

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 04.07.2023

+ **CUSAA 3/2021 & CM APPL. 5517/2021**

RAJEEV KHATRI Appellant

versus

COMMISSIONER OF CUSTOMS (EXPORT) Respondent

Advocates who appeared in this case:

For the Appellant : Mr Amit Kumar Attri and Mr Priyanshu
Upadhyay, Advocates.
For the Respondent : Ms Anushree Narain, Standing Counsel
with Mr Mayank Srivastava, Advocate.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

INTRODUCTION

1. The appellant has filed the present appeal under Section 130 of the Customs Act, 1962 (hereafter '**the Customs Act**'), impugning an order dated 04.06.2020 (hereafter '**impugned order**') passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (hereafter '**the Tribunal**') in appeal no. C/51543/2018- CU(DB).

2. The appellant had preferred the said appeal against an order dated 02.01.2018 (hereafter '**the order-in-original**') passed by the



Adjudicating Authority, imposing a penalty of ₹34,14,020/- on the appellant under Section 112(a) of the Customs Act.

3. The appellant is a G-Card holder of M/s GND Cargo Movers, a person licenced to as a Customs Broker within the meaning of Regulation 2(d) of the Customs Broker Licensing Regulations, 2018 (hereafter '**CBLR**'). The appellant had filed the Bill of Entry for import of certain goods that were found to be liable for confiscation. The Adjudicating Authority had found that the goods imported were prohibited goods and were illegally imported. The Adjudicating Authority also found that the appellant was "*aware of the things which led to irregular filing of the Bill of Entry for the illegal imports made*" and by the order-in-original imposed a penalty equivalent to 25% of the maximum penalty leviable under Section 112 of the Customs Act.

4. Aggrieved by the order-in-original, the appellant preferred an appeal before the Tribunal. The Tribunal, after evaluating the facts, found that "*no case of connivance is made out against the appellant/employee*" and that at best, it appeared that the appellant had "*unknowingly abetted or been instrumental in the nefarious activity of the import of the prohibited goods, by the actual importer- Mr. Ramesh Wadhera, and the lender of the IEC Code*" The Tribunal also found that the penalty imposed under the order-in-original was high and disproportionate and, accordingly, reduced the quantum of penalty from ₹34,14,020/- to ₹10,00,000/-.

QUESTION OF LAW



5. The appellant has projected several questions of law for the consideration of this Court. However, this Court had, on 11.04.2023, framed the following question for consideration in this appeal:

“Whether, in the given facts, penalty under Section 112(a) of the Customs Act can be imposed on the appellant?”

6. We feel that it would be apposite to reframe the question to be addressed as under:

“Whether, given the finding that no case of connivance is made out by the appellant and he had no knowledge of the import of prohibited goods, penalty under Section 112(a) of the Customs Act for abetting their illegal import of prohibited goods, can be imposed on the appellant?”

FACTUAL CONTEXT

7. The officials of the Directorate of Revenue Intelligence (hereafter ‘**the DRI**’) examined the container (being container no. HLXU 6239078) imported by M/s Pixel Overseas. The said container was found to contain the following goods:

	Description of goods		No of Cartons	Quantity
1.	Marking on Card Board – Gas Cooker (SUCULA) GB 16410- 2007 2800 Pa/ 2000 Pa 7Kgs 6Kgs 73x41x17 cm	Marking on Gas Stove inside the Cartons – PICC, Quality Safety/ ISO 9001, China National Accreditations REQTSRARS Wonder Flower	257	514
2.	Refrigerant 22 [Chlorodifluoromethane (CHCLF2)] 30 Lbs Net Weight 13.6 kgs		544 (containing 2 cylinders each)	1088



3.	Unidentified Dried Herbs	75 (approx. 20 kgs each)	1500 kgs (approx.)
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8. The Bill of Entry was filed for 1208 (one thousand two hundred and eight) pieces of two-burner gas stoves (two pieces per carton). The price of the said goods were declared as USD 10.2 per piece. The value of the goods was declared as USD 12321.6 (computed at the rate of USD 10.2 per piece). The said containers were shipped from China to ICD Tughlakabad, New Delhi. The Bill of Entry neither disclosed 1088 (one thousand and eighty eight) cylinders nor the dried herbs, which were subsequently identified as '*salaam mishri*'.

