

GAMING LAWS IN INDIA



Introduction

Gaming, including betting on sports has been in existence for a substantially long period of time in India. Prior to the advent of online gaming becoming an attractive and lucrative venture, physical gaming was more prevalent. The Gaming Industry in India is growing at a rapid pace, having already attracted investments of \$350 million between 2014 and 2020 through venture capital funding in Indian gaming Start-ups. With more than 500 million smartphone users in India as of December 2019, mobile gaming has taken the lead by tapping 85% share of online gaming in India. India is expected to become largest market for the gaming industry with growth estimations pegged at 41.6% for the year ahead.¹

As the economy has progressed to a more digital economy and parliamentary enactments concerning gambling increased, an interesting trend and pattern both in terms of regulation and prohibition on certain activities including in gambling began to emerge.

It is expected that Real Money Gaming (RMG), Fantasy Sports and Esports gaming platforms will drive growth in the gaming industry in the years to come as India has one of the highest demographics and potential for online gaming through better internet infrastructure, reach and penetration across the length and breadth of India.

Some interesting statistics suggest that there are over 400 gaming Start-ups in India catering to single player and multi-player gaming, and newer categories of games such as fantasy sports have picked up momentum. The traditional real money games have also seen a steady increase in demand and the need for diversification and remodelling the concepts of gaming is the need of the hour.²

COVID-19 and its Impact on the Gaming Industry.

The pandemic has resulted in people staying at home due to the lock down and a lot of people turning to the internet and online gaming for entertainment and to pass their time. This has translated in a lot of online traffic on gaming portals and websites. Between the weeks of February 10th to 16th 2020 and March 16th to 22nd 2020, visits to online gaming websites or apps increased by 24% and the engagement, measured by time spent on gaming sites or apps, increased by 21% during the same period.³

Laws applicable to gaming (including games of betting and gambling) in India:

¹ Maple Capital Advisors, Online Gaming – India Story, Investment Trends: [http://www.maple-advisors.com/Online%20Gaming%20-%20India%20Story%20and%20Investment%20Trends%20\(1\).pdf](http://www.maple-advisors.com/Online%20Gaming%20-%20India%20Story%20and%20Investment%20Trends%20(1).pdf)

² KPMG India's Digital Future: <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf>

³ Maple Capital Advisors, Online Gaming – India Story, Investment Trends: [http://www.maple-advisors.com/Online%20Gaming%20-%20India%20Story%20and%20Investment%20Trends%20\(1\).pdf](http://www.maple-advisors.com/Online%20Gaming%20-%20India%20Story%20and%20Investment%20Trends%20(1).pdf)

Article 19 (1) (g) of the Constitution of India (“**Constitution**”) confers upon every citizen of India the freedom to practice any profession, or to carry on any occupation, trade or business. This freedom is naturally, afforded to every occupation, trade or business which are construed as legal. Whilst ‘betting and gambling’ and taxation thereof are State subjects, as enumerated under Entries 34 and 62 of List II (State List) of the Seventh Schedule of the Constitution, there are certain important Central Legislations on the subject of “betting and gambling”.

Overview of Central enactments:

1. The Indian Contract Act, 1872 (“**Contract Act**”)

Section 23 of the Contract Act, states that “*the consideration or object of an agreement is lawful, unless, it is forbidden by law; or is of such a nature that, if permitted it would defeat the provisions of any law*”. Further, Section 30 of the Contract Act states that an agreement by way of wager is “void and unenforceable. However, at the same time such agreements are not forbidden by law and hence if entered into, cannot be termed illegal”⁴, but no suit can be brought to enforce such agreements.

2. Foreign Exchange Management Act, 1999 (“**FEMA**”)

Remittances of income from activities such as, lottery winnings, racing and sweepstakes are prohibited under FEMA read with Rule 3 and Schedule 1 of the Foreign Exchange Management (Current Account Transaction) Rules, 2000.

The Foreign Direct Investment (FDI) policy prohibits “Foreign Direct Investment” and “investment by a person resident outside India” in entities conducting business of “lotteries including online lotteries, gambling and betting including casinos”. Similarly, collaborations in foreign technology in any form whatsoever, for the purposes of gambling and betting activities is also prohibited.

3. The Public Gambling Act, 1867 (“**PGA**”)

The PGA is derived from the British Gaming Act, 1845 and the Betting Act, 1853. The British Gaming Act, 1845 and Betting Act, 1853 made wagering contracts unenforceable while repealing the Unlawful Games Act, 1541. The PGA was primarily enacted with the purpose of punishing public gambling and the keeping of common gaming-houses. Section 12 of the PGA explicitly states that, the restrictions contained therein **shall not apply to any game of mere skill**.

