

TRAILBLAZER
ADVOCATES

October 2023



**FROM HOBBY TO INDUSTRY:
THE REALM OF FANTASY
SPORTS & REGULATORY
INSIGHTS IN INDIA**




About Our Sports & Gaming Law Practice

At TrailBlazer Advocates (TBA), our Sports and Gaming Law Practice is your trusted partner in the dynamic worlds of sports and gaming. With a focus on tailored solutions, we understand that each client is unique, and we work diligently to craft strategies that align with the client's specific goals and needs. Whether our client is an athlete, a sports team, a gaming company, or a sponsor, we are committed to providing them with the highest level of legal support. Our team's comprehensive expertise covers contract negotiation, intellectual property protection, dispute resolution, player representation, licensing, compliance, esports, online gaming, and regulatory advocacy.

For personalized legal solutions and a deep understanding of sports and gaming regulations, we are the go-to destination for navigating the complexities of sports and gaming law. Our commitment to staying updated with industry developments ensures that our clients receive the most relevant advice and representation. At TBA, we don't just provide legal services; we deliver winning strategies that help you thrive in the dynamic worlds of sports and gaming.





CONTENTS

01.
FANTASY SPORTS: A LEGAL
QUAGMIRE

02.
LEGAL CHALLENGES TO
FANTASY SPORTS

03.
ONLINE GAMBLING V.
BETTING

04.
GAME OF SKILL V. GAME OF
CHANCE: THE BIGGEST
QUESTION

05.
LEGAL FRAMEWORK OF
FANTASY SPORTS

06.
TAKEAWAYS FOR BETTER
UNDERSTANDING



PREFACE

From humble beginnings, online gaming has grown into a global industry that captivates the hearts and minds of millions. India, with its youthful population and burgeoning internet connectivity, stands at the forefront of this gaming revolution. The industry is growing rapidly, with estimates suggesting that it will generate over ₹100 billion in revenue by 2025.

However, the growth of the online gaming industry has also raised concerns about its regulation. There have been a number of cases of online gaming addiction and fraud, and there is a lack of clarity about the legal status of online gaming in India.

This comprehensive resource aims to provide a comprehensive overview of online gaming and its regulation in India. It will discuss the different types of online games, the legal framework governing online gaming, the challenges and opportunities facing the industry, and the best practices for responsible gaming. We hope that this ebook will be a valuable resource for anyone interested in learning more about online gaming in India.

Prepared By:

Isheta T Batra | IP, Media & Sports Counsel | Founder, TrailBlazer Advocates (TBA)

Kanika Goswamy | Research Associate, TrailBlazer Advocates (TBA)

Fantasy Sports: A Legal Quagmire

Participation and engagement in gaming is a universally practiced and pursued recreational and social activity offering opportunities for consumer engagement, brand promotion, fan-engagement and interest. Games can be in the form of crossword puzzles or quizzes, or in more advanced and interactive forms such as cards. In regulating those offering such games, Indian laws differentiate between games of skill and games of chance and specify a strict prohibition on participation and offer of games of chance for stakes, while taking a more favourable position with games of skill.



The differential treatment accorded to games of skill and games of chance, with the former permitted and the latter prohibited, has been a historic feature of Indian law. Such differentiation appears to arise out of the historic treatment of gambling in India, whereby despite featuring in Indian culture and history across millennia, it comes attached with negative connotations and a certain stigma.^[1]

Fantasy Sports: Leap from Ancient to Modern Times

Gaming industry in India has been witnessing a tremendous growth in various facets of gaming. This has been possible not only due to easy accessibility of technology which acts as catalyst to a global village but also inclination towards innovation, preferences and varied consumption patterns. The interface of technology with gaming has helped by carving a way for virtual gaming in the form of fantasy sports. Virtual gaming allows consumer to take a real-life experience and invest financial interests in these gaming modes.

Gaming has become a source of money and livelihood for many globally. When this is done with the involvement of monetary risk or a risk associated with a valuable asset, it is coloured unlawful as betting and gambling. In India from ancient time gambling, betting, and wagering has been there and was subject to criticism. The Mahabharata account for a game of wager that caused the religious war. Atharvaveda criticizes such activity by proclaiming what will happen to one who indulges in such activity. While Katyana Smriti calls for regulation of gambling for tax purposes but prohibits respected men from indulging in it. Manusmriti is stricter as it calls such trade an “open theft”, and calling such practices would result in the destruction of kingdom and wealth.

(1) Law Commission of India, Report No. 276 on Legal Framework : Gambling and Sports Betting Including in Cricket in India, (July 2018).



Even though gambling was common in India, the ancient literature takes a sceptical view of it since it is seen as a dangerous pastime that may lead to not just self-harm but also to one's own demise.[2]

Lately, this is changing and a slight transformation been witnessed wherein betting on games has been legalized to some extent. This has come into practice due to the paradigm shift in technology by introduction of digital and online gaming systems. Digital India has led to an improvement of the entire infrastructure in India, with the penetration of internet, availability of mobile technology and its extension to remote and rural areas which has ensured an easy access and incentivized use of such gaming sites. There has been a subsequent surge witnessed in online gaming sites and other fantasy sports in India. It has become an industry with high future prospects, higher contingency and higher profits, which makes it all attractive.[3]

Fantasy sport is an increasingly significant social phenomenon. Fantasy Sports have been recognized as Games of Skill throughout the world. These games are governed by one's skill for the game and not by his chance or luck. The functioning of these games is principally dependent upon a player's superior knowledge, training, experience, attention, adroitness, with slight dependence on chance but predominantly of skill. The results of any of these games is never certain, but doubtful which keeps these Games of Skill outside the ambit of Games of Chance. This distinction between skill and chance has been reasonably carved out by the court through its judgments.[4]

However, Fantasy Sports is a recent concept in India and is not fully developed. Considering the status of regulation and people's perception towards these games, it is required that policies, regulatory set ups which are in consonance with the standards of corporate governance, transparency, integrity, consumer protection, industry development and nation building, are set up, so that these games can be made more acceptable to the general public, upholding the sound judicial precedent laid down by the Court.

(2) J.Sayta, Legality of Poker and other Games of Skill: A Critical Analysis of India's Gaming Laws (2012) 5 NUJS L Rev 93.

(3) Supra Note 1.

(4) Mohd. Rameez Raza, Raj Shekhar and Ujjwal Singh, Gaming and Gambling: The Era of Dream11 and Crashing Dreams, 1.2 GSPR (2021) 43.

Legal Challenges to Fantasy Sports

Fantasy Sports are a globally recognized tool for fan engagement and sport lovers. However, it is quite unfortunate that such a promising industry has found itself at constant odds with Indian regulatory bodies. Most gaming apps find themselves unwittingly earning the ire of our archaic legal system. It is pertinent to mention that the entire market of fantasy sports stands in a regulatory grey area. Hence the various legal issues faced by the industry are discussed below.



