



SAGA LEGAL

COMMUNIQUE

DECEMBER 2022



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COURTS THIS MONTH

- The Supreme Court in the case of *The State of Rajasthan vs Gurbachan Singh & Others (Criminal Appeal No. 2201 Of 2011)* has observed that “Common Intention” as defined under Section 34 of the Indian Penal Code, 1860 (“**IPC**”) can be formed at the spur of the moment and during the occurrence itself. The Bench comprising of J.Sanjiv Khanna and J. Sudhanshu Dhulia opined that “...For Section 34 of the IPC to apply, there should be common intention among the co-perpetrators, which means that there should be a community of purpose and common design. Common intention can be formed at the spur of the moment and during the occurrence itself. Common intention is necessarily a psychological fact and as such, direct evidence normally will not be available. Therefore, in most cases, whether or not there exists a common intention, has to be determined by drawing inferences from the facts proved. Constructive intention can be arrived at only when the court can hold that the accused must have preconceived the result that ensued in furtherance of the common intention.”
- The Supreme Court in the case of *Kalicharan & Ors. vs. State of Uttar Pradesh (Criminal Appeal No. 122 Of 2021)* has observed that while questioning an accused under Section 313 of the Criminal Procedure Code, 1973 (“**CrPC**”), the accused must be explained the circumstances appearing in the evidence against him so that he/she can offer an explanation. The Bench comprising of Justice Sanjay Kishan Kaul and Justice Abhay S. Oka opined that “...Questioning an accused under Section 313 CrPC is not an empty formality... After an accused is questioned under Section 313 CrPC, he is entitled to take a call on the question of examining defense witnesses and leading other evidence. If the 8 accused is not explained the important circumstances appearing against him in the evidence on which his conviction is sought to be based, the accused will not be in a position to explain the said circumstances brought on record against him. He will not be able to properly defend himself.”
- In the case of *Chandi Puliya vs. The State of West Bengal (SLP(Crl) No. 9897 of 2022)*, the Supreme Court has ruled that the accused's plea on the applicability of Section 330(1) of the Criminal Procedure Code, 1973 (“**CrPC**”) has to be considered at the stage of discharge under Section 227 of CrPC. The Bench comprising of Justice MR Shah and Justice CT Ravikumar was dealing with an appeal challenging the order passed by the Calcutta High Court which had dismissed the petition on the ground that an objection can be raised during the framing of charge and not discharge. Upon which, the Court observed that “...the trial Court had observed that the appellant-accused shall be entitled to raise all points as mentioned in his application under Section 300(1) Cr.P.C. at the time of hearing on framing of charge. However, as observed hereinabove, such



exercise was required to be done at a stage prior to framing of charge, and if ultimately the court comes to the conclusion overruling the objection of Section 300(1) Cr.P.C. and on facts satisfies then it may frame the charge as provided under Section 228 Cr.P.C. The High Court has not at all appreciated and/or considered the aforesaid aspect. Therefore, the matter is required to be remanded to the learned trial Court to consider the plea of the accused on the applicability of Section 300(1) Cr.P.C. at the stage of discharge under Section 227 Cr.P.C., which is a stage prior to framing of the charge under Section 228 Cr.P.C.”

- The Supreme Court in the case of *Neeraj Dutta vs. State -Govt. of NCT Delhi (Criminal Appeal No. 1669 Of 2009)* has observed that testimony given by a ‘hostile witness’ can be considered for conviction if it is corroborated by other reliable evidence. The Constitutional Bench comprising of Justice Abdul Nazeer, Justice B.R. Gavai, Justice A.S. Bopanna, Justice V. Ramasubramanian, and Justice B.V. Nagarathna observed that in the absence of evidence from the complainant, it is permissible to draw an inferential deduction of culpability / guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988, (“**the Act**”) based on other evidence adduced by the prosecution. The Court opined that “...It is for the judge as a matter of prudence to consider the extent of evidence which is

creditworthy for the purpose of proof of the case. In other words, the fact that a witness has been declared “hostile” does not result in an automatic rejection of his evidence. Even, the evidence of a “hostile witness” if it finds corroboration from the facts of the case may be taken into account while judging the guilt of the accused.”

