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Changing Dimensions of Fantasy Games in India and its Legality

Akshit Bhardwaj*

Abstract

Technological advancements have paved way for a digitalized community across the world providing minute-to-minute access to different sports games played across diverse regions. With grand winnings that are just a click away requiring the right combination of skills and arrangement of real players, the young managers are virtually managing their own dream team after meticulously examining their career statistics. This has resulted in wide viewership and has provided significant access to e-games including fantasy sports in India. However, the existence of fantasy sports is yet again under scrutiny even when the judicial pronouncements have been in their favour in the past. With no specific laws and guidelines, the users and companies are still waiting for the government to strike a balance between gaming laws and their application on fantasy games.

This article analyses the statutory position of skill- based fantasy games in India while examining the recent judicial trends. It further identifies the challenges that are experienced by the online gaming industry that can potentially damage the growth of fantasy games. Lastly, the article proposes suitable measures to safeguard the interest of all stakeholders.

Keywords- The Sports (Online Gaming And Prevention Of Fraud) Bill 2018, Fantasy Sports Games, Dominant Factor Test, Challenges, Self- Regulation

Introduction

The evolution of fantasy sports games can be traced back to the United States, wherein offline records of fantasy sports players exist since 1960.[1] These records constitute data of sports

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1 Eddie Brown, *The history of fantasy football*, The San Diego Union-Tribune (Aug. 09, 2020, 10:00

like football etc. and provide details of their account holders.[2] Due to the rise in domestic leagues and commercialized international events, fantasy sports games are becoming a part of this culture. Significantly, a recent study of the Broadcast Audience Research Council (BARC) establishes that the game of cricket draws 93% of sports viewership in India.[3] It further reveals that other sports like kabaddi, wrestling, and football are also gaining popularity due to the advent of homegrown leagues and mass commercialization.[4] The growth of young athletes and the interest of youth in sports has contributed significantly to the viewership of sporting events leading to more revenue for broadcasters and streaming industry.[5] This has eventually contributed to the growth of fantasy sports games in India, making it a $150 Billion market due to the formation of multiple competitive platforms.[6]

According to a report prepared by the *Pennsylvania Gaming Control Board*, the characteristics of fantasy sports can be defined as:

"a fantasy or simulation sports game or contest involving athletic events in which a participant owns or manages an imaginary team and competes against other participants or a target score for a predetermined prize determined by statistics generated based on performance by individual athletes participating in actual professional athletic events, provided the outcome shall not be based solely on the performance on an individual athlete, or on the score, point spread, and any performance of any single real team or combination of teams."[7] In simpler terms, fantasy sports enable individuals to act as managers or team coaches while creating their own team involving real-world professional players participating in a particular contest. However, due to its dynamic nature fantasy sports cannot be restricted to a particular definition.

AM), https://www.sandiegouniontribune.com/sports/chargers/sdut-the-history-of-fantasy-football-cure-2014jul28-story.html.

2 *Ibid*.

3 Ians, *Cricket draws 93% of sports viewers in India: BARC*, Business Standard (Aug. 09, 2020, 04:10 PM), https://www.business-standard.com/article/news-ians/cricket-draws-93-of-sports-viewers-in-india-barc-119060400786_1.html.

4 Kunal Dhyani, *Cricket accounts for 93% of sports content consumption in India: BARC*, Inside Sport (Aug. 04, 2020, 04:15 PM), https://www.insidesport.co/cricket-accounts-for-93-of-sports-content-consumption-in-india-barc/.

5 *Ibid*.

6 Rohan Abraham, *A $150bn market: How fantasy sports transformed cricket fans from being spectators to stakeholders,* The Economic Times (Aug 09, 2020, 08:19 PM), https://economictimes.indiatimes.com/magazines/panache/a-150bn-market-how-fantasy-sports-transformed-cricket-fansfrobeingspectatorstostakeholders/articleshow/70185196.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

7 David M. Barasch, *Fantasy Sports Report*, Pennsylvania Gaming Control Board (Aug. 09, 2020, 08:30 PM), https://gamingcontrolboard.pa.gov/files/communications/PGCB_Fantasy_Sports_Report_2016.pdf.

