

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: May 09, 2011
Decided on: May 23, 2011

+ **BAIL APPLICATION NO.508/2011**

SANJAY CHANDRA

....PETITIONER

Through:

Mr. Ram Jethmalani, Sr. Advocate with Mr. K.T.S. Tulsi, Sr. Advocate, Mr. Pinaki Mishra, Sr. Advocate, Ms. Ritu Bhalla, Advocate, Mr. Sushil Bajaj, Advocate & Ms. Rebecca M. John, Advocate

Versus

C.B.I.

.....RESPONDENT

Through:

Mr. Uday Lalit, Sr. Advocate/Special Public Prosecutor with Ms. Sonia Mathur, Advocate, Mr. Narender Mann, Advocate, Mr. A.K. Singh, Advocate, Mr. Shubharanshu Padhi, Advocate, Mr. Sangram Singh Saron, Advocate & Mr. Siddhesh Kotwal, Advocate.

+ **BAIL APPLICATION NO.509/2011 & CRL.M.A. 653/2011**

VINOD GOENKA

....PETITIONER

Through:

Mr. Mukul Rohtagi, Sr. Advocate with Mr. Vijay Aggarwal, Advocate, Mr. Gurpreet Singh, Advocate, Ms. S. Swarna, Advocate & Mr. Sanjay Abbot, Advocate.

Versus

C.B.I.

.....RESPONDENT

Through: Mr. Uday Lalit, Sr. Advocate/Special
Public Prosecutor with Ms. Sonia
Mathur, Advocate, Mr. Narender Mann,
Advocate, Mr. A.K. Singh, Advocate,
Mr. Shubharanshu Padhi, Advocate,
Mr. Sangram Singh Saron, Advocate &
Mr. Siddhesh Kotwal, Advocate.

+ **BAIL APPLICATION NO.510/2011**

GAUTAM DOSHI

....PETITIONER

Through: Mr. Soli Sorabjee, Sr. Advocate with
Mr. Ranjit Kumar, Sr. Advocate, Mr.
Rajiv Nayar, Sr. Advocate with Mr. Shri
Singh, Advocate.

Versus

C.B.I.

.....RESPONDENT

Through: Mr. Uday Lalit, Sr. Advocate/Special
Public Prosecutor with Ms. Sonia
Mathur, Advocate, Mr. Narender Mann,
Advocate, Mr. A.K. Singh, Advocate,
Mr. Shubharanshu Padhi, Advocate,
Mr. Sangram Singh Saron, Advocate &
Mr. Siddhesh Kotwal, Advocate.

+ **BAIL APPLICATION NO.511/2011**

HARI NAIR

....PETITIONER

Through: Mr. Rajiv Nayar, Sr. Advocate with Ms.
Sima Gulati, Advocate.

Versus

C.B.I.

.....RESPONDENT

Through: Mr. Uday Lalit, Sr. Advocate/Special
Public Prosecutor with Ms. Sonia
Mathur, Advocate, Mr. Narender Mann,
Advocate, Mr. A.K. Singh, Advocate,
Mr. Shubharanshu Padhi, Advocate,
Mr. Sangram Singh Saron, Advocate &
Mr. Siddhesh Kotwal, Advocate.

+ **BAIL APPLICATION NO.512/2011**

SURENDRA PIPARA

....PETITIONER

Through: Mr. Neeraj Kishan Kaul, Sr. Advocate
with Mr. N. Hariharan, Advocate.

Versus

C.B.I.

.....RESPONDENT

Through: Mr. Uday Lalit, Sr. Advocate/Special
Public Prosecutor with Ms. Sonia
Mathur, Advocate, Mr. Narender Mann,
Advocate, Mr. A.K. Singh, Advocate,
Mr. Shubharanshu Padhi, Advocate,
Mr. Sangram Singh Saron, Advocate &
Mr. Siddhesh Kotwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

AJIT BHARIHOKE, J.

1. Accused Sanjay Chandra, Vinod Goenka, Gautam Doshi, Hari Nair and Surendra Pipara vide above referred applications under Section 439 Cr.P.C. are seeking bail in case FIR No.RC-DAI-2009-A-0045 P.S. ACB, CBI New Delhi under Section 420, 468, 471 IPC and 13(2) read with Section 13(1)(d) P.C. Act.

2. Briefly stated, allegations in the charge sheet are that during May 2007-2008, the petitioners and public servants, namely, A.Raja, Minister of Communications and Information Technology, his P.S. R.K. Chandolia and the then Telecom Secretary Siddhartha Behura entered into a criminal conspiracy to cause undue advantage to the petitioners or their companies, namely, Swan Telecom Pvt. Ltd. and Unitech Group of Companies and caused corresponding loss to the State exchequer by abuse of their official position.

3. Learned Sh. Ram Jethmalani and learned Sh. K.T.S.Tulsi, Sr. Advocates appearing for the accused Sanjay Chandra submitted that he has been unfairly roped in as an accused on unsubstantiated allegation of conspiracy. There is no evidence of meeting of mind between the petitioner Sanjay Chandra and either of the co-accused persons. Unitech Group of Companies were innocent applicants for UAS Licences and the petitioner had nothing to do with the decision of the public servants to change the policy of first cum first serve or to change the cut off date. It is submitted that Unitech Group of

