REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 34 OF 2015
(arising out of Special Leave Petition (Crl.) No. 2961 of 2013)

SUNIL BHARTI MITTAL .....APPELLANT(S)

VERSUS

CENTRAL BUREAU OF INVESTIGATION .....RESPONDENT(S)

W I T H

CRIMINAL APPEAL NO. 35 OF 2015
(arising out of Special Leave Petition (Crl.) No. 3161 of 2013)

A N D

CRIMINAL APPEAL NOS. 36-37 OF 2015
(arising out of Special Leave Petition (Crl.) No. 3326-3327 of 2013)

J U D G M E N T

A.K. SIKRI, J.

Leave granted.

Introduction:

2. In the year 2008, during the tenure of the then Minister of Telecommunications, Unified Access Services Licenses ("UASL")

were granted. After sometime, an information was disclosed to the Central Bureau of Investigation (CBI) alleging various forms of irregularities committed in connection with the grant of the said UASL which resulted in huge losses to the public exchequer. On the basis of such source information, the CBI registered a case bearing RC DAI 2009 A 0045 on 21st October, 2009. It is now widely known as "2G Spectrum Scam Case". The case was registered against unknown officers of the Department of Telecommunications (DOT) as well as unknown private persons and companies.

3. While the investigation into the said case was still on, a writ petition was filed by an NGO known as Center for Public Interest Litigation (CPIL) before the High Court of Delhi seeking directions for a Court monitored investigation. Apprehension of the petitioner was that without such a monitoring by the Court, there may not be a fair and impartial investigation. Delhi High Court dismissed the petition.

4. Challenging the order of the Delhi High Court, CPIL filed Special Leave Petition before this Court under Article 136 of the Constitution of India. At that time, another petitioner, Dr.Subramanian Swamy, directly approached the Supreme Court

by way of a writ petition under Article 32 of the Constitution of India seeking almost the same reliefs on similar kinds of allegations. Leave was granted in the said SLP, converting it into a civil appeal. Said civil appeal and writ petition were taken up together for analogous hearing. On 16th December, 2010, a detailed interim order was passed in the civil appeal *inter alia* giving the following directions:

> "a. The CBI shall conduct thorough investigation into various issues highlighted in the report of the Central Vigilance Commission, which was forwarded to the Director, CBI vide letter dated 12.10.2009 and the report of the CAG, who have *prima facie* found serious irregularities in the grant of licences to 122 applicants, majority of whom are said to be ineligible, the blatant violation of the terms and conditions of licences and huge loss to the public exchequer running into several thousand crores. The CBI should also probe how licences were granted to large number of ineligible applicants and who was responsible for the same and why the TRAI and the DoT did not take action against those licensees who sold their stakes/equities for many thousand crores and also against those who failed to fulfill roll out obligations and comply with other conditions of licence.
>
> b. The CBI shall, if it has already not registered first information report in the context of the alleged irregularities committed in the grant of licences from 2001 to 2006-2007, now register a case and conduct thorough investigation with particular emphasis on the loss caused to the public exchequer and corresponding gain to the licensees/service providers and also on the issue of allowing use of dual/alternate technology by some service providers even before the decision was made public vide press release dated 19.10.2007."

5. Thereafter, detailed judgment was passed by the Bench of this Court in the aforesaid proceedings on 2nd February, 2012 which is reported as ***Centre for Public Interest Litigation & Ors.*** v. ***Union of India & Ors.***[1]. The Court allowed the appeal as well as the writ petition, holding that spectrum licences were illegally granted to the beneficiaries at the cost of the nation. The Court accordingly cancelled the licences granted to the private respondents on or after 10.01.2008 and issued certain directions for grant of fresh licences and allocation of spectrum in 2G Band. It was also specifically clarified that the observations in the said judgment would not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and other agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of charge-sheet(s) which may be filed by the CBI in future. The Court also made it clear that the Special Judge, CBI would decide the matter uninfluenced by the judgment dated February 02, 2012. Thereafter, order dated 11.04.2011 was passed in that very appeal, making its intention manifest that this Court would be monitoring the investigation by CBI in larger public interest. Special Court was set up for trial of the 2G case

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1 (2012) 3 SCC 1

and a Senior Advocate was nominated as the Special Public Prosecutor by the Court itself, who also agreed with his appointment in that capacity. The Court also made it clear that no other Court would stay or impede trial conducted by the Special Court and the aggrieved person could approach this Court for any grievance. In the present proceedings, we are not concerned with the subject matter of the said trial. However, the aforesaid narrative became necessary to point out that present proceedings triggered as a result of order dated 16.12.2010 vide which the Court directed CBI to register a case and conduct the inquiry in connection with alleged irregularities in grant of licences from 2001 to 2006-2007 as well. Further, as would be noticed later, the investigation pertaining to this period also is being monitored by the Supreme Court and the learned counsel for all the parties were at *ad idem* that challenge to the impugned order is to be entertained by this Court only under Article 136 of the Constitution, though while entertaining these appeals, the Court would bear in mind the parameters of Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code").

The Instant Proceedings : Factual Narration

6. The CBI registered another RC being RC DAI 2011 A 0024 on

17th November, 2011 with regard to alleged irregularities in grant of additional spectrum in the year 2002 during the tenure of late Shri Pramod Mahajan as Minister of Communications. In this RC, apart from Shri Pramod Mahajan, others who were named were Mr. Shyamal Ghosh, the then Secretary (Telecom), Mr. J.R. Gupta, the then Deputy Director General (VAS) and three Cellular Companies viz. M/s Bharti Cellular Limited, M/s Hutchison Max Telecom (P) Limited and M/s Sterling Cellular Limited. After registering the said RC, the CBI started investigation into the allegations contained therein. As already pointed out above, since the matter was being monitored by this Court, progress reports of investigation were filed from time to time in sealed envelopes. On 29th November, 2012, after perusing certain documents presented in a sealed cover, this Court directed the CBI to take action in accordance with the views expressed by it on the issue of prosecution of public servants and the companies in connection with the said case. The precise nature of this order can be seen from the actual language thereof which is reproduced hereunder:

> "At the commencement of hearing in connection with CBI Case No. RC DAI 2011 A 0024, Shri K.K. Venugopal, learned senior counsel appearing for the Central Bureau of Investigation placed before the Court a sealed envelope, which was opened in the Court.

> We have perused the papers contained in the sealed envelope and are of the view that the CBI shall take action in accordance with the views expressed by the Director, CBI on the issue of prosecution of public servants and the companies in connection with the said case.
>
> The report produced by Shri Venugopal shall be put in sealed cover and handed over to the counsel instructing Shri Venugopal. The needful has been done.
>
> List the case on 05.12.2012.
>
> To be taken up at 3.30 P.M."