These sporting platforms/companies work on the notion of providing an array of contests to the public, ranging from paid leagues to free entries. The users accessing these services get an opportunity to test their sporting expertise by picking teams from a real-world player pool for the upcoming matches. Such drafts are drawn up using virtual credits provided for each game by the host. Weighted credit scores are given to players based on their recent form. For example, if there are 100 credits available, users must pick 11 players within the allotted budget. Moreover, marquee players hold the highest credit against their names. The participants are ranked based on the points earned by their selected players during the contest according to their on-field performance and scoring metrics for the relevant match. Companies have created their marking system for the activities carried out by the athletes during a contest.

Regulatory Framework Governing Skill Games in India

Participation and engagement in sports is an extensively practiced, recreational, and social activity that offers opportunities for customer engagement, brand advertisement and promotion, and involvement of fans.[8] Significantly, to regulate those offering complex competitive formats such as board games or fantasy sports, Indian laws distinguish between game involving 'skill' and game involving 'chance', and specify a strict prohibition on participation and the offering of 'chance' games for consideration, while at the same time taking a more favorable position with 'skill' games.[9] A historic characteristic of Indian law has been the distinguished treatment granted to games of skill and games of chance, with the former allowed and the latter prohibited.[10] The above differentiation appears to originate from India's traditional gambling treatment, where while it features throughout the millennia in Indian culture and history, it is associated with negative connotations and societal stigma.[11]

Public Gambling Act, 1867 and Prize Competitions Act, 1955

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[12] (hereinafter "PGA") criminalizes and prohibits the activity of gambling in the public forum and the keeping of a '*Common Gaming House*' in India. According to *Black Law Dictionary*,

8 *Games of Skill in India: A Proposal For Reform*, The Sports Law & Policy Centre, (Aug. 09, 2020, 10:00 AM), https://drive.google.com/file/d/0B6LE5s8UEIKGZXNKNGRnQk94ZEE/view.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 The Public Gambling Act, 1867, No. 03, Acts of Parliament, 1867 (India).

Gambling refers to "*the act of risking something of value for a chance to win a prize.*"[13] Gambling is not defined in the PGA, however, the Act has incorporated the definition of '*Common Gaming House*' referring it 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."*[14] 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 PGA.[15]

Moreover, the Act exonerates the liability of any game involving mere skills, thereby excluding the '*game of skills*' from any liability.[16] 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, PGA 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*[17], 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 remain a game of skill.

The Prize Competitions Act, 1955[18] (hereinafter "PCA") further sets out regulatory guidelines for the rewards and operation of prize competitions across the country. Under PCA, 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 PCA's enactment enunciated that games that are predominantly based on skill are excluded from the regulatory framework and liability terms of the PCA.[19]

13 *Black's Law Dictionary* 750 (4th ed. 2009).

14 Section 12, The Public Gambling Act, 1867, No. 03, Acts of Parliament, 1867 (India).

15 Anand Jayachandran & Aditya Prasad, *All In or Fold – The Legal Conundrum of Real Money Online Poker,* India Corporate Law (July 10, 2020, 10:15 AM), https://corporate.cyrilamarchandblogs.com/2019/07/real-money-online-poker-legalities/.

16 *Supra* note 14.

17 A.I.R. 1957 S.C. 699.

18 The Prize Competitions Act, 1955, No. 42, Acts of Parliament, 1955 (India).

19 *Supra* note 17.

Furthermore, according to the Seventh Schedule of the Indian Constitution (List II, Entries 34 and 62), the state governments have been vested with the power to make betting and gambling legislation for their respective territory. Hence, where there is a state gambling legislation state, it prevails over the PGA. Consequently, many states in India in addition to the PGA have introduced legislation regulating gambling and gaming within their jurisdictions. These state regulations are essentially in accordance with the PGA, and also exempt games that involve skills as a predominant factor.

Conundrum between Game of Skills and Game of Chance

Dominant Factor Test

To adjudge a game as of a skill or chance it is important to take into consideration the facts and circumstances as the deciding factor of each case.[20] To determine the true character of a game, U.S courts have established a "Dominant Factor Test". Significantly, this test acknowledges that most of the games include some form of chance and thus focuses upon deciding whether luck or the skill involved is the most important factor in choosing the winner in those situations where predominantly skills are required.[21] In the case *Bayer v. Johnson*[22] Appeals Court of South Dakota (U.S.) held that: *"The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game."* Perhaps, the test elucidates that the mere influence of chance alone does not affect the nature of the game. Rather, it entails that the element of chance must achieve a certain degree of significance before it makes a game illegal.

