

The Curious Case of the Indian Gaming Laws

Legal Issues Demystified

October 2019

The Curious Case of the Indian Gaming Laws

Legal Issues Demystified

October 2019

concierge@nishithdesai.com

530646.I

About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium *Aligunjan*, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

As a firm of doyens, we pride ourselves in working with select clients within select verticals on complex matters. Our forte lies in providing innovative and strategic advice in futuristic areas of law such as those relating to Blockchain and virtual currencies, Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Ed-Tech, Med-Tech & Medical Devices and Nanotechnology with our key clientele comprising of marquee Fortune 500 corporations.

NDA has been the proud recipient of the RSG - FT award for 2019, 2017, 2016, 2015, 2014 as the 'Most Innovative Indian Law Firm' and in 2016 we were awarded the 'Most Innovative Law Firm - Asia Pacific,' by Financial Times (London).

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.

Accolades

A brief chronicle our firm's global acclaim for its achievements and prowess through the years –

- **IFLR1000:** Tier 1 for Private Equity and Project Development: Telecommunications Networks. 2020, 2019, 2018, 2017, 2014
- **AsiaLaw Asia-Pacific Guide 2020:** Tier 1 (Outstanding) for TMT, Labour & Employment, Private Equity, Regulatory and Tax
- **FT Innovative Lawyers Asia Pacific 2019 Awards:** NDA ranked 2nd in the Most Innovative Law Firm category (Asia-Pacific Headquartered)
- **RSG-Financial Times:** India's Most Innovative Law Firm 2019, 2017, 2016, 2015, 2014
- **Chambers and Partners Asia Pacific:** Band 1 for Employment, Lifesciences, Tax and TMT 2019, 2018, 2017, 2016, 2015
- **Benchmark Litigation Asia-Pacific:** Tier 1 for Government & Regulatory and Tax 2019, 2018
- **Legal500:** Tier 1 for Dispute, Tax, Investment Funds, Labour & Employment, TMT and Corporate M&A 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012
- **Who's Who Legal 2019:**
Nishith Desai, Corporate Tax and Private Funds – Thought Leader
Vikram Shroff, HR and Employment Law- Global Thought Leader
Vaibhav Parikh, Data Practices - Thought Leader (India)
Dr. Milind Antani, Pharma & Healthcare – only Indian Lawyer to be recognized for 'Life sciences-Regulatory,' for 5 years consecutively
- **Merger Market 2018:** Fastest growing M&A Law Firm in India
- **Asia Mena Counsel's In-House Community Firms Survey 2018:** The only Indian Firm recognized for Life Sciences
- **IFLR:** Indian Firm of the Year 2013, 2012, 2011, 2010
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm"

Please see the last page of this paper for the most recent research papers by our experts.

Disclaimer

This report is a copy right of Nishith Desai Associates. No reader should act on the basis of any statement contained herein without seeking professional advice. The authors and the firm expressly disclaim all and any liability to any person who has read this report, or otherwise, in respect of anything, and of consequences of anything done, or omitted to be done by any such person in reliance upon the contents of this report.

Contact

For any help or assistance please email us on concierge@nishithdesai.com or visit us at www.nishithdesai.com

Acknowledgements

Gowree Gokhale

gowree.gokhale@nishithdesai.com

Ranjana Adhikari

ranjana.adhikari@nishithdesai.com

Tanisha Khanna

tanisha.khanna@nishithdesai.com

Inika Charles

inika.charles@nishithdesai.com

Contents

THE GAMING LAWS OF INDIA	01
1. GAMBLING, SKILL GAMES AND LOTTERIES	03
I. Overview of the Legal Framework Regulating The Gambling Industry	03
II. Physical & Internet Gambling	05
2. PRIZE COMPETITIONS	16
3. CASUAL AND SOCIAL GAMING	18
4. OTHER LEGAL AND REGULATORY ISSUES	20
I. Laws affecting the Content of Games	20
II. Telecom Laws Applicable to Social Gaming	23
III. Other Laws Affecting the Gaming /Gambling Industry	25
ANNEXURE I	30
Nagaland: Online gaming licenses for skill games	30
ANNEXURE II	33
Punjab and Haryana High Court Rules Fantasy Sport Preponderantly Skill- based	33
ANNEXURE III	35
All Bets Off for Gaming Operators in Telangana:State Government Passes Ordinance Prohibiting Skill Games	35
ANNEXURE IV	39
Synopsis of the proceedings in the Gujarat Case	39
ANNEXURE V	44
The 'Mahalakshmi' Saga	44
ANNEXURE VI	47
Bombay High Court rules on inapplicability of GST on amount pooled by players in the case of Dream11!	47

The Gaming Laws of India

Games, whether in the form of gambling, or popular social or casual games, are enjoyed by people of all age groups across the globe for their entertainment value. In fact, gambling, irrespective of its many vices, has been a part of the Indian culture since time immemorial. Even before the six side dice was invented, Indians used the nuts of the *Bibhitaki* tree as dice. References to gambling can be traced to the *Mahabharata*, one of India's oldest mythological epics, in which the opponents were tested based on their skills at board and dice games rather than through wars.

The gaming industry has witnessed a paradigm shift with the evolution of television, digital and online gaming models. Following the increased internet penetration in the mid-1990s, from being targeted at academics to being used by the general population, internet-based online games gained popularity. The Digital India drive under the aegis of the Modi government has led to improving the infrastructure as a whole. Better internet speed even in the remote areas has led to more consumption of content even where the mass population resides i.e. the rural areas. Post demonetization, the digital online payment systems received a boom with a larger part of the population being incentivized and compelled to use the same.

All these factors add to the huge potential of the market in India and has led to a surge in the number of online gaming sites over the last few years. The popularity of online gaming is best evidenced by the rapid growth of in the popularity of online card games, like Poker and Rummy and new age games like fantasy sports. Mobile and online models received further impetus in India by the telecom revolution, penetration of internet and cable in substantial popularity of new media with the masses.

This huge size of the potential market in India has led to a surge in the number of online gaming sites over the last few years. The impact is evident by the rise in demand for quality game content, game developers, game developing companies and the gaming industry in general. Gaming as a whole is gaining increasing significance as a major source of income and a profitable business venture worldwide.

In a study by KPMG India dated September 2019, it is suggested that the Indian online gaming industry is set to become a INR 250.3 billion industry by 2024.¹

There has been considerable increase in the Indian betting market which can be evidenced from the report issued by International Centre for Sports Security (“ICSS”), where ICSS claims that the betting market in India could be worth over US\$130 billion.

Given the high growth potential of the gaming industry in India, many foreign entities are exploring possibilities to set up operations here. Similar trends are reflected in many industry related research reports which say that several global gaming firms have opened offices in India or have signed distribution agreements with leading Indian mobile game developers in order to distribute their products in India. While operating gaming businesses is easier in some countries of the world² where gaming is legal, the situation is not so easy in India where the laws are stringent.

With the advent of social and casual games both offline and online, the ‘gaming’ industry can now be said to comprise of 2 verticals – gambling in both traditional and online forms, and skill based social or casual gaming. parts of the country, and the increasing

1. <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf>

2. A few examples include Macau, Nepal, U.K. etc.

In this paper, we discuss the scope of gambling / gaming laws and the evolution of the gambling / gaming industry in India. To clarify, in this paper we have used the term 'gaming' to refer

to social and casual gaming. However, under certain Indian laws, gambling activities are referred to as 'gambling', and specific references to the same may be included in this paper.

1. Gambling, Skill Games and Lotteries

I. Overview of the Legal Framework Regulating The Gambling Industry

A. Physical Gambling & Sports Betting

Under the Constitution of India, the state legislatures have been entrusted with the power to frame state specific laws on *'betting and gambling'*.³ The Public Gambling Act, 1867 (**'Public Gambling Act'**) has been adopted by several states including Uttar Pradesh, Madhya Pradesh and Delhi. The other states in India have enacted their own legislation to regulate gaming / gambling activities within its territory (**"Gambling Legislations"** or **"Gaming Legislations"**). Most of these Gambling Legislations were enacted prior to the advent of virtual / online gambling and therefore primarily refer to gambling activities taking place in physical premises, defined as "gaming or common gaming houses".

■ *Some Gambling Legislation regulating physical gambling and sports betting are as follows:*

- Assam Gaming and Betting Act, 1970
- Bombay Prevention of Gambling Act, 1887
- Goa, Daman and Diu Public Gambling Act, 1976
- Karnataka Police Act, 1963
- Madhya Pradesh (C.P.) Public Gambling Act, 1867
- Madhya Bharat Gambling Act, 1949
- Orissa Prevention of Gambling Act, 1955
- Public Gambling Act, 1867 (applicable to Uttar Pradesh, Punjab, Delhi and Madhya Pradesh)

- Punjab Public Gambling Act, 1867
- Sikkim Online Gaming (Regulation) Act, 2008
- Tamil Nadu City Police Gaming Rules, 1949
- Tamil Nadu Gaming Act, 1930
- The Andhra Pradesh Gaming Act, 1974
- The Andhra Pradesh Gaming Rules, 1976
- The Delhi Public Gambling Act, 1955
- The J. & K. Public Gambling Act, 1977
- The Kerala Gambling Act, 1960
- The Meghalaya Prevention of Gambling Act, 1970
- The Pondicherry Gaming Act, 1965
- The Rajasthan Public Gambling Ordinance, 1949
- The West Bengal Gambling and Prize Competitions Act, 1957
- The West Bengal Gambling Rules, 1958
- Uttar Pradesh Public Gambling Act, 1961

B. Online Gambling

The Gambling Legislations were introduced before the emergence of the internet. Therefore, the provisions of these laws do not expressly contemplate online gambling. The states of Sikkim and Nagaland are the only states to have adopted specific legislation that permits and regulates online gambling, namely the:

- Sikkim Online Gaming (Regulation) Act 2008 (**"Sikkim Gambling Law"**) was passed on June 28, 2008 with the dual objects of controlling and regulating online gaming through electronic or non-electronic formats, and imposing a tax on such games in the State of Sikkim. The *Sikkim Online Gaming (Regulation) Rules, 2009*, were subsequently

3. Constitution of India, Seventh Schedule, List II, Entry No. 34

passed on March 4, 2009 (and the same have been amended from time to time).

- Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act 2015 and the Nagaland Prohibition of Gaming and Promotion and Regulation of Online Games of Skill Rules 2016 (“**Nagaland Gambling Law**”), which regulate games of skill such as chess, sudoku, quizzes, binary options, bridge, poker, rummy, nap, spades, auction, solitaire, virtual golf and virtual racing games.

Further, the state of Telangana has amended the Gambling Legislation applicable to Telangana as an amendment to the legislation, which inter alia, expands the scope of offences to apply to the online medium as well. The Kerala High Court in the case of *Ramachandran K v The Circle Inspector of Police* has held that playing Rummy for stakes would amount to the offence of gambling under the Kerala Gaming Act, 1960.

A review petition was filed against the order of the High Court of Kerala in the matter of *Play Games 24x7 Pvt. Ltd v Ramachandran K & Anr.*⁴ However, the court dismissed the petition, and held that whether playing Rummy for stakes or not (including online Rummy) would amount to a violation of the Kerala Act would have to be seen on a case to case basis.

The court held that:” *What is the manner in which the games are conducted and how it is being conducted through online methods and what are the stakes involved in the matter are all issues which may arise for consideration.*”

C. Casinos

The Gambling Legislations regulate casinos in India. The Gambling Legislations of Goa, Daman & Diu⁵ and Sikkim⁶ allow gambling to a limited extent, under a license, in five star

hotels. In Goa, the law also permits casinos on board an offshore vessel.

D. Lotteries

Under the Constitution of India, the central legislature has the power to enact laws with respect to lotteries.⁷ Lotteries have been expressly excluded from the purview of the Gambling Legislations and are governed by the central law - Lotteries (Regulation) Act, 1998 under which the Lottery (Regulation) Rules 2010 (“**Central Lottery Laws**”) and state specific rules have been framed (“**Lottery Laws**”). The Central Lottery Laws allow the state governments to organize, conduct or promote a lottery, subject to the conditions specified in the Central Lotteries Laws. The state governments may appoint an individual or a corporate as a “distributor or selling agent” through an agreement to market and sell lotteries on behalf of the organizing State. While some states such as Punjab, have gone to the extent of specifically providing for and approving online lottery systems⁸ to be governed by the state Lottery Laws, lottery is banned in certain states in India, for example Madhya Pradesh. Section 294 A of the Indian Penal Code, 1860 (“**IPC**”) specifically prohibits private lotteries. Certain States have repealed Section 294 A of the IPC and enacted their own legislations banning lotteries apart from non-profit lotteries (such as the States of Andhra Pradesh, Gujarat, Karnataka, Maharashtra, etc.). Certain other States have introduced legislation expressly banning lotteries in their States (e.g. the State of Bihar vide the Bihar Ban on Lottery Act, 1993).

E. Daily Fantasy Sports

Certain versions of Fantasy Sports games can be argued to be preponderantly skill based games in the Indian context. Accordingly such games can be treated as exempted under the Gaming Legislations.

The High Court of Punjab and Haryana has held Dream 11’s format of fantasy sport to be a game

4. RP No. 514 of 2019 in WP (C) 35535/2018

5. The Goa, Daman and Diu Public Gaming Act, 1976.

6. Sikkim Casinos (Control and Tax) Act, 2002 read with Sikkim Casino Games Commencement (Control and Tax) Rules, 2007 and Sikkim Casino Games (Control and Tax) Amendment Rules, 2011

7. Constitution of India, Seventh Schedule, List I, Entry No. 40.

8. AIR 1996 SC 1153

of skill in the case of *Shri Varun Gumber v. UT of Chandigarh & Ors.* (“**Varun Gumber Case**”) Thereafter, the High Court of Bombay also recognized that the same format of fantasy sport was a game of skill in *Gurdeep Singh Sachar v. Union of India.*⁹

F. Horse Racing

Horse racing has been given a special status under the Gambling Legislations. Most legislations specifically exclude betting on horse races from within their purview, subject to certain conditions. In *K R Lakshmanan vs State of Tamil Nadu*¹⁰ (“**Lakshmanan Case**”), the Supreme Court held that betting on horse racing was a game of skill since factors like fitness, and skill of the horse and jockey could be objectively assessed by a person placing a bet. The analysis is interesting to note as this reasoning could possibly be used to justify other forms of betting as games of skill, especially sports betting.

II. Physical & Internet Gambling

The most common forms of gambling in India, from time immemorial, are the many versions of card games like *teen patti* (akin to flush), poker, rummy and bridge, as well as sports betting. With the dawn of technology, these games have effectively extended their reach and popularity via the digital medium. Most popular online gambling sites in India are card games sites hosting Rummy and Poker tournaments.

The Gambling Legislations were enacted when digital media and internet were uncommon and its reach was not as far as it is today. The Gambling Legislations deal with gambling in the context of a physical enclosure, termed a “common gaming houses”. Therefore, when these Gambling Legislations are read in the context of online and digital gambling, their interpretation and applicability gets complex.

9. Bombay High Court, Criminal Public Interest Litigation Stamp No.22 Of 2019.

10. AIR 1996 SC 1153

A. Meaning of Gambling

‘Gambling’ as per most Gambling Legislations is understood to mean “the act of wagering or betting” for money or money’s worth.

Gambling under the Gambling Legislations however does typically not include (i) wagering or betting upon a horse-race/dog-race, when such wagering or betting takes place in certain circumstances, (ii) games of “*mere skill*” and (iii) lotteries (which is covered under Lottery Laws).

B. Exemption for Betting on Horse Racing

While carving out betting on horse racing from falling outside the purview of ‘gaming/gambling’, most Gambling Legislations provide certain conditions that are required to be met. The turf clubs where the horse races are held operate under a license from the respective State governments (“**Horse Racing Licensing Legislations**”).

In most states, the Gambling Legislation provide exemption for betting on horse races from the definition of “gaming/gambling” when wagering or betting takes place:

- i. On the day on which such race is to run;
- ii. In an enclosure which the licensee of the race-course, on which such race is to be run, has set apart for the purpose under the terms of the license issued to the licensee in respect of such race-course.

The definition of ‘gaming/ gambling’ further suggests that the licensee of the race course on which the race is to be run, can set up separate enclosures for the purposes of betting on horse racing, subject to the terms of license issued to the licensee. It is pertinent to note that, the Gambling Legislations of some states read with relevant Horse Racing Licensing Legislations, viz. Maharashtra, West Bengal, Andhra Pradesh, Karnataka and Tamil Nadu provides that a licensee can set up the enclosure subject to prior approval of the state governments subject to certain conditions.

C. Games of Skill Outside The Purview of Gambling

The Gambling Legislations provide that the restrictions would not apply to games of “*mere skill*”.

The Supreme Court of India (“SC”) has interpreted the words “*mere skill*” to include games which are preponderantly of skill and have laid down that (i) the competitions where success depends on substantial degree of skill will not fall into category of ‘gambling’; and (ii) despite there being an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of “*mere skill*”.¹¹ Whether a game is of chance or skill is a question of fact to be decided on the facts and circumstances of each case.¹² The judicial view has been very strict in this regard.

Thus, it may be possible that games which satisfy the test of “skill versus chance” are not regulated under the Gambling Legislations and may be legally offered through the physical as well as virtual mediums (including internet and mobile), throughout India.