Companies were not the last applicants. M/s. Shyam Telelink Pvt. Ltd. which also got UAS Licence applied for licence subsequent to the petitioner's companies on 25th September, 2007. It is argued that the Unitech Group of Companies are the not the gainers because of change of policy for the reason that they have paid the requisite amount of entry fee, which other licensees have paid. Learned counsels argued that the theory of conspiracy is negated by the fact that till date, despite of depositing the entry fee and complying with the condition, Unitech Group of Companies have not received spectrum for Delhi and 28 other key districts. It is also argued on behalf of the accused Sanjay Chandra that admittedly, he joined the investigation and was not arrested during investigation. He was not produced in custody along with charge sheet as envisaged under Section 170 CrPC. Therefore, in view of Section 88 CrPC, the petitioner ought to have been released on bail by taking a bond with or without sureties for his appearance during trial. It is also submitted that the refusal of bail to the petitioner by learned Special Judge is in contravention of the direction given by this court in the matter of **Court on its Own Motion Vs. CBI, 2004(1) JCC 308**. Learned counsels further argued that since the charge sheet has already been filed, there is no possibility of the petitioner interfering with the investigation. The petitioner voluntarily appeared in the court pursuant to the summons which rules out any possibility of his fleeing from justice. Therefore, taking into account the facts and the nature of

offence for which the petitioner has been charge sheeted, the petitioner is entitled to be released on bail.

4. Learned Sh. Mukul Rohtagi, Sr. Advocate appearing for the accused Vinod Goenka submitted that he has been unfairly arrayed as an accused. There is no evidence to show his complicity in the conspiracy. Learned counsel submitted that accused Shahid Balwa and Vinod Goenka were examined during investigation wherein both of them stated that they were partners in DB Realty Group. However, Vinod Goenka had nothing to do with telecom business of the above company and as per the arrangement between him and Shahid Balwa, he was exclusively looking after the work of hospitality and realty business of the company. No application or document relating to issue of UAS Licence to M/s. Swan Telecom Pvt. Ltd. was signed by accused Vinod Goenka. This rules out any possibility of his complicity in the conspiracy. Learned counsel further argued that M/s. Swan Telecom Pvt. Ltd. had applied for UAS Licence on 02nd March, 2007 and it already had a highest priority under the earlier policy of first cum first serve. Thus, M/s. Swan Telecom Pvt. Ltd. had nothing to gain from the change in policy which is the bedrock of theory of conspiracy. It is further argued that the petitioner has been charged for the offences entailing maximum punishment upto seven years imprisonment. Therefore, the offence allegedly committed by him cannot be termed as the offence of grave magnitude calling for severest of punishment, as such, the other factors being in favour of the petitioner, he is

entitled to bail. Petitioner Vinod Goenka has relied upon the judgment of Supreme Court in **Gurcharan Singh Vs. State (Delhi Administration)**, 1978, 1SCC 118 and **Anil Mahajan Vs. Commissioner of Customs & Anr.**, 2000(2) JCC 302. Accused Vinod Goenka has also argued the defence taken on behalf of accused Sanjay Chandra regarding the interpretation of Section 88 Cr.P.C. and the directions issued by this Court in **Court on its Own Motion Vs. CBI**, 2004(1) JCC 308.

5. Learned Shri Soli Sorabjee and learned Shri Ranjit Kumar, Sr. Advocates for accused Gautam Doshi, learned Shri Rajiv Nayar, Sr. Advocate for accused Hari Nair and learned Shri Neeraj Kishan Kaul, Sr. Advocate for accused Surendra Pipara have adopted legal arguments advanced on behalf of accused Sanjay Chandra and Vinod Goenka. It is argued on behalf of the above three petitioners that a well-established principle of criminal jurisprudence in India is “*bail not jail*” and the court while deciding bail application is required to be guided by the aforesaid philosophy. It is further contended that case of the respective petitioners is distinct from the other co-accused persons for the reason that they are neither the promoters nor shareholders of the companies which are allegedly benefited by the act of public servants. They were merely the employees and have not received any personal gain from the alleged conspiracy. It is argued that absurdity of prosecution case is apparent from the fact that loss ascribed to the State is alleged to be ₹30,000/- crores, whereas Reliance Telecom

Ltd.(accused No.12) is alleged to have made profit of ₹10 crores by sale of its holding in Swan Telecom Pvt. Ltd. It is further argued that the witnesses have already been examined under Section 161/164 Cr.P.C. without any obstruction from the petitioners which shows that they did not try to influence them. Learned counsels further contended that admittedly the petitioners are not arrested during investigation and they appeared in the court pursuant to the summons. Therefore, it can be safely assumed that there is no possibility of the petitioners interfering with the process of justice by tampering with the witnesses or fleeing from justice. Thus, taking into account the nature of the offences alleged to have been committed by the petitioners, which is not of extreme gravity and the other factors, the petitioners are entitled to bail. In support of their contentions, petitioners have relied upon the judgment in **Babu Singh Vs. State of Uttar Pradesh, (1978) 1 SCC 579** and **State of Rajasthan Vs. Balchand, (1977) 4 SCC 308**.

6. Additional submission in support of bail plea on behalf of accused Surendra Pipara is that he is suffering from multiple ailments-like diabetes, heart problem, hypertension, chronic kidney disease, hyperparathyroidism and Arthritis etc.

7. Learned Sh. U.U.Lalit, Sr. Advocate/Special Public Prosecutor for CBI has strongly opposed the bail applications. He referred to the charge sheet and highlighted the facts detailed hereinafter to prima

facie show the complicity of the petitioners in the offence. Learned Special Public Prosecutor submitted that offence committed by the petitioners is of highest magnitude resulting in huge loss of almost ₹30,000/- crores to the State exchequer, as such they are not entitled to bail. He further submitted that the petitioners are either controlling the benefited companies as hold high positions of power. Therefore, there is a reasonable apprehension that if they are freed on bail, they will use their influence to tamper with the witnesses. Learned Special PP further contended that plea of accused Vinod Goenka that he had nothing to do with the telecom affairs is of no avail to him as he being substantial stakeholder is the direct beneficiary of the scam.