9. The aforesaid goods were seized. Thereafter, search was conducted at the premises of the importer (M/s Pixel Overseas), which was also the residential premises of one Ms Saheema Khan, proprietor of M/s Pixel Overseas. The search revealed that no such concern existed at the said premises.

10. The concerned officials recorded the statement of the appellant. He stated that he had been approached by one Sh. Deepak Kapoor, who was a common friend of the appellant and Sh. Narinder Narula (proprietor of GND Cargo Movers – the Customs Broker). He stated that Deepak Kapoor regularly introduced clients for customs clearance and had requested him to file documents for the clearance of goods imported by M/s Pixel Overseas. And, he had filed the Bill of Entry on the basis of the said information. The appellant acknowledged that the documents did not contain the PAN Card and the attested copy of the Importer-Exporter Code (IEC) of the importer (M/s Pixel Overseas) but



stated that he was assured that the said documents could be arranged. The appellant stated that he was informed that an employee of the importer was on the way to bring the necessary documents. He claimed that he informed Sh Deepak Kapoor that further action such as steps for examination of goods would be undertaken by the customs authorities, only after the requisite documents were submitted. However, the employee of the importer, who was stated to be on the way with the PAN Card and the copy of the IEC, did not show up.

11. The statement of Sh. Deepak Kapoor was also recorded. He confirmed that he had approached the appellant as he was acquainted with him as well as Sh. Narinder Narula, CHA and the proprietor of M/s GND Cargo Movers. He stated that he had handed over the said documents to the appellant for clearance of the goods and that the appellant had agreed to file the documents on payment of ₹5,500/- as agency charges.

12. Sh. Deepak Kapoor explained that in February 2013, he was introduced to one Sh. Ramesh Gupta, Director of M/s GT Sky HK Ltd., Hong Kong by his friend Sh. Vivek, who resided in China and was carrying on the business as a forwarding agent.

13. He stated that in March 2013, he had received a call from one Sh. Sonu, who identified himself as a representative of Sh. Ramesh Gupta in Delhi. He informed him that a container of gas stove was being imported by M/s Pixel Overseas, which required clearance. He agreed



to pay a sum of ₹7,500/- as charges for the same. In addition, he agreed that all expenses towards customs duty, shipping line charges and miscellaneous expenses would be paid by him. He had also handed over the invoices and the packing list issued by M/s GT Sky HK Ltd., Hong Kong in the name of M/s Pixel Overseas for the import of 1208 two-burner gas stoves, as well as the letter of authority and the Bill of Lading.

14. The statements of Ms Saheema Khan, proprietor of M/s Pixel Overseas, was recorded. In her initial statement she claimed that she had no knowledge. However, in her subsequent statements, she stated that one, Sh. Izhar Siddique @ Khan, had offered to open a company in her name and also get an IEC Code. She was informed that she would get ₹20,000/- to ₹25,000/- per month as commission in cash and that someone else would use the IEC and his share in the commission would be 50% of the said amount. He had also informed her that one Sh. Ramesh Wadhera was using her IEC and she was introduced to him at his office at E-513, Third Floor, Sector-7, near Ramphal Chowk, Dwarka. She also claimed that she had asked Sh. Ramesh Wadhera and Sh. Izhar Siddiqui @ Khan to close her account and get the IEC cancelled but they had not done so. She also claimed that her earlier statement was made on the instructions of Sh. Ramesh Wadhera.

15. The DRI officials also conducted searches at the premises of Sh. Ramesh Wadhera and Sh. Izhar Siddiqui @ Khan.

**ORDER-IN-ORIGINAL**

16. A Show Cause Notice dated 26.09.2013 was issued to various noticees including the importer (M/s Pixel Overseas – Noticee no.1), Sh. Izhar Siddiqui @ Khan (Noticee no.2), Sh. Ramesh Wadhera (Noticee no.3), Sh. Deepak Kapoor (Noticee no.4) and the appellant (Sh. Rajeev Khatri – Noticee no.5).

