IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

MAT 684 of 2022
With
CAN 1 of 2022
And
CAN 2 of 2022

Reserved on: 12.05.2022
Pronounced on:19.05.2022

Sukanta Mallick

...Appellant

-Vs-

Union of India and Others

...Respondents

Present:-

Mr. R. Senthil Kumar
Mr. Abhinav Rakshit
... for the appellant

Ms. Manasi Mukherjee
... for the Respondent Nos. 2 to 4

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA, CHIEF JUSTICE

THE HON'BLE JUSTICE KRISHNA RAO, JUDGE

Krishna Rao, J: There is a delay of 13 days in filing this appeal. Hence, CAN 1 of 2022 has been filed by the appellant with a prayer to condone the delay.

Having regard to the explanation which has been furnished in the application, we are of the opinion that the appellant was prevented from filing the appeal within time on account of bona fide reason.

Hence, CAN 1 of 2022 is allowed and delay in filing the appeal is condoned.

The appellant has preferred an appeal against the order passed by the Ld. Single Judge in WPA No. 1554 of 2022 dt. 16.03.2022 wherein the Ld. Single Judge had disposed of the writ petition by passing the following order:-

> *"Be that as it may, the Customs Authority shall complete investigation within a period of one month from date, mandatorily and positively.*
>
> *The Wild Life Warden shall ensure that the process of registration and acceptance thereof, under the aforesaid Advisory, is completed in acceptance or otherwise, of the birds registered by the petitioner, preferably within a period of three months from the date of communication of a copy of this order. The petitioner shall not be permitted to trade in the said birds until clearance by the Wildlife Warden.*
>
> *Let a copy of this order be served by the Registry on the Chief Wildlife Warden of the State of West Bengal.*
>
> *With the aforesaid direction, the instant writ petition shall stand disposed of."*

The appellant has filed a writ petition for quashing in connection with the Seizure Case No. 39/IMP/CL/Macaw/CUS/BCD/DPU/2021-2022 dt. 21.12.2021 wherein the Superintendent of Customs, Barasat Customs Division (DPU) had seized one number of Live Exotic Bird Macaw from the appellant on 24.12.2021 at 19.30 hours at Air Cargo Complex (Domestic) N.S.C.B.I. Airport, Dum Dum, Kolkata.

After the seizure of the said Live Exotic Bird Macaw, the respondent no. 3 had issued summon to the appellant under Section 108 of the Customs Act, 1962 directing the appellant to appear before the respondent no. 3 for the purpose of recording evidence of production of legal documents with respect of the above-mentioned seizure on 24.12.2021 at 07:15 P.M.

On 25.12.2021, the petitioner had made an application for release of Live Exotic Bird Macaw and accordingly, vide order dt. 25.12.2021, the Assistant Commissioner of Customs had released the bird provisionally on deposit of Cash Security of 10% of the book value of the bird i.e. Rs. 1,50,000/- and an on execution of bond for value of the bird, the appellant had deposited an amount of Rs. 15,000/- and the respondents have released the said bird provisionally in favour of the appellant with certain conditions.

With an intention to the streamline the process for import and possession of Exotic Live Species in India, the Ministry of Environment, Forest and Climate Change (hereinafter referred to as MOEFCC),-Government of India had introduced Voluntary Disclosure Scheme titled as "Advisory for Dealing with Import of Exotic Live Species in India and declaration of stock".

The Central Government has given an option to all the citizens of India to voluntarily declare their stock of Exotic Live Species, if any, that lies in their possession with them, within six months from the concerned date in June, 2020 and further the last date for declaring has been extended till March, 2021. The said Scheme of the Central Government is made clear that who have made their voluntarily disclosure of Exotic Live Species were exempted from furnishing the purchased details of breeding details or the income source.

The Counsel for the appellant submits that in accordance with the said Advisory cum Voluntarily Disclosure Scheme, the appellant had declared particulars of their stock of the Exotic Live Species stating that the appellant is in possession of two male and two female Green Wing Macaw, (scientific name– Ara Chloroptera) on 15.11.2022.

The Counsel for the appellant further submits that subsequently, three numbers of Green Wing Macaw were born at the appellant's farm on 02.06.2021 as a result of breeding between the exotic bird declared vide proposal no. WL/WB/SPECIESA/56844/2020 and thereafter the appellant had declared the relevant particulars of such newly born Green Wing Macaw at the Parivesh Portal vide Proposal dt. 26.06.2021.

