filed by the petitioner, was allowed and the order,—*vide* which the application for withdrawal of the resignation, was rejected, was quashed and the case was sent back to the Collector, for consideration of the application for withdrawal of the resignation afresh, in accordance with law. In the present case, as referred to above, the plaintiff-appellant having filed application for withdrawal of the resignation beyond 60 days of the date on which she was relieved of her duties, was not entitled under the Rules to withdraw the resignation. Under these circumstances, in my opinion, the learned Additional District Judge was perfectly justified in holding that the plaintiff-appellant would not be entitled to the declaration and injunction, sought by her.

(15) In view of my detailed discussion above, there is no merit in the present second Appeal and the same is hereby dismissed.

J.S.T.

Before R.C. Kathuria, J

TELSTRA VISHESH COMMUNICATION PVT. LTD.—Petitioner

versus

THE STATE OF HARYANA & OTHERS—*Respondents*

Crl.M. No. 26225/M of 2002

20th December, 2002

Indian Penal Code, 1860—Ss. 406, 420 & 120-B read with S. 34—Public Ltd. Company filing criminal complaint against Pvt. Ltd. Company on the allegations of cheating & conspiracy—C.J.M. passing the summoning order directing the petitioners to face trial—Quashing of—Jurisdiction of the High Court to quash the proceedings at the initial stage—Exercise of—Only in such cases where allegations made in the complaint/FIR even taken at their face value & accepted in entirety do not prima facie disclose the commission of offence—No violation of terms & conditions of Agreement by the accused—Allegations of misappropriation & cheating neither supported by the

material on record nor prima facie criminal case of fraud & dishonesty against the accused is made out-Dispute is clearly of civil nature—Misuse of the process of Criminal Court cannot be permitted—Criminal complaint & the summoning order liable to be quashed.

Held, that the nature and scope of civil and criminal proceedings and standard of proof required in matters is different and distinct which has to be kept in view even at the stage where prayer for quashing of FIR and summoning order is made. Though the power vested in the Court is to be exercised sparingly in exceptional and rarest of rare cases, at the same time, the Court will not allow criminal prosecution where the facts disclosed do not warrant such a recourse as continuing of such criminal proceedings would tantamount to abuse of the process of the Court. Where the matter is essentially of civil nature but has been given a cloak of criminal offence, the Court will not permit the complainant to misuse the process of criminal Court as criminal proceedings are not short cut of the other remedies available in law. It is for that reason it has been insisted upon the Court that before issuing a process it has to exercise great caution because prosecution of a person is serious matter.

(Para 20)

Further held, that it is not prima facie made out that the accused had induced the complainats with dishonest and fraudulent intention to enter into agreements with the complainants. It is clearly brought out on record that civil dispute has been sought to be given the colour of criminality by the complainants so as to prosecute them under Section 406, 420 and 120-B read with Section 34 IPC. The filing of the complaint and summoning order passed by the Chief Judicial Magistrate is on the face of record is misuse of the process of the Court.

(Para 29)

R.S. Cheema, Sr. Adv. with R.S. Rai, Gautam Dutt & Rajindra Barot, Advocate for the petitioners

Sanjeev Sheokand, Assistant Advocate General, Haryana for the State-respondent

Ashwani Kumar, Sr. Adv. with Vikas B and Deepak Dhingra, Advocates for respondent Nos. 2 and 3.

JUDGMENT

R.C. KATHURIA, J.

(1) This judgment shall dispose of six above mentioned petitions wherein the petitioners seek quashing of the complaint No. 69 of 2001 dated 1st February, 2001 (Annexure-P. 1) and the summoning order dated 22nd May, 2001 (Annexure-P) passed by the Chief Judicial Magistrate, Gurgaon directing the petitioner-accused to face trial under Sections 406, 420 and 120-B read with Section 34 of the Indian Penal Code.

(2) The facts which led to the filing of the present complaint against the petitioners-accused need to be noticed in detail in order to focus the controversy involved in these petitions. RPG Telephones Limited, complainant No. 1 and RPG Satellite Communication Limited, complainant No. 2, arrayed as respondent Nos. 2 and 3 in these petitions are public limited companies incorporated and registered under the Companies Act, 1956 (hereinafter referred to as 'the Act') and are based at Delhi having registered office at the place mentioned in the title of the complaint jointly filed by them through B.B. Kaul, authorised representative. State of Haryana has been arrayed in these petition as respondent No. 1 Telstra Vishesh Communication Limited (hereinafter referred to as 'TVCL'), in which Telstra Holding Private Limited, accused No. 4 (hereinafter referred to as 'Telstra') a limited company registered under the laws of Australia (and a wholly owned subsidiary of Telstra Corporation Limited) holds 47.1% shares, Videsh Sanchar Nigam Ltd. holds 33.3% shares and the balance 19.6 % being held by Infrastructure Leasing and Financial Services Ltd. The latter two sharesholders are companies incorporated under the provisions of the Companies Act, 1956. The Company incorporated and registered under the Act has been arrayed as accused No. 1 while Abu W.M. Shafquat, accused No. 2, Pushpendra S. Mankad, accused No. 3 are responsible for day to day activities of the company at the time of commission of offence complained of. Daryll Smith, accused No. 5 and Sig Sovik, accused No. 6 are arrayed being the Directors/ Principal Officers of the Telstra Corporation Limited, accused No. 4, a limited company registered under the Act who had been responsible

for day to day functioning of the said company at the time of commission of the crime. According to the case of the complainant, the above named accused had played major and active role in respect of the offences of cheating and conspiracy which had facilitated illegal benefit for accused No. 1 and accused No. 4 and had resulted in wrongful loss to the complainants.

(3) According to the case set up by the Complainants, complainant No. 1 company holds 100% issued shares of complainant No. 2 company and is beneficial owner of the said shares. In this manner, complainant No. 1 is the holding company of complainant No. 1 Complainant No. 2 is one of the providers of VSAT services in India under a valid licence issued by the Department of Telecommunication under Ministry of Communication, Sanchar Bhawan, New Delhi being the competent authority, Somewhere in the month of September/October 1998, accused Nos. 1 and 4 through accused No. 5, who represented himself to be the authorised official of both accused Nos. 1 and 4 approached the complainants with the proposal that they were interested to purchase equity shares of complainant No. 2 held by complainant No. 1 on the terms and conditions as agreed between the parties. After initial negotiations, a meeting was held between their representatives on 2nd December, 1998. On that day, the points of agreement arrive at between the parties were reduced into writing, copy of which is Annexure-P.4. As per terms of the points of agreement executed by accused No. 5, acting through and on behalf of accused Nos. 1 and 4, accused had agreed to purchase and acquire 100% of the issued share capital of complainant No. 2 held by complainant No. 1. The price of shares, agreed to be acquired by accused, was fixed at Rs. 7.40 per share. As per time frame fixed by the parties, the signing of the term sheet was to be completed within 20 days, completion of due diligence was to be done within 50 days and completion of agreement was to be undertaken within 45 days. In this manner total duration fixed between the parties was 115 days. The repayment of the group loans was to be made in six quarterly instalments starting from 1st July, 1999 which was to be secured by Telstra V-Comm., accused No. 1 with the support of share holders. The guarantees were to be taken over by Telstra V-Comm. by 30th April, 1999. It was also agreed between the parties that within 15 days of the signing of term sheet Telstra V-Comm. was to spell out the number of people they wish to retain. Thereafter,

