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Tribute to the Former Attorney General of India and renowned Jurist Shri. Soli Sorabjee

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Articles invited for the next issue, interested candidates can mail your articles on advocacytmv@gmail.com

FOREWORD

Importance of Research in Legal Academia

In order to look for legal precedents and to obtain answers to various legal concerns, you should engage in legal research. If you want to determine whether a legal problem has precedent or not, it is crucial to conduct legal research. Almost all types of cases require some sort of legal research, which will most often aid in advancing the legal procedure.

There are two basic categories of generic legal information. The primary law, which focuses on precedent, rules, and statuses, comes first. Then there are the secondary sources, which do not have the same legal weight as the primary law. The explanation of legal theory and the fundamental laws is the main subject of this knowledge. More attention is paid to items like periodicals, treaties, digests, and other materials in the second section.

There is no set process for how legal research should be done. You can therefore easily develop your own methodology and proceed with the case at your own pace. You can utilise the time-honored way of reading through and examining legal journals and documents, or you can use legal software for lawyers, which is just as effective and much quicker.

Legal research, in the first place, aids in keeping your attention on the case's facts and enables you to pinpoint the disputed issue's legal tenet. Additionally, research can be used to prepare courtroom arguments, and you'll also need to provide research-supported evidence to support your case.

Legal research also adds to the field of practise because it supports everything with reliable sources, proof, and even historical information. You gain entire knowledge of the problem, and you can use all of that knowledge in a professional manner. No matter how complicated the case, legal research will assist you in providing thorough replies, looking over any relevant statutes, and even ensuring that any legal matters are handled properly.

If you want to find a solution to any kind of legal issue, it's crucial to concentrate on legal research. The truth is that thorough research may often assist tip the odds in your favour, even though the process can occasionally be drawn out and laborious. All you need to do is collaborate with a group of legal professionals who depend on providing the greatest research and making sure everything is done to the highest standard.

With best wishes,

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Legal Profession in India the Second Largest in the World

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Introduction

A lawyer is a person who is learned in Law, as an attorney, counsel, and a person licensed to practice Law. In India, the official term is "advocate" as prescribed under the Advocates Act, 1961. Like in other nations in India, the legal system keeps the justice alive and brings in a balance and harmony for citizens to live peacefully in a society.

India has the world's second-largest legal profession with more than 600,000 lawyers. This includes individual lawyers, small or big firms, counselling. The concept of legal services is considered as a "Noble Profession" in our country. The legal profession is an essential backbone for the administration of justice. A properly organized and well-managed judicial system helps to shape and build a knowledge-oriented society. Also, there have been a set of rules-regulations that have been justified on the grounds of public policy & dignity of the profession.

To describe this, Justice Krishna Iyer says, "Law is not a trade, not briefs, not merchandise, and so the heaven of commercial competition should not vulgarize the legal profession." The position of the legal profession used to be different in the past from what is now.

History of Legal Profession in India

The history of the legal profession in India can be traced back to when Governor Aungier established the first-ever British Court in Bombay in 1672. At that period, the authority of admissions of attorneys was in the hands of the Governor-in-Council. Before 1726, i.e., before establishing the mayor's Courts in Madras & Calcutta, there were no legal practitioners. Later the Mayor's Courts were established in the three presidential towns. Whereas a Royal Charter established the first Supreme Court in the year 1774. And the prominent reason to establish the Supreme Court was the lack of supervision, dissatisfaction, and weakness of the Mayor's Court.

Similarly, Supreme Courts were established in Madras in 1801 & Bombay in 1823, respectively. And hence, the establishment of the Supreme Court brought recognition, wealth & prestige to the legal profession. And also, the foundation of All India Bar Committee,1953 & Advocates Act,1961 acted as

a supporting agency for legal practitioners.