Game of Skill v. Game of Chance

The question of fact that whether the game is of chance or skill is to be decided on the basis of facts and circumstances of each case. Whenever the question of “skill versus chance” is raised, the Indian courts have adopted the test followed by the United States courts known as the “dominant factor test”, or “predominance test”, which helps them effectively calculate the skill versus chance ratio. In general, a game of chance is one in which the winner is mostly decided by luck or chance and the outcome of the game is completely unpredictable, and one is not able to affect the result by any application or use of mental or physical competence, therefore using no skill. On the other hand, the result of a game of skill is influenced by the skill set of the player. This may include things like expertise, experience, knowledge, and training. Games of chance, with the exception of a few states, are classified as gambling in India and are typically illegal. On the other hand, games relying on skill fall outside the scope of gambling and wager and are thus usually exempted from any such restrictions.^[5]

Taxation

The need of the hour is a favourable national policy in order to provide clarity on the taxation conundrum plaguing the sector. According to the current scenario, the GST implications on the sector have the potential to derail the sector’s strong growth trajectory. , and calling such practices would result in the destruction of kingdom and wealth. The GST council is taxing fantasy sports at the highest slab of 28 percent, this will make gaming costlier for users. The industry has also taken concerted efforts to seek an exemption on the application of GST on the prize pool amount. In their representations with the finance ministry, top industry players have argued that gaming platforms have no ownership on the prize pool amount, which is held by a

(5) Urvi Gupta and Uday Mathur, Game of Skill vs. Game of Chance : The Legal Dimensions of Online Games with special reference to Dream11, 3 SML L Rev 115 (2020)



third-party, and therefore this amount is an actionable claim, and one that does not fall under the purview of Rule 31(A) of the central GST rules.

The 28% tax rate seems to be an aggressive move considering the global tax rate on online gaming is between 15-18 percent and the online gaming operators will have to cough up almost 10 times the quantum of tax they are currently paying the government. This move of the government will have an enormous negative impact on the industry as well have a direct impact on the consumers who will bear the additional tax burden. Considering the fact that the industry is in its infancy, a higher tax rate would mean smaller profit margins for gaming operators and consequently slowing down of their expansion rate. This will also lead to smaller prize pools and the higher prices may drive consumers away from the platforms. Therefore, a reasonable rate of taxation is the need of the hour and a centralized body should be formed to overlook the online gaming space as well as maintain uniformity of the law across states.[6]

Intellectual Property Rights

It can be said that sports frenzy in India is fast burgeoning in the direction of a fantasy sport centric scenario which will change the way fans interact with one another. This may create an inherent threat to trademark owners of highly visible sporting events, teams, players etc. In order to attract and capitalise the desires of the fans to identify with a favourite franchise or athletic organisation numerous business have exploited the goodwill or marketability of the sports organisations by producing hats, t-shirts, hoodies that carry a team name, nick name, team player name or a logo or symbol without any authorisation of the person concerned.[7]

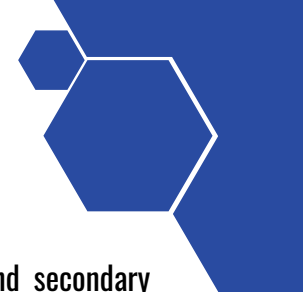

Trademarks

Professional sports are a multi-billion-dollar empire and athletes are beginning to find ways to leverage and add value to their own personal brands. Thus the commercialization of sporting teams and athletes is ubiquitous. Owing to this the licensing of trademarks is a big business in sports. In addition to this the sports fans' obsession with sport related items with sports team affiliation has created a revenue stream for many sport related organisations. In the landmark case of National Football League Properties Inc. v. Wichita Falls Sportswear[8], the court's scrutiny of the consumer confusion issue led to the success of plaintiff in preventing the defendant sportswear company from manufacturing and selling NFL football jersey replicas that created the likelihood of confusion. The court held that NFL Properties had the burden of proving that secondary meaning of the descriptive term i.e. Seattle related the jersey to the NFL team and Wichita Falls activities created a likelihood of confusion. The NFL was able to prove that placing Seattle on the jersey created a likelihood of confusion in the minds of the buyer.

(6) <https://www.livemint.com/industry/fantasy-sports-market-to-touch-rs-1-65-lakh-crore-by-fy25-report-11647417613854.html>

(7) Aaron Kamath, Ranjana Adhikari & Gowree Gokhale, FANTASY SPORTS: YOUR 'SUITABLE BET' IN INDIA, American Gaming Lawyer, Spring (2016).

(8) National Football League Properties Inc v Wichita Falls Sportswear Inc, 532 F. Supp. 651 (1982).



In India Section 32 of the Trademarks Act 1999, states about acquired distinctiveness and secondary meaning. The section conveys that when a mark is registered overlooking the facts in relation to grounds for refusal of registration, it will not be rendered invalid if as a consequence of its use it has, after registration and before commencement of any legal proceedings, acquired a distinctive character in relation to the goods for which it is registered. Thus the fantasy sports could use certain elements of sports events and sportspersons taking the defence of the secondary meaning which it obtains from the development of these fantasy leagues.

Image/Personality Rights

The other issue in the case of fantasy sports is with respect to “image rights” of the players. In the case of *Uhlaender v. Henricksen*, Major League Baseball Players Association (MLBPA) brought a suit alleging a violation of state misappropriation law against a creator of a board game. The production of the board game involved using the “statistics and names” of over 500 professional baseball players without compensation or the permission of the MLBPA. The court said, “A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labours and is a type of property.” The players in *Uhlaender* had a right to their statistics and names, and the defendant had infringed on their rights to publicity by using this information without the players’ permission or compensation. In relation to fantasy sports Professional Sport Leagues can claim player’s statistics are equitable to one’s personality and physical features when it comes to marketability. Thus, statistics should be considered part of a player’s identity. This reasoning finds it rationale from the reasoning given in the case of *Uhlaender*. (*Uhlaender v. Henricksen*, 16 F.Supp. 1277 (1970))

Fantasy leagues on the other hand could bank upon the reasoning that numbers generated from a player’s performance do not reveal anything about his physical characteristics, his personality, image, or his persona and thus in no way crosses the line of affecting their image rights. The test of commercial use stands an important measure to evaluate the legality of the use of player attributes in fantasy leagues. In case of *Palmer v. Schonhorn Enterprises, Inc* (96 N.J. Super. 72 (1967).) was the first case that dealt with the unauthorized integration of names and statistics of professional athletes. In *Palmer*, the defendant used the image and statistics of golf legend Arnold Palmer and other professional golfers in its video game Pro-Am Golf by listing the player’s information in “profile and playing charts” in hopes of improving the sale of the game. The court rejected the defendant’s argument that “since the information contained in the profiles is readily obtainable public data and available to all, it should be denied the privilege of reproducing^[9]. The court distinguished between the “act of capitalizing upon the name by using it in connection with a commercial project” and “pure reporting of an individual’s statistics”. The former was deemed unjust because it allowed the defendant to freely exploit and to profit from successes of another based on the owner’s highly publicized accomplishments. Even in the case of *Arsenal v. Reed* ([2002] EWHC 2695 (Ch).) it was adjudged that the use of signs identical to Arsenal Football Club’s registered trademarks on

