

DYNAMIC NATURE OF PAY-TO-PLAY CONTESTS: A CHECKERBOARD OF VARYING REGULATIONS AND ITS INADEQUACY

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ABSTRACT:

Risking money on online fantasy sports is a hotly contested issue among its supporters and detractors. This article presents a qualitative study on the legal regime of online fantasy sports in India. In the first part of the article, authors examine the issue of wagering money on fantasy sports being a game of chance or of skill. In the second part of the article, the legislative competence for enacting legislations regulating online fantasy sports is scrutinised. In the third part of the article, the authors explore the need for regulation of online fantasy sports; it being a game of chance. Lastly, varying laws among State Governments on online fantasy sports in India is examined. The authors have shed light on The Karnataka Police (Amendment) Act, 2021, to support the view why expanded criminalization of gambling activities is preferred over legalisation.

I. INTRODUCTION

The existence of games in India can be traced back to ancient times such as the ‘game of dice’ played between Pandavas and Kauravas.¹ Since then, the traditional games have metamorphised into virtual games. Online gaming has also undergone transition by leaps and bounds because of technological advancement and global outreach. New gaming formats have emerged, one of them being ‘online fantasy sports.’ Online fantasy sports are held on website platforms where contestants pay an entry fee and create their ‘fantasy’ team of real athletes for a game or series of games with a predetermined budget. The outcome of real-life sports games determines each contestant’s line-up performance. The sole objective of a contestant in such competitions is to perform better than its competitors to win cash prizes. Online fantasy sports have appealed to the masses because of the well-known sporting events such as Indian

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¹ Anuradha Kapur, *Actors, Pilgrims, Kings and Gods: The Ramlila of Ramnagar* (vol. 19, 1985) 57-73.

Premier League and Indian Super League. However, the dark underbelly of these fantasy sports remains to be recognized. These fantasy sports have done more harm than good to the society at large. Risking money on such sports have raised social, economic, and psychological concerns. This raises the dilemma whether this is just a new form of online gaming in its true sense or has it replaced the traditional form of betting/gambling.

II. GAME OF CHANCE OR GAME OF SKILL: THE LEGAL CONUNDRUM

Broadly, games are categorised into games of chance or games of skill. While the former is based on the element of luck, the latter is based on physical or mental skill. The distinction of games of chance and games of skill is of utmost significance as gaming legislations generally exclude gambling on all gaming activities that are not classified as 'games of skill'. To determine the legality of any game, specifically those games which are played with real money, it is imperative to ascertain whether such games will fall within the ambit of gambling legislation. Thus, a distinction between the games of chance and games of skill is of utmost significance.

With the advent of technology, the online fantasy sports have emerged as one of the biggest players in gambling industry. The position of law on whether the online fantasy sports are games of chance or games of skill remains unsettled. The judgment rendered by the High Court of Punjab and Haryana in *Varun Gumber v. Union Territory of Chandigarh and Ors.* was one of the earliest decisions where questions of whether fantasy sports can be categorised as 'betting or gambling' were raised.² The court held that fantasy sports being a 'game of skill' do not fall within the ambit of betting or gambling. This judgement was propounded primarily on the understanding that emerged from earlier findings of the Apex Court in *K.R. Lakshmanan's Case*, *K. Satyanarayana's Case* and *RMDC Cases*.³ The High Court of Punjab and Haryana while analysing these Supreme Court decisions laid down two important principles. First, the

²*Varun Gumber v. Union Territory of Chandigarh and Ors* 2017 Cri L J 3827

³*Dr. K. R. Lakshmanan v. State of T.N. & Anr.* (1996) 2 SCC 226; *State of Andhra Pradesh v. K. Satyanarayana* AIR 1968 SC 825; *R.M.D. Chamarbaigwala v. Union of India* AIR 1957 SC 628; *State of Bombay v. R.M.D. Chamarbaigwala* AIR 1957 SC 699