7. On completion of the investigation, charge-sheet was filed by the CBI in the Court of Shri O.P. Saini, the learned Special Judge, on 21st December, 2012.

8. Before proceeding further, it would be prudent to mention in brief the case set up by the CBI in the charge-sheet to have the flavour of the prosecution case. Though we are not much concerned about the merits of the allegations in these proceedings, a brief account thereof will facilitate in understanding the background leading to the roping in of the appellants in these proceedings. During monitoring of the investigation of CBI Case No. RC-DAI-2009-A-0045 (2G Spectrum Case), this Court vide its order dated 16.12.2010 directed CBI to investigate the irregularities committed in the grant of licences from 2001 to 2007

with partial emphasis on the loss caused to the public exchequer and corresponding gain to the Licensees/Service Providers. Accordingly, in compliance to the said order, a Preliminary Enquiry vide No. PE-DAI-2011-A-0001 was registered on 04.01.2011 at CBI, ACB, New Delhi. During inquiry of the said PE, it was learnt from reliable sources that vide a decision dated 31.01.2002 of the then MoC&IT, on the recommendation of certain DoT officers, the allocation of additional spectrum beyond 6.2 MHz upto 10 MHz (paired) was approved wherein only 1% additional revenue share was charged thereby causing revenue loss to Government exchequer.

9. As pointed above, on the basis of the outcome of the aforesaid inquiry, a regular case was registered on 17.11.2011 for the offences punishable under Sections 120-B IPC r/w 13 (2) and 13 (1)(d) of the Prevention of Corruption Act, 1988 (for short, 'PC Act'). It was against Mr. Shyamal Ghosh, Mr. J.R. Gupta and the three Cellular Companies, names whereof have already been mentioned above. The main allegation is that additional spectrum beyond 6.2 MHz upto 10 MHz (paired) was approved at an additional revenue share at the rate of 1% only, meaning thereby the said additional revenue should have been at a higher rate. As per the investigation, Cellular Operators Association of India

(COAI) had made a request to DoT, in the year 2001, for allocating additional spectrum particularly in Delhi and Mumbai service areas. On this, Technical Committee was constituted which gave its report on 21.11.2001 recommending therein that 6.2 MHz spectrum was sufficient for a subscriber based out of about 9 lacs per operator in service areas like Delhi and Mumbai for another 24-30 months. The Committee also recommended to levy incremental charges for additional spectrum. However, on 31.01.2002, a note was put up by Mr. J.R. Gupta mentioning therein that a consensus had emerged after discussion that additional spectrum to the extent of 1.8 MHz (paired) beyond 6.2 MHz in 1800 MHz band might be released on case to case co-ordination basis to the Operators by charging additional 1% of revenue after customer base of 4-5 lacs was reached. On this note, Mr. Shyamal Ghosh agreed to the reduced subscriber base from 9 lacs to 4/5 lacs for allocation of additional spectrum and recommended to allocate additional spectrum beyond 6.2 MHz upto 10 MHz by charging only additional 1% of AGR. This note was approved by the then Minister of Communications and Information Technology on the same day i.e. 31.01.2002 itself. It resulted in issuance and circulation of General Order on 01.02.2002 to all Cellular Mobile Telecom Service (CMTS)

Operators. As per the allegations in the FIR, the accused public servants entered into a criminal conspiracy with the accused beneficiary companies in taking the aforesaid decision which caused undue cumulative pecuniary advantage of Rs.846.44 crores to the beneficiary companies and corresponding loss to the Government Exchequer, by charging an additional 1% AGR only for allotting additional spectrum from 6.2 MHz upto 10 MHz (paired) instead of charging 2% AGR, as per the existing norms.

10. Thus, the allegation, in nutshell, is for grant of additional spectrum by lowering the condition of 9 lacs subscribers to 4/5 lacs subscribers, by only charging additional 1% AGR instead of charging additional 2% AGR which has caused losses to the Government Revenue. It is further the case of the prosecution that this was the result of conspiracy hatched between Mr.Shyamal Ghosh and the then Minister as well as the accused Cellular Operator Companies. The decision was taken in haste on 31st January, 2002 itself inasmuch as note was prepared by Mr. J.R. Gupta on that day which was agreed to by Mr. Shyamal Ghosh and thereafter approved by the Minister on the same day. On that basis, circular was issued on the very next day i.e. on 01.02.2002. As per the charge-sheet, investigation has also revealed that all this was done in haste to help M/s Bharti Cellular

Limited which had come out with Initial Public Offer (IPO) that was opened and it was not getting good response from the public as it had remained under-subscribed. The moment such a decision of allocating additional spectrum was taken on 31.01.2002, on the very next day, the issue got over-subscribed.

11. It would be pertinent to mention that in the charge-sheet filed, Mr.J.R. Gupta was not made accused as no material of any conspiracy or being a part of decision is attributed to him. In this charge-sheet, CBI named Mr. Shyamal Ghosh and the aforesaid three companies namely M/s Bharti Cellular Limited, M/s Hutchison Max Telecom (P) Limited and M/s Sterling Cellular Limited as the accused persons in respect of offences under Section 13(2) read with 13(1)(d) of the PC Act and allied offences.

The Impugned Order

12. The matter was taken up by the Special Judge on 19th March, 2013 for the purposes of issuance of summons to the accused persons in the said charge-sheet (CC No.101/12). The learned Special Judge passed orders dated 19th March, 2013 recording his satisfaction to the effect that there was enough incriminating material on record to proceed against the accused persons. At the same time, the learned Special Judge also found that Mr.Sunil

Bharti Mittal was Chairman-cum-Managing Director of Bharti Cellular Limited, Mr. Asim Ghosh was Managing Director of Hutchison Max Telecom (P) Limited and Mr. Ravi Ruia was a Director in Sterling Cellular Limited, who used to chair the meetings of its Board. According to him, in that capacity, these persons, *prima facie*, could be treated as controlling the affairs of the respective companies and represent the directing mind and will of each company. They were, thus, "alter ego" of their respective companies and the acts of the companies could be attributed and imputed to them. On this premise, the Special Judge felt that there was enough material on record to proceed against these three persons as well. Thus, while taking cognizance of the case, he decided to issue summons not only to the four accused named in the charge-sheet but the aforesaid three persons as well.

13. Two of the aforesaid three persons are before us in these appeals. Feeling aggrieved, they have challenged the order insofar as it proceeds to implicate them as accused persons in the said charge-sheet.

