(2021) 01 CESTAT CK 0009

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 50170 Of 2021

Rajesh Agarwal @ Raju Sagar @Hash Commissioner Of Customs

Date of Decision : 07-01-2021

Acts Referred:

Customs Act, 1962 — Section 11, 11A, 11B, 11C, 11D, 11E, 11F, 11G, 108, 110, 111(b), 111(d), 112(b)(i), 123

Citation : (2021) 01 CESTAT CK 0009

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Advocate : Ashish Batra, Yashvir Singh

Final Decision : Allowed

Judgement

1. The present appeal is being field by the appellant Mr. Rajesh Agrawal @ Raju Sagar (â??appellant) aggrieved against the impugned Order in

Appeal No. IND- EXCUS-000-APP-092-20-21 dated 29.12.2020 and the Order-in-Original No.11/JC/CUS/IND/2019â?"20 dated 19.02.2020 passed

by the Commissioner (Appeal) and the Joint Commissioner respectively, upholding the absolute confiscation of the subject exotic birds and animals

owned by the appellant, by considering the same to be â??prohibitedâ?? and â??smuggledâ??.

2. Briefly stated, the facts for the purposes of the present appeal are as under:

2.1 The appellant herein is a citizen of India who has dedicated his life to serve the animals and birds through his NGO â??Sanstha Karuna Sagarâ?.

The Appellant is an avid pet lover, social worker and actively involved in rescue and treatment of animals.

2.2 The Appellant started keeping exotic birds and animals since the year 2004-05. The Appellant initially started with 3-4 exotic animals and birds and

with the passage of time the Appellant kept on adding exotic birds and animals and as on today the Appellant has around 200 exotic pets and animals.

2.3 The Appellant had over last 15-16 years purchased 192 exotic species (birds/ animals) domestically from Mr. Jayant Rathore @ Golu (original

Noticee No.2) and Mr. Alvin Francis @ Monu (original Noticee No. 3), both having their pet shops at Indore. The Appellant had purchased the said

animals and exotic birds on payment of cash, and no bills were issued by Mr. Rathore and Mr. Francis. It is pertinent to mention here that Mr.

Rathore and Mr. Francis are involved in trade/exchange of exotic birds/animals in Indore, for last many years.

2.4 Based on a purported intelligence that the animals and exotic birds are of foreign origin, are smuggled into India, a search was conducted by the

officers of DRI, Indore, along with the Forest Officials at the premises of the Appellant on 04.05.2019. A Panchnama was drawn by the officers of

the DRI at the premises of the Appellant.

2.5 Vide seizure memo dated 04.05.2019, the officers of the DRI seized 192 exotic species (birds and animals) under the reasonable belief that they

had been smuggled into India in contravention of the Customs Act, 1962 (the Customs Act). Subsequently, the said exotic birds and animals were

handed over to the zoo authorities under supardanama dated 04.05.2019.

2.6 During the course of the investigation, statement of various persons including the appellant and the co-noticees & others were recorded under

Section 108 of the Act. The appellant has consistently submitted that he had purchased the exotic birds and animals domestically (within India).

2.7 Subsequently, show cause notice dated 01.11.2019 was issued by Joint Director, DRI, proposing to confiscate the seized exotic animals and birds

and to impose penalty upon the Appellant. The Appellant, through his advocate filed reply dated 20.01.2020 to the said show cause notice, praying for

dropping of the proceedings in view of detailed submissions made therein.

2.8 Vide Order-in-Original No.11/JC/CUS/IND/2019 â?" 20 dated 19.02.2020, the Adjudicating Authority while ordering for absolute confiscation of

the birds/animals, imposed a penalty of Rs 5,00,000 on the appellant under Section 112(b)(i) of the Act.

2.9 Aggrieved, the appellant filed statutory appeal before the Commissioner (Appeal), who vide the impugned Order, while reducing the penalty on the

appellant, has erroneously upheld the absolute confiscation of the subject exotic birds and animals.