In the case of *State of Andhra Pradesh v. K. Satyanarayana & Ors.*¹³ (“**Satyanarayana Judgment**”), the SC specifically tested the game of rummy on the principle of *skill versus chance* and held that Rummy was not a game entirely based on chance like the ‘three-card’ game (i.e. ‘flush’, ‘brag’ etc.) which were games of pure chance. It was held that Rummy was a game involving a preponderance of skill rather than chance. The SC based its conclusion on the reasoning that Rummy requires a certain amount of skill as the fall of the cards needs to be memorized, and the building up of Rummy requires considerable skill in holding and discarding cards. The chance element in Rummy is of the same level as that involved in a deal in a game of bridge. In all games in which cards are shuffled and dealt out, there exists an element of chance, because the distribution of the cards is not according to a

predetermined pattern, but is dependent upon how the cards find their place in the shuffled pack. In this judgment the SC has also passingly observed that bridge is a game of skill.

However, the Kerala High Court in the case of *Ramachandran K v The Circle Inspector of Police* has held that playing rummy for stakes would amount to the offence of gambling under the Kerala Gaming Act, 1960. Arguably, games of skill are exempted from the prohibitions under most State anti-gambling laws, irrespective of whether they are played for stakes or not.

A review petition was filed against the order of the High Court of Kerala in the matter of *Play Games 24X7 Pvt. Ltd v Ramachandran K & Anr.*¹⁴ However, the court dismissed the petition, and held that whether playing Rummy for stakes or not (including online Rummy) would amount to a violation of the Kerala Act would have to be seen on a case to case basis.

The court held that:” *What is the manner in which the games are conducted and how it is being conducted through online methods and what are the stakes involved in the matter are all issues which may arise for consideration.*”

In most jurisdictions, including India, the growing popularity of Texas Hold’em Poker cannot be doubted. Though there is a lack of clear jurisprudence on this subject in India presently, there appears to be an increasing trend internationally considering Texas Hold’em Poker as a game preponderantly of skill, and not a game of chance alone, except in the states of Gujarat and Telangana.

D. Concept of Common Gaming Houses

Under the Gambling Legislations (except states like Assam and Orissa where gambling per se is an offence), most offences and prohibitions are in relation to a “common gaming house”.

Generally, under the Gambling Legislations, to qualify as a “common gaming house”, there

11. *State of Bombay v. R.M.D. Chamarbaugwala*, AIR 1957 SC 699.

12. *Manoranjithan Manamyil Mandram v. State of Tamil Nadu*, AIR 2005 Mad 261.

13. AIR 1968 SC 825.

14. RP No. 514 of 2019 in WP (C) 35535/2018

should be (a) an enclosed physical premise such as a house or a tent; and (b) “instruments of gaming” kept or used in such enclosed physical premises for the purpose of accrual of profit or gain to the person owning, occupying, keeping such enclosed physical premises or using any such instrument of gaming in the enclosed physical premises; and (iii) profit or gain by way of charge for use of the same enclosed premises or “instruments of gaming” or otherwise.

However, under certain Gambling Legislations, like Delhi, it may not be necessary for such “profit or gain” to accrue to the person owning, occupying or keeping such premises in order for it to qualify as a common gaming house for certain purposes/games only.

“*Instruments of gaming*” means ‘any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect to any gaming.’¹⁵ In today’s context, there is a school of thought that believes that computer terminals used for gambling and servers on which gambling takes place and related e-records are maintained also constitute “instruments of gaming”.

On analysis of the definition of “common gaming house” in general under the Gambling Legislations, it seems that the intention of the legislatures is to impose restrictions on the use of a physically enclosed premises for the purposes of making “profit or gain” from the use of such premises.

Thus, a private house may not ideally constitute a “Common Gaming House”, if there is lack of intent on the part of the owner to derive any profit or gain from the use of his house for gambling purposes. Extending the same analogy to the digital world, when a person is accessing online gambling websites from his house, arguably, it may not be a “common gaming house”.

The situation may however be different where such gambling activities are carried out in places such as clubs or cyber cafés, where the cyber cafés derive profits by allowing the use of the computer terminals (which may be caught within the scope of “instruments of gaming”).

Most of the Gambling Legislations refer to “any place” in the definition of “Common Gaming House”. In the absence of a specific exclusion, the definition could include a server/portal/ website providing means of gaming. Taking money for providing the online medium to play games may also fall within the ambit of profiteering from providing and maintaining “Common Gaming Houses”. To put an end to this confusion, the online rummy websites had approached the Supreme Court¹⁶ (details of the case have been discussed below) to clarify whether the Gambling Legislations cover online gambling portals.

E. Offences, Offenders & Penalties

Most Gambling Legislations prohibit the act of:

- Owning, keeping, occupying or having care and management of a Gaming House
- Advancing or furnishing money for the purposes of gambling to persons frequenting any such Gaming House;
- Gambling in Common Gaming House or present for the purpose of gambling/gaming in Common Gaming House;
- Gambling or suspected gambling in any public street, place or thoroughfare;
- Printing, publishing, selling, distributing or in any manner circulating anything with the intention of aiding or facilitating gambling/gaming; and
- Activity of Gambling/Gaming per se (This is not applicable to every State. Only the Gaming Legislations of States like Orissa and Assam prohibit the activity of gam-

15. The Public Gambling Act, 1867

16. SLP No. 15371 / 2012

bling/gaming itself, agnostic to the medium through which the gaming is offered).

- Offering of skills games online in Nagaland without a license
- Offering games in the State of Sikkim without a license to operate online games
- Offering any games in the state of Telangana

The liability for offences under the Gambling Legislations usually vests with:

- The owner of the gaming/common gaming house;
- The person keeping or having charge of the gaming/common gaming house;
- The person gambling or possessing instruments or records of betting or suspected of gambling or possessing such instruments

All Gambling Legislations prescribe penalties which are more or less similar. The *Bombay Prevention of Gambling Act, 1887* imposes a fine and imprisonment for offenders. A first offence is punishable with a fine of at least INR 500 (approximately USD 8) and 3 months' imprisonment, a second offence is punishable with a fine of at least INR 1,000 (approximately USD 15-20) and imprisonment for 6 months. and a third or subsequent offence entails a fine of at least INR 2,000 (approximately USD 30-35) and imprisonment for one year.¹⁷

F. Licenses for Gaming

While all the above legislations prohibit gambling in common gaming houses, there are certain state legislations that have legalised some form of gambling and issue specific licenses to the gambling / gaming establishments. For instance, the West Bengal Gambling & Prize Competition Act, 1957 (“**WB Act**”) specifically excludes ‘games of cards like Bridge, Poker, Rummy or Nap’ from the definition of “gaming and gambling”. The WB Act further exempts games of skill from

its ambit, however provides that where such games are played in public markets, fairs, carnivals, streets or any other place to which the public have access, a permit is required from the Commissioner of Police in Calcutta or the District Magistrate or the Sub-divisional magistrate when such game is played in any place where the public may have access.

Further, under the Sikkim Gaming Laws, an interested person can obtain a “license” for the purpose of conducting online games such as Roulette, Black-jack, Pontoon, Puntobanco, Bingo, Casino Brag, Poker, Poker dice, Baccarat, Chemin-de-for, Backgammon, Keno and Super Pan 9 and sports betting, including its organization, management or promotion or negotiation or receipt of bets. A licensee can take the prior approval of the state government to offer any other /addition online games under the license.

The Nagaland Gambling Law only permits skill- based games. Licenses allow operators to organize betting or wagering on online games of skill or to make a profit through the operation of online platforms for playing games of skill. Games of skill are all games where there is a preponderance of skill over chance, and include card-based games (such as poker, rummy and solitaire), quiz/strategy-based games (such as chess or sudoku) and action, sports and adventure games (such as fantasy leagues and virtual sports) (*Nagaland Gambling Law*).

Under the Nagaland Gambling Law, a licenses can be granted to an individual, a public company or a limited liability company incorporated in India and with a substantial holding and controlling stake in India (that is, the ownership of more than 50% of a company’s voting stock must be Indian). Only entities that have no interest in any online or offline gambling activities in India or overseas can apply for a license. Applicants must not have any criminal history or have been charged with, or convicted for, any offence under the Foreign Exchange Management Act 1999 or for money laundering in India and abroad.

Firms and companies must ensure that their controlling stake remains in India and that all executive decisions are taken in India. The operations of both the companies holding

17. Section 4 & 5 of the Bombay Prevention of Gambling Act, 1887

the license and those providing technology support (such as the platform, software, servers and so on) must be controlled, maintained and operated from India.

The developments in relation to online gambling, sports betting as well as legislative developments in the State of Nagaland has been discussed in the Annexures.

In an interesting development, on December 28, 2018, the Sports (Online Gaming and Prevention of Fraud) Bill, 2018, (“**Sports Bill**”) was introduced as a private member’s bill in the Lok Sabha.¹⁸ The Sports Bill was introduced on the heels of the Law Commission’s report on legalizing betting and gambling in India. However, the Sports Bill has now lapsed and will need to be re-introduced in Parliament.

The Statement of Objects and Reasons accompanying the Sports Bill underscored that it has been introduced with the dual aims of (i) preserving integrity in sports and (ii) introducing a regulatory regime for online sports betting. Accordingly, the Sports Bill had been divided into two parts. The first part contained provisions for the prevention of sports fraud. The second part contained provisions for the regulation of online sports betting.

G. The Mahalakshmi & Gaussian Network Sagas

i. The Mahalakshmi Cultural Association case:

Another important issue that arises is whether the owners of gaming houses can collect stakes or derive profits from the players. In the *Satyanarayana* Judgment,¹⁹ the Supreme Court *inter alia* observed that clubs usually charge an additional amount for anything they supply to their members; the additional payments are used to manage the club and provide other amenities.’ The court observed that merely charging an extra fee for playing cards (unless excessive) will not

amount to the club making a profit or gain so as to render the club a common gaming house. The court has laid down this principle in general and has not particularly applied it to games of skill like rummy.

The courts of India have also held that while it is the right of the clubs to have recreational activities which are not prohibited, the authorities have the right to take appropriate proceedings against illegal games of betting, wagering, etc. Thus, the owners of clubs need to be careful about the manner in which services against which fee/ stakes are collected from players are carried out, in order to avoid falling under the penal provisions of the Gambling Legislations.

In a subsequent case²⁰ before the High Court of Andhra Pradesh, the court stated that penal statutes should be strictly construed and the benefit of any loophole in the statute was to be given to the accused. Therefore, it is for the legislature to intervene and amend the law, and lay down that playing rummy with stakes would also be ‘gambling / gaming’ within the meaning of the law.

In 2012 the Madras High Court in the matter of *Director General of Police, Chennai v. Mahalakshmi Cultural Association*²¹ interpreted the *Satyanarayana* Judgment differently in the context of a statute in *pari materia* and held that rummy played with stakes would amount to gambling. This judgment had unsettled a rather settled position of law. The Supreme Court was seized of the matter by way of a Special Leave Petition filed by Mahalakshmi Cultural Association (“**Association**”). Certain online gaming websites (“**Intervenors**”) filed intervention applications on the apprehension that they would be subject to criminal prosecution like brick and mortar rummy providers. The Supreme Court heard arguments based on business models adopted – for example, in the context of online gambling, if a fee was collected for the services provided by the hosts of a website, as opposed to a buy-in for a particular game, would the same be considered ‘stakes’?

18.

19. AIR 1968 SC 825.

20. *D. Krishna Kumar and Anr. v. State of A.P.*, 2003 CrILJ143

21. W.A.No. 2287 of 2011, Madras High Court.

The Intervenor was also asked to submit detailed affidavits by the Supreme Court, explaining the structure of the games offered, the fees charged for such games and the flow of profits in relation to the same.

It was expected that the Supreme Court would lay down guidelines on what business models (including online) would constitute gambling as restricted / prohibited under the gambling legislations of various states (even when skilled games were played for a fee / stake).

The SC on 13 August, 2015 disposed of the petitions of the Intervenor stating that it found that the impugned order did not deal with online Rummy and that it applied specifically to Rummy played in the brick and mortar format only. Further, the judges noted that the States had not taken any decision on whether the provision of online Rummy would constitute gambling under the Chennai City Police Act. Therefore, the SC was of the opinion that it was not necessary to entertain this petition. The SC also mentioned that the observations in the Impugned order may not necessarily relate to online rummy. The SC at this juncture was yet to deliver its verdict on the issue of taking stakes from Rummy in the offline context.

The 19th August 2015 saw under twist in the tale. The counsel for the Association stated that the trial court had passed an order on 11th October, 2014 by way of which the Association had been acquitted. Interestingly, the issue before the trial court brought by the prosecution was not based on the case of Rummy (or any other 13 card game) but for members indulging in a game colloquially and locally called *Mangatha* “*ulle, velliye*” by betting money for profit. The counsel for the Association sought permission to withdraw the original writ filed before the Madras High Court and such permission was granted by the SC with an observation that since the writ petition is dismissed as withdrawn, the observations made by the Madras High Court in the Impugned Order or the matter before the SC do not survive as the writ is infructuous.

ii. Gaussian Network Case

The question of whether a virtual platform could allow games of skills to be played for stakes also came up for consideration before the Delhi District Court.²² A petition was filed under Order 36 Rule 1 of the CPC seeking the opinion of the district court on *inter alia* whether there was any restriction in allowing participants to play games of skill for stakes with the intention of making a profit.

The Court had opined that it would be illegal to allow skill based games to be played for stakes in the virtual space. It observed that the degree of skill prevalent in games played in the physical form cannot be equated with the degree of skill involved while game was played online. The Court seems to have assumed that the degree of chance would increase in online gambling; and there was a possibility for manipulation of outcomes by cheating and collusion April 21, 2016 saw a very unexpected turn of events. The Counsel appearing for Gaussian sought permission from the High Court to withdraw the revision petition. The Counsel argued that under common law as well as established case-law such as *R. M. D. Chamarbaugwalla v. Union of India, State of Andhra Pradesh v. K. Satyanarayana & Ors. and K R Lakshmanan v. State of Tamil Nadu* there was a clear exception provided for games of skill in India. In states like West Bengal, offering games like Poker for stakes was permissible. The Nagaland Act also legitimized offering games of skill such as online Poker and online Rummy. The order of the Delhi District Court, therefore would limit the rights of Gaussian even though it would be legal to offer such games under the Nagaland Act or West Bengal.

The Counsel for Gaussian requested that the approach followed by the Supreme Court while dismissing the Mahalakshmi case be taken in the present scenario also. As mentioned above, in the Mahalakshmi case, petitioners sought permission for the withdrawal of the original writ petition filed before the Madras High Court

22. *M/s Gaussian Networks Pvt Ltd. v. Monica Lakhanpal and State of NCT*, Suit No 32/2012, Delhi District Court.

and permission for the same was granted by the Supreme Court of India. Consequentially, the proceedings before the Supreme Court of India became infructuous and the observations of the Madras High Court does not survive.

The High Court acceded to the request made by the parties and granted permission to withdraw the reference made before the Delhi District Court and the revision petition filed before the High Court. The observations of the District Court, thus, do not survive any longer.

The law continues to remain grey in terms of whether the state wise gambling enactments cover online gaming sites as well. The *Mahalakshmi Case* and the *Gaussian Network Case* could have been the turning point where it was expected that the SC and Delhi High Court respectively would lay down the law stating whether the state Gaming Legislations cover online models as well. However, the shadows of doubt on action on part of the judiciary is now clear and the dilemma of the online operators for the last four years has finally seen its end.

H. Clarity on Fantasy Sports being a ‘Game of Skill’

Under Nagaland Online Gambling Law, games of skill include games where the “skill lies in team selection or selection of virtual stocks based on analysis”. This law also specifies that virtual sport fantasy league games and virtual team selection games are games of skill, and that games of skill can be virtual sports-based games.

In 2017, the High Court of Punjab and Haryana (“**PH Court**”) became the first and only Indian court to rule fantasy sport to be predominantly skill-based (*Shri Varun Gumber v. UT of Chandigarh & Ors.*). The plaintiff in this matter was registered as a player with the respondent company, Dream 11 Fantasy Private Limited (“**Dream 11**”). He lost his bet of INR 50,000 (₹610/660) while playing fantasy sports tournaments offered by Dream 11. The plaintiff moved PH Court alleging that fantasy sports was not based on skill and that Dream 11 was carrying on business covered within the definition of ‘Gambling’ under the Gambling

Legislation applicable to the state of Punjab.

The PH Court relied on the Supreme Court’s decision in *K.R. Lakshmanan v State of Tamil Nadu*, which had held that betting on horse races was a game of skill.

The PH Court construed that the SC had held that competitions in which success depended upon a substantial degree of skill were not gambling, and despite there being some element of chance, if a game was preponderantly of skill, it would be a game of ‘mere skill’.

The PH Court reasoned that playing fantasy sports required the same level of considerable skill, judgment and discretion. Hence, it was held that the element of skill predominated the outcome of the fantasy game and fantasy games were of “mere skill” and could not amount to gambling. Pertinently, the PH Court also held that since fantasy sports did not amount to gambling, Dream 11 was conducting a business activity protected under Article 19(1)(g)7 of the Constitution. Please refer to Annexure II for our detailed description of this judgment. A special leave petition was filed against the order of the PH court before the Supreme Court. However, in September, 2017, the Supreme Court dismissed the petition.²³

The Bombay High Court, in a 2019 case,²⁴ upheld the ruling of the PH Court, and gave special weight to the fact that the Supreme Court had dismissed the petition in holding there was no betting or gambling is involved in the fantasy games operated by Dream 11 as their result is not dependent upon winning or losing of any particular team in real world on any given day. The Court further held that Goods and Service Tax (GST) is not applicable on the entire deposit received from the player but only on the consideration which is payable / collected for the supply of goods or services or both within the platform. Please see Annexure VI for more details.

