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REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1269-1270 OF 2021
(Arising out of SLP(Criminal) No.252-253/2020)

Sripati Singh (since deceased) Through His Son Gaurav Singh ....Appellant(s)

Versus

The State of Jharkhand & Anr. .... Respondent(s)

JUDGMENT

A.S. Bopanna,J.

1. The appellant is before this Court assailing the order dated 17.12.2019 passed by the High Court of Jharkhand at Ranchi in Criminal M.P. No.2635 of 2017 and Criminal M.P. No.2655 of 2017. Through the said order, the High Court has allowed the said Crl.Miscellaneous Petitions and has set aside the orders dated 04.07.2016 and 13.06.2019 passed by the Judicial Magistrate First Class, Palamau in Complaint Case No.1833 of 2015. The learned Judicial Magistrate by the order dated 04.07.2016 had taken

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cognizance of the offence alleged against the respondent No.2 herein. By the order dated 13.06.2019 the learned Judicial Magistrate had rejected the petition filed by the respondent No.2 seeking discharge in the said criminal complaint.

2. The brief facts leading to the present case as pleaded is that the appellant and the respondent No.2 are known to each other inasmuch as the respondent No.2 and the daughter of the appellant were pursuing their education together in London. On their return to India, the respondent No.2 had settled in Bangalore and due to the earlier acquaintance, the cordial relationship amongst the families had continued. The respondent No.2 on learning that the appellant was involved in business, had approached him at Daltonganj and sought financial assistance to the tune of Rs.1 crore so as to enable the respondent No.2 to invest the same in his business. Since the respondent No.2 had assured that the same would be returned, the appellant placed trust in him and the appellant claims to have advanced further sum and in all a

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total sum of Rs.2 crores during the periods between January 2014 to July 2014. The said amount was paid to respondent No.2 by transferring from the account of appellant's daughter and also from the account of the appellant. Towards the said transaction, four agreements are stated to have been entered acknowledging the receipt of the loan. The said agreements were reduced into writing on non-judicial stamp papers bearing No. B489155, B489156, B489157 and B489159.

3. The respondent No.2 assured that the amount would be returned during June/July 2015. Towards the same, three cheques amounting to Rs.1 crore was handed over to the appellant. Thereafter, three more cheques for Rs.1 crore was also given. The appellant is stated to have met respondent No.2 during July 2015 when the respondent No.2 assured that the amount will be repaid during October 2015. Based on such assurance, the appellant presented

the cheques for realisation on 20.10.2015. On presentation, the said cheques were returned due to 'insufficient funds' in the bank account of respondent No.2.

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The appellant therefore got issued a legal notice as contemplated under Section 138 of the Negotiable Instruments Act ("N.I. Act" for short). Since the respondent No.2 had taken the money on the assurance that the same would be returned but had deceived the appellant, the appellant contended that the respondent No.2 had cheated him and accordingly the complaint was filed both under Section 420 of IPC as also Section 138 of N.I. Act. The appellant had submitted the sworn statement of himself and witnesses. The learned Judicial Magistrate through the order dated 04.07.2016 took cognizance and issued summons to the respondent No.2.

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4. The respondent No.2 on appearance filed a miscellaneous petition seeking discharge from the criminal proceeding, which was rejected by the order dated 13.06.2019. It is in that background, the respondent No.2 claiming to be aggrieved by the order dated 04.07.2016 and 13.06.2019 approached the High Court in the said criminal miscellaneous petitions. The High Court, through the impugned order has allowed the petitions filed by the

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respondent No.2. The appellant therefore claiming to be aggrieved is before this Court in these appeals.

5. We have heard Mr. M.C. Dhingra, learned counsel for the appellant, Mr. Raj Kishor Choudhary, learned counsel for the respondent No.1, Mr. Keshav Murthy, learned counsel for respondent No.2 and perused the appeal papers.