competitions where success depends upon a substantial degree of skill are not gambling; and second, 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'. Following this judgement, different High Courts in the country have merely endorsed the findings of the Punjab and Haryana High Court or of the courts which dealt with similar issues prior to them.⁴ Some of these decisions of the High Court which held fantasy sports to be games of skill and thus outside the purview of betting or gambling were appealed before the Supreme Court of India.⁵ The appeal was summarily dismissed by a non-speaking order and therefore the decision of the Courts cannot be considered as a law declared or upheld by virtue of Article 141 of the Constitution.⁶ Furthermore, the aforementioned decisions of Apex Court in K.R. Lakshmanan's Case, K. Satyanarayana's Case and RMDC Cases were specific to the legislations in question therein and did not provide a blanket ruling on the conundrum of game being game of chance or skill. For instance, in the RMDC-1 case, the constitutional validity of the Prize Competition Act, 1955 was called into question as the impugned Act not only regulated prize competition of gambling nature but also those in which substantial degree of skill was involved.⁷ The court applied the doctrine of severability and held that the said Act only applied to "games of chance", and not to "games of skill". In RMDC-2 case, the constitutional validity of Bombay Lotteries Prize Competition Control and Tax (Amendment) Act, 1952.⁸ The court held that the impugned Act does not have the effect of roping in innocent price competitions which are not of gambling nature. Therefore, a competition wherein success does not depend to a substantial degree of

⁴*Gurdeep Singh Sachar v. Union of India Through Ministry of Finance and Ors* 2019 SCC OnLine Bom 13059; *Chandresh Sankhla v. State of Rajasthan & Ors.* 2020 SCC OnLine Raj 264; *Ravindra Singh Chaudhary v. Union of India*, 2020 SCC OnLine Raj 2688

⁵*Varun Gumber v. UT, Chandigarh & Ors.* 2017 SCC OnLine P&H 5372; *Varun Gumber v. Union of India & Ors.*, SLP (Crl) Diary No. 35191 of 2019; *Gurdeep Singh Sachar v. Union of India & Ors.*, SLP (Crl) Diary No. 43346 of 2019; *Union of India v. Dream 11 Fantasy Private Limited* M A 11445/ 2019 in SLP (Crl.) 11445 of 2019; *Avinash Mehrotra v. State of Rajasthan & Ors.* SLP (Civil) Diary No. 18478 of 2020

⁶*Kunbayammed & Ors. v. State of Kerala & Anr.* (2000) 6 SCC 359

⁷*R.M.D. Chamarbaugwala v. Union of India* AIR 1957 SC 628

⁸*State of Bombay v. R.M.D. Chamarbaugwala* AIR 1957 SC 699

skill is recognised to be of gambling nature. In K. Satyanarayana's case, the conviction of Respondents under Section 4 and 5 of the Gambling Act for playing "rummy" for stakes, was set aside by holding that Rummy was a game of skill and Section 14 of the said act excluded "game of skill" from its ambit. Similarly, in Lakshmanan's case, the court decided that horse racing is a "game of skill" and not "game of chance" and thus it falls under exemption from criminal liability provided under the Tamil Nadu Gaming Act and the Tamil Nadu Police Act. In these judgements, the courts laid emphasis on the evolution of the 'Preponderance of chance or skill test', which state that if the game involves a substantial element of skill, it is a game of skill and vice-versa. The material role played by chance/skill is immaterial.

Unlike these games called into question in the above decisions, online fantasy sports are modern games of distinctive nature, and no comparison can be drawn between these games that operated in physical time and space with the one which is open to third party human (service providers) as well as technological intervention by means of computer programming, codes, etc. Apart from this, the intertwining of skills involved in online fantasy sports of different parties i.e., the athletes and the participant creating a dream team, creates a room for new understanding and classification of games. More importantly, whether a game is skillbased or chance based is largely a question of fact and not law.⁹ Each case must be decided independently, taking unique facts and circumstance into consideration. The aforementioned judgments cannot be treated as an authority on the proposition of validity of online fantasy sports and the principles laid down cannot be applied uniformly in the context of online fantasy sports. This leaves scope for adoption of the understanding and classification proposed by the authors with regards to Online Fantasy Sports.

