

M/S. Gammon India Ltd vs Commnr. Of Customs, Mumbai on 6 July, 2011

Equivalent citations: 2011 AIR SCW 4175, 2011 (12) SCC 499, AIR 2011 SC (SUPP) 84, (2012) 1 ALLMR 894 (SC), (2011) 6 ANDHLD 29, (2011) 3 CURCC 191, (2011) 7 SCALE 297

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Bench: H.L. Dattu, D.K. Jain

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5166 OF 2003

M/S GAMMON INDIA LTD.

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APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS,

--

RESPONDENT

MUMBAI

J U D G M E N T

D.K. JAIN, J.:

1. This Civil Appeal, under Section 130-E(b) of the Customs Act, 1962 (for short "the Act"), is directed against order dated 4th April, 2003 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, as it then existed, (for short "the Tribunal"),

in Appeal No. C/298/02-

Mum. By the impugned order, the Tribunal has allowed the appeal preferred by the Commissioner of Customs, Mumbai, holding that the appellant is not entitled to claim the benefit of Exemption Notification No. 17/2001/Cus (General Exemption No. 121), issued by the Min-

istry of Finance, Government of India on 1st March, 2001.

2. Briefly stated, the facts, material for adjudication of the issue arising in this appeal, are as follows:

The appellant namely, M/s Gammon India Ltd. (for short "Gam- mon") and one M/s Atlanta Infrastructure Ltd., Mumbai, (for short "At- lanta") both incorporated as Public Limited Companies, entered into a joint venture agreement on 18th September, 2000. The joint venture was named and styled as "Gammon Atlanta JV". The agreement was entered into for the purpose of submitting a bid to the National Highways Author- ity of India (for short "NHAI") for award of a contract for construction of 31.40 Kilometers of road on National Highway-5. The terms of the agreement, inter-alia, provided that: each of the said parties would share financial responsibilities in the form of guarantees, securities etc. to the extent of 50% of the project value; the venture would be managed by set-

ting up of a management board consisting of a Chairman and one Direc-

tor to be nominated by Gammon and a Joint Chairman and another Direc-

tor to be nominated by Atlanta. Although Gammon was to be designated as the lead partner to the venture but both the companies were to be jointly and severally liable to NHAI for due execution of the contract.

3. The bid tendered by the said joint venture was accepted by NHAI and an agreement dated 20th December, 2000 was executed between NHAI, referred to as the "Employer" on the one part and M/s Gam-

mon-Atlanta JV, referred to as the "contractor", on the other part. On behalf of Gammon-Atlanta JV, the agreement was signed by the repre-

sentatives of both the companies, i.e. Gammon and Atlanta.

4. On 1st March, 2001, in exercise of the powers conferred by sub-section (1) of Section 25 of the Act, the Central Government, issued the afore-noted Exemption Notification, inter alia, exempting the goods of the description specified in Column (3) of the Table given thereun- der, read with the relevant List appended thereto and falling within the Chapter, Heading no. or sub-heading no. of the First Schedule to the Customs Tariff Act, 1975, as specified in the corresponding entry in Column (2) of the said Table. Serial No. 217 of the said Table granted full exemption from basic Customs duty

and additional Customs duty, on the goods falling under Chapter 84 specified in List 11, required for construction of roads. However, the said exemption was subject to certain conditions, enumerated in the said notification. Condition No. 38, relevant for this case, reads as follows:

"38. If,-

(a) the goods are imported by-

(i) the ministry of Surface Transport, or

(ii) a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Trans-

port, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory; or

(iii) a person who has been named as a sub-con-

tractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Author-

ity of India, by Public Works Department of a State Government or by a road construc-

tion corporation under the control of the Government of a State or Union Territory;

(b) the importer, at the time of importation, furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of five years from the date of their importation; and

(c) in case of goods of serial nos. 12 and 13 of List 11, the importer, at the time of importation of such goods, also produces to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, a certificate from an officer not below the rank of a Deputy Secretary to the Govern-

ment of India in the Ministry of Surface Transport (Roads Wing), to the effect that the imported goods are required for construction of roads in India."