Despite the evolution of this test, issues have persisted regarding its application. Initially, U.S courts failed to interpret whether the application of the test is in quantitative terms or in qualitative terms. Consequently, the Supreme Court of Washington explained that: *"The measure is a qualitative one; that is, the chance must be an integral part which influences the result. The measure is not the quantitative proportion of skill and chance in viewing the scheme as a whole."*[23] Thus, it can be safely concluded that the "Dominant Factor Test" is qualitative and not quantitative.

20 *Manoranjithan Manamyil Mandram v. State of Tamil Nadu*, A.I.R. 2005 Mad 261.

21 See *Roberts v. Comm. Inv. Club of Woonsocket*, 431 A.2d 1206, 1211 & n.5 (R.I. 1981).

22 349 N.W.2d 447, 449 (S.D. 1984).

23 See *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 163 (Wash. 1965).

Indian Position & Dominant Factor Test

Courts in India have adopted a similar approach as laid down by the U.S. precedents. The test of predominant nature has been applied to identify the true character of the game.

Game of Rummy

In the landmark case of *State of Andhra Pradesh v. K. Satyanarayana*[24] (hereinafter "Satyanarayana Case"), the court held that even though there is a slight risk involved in the game of Rummy, it is a game of skill as it is predominantly based on the skill of the player playing the game. The court further held that: *"The "three card" game which goes under different names such as "flush", "brag" etc., is a game of pure chance. Rummy, on the other hand requires a 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."*

Interestingly, the court in the above case adopted a two-step test to identify the nature of the activity. These steps involved: firstly, to identify whether the game in question is mainly and preponderantly a skill game, and secondly, whether the organization involved in the operation of these games is making any gain or profit from such activity except for the service fee charged for operations of the game. For the Game of Rummy, the court opined that it majorly requires skills to learn and understand the fall of the cards and needs considerable skills to finish the game and win. The logic behind identifying the true nature of a game has been applied by the legislation and the courts, however, the additional step pertaining to the determination of profit and gain that has been received by the organizer stands a point of issue. This is because if a game is a game of skill then the gambling laws and other allied provisions must not be applied under any given circumstances. This further creates a tussle between the fundamental rights of a person to carry out free trade and business guaranteed under Article 19 of the Constitution and the gambling statutes. It further jeopardizes business models with irrelevant and illogical differentiation.[25] Nevertheless, the *Satyanarayana Case* has laid down the foundation of clearing the confusion pertaining to skill games and chance games by applying the dominant factor test.

Horse Racing

Horse racing has been a part of the rich heritage and traditions and has served as a stage to display strength and valour. While dealing with aspect of wagering in it, the issue before

24 A.I.R. 1968 S.C. 825.

25 *Supra* note 8.

the Supreme Court was whether wagering on horse races constitute a game of skill or chance. In *K.R. Lakshmanan v. State of Tamil Nadu*[26] (hereinafter "*Lakshmanan Case*"), the Supreme Court held 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. 'Gaming' in the two Acts would, therefore, mean wagering or betting on games of chance. It would not include games of skill like horse-racing. We, therefore, hold that wagering or betting on horse-racing - a game of skill does not come within the definition of 'Gaming' under the two Acts.*"

The court by this ruling allowed wagering on horse racing and declared it as a lawful activity that is outside the scope of PGA and PCA. The court formed such a basis due to the availability of numerous publication and information that assists the participant to learn about the maintenance of horses and the nuances of racing. Furthermore, with the application of such knowledge and the right information about the past performances of the horse and the racer, a high degree of skills get involve to determine the outcome of the race. The court also reiterated the principle of the dominance of skills as laid down in the *Satyanarayana Case* while ruling out the aspect of high degree of chance.

The landmark ruling in the *Lakshamanan Case* has special significance as it was the first time that a game directly related to field sports was declared legal in terms of betting. *Lakshmanan Case* and the *Satyanarayan Case* paved way for the fantasy games companies and sports enthusiasts to combine their skills online. The observation of the courts in these two cases rightly supports the legality of the skill based fantasy games as there are major skills involved in choosing the winning team and the right combination.

