

## The Zero Case: Deadly Implications of the Birla-Sahara Judgment

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The manner of dismissal of the interim appeals filed by Common Cause in the Birla-Sahara Papers case triggers a host of questions, legal and political. The presiding of a particular judge is also problematic as it appears to conflict with the code of conduct for judges, more so with the allegations against the chief justice of India and another sitting judge of the Supreme Court made by Kalikho Pul, former Chief Minister of Arunachal Pradesh, in his so-called suicide note.

The case that rewrote a 145-year-old core law. The case that launched the first corruption investigation into Prime Minister Narendra Modi. The case that set up new yardsticks for corporate ethics in India. The case that helped clean up the polity. The case of what are known as the Birla-Sahara Papers could have been any of these three. Instead, it became a case of quick burial by more than one branch of the administration, in a manner that most likely needs the legal equivalent of exhumation.

On 11 January 2017, Justices Arun Mishra and Amitava Roy of the Supreme Court dismissed interim appeals seeking investigation into the Birla-Sahara Papers—a set of documents, emails, spreadsheets, diaries, notebooks seized during raids on the Aditya Birla Group and the Sahara Group. The papers suggested that off-the-book payments were made to several senior politicians in India holding public office, including Prime Minister Modi. Justices Mishra and Roy wrote a 23-page order with a terse last sentence: "The applications deserve dismissal and are hereby dismissed" (*Common Cause v Union of India* 2017). With that, an important case appeared to have hit a wall triggering a host of questions, legal and political.

### How It Came to This

The case is not merely that of the Birla-Sahara Papers. It involves the merits, or lack of them, of India's central vigilance commissioner, the happenings in the scandal relating to allotment of coal blocks, the raids by the Central Bureau of Investigation (CBI) and the Income Tax (IT) department on two leading corporate houses in India, and possible leads into corruption in high places unearthed in those raids.

In 2015, a Delhi-based non-governmental organisation (NGO), Common Cause, and others filed a writ petition in the Supreme Court asking that the appointments of Central Vigilance Commissioner K V Chaudhary and Vigilance Commissioner T M Bhasin be set aside, because they were "not of impeccable integrity." The Central Vigilance Commission (CVC) is the designated agency to receive allegations of corruption and misuse of public office in India. An important function of its chair is to oversee the working of the CBI about allegations of bribery and corruption by public servants.

In 2015, unrelated to the petition against the CVC, a set of papers from the IT department obtained as a result of two search-and-seizure raids in 2013 on the Aditya Birla Group and in 2014 on the Sahara Group reached a few journalists, some of whom reported on them. The IT raid on the Aditya Birla Group came after a CBI raid relating to coal block allocation. The CBI found about ₹25 crore unaccounted cash and several documents described as "incriminating" in a New Delhi office of an Aditya Birla Group firm. The CBI informed the IT department, who then conducted a raid the next day. The Birla-Sahara Papers had—among other things—references to possible payoffs to senior politicians in clearly legible words. For instance, there are references to payments made to "Modiji" and "CM Gujarat" in the Sahara Papers.

Common Cause filed interim appeals asking for a special investigation into what the Birla-Sahara Papers contained, in the context of what appeared to be links to Prime Minister Modi when he was chief minister of Gujarat. Why did Common Cause intervene? Its director Vipul Mudgal offers a rationale:

The case is among many others relating to probity in public life. We believed that the evidence was strong enough to merit an investigation. It was with a similar faith that we filed PILs [public interest litigations] in the coal block allocation and 2G spectrum cases which eventually transformed the way natural resources are allocated in India. Both these cases started similarly with fragments of strong though unconnected evidence but a court-monitored investigation made all the difference by connecting the dots. The case involving the Birla-Sahara Papers is like the 2G and coal block cases.[1]

The case, thus, became important. Initially, Justices J S Khehar and Arun Mishra heard the first interim appeal of Common Cause. Senior Supreme Court Advocate Shanti Bhushan and his co-advocate Prashant Bhushan argued the case. Justice Khehar used the phrase "zero material" to trash Common Cause's case. Prashant Bhushan argued that Justice Khehar was (then) due to be appointed Chief Justice of India (CJI) and this might willy-nilly compromise his freedom to judge a case with possible links to the Prime Minister, who would approve his appointment as CJI. Justice Roy took Justice Khehar's place to hear the second appeal, when he co-authored the order dismissing the appeal as without merit. But, the dismissal of an appeal as meritless does not immediately mean that a case is equally meritless. The manner of this dismissal, thus, raises a few important questions.

## What Constitutes Evidence?

The dismissal of the appeal hinged on the quality of evidence. Justices Mishra and Roy referred to Section 34 of the Indian Evidence Act of 1872 to dismiss the Common Cause interim appeals. The act is a core law that defines evidence in all crime, blue collar and white collar. Section 34 of this act deals with "Entries in books of account when relevant." It says: "Entries in books of account,

regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability." In 2003, the Government of India amended this section by replacing the phrase "such statements" with "such entries."