- The Supreme Court in the matter of *CISF and others vs. Santosh Kumar Pandey (Civil Appeal No. 8671 Of 2015)* while confirming the dismissal of a Central Industrial Security Force (“**CISF**”) constable who had harassed a couple at night in Vadodara has stated that Police officers are not required to do moral policing. The Bench comprising of Justice Sanjiv Khanna and Justice J.K. Maheshwari observed that the Gujarat High Court has failed to take notice of the facts that are startling and distressing and properly apply the law of judicial review. The Court further observed that “...Judicial review is not akin to adjudication of the case on merits, and adequacy or inadequacy of evidence, unless the court finds that the findings recorded are based on no evidence, perverse or are legally untenable in the sense that it fails to pass the muster of the *Wednesbury principles*.” “...Santosh Kumar Pandey is not a police officer, and even police officers are not required to do moral policing, ask for physical favour or material goods.”



- In the matter of *Sukhpal Singh Khaira vs. the State of Punjab (Criminal Appeal No. 885 of 2019)* the Supreme Court has held that the power of the trial court under Section 319 of the Code of Criminal Procedure, 1973 (“**CrPC**”) to summon a person other than accused can be invoked before acquittal or before sentence in the case of conviction. In the present case, the Constitutional Bench composed of Justice Abdul Nazeer, Justice B.R. Gavai, Justice A.S. Bopanna, Justice V. Ramasubramanian, and Justice B.V. Nagarathna has laid down a set of twelve guidelines to be followed by the courts while exercising power under Section 319 of CrPC to summon additional accused.
- The Supreme Court in the case of *Kerala State Electricity Board and others vs. Thomas Joseph @ Thomas M.J. & Others (Civil Appeal Nos. 9252-9253 of 2022)* has observed that delegated legislation, including rules and regulations formed by State and Central authorities, shall not travel beyond the purview of the parent Act. The Bench comprising of Justice Dinesh Maheshwari and Justice J.B. Pardiwala heard an appeal filed against the order passed by the Kerala High Court which had upheld Regulation 153(15) of the Kerala Electricity Supply Code, 2014. Upon which the Court observed that “...*If a rule goes beyond the rule-making power conferred by the statute, the same has to be declared invalid. If a rule supplants any provision for which power has not been conferred, it becomes invalid. The basic test is to determine and consider the source of power, which is relatable to the rule. Similarly, a rule must be in accord with the parent statute, as it cannot travel beyond it.*”
- The Supreme Court in the case of *Neeraj Dutta vs. State (GNCTD) (Criminal Appeal No(s). 1669 of 2009)* has ruled that direct evidence of corruption against a public servant under the Prevention of Corruption Act, 1988 (“**PC Act**”) is not necessary, the demand of illegal gratification can also be proved through circumstantial evidence. The Constitutional Bench composed of Justice Abdul Nazeer, Justice B.R. Gavai, Justice A.S. Bopanna, Justice V. Ramasubramanian, and Justice B.V. Nagarathna while answering on what would qualify as offences under Section 7 and Section 13(1)(d)(i) and (ii) of PC Act, held that “...*in the absence of evidence of the complainant (direct / primary, oral/documentary evidence) it is permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and 70 Section 13(1)(d) read with Section 13(2) of the Act based on other evidence adduced by the prosecution.*”
- The Supreme Court in the matter of *T.P. Gopalakrishnan vs. State of Kerala (Criminal Appeal Nos. 187-188 Of 2017)* has reiterated that Section 300 of the Code of Criminal Procedure, 1973 (“**CrPC**”) prohibits a person from being tried not only for the same offence but



also for any other offence based on the same facts. The Bench comprising of Justice B.R. Gavai and Justice B.V. Nagarathna set aside the order passed by the Kerala High Court and observed that *"...It has already been observed hereinabove that the allegations / offences in the instant cases are the same as the allegations/offences in the previous three cases, therefore as per the mandate under Section 300(2) of the CrPC, the consent of the State Government is necessary. Even if it is assumed for the sake of argument that the allegations are different in present cases from those in the previous cases, the prosecution has failed to obtain the prior consent of the State Government necessary to prosecute the accused-appellant and therefore the trial in the instant case is unlawful."*