2.10 Pertinently, while passing the impugned Orders, the authorities below erred in not dropping the proceedings, despite the appellant relying on the

Judgment of the Honâ??ble Allahabad High Court (Lucknow Bench) in PIL Civil No. 22903 of 2019 titled â??Dinesh Chandra vs UOI & Orsâ??

and that of the Honâ??ble Bombay High Court (Nagpur Bench) in Criminal Writ Petition No. 807 of 2019 titled â??Anil Naidu vs UOI & Orsâ??,

as well as the reply to RTI Applications and the Orders passed by the Commissioner (Appeal), Bangalore and Joint Commissioner, Mumbai, dropping

cases against parties owning exotic animals, under similar circumstances.

2.11. The appellant had started collecting and keeping the exotic birds/ animals since the year 2004-05 and at present had collected about 200 such

pets during the last sixteen years. The purchases were made in cash from time to time from two suppliers who were having pet shops at Indore

namely i) Shri Jayant Rathore alias Golu having pet shop in the name and style of â??pets Heavenâ?? at Shivaji Market, Indore and one ii) Alvin

Francis alias Monu having its pet shop in the name and style of â??Deepa Petâ?? located at Shivaji Market at Indore. During investigation by the

Revenue, the aforementioned suppliers to the appellant were also interrogated and their statements were recorded under Section 108 of the Customs

Act. The two suppliers confirmed having supplied variety of exotic birds and animals to the appellant during the last several years. They also

confirmed that they have dealing in live birds, cats, dogs, hen, ducks, bird food, fish food, aquarium and other accessories. The aforementioned

suppliers have also inter-alia stated that they sourced the birds/ animals from various suppliers located in India. The supplier also stated in their

statement the name of few persons from whom they have sourced, who were located at Mumbai, Chennai, etc. It also came out in the statement of

the suppliers located at Indore, that some of these exotic birds/ animals may have been smuggled into India by other persons. The suppliers also stated

that all the trade in the exotic animal is normally carried out in cash and they have supplied the exotic birds/ animals to the appellant on payment

received in cash.

2.12. The statement of other members of the NGO â?" â??Sanstha Karuna Sagarâ?? namely Sandeep Garg alias Sandeep Sagar was recorded, wherein he also confirmed the welfare activities for birds/ animals by their organizations. He also stated that â??Sanstha Karuna Sagarâ?? is a

registered organization and the founders are Shri Mohan Lal Garg alias Mohan Lal Sagar, the appellant, Pushpak Agarwal alias Pushpak Sagar and

Karan Sagar. The main object of the Sanstha Karuna Sagar is the well being of birds and animals. They look after many species of birds and animals.

That, Sanstha Karuna Sagar is keeping and taking care of birds and animals.

2.13. In his further statement recorded on 21.10.2019, the appellant reiterated that he is unable to produce any documentary evidence supporting

acquisition or purchase of the birds /animals from the said supplier namely Golu and Monu, as no such invoices are issued by them. He further stated

that he is not aware from where the suppliers are sourcing the exotic birds and animals. He also stated that some of the exotic birds and animals may

be smuggled by other persons and also stated that such exotic birds and animals are also bred in India.

2.14. The Department got the animals/ birds examined by the Deputy Conservator of Forest, Tiger Strike Force, Indore, who identified that the birds

and animals and fish are non-native and are of foreign origin. Revenue examined the data of import of Wildlife for the last sixteen years (NIDB) and it

appeared that some of the seized species of wildlife have been imported into India namely the Sun Conure, Love birds, blue and Yellow Macaw,

African Grey Perrot, Roseaete Cockatoo, Persian Cats and Guinea Pigs, etc. It appeared to Revenue that the exotic birds/ animals seized from the

appellant have not been imported through legal route and appeared to be smuggled by other persons.

2.15. The appellant in his affidavit before the Honâ??ble M.P. High Court in Writ Petition No. 10407 of 2019 stated that all the seized animals/ birds

from him have been bred in India, but could not produce any details of breeding in India. In their statements, the said suppliers Golu and Monu had

stated that the trade in wildlife of exotic birds and animals is being done on Whatsapp wherein the sellers and buyers both raised demand or query and

the transaction is completed without both knowing each other in person. Also the payment in the trade is entirely made in cash. The Revenue on

request obtained a certificate from the Deputy Conservator of Forest, TSF, Indore certifying the native country origin of the seized birds/ animals, dated 04.05.2019, a copy of which is annexed at page 77 of the appeal paper book. The Revenue on reference also received a mail from Secretary of

Animal Welfare Board of India, Ministry of Fisheries, animal Husbandry and Dairying, Nodal agency for issuance of the license for animal breeding,

and according to the report of Animal Welfare Board of India, no breeding and keeping permission/ licenses have been provided in India of the seized

Non-native birds / animals.

