IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.01.2019

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THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

Crl.O.P.Nos.19965 & 20020 of 2013
and M.P.Nos.1,1, 2 & 2 of 2013

1. Manoj Kohli,
(Mis-described as Manoj Kholi)
Bharti Cresent, ...Petitioner in Crl.OP.No.19965 of 2013

2. Sunil Bharti Mittal
(Mis-described as Sunil Bharathi Mittal)
Bharti Cresent, ...Petitioner in Crl.OP.No.20020 of 2013

Vs.

1. State of Tamil nadu
Represented by Inspector of Police
Central Crime Branch,
Chennai Sub-Urban Police
Thomas Mount,
Chennai - 600 016.

2. The Inspector of Police
Cyber Crime cell,
Central Crime Branch,
Office of Commissioner of Police
Egmore,
Chennai - 600 008.

3. Infant Dinesh,
No.27, Narayana Nagar,
Nerkundram,
Chennai -600 049. ...Respondents in both Crl.OPs.

Prayer in both Criminal Original Petitions: Criminal Original Petitions filed under Section 482 of the Code of Criminal Procedure, to call for the records in F.I.R. in Crime No.56 of 2010, pending on the file of the Cyber Crime Cell, Central Crime Branch, Office of Commissioner of Police, Egmore, Chennai and quash the same.

For Petitioners [in both petitions]	:	Mr.P.S.Raman Senior Counsel For Mr.R.Parthasarathy
For R1 & R2 [in both petitions]	:	Mr.T.Shanmugarajeswaran Government Advocate (Crl.Side)
For R3 [in both petitions]	:	Mr.R.C.Paul kanagaraj

C O M M O N   O R D E R

Crl.OP.No.19965 of 2013 has been filed by the accused No.2 and Crl.OP.No.20020 of 2013 has been filed by the accused No.1 to quash the F.I.R in Crime No.56 of 2010, on the file of the second respondent.

2. The third respondent/de-facto complainant has filed a complaint stating that he is a subscriber of Airtel Mobile Phone connection bearing No.96772 77011, since 18th August 2009. The said connection is a post paid one and received the monthly enclosing the itemized Bill which will disclose the various heads under which he has to make the payment under the terms of the contract with Airtel. Apart from using the service as a mere telephone, he opted for the GPRS Internet facility for which he has been separately charged. On 26.08.2009 at 11.31 a.m., while he was browsing the Mobile Office, he received SMS ''Thanks for down loading Java Game from Airtel live wap service you'' and for that charged Rs.99.00. He was surprised to read the above message because he had not opted for Airtel Live Service. It is very pertinent to mention that while browsing the site he saw an advertisement at the bottom and the word ''Advertisement'' was written on the top but no price was mentioned in that however the moment he click the site he was charged by the Airtel which is nothing but cheating scientifically. He further stated that the TRAI is well aware of the fact that the Telecom companies will abuse the license conditions and indulge in such malpractices for their unjust pecuniary enrichment. He further stated that the magnitude of the fraud can be highlighted by simply multiplying the charged amount of Rs.99/- with the customer base, which even according to Airtel is around 100,000,000/- (B) Rs.99/- x 100,000,000 = Rs.99,00,000,000/- Crores. In other words, by one illegal billing the Airtel Company had gained Rs.99 crores which clearly amounts to cheating and illegal siphoning of public money. He further stated that it is abundantly made clear that this unjust enrichment is done with full know lodge of the Board of Directors to Bharathi Airtel Telecom Ltd., which is the owner of

Airtel Mobile Service. He further stated that the TRAI has clearly held that :-

> ''Music or video related value added services, such as caller ring back tune, background music, wall papers etc., shall not be provided, even if it is provided free of charges, without taking explicit consent of the consumer in the above manner''.

3. He further stated that despite such categorical directions by the statutory authority, the Airtel Company is continuing with such activities in order to, illegally enriching them and hence, he prayed to punish the persons who are responsible for the aforesaid illegal acts under Sections 406, 420, 120-B IPC.

4. The learned Judicial Magistrate, Tambaram has forwarded the said complaint under Section 156 (3) Cr.P.C. to the Commissioner of Police, Sub-Urban Chennai to direct the Assistant Commissioner of Police, CCB, Chennai to register a case and file a final report within a period of 60 days from the date of the said order. Based on the said order, the second respondent has registered a case in Crime No.56 of 2010 under Sections 406, 420, 120-B IPC against the petitioners herein and four other officers of Bharathi Airtel Telecom Limited. The petitioner in Crl.OP.No.20020 of 2013 is the Chairman and the petitioner in Crl.OP.No.19965 of 2013 is the Chief Executive Officer of the said company. They have filed the present petition to quash the FIR against them.