Aims and Objectives of Acts related to Legal Practitioners

By the implementation and recommendation of the bill that came into existence by All India Bar Committee,1953 said,

The bill primarily focused on the following-

- giving the advocates on the common roll a right to practice in any part of the country and in any court, including the Supreme Court;
- the integration of the Bar into single class of legal practitioners known as advocates;
- the division of advocates into senior advocates & other advocates based on merit;
- the creation of autonomous Bar Councils, one for the whole of India & one for each State.

The Legal Practitioners Act,1846

The first All-India Act on the subject, which introduced several significant developments and regulations, including the following

- the office of the Pleader in the Company's Courts, was kept open to each one and everyone despite being of any nationality or religion. Thus, religious tests were thus abolished for enrolment as a Pleader;
- every barrister enrolled in any of Her Majesty's Courts in India was made eligible to plead in the Sadar Adalats subject to the rules of those courts;
- Vakils were freely allowed to enter into an agreement with their clients regarding their fees & services (professional services & consultancy).

  This Act is regarded as the "first charter of the legal profession."

The Legal Practitioners Act, 1879

This Act was enacted to the laws relating to legal practitioners in mofussil. At this time, there were six grades of practitioners functioning in India. The Advocates, Attorneys & Vakils served the High Court; Pleaders, Mukhtars & revenue- agents served in the lower courts. Also, the Legal Practitioners Act,1879 brought all six grades of legal practitioners into one system under the jurisdiction of the High Court.

Indian Bar Committee, 1923

The committee proposed that a Bar Council should have power to make rules subject to the approval

of the High Court concerned in respect of such matters as

- the qualifications, admission, and certificates of the person of being a proper Advocate of the High Court
- legal education
- masters relating to discipline & professional conduct of Advocates.

The Indian Bar Councils Act, 1926

The Act extended to the whole of British India, but it was applied immediately only to the High Courts of Calcutta, Bombay, Madras, Allahabad, and Patna. The Act also achieved some unification of the Bar by eliminating the two grades of practitioners, the Vakils & the Pleaders, by merging them into the class of Advocates.

The Advocates Act,1961

The Act establishes an All- India Bar Council for the first time. Some important functions were as follows

- to lay down standards of professionals for Advocates;
- to safeguard the rights & interests of Advocates;
- to promote legal education;
- to support law reform;
- to organize legal aid for the poor.

Also, this Act created a State Bar Council in each State.

Changing face of Legal Profession in India

The legal profession has undergone a drastic transformation in recent times. Also, at the same time, Law is not limited to lawyers alone. A basic understanding of Law is a must for every citizen. Each one of us should have a sense of legal knowledge since it's essential for our daily lives. However, the primary focus is on legal education that should produce lawyers with a social vision, strong political views, and commitment.

In today's world, lawyers will have to undertake several roles in society. Also, legal practitioners have to update their knowledge to capture rules and regulations continuously.

Importance of Legal Profession in India

The legal profession is important because it helps solve disputes between individuals, between the governments, between the government, and the common people. Also, they advise clients to choose the correct path and provide a legal remedy. Also, lawyers help common people in upholding their Fundamental Rights. They help people through Public Interest Litigations. Also, people working in the legal profession help maintain a good balance between the legislative, executive & judiciary. And thus, legal professionals are an essential element for the Administration of Justice.

Conclusion

Amongst all the professions of the world, the Legal Profession is considered a "Noble Profession." This is so because it acts for the noble cause and betterment of both individuals and society. Also, Law is a strong weapon that helps maintain Law and order and follow the rules and regulations, which brings peace to society.

In the words of Earl Warren, "It is the spirit and not the form of Law that keeps justice alive."

Judicial Activism

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The literal meaning of the word Judicial is ordered by the court, and activism means the action of using vigorous campaigning to bring political or social change. Judicial activism starts at a point where the Legislative and executive bodies stops or fails to act.