The Curious Case of Poker

The legality of poker games is surrounded by uncertainties and societal stigmas. Lack of clear and comprehensive legislation clarifying its status and legality has resulted in uncertainty regarding its operation in India. The Supreme Court had earlier propounded that there was no scope for the use of one's skill to reach the desired result in games such as poker, double up, blackjack and Pacman because electronic setups relied upon to play these games might be manipulated and therefore the chances of winning are no more in control of the player who is using his skills.[27]

26 (1996) 2 S.C.C. 226.

27 *M. J. Sivani v. State of Karnataka,* A.I.R. 1995 S.C. 1770.

However, the efforts of the Indian Poker Association (IPA) to legalize poker games have resulted in two favorable judgments from the Karnataka High Court and the Calcutta High Court based on their State legislation on Gambling. Although, these two decisions did not delve into the legality of poker altogether, resulting to be limited in nature. The Karnataka High Court in *Indian Poker Association v. State of Karnataka*[28] held that poker, if played like a game of skill, does not require a license and is legal when played in such a manner. However, the court did not test its legality by determining its nature and is therefore considered as a narrow interpretation. In *Indian Poker Association v. State of West Bengal*[29], the court by prima facie considering the game of poker outside the purview of West Bengal Gambling and Prize Competitions Act, 1957 considered it to be legal. Both these judgments have not relied on the "Dominant Factor Test" to identify the true characteristics of the game of poker.

However, the Gujarat High Court after perusing the rules of the game held that *'Texas Hold Em Poker'* was a game of chance and thus prohibited under Gujarat Prevention of Gambling Act, 1997.[30] The court relied upon the observations made in *Satyanarayan Case,* wherein the Supreme Court considered the '*3 Card Game'* like a game of pure chance and therefore declared it illegal. Furthermore, in *M/s Gaussian Networks Pvt. Ltd. v. Monica Lakhanpal and State of NCT*[31], the District Court (New Delhi) distinguished between games played in a physical space and those played on an online platform, and opined that playing 'games of skill' for money is lawful only when played in the physical form. Additionally, the court observed that when games are played on an online forum, various factors are involved that influence the degree of chance, and the predominance of skill over chance becomes uncertain, as other elements like arbitrariness, cheating, and collusion take over. Although, due to withdrawal of the original petition the observation of the court was subsequently set aside.

It can be concluded with regards to the observations made by different courts that poker is primarily a game of chance. However, different positions adopted by various states and lack of a common precedent is adding to the ambiguity regarding its current position. Predominantly, there are high chances involved in the Game of Poker when played online as rightly highlighted in the above case. Due to unreliable algorithms, the operating system might favour any person playing online even though he/she has displayed a minimum amount of skills. However, if a suitable regulation/ measure can be carved out to overcome this uncertainty, the courts must reapply the established tests to reach a balanced outcome.

28 2013 SCC OnLine KAR 8536.

29 WPA No. 394 of 2019 (High Court of Calcutta, 29/08/2019).

30 *Dominance Games Pvt. Ltd. v. State of Gujarat and Ors.*, (2018) 1 G.L.R. 801.

31 Suit No. 32/2012 (Delhi District Court, 17/09/2012).

Legality of Fantasy Sports in India

According to a recent study released by the Massachusetts Institute of Technology (MIT), the majority of sports fantasy games are based on skills rather than luck.[32] The researchers at MIT by analyzing the win/loss ratio and statistics of thousands of fantasy players involved in different sports over multiple seasons have concluded that a fantasy game is inherently a contest that rewards skill.[33] This adds to the rampant rise of online fantasy games that are flourishing amongst the virtual sports managers. Moreover, the dimensions of the online gaming market in India have been growing with revenues reaching approximately Rs. 43.8 billion in Financial Year 2018-19 and are expected to reach Rs. 118.8 billion by 2023.[34]

To effectively deal with the rise of fantasy sports games, Nagaland enacted *Nagaland Prohibition of Gambling and Promotion and Regularization of Online Games of Skill Act, 2015*. Prior to the enactment of this Act, fantasy sports games were not explicitly considered as 'game of skill' under any other policy or judgment. The State of Nagaland through this Act introduced a licensing regime to expressly recognize '*virtual sports fantasy league games*' and '*virtual team selection games*' as the skill based games.[35] Additionally, the State of Sikkim enacted *Sikkim Online Gaming Regulation Act, 2008* that legalized online betting in sports games. The majority of Indian States except Sikkim and Goa have enacted legislation barring betting and gambling after placing their reliance on PGA.