14. Before proceeding to record the submissions of the learned counsel for the appellants as well as the counsel opposite, it

becomes necessary to take note of the brief order dated 19th March, 2013, as this order was read and re-read time and again by each counsel with an attempt to give their own interpretation to the same. Therefore, we deem it apposite to reproduce the said order in its entirety as it would facilitate understanding the arguments of counsel on either side, with more clarity. The impugned order dated 19th March, 2003 reads as under:

> "I have heard the arguments at the bar and have carefully gone through the file and relevant case law.
>
> 2. It is submitted by the learned PP that accused Shyamal Ghosh was a public servant, who has since retired. It is further submitted that remaining three accused are companies, namely M/s Bharti Cellular Limited, M/s Hutchison Max Telecom (P) Limited and M/s Sterling Cellular Limited. It is further submitted that there is enough incriminating material on record against the accused persons and, as such, they may be proceeded against, as per law.
>
> 3. I have carefully gone through the copy of FIR, chargesheet, statement of witnesses and documents on record. On the perusal of the record, I am satisfied that there is enough incriminating material on record to proceed against the accused persons.
>
> 4. I also find at the relevant time, Sh. Sunil Bharti Mittal was Chairman-cum-Managing Director of Bharti Cellular Limited, Sh. Asim Ghosh was Managing Director of Hutchison Max Telecom (P) Limited and Sh. Ravi Ruia was a Director in Sterling Cellular Limited, who used to chair the meetings of its board. In that capacity, they were/are, *prima facie*, in control of affairs of the respective companies. As such, they represent the directing mind and will of each company and their state of mind is the state of mind of the companies. They are/were "alter ego" of their respective companies. In this fact situation, the acts of the companies are to

> be attributed and imputed to them. Consequently, I find enough material on record to proceed against them also.
>
> 5. Accordingly, I take cognizance of the case. Issue summons to all seven accused for 11.04.2013."

15. It will also be pertinent to mention that the appellants were not implicated as accused persons in the charge-sheet. As discussed in some details at the appropriate stage, Mr. Mittal was interrogated but in the opinion of CBI, no case was made out against him. Mr. Ravi Ruia was not even summoned during investigation.

The Arguments : Appellants

16. M/s Harish Salve and Fali Nariman, learned senior counsel, argued the case on behalf of the appellant Sunil Bharti Mittal in an attempt to take him out of the clutches of the impugned order. Mr.K.V. Viswanathan, learned senior counsel, led the attack to the said order on behalf of the appellant Ravi Ruia. Their onslaught was tried to be blunted by Mr. K.K. Venugopal, learned senior counsel appearing for the CBI. Challenge of the appellants was also sought to be thwarted by Mr. Prashant Bhushan, learned counsel appearing for CPIL, and Mr. Sunil Malhotra, counsel who argued on behalf of Telecom Watchdog, which has filed the appeal arising out of SLP (Crl.) Nos.3326-3327/2013 challenging

another order of the even date namely 19th March, 2013 passed by the Special Judge whereby protest application filed by this appellant has been dismissed.

17. Leading the attack from the front, Mr. Harish Salve opened his submission by arguing that the impugned order was in two parts. Paras 1 to 3 pertain to the charge-sheet which was filed by the CBI naming four accused persons namely, Mr. Shyamal Ghosh and the three Cellular Companies. This fact is noted in para 2. He pointed out that in respect of these four accused persons named in the charge-sheet, after going through the copy of the FIR, charge-sheet, statement of witnesses and documents on record, the learned Judge was satisfied that there was enough incriminating material on record to proceed against them. However, in the second part of the order, which was contained in para 4, the Court also found that the three persons (including the two appellants) were, *prima facie*, controlling the affairs of the said three companies and, therefore, they represented the directing mind and will of each company. On that basis, these three persons are treated as "alter ego" of their respective companies and in the opinion of the learned Special Judge, the acts of the companies are "to be attributed and imputed to them". That was the reason given by the Special Judge finding enough

material to proceed against them also which resulted in issuing of summons against these three persons including the appellant.

18. The neat submission of Mr. Salve was that the aforesaid reason given by the learned Special Judge was clearly erroneous in law. Expanding this argument, he submitted that principle of "alter ego" has always been applied in reverse, inasmuch as general principle is that the acts of individual, who is in control of the affairs of a company and is a directing mind, are attributed to the company, inasmuch as whenever such a person, who is controlling the affairs of the company, is made an accused, on the application of the principle of "alter ego", the company can also be implicated as accused person. It is on the well recognised principle that company does not act of its own but through its Directors/Officers and when such Directors/Officers act on behalf of the company, the company is also held liable for those acts on the application of "principal – agent" principle. He submitted that it has never been a case where for the act of the company, an individual is made accused, unless there is a categorical provision in the statute making such a person vicariously liable or there is enough material to attribute the alleged acts of criminality to the said person. For his aforesaid submissions, he placed heavy reliance upon the decision of this Court in ***Iridium India Telecom***

Ltd. v. ***Motorola Inc***[2]. He further submitted that merely on the basis of the appellant's status in the company, it could not be presumed that it is the appellant who became a party to the alleged conspiracy, as was held in ***Maharashtra State Electricity Distribution Co. Ltd.*** v. ***Datar Switchgear Ltd.***[3] in the following manner:

> "27. A bare perusal of the complaint shows that the gravamen of the allegation is that a fabricated document containing the offending endorsement was tendered in evidence before the Arbitral Tribunal on behalf of MSEB by Accused 6, who was in charge of Shirpur Section. It is evident from the aforeextracted paragraphs of the complaint that other accused have been named in the complaint because, according to the complainant, MSEB, Accused 1 was acting under their control and management. It bears repetition that the only averment made against Appellant 2 is that Appellant 1 i.e. MSEB was acting under the control and management of Appellant 2 along with other three accused. <u>There is no denying the fact that Appellant 2 happened to be the Chairman of MSEB at the relevant time but it is a settled proposition of law that one cannot draw a presumption that a Chairman of a company is responsible for all acts committed by or on behalf of the company.</u> In the entire body of the complaint there is no allegation that Appellant 2 had personally participated in the arbitration proceedings or was monitoring them in his capacity as the Chairman of MSEB and it was at his instance that the subject interpolation was made in Ext. C-64.
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> xx xx xx
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> 29. In this regard, it would be useful to advert to the observations made by a three-Judge Bench of this Court in *S.M.S. Pharmaceuticals (2005)8 SCC 89*: (SCC p. 98, para 8)

2 (2011) 1 SCC 74
3 (2010) 10 SCC 479

> "*8*. … There is no universal rule that a Director of a company is in charge of its everyday affairs. We have discussed about the position of a Director in a company in order to illustrate the point that there is no magic as such in a particular word, be it Director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary."

Mr. Salve also referred to the following observations in ***S.K. Alagh*** v. ***State of U.P.***[4]:

> 12. The short question which arises for consideration is as to whether the complaint petition, even if given face value and taken to be correct in its entirety, disclosed an offence as against the appellant under Section 406 of the Penal Code.
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> xx xx xx
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> 19. As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself. (See *Sabitha Ramamurthy* v. *R.B.S. Channabasavaradhya,* (2006) 10 SCC 581."

