CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. IV

Customs Appeal No.40470 of 2020 - SM

[arising out of Order-in-Appeal SEAPORT. Cus. II No.373/2020, dated 21/02/2020 passed by Commissioner of Customs (Appeals-II), Chennai]

Farooq Basha, **Appellant**
Door No.84C/9 [Ground Floor],
71st Street, 84th Block,
New Manali Nagar,
Chennai 600 103.

VERSUS

Commissioner of Customs, **Respondent**
Chennai IV Commissionerate,
Customs House,
No.60, Rajaji Salai,
Chennai – 600 001.

WITH

Customs Appeal No.40471 of 2020 - SM

[arising out of Order-in-Appeal SEAPORT. Cus. II No.374/2020, dated 21/02/2020 passed by Commissioner of Customs (Appeals-II), Chennai]

Mohamed Naseer, **Appellant**
Proprietor of M/s. N.K. Transport
Door No.3401, 1st Floor,
72nd Street, MMDA Mathur,
Chennai – 600 068.

VERSUS

Commissioner of Customs, **Respondent**
Chennai IV Commissionerate,
Customs House,
No.60, Rajaji Salai,
Chennai – 600 001.

Appearance:

Shri G. Derrick Sam, Advocate, *for the Appellant*
Shri R. Rajaram, Authorised Representative, *for the Respondent*

CORAM : HON'BLE Ms. Sulekha Beevi C.S, MEMBER (JUDICIAL)

Date of Hearing : 14.09.2021
Date of Pronouncement: 13.10.2021

FINAL ORDER Nos.42394-42395/2021

Brief facts are that on specific intelligence received by the Directorate of Revenue Intelligence, Chennai Zonal Unit that Red Sanders (prohibited goods) is being smuggled out of the country by declaring the export goods as "cotton tufted floor mats- colour – ASTD" (hereafter referred as CTFM), the port authorities of M/s. Adani Kattupalli Pvt. Port Ltd. was requested to off-load the said container bearing No.TCKU1752615 from the vessel "Messini". The said vessel was scheduled to dock at the M/s. Adani Port before proceeding to UAE. The container was off-loaded and examined. It was seen that Red Sander logs were stacked to half of the height of the container and the declared cargo i.e., 100% CTFM was found in few numbers of HDPE sacks inside the container. The goods within the container as well as the container was detained under Mahazar, dated 22.11.2017. Initial enquiries revealed that the shipping Bill dated 15.11.2017 for export of the goods inside the container was filed by one Shri N. Saravanan of M/s. S.K.P. Logistics.

2. Detailed examination of documents under Mahazar proceedings were conducted at M/s. A.S Shipping Agencies Pvt. Ltd., CFS [hereafter referred to as "M/s. ASSA – CFS"], where the subject goods were loaded and cleared for export. As per the export documents pertaining to the said shipping bill dated 15.11.2017, the overseas buyer was M/s. Mivion General Trading LLC, UAE and port of discharge was Sharjah, UAE. The Customs broker noted in the documents was M/s. G. Kathiravan. The declared item/cargo was

100% Cotton Knitted Tufted Floor Mat – Colour – ASTD in 202 packages. The F.O.B. value declared was Rs.7,47,044/-. On inspection, it was also revealed that the fasteners (rivets) found on the Customs Sealing Point (latches) and Steamer Agent's Sealing Point (latches) of the container were found tampered which demonstrated that the fasteners were removed without cutting the seal. The container was found to contain 804 nos. of Red Sanders wooden pillars/logs totally weighing 9.040 MTs and also floor mats in 27 nos. of HDPE sacks which weighed 360 kgs. The Red Sanders valued at Rs.3,61,60,000/- at Rs.40 lakhs PMT and floor mats were valued at Rs.1,02,510/-. The officers seized the goods under Mahazar along with the container. The seized goods were then handed over to the Custodian for safe custody. M/s. Excellmax Surveyors International, Chennai, who conducted inspection and survey of the goods seized submitted their Survey Report, dated 06.12.2017, wherein, it is reported that the container bearing no.TCKU1752615 had been tampered.

3. On investigations conducted with regard to M/s. ASSA – CFS from where the subject goods were loaded and cleared for export, they furnished copies of documents in the nature of Gate pass, Abstract of Godown Register, Abstract of Vehicle/Container Inward Register, Driver's License, Chennai Port Trust Pass, Weighment Slips pertaining to the subject export container etc.

4. On scrutiny of these documents, it was noticed as under:-

(i) The subject export container bearing no.TCKU1752615 was brought in and out by trailer truck bearing no.NL02-Q-2873;

(ii) One Shri S. Raja son of Shri Sankaran, Madurai was the driver, who brought in and out the subject container in the said CFS and hence his mobile phone number was noted; and

(iii) The trailer entry permit for the driver Shri Raja and for the vehicle NLO2-Q-2873 was issued by Chennai Port Trust based on the recommendation of M/s. N.K. Transport, Trailer Organisers Association, Chennai.