Significantly, the High Court of Punjab and Haryana in 2017 (hereinafter "*Dream 11 Case*") had held that a fantasy sports game was predominantly a game based on skills.[36] In this particular case, the plaintiff moved to the court against fantasy sports game company "Dream11" (defendants) alleging that the game was not based on skill and that Dream11 was conducting business that was covered within the definition of gambling in the State of Punjab. The High Court relied upon the *Lakshmanan Case* and opined that *"petitioner himself created a virtual team of a cricket match between two countries by choosing players, who were to play for two countries collectively and after forming a virtual team as per his own selection, knowledge and judgment, which is thoughtful will, he joined various leagues and after registration which was declared before participating, was not about possibility of winning or losing like horse riding not every bettor is winner."*

32 Jennifer Chu, *Study: There's Real Skill In Fantasy Sports*, MIT News Office (Aug. 07, 2020, 10:00 AM), http://news.mit.edu/2018/hosoi-study-skill-fantasy-sports-1107.

33 *Ibid*.

34 IFSG & KPMG, *The Evolving Landscape Of Sports Gaming In India*, KPMG (Aug. 02, 2020, 11:00 AM), https://home.kpmg/in/en/home/insights/2019/03/online-gaming-india-fantasy-sports.html.

35 *Supra* note 8.

36 *Varun Gumber v. Union Territory of Chandigarh and Ors.*, 2017 CriLJ 3827.

Consequently, the plaintiff's appeal was dismissed by the Supreme Court by upholding the observations made by the High Court in favour of the defendants.[37] This resulted in legalizing skill-based fantasy sports game in India. However, this does not imply that every fantasy game that is created is a game of skill. The Supreme Court at any given time possesses the power to test the merits of the game by determining its character.

Although, there have been instances in multiple States wherein the legality of skill games have been challenged even though when the Supreme Court has affirmed that skill-based games are legal. Recently, in *Chandresh Sankhla v. The State of Rajasthan and Ors*[38], a Public Interest Litigation was filed before the Rajasthan High Court alleging that Dream 11 constitute betting and gambling, and is illegal. The respondent company (Dream11) pleaded that Section 12 of the Rajasthan Public Gaming Ordinance, 1949 grants immunity of game involving "mere skill" and Dream 11 has been held to be a game involving skills (majorly). The court after considering the view adopted by the Punjab & Haryana High Court and the Bombay High Court dismissed the PIL while ruling that skill games are legal as exempted by Section 12 and out of the purview of Gambling laws.

Significantly, the Bombay High Court in *Gurdeep Singh Sachar v. Union of India and others*[39] ([hereinafter "*Gurdeep Singh Case*"), dismissed a Criminal Public Interest Litigation by placing its reliance on previous judicial pronouncements of the Supreme Court and other High Courts. The court upheld the legality of online fantasy sports gaming in India and asserted that such games preponderantly involve skills. The court further opined that unlike betting, the outcome of any team winning or losing in fantasy sports was not dependent on any team losing or winning in the actual world.

However, the Bombay High Court's decision in the *Gurdeep Singh Case* was challenged before the Supreme Court in 2019. Furthermore, the Union of India had also filed an appeal before the court. Subsequently, the petitions were clubbed and were jointly dismissed by the Supreme Court while upholding that Dream 11 facilitates a game of skill.[40] However, the Supreme Court had allowed the Union of India to apply to the Bombay High Court for a specific review for the application of Goods & Services Tax (GST) to Dream 11's operations. Thereafter, the State of Maharashtra filed a special leave petition challenging the Bombay High Court's ruling in the *Gurdeep Singh Case* and subsequently, the court

37 *Varun Gumber v. Union Territory of Chandigarh and Ors.*, Diary No. 27511/2017 (Supreme Court of India, 15/09/2017).

38 Civil Writ Petition No. 6653/2019 (High Court of Rajasthan, 14/02/2020).

39 (2019) 75 G.S.T. 258 (Bombay).