(9) Adam L. Sheps, *Swinging for the Fences: The Fallacy in Assigning Ownership to Sports Statistics and its Effect on Fantasy Sports*, 38 CONN. L. REV. 1113, 1114 (2006).



unauthorized football merchandise by a street trader constitutes trademark infringement.^[10]

Copyright

The doctrine of transformative use is another test which can help the fantasy leagues to justify their operation of the various fan centric leagues. According to this doctrine works that are deemed to possess significant transformative elements are less likely to interfere with the individual's economic interest, and thus are not violative of their image rights or publicity rights. The doctrine witnesses its genesis from the ruling that any person must have a control over the commercialization of his or her personality. The same has been reiterated by the Hon'ble Delhi High Court in the case of ICC Development (International) vs. Arvee Enterprises and Anr(2003 (26) PTC 245 De). The court held the following in this case, "The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, any effort to take away the right of publicity from the individuals, to the organiser {non-human entity} of the event would be violative of Articles 19 and 21 of the Constitution of India. No persona can be monopolised. The right of Publicity vests in an individual and he alone is entitled to profit from it."^[11]

The case of EBC v D.B. Modak (EBC v D.B. Modak (2008) 1 SCC 1) is a landmark judgement with respect to the transformative test. In this case it was stated by the Apex court that no doubt, the appellants have collected the material required for writing the judgment and improved the readability of the judgment by putting inputs in the original text of the judgment by considerable labour, and arranged it in their own style, but that does not give the flavour of minimum requirement of creativity. In this case the sweat of the brow doctrine was rejected and the threshold for copyright violation was increased from the sweat of the brow doctrine was till less than the modicum of creativity standard.

Fantasy sports use player statistics to create new data that is customized to its leagues. The performance of the players' is transformed from hits, yards, touchdowns, and baskets, into fantasy points. The players' statistics are not used to attract attention to the fantasy leagues rather they are used to compute data. Under Section 30(2)(d) of the Trademark Act, 1999 it is provided that a nominative fair use of a trademark by a third party is not an infringement of a registered trademark. Since the statistics are transformed to create new data the fantasy sports could take the defence of this test to establish the novelty and innocuous nature of their work. Hence the use of trademark can evade legal liability when it falls under the ambit of nominative use.^[12]



Given the position of law in India as well as the US, it can be concluded that dispute over copyrightability of statistics or Facts is well settled. Statistics are not copyrightable as they are merely facts and in cases of compilation, a case for copyright infringement can only be made if such statistical compilations are

(9) Adam L. Sheps, *Swinging for the Fences: The Fallacy in Assigning Ownership to Sports Statistics and its Effect on Fantasy Sports*, 38 CONN. L. REV. 1113, 1114 (2006).

(10) Hambleton, Christian Wentworth, "Are Intellectual Property Rights in Fantasy Sports a Reality?" (2014). Law School Student Scholarship. Paper 490.

(11) Ibid

(12) Avi Friedman, *Protection of Sports Trademarks*, 15 Loy. L.A. Ent. L. Rev. 689 (1995).



reproduced in the exact same format. The legal and factual position works out well in favour of fantasy sports game operators as the fantasy sports games format does not involve a direct copy of real time statistics compiled by any entity. Statistics ultimately used by fantasy sports game operators are arrived at by use of scores, which are factual occurrences used by fantasy sports game operators only as raw data to compile fantasy points and therefore, are not a copy of compilations made by any person. Therefore, such use of statistics would not lead to copyright infringement.

Fair Use



This was witnessed in the case of *Consim Info Pvt. Ltd vs Google India Pvt. Ltd* (2013 (54) PTC 578 (Mad)), where the Hon'ble High Court of Chennai held that, "A use is considered to be a permitted nominative fair use, if it meets three requirements, which is as following (i) the product or service in question must be one not readily identifiable without use of the trademark (ii) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service (iii) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

The limits on the use of any registered trademark have been given section under:

- Nothing in Section 29[1] shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor provided the use (a) is in accordance with honest practices in industrial or commercial matters, and (b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.
- A registered trade mark is not infringed where the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services.

In the recent judgement of *Tata Sons Limited vs Greenpeace International & Anr* (2011(1) ARBLR 244 (Delhi)), Tata Steel Ltd. planned to set up a steel plant at Dharma Port which is situated off the coast of Orissa and this had the risk of endangering the lives of numerous Olive Ridley turtles habituating near the port. Greenpeace in retaliation launched its own iconic Pac-Man video game targeting Tata wherein the logo of TATA was used to depict monsters. The international environmental NGO, successfully argued that their use of TATA's logo (stylized T in a circle) was a case of nominative fair use of the mark and that its representation was evidently exaggerated and could not have lowered TATA's reputation in the eyes of the public. The Delhi High Court held that Greenpeace India, which is a non-profit organisation, has not indulged in any profit-making by launching the 'Turtle v. TATA' game on its website. Also the aim of the user of the trademark was to invite the attention of the people towards the owners of the trademark. The use of the TATA's logo by Greenpeace has been termed merely denominative in nature by the Court and the use of the trademark as an object of critical comment does not amount to infringement.

In the case of fantasy sports, the leagues in no way use the trademarks in an unfair manner or use it in a manner which is detrimental to the registered trademark. Hence even their use is mainly denominative in nature and causes no confusion in the minds of the sports fan.



The landmark case concerning fantasy league and the legality of its use of player statistics and their images is the case of *CBC v MLBAM*. It was held by the court that, “There is nothing about CBC’s fantasy games which suggests that any Major League Baseball player is associated with CBC’s games or that any player endorses or sponsors the game in any way. In addition, the use of the players’ names and statistics did not involve the personality, character, physical appearance, or reputation of the players.” Categorizing this information used by CBC as historical facts about baseball allowed the court to rationalize that the players’ name and statistics did not equate to the players’ persona and thus not a symbol of his identity. The court also considered the policy reasons behind the right of publicity and concluded that CBC’s use of players’ names and statistics did not harm the players’ commercial value because: the players’ ability to earn a living did not depend on the publication of their statistics and names; fantasy sports actually enhanced the marketability of players; and CBC was not unjustly enriched as the players’ names and statistics were available in the public domain.”^[13]

Thus in India with rapid rise of fantasy leagues with respect to various sports, there are several new aspects in the legal scenario which will emerge relating to sport events and player rights. Fantasy leagues in addition to big a commercial venture are platform for sports fans wherein they have a sense of association with the players they follow and enjoy being the managers of their imaginary teams. Therefore, the legal solution to all the controversies pertaining to image rights and other trademark issues has to find a golden mean wherein the intellectual property of the sporting events and the sports person is not misused for commercial gain and at the same time fans can continue to experience the joy of being the managers of their dream teams.

(13) Risa J. Weave, *ONLINE FANTASY SPORTS LITIGATION AND THE NEED FOR A FEDERAL RIGHT OF PUBLICITY STATUTE*, *Duke Law & Technology Review*, Vol 2.(2010).

Online Gambling or Betting

Gambling and betting are popularly known as subsets of wagering. Wagering according to Black's Law Dictionary refers to something risked, such as a sum of money on an unpredictable event in which the parties have no material interest other than mutual chances of "gain or loss"[14].