Reliance was also placed on the decision in the case of ***Aneeta Hada*** v. ***Godfather Travels & Tours (P) Ltd.***[5], with particular emphasis on the following passage:

4 (2008) 5 SCC 662
5 (2012) 5 SCC 661

> "32. We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification."

19. In addition to the above, another submission of Mr. Salve was that in the present case, role of the appellant was specifically looked into and investigated by the CBI and an opinion was formed that there was no material to implicate him. Since the appellant was consciously omitted from the array of the accused persons after thorough discussions and deliberations by the investigating agency at the appropriate level, and it was specifically so stated in the charge-sheet itself, in a situation like this even if the learned Judge wanted to differ from the investigating agency and decided to take cognizance against the appellant, he should have given valid reasons for proceeding against the appellant which could include his opinion that there was sufficient material against the appellant to be proceeded against. However, reasons given in the impugned order, according to the learned senior counsel, are totally extraneous

amounting to wrong approach in law.

20. His further submission was that even at a later stage if any evidence surfaces against the appellant, the Court is not powerless as any person can be summoned as accused under Section 319 of the Code at any stage of the trial.

21. Mr. Viswanathan who appeared for the appellant Mr. Ravi Ruia, while adopting the aforesaid arguments and reiterating them briefly, tried to canvass another feature peculiar to in the case of his client Mr. Ravi Ruia. The learned counsel pointed out that he was not even called for interrogation by the CBI which would show that there is no material against him at all. His name is not even mentioned in the charge-sheet. He painstakingly pleaded that in the absence of any material reflected even in the charge-sheet, this appellant would be handicapped in making any submission for his discharge at the stage of framing charges. As the appellant was implicated involving the principle of vicarious liability, which is not applicable and erroneously referred to, he had no option but to file the present appeal for quashing of the notice of cognizance against him. Mr. Viswanathan in support of his submission referred certain judgments, which we shall discuss at the appropriate stage.

The Arguments: Respondents

22. Mr. K. K. Venugopal, learned senior counsel appearing for the CBI, refuted the aforesaid submissions in strongest possible manner. He referred to the various portions of the charge-sheet where allegations against the accused persons are stated and outcome of the investigation revealed. His endeavour was to demonstrate the manner in which the decision was taken, resulting into huge loss to the Government Exchequer and, *prima facie*, it was established that such a decision was taken to help the accused Telecom Companies. He argued that once the companies are charged with *mens rea* offences, they require guilty mind as these are not strict liability offences. However, the companies would act through their Directors/Officers only and the *mens rea*/guilty mind would be of those persons who are controlling the affairs of the companies. He referred to the counter affidavit filed by the CBI which, in summary form, mentions the role of different persons including the manner in which note was put up by Mr. J.R. Gupta; the changes that were made by Mr. Shyamal Ghosh to the said note allegedly to benefit the companies; and the manner in which it was approved by the Minister. This affidavit also mentions that there is evidence on record to show that the appellant Mr. Sunil Mittal had met late Shri

Pramod Mahajan during 2001-2002 for getting allocated additional spectrum beyond 6.2 MHz for tele-service area of his company. There was also evidence of meetings between the appellant and Mr. Shyamal Ghosh for the same purpose during the same period which would constitute the circumstantial evidence to implicate these persons. The thrust of his submission, thus, is that it is the "human agency" in the accused companies who was responsible as it was a *mens rea* offence and such an agency/person has to be the top person, going by the circumstantial evidence. Therefore, even if in the charge-sheet, names of these appellants were not included, the Special Judge was within his powers to look into the matter in its entirety as the charge-sheet along with documents spanning over 25000 pages was submitted to him.

23. Mr. Venugopal joined issue on the interpretation given by the appellants to the impugned order. According to him, the order could not be bifurcated into two parts. Para 3 of the order wherein the Special Judge has observed that he had perused the FIR, charge-sheet, statement of witnesses and documents on record was relatable to the three individuals, including the two appellants as well. He even submitted that in the absence of individual accused persons, who were in charge of the affairs of

the three accused companies, it may become difficult to proceed against the accused companies alone as it was a *mens rea* offence. He also relied upon the following judgments to support the impugned order, with the plea that the trial court was invested with requisite powers to summon the appellants:

1. ***M.C. Mehta (Taj Corridor scam)*** v. ***Union of India***[6]

> "30. At the outset, we may state that this Court has repeatedly emphasised in the above judgments that in Supreme Court monitored cases this Court is concerned with ensuring proper and honest performance of its duty by CBI and that this Court is not concerned with the merits of the accusations in investigation, which are to be determined at the trial on the filing of the charge-sheet in the competent court, according to the ordinary procedure prescribed by law. Therefore, the question which we have to decide in the present case is whether the administrative hierarchy of officers in CBI, in the present case, have performed their duties in a proper and honest manner."

2. ***Kishun Singh*** v. ***State of Bihar***[7]

> "13. The question then is whether de hors Section 319 of the Code, can similar power be traced to any other provision in the Code or can such power be implied from the scheme of the Code? We have already pointed out earlier the two alternative modes in which the Criminal Law can be set in motion; by the filing of information with the police under Section 154 of the Code or upon receipt of a complaint or information by a Magistrate. The former would lead to investigation by the police and may culminate in a police report under Section 173 of the Code on the basis whereof cognizance may be taken by the Magistrate under Section 190(1)(*b*) of the Code. In the latter case, the Magistrate may

6 (2007) 1 SCC 110
7 (1993) 2 SCC 16

either order investigation by the police under Section 156(3) of the Code or himself hold an inquiry under Section 202 before taking cognizance of the offence under Section 190(1)(*a*) or (*c*), as the case may be, read with Section 204 of the Code. Once the Magistrate takes cognizance of the offence he may proceed to try the offender (except where the case is transferred under Section 191) or commit him for trial under Section 209 of the Code if the offence is triable exclusively by a Court of Session. As pointed out earlier cognizance is taken of the offence and not the offender. This Court in *Raghubans Dubey* v. *State of Bihar* (1967) 2 SCR 423stated that once cognizance of an offence is taken it becomes the Court's duty 'to find out who the offenders really are' and if the Court finds 'that apart from the persons sent up by the police some other persons are involved, it is its duty to proceed against those persons' by summoning them because 'the summoning of the additional accused is part of the proceeding initiated by its taking cognizance of an offence'. Even after the present Code came into force, the legal position has not undergone a change; on the contrary the ratio of *Dubey case* was affirmed in *Hareram Satpathy* v. *Tikaram Agarwala*. (1978) 4 SCC 58 Thus far there is no difficulty.