6. The learned counsel for the appellant would contend that the respondent No.2 taking advantage of the acquaintance with the family of the appellant, had borrowed the amount which was to be repaid and the cheque issued was towards discharge of the said amount. In the said circumstance, when the cheques issued was for discharge of the legally recoverable debt and it had been dishonoured, the provisions of Section 138 of N.I. Act would get attracted. Therefore, the complaint filed by the appellant is in accordance with law. It is his further contention that in the present case since respondent No.2 had gained the confidence of the appellant due to the acquaintance with his daughter and in that circumstance

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when the amounts which had been taken by him earlier had been repaid so as to gain the confidence and having received substantial amount had at that stage not made arrangement for sufficient funds in the bank despite having issued the cheques to assure payment, the same would amount to the respondent No.2 cheating the appellant by design and therefore would attract Section 420 IPC. It is contended that towards the amount received, the same had been acknowledged by subscribing the signature to the loan agreement. Further, when there was an undertaking to repay the same, the cheque was issued towards such discharge of legally recoverable debt and the cheque on presentation after the agreed due date for repayment of the loan was dishonoured, the same would constitute an offence. In that regard, it is contended that the learned Judicial Magistrate having taken note of the complaint and the sworn statements recorded by the appellant and his witnesses had taken cognizance and issued summons. In such event, the order passed by the learned Judicial Magistrate for taking cognizance and also to reject the discharge petition filed by the respondent No.2 was in

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accordance with law. It is contended that the learned Judge of the High Court had in fact committed an error in arriving at the conclusion that the cheque issued by the respondent No.2 was towards 'security' and that the same could not have been treated as a cheque issued towards the discharge of legally recoverable debt. It is contended that the learned Judge has proceeded at a tangent and committed an error and as such the order passed by the High Court calls for interference.

7. To contend that the cheque issued towards discharge of the loan and presented for recovery of the same cannot be construed as issued for 'security' has relied on the decision of this Court in the case of ***Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Ltd***., (Criminal Appeal No.867 of 2016) and in ***M/s Womb Laboratory Pvt. Ltd. vs. Vijay Ahuja and Anr***. (Criminal Appeal No.1382-1383 of 2019). Hence, it is contended that the observation contained in the order of the High Court that a cheque issued towards security cannot attract the provision of Section 138 of N.I.

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Act is erroneous and the reference made by the High Court to the decision in ***Sudhir Kr. Bhalla vs. Jagdish Chand and Others*** 2008 7 SCC 137 is without basis. The learned counsel therefore contends that the order passed by the High Court is liable to be set aside and the criminal complaint be restored to file to be proceeded in accordance with law.

8. Mr. Keshav Murthy, learned counsel for respondent No.2 would contend that the learned Judicial Magistrate without application of mind to the fact situation had taken cognizance and issued summons and had not appropriately considered the case put forth by the respondent No.2 seeking discharge. He would contend that the High Court on the other hand, has taken note of the entire gamut of the case and has arrived at the conclusion that the offence alleged both under Section 420 IPC and Section 138 of the N.I. Act has not been made out. It is contended that the claim for the sum of Rs. 2 crores as made in the complaint is without basis. It is his case that the respondent No.2 has issued a comprehensive reply disputing the claim put forth

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by the appellant. It is contended that from the very complaint and the statement of witnesses recorded by the learned Judicial Magistrate it is evident that no criminal offence is made out in the instant case. Even if the case as put forth in the complaint is taken note, at best the transaction can be considered as an advancement of loan for business purpose and even if it is assumed that the said amount was not repaid it would only give rise to civil liability and the appellants could have only filed a civil suit for recovery of the loan. The statement of the witnesses, more particularly the daughter of the complainant would indicate the long-standing relationship between the parties and also the monetary transaction which in any event does not constitute a criminal offence. It is contended that under any circumstance, the offence as alleged under Section 420 of IPC cannot be sustained. Insofar as the offence alleged against the respondent No.2 under section 138 of N.I. Act, the same would also not be sustainable when the complainant himself has relied on the loan agreement wherein reference is made to the cheque being issued as security for the loan. The learned counsel contends that the

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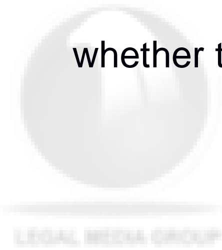
High Court in fact has taken note of these aspects, proceeded in its correct perspective and has arrived at a just conclusion, which does not call for interference. He therefore, contends that the above appeals be dismissed.

