

The ‘Skill’ Element in Fantasy Sports Games

By Gowree Gokhale¹ and Rishabh Sharma²

Across different jurisdictions in the world, games of skill and games of chance played for stakes are treated differently. Indian laws as well make a distinction between skill games and chance games. The anti-gambling laws of most Indian states (“**Gaming Legislations**”) exempt ‘games of mere skill’. The Supreme Court of India (the “**Supreme Court**”) has interpreted the words ‘mere skill’ to mean “preponderantly of skill”.³ The Supreme Court has also held that conducting of skill games does not amount to “gambling” but a commercial activity and therefore entitled to constitutional protection.⁴

In this chapter we have analyzed the legislative framework in India with respect to ‘games of mere skill’ and its application to fantasy sports games.

Skill vs. Chance Debate

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.⁵ While deciding the question of “skill versus chance”, Indian courts have adopted the test followed by the U.S. courts known as the “dominant factor test”, or “predominance test”. This test requires a court to decide whether chance or skill “is the dominating factor in determining the result of the game”. The Supreme Court has applied this test in relation to card games such as rummy (*Satyanarayana case*⁶) and horse racing (*Lakshmanan case*⁷) in detailed orders.

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Rummy: In the *Satyanarayana case*, the Supreme Court held that the game of rummy is not a game entirely of chance like the ‘three-card’ games (i.e., ‘flush’, ‘brag’, etc.) which are games of pure chance. In all games in which cards are shuffled and dealt out, there exists an element of chance, because the distribution of the cards is not according to any set pattern, but is dependent on how the cards find their place in the shuffled pack. However, the Supreme Court concluded that rummy is a game of skill, as the fall of the cards needs to be memorized and the building up of rummy requires considerable skill in holding and discarding cards. The Supreme Court in this case also observed that bridge is a game of skill.

Horse Racing: The Supreme Court has held that betting on horse racing was a game of skill since factors like fitness, and skill of the horse and jockey could be objectively assessed by a person placing a bet. The relevant skill, therefore, in horseracing is the bettor’s ability to assess the horse and jockey.

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

4 *Id.*

5 *Manoranjithan Manamyil Mandram v. State of Tamil Nadu*, AIR 2005 Mad 261.

6 *State of Andhra Pradesh v. K. Satyanarayana*, AIR 1968 SC 825.

7 *Dr. K.R. Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153.

What are Fantasy Sports Games?

Fantasy sports games are games which involve users drafting fantasy teams based on certain conditions from a list of players scheduled to play live games on a given day. The users pay an entry fee to enter a contest and it is pooled in for distribution among the users (“**Entry Pool**”) after deduction of a service/administrative fee by fantasy sports games providers. The users draft their teams based on their application of knowledge (gathered through systematic research), attention, experience and adroitness regarding the relevant sport. Based on the performance of the players selected by the user to draft his/her team, the user collects points. The users are ranked based on the points their selected players accumulate throughout the contest as per their on-field actions and scoring metrics for the contests.

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The Skill Element in Fantasy Sports Games: Global Perspective

There have been a few international cases wherein various courts have taken into account recent academic studies and legal precedents and held that fantasy sports games are games preponderantly of skill and not games of chance alone, subject to certain conditions.

The legality of online fantasy sports games in the U.S. is persuasively supported by *Humphrey v. Viacom*⁸ (the “*Humphrey case*”). In the *Humphrey case*, the plaintiff had claimed that the registration fees paid by fantasy sports league participants constitute “wager” or “bets” and that the winners are determined predominantly by chance (due to potential player injuries and other chance circumstances). In dismissing the plaintiff’s complaint, the district court held that fantasy sports are games of skill, depending on the fantasy participant’s skill in selecting players for his or her team, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.

Data reported in the expert report prepared by Prof. Zvi Gilula has shown how statistical analysis suggests that fantasy sports games are games preponderantly based on skill.⁹ The report focuses on the following key points to show that fantasy sports games are games of skill: (i) what the player (fantasy sports player) does has a direct effect on the contest results; (ii) statistics suggest how skilled, well-informed players are more likely to do better than non-skilled players within a set period of games; and (iii) over time, a player can get better and be more likely to win contests by applying analysis, skills and awareness of the games acquired by them.

Prof. Zvi Gilula’s report observes that the participants in the fantasy sports games offered by companies like FanDuel and DraftKings (the two most prominent companies in the U.S. offering fantasy sports games) have large differences in win rates (i.e., proportion of contests won) averaged over time. To illustrate the import of this point, Prof. Gilula had generated a simple simulation exercise which showed that, the large observed differences in performance across DraftKings clients was consistent with some players persistently out-performing other players over time. The simulation exercise assumed that in each week, an “average performer” and a “top performer” participates in 10 guaranteed pool prize contests. On one hand, the probability of success (win rate) of the hypothetical average performer was found to be 19%. On the other hand, the probability of success (win rate) of the hypothetical top performer was found to be 47% for the same period. The large gap between the win rates of “average” users of DraftKings and top-performing users was statistically found to be both practically and statistically significant.