8. I have considered the rival submissions and perused the record.

9. Briefly put, case of the prosecution is that in order to achieve the end of conspiracy, accused R.K. Chandolia on 24th September 2007 inquired from the concerned officer of "Access Services Cell" of Department of Telecommunication if the applications of Unitech Group of Companies for grant of UAS Licences were received and instructed that after the receipt of their applications, no further applications be accepted. PW Avdesh Kumar Srivastava, DDG(AS-I) told R.K. Chandolia that it may not be proper/fair to abruptly refuse to receive the applications. A note dated 24th September, 2007 in this regard was initiated by the Department on instructions of R.K. Chandolia. Accused A.Raja approved the note and ordered issue of press note informing

public about the cut off date 01.10.2007 for acceptance of the applications for UASL. A Press Release was accordingly published in Newspapers on 25th September, 2007. Though hundreds of applications were received after 25th September, 2007, those applications were not considered for issue of UAS Licence.

10. Charge sheet also disclose that as per the existing policy, the allottees of Letters of Intent (LOI) were given sufficient time to comply with the conditions of LOI. The licences were issued on the basis of seniority of the date of applications and after the issue of UAS Licences, the licensee could apply for allocation of spectrum.

11. On 2nd November, 2007, Director (AS-I) DOT initiated a note seeking for issue of Letters of Intent as per the existing policy of first come first served. The then Telecom Secretary returned the file with the noting, "action may be initiated after orders of MOC & IT are obtained on the issue. He had expressed his desire to discuss this further." A fresh note was put up by Director (AS-I) of DOT on 7th November, 2007 highlighting the existing policy and pointing out that a policy statement in that regard was made in Rajya Sabha on 23rd August, 2007. A draft Letter of Intent was also put up along with the note for approval of the Minister. Accused A.Raja approved the note, but deliberately replaced Para 3 of the draft LOI with the following: "the date of payment of entry fee would be priority date for signing the licence agreement. If the date of payment of entry fee in more than

one case is the same, then the licence will be first signed with the applicant whose application was received earlier.”

12. It is alleged that on 23rd November, 2007, the Licensing Finance Branch of DOT objected to change made in LOI by accused A.Raja and suggested that it appears logical to keep the date of applications as date of priority for issue of licence provided the applicant is able to establish that he is eligible on the date of application and is also eligible when the LOI is issued. This note was endorsed by Member(Finance), Telecom Commission and Secretary(Telecom) also suggesting the revision of entry fee for new licences in line with revision of fee for dual technology spectrum as suggested by Ministry of Finance in its letter. Accused A.Raja, however, ignored the advice to keep the date of application as date of priority for issue of licence or to review and enhance the licence fee and this resulted in a loss to the tune of almost of 30000 crores to the State exchequer.

13. That while putting up a note dated 7th January, 2008 for processing UASL application received upto 25th September, 2007, Director (AS-I) reiterated the existing policy and noted, “sequence of granting of LOIs/UAS Licence has been maintained till now to the date of respective application for a particular service area.” In his note DDG(AS-I) raised the issue of eligibility and clarified that the eligibility on the date of application needs to be considered. When the matter was put up before accused Siddhartha Behura, he attached a draft

press release for the approval of the Minister. Accused A.Raja, MOC & IT asked Secretary (Telecom) to show the draft press release to the Solicitor General and seek his legal opinion. Accused Siddhartha Behura personally took the file to the Solicitor General of India, who advised "I have seen the matter. Issues regarding new LOIs are not before any court. What is proposed is fair and reasonable. The press release makes for transparency. This seems to be in order." However, after obtaining the advice of Solicitor General, accused A.Raja in conspiracy with accused Siddhartha Behura dishonestly deleted the last paragraphs of the approved press release shown to the Solicitor General which recorded, "However, if more than one applicant complies with LOLI condition on the same date, the inter-se seniority would be decided by the date of application" and approved the amended draft of press release. This was done to portray as if the amended draft had the approval of the Solicitor General.

14. On 10th January, 2008, the Press Release was put on the website of DOT calling upon the applicants to collect the LOIs from Siddhartha Behura at 3:30 pm. Four counters were created for collection of LOIs. The LOIs were, however, distributed in a disorderly manner and not as per the seniority of applicants. This resulted in shuffling of priority of the applicants as against the seniority of date of application and provided them opportunity to deposit entry fee prior to the applicants who had applied for licence before them. It is alleged that in aforesaid manner, the accused public servants managed to disturb the seniority

of applicants as per the date of application and caused undue advantage to the petitioners/their companies, who managed to get UAS Licence which they otherwise would not have got but for change in policy of first come first served with dishonest intention by the public servants.