RPG Satcom was required to start the process of reducing the manpower by giving notice to employees as per terms of appointment and compensation upto three months salary for parting. The bank which opens on lien escrow account was to act as trustee. 25% payments towards acquisition price was to be credited into no lien escrow account within seven days of signing of term sheet. The interest earned on Escrow A/c was to be credited to Telstra V-Comm. Care was also taken to spell out as to how due diligence was to be handled and also with regard to the appointment of observers. The nominee of Telstra V-Comm. was required to be invited in the Board meetings of RPG Stat Comm. immediately after signing of the term agreement. The complainant further stated in the complaint that in terms of the licence granted to it by the Department of Telecommunication, Ministry of Communication, New Delhi, they could not sub-licence the use of the transponder to any other body in any manner but still the accused were keen for the acquisition of shares of the complainant in order to get full control of the licensing rights of the complainant to the said transponder because the facility of use of said transponder was available with select licensed companies including the complainants. The above stated terms of the agreement according to the complainant was a design of the accused to cheat them by criminal conspiracy with the sole motive and intention to use the Transponder/Network Service of the complainant and the other facilities connected therewith and to hoodwink the complainant so as to withdraw from their obligation. The accused were fully aware at the time of execution of the points of agreement that transponder space was a scarce commodity and was not available freely and they could not enjoy the said facility without acquiring the company having such transponder space. Therefore, they connived to misrepresent to the complainants that they shall purchse and acquire equity capital of complainant No. 2 who was having valid licence issued by the competent authority. According to the case of the complainants the plea of acquisition was taken by the accused as a route and modus operandi to gain network facilities and the marketing strength of the complainants so as to acquire the business of the complainants and to strength their own business with the aim of damaging the business of complainant No. 2 by reducing its capacity and also acquiring its customers.

(4) Immediately after execution of the aforesaid points of agreement, the complainants in order to perform their obligations

arising therefrom allowed the accused access to their employees, technicians and other personnel to all information which was sensitive in nature including the use of transponder space in May 1999. After having gained confidential information, records and other material, the accused in order to cheat the complainants and in furtherance of the conspiracy hatched by them delayed the fulfilment of their obligations in terms of the aforesaid agreement and failed to carry out the necessary requisites within the period of 115 days. Rather, accused Nos. 1 and 2 continued to represent and make the complainants belive that they had become one entity. In the month of November 1999, the complainants were required to pay certain licence fee to the Department of Telecommunication and for that reason they approached accused No. 1 to arrange for the payment. Accused accordingly paid the charge on behalf of the complainants. Accused also approached the complainants to sign the Memorandum of Understanding (for short 'MOU') (Annexure-P. 5) which was executed between the parties on 15the November, 1999. According to the version for the complainants, the said MOU contained the detail terms-sheet of the acquisition as was referred to in the points of agreement dated 2nd December, 1988. The term sheet as such intended to provide for the specific modalities of the transfer and acquisition of complainant No. 2 by company of the accused. On the same day accused also made the complainants to sign and execute the Network Service Agreement (Annexure-P. 6.). According to the Network Service Agreement, accused No. 1 was extended the facility to avail certain network services from the complainant before the completion of the acquisition. At the signing of the Network Service Agreement, the accused had assured the complainants that they will comply with each term of the agreement signed and executed and soon complainant Nos. 2 and 1 shall become one entity. Believing this representation, the complainants allowed the accused to use their equipments, facilities and access to the company and its affairs. Accused are stated to have used exclusive clause in the MOU to restrain the complainants from negotiating with any other party. Further MOU further provided for the accused to retain only those select employees of the complainants whom they intended to employ after acquisition. Further under the MOU the accused secured privileges like participation in the board meetings of the complainants and to monitor its sovereign activities which facility would not have been extended to them but for their assurance to buy

and acquire the share of the complainants. Accused No. 1 was required to complete the due diligence by 31st January, 2000 and transaction for acquisition of shares was to close on 28th February, 2000 as agreed between the parties. Further in terms of the Network Service Agreement, complainant No. 2 was to provide network service at a nominal charge of Rs. 0.585 million and p. 078 million per month which amount was agreed to be a temporaty arrangement between the parties till the transaction was actually completed as is clearly spelled out from the clauses 2.1, 3.1, 4.1, 4A.2, 6.3, 6.4 of the agreement dated 15th November, 1999. In terms of clause 4A, a part of the payment to DOT was provided for fresh deposit towards the acquisition price. Complainant No. 2 was further required to retain the employees which the accused wished to retain in terms of clause 7.1 of the agreement. The complainant were further required to forgo any other offer of negotiation or any other act involving any third party other than the accused company in terms of clause 9.1 of the agreement. As per contractual obligation, the complainants could not carry structural, re-organisation, diversification, acquisitions, fresh investments, sale or amalgamation of the company. These clause in the agreement caused major impediments in the smooth functioning of the company as per assertion of the complainants which fact was fully known to the accused.

(5) Further case of the complainant is that despite the opportunities and extension given to accused No. 1, it failed to complete due diligence exercise upto 31st January, 2000. On the request of the accused time was further extended in this regard upto March, 2000 in good faith by the complainants. Accused No. 3 attended the board meeting on 17th December, 1999 and 27th March, 2000 representing the other accused. At no stage the accused had expressed any reservation with regard to the terms of the agreement. In the month of March, 2000 complainant No. 2 was required to pay D.O.T. charges amounting to Rs. 140.13 lacs and accordingly called upon the accused to arrange for the said payment. As the entire services were being used and availed by the accused they were asked to pay the said charges. Accused instead of making payment of such charges took up the stand that pending formal decision of the Board, it was not possible for them to pay the said amount. In April, 2000 another communication was addressed by the complainants to the accused calling upon them to complete the formalities of the transactions but