5. Upon further investigations, it was revealed that no person in the name of Shri S. Raja son of Shri Saravanan is residing in the address as given in the above documents. The mobile number given as above also did not yield any result in tracing whereabouts of Shri S. Raja. It appeared that the address given by the driver Shri S. Raja was a fake one.

6. Meanwhile, M/s. ASSA – CFS was asked to provide the details with regard to the vehicles in which the subject export cargo had been brought into their CFS. The Export Cargo Entry Register/Gate-in Pass Register of the subject vehicles, Video Footage, I.D. Cards/Address details of the drivers, who drove the vehicles were furnished. M/s. ASSA-CFS vide their letter dated 13.02.2018 also submitted documents in the nature of Truck Unloading Slip copy, Shipping Bill check list copy, Cargo Inward Register, Surveyor Tally Sheets, Driver's record from RFID and CCTV footage CD copy. On scrutiny and perusal of these documents, it was noticed that the export cargo had been brought into M/s. ASSA-CFS by two lorries bearing Registration No.TAN 4757 and TN 28 & 8449. It was also noticed that one Shri S. Raja, Madurai was the driver, who brought in the subject container TCKU 1752615 into the CFS and then to the port by using trailer truck bearing no.NL02-Q-2873.

7. Accordingly, it was noticed that harbour entry permit for the drivers Shri Raja and for the vehicle NL02-Q-2873 was issued by Chennai Port Trust based on the recommendation of M/s. N.K. Transport Trailer Organisers Association, Chennai. Only vehicles of transport associations [GTA agencies] will be allowed to carry goods into the CFS area and then to the port. Individual lorry owners are not permitted/not given pass to enter into the CFS or the harbour. Shri Raja used the trailer truck bearing no.NLO2-Q-2873 to carry the container in and out of the CFS area and also into the harbour by using the letter issued by M/s. N.K. Transport. Shri A. Mohamed Naseer is the Proprietor of M/s. N.K. Transport and is the appellant in Appeal No.C/40471/2020.

8. The trailer truck bearing registration no.NL02-Q-2873 belongs to Shri Farooq Basha, who is the cousin of Shri A. Mohamed Naseer. Shri Farooq Basha however, contended that he had sold the trailer NL0-Q-2873 vide agreements, dated 12.11.2017 to Shri M. Anslam.

9. On verification, the whereabouts of Shri M. Anslam could not be ascertained and he could not be traced. The whereabouts of the trailer bearing registration no.NL02-Q-2873, which was used for smuggling of Red Sanders also was not traceable.

10. Show-cause notice was issued under section 124 of the Customs Act, 1962 by DRI, CZU, Chennai, dated 04.06.2018 to those involved in the above incident of smuggling of Red Sanders. The appellants are co-noticees in the said show-cause notice along with others. The allegations in para 27 of the show-cause notice pertaining to these two appellants reads as under:-

> *(i) Shipping Bill No.9908912, dated 15.11.2017 was filed in the name M/s. Vivega Apparel Inc., [IEC No.3216501761], 2/534-2, Chinneripalayam, Avinashi, Tirupur – 641 654, for export of "100% Cotton Knitted Tufted Floor Mats – Colour-ASTD in 202 packages" for the overseas buyer M/s,. Mivion General Trading LLC, P.O. Box No.89836, Ceira Dubai, UAE and the Port of discharge was Sharjah UAE in container no.TCKU1752615. The FOB value declared was Rs.747044.30/-.*
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> *(ii) Shri S. Saravanan of M/s. Sara Shipping Coimbatore along with some unknown persons have taken the trailer NL02-Q-2873 loaded with the container TCKU1752615 to some undisclosed location, en-route from CFS to Chennai Port, tampered with the door of the container and opened the same without disturbing the Customs and Liner seals and then de-stuffed some of the declared goods and substituted the same by re-stuffing the Red Sanders wooden pillars/logs with a portion of the declared cargo retained in order to conceal the Red Sanders logs.*
>
> *(iii) Shri S. Saravanan of M/s. Sara Shipping, Coimbatore [the given name as the real name of the person is not known] has organised this act of attempt to smuggle Red Sanders out of the country including transport of the covered goods to the CFS.*
>
> *(iv) Shri S. Saravanan of M/s. Sara Shipping, Coimbatore by submitting fake documents and by assuming wrong identities [like others IEC, projecting himself as the Customs broker at Coimbatore for the actual exporter without giving correct KYC documents] along with Shri S. Raja of Madurai and Shri M. Anslam*

planned and executed this act of attempt to smuggle Red Sanders out of the country so as to avoid the trail leading to him.