1. 'Material Element Test' Triumphs over 'Preponderance of Chance or Skill Test'

In view of the authors, the 'Preponderance of chance or skill test' as

⁹*People v. Mason* 68 Cal. Rptr. 17, 21 (Dist. Ct. App. 1968)

relied on by the Courts in India does not facilitate classification of fantasy sports as a game of chance or skill in the most suitable manner. In the United States of America, several states including Alabama, Alaska, Hawaii, Washington, Missouri, New Jersey, New York, among others, employ the ‘material element test’ to determine whether element of chance is material to the final outcome irrespective of skill being dominant. The authors have selected USA for comparison owing to its technological advancement and developed jurisprudence on online gambling. In New York, the definition of gambling was amended in the Penal Code to include contest of chance which is defined as ‘any contest, game, gaming scheme or gaming device in which the outcome depends on a material degree of element of chance, notwithstanding that skill of the contestants may also be a factor therein’.¹⁰ The New York Supreme Court, Appellate Division embraced the “Material element test” in a February 2020 decision and held that skill factor cannot eliminate or outweigh the material role of chance and thus material element test is ideal test for the classification process.¹¹ The criteria employed in this test is that even if the game involves 51% or more elements of skill, it can still be classified as a game of chance.¹² In *People v. Turner*, the court held that games of chance include both games that require no skill such as lottery and games such as poker or blackjack where the result is dependent upon random distribution of cards, irrespective of skill employed.¹³ Even in India, the courts while establishing the preponderance of chance or skill test, have implicitly concurred with the opinion that games involve both elements of chance and skill. In *K.R. Lakshmanan’s Case*, *K. Satyanarayana’s Case* and *RMDC Cases*, the courts acceded to the fact that all games involve skill and chance, and the deciding factor is the element which is existent substantially in the game. These judgements highlight the fact that categorising a game into watertight compartments either solely based on chance or solely based on skill is not possible as

¹⁰ The New York Penal Law, Art. 225

¹¹ *White v. Cuomo* 181 A.D.3d 76 (N.Y. App. Div. 2020)

¹² *United States v. Di Cristina* 726 F. 3d 92, 98 (2d Cir. 2013); *Tbole v. Westfall* 682 S.W.2d. 33 n.8, (Mo. Ct. App. 1984)

¹³ *People v. Turner* 629 NYS 2d 661, 662 (NY Crim Ct 1995)

they co-exist at the same time.

Just like any other game, chance and skill co-exist in fantasy sports. In other words, they are not mutually exclusive of one another. Undisputedly, a participant in an online fantasy sports competition employs its skills in deciding the line-up for their virtual team, for instance, while analysing past performance of an athlete. Moreover, if the trends of prize distribution are observed in such fantasy sports competitions, it is evident that a small percentage of users who employ their skills in formulating their team receive a large percentage of the prize money as compared to participants who choose their team at random. Regardless of employing skills in the selection of a virtual team, a participant of an online fantasy sport cannot control the performance of an athlete in the real sporting event. Here the skill of another is involved, success or failure is dependent on third party's performance and other allied determinative factors having bearing on the outcome of the sporting event, like injury or illness, poor officiating, a selected player having a bad day or an unselected player having a surprisingly good day.¹⁴ This reinforces the premise of fantasy sport being a game of chance and therefore falling under the category of betting or gambling.

Therefore, the element of skill involved in a fantasy sport cannot outweigh material role of chance. Applying the material element test, *prima facie*, fantasy sports are more akin to game of chance and thus fall within the domain of betting or gambling.

III. LEGISLATIVE COMPETENCE FOR REGULATION

In India, the Legislative powers are conferred upon the State and Centre under the Constitution of India. The power to regulate betting and gambling activities can be traced to multiple entries in the Constitution.¹⁵

The Constitution has empowered the State to legislate on matters relating to 'Betting and Gambling'. Entry 34, List II of Schedule VII to the

¹⁴*Superintendent and Remembrancer of Legal Affairs, Bengal v. L E Renny* 1935 SCC Online Calcutta 153

¹⁵*M/s Ujagar Prints and Others (II) v. Union of India and Others* (1989) 3 SCC 488

Constitution of India explicitly provides for 'Betting and Gambling'.¹⁶ It is settled law of interpretation that legislative entries should be liberally interpreted.¹⁷ Thus, in light of this well-settled principle, the meaning of the term 'gambling' and 'betting' in Entry 34, List 2 of Schedule VII to the Constitution of India should be interpreted broadly.