3. ***Dharam Pal*** v. ***State of Haryana***[8]

"40. In that view of the matter, we have no hesitation in agreeing with the views expressed in *Kishun Singh case*– (1993) 2 SCC 16 that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

41. We are also unable to accept Mr Dave's submission that the Sessions Court would have no

8 (2014) 3 SCC 306

> alternative, but to wait till the stage under Section 319 CrPC was reached, before proceeding against the persons against whom a *prima facie* case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session."

24. He also referred to the decision in the case of ***Lee Kun Hee, President, Samsung Corpn., South Korea*** v. ***State of Uttar Pradesh***[9] wherein this Court has set down the limits of High Court's power under Section 482 of the Code to interfere with summoning orders passed by the trial court, as follows:

> "10. JCE Consultancy filed a criminal complaint (Complaint No. 30 of 2005) under Sections 403, 405, 415, 418, 420 and 423 read with Sections 120-B and 34 of the Penal Code, 1860 before the VIIth Additional Chief Judicial Magistrate, Ghaziabad. In the complaint filed by Shaikh Allauddin Pakir Maiddin, the sole proprietor of JCE Consultancy, Samsung, Dubai, was impleaded as Accused 1 (Appellant 5 herein); Byung Woo Lee, Managing Director of Samsung, Dubai, was impleaded as Accused 2 (Appellant 3 herein); Lee Kun Hee, President, Samsung Corporation, was impleaded as Accused 3 (Appellant 1 herein); Yon Jung Yung, Vice-President and Chief Executive Officer, Samsung Corporation, was impleaded as Accused 4 (Appellant 2 herein); Dong Kwon Byon, ex-Managing Director, Samsung, Dubai, was impleaded as Accused 5 (Appellant 4 herein); S.C. Baek, .ex-Financial Advisor, Samsung, Dubai, was impleaded as Accused 6; Sky Impex Ltd. was impleaded as Accused 7; and the Chairman of Sky Impex Ltd. was impleaded as Accused 8.
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> 21. In order to support the aforesaid primary

9 (2012) 3 SCC 132

contention, it was also emphasised, that Appellants 1 to 4 are all foreign citizens, whereas, Appellant 5 is a foreign company incorporated in Dubai. Appellant 1, we are told, was Chairman and Director of Samsung, South Korea. It is contended that he has had nothing to do with Samsung, Dubai. We are informed that he lives in South Korea. Appellant 2, we are informed, was a former Vice-Chairman and CEO of Samsung, South Korea. He also has had nothing to do with Samsung, Dubai. He too lives in South Korea.

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54. The fourth contention advanced at the hands of the learned counsel for the appellants was aimed at demonstrating; firstly, that the charges, as have been depicted in the summoning order, were not made out; secondly, that the appellants herein were functionaries of a company, and therefore, per se could not be made vicariously liable for offences emerging out of actions allegedly taken in furtherance of the discharge of their responsibilities towards the company; and thirdly, that none of the appellants had any concern whatsoever (even as functionaries of the company concerned), with the allegations levelled by the complainant.

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57. In paras 24 to 30, this Court in *Iridium India Telecom Ltd. case*– (2011) 1 SCC 74 noticed the facts pertaining to the controversy, and the emerging legal technicalities canvassed at the hands of the appellants. In paras 31 to 37, this Court recorded the response thereto, at the behest of the accused. Thereupon, this Court in *Iridium India Telecom Ltd. case* made the following observations in para 38: (SCC p. 89) "*38*. We have considered the submissions made by the learned Senior Counsel. A bare perusal of the submissions would be sufficient to amply demonstrate that this cannot be said to be an 'open and shut' case for either of the parties. There is much to be said on both sides. The entire scenario painted by both the sides is circumscribed by 'ifs' and 'buts'. A mere

reading of the 1992 PPM would not be sufficient to conclude that the entire information has been given to the prospective investors. Similarly, merely because there may have been some gaps in the information provided in the PPM would not be sufficient to conclude that .the respondents have made deliberate misrepresentations. In such circumstances, we have to examine whether it was appropriate for the High Court to exercise its jurisdiction under Section 482 CrPC to quash the proceedings at the stage when the Magistrate had merely issued process against the respondents."

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59. While dealing with the various judgments rendered by this Court on the subject reference was also made to the decision in *M.N. Ojha* v. *Alok Kumar Srivastav*[-](2009) 9 SCC 682 . In *M.N. Ojha case* similar views as in *Bhajan Lal case*[-]1992 Supp (1) SCC 335 came to be recorded in the following words: (*M.N. Ojha case*, SCC pp. 686-88, paras 25 & 27-30)

> "25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realised that the complaint was only a counterblast to the FIR lodged by the Bank against the complainant and others with regard to the same transaction.
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> 27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinise even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

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28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even adverting to the basic facts which were placed before it for its consideration.

29. It is true that the Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

30. Interference by the High Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in the progress of the inquiry in a criminal case which may not be in the public interest. But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint."

63. As of now we are satisfied, that the factual

foundation/background of the acts of omission and commission presented by the complainant is specific and categorical. We are also satisfied that the allegations levelled by the complainant, fully incorporate all the basic facts which are necessary to make out the offences whereunder the impugned summoning order dated 12-1-2005 has been passed. The instant controversy does not suffer from any of the impairments referred in *Iridium India Telecom Ltd. case*. Accordingly, we leave it open to the appellants to canvass the legal issues, as were canvassed before us, before the trial court. After the rival parties have led their evidence the trial court will return its finding thereon in accordance with law without being influenced by any observations made on the merits of the controversy hereinabove, or hereafter.

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71. It was also the contention of the learned counsel for the respondents, that the civil liability, in the instant case, was raised as against the eventual purchaser of the goods/product (Samsung, Dubai), in lieu of the goods/product supplied by the complainant JCE Consultancy, which had passed onto the purchasers under the agreement dated 1-12-2001. Accordingly, the civil liability was only raised as against Samsung, Dubai. However, insofar as the criminal liability is concerned, Samsung, Dubai being one of the subsidiary companies of Samsung, South Korea, it was allegedly under the overall control exercised by Samsung, South Korea. Samsung, South Korea, according to the complainant, was instrumental in the eventual decision taken by Samsung, Dubai to deny the passing of the reciprocal monetary consideration for the goods supplied under the agreement dated 1-12-2001. This, according to the respondents, has been the categorical stance of JCE Consultancy in the criminal complaint, as also, in the pre-summoning evidence recorded before the VIIth Additional Chief Judicial Magistrate, Ghaziabad under Section 200 of the Code of Criminal Procedure.