23. Diary No(s).27511/2017 arising out of impugned final judgment and order dated 18-4-2017 in CWP No. 7559/2017 passed by the High Court of Punjab and Haryana at Chandigarh

24. *Gurdeep Singh Sachar v. Union of India*, Bombay High Court, Criminal Public Interest Litigation Stamp No.22 Of 2019.

I. Telangana outlaws preponderance in skill games

The Governor of the State of Telangana had promulgated two ordinances, which amended the Telangana Gambling Legislation:

- i. The Telangana State Gaming (Amendment) Ordinance, 2017 (“**Ordinance I**”) was promulgated on June 17, 2017. Ordinance I inserted an explanation to the skill – games exemption under the Telangana Gambling Legislation stating that games of skill which have part – elements of chance could not be termed skill games. Furthermore, Ordinance I expanded the offences to apply to the online medium as well.

On June 20, 2017, Ordinance I was challenged by the Rummy Operators before the High Court of Hyderabad in *Auth Rep, Head Infotech (India) Pvt. Ltd., Hyderabad & Anr vs. Chief Secy, State of Telangana, Hyderabad & Ors* (“**the Telangana Proceedings**”).

- ii. Pending final outcome of the Telangana Proceedings, the Governor promulgated the Telangana Gaming (Second Amendment) Ordinance, 2017 (“**Ordinance II**”) to amend the Telangana Gambling Legislation further. While Ordinance II has, inter alia, removed the skill – games exception in its entirety from the Telangana Gambling Legislation, it has also amended the definition of ‘gaming’ under the Telangana Gambling Legislation to state that games (including online games) when played with stakes would amount to ‘gaming.’

On December 1, 2017, the Governor of Telangana gave his assent to the Telangana Gaming (Amendment) Act, 2017. This Amendment incorporates the changes brought in by both Ordinance I and Ordinance II. The primary grounds of challenge by the Rummy Operators to both the Ordinances (now the Amendment), and the rebuttals by the State of Telangana are synopsisized in **Annexure III**.

Another notable development in the State of Telangana is that the Telangana Prevention of *Dangerous Activities of Bootleggers, Dacoits, Drug-*

Offenders, Goondas, Immoral Traffic Offenders And Land-Grabbers Act, 1986 was amended to bring ‘gaming offenders’ (persons who commit or abet the commission of offences punishable under the Telangana Gaming Act, 1974) within the ambit of the legislation. The Telangana Government has the power to detain (subject to this legislation) ‘gaming offenders’ to prevent them from acting in a manner prejudicial to public order.

J. Poker: Game of Skill or Chance

In a recent judgment passed in *Dominance Games Pvt. Ltd. vs State of Gujarat & 2 Ors.* (“**Gujarat Case**”) a single judge of the Gujarat High Court has held that: (i) poker is a game of chance; and (ii) accordingly, conducting poker games falls within the prohibitions under the Gujarat Gambling Legislation. Importantly, the Court held that any game, even if it involves skill but is played with stakes, would fall within the ambit of gambling. This judgment by the Single Judge of the Gujarat High Court has been challenged before the Division Bench, and the next hearing is scheduled on November 18, 2019.²⁵

A synopsis of the proceedings in the Gujarat Case is set out in **Annexure IV**.

In the wake of these developments, another case was filed before the Delhi High Court matter, *Karan Mutha vs. State of NCT* wherein the petitioner filed a petition to quash the proceedings initiated against him under the Delhi Gambling Legislation. The state authorities had initiated proceedings against the petitioner upon raiding premises in which the petitioner was found playing Poker. The petitioner sought to quash the proceedings on the ground that poker is a game of skill and accordingly exempted from the applicability of the Delhi Gambling Legislation. However, the petition was subsequently withdrawn from the High Court.

It is also pertinent to note that, the High Courts of Karnataka and Kolkata, in various matters, have stated that in situations where Poker is played as a game of skill, there was no

25. As of the date of this publication.

objection to the games being organized and have prevented the local police from harassing individuals who conducted Poker tournaments. In a case before the High Court of Delhi, a petitioner has sought a complete ban on online gambling websites from operating in India (both Indian and foreign). The petitioner has sought certain directions from Government entities that taxes are recovered from persons engaged in such gambling activities, and violations of FEMA are checked.²⁶

K. Policy efforts for legalizing betting and gambling

The first instance when the Law Commission of India (“**Law Commission**”) was entrusted with the task of simplifying and streamlining the Gaming Legislations was in 2014. This culminated in the 20th Law Commission issuing a report titled “Obsolete Laws: Warranting Immediate Repeal” – An Interim Report” (“**2014 Report**”).²⁷ In the 2014 Report, the Law Commission observed that the Public Gambling Act, 1867 was an obsolete law in need of immediate repeal. Most of the State Enactments are based on the provisions of the Public Gambling Act. Thus, it construed that the Law Commission acknowledged the need to overhaul the outdated Gaming Legislations governing the industry in India.

Thereafter, following the developments in some highly- reported match fixing matters in India, the Supreme Court appointed a three – member committee (“**Lodha Committee**”) to, among other things, make recommendations necessary to prevent sports frauds and conflicts of interests in the game. The Lodha Committee recommended the legalization of betting in cricket in their report.²⁸

Following this, recently, the Law Commission headed by Justice B. S. Chauhan, a former judge of the Supreme Court was mandated by the Government of India to make recommendations on the possibilities of legalization of sports betting in India and the review of Gaming Legislations with a view to provide for a Central licensing regime. The Law Commission has already taken comments and held active discussions with all stakeholders. In the appeal of the Law Commission dated May 30, 2017, they invited recommendations for legalizing betting and gambling. They set out specific queries for the stakeholders to respond to. Strong legal and business cases have been submitted in support of a regime to legalise the already burgeoning gambling industry in India.

The Law Commission of India (“**the Commission**”) finally released the highly anticipated report on legalizing betting and gambling in India²⁹ (“**Report**”) in July, 2018. However, following apprehensions after the release of the Report, the Commission released a press note to emphasize that its primary recommendation was to ban betting and gambling in India. However, in the event that the Central and State Governments did consider regulating it, certain measures to combat player fraud, enhancement and curbing problem gambling had been enlisted in the Report.

The Report has alluded to factors which make India unsuitable for legalizing betting and gambling activities, such as the fact that one-third of the population is below the poverty line, and that these activities are considered immoral by the Indian society. The Report has also cautioned that extreme financial losses and loan- sharking would result from legalizing these activities.

26. As of the date of this publication, there have not been any orders passed in this case.

27. Law Commission of India, *Obsolete Laws: Warranting Immediate Repeal* – An Interim Report, September 12, 2014, available at: <http://lawcommissionofindia.nic.in/reports/Report248.pdf>

28. <http://www.firstpost.com/sports/ipl-betting-full-text-of-lodha-panels-verdict-on-rajasthan-royals-and-csk-2342310.html>

29. <http://lawcommissionofindia.nic.in/reports/Report276.pdf> Report No. 276, Law Commission of India, ‘Legal Framework: Gambling and Sports Betting,’ July 2018

However, the Report also nods towards the benefits of legalizing gambling, such as the possibility of generating revenue, and employment, as well as boosting supporting industries such as tourism and IT. The Report also underscored that a regulated industry would curb issues of money laundering and fraud.

The Report finally provided the following recommendations for the introduction of a regulatory framework for betting and gambling in India:

- i. **Constitutional Framework:** The Report suggests that central Government derive the legislative competence to legislate on betting and gambling activities (which are presently on the State list, as discussed above), through an alternate entry governing 'Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication,' which falls under the Central list of the Constitution. Alternatively, the report proposes that Parliament may enact a model law which could then be adopted by individual States, or Parliament legislate on these subjects in exercise of its powers under Article 249 or Article 252 of the Constitution of India.
- ii. **Eligibility of a license:** The report has cautioned that gambling and betting should only be permitted to be offered by Indian licensed operators 'operating from within India'.
- iii. **Authority:** While the report suggests that licenses should be awarded by a 'game licensing authority,' it does not provide any recommendations on who such an authority shall comprise of, or how it shall operate.
- iv. **Foreign Direct Investment:** The Commission also recommends that the Foreign Direct Investment Policy under the Foreign Exchange Management Act, 1999 should be relaxed to allow investment in the industry. Currently, foreign direct investment is prohibited in gambling and betting, including in casinos.
- v. **User Restrictions:** The Report introduces a number of measures to protect players from gambling, particularly vulnerable sections of society, such as:
 - A bifurcation between gambling into 'proper gambling' (denoting higher-stakes gambling) and 'small gambling' (denoting lower stakes gambling). Only individuals belonging to higher income groups would be permitted to indulge in the former
 - Linkage of all gambling transactions to operator and players' Aadhar cards (the Indian equivalent of a social security number)/permanent Account Number cards, as well as ensuring all transactions are through electronic means to ensure transparency
 - Age gating provisions for minors, as well as the establishment of a council to study and prevent problem gambling and gambling by minors
 - Prohibitions on gambling for those who avail of Government social welfare schemes, or below the tax bracket
 - Regulation of online advertising content, and displaying risks associated with gambling on all operator websites
- vi. **Taxation:** While the Report did recommend that any income derived from betting and gambling be taxed under the Income Tax Act, 1961 and the Goods and Services Tax Act, 2017, this aspect is already covered under the prevailing tax laws. The Report remains conspicuously silent on any detailed recommendations in tune with the industry representations. This was a key concern for the Indian gaming industry, which the Report has failed to address.
- vii. **Amendments to existing laws:** The report has recommended that certain other laws would need to be amended to bring the gambling industry within a regulatory framework. These laws are enlisted below:

- Amendment to the existing Information Technology (Intermediary Guidelines) Rules, 2011 to bar intermediaries from transmitting only illegal gambling, allowing licensed operators to host gambling related content on platforms, as well as advertise their products
- Introduction of an exception for licensed betting and gambling activities within the National Sports Development Code of India, 2011, introduced by the Ministry of Youth Affairs and Sports. The Code aims to prevent betting and gambling in sports.
- Section 30 of the Indian Contract Act, 1872, renders wagering contracts void and unenforceable. The Report proposes that Section 30 be amended to exempt transactions over licensed operators' portals, or casinos, from the definition of 'wagering agreements.'
- Match fixing and other sporting fraud be made criminal offences with severe punishments

2. Prize Competitions

Many popular games and contests in India are in the form of crossword puzzle prize competitions, missing-word prize competitions, picture prize competitions, etc., in which monetary or other prizes are offered for the solving of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.

Traditionally, one would find a prize competition in a local newspaper or announced on the radio. However, in recent times, with the growing number of media outlets, prize competitions have begun to feature in different forms. For example, on television shows in the form of a puzzle, crossword or a picture prize competition where the viewers would subsequently send the solutions to the organizer by way of SMS or calls. Also, there have been a growing number of SMS driven competitions and online prize competitions.

These competitions are regulated under the various prize competition laws in India including the *Prize Competition Act, 1955* (“**Prize Competition Act**”) which is a central enactment.

In the case of *RMD Chamarbaugwala & Anr.v Union of India & Anr.*,³⁰ the Supreme Court of India held that the Prize Competitions Act only applies to games of chance/ games which were of a gambling character.

However, due to the types of games covered under the Prize Competitions Act (i.e., crossword prize competitions, etc.), there is an anomaly in the scope of this Act, read with the Gaming Legislations, and the nature of games for which a licence is required under the PCA.

Only some of the states of India have passed resolutions to give effect to this law, being the states of Andhra Pradesh, Maharashtra, Tamil Nadu, Orissa, Uttar Pradesh, Madhya Pradesh, Punjab and Gujarat. Some states have also enacted separate laws for regulating prize

competitions in their respective states, such as West Bengal. However, the definition of ‘prize competition’ in such state enactments is more or less similar to that in the Prize Competition Act.

The Prize Competition Act regulates prize competition(s) in which the total value of the prize or prizes (whether in cash or otherwise) offered in any month exceeds INR 1,000 (approximately between USD 15 to 20), and prize competition(s) where the value of entries exceeds INR 2,000 (approximately between USD 30 to 35). Any person intending on conducting such prize competitions has to obtain a license to engage in such activities, and the details for obtaining such licenses are provided in the rules framed thereunder. Any person conducting competitions falling within the purview of the Prize Competition Act, that does not obtain a license, is punishable with imprisonment for a term up to 3 months, or with a fine which may extend to INR 1,000 (approximately between USD 15 to 20), or with both. “Prize competition” has been defined by the Prize Competition Act as any competition in which “prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.”³¹

In the case of *Bimalendu De v. Union of India & Ors.*,³² the legality of the popular show *Kaun Banega Crorepati* (“**KBC**”) was in issue. A public interest litigation was filed before the Calcutta High Court requesting that the game shows KBC (a game show based on the format of popular British show ‘*Who wants to be a Millionaire*’) and *Jackpot Jeeto* be prohibited from being telecast on television on the grounds that the same amounted to gambling, and were hence prohibited under the laws.

The court reviewed the provisions of the *West Bengal Gambling and Prize Competition Act, 1957* (which has an analogous provision to the Prize Competitions Act) and held that game show

30. AIR 1957 SC

31. Section 2(d) of the Prize Competition Act

32. AIR 2001 Cal 30.

did not fit within the definition of a ‘prize competition.’

Similarly, the Bombay High Court³³ has also held that the Prize Competition has a limited meaning and does not include games of skill and competitions such as KBC. . As such, the Prize Competition Act only regulates a competition when prizes are offered for the solution of any numerical or alphabetical puzzle.

While the prize competitions are regulated under the Prize Competition Act and the state specific prize competition laws, depending on the facts and circumstances of each case, the Gambling Legislations may also get attracted while considering such competitions.

The *Tamil Nadu Prize Schemes (Prohibition) Act, 1979* (“**Tamil Nadu Act**”) regulates “prize schemes” in the state of Tamil Nadu. Under this enactment, there is a prohibition on the conduct or promotion of a prize scheme.³⁴ The applicability of this provision is determined purely on the facts and circumstances of each case. If the game format includes the (i) purchase of goods; and (ii) draw of lots to select the prize winner from amongst the persons who have purchased the product, then such a game format would fall within the ambit of this enactment. Under the said enactment, there is no express exemption given for skill based (or preponderantly skill based) games/ prize schemes.

Though the Prize Competition Act does not expressly cull out an exception for skill based games, the Supreme Court in the case of *R. M. D. Chamarbaugwalla v. Union of India*³⁵ laid down the principle that skill based or preponderantly skill based competitions were not sought to be regulated under the Prize Competition Act. The Supreme Court looked at, *inter alia*, the intention of the legislators, the mischief that they sought to address under the legislation, and the history before the legislation was brought into force.

However, under the Tamil Nadu Act this position has not been clarified. Therefore, till the time the courts or the legislature specifically clarifies the legal position under the Tamil Nadu Act vis-à-vis skill based games/prize schemes, depending upon its appetite for risk, companies hosting such games/prize schemes have been relying on either of the interpretations. In view of the same, some entities in their terms and conditions for the games, expressly exclude players from the state of Tamil Nadu.

33. *News Television India Ltd. and Others v. Ashok D. Waghmare and Another*; 2006 (2) MhLj431

34. “Prize Schemes” has been defined as follows:
“prize scheme means any scheme by whatever name called whereby any prize or gift (whether by way of money or by way of movable or immovable property) is offered, or is proposed to be given or delivered to one or more persons to be determined by lot, draw or in any other manner from among persons who purchase or have purchased goods or other articles from shops, centers or any other place whatsoever specified by the sponsors of the scheme or on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in relation to such purchasers.”

35. AIR 1957 SC 628

3. Casual and Social Gaming

'Casual games' typically refers to games like puzzles, adventure themed games, sports and action games, arcade games, card or board games, etc. This is a separate category of games than those which fall within the scope of the Gambling Legislations and the objective of casual games is not to bet or wager.

Casual games have always been one of the popular means of entertainment for the masses. While traditional board games have been popular world over for many decades now, electronic games first became popular with arcade game machines in countries like Japan and USA. These arcade games then gave way to video games and 'home entertainment' systems, such as Nintendo's Gameboy and Wii, Sony's PlayStation series and Microsoft's Xbox series, which have now become a common fixture, starting with western countries, and moving to emerging markets such as India. These video games introduced their audiences to a whole new experience of gaming compared to the traditional board games and today such gaming businesses thrive on the online and mobile platforms too. Computer games have also become popular with the advent of the internet giving rise to 'online games', multiple player interfaces and the ease of interactions with players online. This has enabled casual games to carve a niche for themselves in the market. The mobile and smartphone revolution has added millions of new gamers and thousands of game developers, thanks to the popularity of 'app stores'. These application stores now make it possible for small teams to make and sell games that could, if they became popular, result in millions of downloads and millions in revenues.

Online fantasy sports have also become extremely popular today, both in India and abroad. This format of gaming consists of participants that role play as owners, managers, or coaches of virtual / fictional sports teams. These games are offered to participants through different business models – paid-leagues,

free-entry leagues, knock-out tournaments or any other tournament model, often based on statistics generated and/or points accrued by real individual players or teams of a professional sport. Participants have the ability to trade, buy, sell, rotate and substitute players in their teams before each round of matches, just like a real sports team manager/coach.