The Counsel for the appellant further submits that one person namely Sibi S. Thomas had contacted the appellant had proposed to purchase one Green Wing Macaw from the appellant and for the said purpose, the concern

Exotic Bird needed to be transferred and accordingly, as per the guidelines of MOEFCC, the appellant had declared the particular of such transfer at the Parivesh Portal vide proposal dt. 20.12.2021. Accordingly, the petitioner had made necessary arrangements for transport the Green Wing Macaw bird through Air Cargo of Air India from N.S.C.B.I. Airport, Kolkata to Madras International Airport, Chennai and for the said purpose the appellant had packed the cage in a proper form and booked a slot with Air India for transportation of the cage containing the bird from Kolkata to Chennai.

The Counsel for the appellant further submits that on 24.12.2021 at about 14:30 hours, the petitioner was informed that the Customs Officers have taken possession of the cage and accordingly, the petitioner went to the office of the respondents wherein the said bird was seized and subsequently, it was released on provisional basis.

The Counsel for the appellant submits that Clause III (3) of the advisory did not indicate any stipulated time period upon the Chief Wildlife Warden in issuing the Ownership Certificate for the progenies of the bird which are already registered with Parivesh website.

The Counsel for the appellant further submits that the exclusive time is well covered under Clause I (e) for Ownership Certificate and as such the Provisions of Clause III (3) should not be taken into and read with Clause I (e).

The Counsel for the appellant further submits that the advisory introduced by the Ministry is only to streamline and to collect the data of existing Exotic Live Species inside the Territory of India.

The Counsel for the appellant further submits that according to Clause I (e) of the advisory it is well settled law that the declarer could not be required to produce any document in relation to the Exotic Live Species if the same has been declared within six months from the date of issue of the advisory and the declaration made after six months of the date of issue of the advisory, the declarer shall be required to comply with the documentation requirements under the extend law and regulation.

The Ld. Counsel for the appellant further submits that according to Clause I (e) and III (3) of the advisory, it is clear that the Chief Wildlife Warden after conducting physical verification, registered the stocks and maintain record in their office and issue an Online Certificate of possession within six months from the date of voluntary disclosure and further regarding Clause I (g) it is mandate for the declarer to make a disclosure regarding any acquisition/death/trade/change of possession after the declaration should be informed to the respective Chief Wildlife Warden within 30 days of such acquisition/death/trade and the Chief Wildlife Warden shall issue an acknowledgement to the regard.

The Ld. Counsel for the appellant further submits that the appellant has complied with the provisions of advisory and had not committed any unlawful act.

The Ld. Counsel further submits that the Customs Officer can interfere only in the matter of import and export of goods and that under Section 123 and Section 11 of the Customs Act, 1962, the Exotic Live Birds were not mentioned and included.

The Ld. Counsel for the appellant further submits that the respondent authorities have erroneously issued show cause notice and trying to confiscate the exotic bird unlawfully by forcing the appellant to produce the financial record like bank statements, income tax returns and balance sheets which are totally against the scope of the objects of the advisories and various judgments passed by the Hon'ble Supreme Court and various High Courts.

The Counsel for the appellant relied upon the judgment reported in (2003) 5 SCC 257, judgment passed by the Delhi High Court in the case of Khodiyar Animal Welfare Trust & Anr. -Versus- Ministry of Environment Forest and Climate change dt. 23.10.2020, order passed by the Meghalaya High Court in the case of Ms. J.S. Wahalang vs. Union of India & Ors., dt. 28.10.2021, the order passed by the Hon'ble Allahabad High Court in the case of Dinesh Chandra Vs. Union of India & Ors., dt. 30.07.2022 and submitted that it is well established principle of law that the matter which has been adjudicated and settled need not to be dragged into the criminal courts unless and until the act of the appellant could have been described as culpable.

Per contra, the Ld. Counsel for the respondents no. 2 and 3 submits that the respondent no. 3 has got an information that the appellant was transporting the exotic birds without any permission and without any proper documentation and accordingly, the same was seized by the respondent no. 2 and on the prayer made by the appellant, the same was released in favour of the appellant probationary subject to furnishing of bond. The respondent no. 2 has issued show cause notice upon the petitioner but the petitioner failed to appear before the authority and to produce the documents.

The Counsel for the respondents further submits that the respondents have taken steps in accordance with the law as provided under Sections 108 and 110 of the Customs Act, 1962.