Arthur Schlesinger Jr. first introduced the concept of Judicial Activism in America in 1947. Whereas, it was first introduced in India in 1970 by Justice V.R.Krishna Iyer, Justice P.N.Bhagwati, Justice O. Chinnappa Reddy, and Justice D.A.Desai.

Apart from modern judicial arrangements in the 19th and 20th Century in the world, the signs of Judicial Activism were embedded in ancient Indian Judicial systems. The period is called the Vedic period, when the unwritten laws (non-codified laws) were applied. These laws were changing from time to time and situation to situation in the society and were guided by the force of devoted experts of Law who were part of the judiciary at that time. The same theme of Judicial management is run in British Laws, where they follow the non codified laws, and emphasis is given on Judicial rulings from time to time.

In this system, Judiciary is in a dominating position where social life and social needs are given priority on specific grounds. This kind of system runs effectively where the majority part of society is self-disciplined and accustomed to living with respect to the Law.

As against this, the American Judicial system is based on codified Law that is the same as ours during Independent India. India is following the Democracy to manage the Indian civilization.

The Indian Constitution has provided four pillars of Democracy:

- Legislative Body who creates the Law, this body which represents Society (public) at large. The rule of the majority dominates all the decisions and actions of this body.
- Executive / administrative body - That is, the Government Agencies implementing laws driven by bureaucrat and experts who are part of the Administration.
- Judiciary who interprets the Law.

- Media who communicates the facts and educates the public at large.

The democratic India is stable when all these four pillars perform their role in a defined appropriate way. If any of the pillars fails to perform its role or is proved ineffective due to some situation, the other must actively fill up the gap. This is the "Activism" which has been referred to.

In and around 1970, when the Indian Judiciary found that some areas of social life are not governed appropriately, maybe due to negligence or due to administrative limitations or due to social barriers and most notably due to limitations of elected governments, Judiciary utilised their Constitutional powers to protect Fundamental Rights of Citizens of India. They took *suo-moto* actions based on writs and Public Interest Litigations to bring the Rule of Law and to sort out the critical situations in society to protect the Fundamental Rights as given by the Constitution of India. The laws were created or forced to be created to handle the activities which were violating Fundamental rights. The legislative bodies and administrative bodies were pushed to make certain decisions and act in a guided way to resolve the situation.

Some examples of such rulings and decisions are as follows -

1. In the case of Vishakha vs. State of Rajasthan, the Judiciary interfered and committed to revise the Social Discrimination of Women Act.

2. In the case of Hussainara Khatoon vs. State of Bihar, under decisions of the High Court, 40000 prisoners who were detained unlawfully were released.

3. In Javed vs. State of Haryana, the question of population control and remedies thereof were upheld by the Judiciary.

4. In M.C.Mehta vs. Union of India case, Environmental laws were strengthened.

5. Decision of the Supreme Court in the case of Jali Kattu and other animal protection acts were handled.

Decision on Shri Ram Temple Trust, Lokpal, and Use of Helmets by Two-wheel riders, medical aid in case of accidents are some other examples where the Judiciary interfered and acted as guiding force.

Thus, it can be seen from the above examples that the Political, Social, or administrative compulsions were not allowing to make decisions in the above instances, and that was handled by Judiciary forcefully, which were in the interest of society and the public at large and for the purpose of protecting the Fundamental Rights.

Some criticising forces do call it an encroachment overpowers of legislative bodies by Judiciary. However, it was necessary and need of the hour.

If these provisions of the Constitution would not have been in existence, then the emergency enforced in 1977 all over India would not have been removed in a short span.

Creators of Laws and the process of creating Law has their own advantages and disadvantages, keeping in mind the limitations of time period which cannot be tolerated leading to mismanagement or misinterpretation of Law. At the same time, one has to bear in mind that such powers of the Constitution are like a sword that can be used from both sides.