40 SLP (Crl.) Diary No. 42282 of 2019 and SLP (Crl.) Diary No. 43346 of 2019.

ordered a stay on the effect of the Bombay High Court's ruling and has initiated fresh hearings after notifying all the parties.[41] Interestingly, to determine the scope of Good & Services Tax (GST), the court has to pierce the veil to identify the true character of the activities. With the rise of such platforms, there is a possibility that the court might get into the merits of such operations. If the second step of the two-step test established by the court in *Satyanarayan's Case* which lays down to identify the profit or gain made by the organizer of a skill game except for the service fee, there are chances that the court can restrict the activities of the fantasy companies.

This order has created problems for the existing judicial pronouncements that are in favour of online fantasy games.[42] Nonetheless, the question that now persists is whether the Supreme Court will end the speculations regarding the legality of fantasy sports games in India, once and for all.

The Sports (Online Gaming and Prevention of Fraud) Bill, 2018

The Sports (Online Gaming and Prevention of Fraud) Bill, 2018 aims to maintain the integrity of sports in India by curbing fraudulent activities and regulating the commercial nature of sporting events.[43] The Bill primarily addresses the corrupt practices that are prevalent in sports such as spot-fixing, inside information etc., and proposes to punish the offenders.[44] It further proposes to regulate the online betting structure including the functioning of fantasy games by introducing systematic licensing for the operators.[45] Additionally, it lays down the procedure for renewal and suspension of such licenses that have been obtained under the Bill.[46] Significantly, Section 20 of the Bill seeks to establish an Online Sports Gaming Commission[47] that will perform the following functions;[48] a) to keep check on the activities of Online Gaming Websites; b) tracking illegal activities and

41 SLP (Crl.) Diary No. 42282 of 2019.

42 Rishabh Bhardwaj & Neil Deshpande, *Supreme Court Stays Operation Of High Court Judgment On Online Fantasy Sports In India*, Khaitan & Co. (Apr. 14, 2020, 10:00 AM), https://www.khaitanco.com/thought-leaderships/Supreme-Court-stays-operation-of-High-Court-judgment-on-online-fantasy-sports-in-India.

43 Gaurav Laghate, *Shashi Tharoor moves bill to regulate online gaming*, The Economic TimeS (Jan. 15, 2020, 06:48 AM), https://economictimes.indiatimes.com/news/economy/policy/shashi-tharoor-moves-bill-to-regulate-online-gaming/articleshow/67534323.cms?from=mdr.

44 *Ibid.*

45 Section 15, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

46 Section 19 & Section 20, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

47 Section 11, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

48 Section 13, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

suggesting suitable measures to curb illegal functioning of Online Gaming Websites; c) to monitor suspicious betting trends of the user including the Licensees; d) coordination with State and Central law agencies to limit illegal transactions; e) to prepare special reports pertaining to Online gaming for the Central Government; f) to grant, revoke and suspend licenses and to decide fees for renewal and other applications. It is to be noted that Section 14 of the Bill sets out the ambit of Online Sports Gaming.[49] It states that no person shall engage in any online gaming activity except through an Online Gaming Website formulated under the Bill, and no person shall host any Online Gaming Server or Website without a prior License obtained under the Bill.[50] The provision further discusses the punishment in the form of imprisonment for a term 1 year and 3 years respectively and fine for the contravention of the above mentioned.[51] Consequently, the provisions of the Bill address the major concerns of functioning and governance of betting and gambling that have never been discussed in the past.

However, the Bill suffers from certain irregularities as it does not particularly state the name of the games that can be declared as a skill or chanced based games. Furthermore, the element of solving a dispute within a reasonable time arising between different stakeholders is also missing in the proposed draft. It is also important that the role of all stakeholders including the service platforms and the governmental agencies must also be clearly determined to avoid overlapping and unnecessary interference.

Although, in view of the success of sports leagues in India the Bill if implemented can prove to be a major contributor to the revenue regime. Significantly, Justice Mudgal, who headed the probe on IPL spot-fixing and betting scandal, himself added that legalizing betting in India would help the government generate income by reducing illegal spot-fixing, betting, etc.[52] Interestingly, the Indian Premier League, one of the richest league in the world places itself at the top of the offshore betting companies' revenue list across the world.[53] Moreover, the Betfair Exchange in 2018 traded a total of $4.3 billion, which is just a small part of the overall legal betting transactions taking place across the world.[54] Additionally, on 5

49 The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

50 *Ibid*.

51 *Ibid*.