2.16. On enquiry by Revenue, the ADG Wildlife who is the implementing agency for CITES (Convention of International Trade in Endangered

Species of Flora & Fauna) India, vide his letter dated 07.06.2019 (RUD-25) submitted that no CITES permit or documents have ever been issued for

the import of seized exotic/animals and birds. It further appeared that fourteen out of twenty two species of birds/ animals seized are specified in the

appendix of CITES.

2.17. It further appeared to Revenue that as per the import policy, Condition 5 of Chapter 1- Import of Live Animals, that is, the wild animals as

defined under Wildlife Protection Act, 1972 is permissible against the license to Zoos, Zoological parks, circus companies, private individuals, on the

recommendation of Chief Wild Life Warden of the State, subject to the provisions of the Convention of International Trade in Endangered Species of

Fauna and Flora (CITES). Under Condition No. 6 it appeared that import of Wild Animals (including their parts and products) as defined in the

Wildlife Protection Act, is prohibited, and those species which are listed in CITES and are subject to provisions of CITES.

2.18. It further appeared to Revenue that the exotic pets seized from the appellant are non-native, and in general they are imported illegally and kept at

unauthorized places, individual homes, etc. These are brought through illegal routes without proper license / documents. Curbing the illegal trade of

wild exotic pets is in the interest of animals, environment and the human beings. Accordingly, the appellant was served a show cause notice dated

01.11.2019 requiring him to show cause as to why the exotic species of birds and animals seized under the seizure memo dated 04.05.2019, should not

be absolutely confiscated under Section 111(b) and (d) of the Act, as the same appears to be in contravention of Section 11 of the Customs Act read

with Section 3 of Foreign Trade (Development & Regulation) Act, 1992, the

Import Policy and the CITES. Further penalty was proposed on the

appellant and the other two co-noticees namely Golu and Monu under Section 112(b)(i) of the Act. The Order-in-original was passed on contest and

the seized birds and animals were absolutely confiscated and further penalty of Rs. 5 lakhs each was imposed on the appellant and other two co-

noticees under Section 112(b) (i) of the Customs Act.

2.19. In the first appeal before the Commissioner (Appeals), the Commissioner (Appeals) was pleased to uphold the seizure and confiscation. Further,

appreciating that no permission is required for trading of exotic birds/animals within India under the Customs Act, was pleased to reduce the penalty

under Section 112(b)(i) to Rs. 3 lakhs observing that the seized animals/ birds were smuggled by other person(s) in India and the appellant is a

subsequent buyer in the chain.

3. Being aggrieved, the appellant is in appeal before this Tribunal on amongst the following grounds.

3.1. It is urged that admittedly in the facts and circumstances, it is a case of town seizure of the birds /animals. In such case or facts, the onus is on

the Revenue to establish the allegation of smuggling on the part of the appellant. The appellant have given cogent statement and evidence and have

explained that he has sourced the seized birds/animals from the said Golu and Monu who were made the co-noticee by the Revenue. The said Golu

and Monu located at Indore, have also confirmed that they have sourced from traders/ suppliers located in India and thereafter have supplied to the

appellant. Revenue have not led any evidence of smuggling on the part of the appellant or the immediate suppliers to the appellant, save and except

suspicion raised.

3.2 While passing the impugned Orders, the authorities below erred in appreciating the fact that-

(a) domestic trade in exotic animals and birds is not prohibited;

(b) exotic birds/animals do not come under the purview of Wild Life Protection Act, 1972, inasmuch as the same are not included in the schedule.