The term 'gambling' has been defined in the Black Law's Dictionary as

"Gambling. The dealing, operating, carrying on, conducting, maintaining or exposing for pay any gam. Making a bet. To plan, or game, for money or other stake; hence to stake money or other thing of value on an uncertain event. It involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of a consideration, an element of chance, and a reward. In re Gaming Devices Seized at American Legion Post No. 109, 197 Pa. Super. 10, 176, A.2d 115, 122. The element of gambling are payment of a price for a chance to win a prize. *Boies v. Bartell*, 82....".¹⁸

Thus, *prima facie*, the outcome of the uncertain event may be predictable owing to the skill of the person is wholly irrelevant for the purpose of understanding the word 'gambling' in common parlance. On similar lines, the term 'bet' has been defined in the Black Law's Dictionary as "*A contract by which two or more persons agree that a sum of money, or other thing shall be paid or delivered to one of them on the happening or non-happening of an uncertain event*". Consequently, the term 'betting' has been defined as the "*act of placing a bet or wager*". Thus, in colloquial terms, the term 'betting' is understood to mean the act of contributing money or valuable thing on the happening or non-happening of a future uncertain event with the understanding that the money or other valuable thing will become the property of one or some of them on the happening or non-happening of the event. Therefore, assuming the word 'gambling' was limited to events

¹⁶ The Constitution of India 1950, Entry 34, List II, Schedule VII

¹⁷ *Godfrey Philips Limited and Another v. State of UP* (2005) 2 SCC 515; *Jilubhai Nanbhai Khachar and Others v. State of Gujarat* 1995 Supp (1) SCC 596

¹⁸ Bryan A. Garner, *Black's Law Dictionary*, (8th edn, West Publishing Co. 2004) 701

involving ‘game of chance’, the word “betting” is wide enough to cover wagering money on “games of skill”. The framers of the Constitution are presumed to have intended that every word in the Constitution must be given effect to.¹⁹ If ‘betting’ is assumed to exclude risking money or other valuable thing on the happening of a ‘game of skill’, the word ‘betting’ in Entry 34, List 2 of Schedule VII to the Constitution of India would be reduced to a nullity because then, ‘betting’ and ‘gambling’ would only cover ‘game of chance’. If the word ‘gambling’ covers ‘game of chance’, there was no need for the constitutional makers to use the word ‘betting’ in Entry 34, List 2 of Schedule VII to the Constitution of India to cover only “game of chance” (and not “game of skill”).

Further, Entry 1, List II of Schedule VII to the Constitution provides for ‘Public Order’.²⁰ In *Romesh Thappar v. State of Madras*, ‘public order’ has been defined as “*an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of the internal regulations enforced by the Government which they have established.*”²¹ Delhi High Court has affirmed the view that laws relating to gambling, lotteries, etc. can be traced to the laws necessary for maintenance of public order.²² In *Kanu Biswas v. State of West Bengal*,²³ the court laid down that to ascertain whether an act affects ‘public order’, the test is to observe if it causes disturbance to the current life of the community.²³ Betting and gambling has gravely impacted the commission of crimes in the society and has caused deleterious effects on the even tempo of life of the community. There are several instances wherein debt-ridden gamblers have committed suicide under pressure.²⁴ Hence, regulatory legislations fall within the ambit of public order. Additionally, considering betting and gambling has been categorised as a behavioural disease by the World

¹⁹*High Court of Gujarat and Another v. Gujarat Kishan Mazdoor Panchayat and Others* (2003) 4 SCC 712

²⁰ The Constitution of India 1950, Entry 1, List II, Schedule VII

²¹*Romesh Thappar v. State of Madras* AIR 1950 SC 125

²² *Akhil Bharatiya Sarkari Lottery Vyapari Mahasangh v. Commissioner of Police New Delhi* (1999) 50 DRJ (DB) 495

²³*Kanu Biswas v. State of West Bengal* (1972) 3 SCC 831

²⁴ Pramod Madhav, ‘Tamil Nadu: 31-year-old man hangs self, family blames online gambling addiction’ (*India Today*, 12 October 2021) <<https://www.indiatoday.in/india/story/tamil-nadu-31-year-old-suicide-family-online-gambling-addiction-1863716-2021-10-12>> accessed 28 February 2022