ROLE OF ACCUSED SANJAY CHANDRA:

15. Accused Sanjay Chandra was Managing Director of M/s Unitech Ltd. and was authorised to look after the telecom affairs of the company. He caused to move applications for UAS Licences on 24th September, 2007 by eight Unitech Group of Companies which were subsequently merged with M/s Unitech Wireless (Tamil Nadu) Pvt. Ltd. On 24th September, 2007, accused R.K. Chandolia, P.S. to the Minister showed undue interest in Unitech Group of Companies by enquiring about their applications and also directing the concerned officer of the Department to stop accepting applications for UAS Licences after the receipt of the applications by Unitech Group of Companies. The complicity of the petitioner in the conspiracy is also obvious from the fact that though Press Release dated 24th September, 2007 provided cut off date for applications as 1st October, 2007, yet applications received after 25th September, 2007 till 1st October, 2007 were not even considered by the Department. The first come first served policy was tinkered with by accused A.Raja in furtherance with the other public servants and it was converted into a highly unfair policy that the

seniority of the applicants for issue of licence shall be determined by the date and time at which respective allottees complied with the terms and conditions of LOI and deposit the entry fee. Charge sheet disclose that by adopting such unfair policy, the accused persons managed that M/s Unitech Group of Company could get the seniority for UAS Licence and allotment of spectrum for various circles at Serial No.33 to 54 which seniority Unitech Group of Company could not have got if the existing policy of first come first serve was followed. The charge sheet also disclose that total equity investment of the Unitech Group of Companies who had applied for UAS Licences was ₹138 Crores. However, after the grant of the Letter of Intent, Unitech Group of Companies entered into an investment agreement dated 28th October, 2008 with M/s. Telenor Asia Pvt. Ltd. and M/s Telenor Mobile Communications vide which the Telenor agreed to infuse extra equity into those companies to acquire 65% stake. The enterprise value of Unitech Group of Companies was pegged at ₹4400 Crores of which ₹1146.7 Crores was shown external debt and ₹773 Crores was shareholders loan and net equity worth of promoters as against the actual investment of ₹138 Crores was treated as ₹2480 Crores. Thus, with the grant of Letter of Intent, the promoters of the Unitech Group of Companies got monetary gain of ₹2342 Crores.

ROLE OF ACCUSED GAUTAM DOSHI, HARI NAIR AND SURENDRA PIPARA:

16. At the relevant time, accused Gautam Doshi and Surendra Pipara were Group Presidents and Hari Nair was Group Vice President of Reliance ADA Group. Charge sheet reveals that they entered into a criminal conspiracy with the object to enable Reliance ADA Group Companies to get UAS Licences for 13 circles which they were not eligible to get in view of Clause 8 of UASL guidelines. In order to circumvent the aforesaid ineligibility clause and to cheat the Department, the petitioners Gautam Doshi Hari Nair and Surendra Pipara created and structured a new company M/s Swan Telecom Pvt. Ltd which applied for UASL Licence on 2nd March, 2007. The above referred accused persons has structured M/s Swan Telecom Pvt. Ltd. in such a manner that its equity holding was shown as 90.1% with M/s Tiger Traders Pvt. Ltd. and 9.9% with M/s Reliance Telecom Ltd. The investigation into holding structures of M/s Tiger Traders Pvt. Ltd. revealed that aforesaid company was actually funded by the Group Companies of M/s Reliance ADA Group. It was revealed that ₹3 crores utilized by M/s Tiger Traders Pvt. Ltd. in January 2007 and ₹95.51 crores used by said company in March, 2007 to subscribe to majority equity shares of M/s Swan Telecom Pvt. Ltd. was arranged through Group Companies of Reliance ADA Group. Besides that, a sum of ₹992 crores which constituted the bulk of networth of M/s Swan Telecom Pvt. Ltd. was also provided by Reliance Telecom Ltd. under the garb of subscribing to preferential shares to M/s Swan Telecom Pvt. Ltd. Those preferential shares were purchased by Reliance Telecom Ltd. at

abnormally high premium of ₹999/- per share of face value ₹1/- although M/s Swan Telecom Pvt. Ltd. had no business history at that time. Aforesaid amount was immediately returned by M/s Swan Telecom Pvt. Ltd to M/s Reliance Communications Ltd. on the pretext of advance against a purchase order. These transactions were carried out on the instruction of Gautam Doshi and Hari Nair.

17. Charge sheet also disclose that in order to achieve the end of conspiracy, above three accused persons created two other companies M/s Zebra Consultancy Services Pvt. Ltd. and M/s Parrot Consultants Pvt. Ltd. The equity holding of aforesaid two companies and M/s Tiger Traders Pvt. Ltd. was structured by Gautam Doshi, Hari Nair and Surendra Pipara insuch a manner that those companies were cross-holding each other in interlocking structure during the period w.e.f. March, 2006 to 4th April, 2007. This interlocking was done in such a manner that 50% equity shares of M/s Zebra Consultancy Services Pvt. Ltd. and M/s Parrot Consultants Pvt. were purchased by M/s Tiger Traders Pvt. Ltd., 50% equity shares of Parrot Consultants Pvt. Ltd. and Tiger Traders Pvt. Ltd. were purchased by M/s Zebra Consultancy Services Pvt. Ltd. and 50% equity shares of Zebra Consultancy Services Pvt. Ltd. and Tiger Traders Pvt. Ltd. was purchased by M/s Parrot Consultants Pvt. Ltd. This arrangement ensured that neither of those three companies was absolute owner of any company and this practically left the control of all the three companies in the hands of the Directors i.e. the petitioners. In order to achieve the end of

conspiracy, Hari Nair in league with Gautam Doshi and Surendra Pipara falsified the records of Board Meetings of Swan Telecom Pvt. Ltd. and Tiger Traders Pvt. Ltd to show that M/s. Tiger Traders Pvt. Ltd. was held by India Telecom Infrastructures Fund of Ashok Wadhwa Group and also to show the appointment of Ashok Wadhwa as Director of those companies and his presence during the meetings.