The Constitution confers upon the States the power to make laws on “betting and gambling”. Such being the constitutional arrangement, there cannot be a Central Legislation on the subject unless the Parliament legislates by exercising its power under Articles 249 or 250 of the Constitution, as the case may be, or by exercising the power conferred by Article 252 of the Constitution.

⁴ *Gherulal Parakh v. Mahadeodas Maiya & Ors.*, AIR 1959 SC 781

Accordingly, with the States in India having been conferred with the exclusive power to enact laws on “betting and gambling” as also laws concerning taxation thereof, the Public Gambling Act ceased to be a Central Legislation, such that it was no longer a law applicable to the whole of the territory of India. In the current regime, the only manner in which it can still be held to be applicable is if it is adopted by State legislature out of its own volition.

Overview of some State enactments:

Many States have passed legislation adopting the PGA, while other States such as Andhra Pradesh, Delhi, Gujarat, Maharashtra, Jammu and Kashmir, Meghalaya and Goa among others, have resorted to enacting their own legislations on the subject of gambling and betting. Most States have made an exception for game of skill in their legislation, though some states including Telangana, Andhra Pradesh, Tamil Nadu, Odisha and Assam have a completely parochial view and have a blanket approach to all gaming including game of skill or game of chance.

Yet other States have taken a different approach and provided their own interpretation through their legislations on gaming:

1. State of Nagaland:

Nagaland is one of the more progressive States in India, with a completely different approach to the subject under The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 (“**2015 Act**”). Section 2(3) of the 2015 Act, defines the term, “games of skill”, to “include all such games where there is preponderance of skill over chance, including where the skill relates to strategizing the manner of placing wagers or placing bets or where the skill lies in team selection or selection of virtual stocks based on analysis or where the skill relates to the manner in which the moves are made, whether through deployment of physical or mental skill and acumen”. Schedule A to the 2015 Act, lays down a detailed list of games which includes games such as Chess, Poker, Rummy, Bridge, Nap, Auction, Virtual team selection games, Virtual sport fantasy league games which are considered ‘games of skill’ for the purpose of the 2015 Act. While the 2015 Act prohibits gambling, it encourages the promotion and regulation of games of skill including through the electronic medium by issuing licenses and puts an obligation on the licensee, to ensure that licensee is not providing a portal to players from other territories, to play games that are prohibited or considered to be gambling in such territories, and such portal shall be considered to be a genuine business venture not amounting to gambling.

The 2015 Act seeks to have pan-India application by virtue of the explanation set out under Section 2(1), and Section 2(2) of the 2015 Act. A conjoint reading of Section 2(2) of the 2015 Act and the explanation to Section 2(1), it is understood that the 2015 Act provides for a pan India application for matters of online gaming, to all those States where the games so being offered are legally permissible as “games of skill”.

2. State of Goa:

The Goa, Daman and Diu Public Gambling Act, 1976 (“1976 Act”), took the approach to provide for punishment for public gambling and the keeping of common gaming houses in the Union territory of Goa, Daman and Diu. However, Goa is one of only two State legislations that permits casinos and other games of chance. The Goa Legislative Assembly by amending the 1976 Act in 1992⁵ and 1996⁶ added Section 13A, which allows the State Government to authorise games of “*electronic amusement/slot machines in Five Star Hotels*” and “*such table games and gaming on board in vessels offshore as may be notified*”.

3. State of Sikkim:

The Sikkim Online Gaming (Regulation) Act, 2008 read with The Sikkim Online Gaming (Regulation) Rules, 2009 provides that games such as Poker and Black Jack may be operated and played under a license obtained from the State Government. The Government of Sikkim however has restricted the offering of “online games and sports games” to the physical premises of ‘gaming parlors’ through intranet gaming terminals within the geographical boundaries of the State, by enacting the Sikkim Online Gaming (Regulation) Amendment Act, 2015. In July 2016, the Government of Sikkim, vide a notification, banned its local population from playing in casinos situated in the State.

Thus, in the absence of common consensus among the States on what gaming activities are permitted, how they may be classified either as a game of skill or a game of chance, it is both a challenge as well as an opportunity for the gaming industry to expand its footprint in India. The general population is both receptive and keenly interested in gaming as a pass time or even as a business activity, considering modern variations of traditional games including online gaming is slowly becoming competitive and mainstream in India.