Health Organization, a law seeking to curb the practice can also be a law relating to 'public health' under Entry 6, List II of Schedule VII to the Constitution of India.²⁵

Lastly, Entry 26, List II of Schedule VII to the Constitution provides for 'Trade and Commerce within the State subject to the provisions of Entry 33, List III'.²⁶ Assuming not admitting, betting, and gambling is a game of skill and not a game of chance, then betting or risking money on a game of skill is trade. Hence the State has the competence to frame legislations vide the powers conferred under Entry 26, List II of Schedule VII to the Constitution.

From the above discussion, the ragbag of Legislative entries in Schedule VII to the Constitution of India demonstrate that the State has comprehensive power of regulating betting and gambling.

IV. NEED FOR REGULATION OF ONLINE GAMBLING OF FANTASY SPORTS

In recent years, India has witnessed a digital revolution that has led to online platforms pandering to the vice of betting. Betting has become easily accessible to all age groups and sections of the society.²⁷ This may raise greater concerns than the traditional structure of betting which was limited in time and space. With the proliferation of online platforms owing to the digital revolution, the entire landscape of gaming has undergone a cataclysmic change. Many youngsters have fallen prey to the depravity of online gambling. These incentives cloaked under the promise of lucrative returns are often elusive.

The sinful, pernicious, and morally depraved nature of betting and wagering can be traced back to ancient India. In *State of Bombay v. R.M.D. Chamarbaugwala*, the court noted gambling as a sinful and pernicious vice

²⁵ The Constitution of India 1950, Entry 6, List II, Schedule VII

²⁶ The Constitution of India 1950, Entry 26, List II, Schedule VII

²⁷ NITI Aayog, 'Guiding Principles for the Uniform national-level regulation of online fantasy sports platforms in India' (*Draft for Discussion*, December 2020) <https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf> accessed 27 February 2022

and deprecated its practice.²⁸ The judgement referred to the Rig Veda wherein it is mentioned that

“Dice verily are armed with gods and driving hooks, deceiving, and tormenting, causing grievance woe. They give frail gifts and then destroy the man who wins, thickly anointed with the player’s fairest good.... The gambler’s wife is left forlorn and wretched; the mother mourns the son who wanders homeless. In constant fear, in debt, and seeking riches, he goes by night unto the home of others.”

The Mahabharata deplores the doleful conditions of gambling by Pandavas who gambled away their kingdom. Verse 221 also advises the king to exclude from his realm gambling and betting, for those two vices cause the destruction of the Kingdom of Princes.

In the past few years, the menace of online gambling has reached epic proportions. The enforcement agencies have observed that several delinquents who have used such online platforms were later involved in illegal activities.²⁹ There is a direct nexus between online gaming activities and commission of offences. For instance, a person may commit theft to pay off his gambling debts. Indebtedness often causes people to commit suicides, leaving behind families with huge debts. Recognizing the deleterious effect of online gambling, the World Health Organization has characterised online gaming as a ‘behavioural addiction’ in the International Classification of Diseases.³⁰

Gambling and betting activities have also stunted the growth of art in our country as it may consequently lead to match fixing activities organised at the instance of people participating in fantasy sports competitions. As a result of which athletes may be motivated to underperform in lieu of receiving financial gains. It hampers the morale of players which in turn

²⁸ *State of Bombay v. R.M.D. Chamarbaugwala* AIR 1957 SC 699

²⁹ Sanju George, Richard Velleman, Benedict Weobong, ‘Should Gambling Be Legalized in India?’ (*PubMed Central*, 20 July 2020) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8313460/>> accessed 1 March 2022

³⁰ ‘Inclusion of gaming disorder in ICD-11’ (*World Health Organization*, 14 September 2018) <<https://www.who.int/news/item/14-09-2018-inclusion-of-gaming-disorder-in-icd-11>> accessed 15 January 2022

affects the growth of the gaming industry. Betting or gambling activities taints the essence and purity of a game. Due to this, the nature of games has delineated from being art to a commercial activity. In Karnataka, some players were suspended from the Karnataka Premier League due to rampant match fixing because of which several promising cricketers were denied the opportunity of showcasing their talent.³¹ Hence, regulation of fantasy sports has become the need of the hour to curb the menace it is causing to society. In fact, the sole purpose of the introduction of 'Betting and Gambling' Entry in the Constitution was to give the State complete power to prohibit or regulate betting or gambling activities.³²