The Ld. Counsel for the respondents relied upon the order passed by the Coordinate Bench of this Court in WPA No. 10138 of 2020 dt. 26.03.2021 and submitted that in the said order, the Court has categorically directed the Customs Authorities and the Authorities in control of the Inter-State boundaries exist points and entry points, are directed to ensure the transportation of live birds and other small and big animals which are part of wildlife are intercepted and offenders are brought to book. The restrictions imposed though these orders are compliance throughout the State of West Bengal and this order shall by itself to be treated as prohibition with public notice.

The Counsel for the respondents relied upon the said judgment had submitted that the appellant was apprehended by transporting the live birds and thus the appellant is liable to be prosecuted in accordance with law.

Considered the rival submissions of the parties, documents available on record and the judgment relied by the parties.

The appellant is having the Certificate of Enlistment of the trade of selling of livestock (birds - live exotic birds).

As per the Clause I (e) of the advisory issued by the MOEFCC, a period of six months from the date of the order is given for voluntary disclosure of those who are in possession of Exotic Live Species in the country. As per Clause III (3), the Chief Wildlife Warden shall after verification of the details issue an Ownership Certificate for such progenies of Exotic Live Species as per Annexure-V.

The appellant had declared the stock of Exotic Live Species through the portal on 15.11.2020. The appellant has further informed about the birth of two male and one female of Green-Wing Macaw through the portal on 26.06.2021. The appellant had further informed through the portal on 20.12.2021 about the transfer of one male Green Wing Macaw from Kolkata to Thiruvananthapuram, Kerala in the name of Sibi S. Thomas and the date of transfer was mentioned as on 20.12.2021.

Admittedly the appellant was transporting the Exotic Bird (Green Wing Macaw) from Kolkata to Madras International Airport Meenambakkam Chennai and during transportation, the respondent no. 3, the Inspector of Customs had seized the said bird under section 110 of the Customs Act, 1962 and subsequent the respondent no. 3 had issued summons under Section 108 of the Customs Act, 1962 to the appellant to appear before the respondent no. 2 for inquiry. The appellant had appeared before the respondent no. 3 and on the prayer of the appellant the respondent had released the said bird in favor of the appellant provisionally subject to furnishing bond with certain conditions.

As per the advisory issued by the Government of India, Ministry of Environment and Climate Change (Wild Life Division) the appellant had declared the stock of Exotic Live Species i.e. two (2) Male and two (2) Female Green Wing Macaw on 15.11.2020 through Portal i.e. within 6 months from the date of issuance of advisory.

The "Voluntary Disclosure Scheme" is introduced by the Central Government, Ministry of Environment, Forest and Climate Change, through Wild Life Division on 11.06.2020. The Voluntary Disclosure Scheme is titled as "Advisory for Dealing with import of Exotic Live Species in India and Declaration of Stock". It inter alia provides as under:-

> *" ……. Considering the significance of import and export exotic live species, this Ministry is issuing an advisory to streamline the process for import and possession of exotic live species in India ….."*

The "Voluntary Disclosure Scheme" is in mainly four parts which are as follows :-

> *"I. Developing an inventory of exotic live species in India through Voluntary Disclosure Scheme;*
>
> *II. Import of exotic live species maintenance;*
>
> *III. Registration of progenies of imported animal; and*
>
> *IV. General."*

It also contains following Annexure including:-

- *(i)* *Annexure –I –"Form of Declaration of stock of Exotic Live Species;*
- *(ii)* *Annexure –II – "Registration of Stock/Change in stock due to death/transfer/acquisition of Exotic Live Species;*
- *(iii)* *Annexure – III – Form of Application of to DWLW for an NOC for import of Exotic Live Species;*
- *(iv)* *Annexure I- IV- Form for Application for Registration of Progeny of Previously held Exotic Live Species Stock, and*
- (v) *Annexure – V- Ownership Certificate for Progeny of Exotic Species.*

It is clarified in Para I (a) of the Scheme that:-

> *"a. The phrases "exotic live species" used in this advisory shall be construed to mean only "the animals named under the Appendices I, II and III of the Convention of International Trade in Endangered Species (CITES) of WILD Fauna and Flora" for the purpose of this advisory and does not include species from the Schedule of the Wild Life (Protection) Act,1972."*