For example, in a typical online football fantasy game, a participant may choose 11 (eleven) players as a starting line-up, with a few additional players as substitutes. The outcome of the real football matches involving these players will determine the points that the participant attains. Each player is awarded points and consequently the participant's team as a whole achieves a certain amount of points (aggregate of each of the players' points and any bonuses, in any).

Another type of casual gaming is through social media – Social games such as Farmville, Cityville, etc. have impacted the way consumers use social networks, and Facebook is reckoned as one of the world's largest online gaming platforms.

The nomenclature "casual" does not do away with the fact that there are laws to regulate casual games. For example, since certain casual games may also be based on building up, arrangement, combination or permutation, of letters, words, or figures, the provisions of the Prize Competition Act and related prize competition laws may get attracted to such games. We have elaborated the provisions and applicability of the prize competition laws above in Chapter V (Prize Competitions) of this paper.

In 2016-2017, a game called the Blue Whale Challenge was released. The game consisted of a series of tasks, the last of which was to commit suicide. The game was seen to be linked to a number of children under the age of eighteen committing suicide in India and around the world. A writ petition was filed before the

Madras High Court,³⁶ requesting the Court to devise a proper mechanism to put an end to the game. The Court issued directions to the Central and State Governments to take steps to block access to the game, as well as requiring internet service providers to take due diligence to remove all links and hash tags related to the Blue Whale Challenge. The Supreme Court went on to label the game as a 'national problem',³⁷ in a second PIL that was filed against the game in *Sneha Kalita v. Union of India*.³⁸ This case was ultimately dismissed in November 2017 as the Ministry of Electronics

and Information Technology (“**MeitY**”), respondents in the matter, submitted that it was not possible for them to block access to the game as there were no downloadable applications of the game, and there was hence very little scope for using technical solutions to identify or block the game. It was further noted that MeitY had issued notices to platforms such as Facebook, Google and Yahoo to disable access to and block the game. The Court further directed the Ministry of Human Resource Development to issue a circular creating awareness of the harmful effects of the game.

36. The Registrar (Judicial), Madurai Bench of Madras High Court, Madurai v. The Secretary to Government, Union Ministry of Communications, Government of India, New Delhi & Ors. .Suo Moto W.P. (MD) No. 16668 of 2017.

37. <https://www.moneycontrol.com/news/trends/supreme-court-labels-blue-whale-game-as-a-national-problem-2421941.html>.

38. Writ Petition (Civil) No.943/2017, Supreme Court of India,

4. Other Legal and Regulatory Issues

I. Laws affecting the Content of Games

A. Pornographic and Obscenity Laws

Many games and gaming websites in India include content which may be considered objectionable under the pornographic and obscenity laws of India. For instance, some of the popular websites offer games which have animated caricatures of human beings, including women, depicted in a manner which may be construed as offensive as per the moral standards of India.

i. Indian Penal Code, 1860 and the Information Technology Act, 2008

The Indian Penal Code (“**IPC**”) and the Information Technology Act, 2008 (“**IT Act**”) penalize the publication, distribution and transmission of obscene content. The IPC *inter alia* prohibits the sale, hire, distribution, exhibition, and circulation of any obscene object and also penalizes any person who engages, advertises, promotes, offers, or attempts to do

any obscene activity.³⁹ The IT Act *inter alia* penalizes the transmission of any obscene content⁴⁰ or sexually explicit material in electronic form,⁴¹ including child pornographic content.⁴²

As per the IPC and the IT Act, any material which is lascivious or appeals to the prurient interest or which may deprave and corrupt persons, is considered obscene. In determining whether or not the games and the images depicted in the games are lascivious or appeal to the prurient interest, the court takes into consideration factors such as - (a) whether the work taken as a whole appeals to the prurient interest; (b) whether the work is patently offensive; (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value. The court also takes into account other factors depending on the facts and circumstances of the case.⁴³

Under both these legislations, liability could be in the form of imprisonment, ranging from three to seven years, or a fine in the range of INR 0.5 million (approximately USD 7500) to INR 1

39. Section 292 and 294 of the IPC.

40. Section 67 of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall on first conviction be punished with imprisonment for a term which may extend to 3 years and with fine which may extend to INR 500,000 and in the event of a second or subsequent conviction with imprisonment or a term which may extend to 5 years and also with fine which may extend to INR 1,000,000.

41. Section 67A of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which may extend to 5 years and with fine which may extend to INR 1,000,000 and in the event of second or subsequent conviction with imprisonment for a term which may extend to 7 years and also with fine which may extend to INR 1,000,000.

42. Section 67B of the IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which may extend to 5 years and with fine which may extend to INR 1,000,000 and in the event of second or subsequent conviction with imprisonment for a term which may extend to 7 years and also with fine which may extend to INR 1,000,000.

43. *Director General, Directorate General of Doordarshan & Ors vs Anand Patwardhan & Anr*, Appeal (Civil) 613/2005; Supreme Court of India

million (approximately USD 15000), or both,⁴⁴ which may increase in case of repeat offenders. Further liability could be attracted under the IPC when obscene material is made available to young persons, (that is, below the age of 20 years).⁴⁵

In *Sharat Babu Digumatri v. Government of NCT of Delhi*, the Supreme Court held that, while the IPC makes the sale of obscene material through traditional print an offence, once that offence has a nexus with an electronic record under the IT Act; and no charge is made under the relevant provision of the IT Act, the accused cannot be proceeded against under similar provisions of the IPC. This case ensures that in case there is a conflict between laws, the special law(s) such as the IT Act shall prevail over general and prior laws.

ii. Indecent Representation of Women

The *Indecent Representation of Women (Prohibition) Act, 1986* prohibits any indecent representation of women i.e. the depiction in any manner of the figure of a woman, her form or body in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or that likely to deprave, corrupt or injure the public morality or morals.⁴⁶ The statute prohibits any such depiction, whether through advertisements or in publications, writings, paintings, figures or in any other manner and provides for penalty in connection with the same. The mode of transmission of advertisements is not specified and it may be construed that such advertisement may also be transmitted through the electronic form. This legislation also penalizes the

circulation of any material (including a film, any writing or drawing) containing any indecent representation of women, and may get attracted if the casual games represent women in the manner stated hereinabove. The penalty for violating provisions of the *Indecent Representation of Women (Prohibition) Act, 1986* is imprisonment for a term of up to two years and fine of up to INR 2,000 (approximately USD 30-35) with provisions for more severe punishments in case of repeat offences.⁴⁷

B. Laws Affecting Action based and Violent Games

Many popular casual games, such as Grand Theft Auto, Call of Duty, etc., are action based games which specifically appeal to young gamers.

While the linkage between exposure of certain forms of games to teenagers and violence in society has not been tested in Indian courts, this issue has been subject to enormous interest and controversy in the USA, Europe, and other Asian countries. Some US states, including California, have previously passed laws to regulate the sale of certain types of videos to children, but the US Supreme Court invalidated the same saying that video games formed part of the constitutional right to free speech and hence could not be regulated.⁴⁸ The Supreme Court also ruled that there was evidence indicating that these video games cause violence in society. However, despite this ruling, the state of New Jersey is mulling over a law restricting the sale of video games to minors.⁴⁹

It is also interesting to note that countries such as USA and Canada have independent self-regulatory bodies such as the Entertainment

44. Section 292, 293 and 294 of the IPC and 67, 67A and 67B of the IT Act.

45. Section 293 of the IPC provides that on first conviction, the offender shall be punished with imprisonment for a term which may extend to 3 years, and with fine which may extend to INR 2,000, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to 7 years, and also with fine which may extend to INR 5,000

46. Section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986.

47. Any person who contravenes the provisions of the act shall be punishable on first conviction with imprisonment of either description for a term which may extend to 2 years, and with fine which may extend to INR 2,000, and in the event of a second or subsequent conviction with imprisonment for a term of not less than 6 months but which may extend to 5 years and also with a fine not less than INR 10,000 but which may extend to INR 1,00,000.

48. http://www.nytimes.com/2011/06/29/arts/video-games/what-supreme-court-ruling-on-video-games-means.html?_r=0

49. <http://arstechnica.com/gaming/2013/04/new-jersey-ignores-supreme-court-in-pushing-for-violent-game-legislation/>

Software Rating Board (ESRB), which assigns ratings in respect of age and content, and also issues various guidelines to the video and computer games industry.⁵⁰

'PlayerUnknown's Battlegrounds', or 'PUBG' is a new entrant in the multiplayer social gaming space that has caused not only an uproar but also doubts on how appropriate it is for children to play. A PIL has been filed before the Bombay High Court,⁵¹ by an 11-year-old from Mumbai, Ahad Nizam. The PIL states that PUBG promotes immoral conduct such as violence, murder, aggression, looting, gaming addiction and cyber bullying, thus should be banned. This case is currently pending and next listed on March 8, 2019.

C. Intellectual Property Rights Issues

Casual games are often theme based in nature and use pictures, musical notes, figures, characters etc. to add to the appeal of the games. Since all such works are subject to copyright protection in their individual right, the use of such copyrighted material in the games, without taking adequate permissions/licenses from the owner of copyrighted material, can trigger copyright infringement issues under the Copyright Act, 1957. The owner of the copyright can take civil⁵² or criminal action against the infringer.⁵³

Popular titles may also be protected under the trademark law of India. More often than not, competitors may try to piggy back on the popularity of game titles or series titles (titles for a series of games). In India, titles can be registered and protected as trademarks under the Trade Marks Act, 1999. Unregistered titles which are popular may be protected under common law if

they have acquired a secondary meaning in the judgment of the target customers. The owner of the trademarks can take civil⁵⁴ or criminal action against the infringer.

In India, a user of an unregistered trademark cannot sue another party for infringement of its trademark but may institute only a passing off action against the defaulting party. However, to successfully defend a passing off action, the proprietor of the title will need to prove that the titles of the games (especially popular games), or get-up of the title logos is distinctive, and the public identifies these with the proprietor, which would not be required if the trademark is registered. The proprietor will also need to prove that the defaulting party has been using the marks deceptively and passing off their goods or services as that of the former.

On the flip side, especially in the case of online / social and casual games, since any software as well as visual content, music, characters etc. that are developed for the purpose of a game are protected by copyright and trademark laws (as applicable), the game developer / owner of such content will have the right to commercially exploit such content. Increasingly, it has been seen that most lucrative facets of casual and social gaming are licensing of intellectual property and merchandising.

In addition to the rights described above, the software related to certain types of games / functionalities within the games can also be protected by way of a patent right. While software as such is not patentable in India, certain countries such as the US allow the patenting of software. This distinction between the patent regimes is of importance in relation to games that are made available online. A game developed in India, when offered online and made available / downloaded in a country like the US, may be found to be infringing patent rights held over similar functionalities by any person such a country.

50. <http://www.esrb.org/index.js.jsp>

51. Public Interest Litigation Lodging No. 14 Of 2019, Bombay High Court.

52. Such as injunction, suit for damages or account of profits.

53. Copyright infringement or abetment of the same is punishable with imprisonment for a term which may vary between 6 months to 3 years and fine which may vary between INR 50,000 to INR 2,00,000.

54. Such as injunction, suit for damages or account of profits.

D. Personality Rights Issues

In order to attract gamers, many games such as the FIFA series or the Fallout Franchise, use the caricatures, likeness, voice, reputation or popularity of a celebrity for a commercial benefit without authorization from the celebrity. This may result in violation of the celebrity's personality rights which is a combination of the privacy and publicity rights of a person.

A violation of such rights would result in the court passing an order restraining the company or person owning the game from displaying/exhibiting these games or using the image of the celebrity in such games and/or award damages to the celebrity for harm caused to the reputation of the celebrity.

In India, personality rights have traditionally not been recognized by the courts. However, the Madras High Court in the case of *Shivaji Rao Gaikwad v. Varsha Productions* (“Defendant”)⁵⁵ witnessed the celebrated actor ‘Rajinikanth’ seeking an interim injunction restraining the Defendant from using his name, image / caricature / style of delivering dialogues in the film “Main Hoon Rajinikanth” and other forthcoming films so as to infringe his copyright, infiltrate his personality rights or cause deception in the minds of the public leading to passing-off. The court granted the interim injunction and stayed the release of the impugned film, the name of which was later changed to “Main Hoon Rajini”.⁵⁶

As regards the copyright in the name “Rajinikanth,” the court held that *only the first owner can claim copyright and would be entitled to a license of copyright; so far as the name ‘Rajinikanth’ is concerned, nobody being able to give definite knowledge of when the name came into inception and by whom; further, the name ‘Rajinikanth’ has been used in different movies on several occasions; hence, no one can claim exclusivity as regards the material in public domain*

Regarding the personality rights, the court observed that ‘personality rights.’ while not defined in any particular statute, have been identified by courts in India in various judgements such as *ICC Development (International) Ltd. v. Arvee Enterprises*.⁵⁷ The court held that such rights vests in those who have attained the status of celebrity. If any person uses the name of a is entitled to an injunction, if the said celebrity could be easily identified by the use of his name by the others. Since the celebrity in the instant case was easily identifiable in relation to the movie, the court granted him an injunction. The court additionally held that infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when celebrity is identifiable.

Thus, in a similar manner, games using celebrity images/caricatures/voice/style etc. without due authorization, may be held to be infringing the respective celebrity's personality rights.

II. Telecom Laws Applicable to Social Gaming

A recent study by market research⁵⁸ firm Nielsen provided an interesting insight into the usage of mobile phones in India. As per the study, voice calls and texting accounted for 46% (forty six percent) of smartphone usage whereas multimedia, games, apps and Internet browsing made up the rest.⁵⁹ Importantly, games were the most popular category among paid apps, with nearly 3 out of 5 users (58%) paying for games. There are certain telecom laws that are particularly important to consider by the gaming companies while evaluating their business models.

55. CS(OS) 598/2014

56. <http://indianexpress.com/article/entertainment/bollywood/faisal-saif-changes-title-of-main-hoon-rajinikanth-film/>

57. 2003 (26) PTC 245

58. Smartphones Keep Users in India Plugged In, dated June 2, 2013. Available at: <http://www.nielsen.com/us/en/news-wire/2013/>

59. Online Gaming in India: Reaching a new pinnacle, A study by KPMG India and Google (available at: <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/online-gaming.pdf>)

A. SMS Marketing Related Laws

In light of various complaints made against spam calls and SMSes, the Telecom Regulatory Authority of India (“TRAI”) issued the *Telecom Commercial Communications Customer Preference Regulations, 2010* (“**2010 Regulations**”) which seeks to prohibit Unsolicited Commercial Communications (“UCC”). The 2010 Regulations were replaced by the *Telecom Commercial Communications Customer Preference Regulations, 2018* (“**TCCCPR**”). The TCCCPR came into force on July 19, 2018. The TCCCPR has a phased manner of implementation, and should be fully implemented by February 28, 2019, as the previous deadline was extended for specific provisions by a notification issued by TRAI.

The TCCCPR is in the process of implementation and will be subject to the Codes of Practice (“**CoP**”) which will be drafted by the Access Service Providers, who will ultimately enforce the requirements of the TCCCPR. Thus, there will be more clarity on the processes required to implement the law once all CoPs are implemented by the Access Service Providers.

The TCCCPR has the following broad requirements to be followed in relation to commercials communication⁶⁰

60. Commercial Communication” means any voice call or message using telecommunication services, where the primary purpose is to inform about or advertise or solicit business for

- (A) goods or services; or
- (B) a supplier or prospective supplier of offered goods or services; or
- (C) a business or investment opportunity; or
- (D) a provider or prospective provider of such an opportunity;

Explanation: For the purposes of this regulation it is immaterial whether the goods, services, land or opportunity referred to in the content of the communication exist(s), is/are lawful, or otherwise. Further, the purpose or intent of the communication may be inferred from:

- (A) The content of the communication in the message or voice call
- (B) The manner in which the content of message or voice call is presented
- (C) The content in the communication during call back to phone numbers presented or referred to in the content of message or voice call; or the content presented at the web links included in such communication.

▪ *Opt-out/Consent*

The TCCCPR provides for an opt-out process for commercial communication, where users may register their preferences regarding inter alia, the following (i) the type of messages/calls are willing to receive (eg. SMS, Voice Call, Robo Call, etc.) (ii) the time of the day when they are willing to receive commercial communication; (iii) which day of the week they are willing to receive the commercial communication.

Recipients can use the preference registration process to opt out of commercial communication for certain specified categories: such as entertainment, real estate, education, health, etc. implying that they are amenable to receiving commercial communication for all other categories (partially blocked category), or opt out of receiving all kinds of commercial communication (fully blocked category).

In addition to the above, a sender may be able to send commercial communication to a subscriber who has otherwise generally opted out of receiving commercial communication, if such subscriber has specifically consented to receiving such commercial communication. The TCCCPR provides that consent for sending such promotional commercial communication may either be explicit (which has to be registered) or inferred (for transactional communications or communications arising out of a prior relationship between sender and user such as business, commercial or social or an enquiry made by a user) in which case it must be determined on the basis of the customers conduct or relationship with the sender.

Senders must ensure that communication is sent to recipients, as per their recorded consent and preferences. A user may provide certain preferences for receipt of promotional messages including the day, time and frequency etc. for such communication. Such preference would “be recorded by the Access Provider via distributed ledger technology and would need to be adhered to.