- The High Court of Kerala in the case of *Virginia Shylu vs. Union of India and Other Connected Cases (W.P.(C). Nos.26500 of 2020)* has pronounced a significant verdict on the "Right to be Forgotten" by permitting the erasure of sensitive personal information of parties in the matrimonial cases that may be available online if the parties make such a request. The Division Bench comprising of Justice A. Muhamed Mustaque and Justice Shoba Annamma Eapend dealt with the writ petitions that sought the removal of identifiable information from judgments or orders published in various online portals and the High Court website, on the ground that the same amounts to the violation of the Right to Privacy and

Right to be Forgotten. The Court held that *"...The publication of any valid records is protected by the Constitution as forming part of Article 19(1)(a), the right to freedom of speech and expression. There is no difficulty for Google during the era of the advancement of AI to create a tool and identify particular data and remove the same. If that is not done, it would really infringe the claim based on the right to be forgotten."*

- The High Court of Karnataka in the matter of *S. Nancy Nithya vs. The Government of India and others (W.P. No.22378 Of 2022)* has held that the Passport Manual, 2020, issued for smooth functioning acts like asolutions to answer circumstances that would emerge, but it cannot run counter to the Statute including rules. A Single Judge Bench of Justice M Nagaprasanna was dealing with a writ petition seeking directions to the Regional Passport Officer to renew/ re-issue their passport. The Court observed that *"...the Rules are framed by the Central Government in terms of Section 24 of the Act. Therefore, they are part of the statute and are statutory. The Passport Manual guidelines to issue a passport are a solution to answer circumstances that would emerge, but, cannot run counter to the statute, as they are not statutes. Therefore, the 2nd respondent will have to consider the application of the petitioner in terms of the Rules and seek any document or clarification from the parent in terms of the Rules and not in terms of the Passport Manual."*



- The High Court of Allahabad in the case of *Krishna Kant vs. State of U.P (Criminal Misc. Bail Application No. 33329 of 2020)* while rejecting a bail application held that hostility of the witnesses cannot be a new ground for granting bail. A Single-Judge Bench comprising of Justice Shekhar Kumar Yadav observed that “...if any opinion is taken on the basis of the evidence given by the hostile witnesses, it amounts to evaluating the evidence by this Court, which is impermissible while deciding the bail application under Section 439 Cr.P.C. It is a well-settled principle that trial courts can record convictions based on the evidence of the Investigating Officer also. Therefore, the ground urged now cannot be considered for granting bail to the accused applicant.”
- In the case of *Map Refoils India Limited vs. National Faceless E-Assessment Center (R/Special Civil Application No. 16261 Of 2021)*, the High Court of Gujarat has quashed the assessment order passed under Section 143(3) read with Section 144B of the Income Tax Act, 1961, (“**the Act**”) on the grounds of violation of the principle of natural justice by the National Faceless Assessment Center (“**NFAC**”). The Division Bench comprising of Justice N.V. Anjaria and Justice Bhargav D. Karia has opined that “...the impugned order was passed by the respondent in violation of principles of natural justice without affording an opportunity of personal hearing by not following the prescribed procedure laid down as per the provisions of section 144B of the Act, 1961 for Faceless assessment.”
- In the matter of *Gulam Rashul vs. State of U.P (Jail Appeal No. - 7291 of 2017)*, the High Court of Allahabad while elaborating the scope of Section 201 of the Indian Penal Code, 1860 (“**I.P.C.**”) held that removing the corpse from the scene of the murder to another place will not come under the scope of Section 201 as it does not cause the disappearance of evidence of the commission of murder. The Division Bench comprising of Justice Suneet Kumar and Justice Syed Waiz Mian while partly allowing the criminal appeal filed by the murder convict opined that “Accused has miserably failed to rebut the presumption under Section 106 of Evidence Act...conviction of the appellant under Section 302 I.P.C. is proper and justified in the law and the impugned judgment and order is not excessive or exorbitant and no question arises to interfere in the matter on the point of punishment imposed upon him.”
- The High Court of Bombay in the case of *GTL Infrastructure Limited vs. Vodafone India Limited (VIL) (Commercial Arbitration Application No. 52 Of 2022)* has ruled that when a clause stipulates that parties may be referred to arbitration, the said clause would not constitute an arbitration agreement even though the clause conferred upon the decision of Arbitrator. A Single-Judge Bench comprising of Justice Bharati Dangre