Judicial activism should not result in a parallel concentration of power as Judiciary is independent in India. The 24th Amendment to Constitution inserted Article 13(4), making Article 13 as a Fundamental Right. Accordingly, amendments in Constitution cannot be challenged or reviewed by the Judiciary on the ground of Fundamental Rights.

To conclude, Judicial Activism is the need of the hour to protect the fundamental rights of the citizens, and the Civil Society has got a voice and platform to act to restrict the misuse of immense power by Executives in India by way of Judicial Activism.

Speedy Trial... A Myth.

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Article 21 of the Indian Constitution provides that "No person shall be deprived of his life and personal liberty except according to the procedure established by law." The terms 'Life and Liberty' are comprehensive terms and, if interpreted, it includes a person's right to a speedy trial.

Today, in revenue, civil matters, it can take nearly 20 years if a case goes all the way from the subordinate court to the high court and then the Supreme Court. Twenty years means multiple generations of litigants, enormous cost, and frustration; a case taking this long to be resolved is symptomatic of an inefficient and ineffective judicial system; any 'justice' delivered after a span of 20 years would be bereft of its true meaning.

First, judges, particularly those in the superior courts, deal with cases from the previous decade and not today's pressing issues. Second, the judiciary and the legal system at large is inherently favouring the illegal actions of one party at the cost of violating the rights of the other. Further, a prolonged legal battle will have the effect of encouraging such illegal actions not only by the parties involved but across society, which in the long term lead to an erosion in the faith of people to get timely justice

The establishment of a dedicated and trained cadre to provide support to the judiciary through case management, assistance with budgeting, handling administrative tasks, and ensuring maintenance of court infrastructure will go a long way in enabling the judiciary to focus on the administration of justice. Currently, judicial administration is essentially managed by judges themselves.

Another on-ground cause in delaying the matters, which is dominantly observed, is the accused's tactics to delay the matters and adjournment for as frivolous a reason as his senior's car, which contained the files relating to the case, was stolen.

Further, it is seen that adjournments will only be granted for a sufficient cause and where the circumstances are beyond the control of a party. Sadly enough, even after making the Law, it is the implementation and enforcement which is lacking.

Recently on 25th February 2021, to reduce the pendency of cheque bounce cases that have reached 35 lakh cases across courts, the Supreme Court asked the Centre whether it can create additional courts for expeditious disposal of suits.

A bench of Chief Justice S A Bobde and justices L Nageswara Rao and S Ravindra Bhat asked Additional Solicitor General Vikramjit Banerjee to inform it by in almost seven days whether the Central Government was willing to create additional courts under Article 247 for speedy disposal of cases under Negotiable Instrument Act (NI ACT).

Article 247 of the Constitution gives power to Parliament to establish certain additional courts for the better administration of laws made by it or of any existing laws concerning a matter enumerated in the Union List.

The Supreme court was hearing a *suo motu* case to work out a mechanism for expeditious and just adjudication of cases relating to dishonour of cheques, fulfilling the mandate of Law and reduce high pendency. The bench told Banerjee and senior advocate Siddharth Luthra, appointed as amicus curiae in the matter, that certain judgments say the legislature is duty bound to conduct an impact assessment before creating a new offence under the Law. Luthra further suggested that if a person absconds, then under section 83 of CrPC, attachment proceedings can be initiated. His bank accounts could be attached because he may not be found, but his account can be traced.

One of the prime reasons we cannot contain the ever-growing pendency is a shortage of High Court judges.At present,399 posts,or 37 percent of sanctioned judge-strength,are vacant.

One can conclude that the practicability of speedy trial as a constitutional right seems to be a myth.

Applicability and Expeditious Trial of Cases under Section 138 of The Negotiable Instruments Act, 1881

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In today's global economic world, every person performing a business transaction or an economic activity usually takes services from a financial institution like banks. Hence, banks are now the backbone of our economy. Bank offers various services like deposits, loans, Investments, electronic payment systems, letter of credit, etc. Each and everyone in the world widely uses these services. On a daily basis, "N" number of transactions are getting performed by billions of people.