V. CHANGING NATURE OF REGULATORY REGIME OF GAMBLING IN INDIA

Prior to Independence, the Public Gambling Act, 1867, a central legislation was enacted which prohibited any games of chance and probability except lotteries.³³ However, the Act excluded 'games of skill' from its ambit.³⁴ Several States have adopted this colonial-era statute with certain modifications. Certain States have devised their own laws to regulate gambling. Being a pre-internet statute, this statute fails to cater to the needs of today's gambling activities that have evolved with the dawn of the internet. Some states such as Sikkim, Nagaland and Meghalaya have laid down a licensing regime for online games. Sikkim allows online games that are offered only through intranet terminals and to the exclusion of its state residents.³⁵ Nagaland has restricted the licences only for skill-based games.³⁶ The State of Meghalaya has recently introduced the 'Meghalaya Regulation of Gaming Act, 2021' wherein it permits the

³¹ 'KSCA Suspends Belagavi Panthers Over KPL Match-fixing Scandal' (*News18*, 7 November 2019) <<https://www.news18.com/cricketnext/news/kscs-suspends-belagavi-panthers-over-kpl-match-fixing-scandal-2377969.html>> accessed 18 January 2022

³² Entry 45, Constituent Assembly Debate, <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949_09-02> accessed 15th January 2022

³³ Public Gambling Act 1867

³⁴ Public Gambling Act 1867, s 12

³⁵ Sikkim Online Gaming (Regulation) Act 2008, s 3

³⁶ Nagaland Prohibition of Gambling and promotion and Regulation of Online Games of Skill Act 2015, s 2(1)

operators to offer online and land-based games of chance.³⁷

The State of Tamil Nadu introduced the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 prohibiting wagering or betting in cyberspace or on games of skill in lieu of exemption.³⁸ The Court upheld the challenge and struck down the Act as ultra vires the Constitution in its entirety.³⁹ The Court struck down the Amendment on the ground that the wording of the clauses was so crass and overbearing that they smacked of unreasonableness. Further, strangely, turning the presumption of constitutionality of a statute on its head, the Madras High Court held that the State had failed to discharge its burden of proof of demonstrating that lesser restrictive measures would have aided the State in attaining the desired object. The court has overstepped its jurisdiction and acted as a super-legislature by striking down the Amendment Act. The Special Leave Petition challenging the High Court decision is currently pending before the Supreme Court.⁴⁰ Post this enactment of this Act, several people such as Virat Kohli, Sourav Ganguly were issued notice for their alleged involvement in the promotion of online fantasy sports league applications.⁴¹ The Amendment brought to light several gambling activities.

Similarly, the State of Telangana had imposed a blanket ban on all forms of online gaming by passing the Telangana Gaming (Amendment) Bill back in 2017.⁴² The ban made no distinction between online games of chance or skill and prevented all forms of gaming. However, the recently the State is reconsidering its position on the subject by addressing the lacunae existing in the earlier law. As per reports, the new law will attempt to strike a balance between developing a regulatory system and controlling the menace of gambling.

³⁷ Meghalaya Regulation of Gaming Act 2021, s 3

³⁸ Tamil Nadu Gaming and Police Laws (Amendment) Act 2021

³⁹ *Junglee Games India Private Limited v. State of Tamil Nadu* (2021) SCC Online 2762

⁴⁰ *The State of Tamil Nadu & Ors v. Junglee Games India Pvt. Ltd. & Anr.* 2021 SCC OnLine Mad 2762

⁴¹ Meera Emmanuel, 'PIL in Madras HC seeks arrest of Virat Kohli, Tamannah, other celebs for promoting online gambling websites' (*Bar and Bench*, 1 August 2021) <<https://www.barandbench.com/news/litigation/pil-madras-hc-seeks-arrest-of-virat-kohli-tamannah-promoting-online-gambling-websites>> accessed 19 May 2022