In paragraph 20 of their order, Justices Mishra and Roy say: "Loose sheets of papers are wholly irrelevant as evidence being not admissible under Section 34 to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value" (*Common Cause v Union of India* 2017: 15). Justices Mishra and Roy referred to portions of a 1998 Supreme Court judgment in the Jain Hawala case (*Central Bureau of Investigation v V C Shukla* 1998). This case too hinged on the quality of evidence. The case was about the notebooks and diaries that the CBI found during a raid on businessman J K Jain's house in southeast Delhi. The diaries contained records of what appeared to be payments received and payoffs made to people in high places. These entries were in an abbreviated form. Hawala, in an Indian context, is a parallel and often illegal method of transferring and exchanging monies.

## What Is a Book?

Justices Mishra and Roy quoted the portions of the 1998 judgment to explain what constitutes an account, a book, and thus evidence, which merits examination.

An account presupposes the existence of two persons such as a seller and a purchaser, creditor and debtor. Admittedly, the alleged diaries in the present case are not records of the entries arising out of a contract. They do not contain the debits and credits. They can at the most be described as a memorandum kept by a person for his own benefit which will enable him to consider the same whenever the need arises to do so for his future purpose. Admittedly the said diaries were not being maintained on day-to-day basis during business. There is no mention of the dates on which the alleged payments were made. In fact, the entries therein are on monthly basis. Even the names of the persons whom the alleged payments were made do not find a mention in full. They have been shown in abbreviated form. Only certain "letters" have been written against their names which are within the knowledge of only the scribe of the said diaries as to what they stand for and whom they refer to.

On what constitutes a book, the 1998 judgment said,

The term 'book' in Section 34 [of the Indian Evidence Act 1872] may properly be taken to signify, ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. It is easier however to say what is not a book for the purposes of Section 34, and I have no hesitation in holding that unbound sheets of paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of Section 34.

Thus, the Common Cause appeals were dismissed because the Birla-Sahara Papers did not have a spiral or permanent binding and because the documents were not part of official accounts. Corruption tends to be off-the-books, although at times official financial statements have been found as falsified to hide bribes. The Common Cause appeal rested entirely on the premise that

unaccounted payments were made to politicians, possibly for favours done to the corporate houses in question. The chances of such payments being part of regular business accounts are minimal or non-existent.

## What Is an Account?

Justices Mishra and Roy also quoted the argument on what constitutes an account put forth by Senior Advocate Kapil Sibal, who appeared for the Jains (he was later a minister in both the United Progressive Alliance governments headed by the then Prime Minister Manmohan Singh). He said that in business parlance "account" means a formal statement of money transactions between parties, arising out of a contractual or fiduciary relationship. His view was that books of account need to reflect such a relationship and not merely contain entries of monies received from one set of persons and payment thereof to another set of persons. Sibal then said books of account relating to a business would not be admissible under Section 34 if they were not regularly kept. The words "regularly kept" mean that the entries in books are contemporaneously made at the time the transactions take place, and not long after.

## Facts and Entries

And then, Justices Mishra and Roy referred to the evidentiary value of what Common Cause presented. In paragraph 19 of their order, they quoted the 1998 Supreme Court judgment on the Jain hawala case:

With respect to evidentiary value of [a] regular account book, this Court has laid down in V C Shukla, thus;

"37. In *Beni v Bisan Dayal* it was observed that entries in books of account are not by themselves sufficient to charge a person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In *Hira Lal v Ram Rakha* the High Court said that the rule as laid down in Section 34 of the Evidence Act—that entries in the books of account regularly kept during business are relevant whenever they refer to a matter in which the Court must enquire—was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore, enough merely to prove that the books have been regularly kept during business and the entries therein are correct. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts."

Common Cause counsel Prashant Bhushan disagreed with this. In a statement after the judgment, he said,

Among the documents seized [in a raid by the IT department in November 2014] were detailed accounts maintained in spreadsheets in the computers of an employee of Sahara which contain details of ₹115 crores of cash received in the year 2013-14, out of which ₹113 crores had been paid out to various public servants.

The spreadsheets contained details of dates, amounts and source from which amounts were received, which is mostly from a marketing company of Sahara called Marcomm. It also contained details of payment of this cash on different dates of different amounts to different people at different places and through named delivery persons. This spreadsheet contains details of two payments amounting to ₹10 crore to [the Chief Minister] CM of Madhya Pradesh, one payment to [the] CM of Chhattisgarh, nine payments amounting to ₹40 crores to CM of Gujarat, who is also referred to as Modiji.

Before the IT Department, Sahara claimed that these were fictitious records created by a disgruntled employee to implicate another employee of Sahara. This explanation was disbelieved by IT, who came to the conclusion that these documents represented the true state of affairs for several reasons, most importantly because the cash received mentioned in these documents from Marcomm tallied with the entries and ledger books of Marcomm itself, which were also recovered. (CatchNews 2017)[2]

However, the IT Settlement Commission on 10 November 2016 had granted the Sahara Group immunity in this case, and brought it to an unusually speedy conclusion (Sarin 2017). In their dismissal order, Justices Mishra and Roy refer to the IT Settlement Commission's 10 November 2016 order saying the papers have no evidentiary value.