The Central Government by introducing the "Voluntary Disclosure Scheme" has given an option to all citizens to voluntarily declare their stock of exotic species under the Appendices I, II and III of CITES, if any with them, within six months from the concern date in June, 2020. The Scheme requires citizens to submit themselves to the provisions of the scheme and to thereafter maintain the statutory record as prescribed under the scheme for any addition or reduction in declared stock of exotic species. This will also enable the Government to have a unified information system available for stock of exotic species at the State/Central level. This would also enable the Central Government to introduce further provisions regulatory as well as penal, after giving this window of six months for voluntary disclosure by allowing immunities only to those, who opt to file their voluntary disclosure declaration within six months window. Immunity is not provided to the declarant opting to disclose the stock after this limited window of six months. It in inter alia provided in Part I of the Scheme that :-

> *"(b). It is stated through this advisory that the declarer would not to produce any documentation in relation to exotics live species if the same has been declared within six months of the date of issue of the advisory. For any declaration made after six months of the date of issue of advisory, the declarer shall be required to comply with the documentation requirement under the extant laws and regulations."*

The judgment referred by the counsel for the appellant passed by the Division Bench of Hon'ble High Court at Allahabad in the case of (Dinesh Chandra -versus- Union of India & Ors.) dt. 30.07.2020 wherein the Hon'ble Court had referred the order passed in PIL Civil No. 22903 of 2019 (Dinesh Chandra –versus- Union of India & Ors.) dt. 30.08.2019 and the Hon'ble Court observed inter alia:-

> *"37. From the aforesaid, it is very clear that exotic birds/animals do not come under the purview of Wild Life Protection Act, 1972. There is no provision under the Wild Life (Protection) Act, 1972 to issue licence or permission for dealing in exotic birds. There are no Rules and Regulations and procedures for keeping, breeding, buying, selling and exhibiting such animals (exotic animals) within country which have been bred in India. No documents are specified and no permission are required as per Custom Act*

for keeping, breeding, buying, selling and exhibiting such animals (exotic animals) within country which have been bred in India. Animals have been bred in captivity in India, Customs Act does not have role in it."

In the above mentioned judgment the Hon'ble Court further held that:

"11. There is no change in legal position stated in the sais judgment dt 30.8.2019 even in respect of domestic trading, possession, transportation and captive breeding of exotic species within India, at least for a period of six months 1from the date of introduction of present "voluntary disclosure scheme "as the Clause (b) of Part I of this Voluntary disclosure scheme also provides that – "the declarer would not be required to produce any documentation in relation to the exotics live spices if the same has been declared within six months of the date of advisory."

The judgment referred by the Counsel for the appellant in the case of Khodiyar Animal Welfare Trust & Anr. –versus- The Ministry of Environment and Climate Change & Ors., dt. 23.10.2020 the Hon'ble Division Bench of Delhi High Court held that:-

"15. The window of six months for voluntary disclosure by allowing immunities only to those declarer who opt to file their voluntary disclosure declaration within six months from the date of issuance of Advisory. Immunity is not provided to the declarers opting to disclose the stock once the period of six months is over from the date of issuance of the Advisory. The immunity contained in Clause I (b) of the Advisory as stated herein above for the declarer is not further clarified in the said Advisory. The petitioner is seeking directions so far as immunity is concerned, under the Voluntary Disclosure Scheme that there shall be no investigation into the acquisition or possession of exotic species once the declarer voluntarily discloses as per the Scheme. As per petitioners, once the declaration is made within a period of six months, the declarer should not be subject to any civil or criminal inquiry under any other law for the time being in force, especially about the ownership, possession, trade, transportation, breeding, act of keeping, buying, selling and exhibiting such exotic animals.

16. We are in full agreement with the arguments canvassed by the petitioner. Once the immunity is granted under the Voluntary Disclosure Scheme, the respondent cannot investigate about the ownership, possession, trade, transportation, breeding, act of keeping, buying, selling and exhibiting such exotics animals/birds which are voluntarily disclosed by the declarer. The declarer would not be required to produce any documentation in relation to exotics live species if the same has been declared within six months from the date of issuance of Advisory as per Part I Clause (b) of the Voluntary Disclosure Scheme. After six months' period is over, from the date of issuance of the Advisory the declarer shall be required to comply with the documentation requirement under the extant laws and regulations."