18. Before the LOI could be granted, M/s Reliance Communications Ltd., a group of Reliance ADA Group got GSM spectrum in those 13 circles pursuant to its applications under dual technology policy. Thus, the application dated 2nd March, 2007 moved through M/s Swan Telecom Pvt. Ltd was of no use to Reliance ADA Group. Accordingly, Reliance ADA Group withdrew its holding from M/s Swan Telecom Pvt. Ltd. and the accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd. to the co-accused Shahid Balwa and Vinod Goenka in order to facilitate them to cheat DOT by getting UAS Licence in the name of M/s Swan Telecom Pvt. Ltd. which company till 18th October, 2007 was ineligible for UAS Licence in view of Clause 8 of policy guideline.

ROLE OF ACCUSED VINOD GOENKA:

19. The role assigned to accused Vinod Goenka is that he is the Director of M/s Swan Telecom Pvt. Ltd. along with his co-Director accused Shahid Balwa since 01.10.2007. They took over majority stake in Swan Telecom Pvt. Ltd. on 18.10.2007 through their company

M/s. D.B. Infrastructures Pvt. Ltd., a company of Dynamix Balwa Group. This was done with a view to illegally take advantage of the application for grant of UAS licence submitted by Swan Telecom Pvt. Ltd on 02.03.2007 which was left of no use to M/s Reliance ADA Group. On 18.10.2007, Reliance Telecommunication Group got GSM spectrum in 13 circles under the dual technology policy of the Government. Thus, the application moved by them through M/s Swan Telecom Company Pvt. Ltd remained of no use to Reliance ADA Group. In order to take advantage of the aforesaid situation, the petitioner Vinod Goenka and his co-accused Shahid Balwa joined the party and in furtherance of conspiracy, they took over the majority stake in Swan Telecom Ltd. on 18.10.2007 through their company M/s. DB Infrastructures Pvt. Ltd., a company of Dynamix Balwa Group. Before taking over majority stakes, the petitioner and Shahid Balwa joined as Directors of Swan Telecom Pvt. Ltd . The object of this exercise was to cheat DOT and obtain UAS licence. In order to achieve this end, the petitioner and Shahid Balwa falsified the record pertaining of Board Meeting of M/s Giraffe Consultancy Pvt. Ltd. fraudulently showing transfer of its shares by Reliance ADA Group to itself. The petitioner Vinod Goenka in conspiracy with Shahid Balwa also concealed true facts and furnished false information to DOT regarding share holding pattern of Swan Telecom Pvt. Ltd. as on date of application and thereby misrepresented that STPL was an eligible company to get UAS Licence on the date of application i.e. 02.03.2007, whereas the company was not eligible as

per UAS guidelines. The charge sheet further discloses that petitioner Vinod Goenka along with Shahid Balwa is overall beneficiary of getting UAS licence and valuable and scarce spectrum in 13 telecom circles including Delhi. This is apparent from the fact that within slightly more than two months of issue of UAS Licence to M/s Swan Telecom Pvt. Ltd., a UAE company M/s Emirates Telecommunications Corporation (ETISALAT) subscribed to 11,29,94,228 shares of M/s Swan Telecom Pvt. Ltd. of face value ₹10/- at a huge premium of ₹275.7178 per share for a total consideration of ₹3228 crores. And M/s Genex Exim Ventures Pvt. Ltd. also subscribed to 1,33,17,245 shares of M/s Swan Telecom Pvt. Ltd. at the same premium for a total consideration of ₹380,49,73,846/-. This gives a glimpse of quantum of monetary gain reaped by the accused Shahid Balwa and Vinod Goenka. Therefore, prima facie, it cannot be said that he was not aware of the huge investments done by the company in respect of deposit of the entry fee pursuant to the LOI for issue of UAS licence. Thus, complicity of Vinod Goenka in the conspiracy is, prima facie, disclosed by the charge sheet and the supporting evidence.

20. Learned Shri Ram Jethmalani and learned Shri K.T.S. Tulsi, Sr. Advocates appearing for accused Sanjay Chandra, learned Shri Mukul Rohtagi, Sr. Advocate appearing for accused Vinod Goenka, learned Shri Soli Sorabjee and learned Shri Ranjit Kumar, Sr. Advocates appearing for accused Gautam Doshi, learned Shri Rajiv Nayar, Sr. Advocate appearing for accused Hari Nair and learned Shri Neeraj

Kishan Kaul, Sr. Advocate appearing for accused Surendra Pipara, at the outset, have contended that the order of learned Special Judge dated 20th April, 2011 rejecting the bail of the petitioners is violative of the mandate of Section 88 Cr.P.C. It is contended that admittedly the petitioners were neither arrested during investigation nor they were produced in custody along with the charge sheet as envisaged under Section 170 Cr.P.C. Therefore, the trial court was supposed to release the petitioners on bail by seeking bonds with or without sureties in view of Section 88 Cr.P.C. Thus, it is urged that on this count alone, the petitioners are entitled to bail.

21. The interpretation sought to be given by the petitioners is misconceived and based upon incorrect reading of Section 88 Cr.P.C., which is reproduced thus:

“88. Power to take bond for appearance.---When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial”

22. On reading of the above, it is obvious that Section 88 Cr.P.C. empowers the court to seek bond for appearance from any person present in the court in exercise of its judicial discretion. The Section also provides that aforesaid power is not unrestricted and it can be exercised only against such persons for whose appearance or arrest

the court is empowered to issue summons or warrants. The words used in the Section are “may require such person to execute a bond” and any person present in the court. The user of word “may” signifies that Section 88 Cr.P.C. is not mandatory and it is a matter of judicial discretion of the court. The word “any person” signifies that the power of the court defined under Section 88 Cr.P.C. is not accused specific only, but it can be exercised against other category of persons such as the witness whose presence the court may deem necessary for the purpose of inquiry or trial. Careful reading of Section 88 Cr.P.C. makes it evident that it is a general provision defining the power of the court, but it does not provide how and in what manner this discretionary power is to be exercised. Petitioners are accused of having committed non-bailable offences. Therefore, their case for bail falls within Section 437 of the Code of Criminal Procedure which is the specific provision dealing with grant of bail to an accused in cases of non-bailable offences. Thus, on conjoint reading of Section 88 and 437 Cr.P.C., it is obvious that Section 88 Cr.P.C. is not an independent Section and it is subject to Section 437 Cr.P.C. Therefore, I do not find merit in the contention that order of learned Special Judge refusing bail to the petitioners is illegal being violation of Section 88 Cr.P.C.