- *Transactional communications*

Transactional messages/calls may be sent regardless of whether the user is in the partially or fully blocked category. A transactional message, i.e. a message triggered by a transaction by a user who is a customer of the sender should not fall within the ambit of unsolicited commercial communication and an inferred consent from the user should suffice. Transactional communications should be sent to the user within 30 minutes of the transaction being performed and should be directly related to the transaction.

- *Header/Content Template*

Senders may be able to send commercial communications only via a registered 'header' assigned to it for the said purpose by the Access Provider. A header is an alphanumeric string of maximum eleven characters or numbers assigned to an individual, business or legal entity to send commercial communications. The TCCCPR allows for name or number to be used in lieu of a header. Such headers may also differ for transactional and promotional communications sent even by the same user.

The granular aspect of the implementation of the law will however be finalized only once the CoPs are implemented.

B. Activation of Value Added Services

After various complaints regarding the activation of value added services ("VAS") without the authorization of subscribers and the consequent deduction in balance of the subscribers, the TRAI enacted specific regulations to ensure that consumers are not charged incorrectly/ excessively for any VAS.

The TRAI has imposed various obligations on telecom operators including:

- Informing the consumer, through SMS, on activation of a VAS, the validity period of such service, the charges for renewal and the procedure for the consumer to unsubscribe from the service;

- Before subscribing to a VAS, the operator must obtain confirmation from the consumer via an SMS within 24 hours of activation of the VAS. The consumer must be charged only if such confirmation is received, failing which, the VAS must be discontinued;
- In case a VAS is offered via WAP or mobile internet, explicit consent of the consumer is required via an online consent gateway as is detailed in TRAI's directions.

Though the TRAI has placed all these obligations on telecom operators we have observed that most VAS agreements between the game developers and telecom operators typically involve the telecom operator passing on its obligations to the VAS provider. Further, telecom operators typically also require the VAS provider to comply with all applicable laws and further indemnify the telecom operator in the event of any loss/penalty.

Therefore, in the event that an interactive game is designed to be centered around regular SMSes being activated on a subscriber's handset, the game developer must be mindful of such obligations that may be applicable to such games.

III. Other Laws Affecting the Gaming /Gambling Industry

A. Foreign Direct Investment & Foreign Technology Collaborations in Gambling Industry

Under the Foreign Direct Investment Policy ("FDI Policy") of India issued by the Ministry of Commerce & Industry, Government of India, Foreign Direct Investment ("FDI") is prohibited in entities involved in

- lottery, including government, private lottery, online lotteries, etc; and
- gambling and betting including casinos, etc.

The terms "*lottery, gambling and betting*" have not been defined under the FDI Policy. Hence,

one may rely on the statutes in pari materia, judgments (both domestic and foreign), dictionaries, etc. for the meaning of these terms. Certain operations such as fantasy sports games offered in India may be classified as games in which an element of skill predominates elements of chance, an argument can be made that foreign direct investment may be permitted in such games. However, in the absence of any precedent wherein the scope of the phrase, 'lottery, gambling and betting' has been analyzed by the regulators from a FDI Policy perspective, there is a possibility that the regulators may take a different view since these are matters of government policy.

Further, the FDI Policy also prohibits foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract for lottery business and gambling and betting activities. Thus, any arrangement between Indian and foreign entities for conducting gambling / gaming business needs to be carefully structured to avoid risks under the FDI Policy. For violating the FDI Policy, one may have to pay a penalty

of up to thrice the sum involved where such amount is quantifiable, or up to INR 2,00,000 (approx. USD 4000) where the amount is not quantifiable, and where the contravention is a continuing one, further penalty which may extend to INR 5,000 (approx. USD 100) for every day after the first day during which the contravention continues. Recently, there have been a huge surge in foreign direct investment in entities offering games preponderantly on skill, including Rummy and fantasy sports.

B. Restrictions under Exchange Control Regulations

Under the *Foreign Exchange Management Act, 1999* ("FEMA") read with *Foreign Exchange Management (Current Account Transaction) Rules, 2000* ("Current Account Rules"), remittance of income from winnings from lottery, racing/riding or any other hobby is prohibited. Though in letter remittance for the purpose of betting is not prohibited, keeping in view the spirit of this provision, remittance for the purpose of betting

or any prizes to any player in foreign currency may potentially contravene these rules and incur penalties which may extend up to three times the amount remitted. Further, remittance of monies from India, by Indian players to gaming sites is prohibited.

The Central Board of Direct Taxes ("CBDT") in 2015 had released a circular with certain "clarifications on tax compliance for undisclosed foreign income and assets"⁷³ ("Circular") under the *Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015* ("Black Money Act").

The Circular clarified that a person having funds, subject to tax in India but on which tax was not paid, lying in offshore e-wallets / virtual card accounts maintained with online gaming / poker websites and having made profits therefrom is required to disclose to the Indian tax authorities all the details in relation to these accounts. The Circular stated that that an e-wallet / virtual card account would be considered similar to a bank account where inward and outward cash movement takes place. Hence, the same valuation and declaration of such accounts should be made by persons as in the case of a bank account, in order to comply with certain tax compliance requirements under Chapter VI of the Black Money Act.

C. Intermediary Guidelines Notified under the IT Act

In April 2011, the Information Technology (*Intermediaries guidelines*) Rules, 2011 ("Intermediary Guidelines") were notified under the IT Act, which require intermediaries like ISPs and other intermediaries to inter alia observe necessary due diligence and publish rules and regulations and user agreements for access or usage of the bandwidth provided by the intermediary. The term 'intermediary' has been defined under the IT Act⁶¹ to include

61. Section 2(1)(w) of the IT Act: "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service provid-

“telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes”. Thus, along with ISPs, even websites which serve as aggregators for third party games shall qualify as intermediaries.

As part of the obligation set out in the Intermediary Guidelines, such rules and regulations and user agreements need to include terms which inter alia, inform the users of the bandwidth not to host, display, upload, modify, publish, transmit, update or share any information that is relating to or encouraging gambling, or contains obscene content etc. or is otherwise unlawful in any manner whatever. It appears that the rule has been included with the purpose of among other things, discourage any activity of gaming/ gambling that may be unlawful under the Gambling Legislations in the country.

Additionally, an intermediary, upon obtaining knowledge by itself or being brought to actual knowledge by an affected person, shall act within 36 hours to disable content found to be in infringement of the Intermediary Guidelines.⁶² We understand that as an industry practice the intermediaries have already been including such terms in their user agreements and other policies and have been either temporarily or permanently been blocking gambling and gaming content as and when they receive any take down notices from the authorities or others. The Registrars accredited with the Internet Corporation for Assigned Names and Numbers (“ICANN”) have also been blocking the websites on their own. However, since the law expressly imposes inserting such terms as an obligation on the intermediaries, the intermediaries may increasingly block such websites *suo motu* or on notices from the Ministry of Electronics and Information Technology or similar authorities.

In the landmark judgment of *Shreya Singhal v. Union of India* (“**Shreya Singhal**”),⁶³ known

for the Supreme Court striking down the controversial section 66A of the IT Act, the Supreme Court also read down the provisions of the Intermediary Guidelines related to blocking of content. Recognizing

the concern related to preemptive blocking of content by intermediaries to not attract potential liability, the Supreme Court read down the obligation of intermediaries. The court has now interpreted the term “actual knowledge” to only include court or government orders.

Thus, the obligation to block content has only been limited to cases where the intermediary receives a court or government order.

The Delhi High Court, in *Super Cassettes Industries Ltd. v. Myspace Inc. & Anr*, passed a landmark ruling with relation to intermediary law. The Court held that an intermediary may held to be liable for infringing content hosted on its platform only when it has specific or actual knowledge or a reason to believe that such information may be infringing. Insertion of advertisements and modification of content formats by an intermediary via an automated process and without manual intervention does not result in the intermediary being deemed to have actual knowledge of the content hosted. Once an intermediary has been informed by a complainant of potentially infringing content hosted on its platform, it is not obligated to proactively verify and remove content subsequently hosted on its platform that may infringe the intellectual property rights of the complainant.

D. Anti-Money Laundering Laws:

In India, the *Prevention of Money Laundering Act, 2002* (“PMLA”) is the law which prevents money laundering activities. The PMLA was amended by the *Prevention of Money Laundering (Amendment) Act 2012*, which brought about significant changes to the compliance procedures required under the PMLA. Among other things, entities carrying out the activities

62. Regulation 3(4) of the Intermediary Guidelines

63. Regulation 3(4) of the Intermediary Guidelines 49. 2015 5 SCC1

for playing games for cash or kind (including casinos) (“**Gaming Entity**”) are also required to adhere to the provisions of the PMLA and related rules (“**Rules**”).⁶⁴

The PMLA requires reporting entities⁶⁵ to maintain records of transactions⁶⁶ and documents evidencing identity of their clients in accordance with the Rules.⁶⁷

The following documents are required to be maintained by Gaming Entities:

i. Record of all transactions, including⁶⁸

- All cash transactions of the value of more than INR 1,000,000 (approx. USD 15,000) or its equivalent in foreign currency
- All series of cash transactions integrally connected to each other which have been individually valued below INR 1,000,000 (approx. USD 15,000) or its equivalent

in foreign currency where such series of transactions have taken place within a month and the monthly aggregate exceeds an amount of 1,000,000 (approx. USD 15,000) or its equivalent in foreign currency

- All transactions involving receipts by non-profit organizations of value more than INR 1,000,000 (approx. 15,000) or its equivalent in foreign currency
- All suspicious transactions⁶⁹ whether or not made in cash.
- All cross border wire transfers of the value of more than INR 500,000 (approx. USD 7,350) or its equivalent in foreign currency where either the origin or destination of fund is in India.
- All purchase and sale by any person of immovable property valued at fifty lakh rupees or more that is registered by the reporting entity, as the case may be.

ii. Records of the identity of the clients which are required to be maintained

It has been provided that every reporting entity at the commencement of any account-based relationship with its client must:⁷⁰

- a. Identify its client;
- b. Verify their identity;
- c. Obtain information on the purpose and intended nature of business relationship;

Additionally, in all other cases, the reporting entity must verify identity while carrying out:

64. The Prevention of Money-laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005, prescribes the nature and value of transactions for which records are required to be maintained by a financial institution.

65. Section 2(wa) of the PMLA, “reporting entity” means a banking company, financial institution, intermediary or a person carrying on a designated business or profession;

66. The term ‘transaction’ is defined under rule 2(h) of the Rules as: “transaction” means a purchase, sale, loan, pledge, gift, transfer, delivery or the arrangement thereof and includes: (i) opening of an account; (ii) deposits, withdrawal, exchange or transfer of funds in whatever currency, whether in cash or by cheque, payment order or other instruments or by electronic or other non-physical means; (iii) the use of a safety deposit box or any other form of safe deposit; (iv) entering into any fiduciary relationship; (v) any payment made or received in whole or in part of any contractual or other legal obligation; (vi) any payment made in respect of playing games of chance for cash or kind including such activities associated with casino; and

67. Section 12 of the PMLA

68. Section 2(g) of the Rules: “Suspicious transaction” means a transaction referred to in clause (h), including an attempted transaction, whether or not made in cash, which to a person acting in good faith— (a) gives rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the Act, regardless of the value involved; or (b) appears to be made in circumstances of unusual or unjustified complexity; or (c) appears to have no economic rationale or bonafide purpose; or (d) gives rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism;

69.. Section 2(g) of the Rules: “Suspicious transaction” means a transaction referred to in clause (h), including an attempted transaction, whether or not made in cash, which to a person acting in good faith— (a) gives rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the Act, regardless of the value involved; or (b) appears to be made in circumstances of unusual or unjustified complexity; or (c) appears to have no economic rationale or bonafide purpose; or (d)

70. Rule 9(1) of the Rules

- i. Transaction of an amount equal to or exceeding INR 50,000 (approx. USD 733) whether conducted as a single transaction or several transactions that appear to be connected, or
- ii. All international money transfer operations

The PMLA also provides provisions regarding inquiry and penalties in case of non-compliance with the obligations mentioned above. The director⁷¹ on his own person, or upon any application made by any authority, office or person, make such inquiry or cause such inquiry to be made, as he thinks fit to be necessary.⁷² If in the course of any inquiry, the director finds that a reporting entity or its designated director on the Board or any of its employees have failed to comply with the obligations under the PMLA, he may *issue a warning in writing; or direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific instructions; or direct such reporting entity or its designated director on the Board or any of its employees, to send reports at such interval as may be prescribed on the measures it is taking; or by an order, impose a monetary penalty on such reporting entity or its designated director on the Board or any of its employees, which shall not be less than INR 10,000 but may extend to INR 100,000 for each failure.*⁷³

- iii. Know Your Customer (KYC) norms and Anti-Money Laundering (AML) standards under the PMLA

Additionally, the RBI through a Master Circular⁷⁴ has laid down certain KYC norms and Customer Identification Procedure (“CIP”)⁷⁵ to be followed by banks and financial institutions for opening of accounts and monitoring transactions of suspicious nature for the purpose of reporting the same to appropriate authority such as Financial Intelligence Unit – India⁷⁶ and RBI.

Considering the development of technology and cashless transactions the KYC norms also suggest that agents through whom credit/ debit/ smart or gift cards are issued must also be subjected to due diligence and KYC measures. The norms lay out that before issuance of such card to any client, banks must ensure that all appropriate KYC procedures are duly applied before issuing the cards to the customers.⁷⁷

71. “Director” or “Additional Director” or “Joint Director” means a Director or Additional Director or Joint Director, as the case may be, appointed under subsection (1) of section 49.

72. Section 13(1) of the PMLA

73. Section 13(2) of the PMLA

74. Know Your Customer (KYC) norms / Anti-Money Laundering (AML) standards/Combating Financing of Terrorism (CFT)/ Obligation of banks and financial institutions under PMLA, 2002, RBI/2015-16/42 DBR.AML.BC.No.15/14.01.001/2015-16

75. Clause 3.2.1 of the Master Circular: *The CIP means, “undertaking client due diligence measures while commencing an account-based relationship including identifying and verifying the customer and the beneficial owner on the basis of one of the Officially Valid Document (“OVD”)”.*

76. Under the Department of Revenue, Ministry of Finance

77. Part II of the Master Circular

Annexure I

Nagaland: Online gaming licenses for skill games

Publisher: World Online Gaming Law Report

The State of Nagaland, which is located in eastern India has passed *The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2016* (“Act”). The Act contemplates issuance of online gaming licenses for skill games. This is a first of its kind legislation in India, consequently, it has created a lot of excitement among Indian as well as international operators. The Act as such is a very short piece of legislation, therefore only when the government issues rules in support of the Act, clarity will emerge as to how the Act will be operationalised.

In India, gaming and gambling are a State subject i.e. each State is free to legislate on the said subject for activities within its State.⁷⁸ Most Indian States have legislations in place that prohibit certain gambling activities, but skill based games are specifically excluded. State legislations do not define what is meant by ‘game of skill’; but the Supreme Court of India in various judgements has clarified that when a game has a preponderance of skill over chance, then such game would be considered to be a game of skill. The primary objective of the Act is to prohibit gambling, and to regulate and promote ‘online games of skill’ within Nagaland.

I. Test For Games of Skill

The “preponderance of skill” test as laid down by the Supreme Court of India⁷⁹ has been considered in the Act as the key element in determining whether or not a game is ‘game of skill’. A “game of skill” would include all games where there is a preponderance of skill over chance, including where the skill relates to (i) strategizing the manner of placing wagers or placing bets, (ii) selection of a team or virtual stocks based on analysis, or (iii) the manner in which the moves are made, whether through deployment of physical or mental skill and acumen.

Certain games such as chess, card games like bridge, poker, rummy, napoleon; virtual sports, and fantasy sports leagues have been delineated as “games of skill” in the First Schedule to the Act. The Act contemplates the First Schedule to be a moving schedule, i.e. the Government may either on its own or on representation of any party, update it to include new games of skills. Further, games declared to be a “game of skill” by (i) courts in India or internationally or by statutes; (ii) games for which competitions and tournaments are conducted, or (iii) games which can be determined to be “games of skill” may get included in the Schedule.

78. Constitution of India, Seventh Schedule, List II, Entry No. 34 allows states in India to enact their own legislations to regulate gaming / gambling activities within its territory

79. State of Andhra Pradesh v. K. Satyanarayana & Or AIR 1968 SC 825. The game of Rummy was held to be a game involving preponderance of skill rather than chance based on the fact that Rummy required certain amount of skill as the fall of the cards needs to be memorized and the building up of Rummy requires considerable skill in holding and discarding cards.

This suggests that though certain games may not listed in First Schedule, representations may be made by a potential licensee to include additional games and the government may update the First Schedule if it is convinced on the skill element.

II. Profit Motive is permitted

Revenue models adopted by the licensee may involve earning revenue through advertising, claiming a percentage of the winnings and/ or charging a fixed fee for membership, as per the Act. Thus, a licensee may follow a profit motive based model. Before the Supreme Court of India, in *Mahalakshmi Cultural Association. v. Dir. Inspector Gen. of Police & Or*,⁸⁰ the issue of profiteering on skill based games was discussed and debated, however it was not specifically decided. However, based on various earlier Supreme Court and State High Court judgements, it can be argued that since skill based games are excluded from gaming legislations, profiteering activities on such games should be permitted. This position should assist a licensee to offer skill games to residents of other Indian States as well, as discussed below.