There is no provision under the Wildlife (Protection) Act, 1972 to issue license or permission for dealing in exotic birds. There are no Rules and

Regulations and procedures for keeping, breeding, buying, selling and exhibiting exotic animals and birds within country which have been bred in India;

(c) No permissions are required as per the Customs Act for domestically keeping, breeding, buying, selling and exhibiting exotic birds and animals;

(d) The exotic animals/birds are not notified under Section 123 of the Customs Act, 1962, therefore, there is no burden of proof on the appellant

regarding licit import;

(e) The instant was a case of town seizure under Section 110 of the Customs Act, 1962, which cannot be on mere suspicion in absence of â??reasons

to believeâ??;

3.3. Admittedly, the seized birds and animals are not notified under Section 123 of the Customs Act. Only in case of goods notified under Section 123

of the Act, the burden of proving that the goods are not smuggled, in case where such seizure is made from the possession of any person, it is on the

person from whose possession the goods were seized or on such other person who claims to be the owner thereof. Hence, in the facts of the present

case, it is the onus of Revenue to bring on record cogent evidence to support its allegation of smuggling.

3.4. It is further urged that Revenue has failed to bring any cogent evidence on record and heavily relied on the statement of third person(s) namely

one Shri Salman Merchant owner of â??Salman Exotic Pet Storeâ?? at Mumbai, who inter-alia stated that he knows Mr. Alvin Francis alias Monu at

Indore and has been dealing in the trade of exotic birds and animals with him. He also stated that he has single transaction with Monu, wherein he

gave him one eclectous parrot and in the barter deal he received a green Maccaw. In addition he also received Rs. 10,000/- in cash. He further stated

that he is aware that the trade and transaction in exotic birds is illegal and is also aware that the exotic birds are being imported illegally in India.

3.5 Reliance is also placed on the statement of one Shri Imran from whom the said Monu have been purchasing birds and animals and had specifically

stated that he purchased Marmoset monkey from Imran, who is native of Mumbai, the deal was made through Whatsapp in October, 2018. Shri Imran

in his statement recorded on 22.10.2019 inter alia stated that he is trading in exotic birds through Facebook and Whatsapp group, on commission basis.

He has earlier visited Bangkok and other places and have sourced exotic birds/ animals from outside India and thereafter these are sold in local

market. Save and except the few oral evidences which have been disputed by the appellant and which are not reliable in the eyes of law, Revenue has

not brought any other cogent evidence on record.

3.6. It is further urged that most of the exotic birds/ animals seized are bred in captivity across the country. Since there is no legal and statutory requirement governing the trade/ breeding within India, it is not possible to get the census of exotic birds/ animals. It is further urged that as per the law in India, no registration, certificate, license, bills is required for the possession of exotic birds/ animals. It is legal to possess and trade in exotic birds and animals within India, which are of foreign origin. As a buyer of such exotic animal and birds, the appellant has got no means to find out the exact source of supply. That there is no violation of the provisions of the Customs Act, 1962 for possession of exotic birds/ animals. It is further urged that the jurisdiction of the Customs Department is confined to the point of entry at the time of import.

3.7. In para 23 of the show cause notice, it is alleged that smuggling of marmoset monkeys is clearly established from the statement of co-noticee No. 2 and 3 i.e. Golu and Monu, which is further corroborated by the statement of Imran. Further, noticee No. 2 Golu, in his statement has stated that he is aware that the birds/animals are smuggled into India through sea route. It is further urged that the Court below have erred & upheld the allegation of smuggling on the suspicion that exotic pets are nonnative and in general these are imported illegally through illegal route. It is further urged that the statement of the said person(s) recorded under Section 108 of the Act is not reliable as the same are unsubstantiated, and further have not been tested during the adjudication proceedings by examination and cross-examination. The oral evidences as aforementioned are not reliable and no other evidence is produced and thus impugned orders are fit to be set aside and appeal allowed.

3.8. It is further urged that the exotic animals and birds in question do not attract the provisions of Chapter IVA of the Customs Act, which provides for detection of illegal imported goods and prevention of the disposal thereof comprising of Sections 11A to 11G. Admittedly, the Central Government has not notified the exotic birds and animals in question under Section 11B of the Customs Act.