In case of Sahara, in addition we have the adjudication by the IT Settlement Commission. The Commission has held as well that the Principal Commissioner, IT ... [has] not been able to show and substantiate the nature and source of receipts as well as nature and reason of payments and have failed to prove evidentiary value of loose papers and electronic documents within the legal - parameters.

Curiously, Justices Mishra and Roy referred to the immunity given to the Sahara Group as a factor in dismissing the Common Cause appeals, without questioning the nature of this immunity and the speedy conclusion of the case.

## Holes in the Judgment

Justices Mishra and Roy, therefore, concluded that the Birla-Sahara Papers do not meet the required yardsticks for books, accounts and evidentiary value as described in Section 34 of the Indian Evidence Act 1872. This implies that the processes of maintaining accounts and their evidentiary value have not evolved from 1872 and 1998. This cannot hold. Much has changed in how businesses maintain account books. It is an archaic, limited and unfair application of the mind to understand account books in 2017 as a collection of sheets of paper—blank, written or printed—bound together in a manner which cannot be disturbed or altered except by tearing apart. This is from a pre-internet era. Modern software understands account books differently. In the internet era, everything related to accounts is maintained on electronic devices. There are Excel spreadsheets, Tally software,

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"cloud" architecture and more. Justices Mishra and Roy may have applied the letter of the law but seemingly not its spirit.

Evidence of crime may come in various forms. Blue collar crime, say, murder, may be solved by investigating a trash bin where there is hardly formal evidence of the crime. White collar crime—say, corruption and bribery—often has evidence that does not fit the formal definition of evidence from 1872. Off-the-books entries are often in the form of codes meant to help the persons dealing with it, but not necessarily an accounts wing in a business house that deals with formal money matters. Laws need to evolve with crime. The Parliament of India has an opportunity here to amend the 1872 act to avoid future dismissal of cases of this nature.

The reference to the IT Settlement Commission order is a tad perplexing. The Supreme Court justices appear to have overlooked a few simple facts here. The accounts in the Sahara Papers seem like they have been maintained over a long period. They tally with entries in the ledgers of Marcomm, from where the money paid to politicians was received and distributed. And then, the Sahara Group agreed to pay taxes on the ₹137 crore unaccounted cash seized during the raid. Also, Section 132 of the Income Tax Act of 1961 lays down the legal presumption that documents seized during an IT raid are presumed to be genuine and belonging to the person or firm seized from, unless proven to be otherwise.

The use of the Jain Hawala case as precedent to dismiss the Common Cause appeal appears out of place here. The evidence in the Birla-Sahara Papers is far stronger than in the Jain Hawala case. The Birla-Sahara Papers have full names of the people to whom the money was paid, the names of the people who paid the money, the locations of the fund transfers, the quantum of monies, and the dates when the payments were made. The Jain Hawala case was dismissed after the CBI investigated and filed a charge sheet against the accused. The court then said that the CBI charge sheet was not able to establish the charges against the accused based on the coded entries of alleged payments. There is, thus, a fundamental difference. The Common Cause appeal sought an investigation to establish the veracity of the Birla-Sahara Papers. If the Jain Hawala case was the yardstick, then Justices Mishra and Roy ought to have ordered an inquiry into the contents of the Birla-Sahara Papers. The findings of an independent court-monitored inquiry would have been the appropriate basis of further action; not the mere appeal for an inquiry.

Now, we come to the yardstick of accounts as applied by Justices Mishra and Roy. The IT department considered the Birla Papers incriminating not because they refer to seller and purchaser or creditor and debtor, and not because they contain formal statements of money transactions between parties arising out of a contractual or fiduciary relationship. They are deemed incriminating because they seem to record off-the-books transactions, which basically cannot be accounted for in the formal sense. Allegations of corruption and bribery in public office almost never involve formal statements of accounts.

Periodically, courts worldwide have ruled on fraudulent activity to falsify financial statements, although it is not mandatory that such activity account for bribes. The Common Cause appeals asked for investigation into the Birla-Sahara Papers because they seem to indicate serious corruption in high places. An investigation would have established the degree of incrimination in the documents seized. It was an opportunity to establish the spirit of law on allegations of corruption and bribery in public office. The application of yardsticks for accounted money to unaccounted money is self-defeating. It is a case of law writing unto itself that evidence does not hold even before establishing the veracity of the evidence.

## Role of the Judges

Why, then, did the two judges act so? We could simply suppose that they applied their mind the best way they saw fit. Not every judgment can please everyone. But, there are strands of a chilling nature that do not allow us to apply this basic assumption. Justice Mishra missed elevation to the Supreme Court three times before he made it. There are reports saying the collegium, which appoints judges, asked for a background check on Justice Mishra (Balaji 2013). This was during the tenure of recently-deceased Justice Altamas Kabir as Chief Justice of India. The background check was apparently on Justice Mishra's proximity or otherwise to a right-wing NGO that treats the Bharatiya Janata Party (BJP) as its political wing. After being passed over more than once, Justice Mishra was elevated to the Supreme Court in July 2014, six weeks after Modi took charge as Prime Minister.