The Black's Law Dictionary defines gambling as "the act of risking something of value for a chance to win a prize".



Evident from the definition, an online game may be deemed to be gambling if the element of chance is predominant in deciding its outcome[15]. With vast profits being pulled from this practice, with the activity's revenue being estimated at Rupees 135 billion[16], it serves as a perfect blend of service providers wanting to maximize their profits and the willingness of the consumer to spend on an activity, either to earn quick money, or as a pastime[17].

As explained above, there is a lack of definition of the term "gambling", the State Governments are bestowed to make and amend by laws on gambling can be derived from Entry 34 List II of the Seventh Schedule of the Constitution. As of 2023, only 14 states have legalised gambling which is regulated by the respective bylaws. The focus of the enactments of Gambling Laws in various states has been done to bifurcate the game on the basis of chance and/or the existence of skill in those games[18].

Sikkim's Online Gambling (Regulation) Rules, 2009 and the state of Nagaland's Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 and Online Games of Skill Rules, 2015 are great examples of well thought out state legislations that regulate gambling. The state of Meghalaya had previously enacted the Meghalaya Regulation of Gaming Act, 2021 which enabled operators to obtain a licence to offer online and land-based games of chance such as slots, roulette, keno, wheel of fortune, etc. within the state[19]. However, the same stands repealed. On 28th March 2023, the Regulation of Gaming (Repeal) Bill, 2023 was passed by the government which has now banned any such casino games or lottery games[20].

(14) <https://blog.ipleaders.in/wagering-agreement-and-its-essentials/>

(15) Vivek Satyani, Online Gambling, online at <http://ezinearticles.com/?Online-Gambling&id=1223920> - (visited March 04, 2010).



(16) <https://www.statista.com/statistics/795281/india-market-size-of-gaming-industry/>

(17) (2010) 3,1 GNLU L. Rev. 85 Internet Intermediary Liability for Illicit Online Gambling in India

(18) 1.2 GSPR (2021) 129 A Comparative Analysis of the Gambling Laws in India & Great Britain

(19) <https://g2g.news/online-gaming-laws/bill-repealing-meghalaya-regulation-of-gambling-act-passed-in-legislative-assembly/>

(20) Ibid



Betting involves the transaction of money or any such property for guessing the outcome of a race, game, or any other unpredictable event and this may be done face to face, or through virtual means[21]. In status quo, the term “betting” has no legal definition but the emphasis is placed upon unpredictability of any event happening. One of the most famous forms of betting is sports betting. The Indian Premier League (IPL) tops their lists now, and some websites have even hooked up with offshore betting agencies, thereby allowing Indians to place online bets[22].

While discussing the legalisation of the practice of betting, the opinions have been divided. On one hand, it seems that betting causes fixing, because bookies are enthusiastic to pay players and fix arrange the game to make extensive profits by changing the probabilities in their favour and to anyone winning bets. On the other hand, it is based on argued that legalisation will help regulate the bookies, take betting away from criminals to financed bookies, who poses such have incentive to report corruption, and provide regulatory authorities with a data source to rely on when inspecting cases of fixing and betting[23].

One of the major differences between betting and gambling is that the former is an agreement between two parties where the one who makes an incorrect prediction about an indeterminate outcome will forfeit something to the other. Gambling is wagering of money on an event with an indefinite outcome[24]. However, both fall under the concept of wagering.

(21) <https://legodesk.com/legopedia/law-on-gambling/#:~:text=Betting%20is%20a%20word%20used,face%2C%20or%20through%20virtual%20means.> [2] (22) RAADHIKA GUPTA Source: Economic and Political Weekly , NOVEMBER 30, 2013, Vol. 48, No. 48 (NOVEMBER 30, 2013), pp. 13-15
(23) RAADHIKA GUPTA Source: Economic and Political Weekly , NOVEMBER 30, 2013, Vol. 48, No. 48 (NOVEMBER 30, 2013), pp. 13-15
(24) <https://pediaa.com/what-is-the-difference-between-betting-and-gambling/#Betting>

Game Of Skill or Game Of Chance: The Biggest Question

According to the Public Gambling Act, 1867 there is no specific definition of “Gambling” but Common gaming-house is defined as “any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place, or otherwise howsoever.”

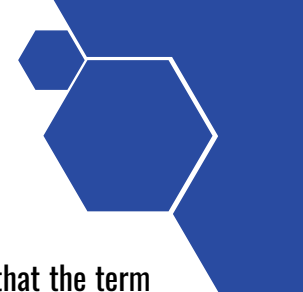



By analysing the above definitions, there are three elements that are essential for an activity to fall under the purview of gambling. They are consideration, chance and prize. Even if one of these elements is missing that will make that activity out of the scope of gambling. It is important to note that the provisions of the Act are not applicable on “Games of Skill”. Section 12 of the Act states that, “Act not to apply to certain games: Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.” Therefore, games which are entirely based on the skills and knowledge of the participants and there is little or no role of luck would not be considered illegal as no such statute or law penalises playing of games which involve skill. As per the legislations on gambling, the game of “mere skill” does not attract any restrictions.[25]

Whether a game is of chance or skill is a question of fact to be decided on the basis of facts and circumstances of each case. Whenever the question of skill versus chance’ is raised, Indian courts have adopted the test followed by the United States courts known as the “Dominant factor test” or “Predominance test”, which helps in effectively calculating the skill versus chance ratio. In general, a game of chance is one in which the winner is mostly decided by luck or chance, the outcome of the game is completely unpredictable, and one is not able to affect the result by any application or use of mental or physical competence, therefore using no skill. On the other hand, the result of a game of skill is influenced by the skill set of the player. This may include things like expertise, experience, knowledge, and training. Games of chance, with the exception of a few states, are classified as gambling in India and are typically illegal. On the other hand, games relying on skill fall outside the scope of gambling and wager and are thus usually exempted from any such restrictions.[26]

(25) Games of Skill in India: A Proposal For Reform, The Sports Law & Policy Centre, (20. 09, 2022, 10:00 AM),

(26) Varun Agarwal and Kartik Sharma, Legal Matrix for Regulating Online Rummy in India, 2022 SCC OnLine Blog OpEd 71.



In the landmark case of *State of Bombay v. R.M.D. Chamarbaugwala*, the Court had laid down that the term “mere skill” would include the games which are primarily games of skill and have interpreted that “mere skill” will only be restricted to Games which are preponderantly of skill and have laid down that competitions where success depends on substantial degree of skill will not fall into category of gambling. 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.



In *RMD Chamarbaugawala* case, the Supreme Court when faced with the challenge of determining whether the activity in question amounted to gambling applied the “Skill Test”. The Court in its judgment said that games that substantially involve skills are not gambling activities but rather commercial activities and are thus protected under Article 19(1)(g) of the Indian Constitution. The Court yet again used the “skill test” in the case of *State of Andhra Pradesh v. K. Satyanarayana*, held that rummy is preponderantly a game of skill and no element of luck determines its result. It was observed by the Court that, “It requires a 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’ refers to any general level of skill and not only to specialized ones.