23. Before adverting to the further submissions made on behalf of respective petitioners, it would be appropriate to have a proper look on the law on bail.

24. In **Gudikanti Narasimhulu Vs. Public Prosecutor, (1978) 1 SCC 240**, Supreme Court has highlighted the importance of personal liberty of an accused. In the said judgment, the Supreme Court has emphasized on creating a balance between the right and liberty guaranteed under Article 21 of the Constitution of India and the interest of justice as well as the society which is sought to be protected by Section 437 Cr.P.C., wherein it is, inter alia, observed thus:

10. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice--to the individual involved and society affected."

25. In **Gurcharan Singh Vs. State (Delhi Administration), 1978, 1SCC 118**, the Supreme Court observed thus:

"18. Chapter XXXIII of the new Code contains provisions in respect of bail sad tends. Section 436, Cr. P.C., with which this Chapter opens makes an invariable rule for bail in case ofailable offences subject to the specified exception under Sub-section (2) of that section. Section 437, Cr. P.C. provides as to when bail may be taken, in case of non-ailable offences. Sub-section (1) of Section 437, Cr. P.C. makes a dichotomy in dealing with non-ailable offences. The first, category relates to offences punishable with death or imprisonment for life and the rest are all other non-ailable offences. With regard to the first category, Section 437(1), Cr. P.C. imposes a bar to grant of bail by the Court or the officer incharge of a police station to a parson accused of or suspected of the commission of an offence punishable with death or imprisonment for life, If there appear reasonable. grounds for believing that he has been so guilty. Naturally, therefore, at the stage of investigation unless there are some materials to justify an officer or the court to believe that there are no reasonable grounds for believing that the person accused of or suspected of the commission of such an offence has 'been guilty of the same, there is a bam imposed under Section 437(1), Cr. P.C. against granting of bail. On the other hand, if

to either the officer in charge of the police station or to the court there appear to be reasonable grounds to believe that the accused has been guilty of such an offence there will be no question of the court or the officer granting bail to him. In all other non-bailable cases Judicial discretion will always be exercised by the court in favour of granting bail subject to Sub-section (3) of Section 437, Cr. P.C. with regard to imposition of conditions, if necessary. Under Sub-section (4) of Section 437, Cr. P.C. an officer or a court releasing any person on bail under Sub-section (1) or Sub-section (2) of that section is required to record in writing his or its reasons for so doing. That is to say, law requires that in non-bailable offences punishable with death or imprisonment for life, reasons have to be recorded for releasing a person on bail, clearly disclosing how discretion has been exercised in that behalf.

.....

22. In other non-bailable cases the court will exercise its judicial discretion in favour of granting bail subject to Sub-section (3) of Section 437, Cr. P.C. if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat appropriate investigation and a fair trial, the court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter to refuse bail subject, however, to the first proviso to Section 437(1), Cr. P.C. and in a case where the Magistrate entertains a reasonable belief on the material that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some material; at the stage of initial arrest, for the accusation or for strong suspicion of commission by the persons of such an offence.

.....

30. In dealing with the question of bail under Section 498 of the old Code under which the High Court in that case had admitted the accused to bail, this Court in the State v. Captain Jagjit Singh (supra) while setting aside the order of the High Court granting bail, made certain general observations with regard to the principles that should govern in granting bail in a non-bailable case as follows:

It (the High Court) should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar other considerations, which arise when a court is asked for bail in a non-bailable offence. It is true that under Section 498 of the CrPC, the powers of the High Court in the matter of granting bail are very

wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non-bailable offence.

We are of the opinion that the above observations equally apply to a case under Section 439 of the new Code and the legal position is not different under the new Code.”

26. In **State Vs. Jaspal Singh Gill**, AIR 1984 SC 1503, the Supreme Court expressed the view that the court before granting bail in cases involving non-bailable offences, particularly where the trial has not yet commenced should take into consideration various factors such as the nature and seriousness of the offence, character of the evidence, circumstances peculiar to the accused, a reasonable possibility of the accused not presenting himself during trial and reasonable apprehension of witnesses being tampered with and the larger interest of the society or the State.

27. In **CBI, Hyderabad Vs. B. Ramaraju**, 2011 Crl.L. J. 301, Supreme Court cancelled the bail of accused Ramaraja purely on the basis of the enormity and gravity of the offence observing thus:

“4. According to the allegations of the appellant, the respondents-accused are involved in one of the greatest corporate scams of the commercial world. It has caused a financial storm throughout the country and the world over. Lakhs of shareholders and others have been duped and the corporate credibility of the nation has received a serious setback. We are deliberately refraining from making a detailed observation regarding the conduct of the respondents-accused because the trial is still pending and we do not want the trial to be prejudiced in any manner.