The judgment referred by the Counsel for the appellant passed by the Hon'ble Division Bench of Meghalaya High Court in the case of Miss. J. S. Wahlang -versus- The Union of India & Ors., wherein the Hon'ble Court held that :

> *"9. Similarly, in Criminal Writ Petition No. 807 of 2019 titled Anil Naidu – versus – Union of India 7 Ors the Hon'ble Bombay High Court, Nagpur Bench held that perusal of section 123 of the Customs Act, 1962, would reveal that it has no application to the exotic species of birds and animals and thus, the owners or persons claiming ownership or are in possession of such exotic species are not required to establish that they are smuggled in India.*
>
> *11. The contentions of the petitioners are without any merits as already held by the Hon'ble Allahabad High Court, The question of presumption of exotic birds and animals are having been illegally smuggled does not arise since exotics birds and animals are not notified under section 123 of the Customs Act. The provisions of Chapter IVA of the Customs Act which provides for detection of illegally imported goods and prevention of their disposal thereof compromising of section 11A to 11G are also inapplicable. Admittedly, the Central Government has not notified the exotics birds and animals in question under section 11B of the Customs Act. There are safeguards in place to detect the illegally smuggled goods at the point of entry and exit which are regulated under the Customs Act. Even the Foreign Trade Policy and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) aid in prevention of illegal smuggling of exotics species. It is also trite that not all exotic species are necessarily imported. On account of captive breeding, it is possible to find exotic birds and animals in India, outside their native origin. Thus, neither there is any statutory presumption exists to presume that all the exotic species in the domestic area are imported in India nor there is legal requirement which compels domestic keeper, breeder or transporter of such exotic species to produce any proof of valid importation or documents establishing his licit acquisition. As already held by the Allahabad High Court, seizure of exotic species in domestic area on mere surmises or merely on the basis of statements recorded by the Custom or Wild Life Authorities would be contrary to the provisions of Customs Act,1962 or even Wild Life Act. Hence no such directions to seize exotic species found within or being transported through the State of Meghalaya can be issued. There is no prohibition, restriction or regulation to sale purchase, possession or breeding of exotic species within India under the provisions of Customs Act,1962 and no such direction be issued."*

The judgment referred by the appellant reported (2003) 5 SCC 257 in the case of (Hira Lal Hari Lal Bhagwati -versus- CBI, New Delhi) held inter alia :

> *"30. In our view, under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In the instant case, the said law which prevails in the field i.e. the Customs Act, 1962, the appellants have been there under wholly discharged and the GCS granted immunity from prosecution. It is well established principle of law that the matter which has been adjudicated and settled need not to be*

dragged into the criminal courts unless and until the act of the appellants could have been described as culpable. The true fact and import of Kar Vivad Samadhan Scheme 1998, in our view, is that once the said Scheme is availed of and all the formalities complied with including the payment of duty, the immunity granted under the provisions of the Customs Act, 1962 also extends to such offences that may prima facie be made out on identical allegation i.e. of evasion of custom duty and violation of any notification issued under the said Act."

In the instant case the respondent no. 3 had seized Exotic Bird of the appellant but admittedly the Central Government has not notified the exotic bird and animals in question under section 11B of the Customs Act or in any of the Schedule of the Wild Life (Protection) Act, 1972 and thus mere surmises or merely on the basis of the statements recorded by the Custom or Wildlife authorities would be contrary to the provisions of the Customs Act, 1962 or even Wild Life Act.

The judgment referred by the Counsel for the respondent no. 2 and 3 passed in WPA 10138 of 2020 dt. 26.03.2021 in the case of (The Court on its own motion In Re: Smuggling and Illegal Trading of Endangered Species of Birds) is not applicable in the instant case as in the said case the Division Bench of this Court directed the concern authorities including Custom Authorities to ensure the transportation of live birds and other small and big animals which are part of Wild Life but the Exotic Birds are neither notified under any Schedule of Wild Life Act nor under the Custom Act.

The appellant, by virtue of the Advisory had declared the stock of Exotic Live Spices on 15.11.2020 i.e. within six months from the issuance of the Advisory and thus in view of the judgments referred above the seizure made by the respondent no. 3 on 24.12.2021 and subsequent summon issued to the appellant by the respondent no. 3 is bad in law and illegal. It certainly amounts to abuse of the process of law.

In the result, we allow the appeal and the impugned order passed by the Learned Single Judge in WPA No. 1554 of 2022 dt. 16th March, 2022 is set aside and the proceeding initiated by the respondent no. 3 being Seizure Case

No. 39/IMP/CL/Macaw/CUS/BCD/DPU/2021-22 dt. 24.12.2021 is also set aside and quashed.

MAT No. 684 of 2022 with CAN 1 of 2022 with CAN 02 of 2022 is accordingly disposed of.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(KRISHNA RAO)
JUDGE

Kolkata
19.05.2022

PA(PD)

(A.F.R. / N.A.F.R.)