52 *Mudgal for Legalised Betting*, The Telegraph (Apr. 29, 2020, 11:30 AM), https://www.telegraphindia.com/sport/mudgal-for-legalised-betting/cid/1335100.

53 Somshuvra Laha, *Legally illegal, but you can bet online in India*, The Hindustan Times, (May 21, 2020, 01:15 PM), https://www.hindustantimes.com/india/legally-illegal-but-you-can-bet-online-in-india/story-SW04haVrqOq1MzlFBvOjiP.html.

54 Vithushan Ehantharajah, *Professional betting and how it works during IPL*, Cricbuzz (Mar. 22, 2020, 10:42 AM), https://www.cricbuzz.com/cricket-news/107235/professional-betting-and-how-it-works-

July 2018, the Law Commission of India (headed by Justice B.S. Chauhan) tabled its final report on the prospect of legalizing online betting in India.[55] The Commission functioning under a 2016 order passed by the Supreme Court concluded that it is difficult to prohibit the practices of betting and gambling, although, it is desirable to formulate a regulation to oversee such activities.[56] In countries like the U.S. thee ae over 20 States that have legalized sports betting and are relying on it to cover the budget deficit in 2020.[57] It is expected that in total, sports betting will account for $1 billion in taxable gross gaming revenue this year, with the vast majority of this tax income coming from the 4 leading markets namely New Jersey, Nevada, Pennsylvania, and Indiana.[58] Indian Government should also consider such possibilities to cover the deficit by implementing such Bills.

One of the many reasons against legalizing sports betting is morally based. However, law and morals are not correlated. All the state should and has done to ensure a balance between law and morality is to control actions that for certain people do not perform well on a moral compass; such as drinking, smoking, etc.[59] With respect to the criminalization of betting in sports, we must bear in mind that criminal legislation will only be involved in the event of a breach. There is a gambling or betting agreement between two parties resulting in one party winning and the other losing, and such an arrangement is unlikely to be public harm or a danger to society's morality.[60]

In light of the above, The Sports (Online Gaming and Prevention of Fraud) Bill 2018 has taken into account all the necessary provisions for the smooth regulation of fantasy sports and betting activities. The licensing regime proposed by the Bill will act as an established structure that will guide companies to follow a systematic mechanism. Also, the system of levying fines for the breach of the provisions of the Bill will reduce the chances of contravention as it can lead to suspension and cancelation of the license.[61] In addition to

during-ipl-cricket-rcb-csk-mi-cricbuzzcom.

55 PRS Legislative Research, *Legal Framework: Gambling and Sports Betting Including Cricket in India*, PRS Legislative Research (Mar. 22, 2020, 10:50 AM), https://www.prsindia.org/report-summaries/legal-framework-gambling-and-sports-betting-including-cricket-india.

56 *Ibid*.

57 Charles Norton, *Why States Are Betting On Sports Gambling To Cover Budget Deficits*, Forbes (Jul. 1, 2020, 12:15 PM), https://www.forbes.com/sites/charlesnorton/2020/07/01/why-states-are-betting-on-sports-gambling-to-cover-budget-deficits/#2075ab965255.

58 *Id*.

59 Snehal Walia, *Legalisation Of Sports Betting In India: What Is The Best Bet?*, Lex Sportiva (Jun. 4, 2020, 11:45 AM), https://lexsportiva.blog/2020/06/04/legalisation-of-sports-betting-in-india-what-is-the-best-bet/#_edn7.

60 *Ibid*.

61 Section 20 & Section 22, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of

this, the penal provisions of the Bill will act as a deterrent against the threat of fraudulent and illegal operations. However, the Sports (Online Gaming and Prevention of Fraud) Bill 2018 lapsed due to the dissolution of the Assembly prior to the 2019 elections. It has not been reintroduced, although, it is considered to be an important foundation for the regulation of sports activities in India.

Challenges Faced by Fantasy Sports in India

The *Dream 11 Case* has changed the landscape of paid online skill fantasy games in India. According to industry estimates, there are nearly 50 to 80 companies scrambling for users in this market with Dream 11 emerging as industry leaders due to hefty investments made by Tencent and Kalaari, while others such as Fantain, Halaplay, and My Team are also witnessing major attention.[62] Perhaps this judgment has laid down a foundation for the industry's surge over the last few years.