the accused insisted and called upon the complainants to continue to provide services till the monthly service charges were completely set off against the payment of Rs. 1,22,59,603 paid by accused No. 1. It was also represented by them that they will accord formal approval on 24th April, 2000. They also assured the complainants that necessary transaction to purchase and acquire share holding of complainant Nos. 1 and 2 shall be carried on the agreed terms in the documents executed between the parties. It is further stated by the complainants that barring nominal monthly service charges of Rs. 0.585 million and Rs. 0.078 million per month, it was agreed to be adjusted of the amount paid to DOT by the accused on behalf of the complainants as provided for in the Network Service Agreement no amount was given by the accused towards the charges of facilities as agreed between the parties. The accused were fully aware that actual cost of the network service and the facilities would be much higher and the nominal service charges were not intended to cover the same. The complainants continued to extend said facilities/services to the accused and also provided all confidential information to the accused because of the assurance given by them that they would acquire 100 % shares of the complainant. The delayed action on the part of the accused to honour the terms of the agreement adversely affected the business of the complainant and morale of its employee. Being disturbed by the prolonged delays on the part of the accused in this direction, the complainants in July 2000 addressed a communication to accused No. 5 seeking confirmation of the factual position. To the utter shock and disbelief of complainant No. 2, accused No. 5 on behalf of accused No. 1 informed the complainants that they require time to discuss the issue with the Board of accused No. 1. In August, 2000, the complainant called upon accused No. 1 to pay the cost of facilities availed by them amounting to Rs. 2,43,53,446 towards the transponder fee and licence fee for the period during which accused No. 1 had been using the transponder facility. In reply, accused No. 1, according to the stand of the complainant, took up a preposterous stand by pleading that the demands towards the cost and fee for the facilities extended by the complainants were to be borne by the complainants alone and accused No. 1 would like to use transponder space till the time a sum of Rs. 1,22,59,603 paid by it to DOT on behalf of the complainants was compeletely set off by monthly service charges of Rs. 0.585 million. The complainant reminded the accused of their obligation and accused

further assured them that the process of acquisition would be carried out shortly. Finding no progress made in this direction and the stand adopted by the accused in effecting the acquisition, the complainants addressed communication to accused No. 5 on 18th October, 2000 explaining the delay attributable to them in ensuring the completion of modalities of acquisition and in reply the accused had informed the complainants that the Board of Directors of accused No 1 were not currently intending to proceed with the transaction of sale and acquisition of shares of complainant No. 2. This communication of the accused completely shocked the complainant and clearly brought out the fraud and deceit perpetrated by the accused on the complainant. Soon after, the Advocates of complainant No. 2 and 1 respectively sent two separate notices dated 14th November, 2000 and 16th November, 2000 to the accused calling upon them to explain and clarify their position with regard to the representation and assurance made through various documents, meetings discussions and negotiations. Accused Nos. 1 and 4 responded to the communication of the Advocates of the complainants through their Advocate vide letters dated 12th December, 2000, 3rd January, 2001 and 21st December, 2000 which clearly spell out the design of the accused to wriggle out of their commitment. They had taken up the stand that the documents executed by them bearing Network Service Agreement are not binding on them. Above stated circumstances, according to the complainants, clearly spell of trust, had committed offence of cirminal breach of trust, criminal conspiracy, cheating and fraudulent misrepresentation resulting in huge losses to the tune of Rs. 29.22 crores to the comlainants and the accused had committed offences under Section 415, 420, 406 and Section 120-B and Section 415, 420, 406 read with Section 34 I.P.C. The complainants prayed that accused be summoned and punished in respect of these offences.

(6) In support of the allegations made in the complaint, B.B. Kaul (PW-1), who is the General Manager of Complainant No. 1 as well as authorised representative of both the complainants, during the course of his statement narrated the circumstances detailed in the complaint. He maintained in his deposition that the complainant RPG Telephone Limited is holding company of complainant No. 2-RPG Satellite Communication Limited holding 100% issued shares of the latter. According to him, complainant No. 2 is one of the providers of VSAT services in India holding the valid licence from the Department

of Telecommunication which is the competent authority. As per his assertion, accused No. 2 Abu W.M. Shafquat and accused No. 3 Pushpendra S. Mankad, represented themselves to be the Director/Principal Officers of accused No. 1 having authority to enter into transactions on its behalf. Similarly, accused No. 5 Daryll Smith and accused No. 6 Sig Sovik claimed themselves to be the authorised representatives of accused No. 4 Telstra Corporation Limited, which is incorporated in Australia under its law. Accused No. 5 also represented to be the authorised representative acting on behalf of accused No. 1. All these accused made the complainant believe that the transactions entered into by them on behalf of accused No. 1 having consent of accused No. 4. This was done by them in conspiracy with each other so as to make ill-gotten gains and cause loss to the complainants. According to him the accused intended to enter into agreement for the purchase of equity of shares of complainant No. 2 held by complainant No. 1 as per terms of agreement dated 2nd December, 1998 whereby it was agreed between the accused and the complainants that price per share would be Rs. 7.40 and the transaction of the acquisition of the shares of the company of the complainants would be completed within the stipulated period. He further stated that as per the terms of the above agreement, the accused were allowed to use transponder space besides other facilities free of charge by the complainants though under the licence term the facility allowed to the complainants to use all transonder space which was otherwise a scarce facility could not be sub-leased. He also deposed that when the points of agreement dated 2nd December, 1998 was entered by accused Nos. 1 and 4, they had intention to cheat the complainants. The accused also committed the offence of criminal breach of trust as the accused by utilising the transponder facilities of the complainant had gained trade secrets and data belonging to them and used that information to their advantage. Factually, the accused never intended to fulfil the terms of agreement though they had been falsely assuring the complainants that they would acquire and complete the formalities within 115 days as initially agreed between the parties. He also placed on record agreement dated 15th November, 1999 Ex. PW. 1/2 and PW. 1/3. He further stated that accused failed to complete the formalities within one and a half years and when in July 2000 accused were asked by the complainants to complete their commitments, the accused flatly refused to do so. Thereafter, efforts were made by the complainant to call upon the

accused to complete the formalities as per letters dated 23rd February, 2000, 11th April, 2000, 14th July, 2000, 16th August, 2000 and 18th October, 2000 (Exs. PW. 1/4 to PW. 1/9). He also proved on record the letters dated 22nd February, 2000, 2nd March, 2000, 10th April, 2000 (Exs. PW. 1/10 to Ex. PW. 1/12). He further proved letters dated 20th April, 2000, 20th April, 2000, 20th July, 2000, 31st August, 2000 and 26th October, 2000 (Ex. PW. 1/13 to PW 1/16). The legal notices Exs. PW. 1/17 to Ex. PW 1/26 were also placed on record.

(7) R.C. Aggarwal (PW-2) was employed as Vice-President Finance of RPG Enterprises Limited. He claimed that he had seen documents Ex. PW. 1/1 to Ex. PW. 1/27 bearing the signatures Paras K. Chaudhary and accused No. 5 which were signed in his presence. Further according to him MOU Ex. PW. 1/2 bears the signature of Paras K. Chaudhary and Abu W.M. Shafquat, accused No. 2, which was signed in his presence. He also proved the annexure to the said MOU, besides the Network service Agreement Ex. PW. 1/3 executed by Paras K. Chaudhary and Abu W.M. Shafquat, accused No. 2. He further proved letters Exs. PW. 1/4 to PW. 1/7 which were addressed by RPG Enterprises to the accused and identified the signatures of Paras K. Chaudhary. He claimed that these letters were signed and despatched in his presence. He also proved documents Ex. PW. 1/8, Ex. PW 1/9, PW. 1/11, PW. 1/12 to PW. 1/13. Exs. PW. 1/14 and P.W 1/16, PW 1/17. PW. 1/23, PW. 1/24, PW. 1/19, PW. 1/20, PW. 1/21, PW, PW. 1/25, PW. 1/26 and Ex. PW 1/27.

