
ONLINE GAMING: EXPLORING RIGHT STRATEGIES

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ABSTRACT

In modern times online gaming has become immensely popular in many countries in the world. The craze of online gaming is huge especially among the youth. In the wake of diminishing sources of revenue online gaming industry may prove to be a game changer. Hence we need to adopt right strategies while dealing with online gaming. The judiciary has dealt with various issues pertaining to online gaming and it is a need of the hour that we should have proper regulation of online gaming. However the legislative response in India has remained inconsistent on the issue of online gaming. The courts need to have an open outlook towards online gaming industry by taking into account exigencies of time and changing circumstances. If a pan India legislative framework is put in place in all the states for regulation of online gaming and fantasy sports and Gaming Commission of India is established, it will become easier to regulate online gaming industry.

This article tries to explore the present legal position on online gaming in India by analysis of legislative and judicial response and suggests better alternative thereto which will be more beneficial, feasible and financially viable also.

Keywords: Online gaming, Fantasy sports, Game of skill, Game of chance, revenue

Introduction:

Entertainment is an indispensable facet of human life. It is a stress buster and provides a great relaxation in otherwise hectic human life. In old days, the avenues for entertainment were limited. But in modern times with the development of science and technology, the avenues of entertainment have increased to a great extent and they have undergone a sea change. In old days the outdoor sports, live plays and drama were the means of entertainment. Then came movies. But with the advent of personal computers, laptops and smart phones, online gaming, e-sports and fantasy sports have become immensely popular. These are especially popular among the youth. Online gaming is picking up as a major leisurely activity in different parts of the world including USA, UK, Korea, China, Taiwan, India, etc. In the beginning of 21st century, online gaming has become a massive cultural phenomenon.¹ Computerized game playing over devices like personal computer, mobile phone can be referred to as gaming. Although online gaming history dates back to 1950s, it developed in real sense in 1990s only.

Concepts of Online Gaming, e-sports and fantasy sports:

Generally online gaming, e-sports and fantasy sports are considered as synonymous. However, they differ from each other. The recent judicial pronouncements indicate that fantasy sport is a game of skill and not game of chance. In *Shri. Varun Gumber vs. Union Territory of Chandigarh and others*², it was held that the fantasy sport Dream 11 involves a substantial degree of skill and did not amount to gambling. Thus in most of the fantasy sports skill is predominant factor, while in online gaming and e sports element of chance is also very much involved. Still let us assume for the sake of convenience that all these three are same.

But online gaming industry has remained neglected from lawmakers probably because it's immense potential as revenue and job generating sector is not fully understood by them. In post covid 19 era where thousands of youths have lost their jobs and livelihood, online gaming industry will certainly provide means of livelihood. However there is a need of putting in place an appropriate regulatory mechanism.

Online Gaming: A bane or boon?

Online gaming is already a multi-crores industry in India. Online gaming has become

¹ Dal Young Jin, *Korea's Online Gaming Empire*, The MIT Press, 2010 at 3-4

² CWP No. 7559 of 2017

immensely popular among the youth of today and it justifies analysis of online gaming in terms of its costs and benefits.

Online gaming to certain extent requires skill. Hence active participation in online gaming promotes skill of player. Secondly, online gaming has certain degree of simulation and hence it may enhance problem solving skills and cognitive abilities of the gamer. It prepares the gamer to tackle real life situations in an effective manner. Another benefit of online gaming may be that its regulation will generate revenue for the government. In post Covid-19 period it can be the game changer. When existing avenues of taxes have shrunk due to global recession, online gaming can boost tax collection and strengthen the global economy. If online gaming industry is developed properly it can generate thousands of new jobs. However, online gaming may bring about certain undesired results also such as addiction, depression, indulgence in online gambling, etc. It may also hamper academic progress of students and excessive time for online gaming would mean reduction in time available for physical sports like athletics, gymnastics, hockey, soccer, tennis, etc.

Due to these inherent dangers associated with online gaming, its legalization has remained a controversial topic in India. Further legalisation of online gaming may offend to public morality. This is because certain online games are more of chance than skill and hence to encourage such games may not be in the interest of our youth. It needs to be seen how online gaming can be fit into the moral fabric of the country.

Currently, several psychologists believe that Internet use and online gaming have structural and psychological resemblances to gambling, to the extent that they should be subject to a similar diagnosis.³

If we consider costs and benefits involved in online gaming we may find that despite certain costs involved, the benefits are relatively more and especially in post Covid 19 period we need to augment our revenue and job market by encouraging online gaming.