5. Ordinarily this Court would be slow in cancelling the bail already granted by the High Court but in the extraordinary facts and circumstances of these cases, we are of the considered view that the impugned orders passed by the High Court granting bail to the

respondents, cannot be sustained in law and the same are accordingly set aside.

.....

7. We are informed that charges have been framed on 25th October, 2010 and trial is scheduled to commence with effect from 2nd November, 2010. In these circumstances, we deem it appropriate to direct the Trial Court to take up the case on day-to-day basis and conclude the trial of this case as expeditiously as possible, in any event, on or before 31st July, 2011.”

28. In a recent judgment in the matter of **Prasanta Kumar Sarkar Vs. Ashis Chatterjee & Anr.**, 2010(11) Scale 408, Supreme Court observed thus:

"11. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are: (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; and (viii) danger, of course, of justice being thwarted by grant of bail".

29. The legal position which emerges from the aforesaid judgments is that the important factors for consideration while deciding the applications for grant of bail, the court must take into account various factors, namely, nature and gravity of accusation; nature of evidence

against the accused; severity of punishment in the event of conviction; danger of accused fleeing from justice; the danger of accused trying to influence the witnesses or thwarting the course of justice and the character and antecedents of the accused etc. And the court will decide on refusal or grant of bail on cumulative consideration of the existence or non-existence of aforesaid factors.

30. Coming to the next common submission made on behalf of the petitioners. Learned counsels for the petitioners have placed strong reliance upon the judgment of this Court in **Court on Its own Motion Vs. CBI, 2004(1) JCC 308** whereby certain directions were issued to be followed by subordinate criminal courts, including the following direction:

“(v) The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating agency during investigation nor produced in custody as envisaged in Section 170 Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. Reason is simple. If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because chargesheet has been filed is against the basic principles governing grant or refusal of bail.”

31. It is submitted on behalf of the petitioners that admittedly they were neither arrested nor produced in custody along with charge sheet as envisaged under Section 170 Cr.P.C. Therefore, in view of the

direction issued vide said judgment, learned Special Judge ought to have released them on bail.

32. I do not find merit in this contention. No doubt, the circumstances pointed out in the above direction are vital for deciding the application for bail to a person accused of a non-bailable offence, but it is not the only factor for granting bail in case of a non-bailable offence. It is well settled by various pronouncements of Supreme Court that while dealing with a bail application, the court must take into account various factors, namely, nature and gravity of accusation; nature of evidence against the accused; severity of punishment in the event of conviction; danger of accused fleeing from justice; the danger of accused trying to influence the witnesses or thwarting the course of justice and the character and antecedents of the accused etc. Thus, it is clear that while deciding a bail application, the court must take into consideration all important factors and the non-arrest of the accused during investigation and failure of Investigating Officer to produce him in custody while filing the charge sheet cannot be the sole determinant for deciding whether to grant or refuse bail to the petitioner. Of course, it is an important factor which should weigh in the mind of the court. Further, the above direction of the coordinate Bench is in conflict with the mandate of section 437(4) Cr.P.C. which requires that if the court decides to grant bail to a person in a non-bailable offence, it has to record the reasons in writing for doing so. Those reasons, obviously are required to be based upon the cumulative assessment of

the above detailed parameters for grant of bail. Thus, in my view, above referred direction of this Court cannot be taken as a binding precedent. Otherwise also, if the above direction of the Coordinate Bench of this court is to be taken as an absolute rule, it has a potential to subvert the course of justice and make Section 437 CrPC which deals with bail to person accused of non-bailable offence redundant. In such a situation, if the Investigating Officer decides to show favour to a person accused of non-bailable offence, he would neither arrest the accused during investigation nor he would produce him in custody as envisaged under Section 170 CrPC. Does it mean that in such a situation, the court would be helpless to exercise his judicial discretion conferred upon him under Section 437 CrPC and subordinate his judicial powers to the whims and fancies of the Investigating Officer? Answer to this question is in the negative. The aforesaid directions, if treated as an absolute rule, has a potential to breed corruption. Therefore, I do not find any merit in the submission and I am of the view that the bail applications of the petitioners are to be dealt with on merits in the background of the facts and circumstances of the case.

33. Above-noted factual matrix detailing the role played by respective petitioners, prima facie show the complicity of the petitioners in the conspiracy to obtain wrongful gain to them or their companies represented by them by abuse of their office and official position by the public servants, namely, the Minister of Communications and Information Technology, his Private Secretary and

Secretary(Telecom) in the matter pertaining to issue of UAS Licences and 2G spectrum by arbitrarily changing the existing policy of first come first served. Charge sheet also, prima facie disclose that in furtherance of conspiracy M/s Swan Telecom Pvt. Ltd. in which petitioner accused Vinod Goenka had substantial financial stakes and M/s Unitech Group of Companies in which petitioner accused Sanjay Chandra has substantial stakes, managed to get UAS Licences for their respective companies which they otherwise could not have got under the policy of first come first serve and, in the process, they reaped huge financial gains running into thousands of crores of rupees by selling the equity of their companies at huge premium. The charge sheet, prima facie disclose that the petitioners Gautam Doshi, Hari Nair and Surendra Pipara facilitated the commission of offence by creating a web of companies with a view to conceal the fact that M/s Swan Telecom Pvt. Ltd., which was floated with the object to achieve the end of the company, was ineligible to get UAS Licences on the date of application i.e. 02.03.2007 as on the said day, it was controlled by M/s Reliance ADA Group and, as such ineligible for licenses in view of Clause 8 of the policy guidelines. The charge sheet also, prima facie disclose that above three accused persons also indulged in concealment and fabrication of records of board meetings to facilitate the crime. Thus, the charge sheet disclose complicity of all the petitioners in the offence complained of which is of extreme gravity involving thousands of crores of rupees, which itself is sufficient to

deny bail to the petitioners at the initial stage when further investigation under Section 173(8) Cr.P.C. is under progress and the trial is still to commence.