Jurisprudence on Gaming in India:

It is generally understood, from the interpretation given by various High Courts in India, and the Supreme Court of India, that to establish if a game is a game of skill the following parameters need to be established:

- (a) the game should involve substantial skills, and skills means presence of skill of a substantial degree;
- (b) success in such game should depend principally upon the superior knowledge, training, attention, experience and adroitness of the player;

⁵ The Goa Public Gambling (Amendment) Act, 1992.

⁶ The Goa Public Gambling (Amendment) Act, 1996.

- (c) greater experience and training in such game should provide the player with greater insight into strategies for success and a better understanding of the game's dynamics and operational constraints, and such experience and training should have a material influence on generating a successful winning outcome in favour of the player.

Let us understand the view taken by the Judiciary on certain games in India:

1. Game of Poker:



In *Dominance Games Private Limited v. State of Gujarat*⁷ the High Court of Gujarat ruled the game Texas Hold'em Poker to be a game of chance stated that, the history of Poker clearly suggests that it was a game of chance and considering the nature and character of game of Poker and manner in which it is played, it is required to be noted that it is a game, which has two stages i.e. initial stage of distribution of cards over which there is no control and later stage of the game, where the cards are opened with batting and it is in the process, complexion of the game that it changes with every turn of the card and betting. The court further went on to imply that in the ultimate analysis, it can be concluded that every game may have some element of skill and some element of chance. Therefore, the Supreme Court has evolved and applied the test of 'substantial degree of skill'. Meaning thereby, it is the predominance of skill over the chance, which will prevail and control the outcome of the game. Assessing and applying this test to the game of Texas Hold'em Poker, the court held that the game of Texas Hold'em Poker, will not satisfy the required criteria of predominance or substantial degree of skill.

The Indian Poker Association has filed an appeal⁸ against the above order before the Division Bench of Gujarat High Court. The matter is currently sub judice before the Division Bench of the Gujarat High Court, therefore the Single Judge order mentioned above prevails as valid and enforceable.

In *M. J. Sivani v. State of Karnataka*⁹ the Supreme Court stated that the elements of gaming are the presence of prizes or consideration, and gaming involved playing of any game, whether of skill or chance, for money or money's worth. In the context of games like Poker double up, blackjack and pacman, the court noted that there was no scope for using one's skill to arrive at a desired result, as the electronic machines on which these games were played could be tampered with resulting in the chances of winning becoming completely unrelated to the skill of the player. Accordingly, games played electronically were placed under the scope of 'games of chance'.

⁷ (2018)1GLR801

⁸ Letter Patent Appeal No. 2625 of 2017

⁹ AIR 1995 SC 1770

In *Indian Poker Association v. State of Karnataka*, the Karnataka High Court while deciding on the requirement of obtaining a license for holding Poker games and tournaments, held that, “*in respect of the game of poker if played as a game of skill, license is not contemplated*”. The conditions, upon the fulfilment of which it can be ascertained that Poker was played as a game of skill were not provided by the court, rendering the judgement to be open to interpretation.

In *Indian Poker Association v. State of West Bengal*¹⁰, the Calcutta High Court stated that, provisions of the West Bengal Gambling and Prize Competitions Act, 1957 and particularly the definition of "gaming or gambling" set out under Section 2 (1) (b) therein, state that Poker is not included either in gaming or gambling and, therefore, if any person plays such game without indulging in any other act, which could amount to an offence, playing such game does not attract police interference. Accordingly, the Calcutta High Court directed that playing Poker shall not result in harassment of the players by the respondents.

2. Game of Rummy:



In *State of Andhra Pradesh v. K. Satyanarayana and Others*¹¹ the Supreme Court held that, rummy is preponderantly a game of skill and not of chance. The Supreme Court further observed that, “it requires certain amount of skill because the fall of the cards has to be memorized and the building up of rummy requires considerable skill in holding and discarding cards”. The expression ‘mere skill’ means presence of skill of a substantial degree.