17. The Adjudicating Authority found that the goods had been mis-declared and that the import of gas cylinders and ‘*salaam mishri*’ were prohibited. Import of *salaam mishri* was not disclosed and the correct value of the goods were not disclosed. The description of the gas stoves was also not correct and their value as declared was not the correct value. The Adjudicating Authority held that the goods in question were liable for confiscation and assessed the value of the said goods at ₹1,36,56,080/- on the basis of the report prepared by the DRI. Apart from directing confiscation of the goods, the Adjudicating Authority, *inter alia*, imposed penalties on the noticees including a penalty of ₹34,14,020/- equivalent to 25% of the maximum penalty under Section 112(a) of the Customs Act, on the appellant.

18. The Adjudicating Authority faulted the appellant for filing the Bill of Entry without verifying the antecedents of the importer and without giving a complete KYC. A duly attested copy of the PAN and the IEC of the firm were not made available to the appellant and he did not know the importer or its proprietor. The Adjudicating Authority also faulted the appellant for failing to inform the concerned Deputy



Commissioner of Customs regarding the shortcomings in the import documents and the Bill of Entry.

19. The Adjudicating Authority imputed knowledge of the illegal import to the appellant and held – *“Thus, from his conduct, it is quite evident that Shri Rajeev Khatri was aware of the things which led to irregular filing of this B/E for the illegal imports made.”*

IMPUGNED ORDER

20. The Tribunal had appreciated the facts and had found that there was no case of connivance established against the appellant and that he had unknowingly abetted or been instrumental in the import of the prohibited goods by the actual importer – Sh. Ramesh Wadhwa. The concluding paragraph of the impugned order is set out below:

“26. Further, the appellant under the influence of Mr. Deepak Kapoor, filed the bills of entry without completing the KYC formalities. Further, from the appreciation of the facts and on perusal of the impugned order, it is evident that no case of connivance is made out against the appellant/employee i.e. no allegation or finding of any additional gain or reward received by him. At best, it appears that this appellant has unknowingly abetted or been instrumental in the nefarious activity of the import of the prohibited goods, by the actual importer – Mr. Ramesh Wadhwa, and the lender of the IEC code. In this view of the matter, I find that the penalty imposed is very high and disproportionate to the offence by this appellant. Accordingly, the penalty imposed under Section 112(a) of the Customs Act is reduced from Rs.34,14,020/- to Rs.10,00,000/-. This appeal is allowed in part. The appellant is entitled to consequential benefit.”



REASONS AND CONCLUSION

21. The Revenue does not contest the finding of the Tribunal that no case of connivance has been made out against the appellant and that he had no knowledge that the goods sought to be imported were prohibited and their import was illegal.

22. Thus, in view of the above, the principal question to be addressed is whether a person, who has no knowledge that the goods imported are liable for confiscation, can be mulcted with penalty under Section 112(a) of the Customs Act for abetting such an offence.

23. In terms of Section 112(a) of the Customs Act, penalty for improper importation of goods is chargeable from any person specified in Clauses (a) and (b) of the said Section. For the purposes of the present controversy, Clause (a) of Section 112 of the Customs Act is relevant and is reproduced below:

“112. Penalty for improper importation of goods, etc.

Any person—

- (a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act”

24. It is clear from the above that Section 112(a) of the Customs Act includes two category of persons, who may be liable for fine. The first category of persons are those who, in relation to any goods, do or omit to do any act which renders the goods liable for confiscation under Section 111 of the Customs Act. The second category of persons



comprises of those who abet the doing or omission of such acts. In the present case, penalty has been imposed on the appellant on the allegation that he had abetted the acts of misdeclaration, importation of prohibited goods and not of committing those acts.

25. Ms Narain, learned counsel who appeared for the Revenue contended that penalty imposed under Section 112(a) of the Customs Act was civil in nature. Therefore, there is no necessity for imputing any knowledge of the acts that rendered the goods liable for confiscation. She submitted that the fact that the appellant had filed the Bill of Entry for the import of goods, which were found to be prohibited, was sufficient to impose penalty under Section 112(a) of the Customs Act. She contended that it was not essential to establish *mens rea* for imposing such penalty.