(v) Shri S. Raja of Madurai and Shri S. Anslam of Madurai, who drove the trailer NL02-Q-2873 loaded with container TCKU1752615 en-route from container yard to CFS and then from CFS to Chennai Port had actively involved in the conspiracy and executed this act of attempt to smuggle Red Sanders out of country.

(vi) Shri S. Raja of Madurai and Shri M. Anslam of Madurai, drivers of the trailer NL02-Q-2873 in conspiracy with Shri S. Saravanan of M/s. Sara Shipping, Coimbatore by submitting their fake Ids, addresses and by transporting the container from yard to CFS and from CFS to Port and executed this act of attempt to smuggle Red Sanders out of the country so as to avoid the trail leading to him/them.

(vii) Shri Mohammed Naseer, Proprietor of M/s. N.K. Transport had given his company's blank letter head along with recommendation letter with his signatures to Shri Farooq Basha, who hold the trailer NL02-Q-2873 which leads to get Harbour Entry permit for the driver and the subject trailer, by the smugglers.

(viii) Shri Farooq Basha, who holds the trailer NL02-Q-2873 had given the No.K. Transport company's blank letter head along with recommendation letter with signatures of Shri Mohammer Naseer of M/s. N.K. Transport and the authorised signatory of the Trailer Organiser's Association to his acting driver Shri M. Anslam of Madurai, for the trailer NL02-Q-2873 which leads to get Harbour Entry permit for the driver Shri S. Raja of Madurai and for the subject trailer.

(ix) The Customs Cargo Service Provider, M/s. A.S. Shipping Agencies (P) Ltd., CFS, by their failure to comply with the provisions of Handling of Cargo in Customs Areas Regulations, 2009, by not providing secure transport between CFS and Port, and thereby abetted this act of attempt to smuggle Red Sanders.

(x) The 804 nos. of Red Sanders wooden pillars/logs, totally weighing 9.040 MT and value at Rs.3,61,60,000/- [Rupees Three Crores Sixty One Lakhs and Sixty Thousands only] attempted to be smuggled through container no.TCKU1752615 vide Shipping Bill No.9908912, dated 15.11.2017, are liable for confiscation under sections 113(d), 113(e), 113(f) and 113(h) of the Customs Act, 1962 read with Sl.No.188 of Schedule 2 [Export Policy] of ITC (HS) Classification of Import and Export Items, issued under provisions of Foreign Trade [Development & Regulation) Act, 1992.

(xi) Penalty is imposable on Shri Mohammed Naseer, Proprietor of M/s.N.K. Transport, under section 114 of the Customs Act, 1962, for his act of omission in giving blank letter heads for port entry without verification of the transporter details, to his cousin Shri Farooq Basha.

(xii) Penalty is imposable on Shri Farooq Basha, ex-owner of the trailer NL02-Q-2873, under section 114 of the Customs Act, 1962 for allowing the use of the trailer for transportation of the Red Sanders logs to the Port without property verifying the antecedents of Shri Anslam, his driver and for having thereby abetted the smuggling of Red Sanders logs.

11. Para 30 of the said show-cause notice reads as under:-

> "Now, therefore, Shri A. Mohammed Naseer, Proprietor of M/s. N.K. Transport and Shri Farooq Basha, ex-owner of the trailer bearing registration no.NL02-Q-2873, are called upon to show-cause to the Additional/Joint Commissioner of Customs, Exports, EDC, Commissionerate-IV, Customs House, No.60 Rajaji Salai, Chennai – 600 001, as to why penalties under section 114 of the Customs Act should not be imposed on them for having abetted this act of smuggling Red Sanders in the manner described in the foregoing paragraphs."

12. After due process of law, the original authority vide order impugned herein passed the following order:-

> *(i) In confiscate the 804 Nos. of Red Sanders logs totally weighing 9.040 MTs and valued at Rs.3,61,60,000/- [Rupees Three Crores Sixty one Lakhs and Sixty Thousands only] under section 113(d), 113(e), 113(f) and 113(h) of the Customs Act, 1962 read with Sl.no.188 of Schedule 2 [Export Policy] of ITC (HS) Classification of Import and Export Items, issued under the provisions of Foreign Trade [Development & Regulation] Act, 1992.*
>
> *(ii) I also confiscate the Floor Mats in 27 Nos. HDPE Sacks Door Mats valued at Rs.1,02,510/- [Rupees One Lakh Two Thousands and Five Hundred and Ten only] under section 113(i) and section 119 of the Customs Act, 1962.*
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> *(iii) I also confiscate the remaining Floor Mats which are not physically available for seizure or confiscation, under section 113(k) of the Customs Act, 1962 as the same appear to have not been exported after having given clearance for export by the Proper Officer.*
>
> *(iv) I order confiscation of Trailer No.NL02-Q-2873 used for carriage of the smuggled goods, under section 115(2) of the Customs Act, 1962. However, I allow redemption of same on payment of a fine of Rs.2,00,000/- [Rupees Two Lakhs only] under section 125 of the Customs Act, 1962.*
>
> *(v) I refrain from confiscation of Container No.TCKU1752615 under section 119 of the Customs Act, 1962 in view of my findings at para 45 of this order.*
>
> *(vi) I impose a penalty of Rs.5,00,000/- [Rupees Five Lakhs only] on Shri A.Mohamed Naseer of M/s. N.K. Transport under section 114 of the Customs Act, 1962 in view of my findings at para 43 of this order.*
>
> *(vii) I impose a penalty of Rs.5,00,000/- [Rupees Five Lakhs only] on Shri Farooq Basha, owner of the trailer bearing registration No.NL02-Q-2873 under section 114 of the Customs Act, 1962 in view ofthe findings at para no.43 of this order.*