It is interesting to note that Kerala High Court in 2019¹² held that "playing rummy for stakes" within the club premises is an offence under the Kerala Gaming Act, 1960 (hereinafter referred to as 'the Act') and it shall be open for the police to take appropriate action after complying with Section 5 of the Act. In a review petition (*Play Games 24X7 Private Limited and Ors. v. Ramachandran K. and Ors*¹³) against the aforesaid judgement, Kerala High Court, dismissed the petition and without passing a specific ruling on legality of online rummy held that the question whether if rummy is played for stakes, will it amount to violation of the provisions of the Gaming Act or not has to be decided on a case to case basis and the manner

¹⁰ W. P. No. 13728 (W) OF 2015

¹¹ AIR 1968 SC 825

¹² WP(C) No. 35535/2018

¹³ RP No. 621 of 2019 in WP(C) 35535/2018

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 *Amit M. Nair v. State of Gujarat*¹⁴, the petitioner prayed for holding and declaring playing on online gambling in Virtual Space/World Web/Cyber Space, through Mobile Applications as well as through Computers more particularly "online rummy" to be bad and illegal as much as it is in violation of the provisions of Section 4 and 5 of The Gujarat Prevention of Gambling Act, 1887. The Gujarat High Court observed that “*There need not be any debate on this issue as Rummy is a game of skill as held by the Supreme Court, for the first time, in the case of State of Andhra Pradesh vs. K. Satyanarayana & Ors., reported in MANU/SC/0081/1967 : AIR 1968 SC 825 and later followed in the case of K.R. Lakshmanan vs. State of Tamil Nadu & Ors., reported in MANU/SC/0309/1996 : AIR 1996 SC 1153. However, the moot question is whether what is being played is "Rummy" in its true sense or it is just pure and simple gambling. This again would depend on individual facts of the case.*” The Court passed an order directing the State of Gujarat to consider the writ application as a representation and directed the State to deal with the issue in larger public interest.

3. Game of Fantasy Sports:



In *Varun Gumber v. Union Territory of Chandigarh and Others*¹⁵ (*Dream 11 judgement*) the High Court of Punjab and Haryana stated that, with any game of skill, greater experience and training in such games provides a user with greater insight into strategies for success and a better understanding of the game's dynamics and operational constraints, and in itself heightens and attunes the element and exhibition of skill on the user's part and thereby has a material influence on generating a successful winning outcome in favour of the user. Accordingly, it was held by the High Court of Punjab and Haryana that, fantasy sports did not amount to gambling and Dream 11 was conducting a business activity protected under Article 19(1)(g) of the Constitution. An appeal against this order was dismissed by the Supreme Court in 2017.

A similar criminal PIL was filed in *Gurdeep Singh Sachar v. Union of India*¹⁶ before the High Court of Bombay and the court took the view similar as given by the High Court of Punjab and Haryana. The Court observed that, unlike betting, winning or losing in fantasy sports was not dependent on any team winning or losing in the real world. The Supreme Court of India, by its

¹⁴ R/Writ Petition (PIL) No. 146 of 2020

¹⁵ CWP No. 7559 of 2017

¹⁶ Judgment dated 30th April 2019 in Criminal P.I.L. No. 16 of 2019

order dated March 6, 2020¹⁷ stayed the effect of the Bombay High Court's decision in Gurdeep Singh Sachar's case. Thus, it remains to be seen how fantasy sports is ultimately classified and categorised within the legal framework of Indian laws.

In another PIL, filed before the Rajasthan High Court, in *Ravindra Singh Chaudhary v. Union of India*,¹⁸ the issue as to whether online fantasy sports games offered by Dream 11 platform amount to gambling or betting came up before the Division Bench. The Court opined that the result of a fantasy game depends on the skill of a participant and not sheer chance, and winning or loosing of virtual teams created by the participant is also independent of the outcome of the game or event in the real world. The format of the online fantasy games offered by Dream 11 is a game of mere skill and the business model is protected under Article 19(1)(g) of the Constitution of India, as repeatedly held by various High Courts and affirmed by the Supreme Court of India.

Conclusion

India being a vast country, States having the power to legislate on State subjects have taken different approaches to the law on gaming. The Courts in India are also divided in their interpretation of what activities constitute game of skill and what activities constitute game of chance. The current law relating to online gaming in India is ambiguous and in its infancy. Except the State of Nagaland which expressly permits online gaming throughout India, subject to obtaining license, there is no other central or State enactment in this regard.

In the absence of a cohesive law or common ground on the subject, and as long as there is no Government prohibition or court ruling prohibiting online gaming platforms from operating in a particular State, if one is able to establish that a particular game involves substantial skill, requires strategies and experience, and is not merely a game of chance, in compliance with the principles of fair play, then one should be able to legally operate online gaming platforms, subject to compliance with other applicable conditions in the relevant State, if any.

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¹⁷ SLP (Crl.) Diary No. 42282 of 2019 Supreme Court of India

¹⁸ D.B. Civil Writ Petition No. 20779/2019