In late 2016, Justice Mishra held wedding receptions for his nephew in New Delhi and Gwalior. Among the guests was Madhya Pradesh Chief Minister Shivraj Singh Chouhan (Bhushan 2017), of whom there is an apparent reference in the Sahara Papers as the "CM MP" to whom ₹10 crore was allegedly paid through a person named Neeraj Vashisht. Also among the guests were union Home Minister Rajnath Singh, union Finance Minister Arun Jaitley and Rajasthan Chief Minister Vasundhara Raje, and a host of BJP seniors.

Should Chouhan's presence trigger concern about Justice Mishra's presence on the bench hearing the Common Cause appeal on the Birla-Sahara Papers? Is there reasonable ground to believe that Justice Mishra presiding over the appeal contravenes the code of conduct for judges in India? This code, formally known as Restatement of Values of Judicial Life,[3] was adopted in a full court meeting of the Supreme Court in May 1997 and then adopted in December 1999 at a New Delhi conference of Chief Justices of High Courts (Venkatesan 2000). Point 6 of the 16-point code says, "A judge should practice a degree of aloofness consistent with the dignity of his office." Point 7 of the code says, "A judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned."

Justice Mishra's conduct appears to conflict with both points. Hosting and receiving many guests from the union government and the political party heading the government, at a nephew's wedding reception, is not aloofness consistent with the dignity of the office of a Supreme Court judge. Chouhan's presence indicates a level of proximity that might fall under the definition of "friend." Although Justice Mishra served as a judge in the Madhya Pradesh High Court and as Chief Justice in the Rajasthan High Court, he ought not to have anything to do with the chief ministers of those states in a personal capacity. His wedding reception was not an official event. It was purely personal. Justice Mishra, thus, behaved in a manner not consistent with point 7 of the code of conduct.

Of Justice Khehar, who presided over the Common Cause appeal until Prashant Bhushan said he should not, there is more. Chief ministers in India do not usually kill themselves. The suicide of Arunachal Pradesh Chief Minister Kalikho Pul in August 2016 was, therefore, a shock (Press Trust of India 2016). He appears to have written a 60-page booklet in Hindi called "My Thoughts," in which the last entry is a day before he was found hanging in his official bungalow. Pul was chief minister for a few months in the first half of 2016. This happened after a revolt by members of the legislative assembly (MLAs) belonging to the Congress unseated chief minister Nabam Tuki. President's Rule

was imposed after which Pul was sworn-in and proved his majority with the help of rebel Congress MLAs and BJP MLAs. Tuki went to the Supreme Court against the imposition of President's Rule.

In an exhaustive 329-page constitutional order on 13 July 2016, comprising three judgments of a five-judge bench, Justice Khehar's leading judgment restored the government of Nabam Tuki. On page 12 of his diary, Pul alleges, "I received phone calls asking for ₹86 crore to give a judgment in my favour. But my conscience did not permit this. I didn't want to hurl the state into a well. Why should I therefore misuse government and public money to save my government?" On page 38, Pul claims, "I lost faith in the courts after this Supreme Court judgment. The MLAs of Arunachal Pradesh can be bought. The Congress party is also up for sale. But I never thought that the judges of the Supreme Court can also be bought. They contacted my associates and I several times to discuss a judgment in my favour. They asked for a bribe of ₹86 crore. I don't have the kind of money to buy the Supreme Court, its judges and its judgments. Neither do I want to."

On page 39, Pul further alleges, "Virender Khehar, the younger son of Justice Khehar, contacted my associates and asked for ₹49 crore. And Aditya Misra, the brother of [the second-most senior judge of the Supreme Court] Justice Dipak Misra, asked me [for] ₹37 crore." On page 40, Pul contends, "I was contacted till 9 pm on 12 July 2016 that if I paid an advance of ₹9 crore, then the judgment would be deferred for a month and I could pay the rest of the ₹77 crore after a judgment in my favour was delivered. I did not agree to pay." On page 41, Pul says, "Until today, 25 July 2016, Ram Avtar Sharma has been contacting me on behalf of Justice Khehar. He is talking of how to get the judgment changed. He has taken the business of how and when to file a petition upon himself. He asked me ₹31 crore for this. ... People must learn to recognise these brokers and traders in law and these corrupt traitors. The government should keep a close watch on the orders of judges and they must draft a law to challenge the judgments of the Supreme Court. So that such a law may be used to stop corruption among the judges."

Pul's diary came into the public domain in February 2017, six months after his suicide. But the administration had it all the while. How much did Prime Minister Modi know of it when he signed the order appointing Justice Khehar as chief justice? How much did other seniors in the union government know? How much did Justices Khehar and Mishra know before they dismissed the Common Cause appeal? Is Pul's diary a dying declaration? Dying declarations have consequences. Are there grounds to reopen the case after Pul's diary and Justice Mishra's wedding reception? This is a case allegedly involving the Prime Minister, partly overseen by the chief justice and with allegations of corruption against the chief justice by a chief minister. Should this case not be reopened?