13. Aggrieved by the penalties imposed under section 114 of the Customs Act, 1962, the appellants are now before the Tribunal.

14. On behalf of the appellant, the learned counsel Shri G. Derrick Sam appeared and argued the matter. He submitted that the adjudicating authority has erred in imposing penalty of Rs.5 lakhs on each of the appellants under section 114 of the Customs Act, 1962. It is stressed by him that both the adjudicating authority as well as the Commissioner (Appeals) have failed to apply their mind as to whether the ingredients of section 114 are attracted in the present case.

15. The penalty is imposed holding that the appellants have abetted the offence of smuggling. Section 114 can be invoked only if 'any person in relation to any goods, does or omits to do any act, which act or omission would render the goods liable to confiscation under section 113 of Customs Act, 1962'. It is essential for the department to establish that the appellant has done some act or has abetted any person to do some act, which is enumerated under section 113 of Act *ibid*. The appellant has not dealt with the prohibited goods. The only allegation against the appellant is that the application for gate pass was in the letter heads belonging to Shri Mohamed Naseer of M/s. N.K. Transports which was used for obtaining gate pass and also that the trailer truck belonged to Shri Farooq Basha. These letter heads were blank letter heads misused by the driver Shri S. Raja, who used the trailer for carrying the container with smuggled goods into CFS and Port. That even assuming without admitting that this allegation is true, it will not lead to contravention of section 114 of the Act *ibid*.

16. The appellant Shri Farooq Basha has stated before the authorities below that he was doing the business of purchasing and selling vehicles. The said trailer NL02-Q-2873 was purchased and remodelled by him. He used to send the vehicles for local trip for hire basis using one acting driver. The name of one such acting driver is Shri Anslam. One day, this Shri Anslam contacted him saying that the vehicle is required for a container movement from Sriperumbudur to Chennai and he has fixed the rent as Rs.9,000/-. Shri Anslam had earlier forged diesel expenses. So Shri Farooq Basha did not use Shri

Anslam as acting driver for the said consignment. After one week Shri Anslam returned with another person as acting driver. Shri Farook Basha then informed him that the trailer is not for hire and is for sale only. Shri Anslam then requested to sell the trailer to him. The trailer truck was sold to Shri Anslam vide sale agreement dated 12.11.2017 and the vehicle was delivered to Shri Anslam on 14.11.2017. In para 7 of the impugned order, the Commissioner (Appeals) has given a finding that 'no evidence was produced even at the stage of appeal regarding the change of the registration with the Road Transport Authority of concerned State Government'. This observation is factually incorrect. The appellant had produced the copy of the sale agreement and there is nothing to discredit this document. Merely because the details of sale have not been updated with the State transport authorities, the factum of sale of the trailer cannot be brushed aside. In this regard, it is pointed out by him that the data retrieved from the Government website "vahan" shows the details pertaining to vehicle No.NL02-Q-2873 and it still stands in the name of much earlier owner Ms. Anita Devi. The appellant having already sold the vehicle before the incident, the allegation that appellant abetted the offence of smuggling is using the trailer truck to carry to container is without basis. The Commissioner (Appeals) has wrongly concluded that the appellant is still the owner of the vehicle.

17. Further, in para 43 of the Order-in-Original, dated 11.03.2019, the original authority also has not accepted the statements of the appellants that the trailer truck was sold to Shri Anslam and that Shri Anslam misused the letter heads of M/s. N.K. Transports, to obtain gate pass and carry the container to CFS, and Port. The original authority has stated that it is strange to believe that appellant, Shri Farooq Basha had sold the trailer to Shri Anslam, who had earlier forged diesel bills. The learned counsel contended that when the sale agreement is produced; it is sufficient evidence to prove that the trailer truck is sold. Appellant was not the owner of the trailer truck on the date of incident, and, therefore, has not abetted in any manner.