26. There is no cavil that the appellant's role in the offending import was confined to the ministerial act of filing the Bill of Entry. Indisputably, the said ministerial act is not the reason why the goods have been held to be liable for confiscation under Section 111 of the Customs Act. The Adjudicating Authority has directed confiscation of the goods, *inter alia*, on the ground that the goods were prohibited goods; the goods were not disclosed and described; and that their correct value was not declared.

27. There is no cavil that *mens rea* is not a necessary element for imposing penalty under Section 112(a) of the Customs Act. The penalty imposed for failure to perform a civil obligation is required to be



distinguished from a penalty imposed as a punishment for committing a crime. Whereas in the latter case, it would be necessary to establish that a person committing the crime had the intent or the knowledge of committing such a crime; there is no such requirement in case of penalty for default in compliance of a statute imposing a civil obligation, unless the words of that statute indicate otherwise. The aforesaid proposition has been stated in *Corpus Juris Secundum*¹ in the following words:

“A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.”

“Accordingly, we hold that the element of *mens rea* was not required to be proved in the proceedings taken by the Income-tax Officer under Section 271(1)(a) of the Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67.”

28. In *Gujarat Travancore Agency, Cochin v. Commissioner of Income Tax, Kerala, Ernakulam: (1989) 3 SCC 52*, the Supreme Court had noted the aforesaid obligations and held that it is not necessary to establish an element of *mens rea* for imposing a penalty under Section 271(1)(a) of the Income Tax Act, 1961; that is, penalty leviable if the assessee without reasonable cause, fails to furnish the return of total income within the stipulated time.

29. In *Indo-China Steam Navigation Co. Ltd v. Jasjit Singh, Additional Collector of Customs Calcutta & Ors.: AIR 1964 SC 1140*, the Constitution Bench of the Supreme Court had rejected the contention that it was essential to establish *mens rea* in respect of levy

¹ *Volume 85, Page 580, Paragraph 1023*



of penalty under the Sea Customs Act, 1878 for violating the provision of Section 52A of the Sea Customs Act, 1878.

30. Thus, indisputably, persons who have committed the acts of omission or commission in relation to goods that rendered them liable for confiscation, are liable to pay the penalty as stipulated under Section 112(a) of the Customs Act, without any requirement to establish their mal intent. However, the same principle would not apply to persons who are alleged to have abetted such acts of omission or commission. This is because, abetment, necessarily requires, at the minimum, knowledge of the offending Act.

31. The use of the expression 'abet' in Section 112(a) of the Customs Act, makes it implicit that the person charged, who is alleged to have abetted the acts of omission or commission, has knowledge and is aware of the said acts. A plain meaning of the word 'abet' means instigation, aid, encouragement of an offence². It necessarily involves the knowledge that the act being abetted is wrong.

32. The Black's Law Dictionary³ defines the expression 'abet' as under:

"1. To aid, encourage, or assist (someone), esp. in the commission of a crime <abet a known felon>. 2. To support (a crime) by active assistance <abet a burglary>."

² Simpson, J. A., & C., W. E. S. (1989). *The oxford english dictionary* (2nd ed., Vol. 1). Clarendon Press.

³ "Abet." *Black's Law Dictionary, 10th Edition, Edited by Bryan A. Garner, 10th ed., West, 2014, pp. 4-4.*



33. In *Queen v Coney & Ors.*⁴: the Court for Crowned Cases Reserved held as under:

“To constitute an aider or abettor, some active steps must be taken, by word or action, with intent to instigate the principal or principals. Encouragement does not, or necessity, amount to aiding and abetting. It may be intentional or unintentional. A man may unwittingly encourage another in fact by his presence, by misinterpreted gestures, or by his silence or non-interference – or he may encourage intentionally by expressions, gestures, or actions, intended to signify approval. In the latter case, he aids and abets; in the former he does not. It is no criminal offence to stand by a mere passive spectator of a crime, even of a murder. Noninterference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to present it, and had the power so to do or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he willfully encouraged, and so aided and abetted. But it would be purely a question for the jury whether he did so or not.”

