The picture in most newspapers of Bharti Group chief Sunil Mittal talking to Reliance Industries chief Mukesh Ambani at the India Economic Summit in the Capital last week, just after he announced his complicated two-stage retail venture (partly with Wal-Mart), was particularly ironic. A few years ago, Mittal and Ambani confronted each other in the telecom business—while Mittal beat Ambani hands down, that time around, it was Ambani who was accused of exploiting grey areas in the law by offering full-blown mobile services on what was a limited mobility licence that his Reliance Infocomm possessed. This time the boot’s on the other leg!

Unlike in the Ambani case, when all rivals went public with their accusations, none of Mittal’s rivals has made much of a ruckus so far. Perhaps they’re waiting for the political parties to do their job but, except for the communists, no one’s particularly bothered, not even the BJP, which is supposed to be the party of the small shopkeepers. While no one is accusing Mittal of blatant violations of the type Ambani got fined several hundred crore for when things were regularised later, the logic here is pretty straightforward: if the law doesn’t allow you to do something directly, how can the law allow you to do it indirectly? FDI in retail is not allowed, so how can the two-stage process be allowed?

Mittal’s managers insist it can but, as in the Infocomm case, it is only when the actual rollout takes place that one will get to know whether the spirit of the no-FDI-in-retail law has been violated or not—if the spirit of the law is indeed violated, as in the Infocomm case, it will be too late, for then you will have what are called “facts on the ground”. In the Ambani case, one of the reasons given by the NDA government for regularising matters was that the company had nearly a million customers by then, who, poor souls, would be penalised for no fault of theirs if the company was now forced to restrict its offering to only the limited mobility their licence was for.

As everyone knows, Mittal has tied up with the world’s largest retailer, Wal-Mart, to set up a Cash ‘n’ Carry business, where FDI is allowed. This business (let’s call it Mittal-Mart) will set up supply chains, in India and abroad, and source all manner of goods and sell them in its outlets, at rates far below what the market charges. But, since the law doesn’t allow Mittal-Mart to sell to individual consumers like you and I (the view is that this will wipe out the millions of small kirana stores we have in the country), the company will function only as a wholesaler—the Cash ‘n’ Carry business allows sale to offices/hotels and retailers who become its members. German giant Metro AG has Cash ‘n’ Carry operations of precisely this sort in Bangalore.

This is where Mittal’s second, and innovative, step comes in. Bharti, on its own, will set up thousands of retail outlets (say, Bharti’s Baniyas!), and each will be a customer of Mittal-Mart! So, while Bharti Baniyas will be fully Indian, they will be able to take advantage of the tremendously low prices and technology advantages that Wal-Mart will bring to Mittal-Mart’s sourcing. But is a Cash ‘n’ Carry business allowed to just supply to one group of persons? That is, can Mittal-Mart supply only to Bharti Baniyas? If this was the case, it would be very obvious the law was being circumvented. What he’s said is that even others will be allowed to become members. Theoretically then, both Kishore Biyani and Mukesh Ambani can set up hundreds of stores across the country who will get their stocks only from Mittal-Mart.

Since Mittal’s no fool, he’s clearly figured out a way by which Bharti Baniyas will get some major advantage from Mittal-Mart that the Biyani and Ambani stores can’t. There are a million ways in which this could be done. The membership fees could be kept very high; since just-in-time replenishment of inventory is critical for retailers, while the Bharti Baniya shops could be linked to Mittal-Mart godowns on an online basis, the others may be asked to come in and replenish stock as and when they need it; there could be stockouts at Mittal-Mart when the others came in; the possibilities are enormous. It is not my case this is what will happen; indeed I am in favour of FDI in retail since this can result in a 15-20 per cent cut in household grocery budgets, but the point is that if it does happen, what will the government do? It’s not just the Infocomm case that comes to mind. There are a large number of foreign retailers who are in the country at the moment despite the law ostensibly not allowing it, and this goes back to even the 1980s, when India saw its first supermarkets in the form of the Nanz chain from the Nandas of Escorts.

The short point is that when the law allows several grey areas, and then winks when a coach and four is driven though this, you’re simply encouraging people to play around with it, to create their own “facts on the ground”, as it were. This is not about encouraging entrepreneurs. This is about encouraging only those who are confident that once they’ve invested enough, the grey areas in the law will get taken care of, as they did at Infocomm. If you abide by the letter and spirit of the law, be prepared for low returns.