18. The main allegation against the appellant Shri Mohamed Naseer is that he issued blank letter heads of the transport agency to his cousin Shri Farooq Basha, which was left in the trailer NL02-Q-2873, and then used by Sh.Anslam and Shri S. Raja to carry the container with the Red Sanders to the CFS and port. The appellant Sh.A.Mohamed Naseer used to give his blank letter heads as well as letter heads of the Trailer Organization Association for obtaining entry to the CFS and Port. These were used by Farooq Basha when the vehicles were given on hire basis by acting drivers. These blank letter heads by omission happened to be left inside the trailer truck NL02-Q 2873 when it was sold to Shri Anslam. They misused these letter heads to obtain entry pass to CFS and Port. It was done without the knowledge of the appellants. The vehicle having been sold the appellants had no role in the attempt to smuggle red sanders. Such allegations do not attract the ingredients of Section 114 of the Customs Act, 1962.

19. The learned counsel submitted that the word "abetment" used in section 114 of the Customs Act is not defined in the said Act. However, section 107 of IPC defines abetment, which states that "*a person abets the doing of a thing when he instigates any person to do that thing or engages with one or more other persons in any conspiracy for the doing of that thing or intentionally aids in the said act"*. The learned counsel submitted that '*mens rea*' is an essential ingredient to establish abetment. The vehicle having been sold and the blank letter heads having been misused without the knowledge of appellants it cannot be said that appellants, have intentionally aided in the smuggling. Hon'ble High Court of Delhi in the case of *M/s. Vishnu Kumar Vs Commissioner of Customs, New Delhi* reported in *2010 (260) E.L.T.356 (Del.)* has held that for a charge of abetment to sustain, the ingredients of section 107 of IPC have to be fulfilled. The Hon'ble High Court further held that the charge of abetment would stand substantiated only if it is proved that the abettor aids any person to do that thing or engages with one or more other person or persons in any conspiracy for the doing of that thing. Intention therefore, is the gist of abetment as defined in clause (3) of section 107 of IPC. The

learned counsel submitted that the Commissioner (Appeals) has not given any finding with regard to the alleged act or omission committed by the appellant which would fit into the definition of abetment. Only if there is a community of interest between the aiding person and the person who commits the actual act, it can be inferred that the dominant intention of the alleged abettor was to aid the doing of that particular act. In the present case, there is no such evidence put forth by the investigating agencies.

20. The learned counsel submitted that the appellants had absolutely no knowledge that the container in question was stuffed with Red Sanders. None of the persons from whom statements were recorded by the DRI during investigation have implicated the appellant. No documentary evidence has been unearthed to prove that the appellants had any role in the smuggling of Red Sanders. In para 27(ii) to (iv) of the show-cause notice , dated 04.06.2018, it it stated that Shri S. Saravanan of M/s. Sara Shipping along with some unknown persons have taken the trailer to some undisclosed destination while moving from CFS to the Port and have tampered with the container to load the prohibited goods/Red Sanders. The show-cause notice does not allege that the appellant was part of this conspiracy and that appellant had any knowledge about the illegal export.

21. The learned counsel relied upon the decisions in the case of *M/s. Karungadan Abdul Rahman Vs Collector of Customs & Central Excise, Cochin* reported in *1995 (77) E.L.T. 333 (Tri.)*, *M/s. Khemani Purshottam Mohandas Vs Commissioner of Customs, CSI Airport, Mumbai* reported in *2017 (354) ER.L.T. 275 (Tri.-Mum.)* and *M/s. Teakrafts Vs Commissioner of Central Excise, Coimbatore* reported in *2017 (358) E.L.T.389 (Tri.-Chennai)* to argue that suspicion however strong cannot be substitute for proof.

22. The decision in the case of *M/s.Vishnu Kumar Vs Commissioner of Customs, New Delhi* reported in *2010 (260) E.L.T. 356 (Del.)* was relied upon by the learned counsel to argue that intentional aiding is the gist of abetment. In the present case, appellants had no knowledge about smuggling of Red Sanders and, therefore, the act of leaving blank letter heads of M/s. N.K. Transports in the trailer cannot be considered as omission amounting to abetment. He stressed that the department has not been able to establish that appellants intentionally aided the commission of the crime. Mere proof that the crime charged could not have been committed without inter-position of the alleged abettor is not enough to attract section 107 of IPC. The decision in the case of *M/s.Ajoyesh Chakraborty Vs Commissioner of Customs, N.E.R. Shillong* reported in *2003 (160 E.L.T.735 (Tri.-Kolkatta)* was relied upon by the counsel to argue that in the said case when there was no evidence on record to show that the transport company had knowledge of illegal export, the benefit of doubt was extended to them and the personal penalty under section114 of the Customs Act, 1962 was set aside. The decision in the case of *M/s. Mohamadkhan Navobkhan Pathan Vs Collector of Customs, Ahmedabad* reported in *1994 (71) E.L.T. 826 (Tribunal)* was referred to argue that vehicle from which the contraband goods seized was sold, it cannot be said that there was any nexus of the appellant with the prohibited goods transported in the trailer. He prayed that the penalties may be set aside.