III. Licenses

In so far as conditions of license / eligibility criteria are concerned, there are certain hurdles and ambiguities in so far as involvement of foreign operators are concerned, especially if they are involved in gambling activities. Some of the issues are as follows:

- i. A license may be granted to a person, company or limited liability company incorporated in India, and having a substantial holding and controlling stake in India. This may be a point of concern for Indian companies that have or propose to

have foreign investments and consequently a degree of foreign shareholding.

- ii. The executive decision making powers and processes of the licensee would be required to be performed within India.
- iii. Technology support, including hosting and management of the website, placement of the servers would need to be within India.
- iv. Applicant for a license cannot be the entity having any interest in any online or offline gambling activities in India or overseas. It is not clear how the government would interpret 'gambling activity', nor is it clear whether the group company of the potential licensee could be involved in gambling activity.

In order to ensure predictability and accountability in the procedure for grant of license, the Act mandates that the licensing authority make a decision within 6 months from the date of receipt of an application, on whether or not to issue a license to an applicant.

The Act clarifies that licensees may offer "games of skill" on their website, mobile platform, television or any other online media.

The Act contemplates issuance of rules which will prescribe the manner and format for applications for a license, or the terms and conditions under which a license may be issued. Such rules may also address aspects such as license fees payable and annual fees payable by operators to the State Government.

IV. Games of Skill offered Pan India

The Act allows a licensee to offer "games of skill" in other Indian States, where such games are not classified as gambling. Thus, States where games of skills are excluded from the ambit of the gambling legislation, are territories where it is permissible for a licensee to offer its skill based games. This adds a layer of legitimacy to operations by licensees by taking into account the regulatory framework at the point of consumption.

80. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/mahalakshmi-case-update-online-rummy-operators-get-some-respite.html?no_cache=1&cHash=8c7a963cb096310edd4a35552557dad4

Earlier, in 2009 the Sikkim Government allowed for online gaming to be offered from the territory of the state. However, based on advice from the federal government, restrictions were imposed whereby sites offering online gaming could be accessed only within the geographical borders of Sikkim.

The Act acknowledges the power of each State to regulate the gaming activity within its jurisdiction. It has therefore established a framework for addressing issues that various States may have with the extra territorial operations of the licensee. If any State is of the opinion that the licensee was offering its games in that State in violation of the Act or local laws of the relevant State, it may inform the Nagaland Government of such violation.

Various State specific gaming legislations seek to regulate activities in a “common gaming house”. Contemporaneously, it may be argued that a common gaming house could also include a server/portal/website providing means of gaming. Therefore, any operator falling afoul of any State level gaming legislation may be open to being prosecuted by a state government. The Act may provide a safe harbour to such operators.

V. Penalties

In case a licensee was found to be engaging in “games of chance or gambling activities”, it would be liable to a fine of INR 20,00,000 (approx. USD 30,000) in the first instance and may be extended to simple imprisonment in case of a repeat offender. Although the Act does not specify, it is likely that imprisonment would extend to directors and other officers in charge of the company in the event of a repeated offence.

VI. Licensing Authority

The Act provides that the State Government may designate an authority or body to monitor and regulate activities of the licensees to ensure compliance under the Act, and to settle disputes arising out of the licensees’ activities.

VII. Way ahead

Taking into consideration the challenging legal landscape in India, obtaining a license under the Act may provide an added level of protection for an operator. In the event of any prosecution being initiated against a licensed operator, the fact that such games were being offered under a legitimate licensing regime may constitute a line of defence. It would assist the licensee to argue that under a legislative regime the games are considered to be games of skill.

Once the rules are published by the Nagaland government, several grey areas in the Act are likely to be clarified.

Annexure II

Punjab and Haryana High Court Rules Fantasy Sport Preponderantly Skill- based

The PH Court has given fantasy sports⁸¹ the sanction of a preponderantly skill - based game in a recent ruling.⁸² The PH Court's ruling has provided respite to fantasy sports operators by safeguarding them from the prohibitions under the Central Act as it had been made applicable to Punjab and Haryana⁸³ ("**Punjab State Enactment**").

A petitioner ("**Player**") was a customer of the respondent company Dream 11 Fantasy Private Limited ("**Dream 11**") and claimed to have fallen prey to the alleged gambling business of the Dream 11 through their website <https://fantasycricket.dream11.com.in>. Following the rules of the play, the Player created virtual cricket and football teams and joined various leagues. The Player bet on his virtual teams, and lost the entire amount he had bet, a sum of INR 50,000/-. The Player consequently approached the PH Court to issue directions to initiate investigation or criminal investigation against Dream 11, alleging that fantasy sports were not based on skill, but were purely gambling activities.

In its defense, Dream 11 described the nature of fantasy sports to the PH Court, and the integral skills required by a player in effectively drafting virtual teams and partaking in leagues. The crux of Dream 11's arguments in contending that skill predominated chance in playing fantasy sport is as follows:

A participant was, while drafting his team, required to:

- assess players and evaluate the worth of a player against the other available players keeping aside bias for an individual or a team;
- Adhere to an upper credit limit, and ensure that the team did not entirely/substantially consist of players from a single real- world
- team. This pivotal precondition also ensured that a player did not create a situation resembling the act of betting on the performance of a single real- world team;
- Evaluate a player's anticipated statistics, for example, in the case of a batsman in a fantasy cricket game, the batting averages, total runs, number of centuries, etc. This evaluation was based on past statistics, as well as prevailing circumstances such as age, player injuries, etc.

In playing in the fantasy game, a participant was also required to constantly monitor the scores of athletes drafted by him, and make substitutions where necessary. He also had the opportunity to avail of Dream 11's free-to-play variants to test his skill and gain experience. Dream Eleven canvassed the argument that the Player had been unable to perform well in the fantasy game as he had failed to exhibit the aforementioned skills.

81. Fantasy sport is a game which takes place over a number of rounds (i.e. a single match, or an entire league). Participants select players to build virtual teams, and act as managers of their virtual teams. These virtual teams compete against one-another to collect points based on the results/achievements of real sportspeople or teams in professional sporting events. The winner is the participant whose virtual team garners the maximum number of points across the rounds.

82. .CWP No.7559 of 2017

83. The Public Gambling Act, 1867, was made applicable to the State of Punjab and Haryana via the Public Gambling (Punjab Amendment) Act, 1929

Apart from the aforementioned factual arguments made by Dream 11, it also relied heavily upon the landmark judgment of the Supreme Court (“SC”) in *K.R. Lakshmanan v State of Tamil Nadu*⁸⁴ (“**Lakshmanan Case**”) in which the SC had held that betting on horse races was a game of skill. The PH Court studiedly analyzed the Lakshmanan Case, in which it had been held that the inherent capacity of the animal, capability of the jockey, the form and fitness of the horse, distance of the race etc., were all objective factors capable of assessment by race-goers. Thus, betting on horse-races was a game of ‘mere skill.’ The PH Court construed that the SC had held that competitions in which success depended upon a substantial degree of skill were not gambling, and despite there being some element of chance, if a game was preponderantly of skill, it would be a game of ‘mere skill.’ Pertinently, the PH Court also held that since fantasy sports did not amount to gambling, Dream 11 was conducting a business activity protected under Article 19(1)(g)⁸⁵ of the Constitution.

The PH Court held, relying on the Lakshmanan Case, that playing fantasy sports too required considerable skill, judgment and discretion. The wide gamut of factors that a participant would need to assess, as elucidated above, would undoubtedly affect the result of the fantasy game. In drafting players, a participant was required to study the rules and regulations of strength of the athlete, along with his weaknesses. Success in Dream 11 fantasy sport had its genesis in a user’s knowledge, judgment and attention. Thus, the element of skill predominated the outcome of the fantasy game, and fantasy sport was a game of ‘mere skill,’ which did not amount to gambling

The Supreme Court dismissed⁸⁶ a Special Leave Petition against the ruling of the High Court of Punjab and Haryana and accordingly upheld the abovementioned judgment. Thus, the ratio in the Varun Gumber Case could be construed as binding on all the Indian States.

84. AIR 1996 SC 1153

85. Article 19(1)(g) of the Constitution of India states that all citizens have the right to practice any profession, or to carry on any occupation, trade or business

86. Diary No(s). 27511/2017 (Arising out of impugned final judgment and order dated 18-4-2017 in CWP No. 7559/2017 passed by the High Court of Punjab and Haryana At Chandigarh.

Annexure III

All Bets Off for Gaming Operators in Telangana: State Government Passes Ordinance Prohibiting Skill Games

Seemingly overnight, the State Government of Telangana has promulgated two ordinances which have created uncertainties for the businesses of Telangana-based operators, or those offering games to players in Telangana. Several affected rummy operators have moved swiftly to challenge the said ordinances before the High Court of Hyderabad. The status of these businesses in Telangana is currently in limbo as the High Court of Hyderabad contemplates whether to uphold the validity of the ordinances.

I. Background

The Telangana State Gaming (Amendment) Ordinance, 2017 (“*Ordinance I*”) was promulgated by the Governor of the state of Telangana (“**State**”) on June 17, 2017 to amend the Telangana State Gaming Act, 1974 (“**the Act**”). The passing of the Ordinance was an unanticipated development which has taken the industry by surprise and created several uncertainties for established skill based gaming businesses.

On 20 June, 2017, Ordinance I was challenged before the High Court of Hyderabad (“**Court**”) in *Auth Rep, Head Infotech (India) Pvt. Ltd., Hyderabad & Anr vs. Chief Secy, State of Telangana, Hyderabad & 3 Ors* (“*the Writ*”) by several rummy operators. Four hearings took place in the Writ between 27 June, 2017 and July 4, 2017 in which arguments were heard by the Court.

four days shy of the next date of hearing in the Writ. Ordinance II came into effect immediately.

II. The Challenge to Ordinance I

The Act, like most State Gaming Legislations excludes games of skill from its purview.

Therefore, prohibitions under the Act do not apply to games of skill. Ordinance I added an explanation stating that games of skill which have part-elements of chance cannot be termed ‘skill games.’ Ordinance I furthermore specifically stated that Rummy was not a skill game as it involved part chance. In the past, the Supreme Court has held in the case of *State of Bombay v. R.M.D. Chamarbaugwala*⁸⁷ that the meaning of ‘mere skill’ means games which are preponderantly of skill. The Supreme Court has also held in *State of Andhra Pradesh v. K. Satyanarayan*⁸⁸ that Rummy is a game which is preponderantly of skill.

In addition, while the Act only made gaming within common gaming houses an offence, Ordinance I amended the law to specifically make online gaming an offence in the state as well. A similar issue was raised in the case of *Mahalakshmi Cultural Association v. The Director, Inspector General of Police & Ors*⁸⁹ Interestingly, the state government of Tamil Nadu had made a statement before the Supreme Court that it was yet to decide whether Rummy played for stakes the Court, on July 8, 2017, the State hastily passed another Ordinance, the Telangana Gaming (Second Amendment) Ordinance, 2017

87. 1957 AIR 699

88. 1968 AIR 825

89. Special Leave to Appeal (C) No(s).15371/2012 (Arising out of impugned final judgment and order dated 22/03/2012 in WA No. 2287/2011 passed by the High Court of Madras)

(“Ordinance II”) to amend the Act further, just in the online medium fell afoul of the law or not. We have provided a date - wise summary of the proceedings in the Writ in the Schedule below.

III. Second Strike: Promulgating Ordinance II

On July 8, 2017, the State passed Ordinance II. Ordinance II has provided the rationale of the State in amending the gaming laws of Telangana in the preamble. It articulated that due to the ease of access of online rummy, several people, including young people, were becoming addicted to online rummy played with real money. The addition had affected the stability of family life, and the careers of students, and thus become a threat to public order.

Ordinance II has removed the skill – games exception in its entirety from the Act. Ordinance II replaced it with a completely unrelated provision to give power to the State to enact provisions to remove difficulties in implementing the provisions of the Act.

Ordinance II also amended the definition of ‘gaming’ under the Act to state that games (including online games) *when played with stakes* would amount to ‘gaming.’ Furthermore, the acts of risking money or otherwise on an unknown result of any event including on a game of skill is included in the definition of ‘betting and wagering.’ The Ordinance also specified that wagering or betting would include acts undertaken directly or indirectly by players playing any game or by third parties.

Schedule A - Telangana Proceedings

June 27, 2017

The petitioners in the abovementioned matter challenged the legislative competence of the state of Telangana to enact Ordinance I. ‘Betting and gambling’ is a state subject under the Constitution of India which may be regulated exclusively by the state, and not the central Government. The petitioners argued that the State could not, by implication, interpret betting and gambling’ to include skill based games

(such as rummy) as well, and thereby derive the competence to legislate on the same. The petitioners argued that the entry relating to ‘betting and gambling’ in the Constitution ought to be read in consonance with the Supreme Court cases interpreting games of mere skill to be those which were preponderantly of skill. Only legislation which regulated games which were *predominantly* chance- based would fall within the legislative competence of the State.

In this regard, the petitioners drew a parallel with another constitutional law case (*Builders Association of India and others etc. etc., Petitioners v. Union of India and others etc.*⁹⁰) which involved the question of whether the state legislature had the power to enforce sales tax on the transfer of goods which were sold as part of a works contract. Under the Constitution of India, the state government is endowed with the exclusive right to tax the sale of goods. The question before the Supreme Court in Builders Association was whether the state could artificially expand the meaning of ‘sale of goods’ under the Constitution to bring it within the legislative competence of the State Government. The Supreme Court reasoned that it could not be said that a transfer of goods as part of a works contract was a sale of goods, and hence fell outside the competence of the state legislature.

Relying on the reasoning in Builders Association, the petitioners contended that, similarly, the State could not, by implication, expand the meaning of ‘betting and gambling’ to include skill games as well. During the arguments the counsels also briefly mentioned that inclusion of the online space in the Act can be challenged. This point however, was not been argued in detail.

June 28, 2017

The Petitioners continued their arguments the next day. In addition to the legislative competence argument that was tendered the previous day, the leading argument made by the Petitioners on this date was that offering games of skill fell within their fundamental right to carry on a trade or business under

90. 1989 SCALE (2)768

Article 19(1)(g) of the Constitution of India. The Supreme Court had held in the case of *R.M.D Chamarbaugwala Case* that offering competitions which involved substantial skill were business activities, the protection of which is guaranteed by Article 19(1)(g). The Petitioners argued that Ordinance I had restrained the Petitioners from offering skill games (including rummy) in violation of their fundamental right under Article 19(1)(g).

The Petitioners also challenged the explanations to the skill – based exemption inserted by Ordinance I. In light of the fact that the Ordinance did *not* delete the exclusion of skill games from the Act, but specified instead which games were not skill games, the Petitioners made another argument to the effect that the legislature had the power to enact law, not interpret the law. The latter was the exclusive power of the judiciary. In view of the Supreme Court judgment in *Satyannarayan Case*⁹¹ wherein the Supreme Court has held rummy to be a game of skill, it was not upto the State's legislature to contradict the Supreme Court's finding of fact.

The Petitioners also challenged the legislative competence of the State to regulate online gaming. Under the Constitution, the central Government is endowed with the exclusive right to enact laws on “*Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.*”⁹² The Petitioners argued that gaming through the online medium fell within this description. Thus, the central Government had the exclusive legislative competence to regulate online gaming.

The Court also attempted to the operations of the Petitioners and how their businesses would be adversely affected if an injunction on the operation of the Ordinance was not granted. The Petitioners highlighted to the Court that they were running their business in a transparent manner with the appropriate KYC diligence, etc.

The Petitioners sought a (i) stay on the implementation of the Ordinance and (ii) an interim injunction against enforcing the Ordinance against them for the period of the proceedings.

At the close of the proceedings, the Court (i) temporarily (i.e. till the next date of hearing on July 3), allowed operators from within the state of Telangana to offer their games outside the state of Telangana, but (ii) did not permit operators from within and outside of Telangana to offer their websites within the State of Telangana.

July 3, 2017

The State commenced with their arguments on this date.

The State argued that Rummy played for stakes amounts to gambling and was not an occupation, trade or business for the purposes of Article 19(1)(g) of the Constitution of India. The State also relied upon authorities in support of the same. Further, the State also argued that even if offering rummy amounted to a trade or business for the purposes of Article 19(1)(g), the State could impose reasonable restrictions within the ambit of Article 19(6) in the interest of the general public.

The State also pointed out that while playing rummy online, allegedly, operator companies manipulated the game as a result of which members of the public were adversely affected.

The High Court posed certain questions to the State, and particularly sought to understand the rationale for deviating from precedents dealing with Rummy on the ground of whether or not the game was played with stakes.

The State requested that it be given time till the next day to provide their inputs

July 4, 2017

The State continued with their arguments on this date. Most State Gaming Legislations cull out an exception for games of ‘mere skill.’ The State argued that the interpretation given to the term ‘mere skill’ in previous precedents should

91. 1968 AIR 825

92. Entry 31, List I (Union List), Seventh Schedule of Constitution of India

not be applied to interpret the words 'skill only' as used in the skill- games exemption under the Act (and as adopted by the State of Telangana). In Chamarbaugwala Case, the Supreme Court had held that the meaning of 'mere skill' meant games which are preponderantly of skill.