⁴² Telangana Gaming (Amendment) Act 2017

While on one hand, most States continue to grapple with a blanket ban of such games, on the other hand, various fantasy sports platforms operate as games of skill. The States which impose a blanket ban have enacted restrictive and ambiguous legislations without being in conformity with the object of the Amendments. Whereas, the other States have categorised online fantasy sports as games of skill without any prohibition on gambling activities. Such regimes are not effective. Regulating such platforms is utopia as there are more than thousand gaming portals online offering users the opportunity of wagering or betting money existing today.⁴³ The numbers are rapidly growing everyday by virtue of it being in virtual space. Hence, it is difficult and cumbersome to identify the legal personality of these online portal i.e., whether they are run by individuals, companies, partnerships, etc. Most importantly, it is difficult to track them as they may operate from one part of the country and offer services in another. The enforcement agencies cannot lay their hands on most of these portals since their place of business may be in another State. Hence, mere regulation may not be sufficient to counter the iniquities of online gambling. Further, varying legislations in different States is not suitable in case of online fantasy sports which do not operate in a physical time and space. A coherent set of uniform legal and regulatory guidelines to bridge the gap in the underlying grey areas is necessary.

Recognizing the vices of online gambling and betting on fantasy sports, State of Karnataka recently amended the Karnataka Police Act, 1963. The Karnataka Police (Amendment) Act, 2021 imposes a ban on electronic means and virtual currency, electronic transfer of funds in connection with any game of chance.⁴⁴ It has also amended the safe harbour provision provided under Section 176 of the Karnataka Police Act, 1963.

⁴³ Technology, Media, and Telecommunications Predictions 2021, India edition, (Deloitte) <<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-predictions-2021-noexp.pdf>> accessed 28 February 2022

⁴⁴ The Karnataka Police (Amendment) Act 2021

⁴⁵ Prior to the Amendment, wagering or betting by persons on their own skills was permissible. However, post the Amendment, the said exemption has been done away with. The Amendment provides safe harbour only to 'pure' games of skill when played without any element of betting and gambling. Therefore, the earlier safe harbour provision that restricted the applicability of the Act for wagering by persons taking part in such games of skill has been done away with. Proponents of legalisation of betting or gambling activities have often raised the contention that despite a game being chance-based, one can risk money on their own skill.⁴⁶ However, post this Amendment, this argument does not hold any ground and irrespective of skill being employed, betting or gambling on such fantasy sports is prohibited. The objective of the Amendment is abundantly clear. It is applicable to 'betting and gambling activity' on a game, regardless of the game being a game of chance or game of skill. Hence, the users of such platforms are not prevented from playing fantasy sports but are merely refrained from risking money on such games.

The Amendment Act has not imposed a ban on online 'game of chance' or 'game of skill'. It merely restrains people from risking money in the hope of achieving unattainable prizes. Section 78(1) of the Karnataka Police Act, 1963 *inter alia* makes it punishable offence to be the owner of an online platform that is open, kept or used for the purpose of gaming in which the receipt or distribution of prizes in money or otherwise is made (a) to depend on chance; or (b) the skill of another.⁴⁷ Section 78(2) of the Karnataka Police Act, 1963 *inter alia* makes it a punishable offence to bet on the outcome of a (a) game of chance; (b) skill of another; (c) their own skill.⁴⁸ The restrictions imposed through the Amendment Act are in proportion to the legitimate aim of curbing the evils of betting. This Legislation is an economic legislation. It is in consonance with the Directive Principles of State Policy. Article 39(f) of the Constitution enjoins a duty on the State to ensure that youth are protected against

⁴⁵The Karnataka Police (Amendment) Act 2021, s 9

⁴⁶ The Karnataka Police (Amendment) Act 2021, s 176

⁴⁷ The Karnataka Police (Amendment) Act 2021, s 3

⁴⁸*Id.* at 41

exploitation and against moral and material abandonment.⁴⁹ This legislation intends to achieve high standards enshrined in the Constitution and to counter a pressing social evil.