Hence, Fantasy sports as a game requires the user to select a team based on the application of their knowledge of the particular the sport and involves player performance analysis. The results are dependent on the performances of each individual player rather than of a single player thereby reducing the likelihood of luck. Thus, it requires users to have an understanding of the game and a judgement of selected players’ performance over the others. Even though every fantasy sports game has an element of chance or luck considering that luck plays a part in the real life performance of players, it is not the determining factor in the success or failure of a user’s fantasy sports team. Thus, fantasy sports would be classified as a game of “mere skill”. With regard to this, various judicial pronouncements have been delivered by the Indian Courts to discuss and recognise the legality of the fantasy sports.

Judicial Pronouncements

- **State of Andhra Pradesh v. K. Satyanarayana & Ors (1968 AIR 825)**

As per the brief facts, on 4th May 1963, the Crescent Recreation Club was raided by police. The respondents were found playing card game known as “Rummy” for stakes. Money and cards were found on the counters of tables during the raids. The Treasurer of the club was also present holding the stake money also known as “Kitty” used in the game. The circle inspector had credible information that the club premises were used for gambling purposes and on raid he even found the same along with evidences such as money and people present there playing. It was observed by the Court Section 3 of the Public Gambling Act 1867 defines “Common Gambling House”. Section 4 of the Act defines the penalty for an owner, occupier or person using common gambling house and includes those persons who have the care or the management in conducting the business in such house, enclosure or open space. Section 6 empowers the police officials to enter the space in case of receiving credible information regarding common gambling house.



Hence, under Section 4, the treasurer and secretary were arrested as they were the person who were having the care and management of the club premises. Further the Circle Inspector was an officer authorised to enter upon and search the premises of the club and therefore his action was fully covered by the section. Also Section 7 refers to the presence of instruments of gaming to be found on account of search will be deemed as a common gambling house.

The magistrate held the respondent guilty. However, the sessions judge in his judgement refers to the two points i.e. firstly Section 14 of the Act provides that nothing done under the Act shall apply to any “Game of mere skill” wherever played. He relied on the fact that game of Rummy was a game of skill and therefore the Act did not apply to the case. The management of the club did not earn any profit from the charge levied on for use of cards, furniture etc. Thus the definition of “common gambling house” is not applicable. With regard to the other contention that a fee or charge was levied which thereby created profit for the club was also rejected by the court as there were no sufficient grounds to prove the same and the account book of the club did not show any such entry. The point of charging extra free for using the club for late night and other services was also considered valid as the club has to provide amenities and pay the staff of the club for their duties.

Further it was held by the court that the game of Rummy is not a game entirely of chance like the “three-card” game.



Rummy requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The court opined that if there is evidence of gambling and the owner is earning profits from the use of premise then the person can be booked for the offence of gambling.

- **Dr. K.R. Lakshmanan vs State of Tamil Nadu and Anr (1996 AIR 1153)**

In Madras Race Club was an association formed in 1896. The principal object of the club was to carry on a business of race club in the running of horse races. It was one of the five “Turf Authorities of India”. Race meetings were conducted in the club premises where bets were made for the horse races. In 1949, the Tamil Nadu Legislature included horse races within “gaming”.

It was observed by the court that, “Gambling is payment of a price for a chance to win a prize. Games may be of chance, or of skill or of skill and chance combined. Gaming as per Section 3 of the Madras Police Act included betting on horse race. A “Game of Chance” is determined entirely or in part by lot or mere luck. The result is wholly uncertain and doubtful. A “game of skill” has a kind of element of chance but the success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. It is the dominant element “skill” or “chance” which determines the character of the game.

The next question before the court was regarding whether a business of “Gambling” can be of nature of fundamental right under Article 19(1)(g) of the Constitution. The court opined that gambling as an activity



has been condemned from ancient times in India as well as in foreign lands. Such activity encourages a sense of losing hard earned money and thereby lower his standard of living. Thus would not be intended by the Constitution makers and be made a subject matter under Article 19(1)(g) of the Constitution of India. Thus as regards gambling competitions, the petitioners before us cannot seek the protection of Art. 19(1)(g) of Constitution. (Relied on R.M.D. Chamarbaugwala & Anr. vs. Union of India and State of Andhra Pradesh v. K. Satyanarayana & Ors).

The court opined that the expression “game of mere skill” has to be interpreted as “mainly and preponderantly a game of skill”. The games or competitions which have a substantial degree of skill are not “gambling” and even if there is an element of chance, if the game is a preponderantly game of skill it would be a game of “mere skill”. The contention was that whether horse race is a game of chance or game of skill. It was held that Horse racing is an organized institution. Apart from a sport, it has become a huge public entertainment business. The breed of the horse is an important factor. The experts select the horses who are to be inducted into the racing profession. The selected horses are given extensive training by professional trainers.

The court opined that horse race is not a game of chance as the winner is not determined by lot or chance rather has to exercise his reason, judgment, sagacity or discretion. The winning is determined not by chance alone but also the condition, speed and endurance of the horse and the skill and management of the rider. The mechanism and instruments employed in horse race are only tool assisting in smooth conduct of game and does not have an impact on the result of the race. Hence it was held that horse-racing is a sport which primarily depends on the special ability acquired by training. It is a game where the winning depends substantially and preponderantly on skill.

- **Varun Gumber v. UT of Chandigarh (2017 Cri LJ 3827)**

In this case the Petitioner registered himself on Dream 11 website owned by the Respondent Company after being satisfied that their operations were legitimate and does not amount to gambling under Public Gambling Act 1867. He deposited INR 50,000 in his account. He participated in a match and formed a virtual team for the cricket match and used INR 24,000 for playing in the league. In the end he lost all the money which he had betted on the team. Later he again created a team for a football match and ended up losing an amount of INR 26,000. At last, he was left with INR 3 in his account as balance. He contended that the nature of the activities offered on the website are not based on skill rather purely a game of chance which is prohibited under Public Gambling Act 1867.

With regard to Fantasy Sports Game it was held by the court that, it is a game which occurs over a predetermined number of rounds in which participating users select, build and act as managers of their virtual teams (constituted of real players or teams) that complete against virtual teams of other users, with results generated by the real individual sportspersons or teams in the event. There is a requirement for material and considerable skills to be engaged by the user in “drafting” of a virtual team. It was submitted by the company that all the users before engaging in the fantasy sports game read and understand the rules and assess the players before selecting their team.



Thus an element of skill predominant requiring exercise of superior knowledge, judgement, attention and adroitness needs to be engaged in assessing and monitoring the past performance of the player and his score.

It was contended that the failure of the petitioner to achieve success in Dream11's fantasy sports games are principally and directly attributable to his failure to employ adequate skill, knowledge and assessment of participating players to maximize his potential points accumulation. It was opined that in judicial precedent it is decided that gambling is not trade and as such is not protected by Article 19(1)(g) of the Constitution. It has further been authoritatively held that the competitions which involve substantial skill are not gambling activities. Such competitions are business activities, the protection of which is guaranteed by Article 19(1)(g) of the Constitution.