3.9. The appellant has also relied on the ruling of Honâ??ble Allahabad High

Court, in PIL Civil No. 22903 of 2019 titled â??Dinesh Chandra vs. UOI

& Orsâ?? wherein a judgement dated 30.08.2019, the Honâ??ble High court have inter-alia held as under:-

â??30. Annexure - P9 clearly shows that CITES do not govern the domestic trade, possession or breeding by any person including aviaries,

but only international Trade.

â?¦.

33. Thus, ""Internal Trade"" i.e., domestic trade within India, of 'exotic species' not in any Schedule of the Wildlife (Protection) Act, 1972 was

never prohibited. Only 'External Trade' i.e., International Trade is governed by the conditions of Foreign Trade Policy.

â?¦.

36. Thus, domestic trade in exotic animals/exotic birds is not prohibited, and substantial exports of the 'exotic birds' is seen since several

years in view of large scale breeding of 'exotic species' in India.

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 Wildlife (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 Customs 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.

38. From plethora of material adduced by the petitioner, which are referred in preceding paragraphs, it is very clear that trade, possession,

transportation and breeding of exotic animals/exotic birds within India is not governed and restricted by Wildlife (Protection) Act, 1972.

â?¦

41. The exotic animals/birds are not notified under Section 123 of the Customs Act, 1962. Thus, there is no burden on the person who is in

possession of exotic animals/birds, to prove his lawful acquisition or lawful importation into India under the provisions of Customs Act,

1962.

(emphasis supplied)

42. The 'exotic animals/birds' do not attract provisions of Chapter IVA- Detection of illegally imported goods and prevention of disposal

thereof, containing Sections 11A to 11G, as they are not notified under Section 11B. Thus, the person in possession of 'exotic animals/Birds

is not bound to comply with requirements of Section 11C to 11F of the Customs Act, 1962 regarding intimation of place of storage,

precautions to be taken in acquiring, maintaining accounts or sale thereof.

43. It is also true that in absence of the exotic animals/exotic birds being covered under Section 123 of the Customs Act, 1962, there is no

statutory presumption that all exotic animals/birds in India are necessarily smuggled into India.

44. There is no merit in the prayer seeking direction to respondent DRI to conduct search and seizure operations with assistance of WCCB

officials, at the shops, residences, breeding farms and all such places within India, where exotic animals/birds are kept or traded or being

transported, whether for breeding or otherwise. 'Seizure' has to be in accordance with Section 110 of the Customs Act, 1962. Existence of

'reasonable belief' that the concerned goods would be liable to confiscation, is a sine qua non for any valid seizure under Section 110. Any

confiscation would be governed by the principles governing onus of proof in town seizures. Thus, confiscation or town seizure would not be

authorized by law, when it would be merely on suspicion that an exotic bird in possession of a person within India may have been smuggled

into India, on the basis such as - that person is not an importer, or is not having any proof of any valid importation under a License/ CITES

permit or proof of duty payment or any reliable purchase voucher or proof of any other legal acquisition or on the strength of oral

statements of any other co-accused. In such situation, mere 'acquisition', 'purchase', or 'possession"" of the exotic animals or exotic birds,

shall not invite penal consequences under the Customs Act, 1962. If at the entry/ exit point, some consignment of import/export of exotic

animals/birds is intercepted, upon establishing violation of the statutory provisions or CITES, the same would be liable for confiscation.

â?¦

48. From the aforesaid, we are of the view that the Central Government has consciously kept the exotic animals/ exotic birds out of the

purview of Wildlife (Protection) Act, 1972 by not including them in its Schedules, and has thus permitted their domestic trading, possession

and captive breeding in India. Such legislative intent and decision of the Government can neither be interfered with in writ jurisdiction, nor

can any direction be given to the Government in this regard to amend Wildlife (Protection) Act, 1972 or Customs Act, 1962. At the point of

Import/Export, a Customs/DRI officer has jurisdiction to detect and prevent International Trade, i.e., import/ export of live animals and

birds into or out of India, if found in violation of the provisions of Customs Act, 1962 read with the 'CITES' and Foreign Trade Policy. Thus,

any live animals and birds, while being smuggled through the Indian Customs Frontiers, can be seized at the point of Import/Export by

DRI/Customs and the concerned persons can be subjected to penal and confiscatory provisions in accordance with the provisions of the