34. It is submitted by the petitioners that the allegations against the petitioners are of civil nature and the offence purported to have been committed by them cannot be termed as a grave offence. Learned counsels appearing for the petitioners contended that Section 437(1) gives an insight as to which offences are of extreme gravity. It is submitted that the Legislature by restricting the powers of the Magistrate to grant bail under Section 437 Cr.P.C. to a person accused of a non-bailable offence with death or life has clearly made a distinction between the offences of ordinary nature and grave nature. It is submitted that aforesaid restriction of powers of the Magistrate is a clear indication that only those offences which are punishable with life or death fall within the category of grave offences in which the court can deny bail to a person accused of a non-bailable offence by deviating from the guiding principle of "*bail not jail.*"

35. I do not agree with above contention. Of course, Section 437(1) puts a restriction on the power of a Magistrate to release a person on bail against whom there exists reasonable ground to believe that he has committed an offence punishable with death or life imprisonment. This however, does not mean that for the purpose of deciding the bail applications, only the offence punishable with death or life

imprisonment shall be treated as offences of grave magnitude. To my mind, quantum of sentence alone cannot be yardstick for measuring the gravity of offence. Another parameter to measure the gravity of offence is the impact of the offence on the society. The offences against body or property generally affect one or few victims, but the economic offences involving exploitation of public offices have a potential to impact the society at large. When a loss is caused to the State exchequer, every citizen suffers because the money could have been used for the development of the country or for public welfare measures like food, health, education etc. In the instant case, the petitioners have been shown to be prima facie involved in criminal conspiracy resulting in a financial loss to the tune of around ₹ 30,000/- Crores and corresponding gains to their companies running into thousands of crores of rupees. This is an offence of highest magnitude which not only impacts the society at large but also puts a question mark on the governance in the country which can adversely affect the economy of the country. Therefore, in my view, the gravity of the offence itself is sufficient to deny bail to the petitioners. For my conclusion, I draw strength from the following observations of Supreme Court in the matter of **CBI, Hyderabad Vs. B. Ramaraju**, 2011 Crl.L.J. 301, while cancelling the bail granted to the accused:

“4. According to the allegations of the appellant, the respondents-accused are involved in one of the greatest corporate scams of the commercial world. It has caused a financial storm throughout the country and the world over. Lakhs of shareholders and others have been duped and the corporate credibility of the nation has received a

serious setback. We are deliberately refraining from making a detailed observation regarding the conduct of the respondents-accused because the trial is still pending and we do not want the trial to be prejudiced in any manner”.

36. It is submitted on behalf of the petitioners that the conduct of the petitioners during investigation have been cooperative. There is no allegation that they tried, interfered with the investigation or influenced the witnesses and they appeared in the court pursuant to the summons. Therefore, there is no possibility of their fleeing away from justice or tampering with the judicial process by influencing the witnesses. Learned counsels submitted that only on the basis of accusation, which is yet to be established in trial, the petitioners ought not be detained in custody.

37. At the first blush, arguments of the petitioners appears to be attractive. However, one cannot ignore the history of this case. From the record, it is evident that despite of having collected prima facie evidence of involvement of petitioners in deep rooted conspiracy involving corrupt practice by the public servants to cause huge wrongful gains to the favoured companies of the petitioners running into thousands of crores of rupees, neither of the petitioners were arrested by the CBI nor they were taken into custody and produced before the court along with the charge sheet as envisaged under Section 170 CrPC. This circumstance, in itself, gives an insight into the influence wielded by the petitioners during investigation. The fact that the charge sheet against the petitioners have been filed and there is no

allegations that the petitioners tried to influence the witnesses during investigation, cannot be a guarantee that during trial, the petitioners would not try to interfere with the process of justice by tampering with the witnesses. It cannot be ignored that during investigation the petitioners could not have known the identity of the witnesses examined during investigation. The situation has changed after the filing of charge sheet. Petitioners are now aware of the identity of the witnesses and incriminating statements made by them during investigation. Therefore, given the magnitude of the offence and the role played by the petitioners in the scam, there is a reasonable likelihood of the petitioners tampering with the witnesses, particularly when employed in the companies controlled by them.

38. Learned counsel for the accused Surendra Pipara has strongly urged for his release on bail because of his medical condition. The report of Medical Board of Dr. Ram Manohar Lohia Hospital dated 4th May, 2011 records that Surendra Pipara is a known case of Diabetes Mellitus, Coronary artery disease, Hypertension and kidney disease, presently he is stable and he can be managed in OPD of DDU Hospital. In view of the aforesaid report, I do not find merit in the plea of petitioner Surendra Pipara for bail, particularly in view of the gravity of the accusation against him and a possibility of his tampering with the witnesses if freed on bail. Jail Superintendent is, however, directed to ensure that Surendra Pipara is provided proper treatment at DDU Hospital as per the medical advice.

39. In view of the discussion above, taking into account the gravity of the accusation against the petitioners a reasonable possibility of their interfering with the process of justice by tampering with the evidence, I do not deem it appropriate to release the petitioners on bail at this stage when the further investigation in the matter is going on and the trial is yet to begin.

40. Bail applications are, therefore, dismissed.

41. It is clarified that nothing contained in this order shall be treated as finding on the merits of the case.

(AJIT BHARIHOKE)
JUDGE

MAY 23, 2011

pst/akb