9. In the light of the rival contentions, a perusal of the appeal papers would disclose that it is the very case of the appellant that he has advanced substantial amount of Rs. 2 crores to the respondent No.2 by way of financial assistance for business purpose. While taking note of the nature of the transaction and also the proceedings initiated, it is necessary for us to remain conscious of the fact that the proceedings between the parties is at the preliminary stage and any conclusive findings rendered in relation to the dispute between the parties would affect their case if ultimately the appellants were to succeed herein and the criminal proceedings are to be restored for further progress. Therefore, what is necessary to be examined herein is, as to whether the appellant has *prima facie* established a transaction under which there is a legally recoverable debt payable to the appellant by the

respondent No.2 and as to whether the cheques in question relating to which the complaint has been filed by the appellant is issued towards discharge of such legally recoverable debt. In that regard, what is necessary to be considered is also as to whether the cheques in question are still to be considered only as 'security' for the said amount and whether it was not liable to be presented for recovery of the legally recoverable debt. The question which would also arise for consideration is as to whether the complaint filed by the appellant should be limited to a proceeding under Section 138 of N.I. Act or on the facts involved, whether the invoking of Section 420 IPC was also justified.



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10. While considering the above aspects, it is evident that the learned Magistrate having referred to the complaint and sworn statement of the complainant and the witnesses has taken cognizance, issued summons and has consequently arrived at the conclusion that the discharge as sought by the respondent No.2 cannot be accepted. The High Court on the other hand having referred to the rival

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contentions has concluded as follows:-

> “20. From the aforesaid facts and from the documents of the complainant, this Court finds that long standing 'business transaction and inability of refunding a loan has been given a colour of criminal offence of cheating punishable under Section 420 of the Indian Penal Code. A breach of trust with *mens rea* gives rise to a criminal prosecution. In this case when I go through the evidence before charge of the complainant and the documents of the complainant, I find that there were long standing business transactions between the parties. Since 2011 money was advanced by the complainant and his family members to the accused and the complainant witness admits that money was also transferred from the account of the accused to the account of daughter of the complainant. From the evidence, I find that there is no material to suggest existence of any *mens rea*. Thus, this case becomes a case of simplicitor case of non-refunding of loan, which cannot be a basis for initiating criminal proceeding. The Hon'ble Supreme Court in the case of Samir Sahay alias Sameer Sahay versus State of UP & Anr. reported in (2018) 14 SCC 233 held that when the dispute between the parties was ordinarily a civil dispute resulting from a breach of contract on the part of the appellant by non- refunding of amount advanced, the same would not constitute an offence of cheating. In this case also, I find that it is true case that the amount of loan has not been refunded, thus, this cannot come within the purview of cheating, though the complainant by suppressing the material facts, has tried to give a different colour. Thus, I find that no case punishable under Section 420 of the Indian Penal Code can be made out in this case.
>
> 21. Further, I find that it is the documents of the complainant, which show that the cheques were given by way of security. Even if I do not believe the statement of the accused, the documents of the complainant cannot be brushed aside. As held earlier, supported by the decision of the Hon'ble Supreme Court in the case of "Sudhir Kumar Bhalla" (supra) a cheque given by way of security cannot attract Section 138 of the Negotiable Instruments Act. Since

> the cheques were given by way of security, which is evident from the complainant's documents (though this fact has also been suppressed in the complaint petition), I find that Section 138 of the Negotiable Instruments Act is also not attracted in this case."

11. In the background of what has been taken note by us and the conclusion reached by the High Court, insofar as the High Court arriving at the conclusion that no case punishable under Section 420 IPC can be made out in these facts, we are in agreement with such conclusion. This is due to the fact that even as per the case of the appellant the amount advanced by the appellant is towards the business transaction and a loan agreement had been entered into between the parties. Under the loan agreement, the period for repayment was agreed and the cheque had been issued to ensure repayment. It is no doubt true that the cheques when presented for realisation were dishonoured. The mere dishonourment of the cheque cannot be construed as an act on the part of the respondent No.2 with a deliberate intention to cheat and the *mens rea* in that regard cannot be gathered from the point the amount had been received. In the present facts and circumstances, there is no sufficient evidence to

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indicate the offence under Section 420 IPC is made out and therefore on that aspect, we see no reason to interfere with the conclusion reached by the High Court.