Customs Act, 1962. There is no restriction on domestic trade, keeping, captive breeding, buying, selling and exhibiting 'exotic animals/exotic

birds' within India, either under the Wildlife (Protection) Act, 1972 or under the Customs Act, 1962 or under the Foreign Trade

(Development & Regulation) Act, 1962 or CITES. Any person in possession of 'exotic animals/exotic birds' within India, is not bound to

comply with the requirements of Section 11C to 11F of the Customs Act, 1962 regarding intimation of place of storage, precautions to be

taken in acquiring, maintaining accounts or sale, as they are not notified under Section 11B. Similarly, mere 'acquisition', 'purchase', or

'possession' of the exotic animals or exotic birds within India, shall not invite any penal consequences under the Customs Act, 1962 or

Wildlife (Protection) Act, 1972.â??

3.10. Another Judgment dated 30.07.2020 passed by the Honâ??ble Allahabad High Court, Lucknow Bench in PIL Civil No. 12032 of 2020 titled

â??Dinesh Chandra vs UOI & Orsâ?? also supports the case of the appellant. Vide Order dated 13.10.2020, the Honâ??ble Supreme Court has dismissed the SLP filed there against.

I. Further, in Criminal Writ Petition No. 807 of 2019 titled â??Anil Naidu vs UOI & Ors, the Honâ??ble Bombay High Court Nagpur Bench

has held as under:

â??In the background of above submissions, we find that admittedly, import of exotic species of birds or animals is not permitted unless it is

under valid license or payment of appropriate customs duty. So far as Wildlife Protection Act is concerned, admittedly, exotic species of

birds or animals are not covered under the schedule thereunder and as such, we do not find that there can be any restriction to their

domestic trade, possession or keep for breeding under the said Act. It is specifically noted that simply because exotic species are those birds

or animals whose origin is not placed to Indian Wildlife by itself does not mean that unless the person who is in possession of same, said

birds or animals are presumed to be smuggled into India, in view of the fact that provisions of the Foreign Trade Policy are applicable only

in international foreign trade and not in relation to domestic possession or trading or breeding.

In view of the case of the petitioner as unfolded above, perusal of the provisions 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, owners or persons claiming ownership or are in possession of such

exotic species are not required to establish that they are smuggled in India. Reference can also be usefully made to the provisions of Section

110 of the Customs Act, 1962, which enables the officers of respondent No.3 â?" Directorate of Revenue Intelligence to exercise its powers

to seize any goods or documents only if, they have â??reason to believeâ?? that the said goods are liable for confiscation.

Admittedly, it is not the case of the petitioner that â??M/s. SRK Exotic Birds, Nagpurâ? had imported any consignment of such species.

Documents filed in support of the petition, in fact, would establish that â??M/s. SRK Exotic Birds, Nagpurâ? is not only engaged in keeping

and trading of such birds, but are also into breeding of them irrespective of the fact that origin of such birds is not actually traced in India.

As such, we do not find any manner whatsoever in which exotic species in possession of any such person can be ascertained as

â??smuggled into Indiaâ?? or â??locally bred in-captivityâ?? in the absence of any statutory ban imposed upon such in-captive breeding.

(emphasis supplied)

In that view of the matter, we do not find any reason to issue any directions to initiate action as prayed for under the provisions of the

Customs Act 1962 on any domestic keeper of the exotic species, as issuance of any such directions would be contrary to law, as it stands on

today. However, we note that, if violation of any of the provisions of the Prevention of Cruelty to Animals Act, 1960 is found, in that event,

appropriate authority under the said Act would definitely have jurisdiction to act upon, which would be limited under the provisions of the

said Act. Considering the fact that there is no statutory presumption that all the exotic species are imported to India, nor there is a legal

requirement which compels domestic keeper of such species to produce any proof of importation or documents establishing his acquisition,

no relief as sought for can be granted, as there is no prohibition, restriction or regulation to sale, purchase, possession or breeding of the

exotic species within India under the provisions of the Customs Act, 1962. As such, issuing of directions as prayed, would be without

jurisdiction. The provisions of Sections 123 and 110 of the Customs Act, 1962 are clear and unambiguous and, therefore, any seizure of

such exotic species from one who is in possession and acquisition of same would be contrary to the provisions of the said Act.â??