It is well-established that there cannot be business in a crime.⁵⁰ Games of chance or wagering money on skill of another are *res extra commercium* in nature and hence do not violate a person's right to trade. Gambling and betting activities from their very nature and in essence are extra-commercium. Though the external formalities and instruments of trade may be employed yet they are not protected by Article 19(1)(g) or Article 301 of the Constitution.⁵¹ The sky-rocketing suicide rates and financial decadence of the youth in recent times owing to betting on online platforms are overwhelming reasons to impose complete ban on risking money on an uncertain event, online or offline, in a game of chance or skill.⁵² The constitutional validity of this legislation was challenged in Karnataka High Court and the High Court declared the Amendment Act as ultra-vires the Constitution. However, the Court ruled that the State may bring legislation for the regulation of online gaming within the bounds of the Constitution.⁵³ This judgement came as a relief for the gaming industry as it allows the entities to continue offering their services uninterrupted. However, it leaves room for further regulatory intervention by the government. This appears to be promising in countering the threats of gambling or betting in the society. It leaves ample scope setting up a strong regulation that leads to a win-win for players, industry, and the government. The judgement failed to distinguish between skill-based games and chance-based games, hence leaving the primary question unanswered. We can only hope that this will set the tone to establish a robust and uniform regulatory framework for the online gaming industry.

⁴⁹ The Constitution of India 1950, art. 39, Cl. (f)

⁵⁰ *Khoday Distilleries Limited v. State of Karnataka* (1995) 1 SCC 574

⁵¹ *State of Bombay v. R.M.D. Chamarbaigwala* AIR 1957 SC 699

⁵² Kavita Mandhare, 'World Suicide Prevention Day: Gaming and suicide, an emerging connection' (*The Bridge Chronicle*, 9 September 2020) <<https://www.thebridgechronicle.com/lifestyle/world-suicide-prevention-day-gaming-and-suicide-emerging-connection-55492>> accessed 28 February 2022

⁵³ *All India Gaming Federation and Another v. State of Karnataka* 2022 SCC OnLine Kar 435

VI. CONCLUSION

The question whether gambling or betting on fantasy sports is a game of chance or game of skill has continued to elude the State Governments and they have been unable to arrive at a unified answer. The test devised by judiciary in India to create legal distinction between skill and chance has not adapted well to fantasy sports. Evolving out of the traditional contests, the format of fantasy sports has changed today. The factor of chances has increased and the level of skill necessary to play has decreased. Thus, the authors have arrived at the conclusion that the 'preponderance test' employed by the courts over the years can no longer be applied in the context of fantasy sports.

In a country like India, where population and poverty both are rampant, regulation is the ideal way forward. On one hand fantasy sports industry is alleged to give a boost to a country's FDI, but on the other hand a greater proportion of the section of society loses money.⁵⁴ There is no doubt that the development of a country's industry is significant. This development cannot be at the cost of the welfare of its citizens. However, imposing mere restrictions is not sufficient. It is a settled law that restrictions can be prohibitory in nature. In other words, regulations involve prohibition. Imposing a ban on gambling of fantasy sports does not mean fantasy sports are banned *in toto*. Restrictions should be placed on risking money on such contests. The Fantasy Sports Competition can operate and provide services in a manner similar to innocent prize competitions by rewarding winners with non-cash incentives such as goodies, coupons. NITI Aayog recognized the legislative gap in relation to online fantasy sports and provided certain recommendations.⁵⁵ In consonance with NITI Aayog's recommendations to an extent, it is recommended that the ambiguity of varying regulations in different states must be addressed through a uniform national-level safe harbour for fantasy sports game. A self-regulatory body for regulation of online

⁵⁴ PricewaterhouseCoopers India's report: Federation of Sports Gaming 'Report on Taxation of Online Fantasy Sports Gaming Market in India' (May 2019) accessed 28 February, 2022

⁵⁵ *ibid* 14.

fantasy sports must be created consisting of persons in experience in governance, law, and administration. Furthermore, adherence to advertising standards as laid down by the Advertising Standards Council of India must be complied with, for instance, the advertisements should be honest and not make absurd claims like fantasy sports being a source of sustenance or earning livelihood.

Thus, until an appropriate legislation is enacted in relation to online fantasy sports, such interim measures must be employed.