> 72. These allegations made by JCE Consultancy, are supported by documents furnished to the summoning court. The aforesaid factual position has also been endorsed by Sky Impex Ltd. before this Court. According to the learned counsel for the respondents, the culpability of the appellants before this Court, in a series of similar actions, clearly emerges even from documents placed on record of the instant case by Sky Impex Ltd. As such, it is submitted, that the respondents have per se repudiated all the submissions advanced on behalf of the appellant, obviously subject to the evidence which rival parties will be at liberty to adduce before the trial court.
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> 74. It would not be appropriate for us to delve into the culpability of the appellants at the present juncture on the basis of the factual position projected by the rival parties before us. The culpability (if at all) would emerge only after evidence is adduced by the rival parties before the trial court. The only conclusion that needs to be drawn at the present juncture is that even on the basis of the last submission canvassed on behalf of the appellants it is not possible to quash the summoning order at this stage. In the aforesaid view of the matter, it is left open to the appellants to raise their objections, if they are so advised, before the trial court. The trial court shall, as it ought to, adjudicate upon the same in consonance with law after allowing the rival parties to lead evidence to substantiate their respective positions."

25. He concluded his submission by reiterating that when it was a case of circumstantial evidence which appeared on record in abundance, the trial court was right in summoning the appellants and in fact, judgment in ***Keshav Mahindra*** v. ***State of M.P.***[10] fully supported the impugned order. On the other hand, decision in

10 (1996) 6 SCC 129

Iridium India Telecom Ltd. (supra) had no application to the facts of this case.

26. Mr. Prashant Bhushan, appearing for intervenor, highlighted the role of the appellant Mr. Sunil Bharti Mittal from the records and particularly the extract of file noting which *inter alia* contained the views of the Superintendent of Police. He, thus, submitted that this constituted sufficient material to proceed against him and since it was only a summoning order, the appellants were free to seek discharge before the trial court. Submissions of Mr. Sunil Malhotra, Advocate, were also on the same lines.

The Arguments: Appellants' Rejonder

27. Mr. Fali Nariman argued in rejoinder on the lines submissions were made by Mr. Salve, and in the process lucidly expanded those submissions. Emphasising that position in law with regard to vicarious liability was that there is no such vicarious liability in criminal law unless something is imputed or there is a specific statutory provision creating criminal vicarious liability. He pointed out that in para 4 of the impugned order, the learned Special Judge has not gone into the facts but did so taking shelter under a legal cover, but went wrong in applying an *ex facie* incorrect non- existing legal principle.

Our Analysis of the Subject Matter

28. We have given our serious consideration to all the submissions made before us and fully conscious of the importance of the matter as well. At the outset, we would like to point out that detailed submissions were made on the nature of the charges, and in the process, learned counsel for the appellants tried to trivialize the matter by stating that what was decided was only a policy decision of the Government to allocate additional spectrum by charging 1% additional AGR i.e. from 4% to 5%; benefit thereof was extended to all Cellular Operating Companies including Pubic Sector Companies like MTNL and BSNL etc. and, therefore, there cannot be a criminal intent behind it. Mr. Salve as well as Mr. Nariman took pains in showing various portions of the counter affidavit filed by the CBI to show that the appellant was left out and not made accused after due deliberations and argued that it was not a case of erroneous omission by CBI. It was also argued at length that the allegations were in the domain of the policy decision taken by the Government to charge 4% of AGR whereas it was realised much later in the year 2010 when the TRAI has passed orders that it should have been 5% AGR. According to them, it was merely a *bona fide* policy decision which could not be subject matter of criminal proceedings, in the

absence of intent of criminality therein. More so, when benefit of the said decision was not confined to the appellant's company, namely M/s Bharti Cellular Limited, but was extended to all others as well including public sector telecom companies like MTNL and BSNL. Therefore, there cannot be a criminal intent behind such a decision. Mr. K.K. Venugopal and others, appearing for the other side, had tried to demonstrate that the aforesaid submission of the learned counsel for the appellant was totally erroneous and contrary to records. He tried to project that it was a conspiracy of major level with sole intention to benefit the accused companies at the cost of the public exchequer and for this purpose, criminal conspiracy was hatched up between them. However, we make it clear at this juncture itself that this part of the submission is beyond the scope of the present appeals inasmuch as even according to the learned counsel for the appellants that the aforesaid is not made the basis of the order while implicating the appellants herein. Insofar as four persons who were made accused in the charge-sheet by the CBI is concerned, they are concededly not before us as their summoning order has not been challenged. Therefore, we deem it unnecessary to go into this question, which position was even conceded by all the counsel appearing before us.

29. The fulcrum of the issue before us is the validity of that part of impugned order vide which the two appellants who were not named in the charge sheet, have been summoned by the Special Judge, for the reasons given therein.

(i) <u>Dissecting the Impugned Order:</u>

30. In the first instance, we make it clear that there is no denying the legal position that even when a person is not named in the charge sheet as an accused person, the trial court has adequate powers to summon such a non-named person as well, if the trial court finds that the charge sheet and the documents/material placed along with the charge-sheet disclose sufficient *prima facie* material to proceed against such a person as well. ***Kishun Singh*** (supra) and ***Dharam Pal*** (supra) are the direct decisions on this aspect. However, in the present case, the question is not as to whether there is sufficient material against the appellants filed in the trial court to proceed against them. Whether such a material is there or not is not reflected from the impugned order as that aspect is not even gone into. The learned Special Judge has not stated in the order that after examining the relevant documents, including statement of witnesses, he is satisfied that there is sufficient incriminating material on record to proceed

against the appellants as well. On reading of the impugned order which is already extracted verbatim, it is very clear that in para 2 of the order, the learned Special Judge discusses the submissions of the Public Prosecutor in respect of the persons who are made accused in the charge-sheet. Insofar as charge-sheet is concerned, it has named Mr. Shyamal Ghosh, who was the public servant and other three accused persons are the corporate entities. Submission of the learned Public Prosecutor is recorded in this para that there is enough incriminating material on record against them and they be proceeded against, as per law. Immediately thereafter in para 3, the learned Special Judge records his satisfaction on the perusal of the records namely FIR, charge-sheet, statement of witnesses and documents and states that he is satisfied that there is enough incriminating material on record to proceed against the "accused persons". Para 3 is clearly relatable to para 2. Here, the "accused persons" referred to are those four persons whose names are mentioned in para 2. Obviously, till that stage, appellants were not the accused persons as they are not named as such in the charge-sheet. After recording his satisfaction *qua* the four said accused persons, discussion about other three individuals (including the two appellants) starts from para 4 where

the Special Judge "also" finds and refers to the positions which these three persons hold/held in the three companies respectively. In para 4, the learned Special Judge does not mention about any incriminating material against them in the statement of witnesses or documents etc. On the other hand, the reason for summoning these persons and proceeding against them are specifically ascribed in this para which, *prima facie*, are:

i) These persons were/are in the control of affairs of the respective companies.

ii) Because of their controlling position, they represent the directing mind and will of each company.

iii) State of mind of these persons is the state of mind of the companies. Thus, they are described as "alter ego" of their respective companies.

31. It is on this basis alone that the Special Judge records that "in this fact situation, the acts of companies are to be attributed and imputed to them".