(8) On the basis of preliminary evidence adduced by the complainants, the Chief Judicial Magistrate, Gurgaon as per order dated 22nd May, 2001 prima facie came to the conclusion that all the above named accused had committed the offences under Section 406, 420 and 120-B read with Section 34 I.P.C. and accordingly summoned them to face trial in his Court in respect of the aforesaid offences. Aggrieved by the said order the present petitions had been filed by all the six named accused.

(9) While seeking quashing of the complaint and the summoning order dated 22nd May, 2001 passed by the Chief Judicial Magistrate, Gurgaon against the petitioners-accoused, it had been strenuously urged by the counsel representing the petitioners that careful reading of the complaint would indicate that it had been to some portion of the documents executed between the parties so as to

give a distorted picture of the whole issue which had arisen out of the terms of the agreement so as to build up a case of misappropriation, cheating and conspiracy against them which stand is factually not spelled out from the documents produced on record from the side of the complainants during the course of preliminary evidence. In particular reference was made to the writing dated 2nd December, 1998 termed as points of agreement (Annexure-P. 4,) MOU dated 15th November, 1999 (Annexure-P. 5) and Network Service Agreement dated 15th November, 1999 (Annexure-P. 6) which transparently surface the rights of the parties. It was pointedly urged by them that it cannot be ignored that the petitioners had paid advance to respondent Nos. 2 and 3, who played fraud by illegal termination of the Network Service Agreement. It was urged by them that it was respondent No. 3, who was required to pay balance outstanding amount of Rs. 42,06,103 to petitioner No. 1 with interest @ 21% per annum. It was further contended by them that said MOU and NSA do not suffer from any ambiguity. Reading of Clause 3 of the NSA (Annexure-P. 6) containing the terms of termination of the agreement would reveal that it was specifically mentioned therein that agreement would come to an end in three eventualities. One was an earlier completion of share purchase agreement. The other alternative was when the amount deposited would be fully set off from the monthly payment and third alternative was available to the petitioners to terminate the agreement at any time of two days notice. Further reference was made to the points of agreement dated 2nd December 1998 which clearly indicates the basis on which negotiations between the parties were to be completed within the time frame and it was merely aimed at exploring the possibility for purchase of share of respondent No. 3 by respondent No. 2. It is for that reason while dealing with the time frame, the agreement in question reference to the signing of a term sheet was made specifically which is nothing but a document whereby terms of transfer of shares would be settled. Thus, it was not a document which can be termed as a complete contract for transfer of shares between the parties. Referring to the terms "due diligence" employed in this document, it was stated that it signifies a clearly definable commercial term which permits the party to carry out business or commercial audit through financial and legal experts. The very idea of such an exercise is to preserve the liberty of the party to have the due diligence conducted and then decide further on the

basis of the advice given by the experts. Thus, it cannot even remotely be said, as sought to be inferred on behalf of the complainants that agreement dated 2nd December, 1998 was an agreement entered into between the parties for transfer of shares. Additionally, it was submitted that the prime fact that the parties had chosen to execute MOU dated 15th November, 1999 (Annexure-P.5) further indicates that the parties had only settled to negotiate the possibility of acquisition and whatever rights came into existence in the agreement dated 2nd December, 1998 came to be substituted by this document. It is for that reason that under clause 1. under the title "Scope 1.1 it was stated that his MOU set out the manner in which the parties intend to negotiate the proposed transaction referred to in clause 2." In this manner the parties had committed themselves to carry out negotiations for possible transfer of the shares. Further clause 4.3 stipulates that the actual price to be paid for the shares would be determined by negotiations between respondent No. 2 and accused No. 1, who is one of the petitioners in the present petitions taking into account, among other things, the result of the petitioners financial, technical and legal due diligence. These recitals clearly provide that important and vital component of price was left to be determined in the minor envisaged under this agreement. It is for that reason clause 6 which deals with the due diligence had given wider option to accused No. 1. Further clauses 8, 9 and 10, according to the counsel for the petitioners, in no manner change essential nature of MOU. Clause 15 clearly specifies "No Binding Obligation" between the parties. It was highlighted by them that respondent No. 2 and 3 have no material to substantiate the stand taken that any breach of contract had occurred or any cause of action had occurred under the circumstances of the case.

(10) Additional circumstances to which pointed reference was made on behalf of the petitioners are that RPG Telephones Limited, respondent No. 2 and TVCL were both licensed provider of VSAT Service in India. Respondent Nos. 2 and 3 had deliberately not disclosed in the complaint filed about the Corporate Gurantee dated 15th November, 1999 and thus they are guilty of suppressing the material fact from the Court. Respondent Nos. 2 and 3 had also withheld the information from the Court because in the complaint no mention had been made that they had terminated Network Service Agreement vide telegram dated 26th November, 2000 (Annexure-P. 10) placed on record by TVCL in Criminal Misc. No. 26225-M of 2001,

which was followed by the letter dated 14th November, 2000 (Annexure-P. 8) and another letter dated 16th November, 2000 (Annexure-P. 9) placed on record in the above mentioned petition.

(11) On behalf of Abu W.M. Shafquat, petitioner, arrayed as accused No. 2 in the complaint, it had been stated that he is a non-resident Indian based at A 15, Haves Barton Working Survey, England, U.K. At the relevant time, he was working with Telstra Vishesh Communications Limited, New Delhi as Vice-President (Sales & Marketing) since, October 2, 1995. He was nominated as Director of Board of Directors of Telstra Vishesh Communication Limited (for short 'TVCL') on the understanding that he would resign as Managing Director with effect from the date agreed at the earliest and at the request of TVCL, it was agreed that the petitioner would resign as Managing Director of TVCL w.e.f. 15th November, 1999 and from that time onward he would not be concerned with TVCL. The said Telstra Holdings Private Limited, according to him holds 47.1% shares of TVCL. Videsh Sanchar Nigam Limited holds 33.3% shares of TVCL and balance 19.6% shares are held by Infrastructure Leasing and Financial Service Limited. As per his stand, the latter two shareholders are companies incorporated under the provisions of the Act. Since 15th November, 1999, the petitioner is not associated with TVCL in any manner and presently he is employed with a company in U.K. In this manner, having ceased to have any concern with TVCL, he has been summoned in the complaint with TVCL, he has been summoned in the complaint without any basis. At the same time, it was not disputed by the counsel representing him that the petititioner had taken part in negotiation and discussion in the capacity of Managing Director of TVCL and had executed the MOU dated 15th November, 1999 as a representative of TVCL under the direction of the Board of Directors of TVCL. It was also submitted that he had not incurred any liability for the reasons stated earlier as the documents placed on record do not establish his involvement in the commission of offence stated in the complaint.