⁸ *Humphrey v. Viacom*, 2007 BL 38423 (D.N.J. 2007).

⁹ *FanDuel v. Schneiderman*, N.Y. Sup. Ct., 161691/2015 available at: <http://www.legalsportsreport.com/wp-content/uploads/2015/11/DK-Oppn-to-Pl.pdf>.

The report argues that it is highly unlikely that the difference in average win rates between top performers and average performers can be explained solely by chance.

This is to say that, if we consider a person who was consistently winning fantasy sports games and has a good understanding of the game and pit them against either a person with little knowledge of fantasy sports games, or against a person who selects a random lineup, the player who is skilled and a consistent winner will be victorious most of the time. The ability to consistently find players who over-perform when compared to their salary value is a critical element denoting the skill involved in fantasy sports games.

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The Skill Element in Fantasy Sports Games: Position in India

In 2015, the State of Nagaland introduced a licensed regime for skill games under Nagaland Prohibition of Gambling and Promotion and Regularisation of Online Games of Skill Act, 2015 (“**Nagaland Gaming Legislation**”). Prior to the notification of the Nagaland Gaming Legislation, fantasy sports games were not expressly held to be a “game of skill” in any Indian legislation or judgment. The Nagaland Gaming Legislation expressly recognized, *inter alia*, “virtual sport fantasy league games” and “virtual team selection games” as skill games. However, in our view these games should satisfy the skill preponderance test that has been specified in the definition of the “Games of Skill” of the Nagaland Gaming Legislation.

In 2017, the High Court of Punjab and Haryana (“**P&H High Court**”) became the first Indian court to rule a fantasy sports game to be a game predominantly based on skill.¹⁰ The plaintiff in this matter was

¹⁰ Shri Varun Gumber v. Union Territory of Chandigarh and Ors., CWP No. 7559 of 2017.



registered as a player on the platform Dream11.com, which was operated by the respondent company, Dream11 Fantasy Private Limited (“**Dream11**”). He lost while playing fantasy sports games tournaments offered on Dream11.com. The plaintiff moved the P&H High Court alleging that fantasy sports was not based on skill and that Dream11 was carrying on business covered within the definition of ‘gambling’ under the gambling legislation applicable to the state of Punjab.

The P&H High Court relied on the Supreme Court’s decision in the *Lakshmanan case*. The P&H High Court observed that playing fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing. The P&H High Court relied on the following arguments put forth by Dream11 adjudicating the fantasy sports game offered by Dream11 to be a ‘game of skill’

The P&H High Court observed that playing fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing.

A user, while drafting his fantasy team on Dream11, was required to:

- Pick a team consisting of at least as many players as required to constitute a real world team to score points for the duration of at least one entire real world match;
- Assess all the players available to make a team and evaluate the worth of a player against the other players keeping aside bias for an individual or a team;
- Based on knowledge and awareness of player’s performance, evaluate a player’s statistics;
- Adhere to an upper limit of spend to draft a team while ensuring that the team did not entirely/ substantially consist of players from a single real world team. This pre-condition also ensures that a user does not create a situation resembling the act of betting on the performance of a single team;
- Analyse the conditions of the other factors pertaining to the game, pitch, form of players, etc;
- Constantly monitor the scores of players drafted by a user.



An appeal was filed against the decision passed by the P&H High Court in this case and a two judge bench of the Supreme Court passed an order dismissing the appeal.¹¹ Thus, the P&H High Court order has reached finality in relation to the specific game format that was examined by the P&H High Court. Since the Supreme Court has given its confirmation to the order of the P&H High Court, the same could be construed as binding in all the Indian states with respect to specific game format analysed by the P&H High Court.

There are certain Indian states that do not provide specific exemptions for games of skill in their Gaming Legislations. However, it can be argued that those legislations in any case cannot apply to games of skill.

Conclusion

Based on what is set out above and the legal precedents, both internationally and in India, it can be persuasively argued that fantasy sports games are games in which success depends upon a substantial degree of skill. It is also pertinent to note that, not all fantasy sports games have been held to be games 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, viz., restrictions on the number of players from a single team, upper caps and limits, etc., plays a critical role in analyzing 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.

¹¹ Shri Varun Gumber v. Union Territory of Chandigarh and Ors., Supreme Court Order dated September 15, 2017, Supreme Court of India, Record of Proceedings, Diary No. 27511/2017.