## What the Birla Papers Say

The Birla Papers—documents seized during raids in 2013 at the Aditya Birla Management Corporation Pvt Ltd (ABM- CPL)—have testimonies and email conversations relating to unaccounted cash, hawala transactions and what appear to be corrupt practices involving investigative wings of the Government of India. The principal testimonies are from Anand Kumar Saxena, then deputy general manager (DGM), accounts, ABMCPL, and Shubhendu Amitabh, group executive president and in charge of ABMCPL. Saxena and Amitabh have signed on the documents. They affirm

everything they say. There are signatures of IT officials Ankita Pandey and R D Verma corroborating this. These are statements recorded under Section 132(4) of the Income Tax Act, 1961.

Saxena says he was responsible for managing cash and accounts at the ABMCPL, but he does not know how ₹25 crore was in the almirah only he had the keys to. He says that "no record is kept about receipt and payment or disbursement of said cash" and that "in view of this, we cannot produce any records or account in support of the availability of said cash." [4] Why are there no records of such a large sum of money? Was this normal practice?

Saxena says he has "no idea" how the ABMCPL keeps track of inward and outward movement of cash. He says that he receives cash from hawala operators (whom he describes as *angarias*) regularly and explains how this happens. He further says that,

we are instructed by Shubhendu Amitabh to disburse or make payment of a particular amount through our senior officers of the company to some persons but the purpose of such disbursement or payment is not communicated to us. The procedure adopted for making the disbursement or payment in cash is such that we cannot identify the persons to whom it is paid.

Saxena names four ABMCPL officers as conduits for unaccounted cash transactions: M Ravishankar, Assistant Vice-President; Vinod Verma, Assistant Vice-President; K M Sunil Kumar, DGM; and P R Seshamani, Advisor. Saxena refers to an incident where he "sat back in the car while my senior colleagues deliver the cash." [5]

Saxena says that he followed Amitabh's orders in making entries of unexplained cash transactions under various heads he did not understand. Nor, he says, did he know the source, nature and purpose of such cash and transactions. He says that the notebooks that contained the dates of unaccounted cash transactions before 2011 were destroyed, but that he knows of unaccounted cash transactions happening in the ABMCPL for five years and that he maintained records of some of them. [6]

Saxena says he used to collect unaccounted cash from hawala operators on occasion. [7] He provides details of virtually daily hawala transactions at ABMCPL in the range of ₹50 lakh to ₹1.5 crore. He gives names and contact details of the hawala operators and details the amounts of cash received from these hawala operators at the ABMCPL office. He explains how all this was done: with the hawala operators having code words for amounts and tallying the serial numbers of currency notes of ₹10 and ₹20 denominations, which would be matched and money exchanged.

Amitabh initially says that he cannot remember much. He says the coded account heads are "not known" to him. He repeats at several places that he does not remember anything. He then says he used codes so that no one in his office would know. He adds that he used formal office names as codes to "make Saxena feel comfortable and to keep guises under check." And finally, Amitabh says in an affidavit that the ₹25 crore unaccounted cash found in the October 2013 raid was his. He says this money came from his dealings in real estate and moneylending. He further says that the money for his dealings in real estate and moneylending came from a company called Sunbeam Trading & Investment Private Ltd.

Amitabh says Sunbeam Trading & Investment is an unlisted company of the Aditya Birla Group with its registered office at Kolkata and engaged in the business of iron ore trade from the years 2007-08 until 2010-11. He says this company also had an office in the same building as the ABMCPL on Parliament Street, New Delhi. He says Sunbeam told him that some money would be paid in cash at

its Parliament Street office and asked Amitabh to take charge of the funds for "safekeeping." Amitabh says he used this money for his dealings in real estate and moneylending, through which he earned handsomely. A part of these earnings was the unaccounted ₹25 crore found in the October operation.[8]

Did Amitabh, as Group Executive President, ever inform his seniors at the Aditya Birla Group that he was keeping vast sums of unaccounted personal cash in the ABMCPL office? If so, what did the Aditya Birla Group say or do? Is it normal practice for the ABMCPL head, as Amitabh was, to store one company's cash in another company's office?

Amitabh explains his change in stance thus: "I was very very anxious in those moments when I sat down to pen my answers. Anxiety, apprehension, fear and a severely troubled mind had little reasoning [his word] to cheer about. In that moment of gross tension with a sinking world—my office, home, etc, around me—I had only a confused mind to offer. Though I did know of the coded entries but lacked the stability to reason through the maze. I never maintained a record of details and did all of this in a rather ad hoc unscientific manner."

## IT Appraisal of the Birla Papers

The IT Appraisal Report says that the ABMCPL routinely used a network of hawala operators to receive and disburse huge amounts of unaccounted cash. It says that it has established how at least one hawala operator, Jalu Ram, conducted his business with the ABMCPL in which at least two officers of the ABMCPL are named, Saxena, DGM, Accounts, at ABMCPL, and G K Tulsian of Grasim - Industries, who is also Director at Sunbeam.[9]

The report says that a search of Amitabh's residential premises resulted in seizure of "highly incriminating" documents that revealed "very largescale evasion of income tax." [10] It says that the ABMCPL explained the unaccounted ₹25 crore found in the October 2013 raid as solely belonging to Amitabh and not to the ABMCPL.[11]

The report says that Saxena and Amitabh "seem to have come out only with part truth about the true nature of transactions and appear to have made certain claims which do not seem to be true." [12] Amitabh was reporting directly to Aditya Birla Group President and Chairperson Kumaramangalam Birla.[13] Did Amitabh brief Birla of his unaccounted cash?