(12) Pushpendra S. Mankad in his petition had not disputed that he is the Chief Executive of Telstra Vishesh Communication Limited, accused No 1. Telstra Corporation Limited, accused No. 4 is a company incorporated under the laws of Australia having its registered office at Mansfield. Daryll Smith, accused Nos. 5 is the

Director of accused No. 4 at Sydney and Sig Sovik, accused No. 6 is the General Manager of accused No. 4 at Sydney. These petitioners claim that they are not even share holders of TVCL and had no privity of contract with respondent Nos. 2 and 3. It was also submitted by the counsel representing these petitioners that accused No. 4 or any of its Directors were not party to the negotiations or signatories to agreement between respondent Nos. 2 and 3 and TVCL. It was also contended that Telstra Holding Private Limited is not even the signatory to any of the documents alleged to have been executed between respondent Nos. 2, 3 and TVCL. It was also pointed out by him that the fact brought out on record and the doucments placed on record do not even remotely connect the petitioners and Telstra Hoding Private Limited with the commission of the alleged crime.

(13) Counsel representing respondent Nos. 2 and 3 while controverting and contesting the stand taken on behalf of the petitioners during the course of his arguments reiterated and justified the facts stated in the complaint and the attrubution made to the petitioners-accused on the basis of the preliminary evidence adduced in support of the allegations made in the complaint which led to the summoning of the petitioners-accused in respect of the offence mentioned above. While refuting the stand taken on behalf of the petitioners-accused that the factum of Corporate Guarantee dated 15th November, 1999 and the termination letter in the form of telegram had been suppressed in the complaint, it was pointedly urged by him that the terms contained in the MOU dated 15th November, 1999 coupled with notices dated 14th November, 2000 and 16th November, 2000 sent by the counsel representing the complainant explained in detail that because of the false representation and inducement made by the petitioners-accused with the clear intention to cheat the complainants, the Network Service Agreement and all the guarantees extended thereunder shall become null and void and for that reason the guarantees could not be enforced in view of the fraud played by the petitioners on the complainants-respondents. At the same time, it was also contended on behalf of the respondents that factually the term sheet was executed in the form of MOU and due diligence as stipulated in the agreement was completed and it is only thereafter that accused No. 3 started participating in the Board meetings of complainant No. 2 which fact can be supported on the basis of record of the complainants. While referring to the admission made by TCCL, petitioners-accused No. 1 that it is a company

in which Telstra Holds 47.1% shares, the clear nexus between accused No. 1 and accused No. 4 is spelled out on record and it is because of the collusion between accused Nos. 1 and 4 and its officers that the fraud and cheating was committed upon the complainants. According to the respondents the privity of contract between the parties had come into being on the basis of execution of points of agreement dated 2nd December, 1998 which was signed and executed by Daryll Smith, accused No. 5 who was the Director of accused No. 4. He had also represented accused No. 1 petitioner and accused No. 4 because they were interested in buying 100% share holdings of the complainant company and it is because of the assurance extended by accused No. 5 that the documents came to be executed between the parties. Reference was also made to the several letters produced on record notice of which had been taken by the Chief Judicial Magistrate, Gurgaon in the summoning order to support the stand taken by the respondent-complainants. On the basis of these circumstances, counsel representing the respondents prayed for the rejection of the petitions filed by the petitioner-accused.

(14) At this stage, it would be appropriate to notice the parameters which have to be kept in view while exercising the jurisdiction for quashing the complaint and summoning order passed against the accused. The Apex Court in catena of cases has explained that the revisional or inherent powers of quashing the proceedings at the initial stage should be exercised sparingly and only where allegations made in the complaint or in the FIR, even taken at their face value and accepted in entirety, do not prima facie disclose the commission of offence. The disputed and controversial facts cannot be made the basis for the exercise of such jurisdiction.

(15) In ***R.P. Kapur*** v. ***State of Punjab (1)*** it was laid down as under :—

> "It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to

(1) AIR 1960 S.C. 866

interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indict some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceedings in question is in respect of an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings the High Court would be justified in quashing the proceedings on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of the cases in which the inherent jurisdiction of High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there

is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an inquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under Section 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point."

(16) The above judgment was followed in ***Hazari Lal Gupta*** v. ***Rameshwar Prasad (2), State of Karnataka*** v. ***L. Muniswamy, (3) State of Haryana*** v. ***Bhajan Lal, (4)*** The last case laid some of the guide-lines for the Courts in this regard and the same are as under:—

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(2) AIR 1972 SC 484
(3) AIR 1977 SC 1489
(4) AIR 1992 SC 604

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provisions in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

(17) The principles enunciated in the above mentioned cases have also been followed in ***Rupan Deol Bajal*** v. ***Kanwar Pal Singh Gill, (5) Rajesh Bajaj*** v. ***State NCT of Delhi, (6) State of Kerala*** v. ***O.C. Kuttan, (7) P.S. Rajya*** v. ***State of Bihar, (8) State of Orissa*** v. ***Bansidhar Singh, (9)***

(5) 1995 SCC (Crl.) 1059
(6) 1999 SCC (Crl.) 401
(7) 1999 SCC (Crl.) 304
(8) 1996 SCC (Crl.) 897
(9) 1996 SCC (Crl.) 259

(18) Reference in this regard can also be made to ***State of Bihar*** v. ***Md. Khalique and another, (10) Kamladevi Agarwal*** v. ***State of W.B. and others (11), M. Krishnan*** v. ***Vijay Singh and another, (12) Dinesh Dutt Joshi*** v. ***State of Rajasthan, (13) M.N. Damani*** v. ***S.K. Sinha and others (14) Om Wati (Smt.) and another*** v. ***State Through Delhi Admn. and others, (15) Lalmuni Devi (Smt.)*** v. ***State of Bihar and others, (16) Maratt Rubber Limited*** v. ***J.K. Marattukalam, (17) Prudential Capital Mkt. Limited and another*** v. ***State of Bihar and others, (18) Mahavir Prashad Gupta and another*** v. ***State of National Capital Territory of Delhi and others, (19) Medchl Chemicals & Pharm (P) Ltd.*** v. ***Biological E. Ltd. and others, (20) and Trisuns Chemical Industry*** v. ***Rajesh Agarwal and others, (21).***