12. Having arrived at the above conclusion and also having taken note of the conclusion reached by the High Court as extracted above, it is noted that the High Court has itself arrived at the conclusion that the instant case becomes a simpliciter case of non-refunding of loan which cannot be a basis for initiating criminal proceedings. The conclusion to the extent of holding that it would not constitute an offence of cheating, as already indicated above would be justified. However, when the High Court itself has accepted the fact that it is a case of non- refunding of the loan amount, the first aspect that there is a legally recoverable debt from the respondent No.2 to the appellant is prima-facie established. The only question that therefore needs consideration at our hands is as to whether the contention put-forth on behalf of respondent No.2 that an offence under Section 138 of the N.I. Act is not made out as the dishonourment alleged is of the cheques which were issued by way of 'security' and not towards discharge of any

debt.

13. In order to consider this aspect of the matter we have at the outset taken note of the four loan agreements dated 13.08.2014 which is the subject matter herein. Under each of the agreements, the promise made by respondent No.2 is to pay the appellant a sum of Rs.50 lakhs. Thus, the total of which would amount to Rs.2 crores as contended by the appellant. Towards the promise to pay, the repayment agreed by the respondent No.2 is to clear the total amount within June/July 2015. Para 5 of the loan agreement indicates that six cheques have been issued as security. The claim of the appellant has been negated by the High Court only due to the fact that the agreement indicates that the cheques have been given by way of security and the complainant has also stated this fact in the complaint. Though the High Court has taken note of the decision in the case of ***Sudhir Kumar Bhalla*** (supra) to hold that the cheque issued as security cannot constitute an offence, the same in our opinion does not come to the aid of the respondent No.2. There is no categorical declaration by this

Court in the said case that the cheque issued as security cannot be presented for realisation under all circumstances. The facts in the said case relate to the cheques being issued and there being alterations made in the cheques towards which there was also a counter complaint filed by the drawer of the cheque. Hence, the said decision cannot be a precedent to answer the position in this case and the High Court was not justified in placing reliance on the same.

14. In fact, it would be apposite to take note of the decision of this Court in the case of ***Sampelly Satyanarayana Rao*** (supra) wherein this Court while answering the issue as to what constitutes a legally enforceable debt or other liability as contained in the Explanation 2 to Section 138 of N.I. Act has held as hereunder:-

> “10. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways (supra) with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act.
> ***We are of the view that the question whether a post-dated cheque is for "discharge of debt or***

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liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

11. Reference to the facts of the present case clearly shows that though the word "security" is used in Clause 3.I (iii) of the agreement, the said expression refers to the cheques being towards repayment of instalments. The repayment becomes due under the agreement, the moment the loan is advanced and the instalment falls due. ***It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and instalments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly***

represent the outstanding liability.

12. Judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra), where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. ***Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan instalment which had fallen due though such deposit of cheques towards repayment' of instalments was***

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> ***also described as "security" in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.***
>
> 13. ***Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court."***
>
> (emphasis supplied)

The said conclusion was reached by this Court while distinguishing the decision of this Court in the case of ***Indus Airways Pvt. Ltd. Vs. Magnum Aviation Pvt. Ltd.*** (2014) 12 SCC 539 which was a case wherein the issue was of dishonour of post-dated cheque issued by way of advance payment against a purchase order that had arisen for consideration. In that circumstance, it was held that the same cannot be considered as a cheque issued towards discharge of legally enforceable debt.

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15. Further, this Court in the case of **M/s Womb *Laboratories Pvt. Ltd.*** (supra) has held as follows:-

> "5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved- that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques.
>
> 6. Suffice it to observe, the impugned judgment of the High Court cannot stand the test of judicial scrutiny. The same is, therefore, set aside."

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16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the

amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.

17. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan

due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a *sine qua non* to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for

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recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation.

18. If the above principle is kept in view, as already noted, under the loan agreement in question the respondent No.2 though had issued the cheques as security, he had also agreed to repay the amount during June/July 2015, the cheque which was held as security was presented for realization on 20.10.2015 which is after the period agreed for repayment of the loan amount and the loan advanced had already fallen due for payment. Therefore, prima facie the cheque which was taken as security had matured for payment and the appellant was entitled to present the same. On dishonour of such cheque the consequences contemplated under the Negotiable Instruments Act had befallen on respondent No.2. As indicated above, the respondent No.2 may have the defence in the proceedings which will be a matter for trial. In any event, the respondent No.2 in the fact situation cannot

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make a grievance with regard to the cognizance being taken by the learned Magistrate or the rejection of the petition seeking discharge at this stage.