However, as different states have the power to control the affairs of gambling within their territories through their legislation, the users and companies are in a constant dilemma to identify between skill and chance-based games that qualify as legal games in different states. Moreover, stakeholders broadly face the following challenges:

I. Lack of a Common Precedent- Games such as Poker and Rummy suffer due to irregularities and vague interpretations laid down under state legislations. Moreover, due to multiple legislations in different states, it becomes difficult to establish a common understanding throughout the country as PGA does not have the authority to rule over the state law.

II. Data Privacy and Data Protection - Right to Privacy is a fundamental right enshrined under Article 21 of the Indian Constitution.[63] A user registering on a paid fantasy sports website needs to provide his personal details including his bank account and PAN Number to withdraw his winnings (if any). The user providing this information gives exclusive access to the operating company. As new companies are entering the market and facilitating the use of fantasy websites, the users are creating their accounts on multiple platforms to experience

2018.

62 Rahul Sachitanand, *Despite Initial Success, Fantasy Gaming May Need A New Strategy*, The Economic Times (Apr. 16, 2020, 12:30 PM), https://economictimes.indiatimes.com/industry/media/entertainment/despite-initial-success-fantasy-gaming-may-need-a-new-strategy/articleshow/68867473.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

63 *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1.

different games. However, there is a significant risk that these details might not be completely protected and secured due to the lack of a policy to regulate the functioning of these companies. With the advent of server hacking, and consistent breaches leading to data leaking, the details of users and companies face an imminent danger that requires immediate attention.

III. Lack of a Regulatory Framework- Due to the absence of a *sui-generis* policy to administer the functioning of skill games in India, companies are facing difficulties in executing a systemic business model. With the changing dynamics of technology and gaming interface, a policy to address the issues relating to gaming infrastructure is a necessity. Additionally, at the central level there is no procedural and substantial framework to govern online establishments. Moreover, the lack of clarity regarding games that form part of a legal regime further adds to the problems faced by companies.

IV. Fair Play and Dispute Resolution- A major challenge for the companies is to design a fair-play violation policy that ensures stringent adherence to the guidelines laid down in the rules and regulations. According to the *ThreatMetrix Gaming and Gambling Cybercrime Report*, nearly one out of 20 new accounts are created for fraudulent transactions.[64] This suggests that this rapidly rising industry is affected by fraud and has become a prime target for fraudsters.[65] Moreover, the lack of a dispute resolution mechanism further adds to the problems as the disputes being dynamic in nature require a suitable procedure to resolve the issues of the users.

Conclusion & Recommendations

Skill gaming in India is experiencing tremendous growth that is driven by technological advancements, innovation, and changing patterns of consumer consumption. The current state of regulatory environment and perception of individuals would require this industry to develop policies and procedures such as self-regulation, maintaining high standards of corporate governance, honesty, and accountability. It is imperative that different stakeholders must collaborate with self-regulatory bodies such as the Federation of Indian Fantasy Sports (FIFS) to organize their structure according to a formal code of conduct. Organizations like FIFS promote self-governance for fantasy sports by creating a system

64 Team Springworks, *The importance of background checks in the gaming industry*, Springworks, (Aug. 09, 2020, 12:15 PM), https://blog.springrole.com/the-importance-of-background-checks-in-the-gaming-industry-1be8bdf7326.

65 *Ibid*.

of common industry practices and organizes research-oriented studies to focus upon the changing dynamics of sports industries. It further establishes a complaint and redressal mechanism for the users to resolve their issues and queries pertaining to the functioning of online fantasy games.

Furthermore, the government at the central level must formulate a *sui-generis* policy to promote and establish guidelines for the operation of skill-based games. For example, Malta Gaming Authority has issued *The Skill Gaming Regulations, 2017* to provide a broader framework and logical criteria for the assessment and characterization of a game of skill and their functioning. These criteria consist of multiple conditions such as nature and objective of a game, the required skills, and eligibility to participate.

In addition to this, the government must address the issue of obtainment and the protection of the user's data. This issue can be resolved by the companies by following a set of principles such as end-to-end encryption of the user's transaction to safeguard his details and banking operations. Additionally, a secured system must be developed to store sensitive information of the users. These initiatives would not only reduce the ambiguity pertaining to skill games but will also improve consumer protection while ensuring growth of an industry that contributes to the development of all stakeholders.