5. Mr.P.S.Raman, learned Senior counsel assisted by Mr.R.Parthasarathy, for the petitioners has submitted that the petitioners herein have been shown as accused Nos.1 and 2 in the FIR. He further submitted that admittedly, the petitioners herein are shown as the Chairman and Chief Executive Officer and no specific allegations have been made against them as the aforesaid offences have been committed with their knowledge. It is also not alleged in the complaint that the petitioners were acted with criminal intention and hence, he prayed to quash the FIR against them. In support of the said contentions, he relied upon the decision in SUNIL BHARTI MITTAL vs. CENTRAL BUREAU OF INVESTIGATION (2015) 4 SCC 609.

6. Mr.R.C.Paul Kanagaraj, the learned counsel for the third respondent/de-facto complainant has submitted that in the complaint, it is clearly stated that the petitioners herein are ultimately going to get benefits and hence, a prima facie case is made out against them. He further submitted that the case is at investigation stage and this Court may allow the investigation to complete and only after completion of the

investigation, it can be said that whether these petitioners acted with criminal intention or not and therefore, he prayed to dismiss the petition.

7. Mr.T.Shanmugarajeswaran, the learned Government Advocate (Crl.Side) appearing for the respondents 1 and 2 has submitted that the petitioners herein are being the Chairman and Chief Executive Officer of the Bharathi Airtel Telecom Limited and without their knowledge, the amount would not have been taken from the account of the third respondent and that the petitioners are ultimately going to get the benefits. He further submitted that it is premature to decide whether the FIR is sustainable against the petitioners herein or not. He further submitted that only after full investigation, it can be said whether these petitioners acted with criminal intention or not and therefore, he prayed to dismiss the petition.

8. In SUNIL BHARTI MITTAL vs. CENTRAL BUREAU OF INVESTIGATION (supra) the Hon'ble Supreme Court in paragraph Nos.41 to 44 has observed as follows:-

> ''41. 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 are 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 Director of a company can be held liable.
>
> (iii) Circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person.
>
> 42. 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.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an 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.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section141 of the Negotiable Instruments Act, 1881. In Aneeta Hada 11, 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.”

9. From the aforesaid decisions, it is clear that when the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. Further, 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.

10. It is seen from the typed set of papers filed by the petitioners that the third respondent herein has filed a complaint under Section 156 (3) of Cr.P.C for the offence punishable under Sections 406, 420, 120-B IPC. In the complaint, he has mentioned in the cause title as follows:-

''Bharathi Airtel Telecom Limited
Represented by
1.Sunil Bharathi Mittal, the Chairman.

2.Manoj kholi, the CEO.
3. The Chief Technical Officer.
4. The Chief Financial Officer.
5. The Head of Mobile Division.
6. The Head of Value added Service Division. ... Accused.''

11. A perusal of the above cause title shows that the Bharathi Airtel Telecom Limited alone has been shown as accused and it was represented by the petitioners herein and four others. If the third respondent wants to prosecute the company, he can prosecute the company, but he cannot insist the Company that should be represented by a particular person or persons. It is for the company to choose which office bearer has to represent for it.

12. In the complaint, the third respondent has shown the Bharathi Airtel Telecom Limited alone as accused, but in the FIR registered by the second respondent, the said company has not been shown as accused. On the contrary, the persons who were shown as representatives of the said company have been mentioned as accused. It shows that the second respondent has mechanically registered the FIR against the persons, who were shown in the complaint as they are representing for the company and hence on that ground, the FIR against the petitioners herein has to be quashed.

13. In the result, these petitions are allowed. The FIR in Crime No.56 of 2010 on the file of the second respondent is quashed against the petitioners herein alone. It is open to the second respondent to proceed against the Bharathi Airtel Telecom Limited and investigate the matter. If the investigation reveals that any of the officers of the said Company also committed offence involving mens rea, it is open to him to file a final report including the said persons also as early as possible. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

msrm

To
1. The Inspector of Police
    Central Crime Branch,
    Chennai Sub-Urban Police
    Thomas Mount,
    Chennai - 600 016.

2. The Inspector of Police
    Cyber Crime cell,
    Central Crime Branch,
    Office of Commissioner of Police
    Egmore,
    Chennai - 600 008.

3. The Public Prosecutor
    High Court of Madras.
    Madras.

4. The Section Officer,
   Criminal Section,
   High Court, Madras-104.

+1cc to Mr.R.Parthasarathy, Advocate SR.No.2081

Crl.O.P.Nos.19965 & 20020 of 2013
and M.P.Nos.1,1, 2 & 2 of 2013

VSN II(CO)
GMY(14/02/2019)