19. In the background of the factual and legal position taken note supra, in the instant facts, the appellant cannot be non-suited for proceeding with the complaint filed under Section 138 of N.I. Act merely due to the fact that the cheques presented and dishonoured are shown to have been issued as security, as indicated in the loan agreement. In our opinion, such contention would arise only in a circumstance where the debt has not become recoverable and the cheque issued as security has not matured to be presented for recovery of the amount, if the due date agreed for payment of debt has not arrived. In the instant facts, as noted, the repayment as agreed by the respondent No.2 is during June/July 2015. The cheque has been presented by the appellant for realisation on 20.10.2015. As on the date of presentation of the cheque for realisation the repayment of the amount as agreed under the loan agreement had matured and the amount had become due and payable.

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Therefore, to contend that the cheque should be held as security even after the amount had become due and payable is not sustainable. Further, on the cheques being dishonoured the appellant had got issued a legal notice dated 21.11.2015 wherein inter-alia it has been stated as follows:-

> “You request to my client for loan and after accepting your word my client give you loan and advanced loan and against that you issue different cheque all together valued Rs. One crore and my client was also assured by you will clear the loan within June/July 2015 and after that on 26.10.2015 my client produce the cheque for encashment in H.D.F.C. Bank all cheque bearing No.402771 valued Rs. 25 Lakh, 402770 valued Rs.25 lakh, 402769 valued Rs. 50 lakh, (total rupees one crore) and above numbered cheques was returned with endorsement "In sufficient fund". Then my client feel that you have not fulfil the assurance.”

20. The notice as issued indicates that the appellant has at the very outset after the cheque was dishonoured, intimated the respondent no.2 that he had agreed to clear the loan by June/July 2015 after which the appellant had presented the cheque for encashment on 26.10.2015 and the assurance to repay has not been kept up.

21. In the above circumstance, the cheque though issued as security at the point when the loan was advanced, it was

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issued as an assurance to repay the amount after the debt becomes due for repayment. The loan was in subsistence when the cheque was issued and had become repayable during June/July 2015 and the cheque issued towards repayment was agreed to be presented thereafter. If the amount was not paid in any other mode before June/July 2015, it was incumbent on the respondent No.2 to arrange sufficient balance in the account to honour the cheque which was to be presented subsequent to June/July 2015.

22. These aspects would prima-facie indicate that there was a transaction between the parties towards which a legally recoverable debt was claimed by the appellant and the cheque issued by the respondent No.2 was presented. On such cheque being dishonoured, cause of action had arisen for issuing a notice and presenting the criminal complaint under Section 138 of N.I. Act on the payment not being made. The further defence as to whether the loan had been discharged as agreed by respondent No.2 and in that circumstance the cheque which had been issued as security had not remained live for payment subsequent

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thereto etc. at best can be a defence for the respondent No.2 to be put forth and to be established in the trial. In any event, it was not a case for the Court to either refuse to take cognizance or to discharge the respondent No.2 in the manner it has been done by the High Court. Therefore, though a criminal complaint under Section 420 IPC was not sustainable in the facts and circumstances of the instant case, the complaint under section 138 of the N.I Act was maintainable and all contentions and the defence were to be considered during the course of the trial.

23. In that view, the order dated 17.12.2019 passed by the High Court of Jharkhand in Cr.M.P No.2635 of 2017 with Cr.M.P No.2655 of 2017 are set aside. Consequently, the order dated 04.07.2016 and 13.06.2019 passed by the Judicial Magistrate are restored. The complaint bearing C.C. No.1839 of 2015 and 1833 of 2015 are restored to the file of the Judicial Magistrate, limited to the complaint under Section 138 of N.I. Act to be proceeded in accordance with law.

24. All contentions of the parties on merit are left open. We make it clear that none of the observations contained herein shall have a bearing on the main trial. The trial court shall independently arrive at its conclusion based on the evidence tendered before it.

25. The appeals are allowed in part with no order as to costs.

26. Pending application, if any, shall also stand disposed of.

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……………………J.
(M.R. SHAH)

……………………J.
(A.S. BOPANNA)

New Delhi,
October 28, 2021