- while dismissing the plea opined that *“... the existence of valid arbitration agreement should be determined from the facts and circumstances of a case, including the intention of the parties gathered from the correspondence exchanged between them, the surrounding circumstances and conduct of the parties...The intention of the parties expressing consensual acceptance to refer disputes to arbitrator, is mandatory and the existence of an arbitration agreement, to confer jurisdiction upon the Arbitrator to hear and decide the dispute, is imperative. When there is no such agreement, there is no jurisdiction in the Arbitrator.”*
- The High Court of Delhi in the case of *PR. Commissioner Of Income Tax-7 vs. Pawa Infrastructure Limited (CM. APPL. Nos. 49348-49 of 2022)* has ruled that the leasehold rights held by the assessee in the plot shall be treated as “Capital Asset” and the compensation received on the cancellation of the plot is a capital receipt and not a revenue receipt. The Division Bench of Justice Manmohan and Justice Manmeet Pritam Singh Arora further held that *“...It is trite law that if an agreement for the transfer of rights in an immovable property is not performed by the transferor, the transferee is entitled to compensation as he/she is deprived of the price of escalation. Therefore, the character of payment received as compensation by the transferee bears the character of capital receipt.”*
 - The High Court of Bombay in the case of *Rohan Tukaram @ Appasaheb Kale vs. Somnath Haribhau Koli and another (Writ Petition [Stamp] No. 20054 of 2022)* has pulled up the Maharashtra Police for registering F.I.R. under Section 3 of the Official Secrets Act, 1923 against a Pune-based developer for taking photos and video of a police station. The Division Bench comprising of Justice Revati Mohite Dere and Justice Prithviraj K. Chavan observed that *“We regularly come across cases where F.I.R's are being registered by the Police, under section 3 of the Official Secrets Act, without application of mind, which is a matter of serious concern i.e for acts done in the Police Station, video graphing of discussions in the Police Station, taking photographs within the Police Station, etc, more particularly, when a 'Police Station' is not a prohibited place. To attract the provisions of the Official Secrets Act, the place where the incident takes place has to be a 'prohibited place', as defined in section 2(8) of the Official Secrets Act. Registration of the offence under Section 3 of the Official Secrets Act, as against the petitioner, in the facts, is clearly an abuse of the process of law and if not quashed, would lead to a serious miscarriage of justice, which cannot be countenanced.”*



NOTIFICATIONS / AMENDMENTS INSIGHTS

- Vide Circular no. 24 of 2022 and F. No. 275 / 15 / 2022-IT(B) dated 07.12.2022, the Central Board of Direct Taxes (“**CBDT**”) has issued Income-Tax Deduction from Salaries during the Financial Year 2022-23 under Section 192 of the Income-Tax Act, 1961, (“**the Act**”). Accordingly, the rates of deduction of income tax from the payment of income under the head "Salaries" under Section 192 of the Act, during the financial year 2022-23, have been intimated. The Circular also explains certain related provisions of the Act and Income-tax Rules, 1962.
- Vide Circular no. 25 of 2022 and F. no. 2251129/2022/ITA-II dated 30.12.2022, the Central Board of Direct Taxes (“**CBDT**”) has provided clarification for the purposes of clause (c) of Section 269ST of the Income-tax Act, 1961 (“**the Act**”) in respect of dealership/distributorship contract in case of Co-operative Societies. Accordingly, it is clarified that *“in respect of Co-operative Societies, a dealership/ distributorship contract by itself may not constitute an event or occasion for the purposes of clause (c) of Section 269ST. Receipt related to such a dealership/distributorship contract by the Co-operative Society on any day in a previous year, which is within 'the prescribed limit' and complies with clause (a) as well as clause (b) of Section 269ST, may not be aggregated across multiple days for purposes of clause (c) of Section 269ST for that previous year.”*
- Vide Circular no. SEBI / HO / AFD-1 / PoD / P / CIR / 2022 / 171 dated 09.12.2022, the Securities and Exchange Board of India, 1992, (“**SEBI**”) has issued that in terms of Regulation 10(a) of SEBI Alternative Investment Funds (“**AIF**”) Regulations, 2012 (“**AIF Regulations**”) AIFs may raise funds from any investor whether Indian, foreign or non-resident Indians, by way of issue of units. Accordingly, SEBI has also specified certain conditions that have to be complied with by the manager of an AIF at the time of onboarding investors.
- Vide Circular no. SEBI / HO / DDHS / DDHS-RACPOD1 / P / CIR / 2022 / 174 dated 16.12.2022, the Securities and Exchange Board of India, 1992, (“**SEBI**”) has provided Applicability of SEBI circular on Principles of Financial Market Infrastructures (“**PFMIs**”) to AMC Repo Clearing Limited. Vide Gazette notification dated 24.01.2022, AMC Repo clearing Limited was granted recognition as a Clearing Corporation for the purpose of clearing and settling transactions in the repo and reverse repo in the debt securities that are dealt with or traded on a recognized stock exchange. Accordingly, the provisions of the PFMIs shall be applicable to AMC Repo Clearing Limited.
- Vide Circular no. 19 and Ref. no. RBI/2022-23/151 dated 12.12.2022, the Reserve Bank of India (“**RBI**”) has issued The Master Direction – Foreign Exchange Management (Hedging of