3.11. Even, the Rajasthan High Court in Vivek Swami vs UOI & Ors, D.B. Civil Writ Petition No. 7491/2020 vide judgment dated 14.10.2020 has

held as under:

â??12. On the basis of the pleadings filed before this Court, following facts are not in dispute:-

â?¦.

(b) In the Wild Life (Protection) Act, 1972, there are various provisions to prevent and penalise any possession, trade, captive, breeding

and transportation of all wild animals/birds listed in the schedules of the said Act. Clearly the term â??exotic live speciesâ? is not covered

under the Wild Life (Protection) Act, 1972.

(emphasis supplied)

(c) The Customs Act, 1962 as well as the Foreign Trade (Development and Regulation) Act, 1992 are applicableo nly, qua â??International

Trade of exotic live speciesâ?? and India is signatory to the Convention of International Trade in Endangered Species of Wild Fauna and

Flora (CITES). The CITES is an International Convention aimed and ensuring that international trade of wild animals, birds specified in

various appendices available thereto, does not threaten their existence and their native habitats. The enforcement of CITES provisions at

the point of import or export is by Custom/DRI Officers.

(d) The enforcement of CITES provisions within India at any place other than the point of import/export is carried out by the State/Union

Territories. The Wild Life Department is headed by the Chief Wildlife Warden under the Wild Life (Protection) Act, 1972, however it is clear

therefrom that such officers have no jurisdiction in the matter of possession, breeding domestic trade/ transportation of â??exotic live

speciesâ??, since the same is not covered by the Wild Life (Protection) Act, 1972.

(e) The term â??exotic live speciesâ? has not been notified under Section 11(B) of the Customs Act, 1962. Thus, a person in possession of

â??exotic live speciesâ? is not required to comply with Section 11 (C) to Section 11(F) of the Customs Act, 1962 regarding intimation of the

place of storage, precautions to be taken in acquiring and maintaining the accounts or sale thereof. Further, in absence of the term

â??exotic live speciesâ?? being covered under Section 123 of the Customs Act, 1962.

â?¦.

20. It would be pertinent herein also to take note of the judgment of the Honâ??ble Supreme Court in D.K. Basu Vs. State of West Bengal

(1997) 1 SCC 416 and in A. Tajudeen Vs. Union of India (2015) 4 SCC 435, wherein their Lordships have noted various instances of

compelled testimony by misuse of provisions such as Section 108 of the Customs Act, 1962, therefore, misuse cannot be ruled out. However,

we are of the considered view, that any possibility of abuse of power conferred under Section 108 cannot be a ground to challenge the

vires of Section 108 and one cannot deal with the same as manifestly arbitrary, unreasonable, unfair or unconstitutional. Section 108 of the

Customs Act, 1962 is an important power conferred upon the Custom Officers for investigation under the offences punishable under the Act

for recording voluntary statements.

21. We make it clear that we have only dealt with the use of Section 108 of the Customs Act, 1962 in the context of aforesaid Voluntary

Disclosure Scheme issued by the Government of India under the Ministry of Environment, Forest & Climate Change vide its notification

dated 11.06.2020.

(emphasis supplied)

The order of Honâ??ble Rajasthan High Court has been confirmed by the Honâ??ble Supreme Court as it has found no ground to interfere with the

order of the High Court and dismissed the SLP by its order dated 14.12.2020 in SLP (C) No. 12879 of 2020 in the case of Vivek Swami vs. UOI &

Ors.

4. Opposing the appeal, learned Authorised Representative appearing for the Revenue Shri Yashvir Singh relies on the impugned order. He further

states that there is no record available of the exotic birds/ animals having been breed in India. He further urges that the suppliers of the appellant who

are co-noticees, have stated that they have sourced from persons located in India but are aware that such persons are also engaged in smuggling. It is

further urged that Revenue have examined the import data from NIDB for the period 2004 to 2018 and found that some of the seized species of

exotic birds/ animals were not imported during this period, during which the appellant claims to have made purchases within India. It is further urged

that the seized exotic birds/ animals are of foreign origin as certified by the Deputy Conservator of Forest, and the certificate granted is annexed in the

appeal paper book. Further, it has come out in the investigation that the appellant could not produce any documentary evidence of the illicit purchase,

hence the allegation of the Revenue of the same being smuggled is credible. Accordingly, he prays for dismissing the appeal.