Amitabh said initially that he did not remember anything about the coded heads under which Saxena made unaccounted money entries. He said: "I reiterate that all entries, for obvious reasons, were coded. None other than myself knew of this. And, since this was being done in a state of guise, my accounts department too were not in [the] picture. I never maintained a record of such detail and did all of this in a rather ad hoc, unscientific manner." He also said: "I maintain that I do not remember names and other specifics of individuals or parties that I deployed funds with." [14]

The report states,

However, after a letter dated 25 December 2013 was filed by ABMCPL on 26 December 2013, he suddenly changed his mind and surprisingly his memory came back to remember all the alleged

coded entries in respect of which he had earlier feigned ignorance. ... This sudden change in his stand, his reluctance to reveal the truth about the transactions and his theory of alleged moneylending and real estate business activities without any corroborative material whatsoever, other than his claim and similar uncorroborated supporting claim makes it obvious that while he has some inclination to pay taxes on undisclosed income, he is not inclined to come out with the full truth about the real nature of such transactions.[15]

The report refers to contradictions in Amitabh's stance on the alleged Sunbeam money when he refers to a Sunbeam Director, R P Pansari, as the person who told him to keep ₹34 crore of Sunbeam money safe, which was from the period 2007-08 to 2010-11. Pansari says he became a Sunbeam Director on 9 October 2013, which means he did not tell Amitabh anything about the ₹34 crore.[16]

## The Gujarat CM Entry

Amitabh said that an entry found on his laptop, "Gujarat CM—₹25 crore (12-done-rest?)," relates to Gujarat Alkali Chemicals. He explained it thus: "These were purely personal notes. The note was for my knowledge and consumption—a business development at Gujarat Alkali Chemicals, a company engaged in caustic soda as well. This was an update for my knowledge only. Only for personal consumption. I used abbreviations. Guj CM stands for Gujarat Alkali Chemicals."

The report states that Amitabh was asked if he used a similar abbreviation, Gujarat CM for Gujarat Alkali Chemicals, anywhere else and if it was used by anyone else in the Aditya Birla Group when referring to Gujarat Alkali Chemicals.[17] Amitabh says that he uses a lot of abbreviations in personal diaries and notings and that he wrote "WEF" about "Gujarat CM." If he was writing an email, Amitabh said, he might have written Gujarat Chemicals or World ECO Forum, but since it was a personal note, he did not expand. He adds that the "₹25 crore" and "12 done-rest?" referred to the reduction in Indian mutual funds shareholding in Gujarat Alkali Chemicals. "It very sharply reduced from ₹12-₹25 crore. My personal random notes reflect this trend only." He does not expand on "coded names" when asked about entries saying, "Gujarat PCC Patel" and "6 crore friend for Bihar."

What exactly does "reduced from ₹12-₹25 crore" mean? How does "12 done-rest?" relate to a drop in mutual fund value? For what exactly is the reference to the WEF? What was "his team" doing in Gujarat?[18] Given that the report says Amitabh was evasive and made unbelievable turnarounds by turn, does the entry "Gujarat CM" not merit more attention?

## The Sunbeam Puzzle

Sunbeam wrote to the IT authorities after the October 2013 raid that it is a private limited company with its registered office at Industry House, 10 Camac Street, Kolkata 700017. Sunbeam said that although the company was incorporated in 1997, its iron ore business occurred only between the financial years 2007-08 and 2010-11. Sunbeam said it conducted its iron ore trade through a broker, Vijay Mundhra, who "insisted" on making part payment in cash outside the books. Sunbeam said that

it then arranged for the safe custody of its cash with Amitabh.

A search on Google for Sunbeam Trading & Investments Private Ltd at the Kolkata address it gave opens to a Non Banking Financial Company (NBFC) listing, where Sunbeam is listed as a chit fund company.[19] Its page further opens to a blank page.[20] A Google search of Sunbeam Trading & Investment Private Ltd Kolkata, without typing the full address, leads to a listing on the Zauba Corp website.[21] A point of interest in this listing is that G K Tulsian is listed as one of its four directors. Details of his association with other companies are also listed on this website.[22]

There are at least six Aditya Birla Group companies that Tulsian is associated with, including Aditya Birla Money Limited, Aditya Birla Power Company Limited, Aditya Birla Commodities Broking Limited, Aditya Birla Retail Limited, and Birla Telecom Limited. Of interest is that Tulsian is the name mentioned by hawala operator Jula Ram as the one who gave him the money in Mumbai to be handed to Saxena in New Delhi.[23] Also of interest is that Saxena said that one of the coded heads under which unaccounted cash entries were made was "Mr G K Tulsian." Under this head ₹6 crore was entered between 26 October and 18 December 2010, Saxena said. This amount was then transferred to another account coded as "HQ." [24] He describes Tulsian as an employee of Grasim Industries Ltd, an Aditya Birla Group company. Tulsian, thus, pops up as a Grasim employee, as the person who handed over unaccounted cash to a hawala operator in Mumbai for transfer to Delhi, as a director in Sunbeam, the company whose unaccounted cash Amitabh took charge of in the ABMCPL office on Parliament Street, and as a person associated with a clutch of other Birla companies.