5. It appears that the appellant approached NHAI for issue of the certifi-

cate, as contemplated in para (c) of Condition no.38, for import of one 'Concrete batching plant 56 cum/hr' covered under Item No. 13 of List 11, referred to at Serial No. 217 in the said Exemption Notification-

tion. Vide letter dated 3rd August, 2001 NHAI forwarded a Certificate, issued by the Deputy Secretary, Government of India, Ministry of Road Transport and Highways, addressed to the Assistant Commis-

sioner of Customs, Mumbai, certifying that the said equipment was re-

quired for construction of roads and recommending its duty free im-

port.

6. Equipped with the said certificate, Gammon, the appellant herein, im-

ported the specified Concrete Batching Plant from Germany and filed Bill of Entry (for home consumption) for its clearance at 'nil' rate of duty under Notification No.17/2001-cus, dated 1st March, 2001. The Deputy Commissioner of Customs, by his order dated 5th October, 2001 rejected the claim of the appellant for exemption from payment of Customs duty on the ground that the appellant had failed to comply with the conditions stipulated at Serial No. 38 appended to the exemp-

tion notification. According to the Adjudicating Authority, as per the said condition, the exemption is available only if the goods are import-

ed by "a person who has been awarded the contract" by NHAI for construction of roads in India by or on behalf of Ministry of Surface Transport, but in the present case the goods have been imported by Gammon to whom no contract had been awarded by the authorities specified in the notification. Admittedly, the contract had been award-

ed in the name of joint venture - M/s Gammon-Atlanta JV. Thus, the adjudicating authority came to the conclusion that the appellant was not entitled to the benefit of exemption notification in their capacity as a partner in the joint venture, to whom the contract had been awarded.

7. Aggrieved thereby the appellant preferred an appeal to the Commis-

sioner of Customs (Appeals). The Commissioner (Appeals) was of the view that Gammon having been nominated as the lead partner in the joint venture for due performance of the contract awarded by NHAI, with authority to incur liabilities and to receive instructions for and on behalf of the joint venture, and the machine having been im-

ported on behalf of the joint venture for the purpose of road construc-

tion, the benefit of the said exemption notification could not be denied to the appellant. Inter-alia, observing that the appellant was not an outsider and perhaps due to some technical reasons the machine had been imported in the name of the appellant, the Commissioner held that outright denial of the benefit of the said notification was not war-

ranted. Accordingly, he allowed the appeal.

8. Being dissatisfied with the decision of the Commissioner (Appeals), the revenue carried the matter in further appeal to the Tribunal. As aforesaid, by the impugned order the Tribunal has allowed the said appeal. Distinguishing the case of *New Horizons Limited & Anr. Vs. Union of India & Ors.*¹, relied on behalf of the importer, the Tribunal 1 (1995) 1 SCC 478 has come to the conclusion that the benefit of Exemption Notification cannot be availed of by a joint venture because it is nothing more than an association of two persons, having no identity in law. The Tribunal has gone on to observe that had such a bill of entry been filed even by a joint venture, the department would have been justified in rejecting it on the ground that the identity of the real importer was not known.

Aggrieved, Gammon is before us in this appeal.

9. We have heard learned counsel for the parties.

10. Mr. J.S. Sinha, learned counsel appearing on behalf of the appellant, strenuously urged that in light of the decision of this Court in the case of *New Horizons (supra)*, wherein the concept of a joint venture has been explained and the same has been subsequently followed in *Gan-*

*pati RV-Talleres Alegria Track Private Limited Vs. Union of India & Anr.*², the view taken by the Tribunal is clearly erroneous. It was contended that since a joint venture is a legal entity with all the trap-

pings of a partnership under the Indian Partnership Act, 1932, the gen-

eral principles of the said Act were applicable to the joint venture and, therefore, any one of the two partners of the joint venture, viz. Gam-

mon and Atlanta was competent to import the subject machinery for and on behalf of the contractor viz. the joint venture for execution of 2 (2009) 1 SCC 589 the road project under contract between the joint venture and NHAI. It was argued that the eligibility certificate dated 3rd August 2001, issued by the Ministry of Road Transport and Highways, stating that the sub-