The State continued to argue on the basis of State of *Andhra Pradesh v. K. Satyanarayan* that rummy, when played for stakes, would qualify as gambling. The Petitioner counter-argued that the State's interpretation of the *Satyanarayan* case was incorrect, and was contrary to the interpretation given to the case by the Supreme Court in *Lakshmanan Case*.

The temporary permission granted by the Court on June 28, 2017 was not extended further. However, the Court indicated to the Petitioners that if the State took any action against them for offering games outside Telangana, to report such instances to the Court.

July 12, 2017

The matter did not come up for hearing on this date. However, towards the close of the day, at the instance of the Petitioners, the Judge orally restricted the State Government from taking action against the conduct of the operators' business outside the boundaries of the State of Telangana.

July 13, 2017

The judge clubbed the challenge to Ordinance I and Ordinance II on this date. The oral direction given by the Judge to the State during the hearing on July 12, 2017 was converted to a formal direction for four weeks in which the Hyderabad HC directed the State of Telangana not to seize the Rummy Operators' plant and machinery located in Hyderabad, or seal their premises on the condition that the Rummy Operators would block access to their only rummy portals to all persons residing within the State of Telangana. It was left open to the Rummy Operators to carry on their business to persons residing in other states. It was also left open to the State of Telangana to enter the Rummy Operators' premises to the limited extent of ensuring that their portal had blocked access to all persons residing within Telangana.

August 10, 2017

The interim order granted on 13 July, 2017, was extended till 30 August, 2017

Annexure IV

Synopsis of the proceedings in the Gujarat Case

I. Facts

The petitioners in the Gujarat Proceedings (“**Petitioners**”) filed special civil applications seeking, (i) to set aside an order/communication dated March 15, 2017 from the Commissioner of Police rejecting the petitioner’s request for a No Objection Certificate (“**NOC**”) to conduct poker (“**Communication**”) and (ii) a declaration that poker was a game of skill and not a game of chance and therefore, covered under the exception for games of skill (“**Exception**”) under the Gujarat Prevention of Gambling Act, 1887⁹³ (“**Gujarat Act**”).

A single judge of the High Court of Gujarat (“**Gujarat HC**”) rejected the petitions and held that that (i) poker is a game of chance; (ii) accordingly, conducting poker games falls within the prohibitions under the Gujarat Act.

II. Issue

Whether Poker was a game of skill and thus fell within the Exception

III. Petitioner’s Arguments

The Petitioners submitted that once it was shown that Poker was a game of skill, the provisions of the Gujarat Act would not be attracted due to the Exception.

Accordingly, the Petitioners argued that Poker was a game of skill based on the following legal and factual arguments:

- preponderance of skill, it would be a game of skill. However, in every game of skill, there was an element of chance, as recognized by the SC in the Satyanarayana Case and the Lakshmanan Case. However, if it was predominantly a game of skill, it would be exempt from the Gujarat Act.
- Akin to a game of Rummy, there is an element of chance in Poker too when cards are shuffled and dealt out initially. However, as recognized by the SC in the Satyanarayana Case (in which Rummy was held to be a game of skill), it is how, after receipt of the cards, the player plays the game which makes a game predominantly one of skill. In Poker, too, the manner in which the player plays *after* having been dealt the cards rendered it a game of skill, based on the following:
 - a person had to assess rival players’ reaction whilst maintain a ‘poker face,’ i.e. keeping one’s expression concealed;
 - Every turn of the card required a player to make an assessment of whether to continue or not. The exercise of judgment was recognized to be an exercise of skill in the Lakshmanan Case.
 - A player must possess intellectual and psychological skills. They must know the rules and mathematical odds, as well as how to read tells and styles of other players, as well as know when to hold and fold and raise, as well as how to manage their money.
- The Petitioners referred to the testimony of the experts Robert C. Hannum and Anthony N. Cabot, which had been relied upon by the United States District Court in holding that poker was a game of skill in *United States of America v Lawrence*

93. Section 13, Gujarat Prevention of Gambling Act, 1887: Saving of Games of Mere Skill: Nothing in this Act shall be held to apply to any game of mere skill wherever played.

*DiCristina*⁹⁴ (“**Di Cristina Case**”). The testimony hypothesized that a game of skill was one in which the player could alter the expected outcome. The expected win in poker, too, was dependent on the skill or strategy employed by the player in making key decisions, which could be developed as a skill. The Petitioners emphasized on the following strategic decisions required of a player in Poker in the said testimony:

- The decision on how much money to invest
- Betting strategy, i.e. whether to fold or bet and how much to bet
- Poker had been recognized as a game of skill by other state legislatures. The legislatures of West Bengal⁹⁵ and Meghalaya had already carved out an exception for poker from the ambit of gambling, while the legislature of Nagaland had deemed poker to be a skill-based game.⁹⁶
- The High Court of Calcutta had held⁹⁷ that playing of poker could not be treated as an offence under the West Bengal Gambling and Prize Competitions Act, 1957.
- Certain courts of the United Kingdom, the United States of America, Brazil and Australia, had held that poker was a game of skill, and such decisions ought to be considered

The Petitioners further canvassed the following arguments:

- The observations of the SC in the Lakshmanan Case were relied upon to submit that Poker being a game of skill, the offering of Poker was protected under Article 19(1)(g) of the Constitution of India. The refusal of the NOC

could not be said to be a reasonable restriction on such right, which was in the nature of an arbitrary and illegal prohibition.

- The legislative competence of the State legislature was also challenged by the Petitioners. The Constitution provided that States had the exclusive legislative competence to legislate on ‘betting and gambling.’⁹⁸ Accordingly, unless both betting and gambling were involved, the State did not have the competence to legislate on the game.
- The Petitioners also argued, based on principles of natural justice that the decision of the Commissioner of Police in the Communication that poker was a game of chance was taken without hearing the Petitioners. Moreover, the Petitioners relied on *Siemens Engineering & Manufacturing Co. of India Ltd. v Union of India & Anr.*,⁹⁹ to submit that a charge had to be supported by reasons, and the decision in the Communication was baseless, as it was unsubstantiated by any material to show that poker was a game of chance.

IV. Respondent’s Arguments

The Respondents outlined, at the outset, the historical prohibitions on gambling in India. To this end, the Respondents traced Indian scriptures which had highlighted the evils of gambling, and religions which had forbidden gambling. It was submitted that the moral fabric of society was eroded by gambling.

Against this backdrop, the Respondents’ argued that Poker was a game of chance based on the following legal and factual contentions:

- The judgments referred to by the Petitioners were in the context of the game of Rummy, which had been held to be a game of skill and accordingly fell outside the purview of gambling.

94. United States of America against Lawrence DiCristina, United States District Court, Eastern District of New York

95. Section 2(1)(b), West Bengal Gambling and Prize Competitions Act, 1957, specifically carves out an exception for poker from the definition of gambling

96. Poker has specifically been enlisted under the Schedule to the Nagaland Prohibition of Gambling and Promotion and Regularisation of Online Games of Skill Act, 2015 as a game of skill

97. *Shri Kizhakke Naduvath Suresh, Indian Poker Association v. State of West Bengal & Ors.*

98. Schedule 7, List II, Entry 34, Constitution of India

99. *Siemens Engineering & Manufacturing Co. of India Ltd. v Union of India & Anr.*, (1976) 2 SCC 981

- The observations in the Satyanarayana Case were relied upon in which the SC had recognized that electronic machines were operated to ensure that a player would lose. Accordingly, whether it was a game of pure chance or manipulated with the tampering of machines to make it a game of chance, acquired skills would be of no assistance to a player.
- The outcome of the game of poker depended on the card dealt to a player. This by itself would suggest that it was merely a game of chance. The skill involved in Poker was at the most how a person could bluff irrespective the card he was dealt. However at that stage as well, the outcome of the game was totally dependent on the card dealt. Accordingly, Poker was a game of chance. The submissions of the Petitioner with reference to mathematical assessment and psychological observation and other assessment could not render Poker into a game of skill. Furthermore, how a player plays is not a skill as it depended on the traits of a player and how deep-pocketed he was.
- The SC in *M.J. Sivani & Ors v State of Karnataka & Ors*¹⁰⁰ had, while referring to poker machines, observed that such games were games of chance.
- Poker had its origin in games of Flush, Brag, or Teen-Patti. Flush had been recognized as a game of chance by the SC in the Satyanarayana Case.
- In countries such as France, Germany and America, Poker was considered a game of chance.
- The Di Cristina judgment relied upon by the Petitioners had been overruled in a subsequent case by the Superior Court of Pennsylvania.¹⁰¹ In this subsequent judgment, the court had held that Texas Hold'em Poker was a game of chance as the three elements of gambling (consideration,

chance and reward) under Pennsylvania Law were present.

The Respondents also advanced the following arguments:

- In response to the Petitioner's claim that they had a fundamental right to carry on trade or business under the Constitution, the observations of the SC in *M.J. Sivani & Ors v State of Karnataka & Ors*¹⁰² were referred to, in which it was recognized that no one had an inherent right to carry on a business which was injurious to the public. Trade or business with attendant danger to the community may be totally prohibited or permitted subject to restrictions.
- The Respondents also relied upon the Chamarbaugwala Case, in which the SC had held that the provisions under the Prize Competitions Act, 1955, are severable in their application to only games of chance. The Respondents relied upon the fact that the SC had held in that case that gambling was never intended to be a part of 'trade, business or commerce,' protected under Article 19(1)(g) of the Constitution of India, nor form part of the country's trade, commerce or intercourse under Article 301.

V. Judgment

At the outset, the Judge cautioned that sports betting had been brought within a regulatory framework in countries such as Australia, the UK and USA. However, one could not overlook the ground realities in India where (i) the majority of the population were struggling for basic amenities, and (ii) there was a lack of awareness amongst people of whether betting was permitted amidst the craze for easy money. Accordingly, law had been enacted to prohibit and restrict such activity. Such laws could not be challenged by the Petitioners in the guise of challenging the Communication.

The judge referred to the Chamarbaugwala Case in which the SC had outlined the evils of

100.(1995) 6 SCC 289

101. Commonwealth of Pennsylvania v Walter Leroy Watkins (Criminal Division at No(s): CP-19-CR-0000733-2008)

102.(1995) 6 SCC 289

gambling by quoting from the ancient Indian scriptures, and also underscored that gambling had been looked down upon by English common law

The judge rejected the contention of the Petitioners that every game involved some element of skill and some element of chance. The judge proceeded to hold that, in applying the test of predominance of skill, Poker was a game of chance based on the following:

- The history of poker clearly suggests that it is a game of chance. The judgments of some foreign countries and some articles suggest that it had originated from Flush/Teen Patti. Teen Patti had originated from Brag. Like Teen Patti, chance was a dominant factor in Poker as well. The SC in the Satyanarayana Case had observed that Flush, Brag and Teen Patti were games of chance. As a natural corollary, Poker, being a variant of the said games, was a game of chance as well.
- Poker begins with the distribution of three preflop cards and the game proceeds when the cards are turned or opened. Thus, Poker consists of two stages – an initial distribution of cards and the opening of the cards with betting. The second stage had been submitted to render Poker a game of skill by the Petitioners, such as assessing others players' faces and inducing them to bet. However, these factors would in fact reflect that it was a game of chance which depended upon the initial distribution of cards over which a player has no control. If he had a bad day with a bad card, a player could not turn around the table. All he can do is limit his losses.
- Much of a player's decision to bet depended on the individual personality of a player, for instance a player with good luck or deep pockets may be induced to play even after being dealt an average card.
- Bluffing or deception could not be termed as a skill or an art, as the same would amount to offences under the Indian Penal Code, 1860. If the submission of the Petitioners that these amounted to an exercise of skill were

accepted, many such acts which amounted to fraud or cheating could be said to be skills, notwithstanding that they were offences under law.

- Rummy, which has been held to be a game of skill in the Satyanarayana Case, was distinguished on the ground that it had nothing to do with stakes. Whereas, in Poker, betting was an inescapable part of gameplay. It was this factor which differentiated Poker from Rummy. Accordingly, even if it was a game of skill, if it was played with stakes, it would amount to gambling.
- The judge also rejected the reliance placed by the Petitioners on foreign articles and judgments. He held that the hypotheses in these articles could not take a game out of the purview of the Gujarat Act. Furthermore, the Di Cristina Case had been reversed upon appeal. In the appeal it had been clearly observed that the parties did not dispute that Poker constituted gambling under New York State law. Even in the judgment of *R v Kelly*,¹⁰³ the UK's Court of Appeal had held that the jury in the Trial Court was entitled to hold that Texas Hold'em Poker was a game of chance as defined under the Gaming Act, 1968.
- It was not relevant whether certain states such as West Bengal had considered Poker to amount to gambling, as per the Constitutional scheme, each State Legislature was empowered to regulate betting and gambling. The judge also rejected the other contentions of the Petitioners on the grounds below:
- The judge rejected the contention of the Petitioners that their rights under Article 19(1)(g) of the Constitution had been affected by the Communication, by relying upon the observations in the Chamarbaugwala Case in which it was highlighted that gambling was not a trade but *res extra commercium*, and accordingly did not fall within the purview of Article 19(1)(g). A parallel was

103. *R v Kelly* [2008] EXCA Crim 137

drawn with the gambling and liquor, and reference was made to the SC's judgment in *Sheoshankar v State*,¹⁰⁴ upholding an Act regulating consumption of liquor upon challenge to it under the said Article, on the ground that liquor was a noxious object which ceased to be a legitimate object of property or commerce. The SC also held that the rights under Article 19(1)(a) – (g) of the Constitution were not absolute, and could be curtailed in the interest of the general public as per Articles 19(2) – 19(6). Accordingly, the State was empowered to make laws to protect the public interest and such legislative competence could not be challenged on the ground of violation of Article 19(1)(g).

- When the State legislature had not provided for the licensing of such activities, as was the case with the US and the UK, a Court could not read or add into it. In the case of horse-racing, a specific provision was made.
- The argument of the Petitioners based on principles of natural justice could also not be accepted as it was not an issue for adjudication by the authority when the Gujarat Act itself prohibited gambling.

Accordingly, the judge held that poker was a game of chance, and the Communication could not be set aside.

104. AIR 1951 Nagpur 646

Annexure V

The ‘Mahalakshmi’ Saga

-An update on the Supreme Court’s stand on the case of the Online Rummy Operators

-Ranjana Adhikari & Gowree Gokhale

While India has featured on the business maps of a number of International operators, the anxiety around the case of the online operators before the Supreme Court seeking clarity on the applicability of the state gambling laws to their business models had stopped many from putting wheels on their plans.

For the last few years, the entire gaming business community was patiently watching the developments in the *Mahalakshmi Case*¹⁰⁵ before the Supreme Court of India (“SC”). The matter was essentially a challenge before the SC by Mahalakshmi Cultural Association (“**Association**”) to order of the Madras High Court (“**Impugned Order**”)¹⁰⁶ in relation to the game of Rummy being played in brick and mortar clubs. Since the online Rummy portals feel a slight brunt of this order, they had also approached the SC for clarity on the position of law vis-à-vis online gaming. In a dramatic turn of events over last one week the SC has delivered two orders, which gives the operators organising skill based games some respite.

While on 13 August 2015, the SC observed that the Impugned Order has not dealt with online Rummy and therefore any observations made in the Impugned Order may not necessarily relate to online Rummy, on 19 August 2015, there was a unique twist in the tale where the Association withdrew the matter, thereby making the original Impugned Order infructuous.

105. *Mahalakshmi Cultural Association v. The Director, Inspector General of Police & Ors* Special Leave to Appeal (C) No(s).15371/2012 (Arising out of impugned final judgment and order dated 22/03/2012 in WA No. 2287/2011 passed by the High Court of Madras)

106. *The Director General of Police vs Mahalakshmi Cultural Association* (2012) 3 Mad LJ 561

This article gives a detailed account of how matters unfolded in the Mahalakshmi case and what this recent order means to the business community.

I. The background to the Mahalakshmi Case

The gambling laws in India are State specific. In most State enactments games of skill are excluded from the application of gambling laws. In the case of *State of Andhra Pradesh v. Satyanarayana*¹⁰⁷ (“**Satyanarayana Case**”), the SC had held that Rummy (the 13 card game) was a game of skill.

The Mahalakshmi Case was essentially an appeal filed against the Impugned Order of the Madras High Court before the Supreme Court by the Association. To give a brief background, the Inspector of Police, Chennai raided the premises of the Association on the grounds that the premise of the Association was being used for gambling and that the members were playing Rummy with stakes. A case was accordingly registered against the Association.

Aggrieved, the Association filed a Writ petition before a single judge for seeking directions to forbear the police from *inter alia* interfering with the activities of the Association in any manner, including playing 13 cards game of Rummy with or without stakes. The said writ petition was disposed of by the court in favor of the Association, on the grounds that Rummy is a skill based game and hence is not illegal. Certain directions were also issued to the police in this case.

It was this order of the single judge that had been challenged by the Appellants (Police) in

107.. AIR 1968 SC 825

the writ appeal before the division bench of the Madras High Court, where the court had interpreted the Satyanarayana Case slightly differently and held that in the event the club / association allows its members or guests to play Rummy with stakes or make any profit or gain out of such play, the police has the authority to invoke the provision of Chennai City Police Act.

The Impugned Order had unsettled a rather settled position of law. Various courts had previously held that games of skill fall outside the purview of the gambling laws and therefore stakes or profit can be made from such games. Different interpretations by different high courts gave rise to ambiguities on the position of law on collection of stakes from the game of Rummy.