(19) Further reference may be made to ***Hridaya Ranjan Prasad Verma and others*** v. ***State of Bihar and anothers, (22), Alphic Finance Limited*** v. ***P. Sadashivan (23) G. Sagar Suri*** v. ***State of Uttar Pradesh and others, (24) Sunil Kumar*** v. ***Escorts Yamaha and others, (25), Madhavrao Scindia and others*** v. ***Sambhajirao Angre and others, (26) Manju Gupta*** v. ***M.S. Paintal (27), Ashok Chaturbedi and others*** v. ***Shitul H. Chanchani (28), Pepsi Foods Limited and another*** v. ***Sepcial Judicial Magistrate & others (29), Punjab Anand Lamp Industries Limited*** v. ***Asahi Video Private Limited (30), M/s Kunstocom Electronics (I) Private Limited*** v. ***Gilt Pack Limited and another (31), and State of Karnataka*** v. ***Muniswamy (supra).***

(20) In the above mentioned cases taking into consideration the facts brought before the court, the discernible principle which has been emphasised appears to be that the nature and scope of civil and

(10) (2002) 1 SCC 652
(11) (2002) 1 SCC 555
(12) (2002) SCC (Crl.) 19
(13) (2002) SCC (Crl.) 24
(14) (2001) 5 SCC 156
(15) (2001) 4 SCC 333
(16) (2001) 2 SCC 17
(17) (2000) 9 SCC 547
(18) (2000) 9 SCC 539
(19) (2000) 8 SCC 115
(20) (2000) 3 SCC 269
(21) (1999)8 SCC 686
(22) AIR 2000 SC 2341
(23) JT 2001(2) SC 588
(24) JT 2000(1) SC 360
(25) 1999 SCC (Crl.) 1466
(26) AIR 1988 SC 709
(27) AIR 1982 SC 1181
(28) AIR 1982 SC 2796
(29) AIR 1998 SC 128
(30) 1999 (1) RCR (Crl.) 601
(31) JT 2000(1) SC 268

criminal proceedings and standard of proof required in matters is different and distinct which has to be kept in view even at the stage where prayer for quashing of FIR and summoning order is made. Though the power vested in the Court is to be exercised sparingly in exceptional and rarest of rare cases, at the same time, the Court will not allow criminal prosecution where the facts disclosed do not warrant such a recourse as continuing of such criminal proceedings would tantamount to abuse of the process of the Court. It is for that reason that it has been reiterated in the above mentioned cases that where the matter is essentially of civil nature but has been given a cloak of criminal offence, the Court will not permit the complainant to misuse the process of criminal Court as remedies available in law. It is for that reason it has been insisted upon the Court that before issuing a process it has to exercise a great caution because prosecution of a person is serious matter as has been highlighted in ***Pepsi Foods Limited and another*** v. ***Special Judicial Magistrate and others (supra).*** The pertinent observations made in the above mentioned case are contained in para 28 of the judgment which read as under :—

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

(21) At this stage notice has also to be taken of the observations of the Apex Court in ***Nagawwa*** v. ***Veeranna Shivalingappa Konjalgi, (32),*** wherein it was held that order of Magistrate issuing process against the accused could be quashed under the following circumstances :—

> "(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused :
>
> (2) Where the allegations made in the complaint are patently absured and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused :
>
> (3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible ; and
>
> (4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

(22) While taking notice of the position of law explained in the above mentioned cases, one patent fact which has to be kept in mind is that basically the controversy has to be decided on the basis of facts and circumstances of this case because they are the real basis which would enable that Court to settle the controversy which has arisen between parties.

(23) The petitioners are being sought to be prosecuted under Sections 415, 420, 406, 120-B read with Section 34 I.P.C., it is prefatory necessary to notice the essential ingredients of these offences. In this

(32) 1976 SCC (Crl.) 507

regard discussion contained in para 13 to 15 of the judgment in ***Hridaya Ranjab Prasad Verma and others*** v. ***State of Bihar and another*** (supra) needs to be referred to. It was stated therein as under :—

"13. Cheating is defined in Section 415 of the Code as :

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section."

The section requires—

(1) deception of any person :

(2) (a) fraudulently or dishonestly inducing that person

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property ; or

(b) intentionally inducing that person to do or omit to do anything which he would do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing

or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

(24) In ***G.V. Rao*** v. ***L.H.V. Prasad and others (33),*** in para 7, it was stated by the Apex Court as under :—

"As mentioned above, Section 415 has two parts. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property : in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in Jaswantrai Manilal Akhaney v. State of Bombay, AIR 1956 SC 575 a gulity intention is an essential ingredient of the offence of cheating. In

(33) 2000(2) RCR (Crl.) 290 (SC)

order, therefore, to secure conviction of a person for the offence of cheating, "mens rea' on the part of that person, must be established. It was also observed in Mahadeo Prasad v. State of of W.B., AIR 1954 SC 724 that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered."

(25) After having noticed the position of law, the facts of the case have to be evaluated even at the risk of repetition so as to arrive at the core of the controversy on the basis of respective stands taken by the parties. The admitted facts in this case are that TVCL, accused No. 1 is a company in which Telstra registered under the laws of Australia holds 47.1% shares. In addition Videsh Sanchar Nigam Ltd. holds 33.3 % shares and the balance 19.6% are held by Infrastructure Leasing and Financial Services Ltd. The latter two shareholders are companies incorporated under the provisions of the Companies Act, 1956. It is also not disputed by the parties that complainant No. 1 RPG Telephones Limited and TVCL are both licensed providers of VSAT Service in India. Therefore, they are fully aware with regard to the contractual obligations which they had with the Department of Telecommunications, Ministry of Comunication, Complainant No.-1 company holds 100% shares of complainant No.2-company and is beneficial owners of said shares. For this reason complainant No. 1 is holding company of complainant No. 2. The complainants had admitted in the complaint that in terms of the licence granted to it by the Department of Telecommunications, Ministry of Communication, New Delhi, it could not sub-licence use of transponder to any other body in any manner. It means that the complainant itself had violated negotiate with accused No. 1 through accused Nos. 4 and 5 as stated in the complainat. For the transfer of 100% of the issued shares capital @ Rs. 7.40 per share of complainant No. 2 held by complainant No. 1, on being approached by them somewhere in the month of September/October, 1988 it is admitted by the complainants that various discussions took place between the parties and it is only after joint assurance to the representative of the complainants was given on behalf of the above referred accused that it was agreed that the accused shall purchase equity shares of complainant No. 2 held by complainant No. 1. It is thereafter on 2nd December, 1998 a formal document was executed between them and accused No. 5 acting