ject machine would be imported by the appellant herein, will sustain the eligibility of the joint venture in view of the law laid down by this Court in *New Horizons (supra)*. It was submitted that in view of an inclusive definition of the word "person" in the Export and Import policy for the years 1997-2002, which includes a "legal person", the import of machinery by the appellant for and on behalf of the joint venture is as good as an import by the joint venture who has been awarded the contract for construction of roads, thus fulfilling condi-

tion No.38 of the Exemption Notification. Learned counsel asserted that since in identical fact situations in the cases of IVRCL Infras-

tructures & Projects Ltd. Vs. C.C., Chennai (Sea)³ and Techni Bharathi Ltd. Vs. Commissioner of Customs, Mumbai-II⁴, when ma-

chinery for a road project was imported by one of the constituents' of the joint venture, the benefit of the same Exemption Notification had been granted by the Tribunal. It was argued that the said orders of the Tribunal having been accepted by the revenue, it cannot be permitted to take a different stand on the same point in the case of the appellant.

Lastly, relying on the decision of this Court in Commissioner of Cus-

3 2004 (166) E.L.T. 447 (Tri.-Del.) 4 2006 (198) E.L.T. 33 (Tri.-Bang.) toms (Preventive), Mumbai Vs. M. Ambalal & Co.⁵, learned counsel submitted that a beneficial and promotional exemption notification has to be construed liberally.

11. Per contra, Mr. Harish Chander, learned senior counsel appearing on behalf of the revenue, supporting the decision of the Tribunal, submitted that the joint venture and Gammon being two independent entities, the eligibility certificate dated 3rd August, 2001 issued in favour of the latter was of no consequence in so far as the Exemption Notification was concerned because the contract for construction of roads had not been awarded to Gammon, who had imported the machine but to the joint venture. It was stressed that Gammon, on their own, were not entitled to import any goods for the execution of road works under the contract awarded to the joint venture by NHAI.

Placing reliance on the decision of this Court in Novopan India Ltd., Hyderabad Vs. Collector of Central Excise & Customs, Hyderabad⁶, learned counsel contended that the Exemption Notification has to be construed strictly. Responding to the allegation of pick and choose policy adopted by the revenue, learned counsel urged that non-filing of an appeal in a similar case does not operate as a bar for the revenue to prefer an appeal in another case. In support, learned counsel 5 (2011) 2 SCC 74: 2010 (260) E.L.T. 487 (S.C.) 6 1994 Supp (3) SCC 606 commended us to the decision of this Court in C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin⁷. It was thus, assert-

ed that the decision of the Tribunal did not warrant any interference and the appeal deserved to be dismissed.

12. The short question for determination is whether import of the speci-

fied machine by Gammon can be considered to be an import "by a person who has been awarded a contract for construction of the roads in India", so as to fulfill Condition No.38, laid down in Exemption Notification No.17/2001/Cus dated 1st March, 2001?

13. In order to appreciate the contentions advanced on behalf of the par-

ties on the question in issue, it would be expedient and useful to once again notice the salient features of agreement dated 18th September, 2000 entered between Gammon and Atlanta.

14. Agreement dated 18th September, 2000 provided that: financial re-

sponsibilities of each of the parties to be shared equally in the form of guarantees, securities, etc. of the joint venture would be 50% of the project value; the Management of the joint venture would be subject to the overall control of the Management Board, consisting of a Chair-

man, to be nominated by Gammon, a Joint Chairman to be nominated by Atlanta and one Director each to be appointed by both of them;

7 (2008) 8 SCC 739 : (2008) 228 ELT 497 joint venture bank account would be operated under joint signatures of the authorized representatives of Gammon and Atlanta and neither party would be entitled to borrow for or on behalf of the joint venture or to acknowledge any liability without express prior consent in writ-

ing of the other party except to the extent of its share of work; Gam-

mon being most experienced party would be the lead partner of the joint venture for the performance of the contract; the partner-incharge would be authorized to incur liabilities and to receive instructions for and on behalf of the partners of the joint venture, whether jointly or severally, and entire execution of the contract including receiving pay-

ment would be carried out exclusively through the partner-incharge but any financial commitment required by the lead partner, on behalf of the joint venture, would always be previously discussed and agreed upon by the parties. As stated above, though under agreement dated 18th September, 2000, Gammon was notified as the lead partner but agreement dated 20th December, 2000 executed between NHAI as the "employer" and Gammon-Atlanta JV as "contractor" was signed by the representatives of both the companies viz. Gammon and Atlanta, meaning thereby that so far as NHAI was concerned, for them the con-

tractor was Gammon-Atlanta JV and not Gammon or Atlanta individ-

ually.