(ii) <u>Principle of "alter ego", as applied</u>

32. The moot question is whether the aforesaid proposition, to proceed against the appellants is backed by law? In order to find the answer, let us scan through the case law that was cited during the arguments.

33. First case which needs to be discussed is ***Iridium India*** (supra). Before we discuss the facts of this case, it would be relevant to point out that the question as to whether a company could be prosecuted for an offence which requires *mens rea* had been earlier referred to in a Constitution Bench of five Judges in the case of ***Standard Chartered Bank*** v. ***Directorate of Enforcement***[11]. The Constitution Bench had held that a company can be prosecuted and convicted for an offence which requires a minimum sentence of imprisonment. In para 8 of the judgment, the Constitution Bench clarified that the Bench is not expressing any opinion on the question whether a corporation could be attributed with requisite *mens rea* to prove the guilt. Para 8 reads as under:

> "8. It is only in a case requiring *mens rea*, a question arises whether a corporation could be attributed with requisite *mens rea* to prove the guilt. But as we are not concerned with this question in these proceedings, we do not express any opinion on that issue."

34. In ***Iridium India*** (supra), the aforesaid question fell directly for consideration, namely, whether a company could be prosecuted for an offence which requires *mens rea* and discussed this aspect at length, taking note of the law that prevails in America and

11 (2005) 4 SCC 530

England on this issue. For our benefit, we will reproduce paras 59, 60, 61, 62, 63 and 64 herein:

> "59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.
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> 60. It may be appropriate at this stage to notice the observations made by MacNaghten, J. in *Director of Public Prosecutions* v. *Kent and Sussex Contractors Ltd.* 1972 AC 153: (AC p. 156):
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> > "A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention — indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should .deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate."
>
> 61. The principle has been reiterated by Lord Denning in *Bolton (H.L.) (Engg.) Co. Ltd.* v. *T.J. Graham & Sons Ltd.* in the following words: (AC p.

172):

> "A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* (AC at pp. 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty."

62. The aforesaid principle has been firmly established in England since the decision of the House of Lords in *Tesco Supermarkets Ltd.* v. *Nattrass*. In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law: (AC p. 170 E-G)

> "I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of

> the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."

63. From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of "alter ego" of the company.

64. So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of this Court in *Standard Chartered Bank* v. *Directorate of Enforcement*[-] (2005) 4 SCC 530 . On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has been observed as follows: (SCC p. 541, para 6)

> "*6*. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is

> that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents."

35. It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company.

36. In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of the company and, therefore, on this premise, acts of the company is attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law. As demonstrated hereinafter, this proposition would run contrary to the principle of vicarious liability

detailing the circumstances under which a direction of a company can be held liable.

(iii) <u>Circumstances when Director/Person in charge of the affairs of the company can also be prosecuted, when the company is an accused person</u>:

37. No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving *mens rea*, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

38. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

39. When the company is the offendor, vicarious liability of the Directors cannot be imputed automatically, in the absence of any

statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In ***Aneeta Hada*** (supra), the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction namely where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. This very principle is elaborated in various other judgments. We have already taken note of ***Maharashtra State Electricity Distribution Co. Ltd.*** (supra) and ***S.K. Alagh*** (supra). Few other judgments reiterating this principle are the following:

1. ***Jethsur Surangbhai v. State of Gujarat***[12]

> "9. With due respect what the High Court seems to have missed is that in a case like this where there was serious defalcation of the properties of the

12 (1984) Supp. SCC 207

Sangh, unless the prosecution proved that there was a close cohesion and collusion between all the accused which formed the subject matter of a conspiracy, it would be difficult to prove the dual charges particularly against the appellant (A-1). The charge of conspiracy having failed, the most material and integral part of the prosecution story against the appellant disappears. The only ground on the basis of which the High Court has convicted him is that as he was the Chairman of the Managing Committee, he must be held to be vicariously liable for any order given or misappropriation committed by the other accused. The High Court, however, has not referred to the concept of vicarious liability but the findings of the High Court seem to indicate that this was the central idea in the mind of the High Court for convicting the appellant. In a criminal case of such a serious nature mens rea cannot be excluded and once the charge of conspiracy failed the onus lay on the prosecution to prove affirmatively that the appellant was directly and personally connected with acts or omissions pertaining to Items 2, 3 and 4. It is conceded by Mr Phadke that no such direct evidence is forthcoming and he tried to argue that as the appellant was Chairman of the Sangh and used to sign papers and approve various tenders, even as a matter of routine he should have acted with care and caution and his negligence would be a positive proof of his intention to commit the offence. We are however unable to agree with this somewhat broad statement of the law. In the absence of a charge of conspiracy the mere fact that the appellant happened to be the Chairman of the Committee would not make him criminally liable in a vicarious sense for items 2 to 4. There is no evidence either direct or circumstantial to show that apart from approving the purchase of fertilisers he knew that the firms from which the fertilisers were purchased did not exist. Similar is the case with the other two items. Indeed, if the Chairman was to be made liable then all members of the Committee viz. Tehsildar and other nominated members, would be equally liable because all of them participated in the deliberations of the meetings of the Committee, a conclusion which has not even been suggested by the prosecution. As Chairman of the Sangh the appellant had to deal with a large variety of matters

and it would not be humanly possible for him to analyse and go into the details of every small matter in order to find out whether there has been any criminal breach of trust. In fact, the hero of the entire show seems to be A-3 who had so stage-managed the drama as to shield his guilt and bring the appellant in the forefront. But that by itself would not be conclusive evidence against the appellant. There is nothing to show that A-3 had either directly or indirectly informed the appellant regarding the illegal purchase of fertilisers or the missing of the five oil engines which came to light much later during the course of the audit. Far from proving the intention the prosecution has failed to prove that the appellant had any knowledge of defalcation of Items 2 to 4. In fact, so far as item 3 is concerned, even Mr Phadke conceded that there is no direct evidence to connect the appellant."

2. ***Sham Sunder v. State of Haryana***[13]

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

3. ***Hira Lal Hari Lal Bhagwati v. CBI*** [14]

"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 thereinunder wholly discharged and the GCS granted immunity from prosecution."

13 (1989) 4 SCC 630
14 (2003) 5 SCC 257

4. ***Maksud Saiyed v. State of Gujarat***[15]

> "13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

5. ***R. Kalyani v. Janak C. Mehta***[16]

> "32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created."

6. ***Sharon Michael v. State of T.N.***[17]

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15 (2008) 5 SCC 668
16 (2009) 1 SCC 516
17 (2009) 3 SCC 375

"16. The first information report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant Company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the Company."

7. ***Keki Hormusji Gharda*** v. ***Mehervan Rustom Irani***[18]

"16. We have noticed hereinbefore that despite of the said road being under construction, the first respondent went to the police station thrice. He, therefore, was not obstructed from going to the police station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Section 341 IPC.