23. The learned Authorised Representative Shri R. Rajaram argued for the department. The incident is attempt to smuggle prohibited goods and the goods are Red Sanders. The shipping bill dated 15.11.2017 was filed declaring the goods as “Cotton Tufted Mats”. The goods after being stuffed at the CFS area into the container was carried in the trailer truck NL02-Q-2873 to the Port from where it was loaded on to the vessel. If the DRI had not intercepted at appropriate time, the goods would have been smuggled out of the country. All the procedures with respect to export was completed and the container/goods had been loaded on to the vessel. The grave nature

of the offence is clear from the Inspection/Survey Report which shows that the seals affixed after stuffing the container were tampered. The vehicle with the container was driven to some other destination before reaching the port and thus stuffed with the prohibited goods. There are restrictions for vehicles that can be engaged for carrying the goods/container into CFS and then to the Port. Only after obtaining gate pass issued by Chennai Port the vehicles are allowed to enter. These passes are issued on the recommendation of Trailer Organization Association only.

24. The trailer truck NL02-Q-2873 was issued gate pass for carrying the container upto the port. The appellant Shri Mohamed Naseer is the Proprietor of M/s. N.K. Transport Agency. The letter with his signature was presented before the Chennai Port Trust for obtaining the Gate Pass. The involvement of appellant Shri Mohamed Naseer is clear from the fact that he had issued the letter for obtaining the Gate Pass to the trailer truck which carried the container with smuggled goods. The vehicle belongs to Shri Farooq Basha. Only after the initiation of investigation, the sale agreement contending that the trailer truck has been sold to Shri Anslam has been produced. This document is only an afterthought. The said document would not absolve the liability of Shri Farooq Basha.

25. The contention of Shri Mohamad Naseer that he used to give blank letter heads to Shri Farooq Basha for procuring Harbour Entry Pass on earlier occasions and that such letter heads were kept in the trailer truck and came to be passed on when it was sold and the same came to be misused by Shri Anslam and driver Shri S. Raja is only a concoted story put forward to absolve from liability. This contention itself reveals the illegal omission on their part of not keeping in safe custody of such important letter heads which has aided in the act of attempt to smuggle Red Sanders. The investigation has clearly brought out the involvement of the appellants in the incident of attempt to smuggle goods out of the country. He referred to para 43

to support his contentions. He prayed that the appeal may be dismissed.

26. Heard both sides.

27. The appellants are aggrieved by the penalty of Rs.5 lakhs imposed upon each of them under section 114 of the Customs Act, 1962.

28. The case of the department is that the letter heads of the firm (Good Transport Agency viz., M/s. N.K. Transport) of the appellant Shri A. Mohamed Naseer along with the letter heads of the Trailer Organizers' Association bearing signatures facilitated the culprits, Shri Mohammed Anslam and Shri S. Raja to obtain gate pass for entry to CFS and Port. The vehicle NL02–Q-2873 which was used to carry the container belonged to the appellant Shri Farook Basha. The appellants thus facilitated and aided in the attempt to smuggle red sanders out of the country and are guilty of abetment under section 114 of the Customs Act, 1962. The relevant section 114 reads as under:-

> *"114. Penalty for attempt to export goods improperly, etc.—Any person 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 113, or abets the doing or omission of such an act, shall be liable,—*
>
> *(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty 1[2[not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act]], whichever is the greater;*
>
> *(ii) in the case of dutiable goods, other than prohibited goods, to a penalty 3[not exceeding the duty sought to be evaded or five thousand rupees], whichever is the greater; 4[(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.]"*

29. The Customs Act, 1962 does not define the word 'abetment'. We may take a look into section 107 of Indian Penal Code which 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
>
> (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.

30. The learned counsel for appellant has been at pains to argue that for imposing penalty under section 114 on a charge of abetment, it is not enough to establish that the act done by the alleged abettor facilitated the commission of the crime. The intention on the part of the abettor so as to facilitate the commission of the crime has to be proved. It is also stressed by the learned counsel that it is not sufficient to prove that the crime could not have been committed without the intervention/aid of the abettor. The '*mens rea'* on the part of the alleged abettor has to be established. Various decisions have been taken support of by the learned counsel to argue these points.