Commodity Price Risk and Freight Risk in Overseas Markets) Directions, 2022. Accordingly, resident entities in India are currently not permitted to hedge their exposure to the price risk of gold in overseas markets. However, RBI has allowed eligible entities to hedge their exposure to the price risk of gold on exchanges in the International Financial Services Centre (IFSC) recognized by the International Financial Services Centres Authority (IFSCA).

- Vide Notification Ref. no. RBI / 2022-23 / 155 of DOR.ACC.REC.No.91 / 21.04.018 / 2022-23 dated 13.12.2022, the Reserve Bank of India (“**RBI**”) has issued directions for disclosure of material items under RBI (Financial Statements - Presentation and Disclosures) Directions, 2021. Accordingly, it is instructed that all the commercial banks shall disclose particulars of all such items in the notes to accounts, wherever any item under Schedule 5(IV)-Other Liabilities and Provisions or Schedule 11(VI)-Other Assets or Schedule 14(I)-Other Income exceeds one percent of the total income.



DEALS THIS MONTH

- Communications solutions provider, Bharti Airtel has acquired a strategic stake in Lemnisk (Immensitas Private Limited) under its Startup Accelerator Program. Lemnisk is a Bengaluru-based start-up that offers real-time marketing automation and a secure customer data platform (“CDP”) capable of orchestrating 1-to-1 personalization and cross-channel customer journeys at a scale that increases conversions, retention, and growth for enterprises. The acquisition will help Airtel to work towards the creation of a CDP across its digital businesses, which include Ad-tech (Airtel Ads), Digital Entertainment (Wynk Music and Airtel Xstream), and Digital Marketplace (Airtel Thanks App).
- Mensa Brand Technologies Private Limited, which owns a clutch of direct-to-consumer companies under Mensa Brands, has partnered with India Lifestyle Network to acquire lifestyle portals MensXP, iDiva, and creator management and marketing company Hypp from Times Internet for an undisclosed amount. The acquisitions will enhance Mensa’s digital brand-building capabilities and provide synergies in building a next-generation, digital-first consumer company.
- Neobank- payments infrastructure startupIppoPay has acquired Tamil Nadu-based startupRoamsoft Technologies for an undisclosed amount in an all-cash deal. Roamsoft is primarily engaged in the business of developing products and providing technology services to startups, especially in the fintech and e-commerce space. The acquisition will provide IppoPay with a suite of products that will help supercharge IppoPay’s in-house capabilities.
- Online travel aggregator EaseMyTrip has entered into a definitive agreement to acquire a seventy-five percent stake in Gujarat-based Nutana Aviation Capital. Nutana Aviation offers charter solutions to clients in India and abroad. It leases charter aircraft enabling operators to run efficiently along with providing charter booking services to its clients, within and outside India. With this acquisition, the company is focused on growing inorganically and expanding its footprint in international markets.



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