15. According to the adjudicating authority, it was clear from both of the said agreements that the contract of construction of roads in India was awarded to the joint venture and, therefore, Gammon was not entitled to avail of the benefit of the Exemption Notification as an independent entity. On the contrary, the Commissioner (Appeals) allowed the ben-

efit of the Exemption Notification to the appellant on the ground that the Exemption Notification should be given a liberal interpretation and that the revenue should not try to take advantage of ignorance of law and procedure on the part of Gammon. It is the Tribunal which has dealt with the

issue in detail by taking into consideration certain factu-

al aspects pertaining to the import of machine like placement of the supply orders by Gammon and not by the joint venture and its pay-

ment by Gammon from its own account and not from the joint venture account provided for in the joint venture agreement. Rejecting the plea of the appellant that in light of the decision of this Court in New Horizons (supra) wherein it has been held that a joint venture is a le-

gal entity in the nature of a partnership, the import of the machinery by Gammon is to be considered as having been done on behalf of the joint venture, the Tribunal has allowed revenue's appeal.

16. Since the stand of the appellant is that the issue arising in the present appeal stands concluded in their favour by the decision of this Court in New Horizons (supra) and a subsequent decision of this Court as also of the Tribunal, in which the said decision has been relied upon, it would be necessary to discern the ratio of the decision in New Hori-

zons (supra).

17. In New Horizons (supra), a joint venture company, consisting of a few Indian companies (with 60% share capital) and a Singapore based company (with 40% share capital), had participated in tender proceed-

ings floated by the Department of Telecommunications for printing and binding of telephone directories of Delhi and Bombay. The ten-

der submitted by New Horizons Ltd; (for short "NHL") was not ac-

cepted by the tender evaluation committee, apparently, on the basis of the fact that the successful party had more technical experience than any one of the constituent companies of NHL. Aggrieved by the said decision, NHL filed a writ petition in the Delhi High Court against the decision of the Department of Tele-communications. The said writ petition was dismissed rejecting the plea of the NHL that the technical experience of the constituents of the joint venture was liable to be treated as that of the joint venture. NHL brought the matter to this Court. Explaining the concept of joint venture in detail, it was held that a joint venture is a legal entity in the nature of a partnership en-

gaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contributed assets and shared risks. It was observed that a joint venture could take the form of a Corporation wherein two or more persons or companies might join to-

gether. Accordingly, the appeal of NHL was allowed and it was held that it was a joint venture company in the nature of a partnership be-

tween the Indian group of companies and Singapore based company which had jointly undertaken the commercial venture by contributing assets and sharing risks. Applying the principle of "lifting the corpo-

rate veil", it was held that the joint venture companies' technical expe-

rience could only be the experience of the partnering companies and the technical experience of all constituents of NHL was liable to be cumulatively reckoned in the tender proceedings and any one of the constituents was competent to act on behalf of the joint venture com-

pany. Highlighting the concept of joint venture, the Court observed thus:

"24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p.117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342)....."

18. In short, New Horizons (supra) recognises a joint venture to be a legal entity in the nature of a partnership of the constituent companies.

Thus, the necessary corollary flowing from the decision in New Hori-

zons (supra), wherein the partnership concept in relation to a joint venture has been accepted, would be that M/s Gammon-Atlanta JV, the joint venture could be treated as a 'legal entity', with the character of a partnership in which Gammon was one of the constituents. In that view of the matter, the next question for consideration is whether being a legal entity i.e. a juridical person, the joint venture is also a "person" for the purpose of Condition No.38 of the Exemption Notifi-

cation, stipulating that the goods should be imported by "a person"

who had been awarded a contract for construction of goods in India by NHAI?