31. I have no quarrel with the principles enunciated in the above decisions that an innocent aid which ultimately leads to commission of crime is not sufficient to attract the charge of abetment. In the present case, the facts are brought out in para 21.02.01 to 21.02.05 of the Order in Original. For better appreciation relevant portion of para 21.01 is reproduced as under:-

> "Since August, 2013, he had registered his company in Trailer Organiser's Association and his Firm code was N-176; that for entry into the Chennai Port, applications were issued only through Trailer Organiser's Association and that application could be only obtained from them in person; After seen and perused the documents viz. (i) letter dated 13.2.18 of the Manager, AS Shipping CFS; (ii) Chennai Port Trust - Harbour Entry Permit no.26260228 & 26260229, Challan no.231 dated 17.11.2017 by which the subject container TCKU1752615 brought into Chennai Port in Trailer Truck NL02-Q-2873; and the documents viz. (iii) Application form (no.2542) for Temporary permits - individuals/vehicles for one Shri Raja Driver and Trailer no.NL02-Q-

> 2873 and (iv) request letter dated 17.11.2017 in the letter head of M/s.NK Transport, Chennai for the daily pass to driver and vehicle for the period from 17.11.17 to 23.11.17, submitted by the Traffic Manager, Chennai Port Trust vide letter D5/014/2018/T(PS) dated 16.04.2018, he *inter alia* stated that he agreed that the signature placed on the said applications were of his own; that but, he had given that blank applications with signatures to his cousin Shri Farooq Basha for his trailers' use. For verification, he submitted similar type of blank applications which had his signature as proprietor of M/s. N.K. Transport and another signature of a person of M/s. Trailer Organizer's Association. He also submitted copies of extracts of diary notes which had details of movement of his own trailers to Chennai Port during the period 09.11.2017 to 27.11.2017 for verification. He further *inte ralia* stated that his cousin Shri Farooq Basha was in the Transport business and he used to purchase old trucks/trailers from other states and after made some repairs/remodelling, he used to sell the same for good price in local; that at that time, the Shri Farooq Basha was hold the said trailer bearing registration no.NL02-Q-2873; that Shri Farooq Basha might be used his above said blank letter head to get the Harbour Entry Permit for that trailer and he (Shri Farooq Basha) only knew the full details. Shri Mohamed Naseer also has given the address of his cousin as "Shri Farooq Bhasha, S/o. Abdul Kareem, 84 C/9, 71st Street, 84th Block, Manali New Town, Chennai 600 103". He further *inter alia* admitted that the said blank letter head with signatures given by him to his cousin was a great mistake; that since Shri Farooq Basha was his relative, he had given the said blank letter heads to him; that he assured that hereafter he would not give such documents." [***emphasis supplied]***

32. The appellant Shri A. Mohamed Naseer is the proprietor of M/s. N.K. Transport Agency. Shri Farooq Basha is his cousin. The appellant Shri A. Mohamed Naseer got his company registered in the Trailor Organizers Association since August 2013 and his firm code is N–176. For getting entry into the Chennai Port, only applications presented through Trailor Organizers' Association by a transport agency will be considered. Thus, individual truck owners / drivers are not given gate pass for entry into the CFS / Port. From the details given by M/s. ASS-CFS, the investigation officers found that one Shri Raja driver used Trailor Truck No. NL02-Q-2873 to carry the container TCKU1752615 to the CFS and then to the port. On examination of container after unloading from the vessel it was seen to contain prohibited goods/Red Sanders. The seals affixed by the customs authorities at the CFS after stuffing the container were seen tampered. It is clear that the container was loaded with the prohibited goods before reaching the port somewhere between the time it reached the port. This could not have been done without obtaining a gate pass for entry into the port. The documents furnished by M/s. ASS-CFS show that a request letter,

dated 17.11.2017 in the letter head of M/s. N.K. Transport, Chennai was submitted to Chennai Port Trust requesting for issue of daily pass to the driver Shri Raja. This request along with recommendation letter in the letter head of the Trailer Organization Association with signature was submitted before the Traffic Manager of Chennai Port Trust to obtain the gate pass. The details of the driver and vehicle were stated in such letter. The appellant Shri A. Mohamed Naseer has admitted his signature in the letter. So also, he admitted that he knows the signature in the letter of Trailor Organizers' Association. The defence put forward is that these are blank signed letter heads which have been misused by Shri S. Raja and Shri Anslam to obtain gate pass. It is important to note that the appellant Shri Mohamed Naseer has not denied the signatures in these applications for gate pass. So also he admits knowledge of the signature of Trailor Organizers' Association. Again the vehicle/trailer truck NL02–Q-2873 was owned by Shri Farook Basha. Shri Mohamed Naseer and Shri Farooq Bash are not strangers. They are cousins. Shri Farooq Basha admits using such blank letter heads for obtaining gate pass when vehicles were given on hire basis with acting driver. But he pleads ignorance to the incident and contends that the vehicle was sold to Shri Anslam on 12/14.11.2017. The translated version of the sale agreement is as under:-