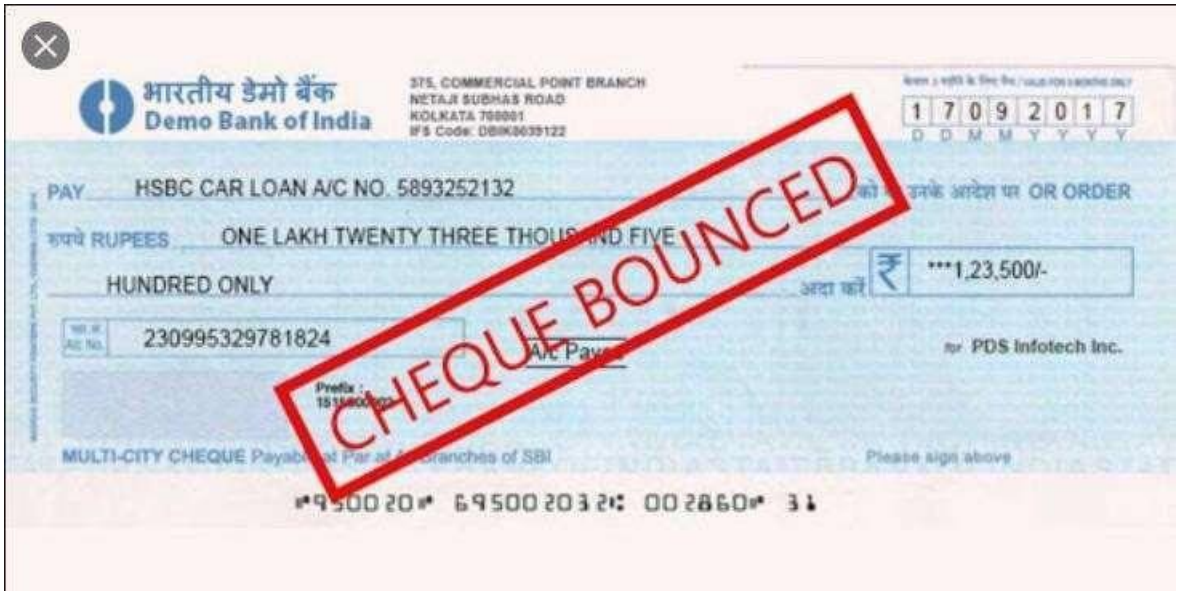
In India, all the Banks are regulated by "Banking Regulation Act,1949". This Act works both ways by protecting the interest of the Bank and safeguarding the clients as well. While taking services from the Bank customer has to follow all the prescribed rules and regulations. While taking the benefits of bank services, a client comes across various other rules and regulations. One of the significant Laws that usually comes into play is "The

Negotiable Instruments Act,1881" This Act came into force during British India timeand still followed without much changes.

This Act deals with multiple negotiable instruments like Promissory notes, Bills of Exchange, Cheques, and Hundis. While the instruments like Promissory notes, Bills of Exchange are mainly used for commercial transactions, an instrument like Cheque is used by common people to transfer funds. By using cheques, a person can quickly transfer a big amount without any risk. However, though this instrument helps in performing payment related transaction, few people do take advantage of this instrument by giving fake cheques, since at the time of making the transaction party using this instrument will not disclose its actual financial position, and the other party might trust this instrument considering its validity in the eyes of the Law.

Section 138 of The Negotiable Instruments Act relates to "Dishonour of a cheque for insufficiency, of funds, etc., in the account." This section is widely used in the cases pertaining to **CHEQUE BOUNCE**. The situation of cheque bounce can arise due to following things

1) Insufficient funds in the bank account
2) Wrong/Incorrect signature on the instrument
3) Overwriting on the instrument
4) Amount mismatch on the face of the cheque (Amount mentioned differently in words and numbers)
5) Presentation of the instrument to Bank for payment after the expiry of the validity of the instrument.
6) Disfigured or damaged cheque.
7) Crossing limit of the overdraft.