through and for accused Nos. 1 and 4 companies which was termed as points of agreement. As per stand of the complainants, the time frame of the acquisition was required to be completed within 115 days. The complainant-company was to be taken over by accused No. 1 by 30th April, 1999. The mode of payment was also specified in this document that modalities of acquisition of the shares of the complainants were settled. Under this document no rights whatsoever of the complainant in the transponder licensed to it were factually transferred on the date of agreement. Terming this document having procured by the accused on the basis of criminal conspiracy and misrepresentation on their part appears to be without any foundation. There was no term in the agreement dated 2nd December, 1998 that the complainant shall allow the accused the use of transponder space in May, 1999. Rather, specific reference was made to the due diligence to be handled by the Chartered Accountant specified therein and the sharing of resources and technical network was to be taken place on signing of the term sheet and thereafter nominee of accused No. 1 was required to attend the Board meeting of the complainants. It is not the case of the complainants that any term sheet was signed by the accused within the stipulated period. Rather, the definite case of the complainants is that till November 1999 it was maintained by the accused that no formalities have been completed by them which factual position was not disputed by the complainants though inaction of the accused was termed as an act of hoodwinking on the part of the accused which was purposely done in order to create false impression on the complainants that they would complete the same. This delay on the part of the accused was termed to have been done in order to cheat the complainants. Above stated facts clearly indicated to the respondents that the accused had not completed necessary requisite formalities within 115 days stated in the terms of agreement. Still it approached the accused in November 1999 when the complainants were required to pay licence fee to the Department of Telecommunications asking accused No. 1 to make the payment of the demands made by the complainants, had called upon the complainants to sign the MOU on 15th November, 1999 and it is therafter MOU came to be signed between accused No. 1 and the complainants on that day. This document was not signed by Telstra or its Directors. In MOU dated 15th November, 1999 RPG Telephones Limited has been described for short as "RPG" and RPG Satellite Communication

Limited has been described as "Company" and Telstra Vishesh Communication Limited as "V-Comm."

(26) Reading of the terms of MOU would clearly spell out that the parties had intended to negotiate the proposed transaction referred to in clause 2. Under clause 2, the transaction related to the sale and transfer by RPG to V-Comm. of share constituting 100% of the issued shares of the company. It was also agreed between the parties that V. Comm.'s obligation to purchase any such shares would be contingent upon its purchase of all such shares. The purchase price of the shares was expected to be R. 70 million being Rs. 5 per share as stated in Clause 4 of the agreement. Under Clause 4. A2 RPG was required to demonstrate within 7 days of execution of the MOU to V-Comm. its satisfaction that Rs. 10,55,000 has been paid by RPG o n behalf of the Company to DOT together with the penality interest of Rs. 14,61,695.00. It was further mentioned in this agreement that the Company shall execute Network Services Agreement and if it was done within 7 days then V-Comm. shall promptly pay DOT on behalf of the Company Rs. 1,22,59,603.00 which included the licence fee of Rs. 31,67,603.00 and space segment charges of Rs. 90,92,000.00 which was due by the Company to DOT. Under Clause 4.A, it was provided that an amount of Rs. 25,88,581.00 form the part of payment relating to the amounts payable by the Company to DOT for the period July 1999 shall be deemed to constitute a deposit under the share purchase agreement and part payment of the total amount of Rs. 96,71,022.00 forming part of the payment constitutes a loan by V-Comm. to the Company to meet certain of its obligations to DOT (but not in respect of penality interest) for the period prior to 1st July, 1999 until the date of execution of the share purchase agreement. In relation to the satisfactory due diligence as stated in clause 5.1 (c), RPG and the Company had permitted the conduct of customary and such due diligence was to be completed to the satisfaction of V-Comm. The closing of the transaction contemplated under this agreement intended to be on or before 28th February, 2000. Conditions of purchase agreement had been specified in clause 5.2. It would be appropriate to refer to the obligation cast upon the V-Comm. under clause 6 of the agreement which reads as under :-

"Due Diligence :-

6.1 The Company will permit V-Comm. and the financial, legal and other advisers of V-Comm. to carry out

technical, financial and legal due diligence investigations of the Company, its results and its operations, including without limitation investigations of licenses, contracts, books and records, physical plant, results of operations and tax matters and the validation of the value of the assets and liabilities of the Company as on 30th June, 1999 and 30th September, 1999 and the revence streams on the installed base of Vsats as on the date.

6.2 The Company will make available to V-Comm. advisers such records and materials, make available for discussions such senior and other personnel of the Company, its external auditors and its external legal counsel, and make accessible such of the Company's physical plant, as any of them may reasonably request.

6.3. V-Comm. will endeavour to complete its due diligence exercise by 31st January 2000.

6.4. Within 14 days of completion of its due diligence, V-Comm. will by notice advice RPG whether or not it intends to proceed with the proposed transaction. If V-Comm. intends to proceed with the transaction it shall in that notice either confirm or revise the expected purchase price for the Shares. If V-Comm. notifies RPG that it does not wish to proceed then this MOU shall terminate, provided that this clause 6 together with clauses 4A, 9, 10.1(e), 11, 12,14 and 15 shall survive termination.

6.5 If V-Comm. notifies RPG of a revised purchase price for the Shares and RPG does not accept that revised price and V-Comm. and RPG fail to reach agreement on a revised price within 15 days then either V-Comm. or RPG by notice to the other may terminate this MOU provided that this clause 6 together with clauses 4A, 9, 10.1(e), 11,12, 14 and 15 shall survive termination.

6.6. V-Comm. undertakes to keep confidential of confidential information disclosed to V-Comm. as part of the due diligence.

6.7. Nothing in clause 6.6 prevents V-Comm. disclosing any confidential information to its advisers, shareholders and their employees and advisers subject to compliance with the existing confidentiality agreement executed between the Company and V-Comm." Clauses 7 and 15 further provide as under :-

"7. Employees :

7.1. The list of company employees that V-Comm. wishes to retain is enclosed in Annexure 2. Pending completion of any sale of the Shares : (i) the Company shall use best endeavours to continue to keep these persons in its employ pending completion of any sale of the Shares ; (ii) the Shareholders shall procure that the company terminate its other employees on terms acceptable to V-Comm. and the Shareholders shall indemnify and keep indemnified the Company V-Comm. against all claims that may be made by such employees.

xx xx xx xx xx xx

15. No Binding Obligation :

15.1. Except for the provisions of clauses 3, 4A, 7, 8, 9, 10, 11, 12 and 15 this MOU does not constitute or create, and shall not be deemed to constitute or create, any legal binding or enforceable obligation on the part of any party. No such obligation shall be created, except by the execution and delivery of the agreements referred to the clause 5 containing such terms and conditions of the proposed transaction as may be agreed upon by the parties, and then only in accordance with the terms and conditions of such agreements."

(27) It is clear from the Network Services Agreement which came to be executed between the parties on 15th November, 1999 that the parties have specifically indicated conditions precedent as 1A.1 whereby all prior contracts, arrangements and understandings made between the parties in or in relation to the provision of Network

Services (as defined in clause 1B.) shall terminate on the commencement date. The clauses 2.1, 2.2, 3.1 and 3.2 of this agreement are in following terms :-

"2. **Consideration**

2.1. Subject to provisions of clause 22, V-Comm. shall pay RPG an amount of Rs.0.85 million per month (the "Monthly Payment") for the duration of this Agreement. The Monthly Payment is Payable in advance.