TRANSLATION COPY

VEHICLE SALE AGREEMENT

Agreement Date : 12.11.2017
City: Chennai

Seller (1)	**Buyer (2)**
Name : K. Farooq Basha Father's Name : Abdul Kareem Street:55/72, 55th Block City:Manali, Pudhu Nagar, Chennai - 600 103	Name : M. Anslam Father's Name : Marimuthu Street:92, Thamizhan Street, Old Ramnad Road, City : Madurai - 624 009

Vehicle Registration No.	:	NL 02 Q 2873
Model Name	:	2010
Make	:	Ashok Leyland
Vehicle Agreed Price	:	Rs.3,90,000/-
Advance paid	:	Rs.10,000/-
Remaining amount	:	Rs.3,80,000/-
	:	(Received on 14.11.2017)
No. of Instalment days	:	5 days

Engine No.:
Chassis No.:

As of today, 14.11.2017, the person mentioned in (2) has obtained the possession of the vehicle in good running condition. This document shall be considered to be the receipt for the such possession. In case the person mentioned in (1) fails to surrender the above-mentioned records as agreed, then he is bound to pay compensation, as demanded by the person mentioned in (2). In case the person mentioned in (2) fails to settle the payment, within the instalment period, the person mentioned in (2) shall be bound to pay compensation, as demanded by the person mentioned in (1), along with losing the advance amount.

33. Though. it is contended that the trailor truck was sold and delivered to the purchaser Sh.Anslam on 14.11.2017, there is no evidence for the passing of consideration. Interestingly as per the documents, the gate pass were issued for entry of truck with above two persons name from 17.11.2017 to 23.11.2017. The shipping bill was filed on 15.11.2017 after which container was loaded to the vessel. The DRI Officers intercepted and offloaded the container on 22.11.2017. During the time of investigation Sh.Farook Basha has produced the sale agreement contending that he sold the vehicle to Shri Anslam. This document is produced only after coming to know about the documents unearthed from M/s.ASSA-CFS. Further, the sale agreement is not a stamped document. Shri Farook Basha admits that the truck belongs to him. The truck or Shri Anslam or Shri Raja are traceable after the incident. If Shri Farook Basha was employing Shri Anslam as acting driver and also sold vehicle to him, he ought to be able to furnish details of Shri Anslam. All these lead to the strong inference that the agreement of sale is an afterthought to absolve from liability.

34. The appellants plead total ignorance about the attempted smuggling of red sanders. The contention of the appellants that they kept the blank signed letter heads in the vehicle at the time of sale is too fanciful to digest. It is admitted by Shri A. Mohamed Naseer that there was omission on his part by giving the signed blank letter heads to Shri Farooq Basha. There is also an admission on the part of Shri Farooq Basha that he committed a mistake by leaving the said blank letter heads in the vehicle at the time of sale. These are serious

omissions on the part of the appellants which has aided in the attempt for smuggling. The question then is as to whether omissions are illegal omissions so as to be an ingredient to fall within the third limb of Section 107 IPC. An omission can be considered to be illegal if what has been omitted was required to be done by such person under law. Thus, there should have been an obligation to do a particular act under some law. Such obligation may be under any Act, Rules, Regulations, Instructions. In the present case, entry into CFS/Port is restricted. Access to this area can be obtained only if a request is made by the transport agency along with recommendation letter of the Trailor Organizers' Association. It is also necessary to give details of the driver and the trailer truck/lorry in such applications. After obtaining the gate pass, the transport agency is required to keep a record with regard to the movement of the vehicles for which he has obtained gate pass. These are regulations, which the appellants have to oblige with care and caution.

35. The intention of the person who has aided in the offence has to be inferred from the circumstances. The department need not establish facts beyond reasonable doubt. In quasi-judicial proceedings, the test is that of preponderance of probabilities. These are facts which stands admitted/established and also facts which are probable. When the established facts and the probable facts give a wholesome connection, the test of preponderance of probability would stand established. The signatures in the letters being admitted, the appellant cannot wriggle out of the liability by putting forward a plea of passing over blank signed letter heads by mistake. Similarly, the vehicle being owned by Shri Farooq Basha, he cannot escape by contending that during the relevant time the vehicle was sold.

36. In my view, the case of appellants that blank letter heads were left by omission in the vehicle which was sold is only put forward to get out of the charges levelled against them and cannot be accepted. I find that department has been able to establish the guilt/charge of

abetment on the part of appellants. The penalties imposed on each of the appellants are legal and proper.

37. The impugned order does not call for any interference as regards the appellants herein. Both appeals are dismissed.

(Pronounced in open court on **13th October, 2021**)

(Sulekha Beevi C.S.)
Member (Judicial)

Ksr/Rex

Ksr/Rex