During the course of the proceedings before the SC an application for intervention was filed by Games 24*7 and Play Games (“**Rummy Websites**”) to be impleaded in this matter since their operations were being affected by the refusal of banks to process payments of the players on these sites. There was also the apprehension of criminal prosecution, since physical rummy providers were being prosecuted. Further, many states had exemptions for games of skill in their statutes but certain states like Orissa had no such exemption.

It was expected that the Supreme Court would lay down guidelines on what business models (**including online**) would constitute gambling as restricted / prohibited under the gambling legislations of various states (even when skilled games were played for a fee / stake).

Extensive submissions were made by the counsels for the Rummy Websites over the course of hearings conducted in 2014-15. There have been many arguments and debates before the SC on the different kinds of business models adopted for example, in the context of online gambling, if a fee is collected for the services provided by the hosts of the website, as opposed to a buy in for a particular game, would the same be considered ‘stakes’?

Some of the online operators who had made representations before the SC in this case, had been asked to submit detailed affidavits,

explaining the structure of the games offered, the fees charged for such games to be played, and the flow of profits in relation to the same.

It was contended that previously¹⁰⁸ the SC had held that horse racing was a game of skill and playing for stakes in a game of skill was not illegal. It was urged that the logic followed in the Lakshmanan Case should be applied in case of Rummy given that the Satyanarayana Case had held that Rummy was a game of skill.

It was further contended that Rummy being a game of skill, even when played for money would not amount to gambling as the sole motivation was not money but the display of skill. The skill required to engage in the activity would not be eliminated by the addition of the monetary factor. There is a clear distinction made in common law between games of skill and games of chance under common law. Further, the jurisprudence reflected that there was a legal, judicial and executive policy to put games of skill in a different genus and specie from games of chance.

II. The Verdict

The SC on 13 August, 2015 disposed of the petitions of the Rummy Websites stating that it found that the Impugned Order did not deal with online Rummy and that it applied specifically to Rummy played in the brick and mortar format only. Further, the judges noted that the States had not taken any decision on whether the provision of online Rummy would constitute gambling under the Chennai City Police Act. Therefore, the SC was of the opinion that it was not necessary to entertain this petition. The SC also mentioned that the observations in the Impugned order may not necessarily relate to online rummy. The SC at this juncture was yet to deliver its verdict on the issue of taking stakes from Rummy in the offline context.

108. *K. R. Lakshmanan v. State of Tamil Nadu*, 1996 AIR 1153 (“Lakshmanan Case”)

The 19th August 2015 saw under twist in the tale. The counsel for the Association stated that the trial court had passed an order on 11th October, 2014 by way of which the Association had been acquitted. Interestingly, the issue before the trial court brought by the prosecution was not based on the case of Rummy (or any other 13 card game) but for members indulging in a game colloquially and locally called *Mangatha* “*ulle, velliye*” by betting money for profit. The counsel for the Association sought permission to withdraw the original writ filed before the Madras High Court and such permission was granted by the SC with an observation that since the writ petition is dismissed as withdrawn, the observations made by the Madras High Court in the Impugned Order or the matter before the SC do not survive as the writ is infructuous.

III. Reason to rejoice but matters remain grey

The law continues to remain grey in terms of whether the state wise gambling enactments cover online gaming sites as well. The Mahalakshmi Case could have been the turning point where it was expected that the SC would lay down the law stating whether the state Gaming Legislations cover online models as well.

This also means that the position of law on taking stakes from games of skill reverts to the original position fortified by many court judgments- games of skill fall outside the purview of the gambling laws of the relevant States and therefore stakes or profit may be made from such games.

One would also need to keep in mind the case of *Gaussian Networks*¹⁰⁹ where the question of whether games of skill can be offered for money on virtual platforms was considered. The petitioners had filed a petition under Order 36 of the Code and Civil Procedure Code (“CPC”) for seeking the opinion of the Hon’ble court on *inter alia* the question of whether there was any restriction on taking stakes from games of skill on websites making profit. The Court had opined that when skill based games are played for money in virtual space, the same would be illegal and observed that the degree of skill in games played in a physical form cannot be equated with those played online. It is important to note that this particular judgment is only binding on the parties to the matter and that it has already been challenged before the Delhi High Court.

One would need to now observe how the arguments would develop in this matter. However, on a close perusal of the order, the concerns raised by the court can be addressed by building adequate fraud control checks in the systems. This is a standard practice globally and also helps address anti-money laundering issues that plague these websites.

109. *M/s Gaussian Networks Pvt Ltd. v. Monica Lakhanpal and State of NCT*, Suit No 32/2012, Delhi District Court

Annexure VI

Bombay High Court rules on inapplicability of GST on amount pooled by players in the case of Dream11!

- Bombay High Court rules in favour of Dream11 to hold that games played on its platform is a game of skill and not game of chance.
- Rules applicability of GST only on the service fee charged by the platform for the services provided by it.
- Rejects argument that GST should be payable on the whole amount pooled in by the players.

Recently, the High Court of Bombay (“**High Court**”) in the case of *Gurdeep Singh Sachar v. Union of India*,¹¹⁰ following the judgment of the High Court of Punjab and Haryana (“**P&H High Court**”) ruled that no betting or gambling is involved in the fantasy games operated by Dream11 as their result is not dependent upon winning or losing of any particular team in real world on any given day. It further ruled that Goods and Service Tax (“**GST**”) is not applicable on the entire deposit received from the member but only on the consideration which is payable for the supply of goods or services or both within the platform.

Background

The case before the High Court of Bombay stems from a Criminal Public Interest Litigation (“**PIL**”) filed against Dream11. Dream11 is fantasy sports platform based in India that allows users to play fantasy cricket, hockey, football, kabaddi and basketball. The PIL alleged that Dream11 was carrying out illegal

operations of gambling/betting/wagering in the guise of Online Fantasy Sports Gaming (“**OFSG**”) and hence should be penalized under the *Public Gambling Act, 1867* (“**Act**”). The PIL consequently alleged that Dream11 was in violation of the Central Goods and Service Tax Act, 2017 (“**CGST Act**”) read with Rule 31A of Central Goods and Service Tax Rules, 2018 (“**CGST Rules**”).

Section 7 of the CSGT Act provides that certain activities under Schedule III of the CGST Act shall neither be treated as a supply of services, or supply of goods, and would therefore be exempt from the levy of GST. Schedule III lists “*actionable claims, other than lottery, betting and gambling*” as one such activity. Rule 31A of the CGST Rules determines the value of supply for the calculation of GST in the case of lottery, betting, gambling and horse racing. As per this rule, the value of supply of an actionable claim in the form of chance to win in betting, gambling (...) is “*100% of the face value of the bet or the amount paid into the totalizator.*” It was on this basis that the Petitioner contended that the entire amount paid by the player would be the basis of calculation for GST which for betting, gambling or lottery is currently applicable at the rate of 28%.

A. Contentions of the Petitioner

The contentions of the Petitioner primarily revolved around the following:

- Fantasy games are nothing but means to lure people to spend their money for quick earning by taking a chance, and most of them end up losing their money in the process, which is thus “*gambling/betting/wagering, being different forms of “gambling”*”.

¹¹⁰. Bombay High Court, Criminal Public Interest Litigation Stamp No.22 Of 2019.

- Upon entering in various contests and putting alleged betting money in those contests, the player receives a tax invoice which taxes only the money that Dream11 retains towards services of providing the platform to the players. For the balance amount, i.e. the stake put in by the player to play the contest an “acknowledgement” is given. This “acknowledgement” amount collected from each player is pooled in as Escrow Account and their contribution ultimately gets distributed amongst the players themselves as prize money immediately upon conclusion of game, as a result of which, some players get more than their contribution, and some lose money. and not the entire amount which is put as stake by the player.
- Since these activities are nothing but ‘gambling’ or ‘betting’, even if this acknowledgement amount is separately kept in an Escrow account and not retained by Dream11, GST should be payable on this amount as the activity carried out by the platform is nothing but ‘betting’ or ‘gambling’ and should therefore be governed by Rule 31A(3) of CGST Rules.
- Like horse racing, the said Rule shall apply even in such fantasy games amounting to gambling and/or betting and/or wagering, and thus GST at the rate of 28% shall be payable on 100% amount collected by Dream11 and not at the rate of 18% which is currently being paid on the amount that is retained by Dream11 for services of providing the platform.

B. Contentions of Dream11

Dream11 contended the following:

- The games available on Dream11’s platform are not in the nature of betting/ gambling. This fact has already been decided by the P&H High Court¹¹¹ wherein the court ruled in favor of Dream11 and

held that success in Dream 11’s fantasy sports basically arises out of user exercise of superior knowledge, judgment and attention thus, as per their skill; and that their fantasy games are exempt from the application of the penal provisions, in view of Section 18 of the Act, and held that they have protection guaranteed under Article 19(1)(g) of the Constitution of India. In reaching their decision, the P&H High Court relied on the Supreme Court’s decision of *K. R. Lakshmanan v. State of Tamil Nadu*¹¹² (“**Lakshmanan case**”) to hold that playing fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing.

- A Special Leave Petition against this judgment of P&H High Court was admittedly dismissed by the Hon’ble Supreme Court vide Order dated September 15, 2017.
- An explanation of how the game works on the platforms was given wherein it was explained that the players compete against such virtual teams created by other users / participants. The winners are decided based on points scored, using statistical data generated by the real-life performance of the players on the ground. Further, the deadline to create a team is latest by the official match start time and no changes can be made after the deadline. The participants do not bet on the outcome of the match and merely play a role akin to that of selectors in selecting the team. Therefore, the games played on their platform is a ‘game of skill’ and not of ‘chance’, and therefore outside the purview of Rule 31A(3) of the CGST Rules.

C. Issues before the High Court

1. Whether the activities of Dream11 amount to ‘Gambling’ / ‘Betting’?
2. Whether Rule 31A(3) of CGST Rules should be applicable to Dream 11?

111. *Shri Varun Gumber v. Union Territory of Chandigarh and Ors.*, CWP No. 7559 of 2017.

112. *K. R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153.

D. Ruling

The High Court ruled in favor of Dream 11 and rejected the contentions of the Petitioner. Reliance was placed on the decision of the P&H High Court and the *Lakshmanan case* to hold that the games played on the Dream 11 platform were games of skill and not games of chance. The court ruled that if the result of the game/contest is determined merely by chance or accident, any money put on stake with consciousness of risk and hope to gain, would be 'gambling' or 'betting'. Since that is not the case in case of fantasy games played on the Dream 11 platform, the same does not amount to gambling or betting. It rejected the argument of the Petitioner that the result would depend largely on extraneous factors such as, who amongst the players actually play better in the real game on a particular day, which according to the Petitioner would be a matter of chance, howsoever skillful a participant player in the online fantasy game may be.

In respect of the issue on payment of GST, the High Court rejected the allegation of the Petitioner that Dream 11 has evaded GST by erroneous classification of the games played on their platform. It held that only if their OFSG is 'gambling' or 'betting', there is a scope to infer the possibility of any tax evasion. It further ruled that the amounts pooled by the players in the escrow account is an 'actionable claim' as the same is to be distributed amongst the winning participating members as per the outcome of a game. As discussed above, under the CGST Act, 'actionable claims' other than lottery, betting and gambling are neither considered to be 'supply of goods' nor a 'supply or services', and are hence exempt from the levy of GST.

Since OFSG on Dream 11's platform is not in the nature of betting or gambling, the High Court ruled that money pooled in by the players cannot be subject to GST. It further rejected the argument of the Petitioner that the money so deposited by the players should fall under the definition of consideration and hence taxable to GST. The scope of definition of 'consideration' extends only in relation to "the supply of goods

or services or both". Since, the said activity or transaction relating to the actionable claim qua the amounts of participants pooled in escrow arrangement, for which only acknowledgement is given, is neither supply of goods nor supply of services, the same is clearly out of the purview of the expression 'consideration'. The Bombay High Court further agreed with Dream 11's view that GST is payable only on the consideration which is payable for the supply of goods or services or both within the platform at the rate of 18%.

E. Analysis

- *Game of Skill:* The ruling of the High Court should bring about cheer to the OFSG industry. The decision of the High Court is welcomed move as there may have been earlier some doubt on the decision of the P&H Court in other states, but with the High Court also ruling in favor of Dream 11 and giving a reasoned order, the picture seems to be quite clear and will go a long way in establishing that OFSG's should be considered to be games of skill and not of chance thereby allowing them to not be considered in the nature of betting, gambling or lottery.
- *Applicability of GST:* The ruling of the High Court gives much needed clarity to the gaming industry on applicability of GST. The High Court in its right mind has understood how the game works in practice and the only service provided by Dream 11 is that of providing the players with a platform on which they can come together and play. Therefore, the charge of GST only on the service fee is completely justified. Another way to look at this would that the value of services that Dream 11 is providing is equivalent only to the service fee that they are charging on a game to game basis. Once the fact is clarified that they are a game of skill, there can be no exception that they should only be charged at 18% on the value of the services provided by them and not on the whole amount pooled in by the players.

-
- *Escrow Account:* In the instant case, Dream11 was using an escrow account where the money of the players was being pooled and from which the winner was being paid. This has been an important question that the gaming industry has been trying to answer. While the High Court order does not go into this aspect, the fact that if an escrow account is maintained the money is pooled should help in establishing in that the money's in the escrow was never the money of the platform but belonged to the players and hence there should be no GST on such money's. However, the important question that needs consideration is what if the platform does not maintain an escrow account? Whether or not GST should be applicable in that case? It is quite clearly understood that the money that belong to the players is not considered revenue of the platform and are accordingly calculated and disclosed in the balance sheet.

Therefore, by implication, there should be no requirement to maintain a separate escrow account for the purposes of exemption from GST on such amounts. However, this question remains unanswered.

- *What this means for other industry players:* The position that if the game is based on skill, GST should be applicable on the service fee is quite clear and to that extent should be applicable to all industry players in that business. However, when it is not clear whether the game is based on skill or chance, the question that remains unanswered is should the platform pay GST only on the service fee or should it pay it on the whole amount?

The following research papers and much more are available on our Knowledge Site: www.nishithdesai.com

	<p>Private Equity and Private Debt Investments in India</p> <p>May 2019</p>		<p>International Commercial Arbitration: Law and Recent Developments in India</p> <p>May 2019</p>		<p>Are we ready for Designer Babies?</p> <p>May 2019</p>
	<p>Dispute Resolution in India: An Introduction</p> <p>April 2019</p>		<p>The Indian Medical Device Industry: Regulatory, Legal and Tax</p> <p>April 2019</p>		<p>Impact Investment: Innovation for India's Education Sector</p> <p>April 2019</p>
	<p>IP Centric Deals: Key legal, tax and structuring considerations from Indian law perspective</p> <p>February 2019</p>		<p>Fund Formation: Attracting Global Investors</p> <p>February 2019</p>		<p>Building a Successful Blockchain Ecosystem for India</p> <p>December 2018</p>

NDA Insights

TITLE	TYPE	DATE
Bombay High Court Quashes 197 Order Rejecting Mauritius Tax Treaty Benefits	Tax	May 2019
Payments For Online Subscription Services Not To Be Taxed As Royalty	Tax	May 2019
Taxation Of Unexplained Cash Credits: Recent Developments	Tax	May 2019
Taxing Cross-Border Production Activities – Contract Language Re-Emphasized	Tax	May 2019
Delhi High Court Sets Aside The Arbitral Award Passed In The Airport Metro Express Dispute	Dispute Resolution	May 2019
Arbitration Clause In An Unstamped Agreement? Supreme Court Lays Down The Law	Dispute Resolution	May 2019
English Court's Dictum On The "Without Prejudice" Rule	Dispute Resolution	May 2019
Bombay High Court Settles Dust Over Validity Of 'Options' Under Securities Law	Dispute Resolution	May 2019
Stamp Duty Stumps Brokers And Demat Transfers	Regulatory	May 2019
External Commercial Borrowings: Regulatory Framework Substantially Relaxed	Regulatory	May 2019
NDA Presents Regulatory Approaches On Crypto-Assets To The Government Of India	Regulatory	May 2019
To Strike While The Iron Is Hot: Sebi Relaxes Norms For Listing Of Start-Ups	Regulatory	May 2019

Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com

Nishith Desai Associates

LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI

93 B, Mittal Court, Nariman Point
Mumbai 400 021, India

tel +91 22 6669 5000
fax +91 22 6669 5001

SILICON VALLEY

220 California Avenue, Suite 201
Palo Alto, CA 94306-1636, USA

tel +1 650 325 7100
fax +1 650 325 7300

BANGALORE

Prestige Loka, G01, 7/1 Brunton Rd
Bangalore 560 025, India

tel +91 80 6693 5000
fax +91 80 6693 5001

SINGAPORE

Level 30, Six Battery Road
Singapore 049 909

tel +65 6550 9856

MUMBAI BKC

3, North Avenue, Maker Maxity
Bandra-Kurla Complex
Mumbai 400 051, India

tel +91 22 6159 5000
fax +91 22 6159 5001

NEW DELHI

C-5, Defence Colony
New Delhi 110 024, India

tel +91 11 4906 5000
fax +91 11 4906 5001

MUNICH

Maximilianstraße 13
80539 Munich, Germany

tel +49 89 203 006 268
fax +49 89 203 006 450

NEW YORK

375 Park Ave Suite 2607
New York, NY 10152

tel +1 212 763 0080