17. The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because

18 (2009) 6 SCC 475

some allegations were made against the Company.

18. In *Pepsi Foods Ltd.* v. *Special Judicial Magistrate* (1998) 5 SCC 749 this Court held as under: (SCC p. 760, para 28)

> "28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused."

19. Even as regards the availability of the remedy of filing an application for discharge, the same would not mean that although the allegations made in .the complaint petition even if given face value and taken to be correct in its entirety, do not disclose an offence or it is found to be otherwise an abuse of the process of the court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure."

40. It is stated at the cost of repetition that in the present case, while issuing summons against the appellants, the Special Magistrate

has taken shelter under a so-called legal principle, which has turned out to be incorrect in law. He has not recorded his satisfaction by mentioning the role played by the appellants which would bring them within criminal net. In this behalf, it would be apt to note that the following observations of this Court in the case of ***GHCL Employees Stock Option Trust*** v. ***India Infoline Ltd.***[19]:

> "19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the *prima facie* case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is *sine qua non* for initiating criminal action against them. (*Thermax Ltd.* v. *K.M. Johny followed)*
>
> xx xx xx
>
> 21. In the instant case the High Court has correctly noted that issuance of summons against Respondents 2 to 7 is illegal and amounts to abuse of process of law. The order of the High Court, therefore, needs no interference by this Court."

41. We have already mentioned above that even if the CBI did not implicate the appellants, if there was/is sufficient material on record to proceed against these persons as well, the Special Judge is duly empowered to take cognizance against these persons as well. Under Section 190 of the Code, any Magistrate of first class (and in those cases where Magistrate of the second

19 (2013) 4 SCC 505

class is specially empowered to do so) may take cognizance of any offence under the following three eventualities:

> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report of such facts; and
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

42. This Section which is the starting section of Chapter XIV is subject to the provisions of the said Chapter. The expression "taking cognizance" has not been defined in the Code. However, when the Magistrate applies his mind for proceeding under Sections 200-203 of the Code, he is said to have taken cognizance of an offence. This legal position is explained by this Court in ***S.K. Sinha, Chief Enforcement Officer*** v. ***Videocon International Ltd & Ors.***[20] in the following words:

> "19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of: and when used with reference to a court or a Judge, it connoted "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.
>
> 20. "Taking Cognizance" does not involve any

20 (2008) 2 SCC 492

> formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence...."

Sine Qua Non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the Court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a *prima facie* case or not.

43. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

44. Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance under Section 190 of the Code. There is no question of applicability of Section 319 of the Code at this stage (See ***SWIL Ltd.*** v. ***State of Delhi***[21]). It is also trite that even if a person is not named as an accused by the police in the final report submitted, the Court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (See ***Union of India*** v. ***Prakash P. Hinduja and another***[22]). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer.

45. On the other hand, Section 204 of the Code deals with the issue

21 (2001) 6 SCC 670
22 (2003) 6 SCC 195

of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a *prima facie* case for proceeding in respect of an offence, he shall issue process against the accused.

46. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a *prima facie* case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for

proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is *prima facie* case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be *ex facie* incorrect.

48. However, there has to be a proper satisfaction in this behalf which should be duly recorded by the Special Judge on the basis of material on record. No such exercise is done. In this scenario, having regard to the aforesaid aspects coupled with the legal position explained above, it is difficult to sustain the impugned order dated 19.03.2013 in its present form insofar as it relates to implicating the appellants and summoning them as accused persons. The appeals arising out of SLP (Crl.) No. 2961 of 2013 and SLP (Crl.) No. 3161 of 2013 filed by Mr. Sunil Bharti Mittal and Ravi Ruia respectively are, accordingly, allowed and order summoning these appellants is set aside. The appeals arising out of SLP (Crl.) Nos. 3326-3327 of 2013 filed by Telecom Watchdog are dismissed.

Epilogue

49. While parting, we make it clear that since on an erroneous presumption in law, the Special Magistrate has issued the summons to the appellants, it will always be open to the Special Magistrate to undertake the exercise of going through the material on record and on that basis, if he is satisfied that there is enough incriminating material on record to proceed against the appellants as well, he may pass appropriate orders in this behalf. We also make it clear that even if at this stage, no such *prima facie* material is found, but during the trial, sufficient incriminating material against these appellants surfaces in the form of evidence, the Special Judge shall be at liberty to exercise his powers under Section 319 of the Code to rope in the appellants by passing appropriate orders in accordance with law at that stage.

.....CJI.
(H.L. DATTU)

.....J.
(MADAN B. LOKUR)

.....J.
(A.K. SIKRI)

NEW DELHI;
JANUARY 09, 2015.

ITEM NO. 1A COURT NO.1 SECTION II
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO. 34 OF 2015 @
PETITION FOR SPECIAL LEAVE TO APPEAL (Crl.) NO. 2961 OF 2013

Sunil Mittal .. Appellant(s)

vs.

Central Bureau of Investigation ..Respondent(s)

WITH

CRIMINAL APPEAL NO. 35 of 2015
(@ SLP(Crl.) No. 3161 of 2013

CRIMINAL APPEAL NOs.36-37 of 2015
(@ SLP(Crl.) Nos. 3326-3327 of 2013)

DATE : 09.01.2015 These matters were called on for pronouncement of judgment today.

For Appellant(s) **Mr. Harish Salve, Sr. Adv.**
Mr. Fali S. Nariman, Sr. Adv.
Mr. Amit Desai, Sr. Adv.
Mr. Percival Billimonia, Adv.
Mr. Sidharth Agarwal, Adv.
Mr. Kamal Shankar, Adv.
Mr. Atul N, Adv.
Mr. Manpreet Lamba, Adv.
Mr. Gautam , Adv.
Mr. Utkarsh Saxena, Adv.
Mr. Utkarsh Saxena, Adv.

For Respondent(s) **Ms. Pinky anand, ASG**
Mr. Gopal Sankaranarayanan, Adv.
Mr. Rajesh Ranjan, Adv.
Mr. Balendu Shekhar, Adv.
Mr. B.V. Balram Das, Adv.
Ms. Meenakshi Grover, Adv.
Mr. Rohit Bhat, Adv.
Mr.D.S. Mehara, Adv.

Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising Hon'ble the Chief Justice, Hon'ble Mr. Justice Madan B. Lokur and His Lordship.

Leave granted.

The appeals arising out of SLP(Crl.) No. 2961 of 2013 and 3161 of 2013 are allowed. The appeals arising out of SLP(Crl.) Nos. 3326-3327 of 2013 are dismissed.

[Charanjeet Kaur]
Court Master

[Vinod Kulvi]
Asstt. Registrar

[Signed reportable judgment is placed on the file]