It was thus held that the scope and ambit of the term game “mere skill” in the context of the is that:

- the competitions where success depends upon the substantial degree of skill are not gambling.
- 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”. Playing a fantasy game involves creation of virtual team by him which would certainly requires a considerable skill, judgment and discretion.



He is required to study the rules and regulations of strength of athlete or player and weakness also. Moreover, it was observed that the petitioner himself created a virtual team of a Cricket Match between two countries as indicated in the website by choosing 11 players out of total player, who were to play for two countries collectively and after forming a virtual team of 11 players as per his own selection, knowledge and judgment. Therefore, there is no possibility of winning or losing like horse riding as not every better is winner.

Hence success in fantasy sports arises out of user exercise, superior knowledge, judgment and attention. Fantasy sports game constitute the game of “mere skill” and not falling within the activity of gambling for the invocation of 1867 Act.

- **Ravindra Singh Chaudhary v. Union of India (MANU/RH/0499/2020)**

A PIL was filed alleging that respondent company Dream 11 Fantasy Private Limited allow its users to register and play various games, to form their own teams made up of real players for cricket, football, kabaddi and NBA with maximum budget of 100 crores. Furthermore, users initially had to pay an amount of INR 100 out of which 20% is retained by Respondent, whereas 80% of the remaining balance is transferred towards the winning amount for the game. It was alleged that the game being played on the aforesaid platform is nothing else but “betting” on the cricket team. The online fantasy sports games were games of chance, thereby constituting illegal act of gambling/betting and that respondent Nos.1 to 4 i.e. government are not prohibiting this illegal act. Further, the petitioner contended that an action should be taken against the company under the Central Goods and Service Tax Act, 2017 and the Rules made thereunder for evasion of GST.

It was held by the court that the result of the fantasy games offered by the Respondent is not determined



merely by chance or accident, but the skill of the participant determine the result of the game having predominant influence on the outcome of the fantasy game. Whether any particular team in the real world match wins or loses, is also immaterial as the selection of virtual team by the participant involves choosing players from both the teams playing in the real world. It is clear that offering the fantasy games of Dream-11 involving substantial skills is a business activity and not wagering having protection granted by Article 19(1)(g) of the Constitution.

The court accepted the contention of the Respondent that the online fantasy games are not operating in total regulatory vacuum and on affidavit it has been submitted that they are subject to self-regulation by the industry body known as “Federation of Indian Fantasy Sports” (“FIFS”) founded in 2017, of which Respondent was a member. The FIFS has also issued Self-Regulation Guidelines on Advertising Online Gaming by adopting IMAI Guidelines to ensure that the advertisements are fair, transparent and not misleading. The guidelines prohibit advertisements by members suggesting any gambling/betting activities and there is a penalty clause as well for violation.


The Court also accepted the contention of the Respondent that the fantasy sports formats are globally recognized as a great tool for fan engagement, as they provide a platform to sports lovers to engage with their favourite sports along with their friends and family. This legitimate business activity having protection under Article 19(1)(g) of the Constitution contributes to Government Revenue not only vide GST and income tax payments, but also by contributing in increased viewership and higher sports fan engagement, thereby simultaneously promoting even the real world games.

- **Junglee Games V. State of Tamil Nadu (2021 SCC Online Mad 2762)**


In February 2021, the Tamil Nadu government amended the Tamil Nadu Gaming Act, 1930 Section 3(b) of the Amending Act redefined “gaming” to include any game involving wagering or betting in person or in cyber space, except a lottery. It prohibited all forms of games conducted in cyberspace, regardless of whether it was a game of mere skill or a game of chance, removing the exemption for “games of mere skill” in the Gaming Act.

Additionally, the act introduced section 3A to prohibit wagering or betting in cyberspace by playing rummy, poker, or any other game, punishable with imprisonment extending to two years for anyone playing or facilitating such activities. Section 11 of the Amending Act also included games of “mere skill” into the fold of offences if such games were played for wager, bet, money or other stake. This clause went beyond the Tamil Nadu Gaming and Police Laws (Amendment) Ordinance 2020, which did not remove the exemption to “games of mere skill” in Section 11 of the original 1930 Act and would not have covered wagers and prizes on games such as (online and offline) chess.

The Amending Act was challenged by three groups of petitioners: those involved in providing the game of rummy in cyberspace (Junglee Games India Private Ltd), those providing poker and a private body regulating diverse forms of online gaming (the All India Gaming Federation). The court observed that in judicial parlance, the terms “gaming” or “gambling” connote activities whose outcomes depends predominantly on an element of chance.



On the other hand, an activity is regarded as a game of “skill” if the consequences are guided more by skill than chance. The High Court held various online games such as poker and rummy are games of skill as they required knowledge, skill, and memory.



However, the expanded definition of “gaming” under Section 3(b) and the sweeping ambit of Section 3A of the Amending Act encompassed all sporting/gaming activities (whether virtual or physical) if played for a prize / money / stake. The Court held that the Amending Act created a legal fiction, whereby even games of skill, which were otherwise permissible, would amount to an offence if any betting was involved, which turned “the existing statute on its head”. Therefore, the High Court found that the wording of the Amending Act was overbearing and excessive.

Legal Framework Of Fantasy Sports

According to the State list, in the 7th schedule of the Constitution of India, the power to formulate laws on gambling and betting are provided to the state government. Entry number 32 of the State List provides for the state to make laws on betting and gambling and Entry Number 62 on taxes on entertainments, amusements, betting and gambling. The main legislation dealing with gaming in India is the Public Gambling Act.





- **State Regulations**

Now, most of the states have adopted their own legislation dealing with gambling mostly based on the central legislation i.e. Public Gambling Act, 1867. To mention a few, some of them are Kerala Gambling Act, Sikkim Regulation of Gambling Act, 2005, Goa, Daman and Diu Public Gambling Act, West Bengal Gambling and Prize Competition Act etc. Except Sikkim and Goa, majority of the states have enacted laws prohibiting betting and gambling. Sikkim and Goa with prior permission of the state government and with a prior license allows some table games on board in offshore vessels.

India's gaming framework at the national level is regulated by the Public Gambling Act, 1867, and the Prize Competitions Act, 1955. The Public Gambling Act, 1867 criminalizes and prohibits the activity of gambling in the public forum and the keeping of a 'Common Gaming House' in India. It can be concluded that an act to qualify as gambling essentially requires chance, consideration, and a prize. Furthermore, it is safe to assume that web-servers that facilitate online gaming houses fall within the ambit of Act.

However, the Act exonerates the liability of any game involving mere skills, thereby excluding the 'game of skills' from any liability. Games based entirely on participant's skills and knowledge and involve a factor of little or no luck would not, therefore, be considered illegal because such legislation or law imposes no penalty on games comprising of skills. Although, the act does not define the ambit of the game of skills or any other factor to interpret the term 'mere skill'. However, in the case of State of Bombay v. R.M.D. Chamarbaugwala, the court interpreted a game of "mere skill" as the game which primarily includes skills and enunciated that it will be only applicable to games that are preponderantly of skill, and in spite of a certain degree of chance the game preponderantly remains a game of skill.