5. Having considered the rival contentions, I find that it is a case of town seizure and not interception at the point of entry in India. Admittedly, the

appellant have purchased the exotic birds/ animals in domestic area within India, which has been corroborated by the two suppliers based at Indore namely Golu and Monu who are also the co-noticees. Further, there is no evidence on record that the said Golu and Monu have smuggled the exotic

birds/animals in India. Further, I find that the Revenue has failed to establish the allegation of smuggling with any cogent evidence, either by the

appellant or the other two co-noticees. The burden of proof lies on Revenue to support its allegation of smuggling.

6. Further, the Honâ??ble Allahabad High Court in the case of Dinesh Chandra (supra) have held that CITES do not govern the domestic trade,

possession or breeding by any person including aviaries, but only international trade. It was further observed that â??internal tradeâ?? i.e. domestic

trade within India, of â??exotic speciesâ?? is not found in any schedule of the Wildlife (Protection) Act, 1972 and was never prohibited. Only

â??external tradeâ?? i.e. international trade is governed by the conditions of Foreign Trade Policy. The Honâ??ble Allahabad High Court further

held that domestic trade in exotic birds/ animals is not prohibited and substantial export of the exotic birds from India is seen since several years in

view of large scale breeding of exotic species in India. It is further held that no documents are specified and no permission is required as per Customs

Act for keeping, breeding, buying, selling and exhibiting of such exotic birds/ animals within the country. It is further held that the exotic birds/animals

are not notified under Section 123 of the Customs Act. Thus, there is no presumption of smuggling on the person who is in possession of such exotic

birds/ animals, also do not attract the provisions of Chapter IV-A of the Customs Act. It was also held that mere acquisition, purchase or possession

of exotic birds/animals does not violate provisions under the Customs Act. It is only at the entry point, at the time of import, any consignment of exotic

birds/ animals intercepted, upon establishing violation of the statutory provisions or CITES, the same would be liable for confiscation. It was held that

the Central Government has consciously kept the exotic birds /animals out of the purview of Wildlife (Protection) Act, 1972 by not including them in its

schedules, and has thus ipso facto permitted their domestic trading, possession and captive breeding.

6.1. I find that similar view was taken by the Honâ??ble Bombay High Court in Anil Naidu vs. UOI & Ors. by its judgment dated 11.09.2019 in

Criminal Writ Petition No. 807 of 2019.

6.2. I find that similar view has also been taken by the Honâ??ble Rajasthan High Court in its judgment dated 14.10.2020 in Writ Petition No. 7491 of

2020 in the case of Vivek Swami vs. UOI & Ors. wherein, in the Writ Petition the prayer was to direct the â??Central Board of Indirect Taxesâ??

to issue suitable circular/ instructions to enable the citizens in possession of exotic species to make declaration under the â??voluntary disclosure

schemeâ?? without any fear under the Customs Act, 1962, and further direction on the Officers of CBIC in the nature of â??writ of prohibitionâ??

for seeking any information relating to the acquisition of birds/ animals in his possession, which the petitioner is contemplating to declare under the

voluntary disclosure scheme issued by the Central Government. The Rajasthan High court relying on the aforementioned ruling of the Allahabad High

Court in Dinesh Chandra (supra) have observed that the Customs Act and the Foreign Trade (Development and Regulation) Act, are applicable only

qua international trade of exotic life species. It was also observed that the Wildlife Department headed by the. Chief Wildlife Warden have got no

jurisdiction in the matter of possession, breeding, domestic trade and transportation of exotic life specifies, since the same is not covered by the

Wildlife Protection Act, 1972.

7. In view of my aforementioned findings and the ruling of the Honâ??ble High Courts, I allow this appeal and set aside the impugned order. The

appellant will be entitled to consequential benefits including return of the seized exotic birds/ animals forthwith. The respondent is directed to return the

seized birds/ animals etc. within a period of seven (7) days from the date of receipt or service of copy of this order.

(Operative part of the order pronounced in open Court)