34. Section 3(1) of the General Clauses Act, 1897 expressly provides that the expression ‘abet’⁵ would have the same meaning as in the Indian Penal Code, 1860 (hereafter ‘**the IPC**’).

35. Section 107 of the IPC explains the meaning of the expression ‘abetment of a thing’. The said Section of the IPC reads as under:

“107. Abetment of a thing.—A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

⁴ (1882) 8 Q.B.D. 534

⁵ 3. **Definitions**—In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

(1) “abet”, with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code (45 of 1860);



Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.”

36. Thus, in the context of Section 112(a) of the Customs Act, by definition, the expression ‘abet’ means instigating, conspiring, intentionally aiding the acts of commission or omission that render the goods liable for confiscation.

37. It is apparent from the above that the knowledge of a wrongful act of omission or commission, which rendered the goods liable for confiscation under Section 111 of the Customs Act, is a necessary element for the offence of abetting the doing of such an act.

38. In *Shree Ram v. State of U.P.: 1975 3 SCC 495*, the Supreme Court held as under:

“6.....Section 107 of the Penal Code which defines abetment provides to the extent material that a person abets the doing of a



thing who “Intentionally aids, by any act or illegal omission, the doing of that thing”. Explanation 2 to the section says that “whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act”. Thus, in order to constitute abetment, the abettor must be shown to have “intentionally” aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107. A person may, for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment under the third para of Section 107.”

39. In *Amritlakshmi Machine Works v. The Commissioner of Customs (Import), Mumbai: 2016 (335) E.L.T. 225 (Bom.)*, a Full Bench of the Bombay High Court had considered the aforesaid issue and held that the word ‘abetment’ is required to be assigned the same meaning as under Section 3(1) of the General Clauses Act, 1897. The court further opined as under:

“31.Mere facilitation without knowledge would not amount to abetting an offence. Parliament has specifically included abetment in Section 112(a) of the Act, to include acts done with knowledge, otherwise the first portion thereof “Any person - (a) who in relation to any goods does or omits to do any act” would cover acts done or omitted to be done on account of instigation and/or encouragement without knowledge. However, the first portion of Section 112(a) of the Act is only to make person of first degree in relation to the act or omission strictly liable. Persons who are not directly involved in the act or omission to act, which has led the goods becoming liable for confiscation cannot be made liable unless some knowledge is attributed to them. Therefore, it is to cover



such cases that Section 112(a) of the Act also includes a person who abets the act or omission to act which has rendered the goods liable to confiscation. Imposing penalty upon an abettor without any *mens rea* on his part would bring all business to a half as even innocent facilitation provided by a person which has made possible the act or omission to act possible could result in imposing of penalty.”⁶

40. We respectfully concur with the aforesaid view. This view has also been consistently followed by the Tribunal.

41. In *Commissioner of Customs (Import) v. Trinetra Impex Pvt. Ltd. : (2020) 372 E.L.T. 332 (Del.)*, a Co-ordinate Bench of this Court had rejected the Revenue’s appeal against an order of the Tribunal setting aside the levy of penalty on a CHA under Section 112(a) of the Customs Act. This Court had referred to the decision of the Bombay High Court in *Amritlakshmi Machine Works v. The Commissioner of Customs (Import), Mumbai (supra)* and held as under:

“11. In respect of the show cause notice dated 8-7-2011, the imposition of the penalty has been made under Section 112(a) of the Act in respect of the goods which have been held to be liable to be confiscated under Section 111 of the Act. Here, the imposition of the penalty on the CHA is founded on the ground that he has abetted the offence. Though, for imposition of penalty in respect of the cases falling under Section 112(a) of the Act, *mens rea* may not be required to be provided as condition precedent, however, when it comes to imposition of the penalty on an abettor, it is necessary to show that the said essential element/ingredient is present.”

CONCLUSION

42. In view of the above, the question framed is answered in the negative.

⁶ Majority opinion delivered by M.S. Sanklecha, J.



43. The penalty imposed on the appellant under Section 112(a) of the Customs Act is set aside.

44. The appeal is allowed in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 04, 2023
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