Indian Judiciary on online gaming:

As we do not have dedicated centralised online gambling and online gaming laws, the judiciary has to deal with intricate issues involved therein. The Indian judiciary has addressed various

³ FALTIN KARLSEN, *A WORLD OF EXCESSES: ONLINE GAMES AND EXCESSIVE PLAYING* 6 (1st ed. Taylor and Francis 2013)

issues associated with online gaming in some cases. But the online gaming jurisprudence is still evolving and it will take some more time. The decisions of High Courts are not consistent and hence the overall picture is murky.

Before we come to decisions directly on online gaming, it is pertinent to mention about earlier judicial discourse on game of skill and game of chance. This is because in formulating right strategies for online gaming also this distinction is going to be crucial.

In *Dr. Lakshmanan vs. Union of India*⁴, the question was whether horse racing is a game of skill or merely a game of chance. It was held that horse racing is certainly a game of skill and hence it is legal and permissible. The majority decision was delivered by Kuldip Singh, J. The Supreme Court in its judgment considered the decision in *Commonwealth vs. Kentucky Jockey Club*⁵ wherein it was held that a statute permitting betting on horse racing was constitutional. Further it referred to a decision *Harless vs. United States*⁶ in which it was held that horse racing is not a game of chance.

After careful perusal of the foreign decisions and Indian decisions, the Supreme Court concluded that horse racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained jockey can touch the winning-post. This decision is very much relevant even in online gaming in order to distinguish between online game of chance and online game of skill. It is the online game of skill which may be allowed, while online game of chance may be prohibited.

In *State of Andhra Pradesh vs. K. Satyanarayana*⁷, the Supreme Court held that under normal circumstances rummy is a game of skill and is permitted under gambling law. The Court was of the view that the game of rummy is not entirely of chance. It requires certain degree of skill. However there is a rider that game owners should not make any profits or gains from rummy and games should not be played for stakes. This decision will not help the online rummy game owners as they do charge participation fee.

In *Dominance Games Pvt. Ltd. vs. State of Gujarat*⁸ and also in *Nasir Salim Patel vs. State of*

⁴ AIR 1996 SC 1153

⁵ 238 Ky. 739

⁶ 1 Morris 169 (1843)

⁷ AIR 1968 SC 825

⁸ (2018 1 GLR 801)

Maharashtra and others⁹ it was held that poker is a game of chance and hence prohibited. In *M. J. Sivani v. State of Karnataka*¹⁰ also it was observed that there is no scope for using skill in games like poker double up, blackjack and pacman thereby meaning that they are prohibited. In *Indian Poker Association vs. State of West Bengal*¹¹, the petitioner association in its petition stated that although it is a legally registered association, its members are being unnecessarily harassed on the ground that there is a legal bar to play poker which is predominantly a game of skill and not game of chance. The counsel of the petitioner contended that poker was not included either in gaming or gambling under section 2(1) (b) of the West Bengal Gambling and Prize Competition Act, 1957. While accepting the contention, the Calcutta High Court held that poker is not covered under the state gambling laws meaning thereby that it is a game of skill and not a game of chance.

In USA there are conflicting decisions on game of poker. California and Montana courts have held that poker was a gambling game containing elements of chance. But in *Commonwealth vs. Watkins* it was held that poker was not online gambling as it was a game dominated by elements of skill.¹²

In *Shri. Varun Gumber vs. Union Territory of Chandigarh and others*¹³ the Punjab and Haryana High Court elaborately dealt with the issue of whether fantasy sports possess element of skill or not. After analysing the entire mechanism of fantasy sports the Court held that playing fantasy sports requires considerable skill, judgment and discretion as the user has to judge athleticism and dexterity of the players, compare their strengths and weaknesses against other players, and account for other non athletic characteristics such as biases and prejudices. The Court held that fantasy sports possess an element of skill that predominantly affects the outcome of the games as such are not gambling activities but games of skill.

The decision was followed by Bombay High Court in *Gurdip Singh Sachar vs. Union of India*¹⁴. In this case the petitioner claiming himself to be public spirited advocate sought directions to initiate criminal prosecution against respondent no. 3 namely Dream-11 Fantasy Pvt. Ltd. for

⁹ Criminal Writ Petition No. 427 of 2017

¹⁰ AIR 1995 SC 1770

¹¹ W.P.A. No. 394 of 2019

¹² Jonathan Conon, *Aces and Eights: Why The Unlawful Internet Gambling Enforcement Act Resides In Dead Man's Land In Attempting To Further Curb Online Gambling And Why Expanded Criminalization Is Preferable To Legalisation*, *The Journal Of Criminal Law And Criminology* Vol. 99 No. 4 (2009)

¹³ 2017 Cri.LJ 3827

¹⁴ *Judgment dated 30th April 2019 in Criminal P.I.L. No. 16 of 2019*

allegedly conducting illegal operations in the nature of gambling or betting or wagering under the label of online fantasy sports gaming, which in the opinion of the petitioner shall attract penal provisions of Public Gambling Act, 1867. It was further contended that the respondent company has also violated provisions of CGST Act and Rule 31-A of CGST Rules, 2018.