2.2 Pursuant to the Prior Contracts, V-Comm. paid Rs. 3.03 million of which RPG acknowledges that Rs. 0.5.11 million ("Outstanding Amount") is now refundable by RPG to V-Comm. (due to the early termination of the Prior Contracts pursuant to this Agreement). Further on and subject to the terms of the MOU 9 as defined in Clause 3.1), V-Comm. will pay the department of Telecommmunications ("DOT") Rs. 1,22,39,603.00 which amount shall on payment (in accordance with the terms of the MOU constitute a deposit for that amount ("Deposit"). The deposit and the Outstanding amount may, at V-Comm's option be set off against the Monthly Payment to be paid by V-Comm. from the commencement Date. Provided that if V-Comm. exercise this option the parties acknowledge that the Outstanding Amount shall be treated as being set off first and the Deposit shall only be set off when the Outstanding Amount has been fully set off.

xx xx xx xx xx

3. Term and Termination

3.1 This Agreement shall continue in force until the earlier of completion under any Share Purchase Agreement (as contemplated by the MOU) or the outstanding Amount and the Deposit have been fully set off from the Monthly Payments pursuant to clause 2 unless sooner terminated in accordance with its terms.

3.2 V-Comm. may terminate this Agreement at any time on 2 days notice with or without cause. On such termination, RPG shall immediately refund to V-Comm. the total of :

(a) the deposit and the Outstanding amount less any Monthly Payments which have been deducted from the Deposit and the Outstanding Amount pursuant to clause 2.2; and

(b) Monthly Payments for months in which the Network Services have not been performed to the satisfaction of V-Comm."

Another agreement to which no reference was made in the complaint and the summoning order is the Corporate Guarantee executed between RPG, the Company and the V-Comm. The reason for this guarantee are clearly spelled out as under :—

"1. RPG and V-Comm. have entered into a Memorandum of Understanding and Network Services Agreement each dated 15th November, 1999 in realtion to certain transactions contained therein in relation to the Company which is a wholly owned subsidiary of RPG; V-Comm. has, at RPG's request, agreed to pay an amount of Rs. 1,22,59,603.00 (the "Amount" due to the Department of Telecommunications from the Company) ;

2. In consideration of V-Comm. making such payment, RPG, has agreed to unconditionally and irrevocably guarantee all amounts paid by V-Comm. to DOT for the company ;"

(28) The need for detailed reference to the terms of the above stated documents has arisen because during the course of arguments, counsel representing the respondents-complainants urged that the documents subsequent to the execution of the points of agreement did not in any manner vary and substitute the terms agreed between the parties in the points of agreement. This submission on the face of record is not supportable by the various recitals referred to above in

the Memo of Understanding, Network Services Agreement and Corporate Guarantee. Clause 5 of MOU referred to above in no uncertain terms provided that the condition, precedent for the take over provided that the condition, precedent for the take over was completion of due diligence to the satisfaction of accused No. 1. It is for that reason in clause 5.2 of MOU it is stated that any purchase agreement would itself be subject to the satisfaction of various conditions precedent including the approval of the Board and share holders of accused No. 1 as well as Board of Telstra corporation Limited. Clause 1.5 of the MOU further provides that except for the provisions of Clause 3, 4A, 7, 8, 9, 10, 11, 12 and 15, other terms of MOU do not constitute or create nor shall be deemed to constitute or create any legally binding or enforceable obligation on any party. Therefore, according to the terms of the MOU, the parties had decided to proceed with the proposed transaction to be specified in Network Services Agreement. Even in the Network Service Agreement, it was specifically stated that "All prior contracts, arrangements and understandings made between the parties in relations to the provisions of such NSA terminate on the commencement day, "As certain services consisting of access to transponder, meeting to be attended by the constituted representatives of accused No. 2 and certain restrictions of employment of employees and expansion of network of the complainants were imposed under this agreement, Accused No. 1 had agreed to pay Rs. 0.585 million per month to complainant No. 1. Accused No. 1 had also agreed to pay Rs. 25,88,581 to DOT on behalf of accused No. 1 which was to constitute as deposit to set off against the monthly payment. The complainants had expressly agreed by executing a Corporate Guarantee in favour of accused No. 1 to pay amount owned by complainant No. 2 to the petitioners upto an amount of Rs. 1,22,59,603. It is definite case of the accused that due diligence was not completed and period had been extended upto March 2000 by the complainants themselves on the request made on behalf of the accused as is clearly spelled out from the documents placed on record. The breaking point as is manifest from the record is that in March 2000, complainant No. 2 was required to pay DOT charge amounting to Rs. 140.13 lacs. Instead to making the payment, complainant No. 2 called upon the accused to arrange for the said payment on the plea that they were

utilising the entire services of the transponder space which commitment was not agreed to by the accused because decision for acquisition had not been taken by then by the Board of Directors of accused No. 1. No doubt, accused No. 1 had intimated to the complainants in April 2000 that they should cooperate with them. The complainants were also informed that they should continue to provide Telstra V-Comm. 'the Network Services Agreement till the nominal service charges are completely set off against the sum of Rs. 1,22,59,603 paid by accused No. 1 to DOT on behalf of the complainants. The matter continued to linger on till August 2000 when further demand of Rs. 2,43,53,046 was made by the complainants from accused No. 1 towards the transponder fee and licence fee for the period accused No. 1 had been using the transponder facility. The accused informed in reply that the demand of Rs. 2,43,53,046 towards the cost of transponder and licence fee had to be paid by the complainants. No clause as such could be pointed out in any of the agreements referred to above including the Network Service agreement whereby it could be stated that accused had agreed to incur the liability of transponder space and licence fee due from the complainants towards DOT. In fact, the doucments produced on record clearly indicate that no such document whereby accused had taken over the company of the complainants had come into existence and it is that reason complainants of its own volition terminated the agreement between the parties by telegram dated 26th November, 2000 (Annexure-P. 10).

(29) From the documents and the evidence adduced on record, it cannot be doubted that whatever facility had been extended from the side of the complainants to the accused that was for consideration in terms of the Network Services Agreement agreed between the parties as an interim measure and question of misappropriation sought to be built up on behalf of the complainants and cheating is not supported by the material on record. Rather, the complainants had themselves entered into the Corporate Guarantee which totally nullifies the stand taken on behalf of the complainants. It is not prima facie made out that the accused had induced the complainants with dishonest and fradulent intention to enter into agreements with the complainants. It is clearly brought out on record that civil dispute has been sought

to be given the colour of criminality by the complainants so as to prosecute them under Sections 406, 420 and 120-B read with Section 34 I.P.C. The filing of the complaint and summoning order passed by the Chief Judicial Magistrate is on the face of record is misuse of the process of the Court.

(30) Consequently, I accept the petitions and quash the complaint and the summoning order dated 22nd May, 2001 passed against the petitioners-accused.

J.S.T.

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