The report says that Sunbeam owned up to ₹34.63 crore as undisclosed income, which was in Amitabh's custody.<sup>25</sup> These suggest that there may be a chain that links the Aditya Birla Group to Sunbeam, to hawala transactions, to Amitabh, to Saxena, and so on.

## The DRI Connection

The Birla Papers contain printouts of several emails that ought to interest an investigator. There is one in January 2013 from Bhuvan Chandra, who reported to Shubhendu Amitabh, that refers to ways of retrieving incriminating material and peddling influence on the Directorate of Revenue Intelligence (DRI), a premier investigating wing of the Ministry of Finance, Government of India. It speaks of "preventing DRI investigations business operations of other group companies" and restricting a DRI probe into "iron ore only."

DRI officials would support our contention in Settlement Commission and request for settlement directives. Thereafter, we need to get back all the electronic devices and records from the possession of DRI to avoid any other action by any other agency. As per the arrangement, all records, electronic devices and other evidence would be returned to us. We can destroy the evidence immediately thus avoiding further penal action by any other agency which may be detrimental to our interests.

Another email from Chandra to Amitabh in July 2012 talks of DRI officers investigating a case of under-invoicing "seeking undue favours leading to precipitation of matters." There is talk here on how to scuttle probes, weaken investigations, and how they could go all the way to the "TOP." An April 2013 email from Chandra to Amitabh talks of how the "DRI would return evidence, not share its

findings with other agencies, and bury the matter as they too would be exposed." There is a reference to the DRI letting the Aditya Birla Group "go with a rap on the knuckles" in an investigation into fake invoices.

A January 2013 email from Chandra to Amitabh lists five names of key officials, including Y Kumar of the Central Board of Direct Taxes, who is described as "Linkman and trusted aide of TOP." A September 2012 email from Chandra to Amitabh refers to deals with the DRI on limiting damage by limiting official information. It also lists officials who were likely to be appointed to top positions in the union finance ministry before they were appointed. All these mails have a code "Tourists," presumably for the DRI. An April 2013 email from Chandra to Amitabh talks of success in reducing penalty, "doctoring statements," and how "friendly officials trusted by the DRI and the Aditya Birla Group would complete obligations" and "take back records."

## Birla Chairman's Diwali Gift List

An interesting email from K V Sunil (dated 16 October 2010), who reported to Amitabh, offers insights into whom Kumaramangalam Birla wanted to send Diwali gifts. It is a detailed list with - subheads and is from the 2010-11

period with the subject line "Chairman's list—Diwali gifts." The first subhead is "politicians": Manmohan Singh, Sonia Gandhi, Ahmed Patel, Pranab Mukherjee, A K Antony, P Chidambaram, S M Krishna, Kamal Nath, Anand Sharma, Veerappa Moily, B K Handique, Digvijaya Singh, Motilal Vora, Kapil Sibal, Salman Khurshid, Sri Prakash Jaiswal, Prithviraj Chavan, Jairam Ramesh, Shashi Tharoor, Sachin Pilot, Jyotiraditya Scindia, Jitin Prasada, Milind Deora, L K Advani, Nitin Gadkari, Venkaiah Naidu, Narendra Modi, Jaswant Singh, Arun Jaitley, Sushma Swaraj, Dina Nath Mishra, Amar Singh, Mamata Banerjee, Dayanidhi Maran, Kanimozhi, Sharad Pawar, Praful Patel, Lalu Prasad Yadav and Prem Chand Gupta.

The second subhead is "bureaucrats" and lists the [then] Cabinet Secretary K M Chandrasekhar, T K A Nair prime minister's office [PMO], Christy Fernandez (secretary to president of India), G K Pillai (home secretary), Ashok Chawla (finance secretary), Sunil Mitra (Department of Revenue), R Gopalan (Department of Financial Services), P Umashanker (power secretary), Javed Usmani, Shatrughan Singh (PMO), Vini Mahajan (PMO), I S Chaturvedi (PMO), C Balakrishnan (coal), V Vijayakumar (mines secretary), Nirupama Rao (secretary, external affairs), Ajay Shankar (secretary, Department of Industrial Policy and Promotion), Rahul Khullar (secretary, commerce), Alok Perti (additional secretary, coal), P Dilipkumar (director general, forests), one Mahajan (joint secretary, coal), D S Chowdhary (private secretary to the coal minister), Alok Singh (private secretary to the corporate affairs minister) and I C P Kesasi (joint secretary, power).

A third subhead is "important target audience": Vincent George (10, Janpath), one Madhavan (10, Janpath), Mr Pillai (10, Janpath), and from the PMO—Mr Bala, Mr Punar, Mr Sundaram, |Mr Sudhankar, Mr Parmar. The last name in this list is Mr Mahajan (PS to Ahmed Patel).