Section 138 of the Act talks about punishment for dishonouring of cheques. Section 138was introduced as a criminal offence in 1989 by way of an amendment to The Negotiable Instruments Act, 1881. The main objective of the introduction of this section was to encourage the use of cheques and to increase the credibility of transactions through cheques by making the dishonouring of the cheques as an offence. Section 138 providesthat when the cheque is dishonoured for insufficiency of funds or for any of the prescribed reasons, the one who is at defaulter can be punished with imprisonment for a term which may extend to two years, or with a fine which may extend to twice the amount of the cheque, or both and it is also considered as a non-cognizable offence.

The ingredients required for complying with Section 138 are as follows

- a person must have drawn a cheque for payment of money to another for the discharge of any debt or other liability;
- that cheque has been presented to the Bank within a period of three months;
- that cheque is returned by the Bank unpaid, either because insufficient of funds or that it exceeds the amount arranged to be paid from that account by an agreement made with

the Bank;

- the payee makes a demand for the payment of the money by giving a notice in writing to the drawer within 15 days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid;
- The drawer fails to make payment to the payee within 15 days of the receipt of the notice.

Procedure that is followed in matters with regard to Section 138 of the Act is as follows

i. A legal notice is to be issued to the drawer within 15 days of dishonour of cheque by registered post with all relevant facts. The drawer is given a time of 15 days to make the payment. If the payment is made, then the matter is served, and the issue is settled. On the other hand, if the payment is not made, thenthecomplainant is to file a complaintunder Section 138 of the Act, against thedrawerwithin 30 days fromthedate of expiryof 15 daysspecified thenotice to the concerned Magistrate Court within the jurisdiction.

ii. The complainant or his authorized agent should appear. If the Court is satisfied and finds substance in the complainant, then a summons will be issued to the accused to appear before the Court.

iii. If, after being served with the summons, the accused abstains himself from appearing, the Court may issue a bailable warrant. Even after this, if the drawer does not appear, a non-bailable warrant may be issued.

iv. On the appearance of the drawer/accused, he may furnish a bail bond to ensure his appearance during the trial. After which, the plea of the accused is recorded. In case he pleads guilty, the Court will post the matter for punishment. If the accused denies the charges,then he will be served with a copy of the complaint.

v. The Complainant may present his evidence by way of an affidavit as per section 145 of the Act and produce all documents, including the original, supporting his complaint. The complainant will be cross-examined by the accused or his counsel.

vi. The accused will be allowed to lead his evidence. The accused will also be afforded an opportunity to submit his documents in support of his case, as well as witnesses in his support. The complainant will cross-examine the accused and his witnesses.

vii. The last stage of the proceeding is that of the arguments, after which the Court will pass

a judgment. If the accused is acquitted, then the matter ends, but the complainant can further appeal to the High Court. Similarly, if the accused is convicted, he can file an appeal in the Sessions Court.

It must be noted that the offence under Section 138 of the Act has been made compoundable.

The **Negotiable Instruments (Amendment) Act, 2018,** which came into effect from September 1, 2018, allows the Court trying an offence related to cheque bouncing to direct the drawer to pay interim compensation not exceeding 20% of the cheque amount to the complainant within 60 days of the trial court's order to pay such compensation. This interim compensation may be paid either in a summary trial or a summons case. The drawer pleads not guilty to the accusation made in the complaint or upon framing of charge in any other case. Furthermore, the Amendment also empowers the Appellate Court, hearing appeals against conviction under s. 138, to direct the appellant to deposit a minimum of 20 % of the fine/compensation awarded, in addition to interim compensation.