The petitioner pointed out that on the website of Respondent no. 3 the option to play free is made available. But after some time people tend to pay their hard earned money instead of playing free. Thus these online fantasy games are luring people to spend their hard earned money for quick earning by taking a chance and most of them end up losing their money. Thus this online fantasy game Dream-11 is promoting betting or gambling or wagering and hence it is merely a game of chance and not game of skill and it is dependent upon the luck of a player on a given day. In this fantasy game the GST is charged only on platform fee say 20% and not on entire money which is put at stake by the player. For the balance 80% amount only acknowledgement is given and thereby evasion of GST is taking place.

However the respondent no. 3 contended that the online fantasy game Dream – 11 is predominantly a game of skill where players form their virtual teams. The winners are decided on the basis of points scored for which statistical data is generated. The participants do not bet upon the outcome of the match. After hearing arguments of both the sides Hon'ble Ranjit More, J. of Bombay High Court held that the online fantasy game of Dream 11 is a game of skill and there is no violation of CGST Act or CGST Rules committed by respondent no. 3. This decision was followed further in *Chandresh Sankhla vs State of Rajasthan*¹⁵.

In *D. Siluvai Venance vs. State*¹⁶ the Madras High Court quashed the proceedings against the petitioner teacher and held that game of cards played by the petitioner on private farmland did not constitute a common gaming house and consequently is not gambling under the Act. The court posed a query to the Asst. Inspector General of Police as to how several online games like poker, rummy and other fantasy sports are being played in the state of Tamil Nadu although the police is so particular about strict implementation of Tamil Nadu Gaming Act, 1930. The Asst. Inspector General of Police filed a status report wherein concerns were expressed regarding growing addiction to online gaming in the state. The High Court very rightly observed that most of the judgments on poker, rummy and other games are given in the context of physical clubs or locations, except those involving fantasy sports. It was also rightly pointed

¹⁵ 2020 SCC OnLine Raj 264

¹⁶ 2020 SCC On Line Mad 1546

out that besides Nagaland and Sikkim, which allowed online gaming under a licensing and regulatory regime, and Telangana which has banned online games for money by statute, no other state has any specific law on online or virtual gaming.

The court cautioned against the hazards of addiction to online gaming and monetary losses, especially for the youth and unemployed. The Court emphasised the need of regulating online gaming industry so that new jobs may be generated in this rapidly flourishing industry. Justice Pugalendhi in this case urged the state government to *pass a suitable legislation for regulating and controlling such online gaming through license. The Court also clarified that it is not against the virtual games, but there should be a regulatory body to monitor and regulate the legal gaming activities, be it in the real world or the virtual world. It was held that the fantasy sport Dream – 11 is a game of skill*

Regulation of online gaming:

In India as gambling is a state subject the online games in the nature of gambling have been dealt with under state legislations and till today we do not have any dedicated centralized online gambling or online gaming law. The approaches of states vary drastically. Some states have preferred a blanket ban on online gaming while others have preferred regulation of online gaming. For instance, the state of Meghalaya has embraced the online gaming industry by regulating the same. Meghalaya has enacted the Meghalaya Regulation of Gaming Act, 2021. It is an enabling statute which enables operators to obtain a licence to offer online and land based games of chance such as keno, wheel of fortune, etc. The state of Sikkim has also enacted a licensing regime for online games within State of Sikkim by enacting Sikkim Act and Sikkim Online Gaming Regulation Rules, 2009. Nagaland has also adopted a licensing regime for online games of skill by enacting the Nagaland Act and the Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Rules, 2016.¹⁷

These two are diametrically opposite models dealing with online gaming.

Conclusion:

Online gaming is definitely going to be a game changer and hence we must regulate it properly through a comprehensive law by mentioning it in Union list or concurrent list in seventh

¹⁷ See generally, Ranjana Adhikari, Shashi Shekhar Misra <https://iclg.com/practice-areas/gambling-laws-and-regulations/india> as last accessed on 26/01/2022

schedule of the Constitution. It will bring about uniformity in the existing laws on online gaming. A Gaming Commission of India (GCI) shall be established on lines of Competition Commission of India (CCI) to resolve disputes arising out of online gaming. Online gaming industry will be a boon to our economy. A robust and thoughtful regulatory framework on online gaming could contain provisions imposing time as well as monetary limits on players indulging in gaming in order to protect the minors and students while ensuring the possibility of job creation, revenue generation and cross border collaborations.