The Prize Competitions Act, 1955 further sets out regulatory guidelines for the rewards and operation of prize competitions across the country. Under the act, a prize competition can be defined as any competition providing a prize for the answer/ solution that is achieved through arranging or setting up pictures, puzzles, numbers, etc. It governs the restrictions and application on the conduct and hosting of a prize competition



or a game. The Supreme Court while determining the background and intent of the legislature behind the enactment enunciated that games that are predominantly based on skill are excluded from the regulatory framework and liability terms of the Act.

- **Recommendations by NITI Aayog [27]**

NITI Aayog recognised the legislative void on the issue, noting that the platforms are “having to shelter under an undefined exception to the state gambling and public order laws”. A draft for discussion was consequently prepared for guiding principles to the Online Fantasy Sports Platforms (OFSPs).

The draft points out the following impediments to the industry as a result of the legislative void:

- There is no objectively definable test to assess and determine whether a game will be characterized as a game of skill or chance. This puts the onus of assessment on the developer of the game itself. Without clarity, innovation and development may be stifled.
- The variance of regulation among states poses heavy compliance burden on the platforms.
- Differential regulation among states also results in burden for consumers with respect to penal compliance. For example, a user living normally in Delhi may face prosecution if using the app within Nagaland.
- A self-regulatory organization for the industry, supervised by an independent oversight board. This proposed organization would further constitute an independent evaluation committee which would be responsible for determining the ‘skill’ level in the game.
- Guiding principles, which include compliance with advertising guidelines, age limits, and communications to states for requests of immunity.

- **Regulations by ASCI [28]**

December 2020

The Advertisement Standards Council of India (“ASCI”) had released guidelines in December 2020, on advertisements for fantasy sports and online gaming. Under the ASCI Guidelines, all such advertisements should contain certain mandatory disclosures and statements (whether such advertisement are in print or audio/ video format) such as:

- the game involves financial risk and may be addictive and that the players should play at their own risk.
- the advertisement should not present online gaming for real money winnings as an income opportunity or an alternative employment option.
- the advertisement should not suggest that a person engaged in gaming activity is more successful as compared to others.
- the advertisements should not depict any person below the age of 18 years or who appears to be below 18 years of age, engaged in the game of online gaming for real money winnings or suggest that such persons can play these games.

(27) Adam L. Sheps, *Swinging for the Fences: The Fallacy in Assigning Ownership to Sports Statistics and its Effect on Fantasy Sports*, 38 CONN. L. REV. 1113, 1114 (2006).

(28) <https://mih.gov.in/sites/default/files/Advisory.pdf>



February 2021

The Influencer Guidelines suggested certain standards to be followed by influencers which include specific disclosures of the nature of posts by making a prominent labeling of each digital media posts, and also provides for the specifications of labeling or disclosures to be followed in picture posts, video posts and audio posts.

- **Online Gaming Bill (Regulation) Bill, 2022**

The Online Gaming (Regulation) Bill, 2022 was introduced with the twin fold objective of preserving integrity in online gaming and introducing a regulatory regime for online gaming. With the recognition of the regulatory conundrum in this sector, the Bill seeks to implement a codified framework to streamline the conduct of online gaming platforms. The Bill intends to bring under its ambit all forms of online gaming irrespective of whether it is a game of skill or chance. It envisages to establish a “watch-dog” i.e. an Online Gaming Commission which is to be constituted by the Central Government. The Commission shall have the power to oversee the functioning of online gaming websites and take measures to curb illegal online gaming. Further, it intends to establish a licensing regime and empowers the Commission to grant, suspend and revoke licenses for online gaming websites. Further, it bars any entity from operating an online gaming server or an online gaming website without a license and even makes it a punishable offence. The Commission is empowered to formulate rules regarding the licensing, manner of keeping accounts, persons who may be permitted to play online games, organization or exhibition of online games, conditions for admissions of participants and the fees to be charged, notices to be put on the online gaming website and conditions regarding providing credit facilities by a licensee to players of online games, regulation of participation by proxy in online games, etc.

- **Online Gaming vide IT (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023**

The Ministry of Electronics and IT (MeitY) has introduced various checks and balances through relevant amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 notified on April 06, 2023. The purpose of these amendments is to control the unabated and unwarranted negative impact of online gaming activities on users, especially children and other vulnerable sections of society.

IMPORTANT DEFINITIONS

- **'ONLINE GAME'**: A game that is offered on the Internet and is accessible by a user through a computer resource or an intermediary
- **'ONLINE GAMING INTERMEDIARY'**: Any intermediary that enables the users of its computer resource to access one or more online games
- **'ONLINE GAMING SELF-REGULATORY BODY'**: An entity designated as such under rule 4A
- **'ONLINE REAL MONEY GAME'**: An online game where a user makes a deposit in cash or kind with the expectation of earning winnings on that deposit.



ONLINE GAMING SELF-REGULATORY BODY (SRB)

Ministry will designate the role to as many online gaming self-regulatory bodies as it may consider necessary. Purpose would be to verify an online real money game as a permissible online real money game as per these rules. These SRBs will decide if a online real money game is allowed or not based on the standards under these rules.

ELIGIBILITY CRITERIA FOR DESIGNATION AS AN SRB



- Must be a company registered under section 8 of the Companies Act, 2013;
- Membership must be representative of the gaming industry;
- Members must have been offering and promoting online games in a responsible manner;
- Must have sufficient capacity, including financial capacity, to perform its functions as an online gaming self-regulatory body under these rules.
- Its Board of Directors must be comprised of individuals of repute who do not have any conflict of interest and possess special knowledge or practical experience suitable for the performance of the functions of such self-regulatory body;
- The Board of Directors must consist of individuals who have special knowledge of or practical experience in the online gaming industry, promoting the interests of users of online games, education, psychology or mental health, information and communications technology, child rights, public policy, public administration, law enforcement, public finance or other relevant fields.
- Its memorandum of association and articles of association must contain provisions relating to the performance of its functions under this rules, including the redressal of grievances in a manner free from conflict of interest and at arm's length from its members; the disclosure and reporting by and accountability of its members; the clear and relevant criteria for the acceptance and continuation of a person as its member; criteria for revoking or suspending such membership after giving such person an opportunity of being heard.