This list shows how the Aditya Birla Group already had Narendra Modi in sight when he was Gujarat's chief minister in 2010-11.

## Fight of the Lawmakers

While the court battle was on, two lawmakers clashed on the Birla-Sahara Papers outside court. Rahul Gandhi announced that he had "bulletproof" information on the "personal corruption of Prime Minister Modi" and that there would be a political earthquake if he (Gandhi) spoke on it (Ansari 2016). Subsequently, Gandhi referred to the Birla-Sahara Papers as his source. Modi then ridiculed Gandhi as a youngster "learning to speak" and that he was glad "there was no chance of earthquake" (Pandey 2016).

Ordinarily, this might come across as routine banter between politicians of opposing political parties. But this was no ordinary context. The Birla-Sahara Papers seemed to indicate serious corruption and bribes in high places. The appeal to have them investigated was dismissed based on a law from 1872. Gandhi is an important lawmaker and Modi is the principal lawmaker in India. On them rests the task of forming and amending laws like the Indian Evidence Act. What they say and do, thus, becomes an important marker.

It is more incumbent on Modi to ask for an inquiry. In his 2014 election campaign, Modi spoke of a "Jayanthi Tax," a reference to the alleged bribes paid to Congress politician Jayanthi Natarajan during her stint in the Ministry of Environment and Forests (*Times of India* 2014). The Birla Papers refer to a ₹7.5 crore payment to "Project J—Ministry of Environment and Forest." If the Birla Papers were good for Jayanthi Natarajan, they ought to be good for Modi too. The source is the same.

## Conclusions

One day soon, Indian lawmakers would have to expand the scope of Section 34 of the Indian Evidence Act of 1872 so that it reflects contemporary times and business practices. This would then enable courts to adjudicate differently from the Supreme Court dismissal of the Common Cause appeal. The dismissal was about the nature of the evidence and not about the case itself. And then, other aspects of the case that came before the Birla-Sahara Papers are alive: that of the CVC's integrity, the allegations of impropriety in coal block allocation, and so on. It should be remembered that the raid on the Aditya Birla Group company took place when the coal block allocation scandal was being investigated by the CBI under the direct supervision of the Supreme Court.

Also, the Supreme Court order hardly establishes the innocence of the Aditya Birla Group and the Sahara Group. Corporate ethics and the aggravating nature of relationships between top business groups and the legislature are important factors in how modern India is being shaped. On the face of it, therefore, there appears to be enough material to recall what the two-judge bench ruled.

## Notes

[1] Email communication with the author, 2 February 2017.

[2] The *EPW* had published an article by Paranjoy Guha Thakurta (2016) detailing the alleged payments made by the Sahara Group and asking whether Modi received over ₹55 crore from them when he was Gujarat's chief minister.

[3] [http://rajasthanjudicialacademy.nic.in/docs /3\\_s1.pdf](http://rajasthanjudicialacademy.nic.in/docs /3_s1.pdf) (viewed on 28 February 2017).

[4] Page 23 of Appraisal Report, Vol IV, answer to Question 27; p 25 of Appraisal Report, Vol IV, answers to Questions 40, 43.

[5] Pages 23–24 of Appraisal Report, Vol IV, answers to Questions 29,30, 32, 33, 34, 35, 36, 37, 38, 39.

[6] Pages 26–27 of Appraisal Report, Vol IV, answers to Questions 45, 47, 48, 49, 50.

[7] Page 27 of Appraisal Report, Vol IV, answer to Question 51.

[8] Pages 52–54 of Appraisal Report, Vol IV.

[9] Pages 31, 46–49 of Appraisal Report, Vol IV.

[10] Page 50 of Appraisal Report, Vol IV, para 8.2.1.

[11] Page 51 of Appraisal Report, Vol IV.

[12] Page 62 of Appraisal Report, Vol IV, sub-section 8.3.

[13] Page 84 of Appraisal Report, Vol IV, sub-section 8.3.2.

[14] Page of Appraisal Report 277, 282, Vol I.

[15] Page 86 of Appraisal Report, Vol IV.

[16] Page 102 of Appraisal Report, Vol IV.

[17] Pages 114–15 of Appraisal Report, Vol IV, answers to Questions 122–25.

[18] Page 105, Appraisal Report, Vol IV.

[19] <http://www.nbfc.biz/List.aspx?ct=NBFC&pnm=Kolkata&page=527> (viewed on 28 February 2017).

[20] <http://www.nbfc.biz/details.aspx?typ =SUNB EAM%20TRADING%20&%20INVESTMENTS %20PRIVATE%20LIMITED>, viewed on 28 February 2017.

[21] <https://www.zaubacorp.com/company/SUNBEAM-TRADING-INVESTMENTS-PRIVATE-LIMITED/U67120MH1997PTC253259>, viewed on 28 February 2017.

[22] <https://www.zaubacorp.com/director/GOPIK RISHNA-KRISHNA-TULSIAN/00017786>, viewed on 28 February 2017.

[23] Page 48 of Appraisal Report, Vol IV.

[24] Page 38 of Appraisal Report, Vol IV.

[25] Page 55 of Appraisal Report, Vol IV.

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