19. In support of his submission that the joint venture is a "person" as contemplated in the Exemption notification, learned counsel for Gam-

mon had relied on the definition of the word "person" as given in para 3.37 of the Export and Import policy for the year 1997-2002. It reads thus:

"3.37- "Person" includes an individual, firm, society, company, corporation or any other legal person".

20. The argument was that since a joint venture has been declared to be a legal entity in New Horizons (supra), it squarely falls within the am-

bit of the said definition of the word "person". We are of the opinion that even if the stated stand on behalf of the appellant is accepted, mercifully, on stark facts at hand, it does not carry their case any fur-

ther. Neither was it the case of the appellant either before the Adjudi-

cating Authority or before the Appellate Authority or before us, nor is it suggested by the documents viz. the supply order or the bill of entry, that the import of the machine was by or on behalf of the joint venture.

On the contrary, the Tribunal has recorded in its order that when ques-

tioned, learned counsel for the appellant clarified that correspondence with the supplier of goods and placement of order had been done by Gammon and not by the joint venture or on their behalf. He also ad-

mitted that payment for the machine had not been made from the joint venture account, which had been provided for the contract but from the funds of Gammon.

21. Thus, the inevitable conclusion is that import of "Concrete batching plant 56 cum/hr" by Gammon cannot be considered as an import by M/s Gammon-Atlanta JV, "a person" who had been awarded contract for construction of the roads in India and therefore, neither Gammon Atlanta JV nor Gammon fulfill the requisite requirement stipulated in Condition No.38 of the Exemption Notification No. 17/2001/Cus dat-

ed 1st March, 2001.

22. As regards the plea of the appellant that the Exemption Notification should receive a liberal construction to further the object underlying it, it is well settled that a provision providing for an exemption has to be construed strictly. In Novopan India Ltd. (supra), dealing with the same issue in relation to an exemption notification, a three-Judge Bench of this Court, stated the principle as follows:

"16. We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals-- and in Union of India v. Wood Papers referred to therein -- represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee -- assuming that the said principle is good and sound -- does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

23. Applying the above principles, we are of the opinion that since in the instant case the language of condition No.38 in the Exemption Notifi-

cation is clear and unambiguous, there is no need to resort to the inter-

pretative process in order to determine whether the said condition is to be imparted strict or liberal construction.

24. Before parting, we wish to place on record our deep concern on the conduct of the two Benches of the Tribunal deciding appeals in the cases of IVRCL Infrastructures & Projects Ltd. (supra) & Techni Bharathi Ltd. (supra). After noticing the decision of a co-ordinate Bench in the present case, they still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment, thereby creating a judicial uncertainty with regard to the declaration of law in-

involved on an identical issue in respect of the same Exemption Notifi-

cation. It needs to be emphasised that if a Bench of a Tribunal, in identical fact-situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that will be destructive of the institutional integri-

ty itself. What is important is the Tribunal as an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a larger Bench, for which provision exists in the Act itself. In this behalf, the following observations by a three Judge Bench of this Court in Sub-

Inspector Rooplal & Anr. Vs. Lt. Governor & Ors.8 are quite appo-

site :

"At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of an- other Coordinate Bench of the same Tribunal. This is op- posed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding offi- cer of a judicial forum ought to know, for consistency in in- terpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again 8 (2000) 1 SCC 644 that precedent law must be followed by all concerned; devia- tion from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement."

We respectfully concur with these observations and are confident that all the Courts and various Tribunals in the country shall follow these salutary observations in letter and spirit.

25. In view of the foregoing discussion, the decision of the Tribunal, hold-

ing that the appellant was not entitled to the benefit of Exemption no-

tification No. 17/2001-Cus dated 1st March, 2001, cannot be flawed.

The appeal being bereft of any merit is dismissed accordingly, with costs, quantified at `50,000/-.

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(D.K. JAIN, J.)

(H.L. DATTU, J.) NEW DELHI;

JULY 6, 2011.

RS