INFORMATION THAT SRB SHALL PUBLISH AND MAINTAIN ON ITS WEBSITE

- An updated list of all permissible online real money games verified by it
- Details of such verified online games including the details of the applicant, the dates and period of validity of the verification, the reasons of such verification and the details of the suspension or revocation, if any, of verification of any online real money game
- An updated list of all its members, whether present or former, the dates of their acceptance as member, their corporate or business-related identity number and other details, and the details of suspension or revocation of membership of any member
- A framework for verifying an online real money game
- Framework for redressal of grievances and the contact details of the Grievance Officer

FRAMEWORK FOR VERIFYING AN ONLINE REAL MONEY GAME

- the measures to ensure that such online real money game is not against the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States and public order;

- 
- 
- the safeguards against user harm, including self-harm and psychological harm;
 - the measures to safeguard children, including measures for parental or access control and classifying online games through age-rating mechanism, based on the nature and type of content;
 - the measures to safeguard users against the risk of gaming addiction, financial loss and financial fraud, including repeated warning messages at higher frequency beyond a reasonable duration for a gaming session and provision to enable a user to exclude himself upon user-defined limits being reached for time or money spent;
 - Other things as SRO may deem fit

DON'TS FOR ONLINE GAMING PLATFORMS

- Don't offer games that are deemed illegal under Indian law, such as games of chance or gambling.
- Don't allow users to engage in behavior that violates Indian law or cultural norms, such as promoting hate speech or inciting violence.
- Don't collect or share users' personal information without their consent or in violation of Indian data privacy laws.
- Don't neglect to implement sufficient security measures to protect users' information and prevent hacking or cyber attacks.
- Don't misrepresent the nature of the games or the odds of winning to lure users into spending money.
- Don't target underage users or encourage them to engage in gambling or other activities that may be harmful to their development.
- Don't ignore user complaints or fail to provide adequate customer support for issues such as technical problems or unfair treatment.

Takeaways For Better Understanding

Based on what is set out above and the legal precedents, it can be persuasively argued that fantasy sports games are games in which success depends upon a substantial degree of skill. Various factors that a participant would need to assess keeping in mind the different conditions and scoring metrics set out for drafting a team affect the result of the fantasy sports game. Based on the reasoning of various courts, analysis of the conditions or the metrics within which a user is required to draft their team, restrictions on the number of

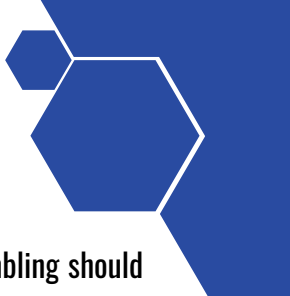



the metrics within which a user is required to draft their team, restrictions on the number of players from a single team, upper caps and limits, etc. plays a critical role in analysing the element of skill involved in fantasy sports games.

The undecided question of law that emerges here is whether online fantasy sports games fall under the ambit of gambling, or are they exempt from the PGA being games merely of skill has been before the Supreme Court. It has been witnessed that, the fantasy sports platforms are still at their nascent stage and without any specific regulation and with geographical access with no bounds, this industry still faces many hurdles which need to be catered to. It can be analysed that Laws that impose a blanket ban on gaming both online and offline without having regard to the nature of the game would jeopardize the interest of the investors in the online gaming industry. Online gaming should be regulated in contrast with the current blanket ban. The online gaming has a business potential of INR 150 Billion in India and a complete ban will be economically detrimental for the nation. Further the Supreme Court's decision in these cases has a significant implication. If the Supreme Court rules that online fantasy games are based solely on chance, the entire industry may be forced to close.

High Court judgements discussed above have demonstrated a willingness to agree with this viewpoint. However, take into consideration that the analytical metrics for each game are unique. The level of skill required in a fantasy sport game is greatly influenced by the rules and regulations. As a result, the gameplay and interface of each game should be understood differently by applying the various principles enumerated in decisions such as Varun Gumber and Gurdeep Singh Sachar. Moreover, regulating these matters would eliminate black money from economy. Further, if legalised and taxed, online gaming can be a huge source of revenue for the government. It would also lead to creation of avenues of employment and a robust framework for regulating online gaming would ensure people don't indulge in excesses and everything remains legal.^[29]

(29) Vishal Misra, Devavrat Shah, and Sudarsan V.S. Ranganathan, "Is It Luck or Skill : Establishing Role of Skill in Mutual Fund Management and Fantasy Sports", 2020.



Some vital aspects as to the framework will likewise need set up for example, betting and gambling should just be offered by Indian authorized administrators who have legitimate licenses from the permitting authority, there ought to be a limitation on the quantity of transaction an individual can do for a time. The idea of stakes ought to be limited to liquid consideration, connected to a PAN or Aadhaar card, and the wagering sum ought to likewise be endorsed by law. Also, those who get grants or don't fall inside the domain of the Income Tax Act or the GST Act ought to be suspended from taking part in online or offline betting. Finally, a blanket ban on it would be futile but a regulation would help manage the affairs successfully.

However, over the past years, gambling has been prohibited mainly for the reasons of preventing addiction to such activities and to prevent people having intermittent and low income sources from losing their money on a mere chance of something happening or not. It is quite important to acknowledge that the impact of fantasy sports on individuals and society at large is not much different from ordinary betting/gambling. In a country with nascent digital literacy and vast income inequality, fantasy sports just like ordinary gambling can have unanticipated implications for many. A blanket ban would worsen the condition and increase a need for consumer protection. While considering the issue, it is important to understand that the analytical metrics of every game is different and there may be scope of manipulation in online platforms. Due to technological advancements, private international disputes may also arise between the parties. The consumers may also face data privacy issues. Hence fantasy sports may affect society in a similar fashion as conventional gambling by promoting addiction to chance-based money making and diminishing bare savings of the poor who choose to indulge in them. Hence, FGs should be allowed only if the law answers the bigger question of allowing gambling activities in the affirmative^[30].

The Key Takeaways for individuals engaged in playing as gamers and for companies engaged in providing such platforms are as follows:

For Gamers:

- Be well versed with rules and regulations.
- Analyse the risks before contributing to the pool.
- Seek legal advice before employing large amount in games.
- Take assistance from sports analyst for better results.
- Be educated on the nuances of fantasy sports.

For Platform Providers:

- Create a safe, legal and regulated environment for sports.
- Self-Regulatory mechanism for better approach.
- Educate the users for informed decisions.
- Avoid tax-evasion.
- Well-established dispute resolution mechanism.
- Avoid violation of intellectual property rights.

(30) Akshit Bhardwaj, Changing Dimensions of Fantasy Games in India and its Legality, 2.1 VSLR (2020) 96.



Conclusion

As it stands, the subject is under intense litigation, legislation, and discussion from a host of different areas with courts from all parts of the country frequently involved in various issues around the fantasy sports industry. Evidently, there has been a considerable shift in the judicial approach vis-à-vis regulating the online gaming space, where courts have been nudging state governments to regulate the virtual gaming landscape. Various High Courts have urged the state governments to possibly regulate online gaming. Further, certain states have also brought legislations seeking to ban/regulate online gaming. Based on the reasoning of various courts, analysis of the conditions or the metrics within which a user is required to draft their team, plays a critical role in analysing the element of skill involved in fantasy sports games. Hence, the gameplay of each fantasy sports game needs to be analysed on a case to case basis applying the principles discussed above.

TBA Insights

TRAILBLAZER
ADVOCATES



Isheta T Batra

IP, Sports & Media Counsel

isheta.batra@tbalaw.in



Tuhin Batra

Corporate Counsel

tuhin@tbalaw.in

If you have any questions about this publication, please contact us at info@tbalaw.in

The information contained in this publication should not be construed as legal advice. Analysis or explanation on this topic requires assistance from an expert. This publication is not intended for solicitation of legal work under any jurisdiction.