On 8 June 2020, the Ministry of Finance proposed decriminalizing various minor offences for improving business sentiment and unclogging court processes, including Section 138 of The Negotiable Instruments Act, 1881. The main reason for this proposal isto increase the foreign investment in our country and help boost the country's economy during this condition. Serious debates and discussions are going on decriminalizing section 138 or not because this section affects the public at large.

Concerned with the large number of cases filed under section 138 of the Negotiable Instruments Act, 1881 pending at various levels, a division bench of Supreme Court consisting of CJI S A Bobade and Jd. L. Nageswara Rao decided to examine the reasons for the delay in disposal of these cases. The Registry was directed to register a *Suo Motu* Writ Petition (Criminal) captioned as "Expeditious Trail of Cases under Section 138 of N.I. Act 1881," Mr. Siddharth Luthra, Learned Senior Counsel was appointed as Amicus Curiae and Mr. K. Parameshwar, learned Counsel was requested to assist him. Notices were issued to the Union of India, Registrar Generals of the High Court, Directors Generals of Police of the States and

Union Territories, Member Secretary of the National Legal Services Authority, Reserve Bank of India, and Indian Banks Association, Mumbai representative of banking institutions. After hearing the learned solicitor General of India and Mr. Ramesh Babu, learned counsel for the Reserve Bank of India, on 10th March 2021, Supreme Court found it appropriate that to form a Committee with the Hon'ble Justice R.C. Chavan, former judge of the Bombay High Courtas the Chairman to consider various suggestions that are made for arresting the explosion of the judicial docket. The Committee is directed to deliberate on creating additional courts to try complaints under Section 138 of the Act.

During the course of the hearing, it was felt by the three judges bench that the matter needs to be referred to a larger bench. After the reference of the matter to a larger bench (5 judge bench)consisting of Chief Justice of India S A Bobade, Justice. Nageshwara Rao, Justice. B. R. Gavai, Justice. A.S. Bopanna, Justice.S. Ravindra Bhat was made. On 16th April 18, 2021, larger bench held as follows:

1) The High Courts are requested to issue practice directions to the Magistrate to record reasons before converting trial of complaints u/s 138 of the Act from summary trial to summons trial.
2) The inquiry shall be conducted on receipt of complaints u/s 138 of the Act to arrive at sufficient ground to proceed against the accused when such accused reside beyond the Court's territorial jurisdiction.
3) For the conduct of inquiry u/s 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to the examination of documents without insisting on examination of witnesses.
4) We recommend that suitable amendments be made to the Act to provide one trial against a person for multiple offences u/s 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.
5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint u/s138 forming part of a transaction, as deemed service in respect of all the complaints filed before same Court

relating to dishonour of cheques issued as part of the said transaction.

6) Judgments of t h e Supreme Court in *Adalat Prasad vs. Rooplal Jindal and others* (2004) 7 SCC 338 *and Subramanium Sethuraman vs. State of Maharashtra* (2004) 13 have interpreted the Law correctly, and we reiterate that there is no inherent power of Trail Courts to review or recall the issue of summons. This does not affect the Trial Court's power under Section 322 of the Code to revisit the order of issue of process in case it is brought to the Court's notice thatit lacks jurisdiction to try the complaint.
7) Section 258 of the Code does not apply to complaints u/s 138 of the Act and finding to the Contrary in *Meters and Instruments Private Limited and Another vs. Kanchan Mehta* judgment, do not lay down the correct Law. To conclusively dealwith this aspect, amendment to the Act empowering the Trail courts to reconsider/recall summons in respect of complaints u/s 138 shall be considered by the Committee constituted by order of Supreme Court dated 10.03.2021
8) All other points, which have been raised by the Amicus Curiae in their preliminary report and written submissions, were not considered then. It was also ordered that the Committee should also consider any other issue relating to expeditious disposal of complaints u/s 138 of the Act.

I hope the Committee soon will come up with some concrete solutions, which will be helpful to clear the huge pendency of complaints under Section 138 of the Act.

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