

Destination India:

Setting The “Odds” Against The Legal Juggernaut

Can the land of spices be the new ace in the pack for your gambling business?¹

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India's growth saga is no secret to the world and it finds a place in the global aspirations of most companies. With a burgeoning population of well over 1.27 billion and an unparalleled market to offer, it is no wonder that India has attracted the interests of even the international gambling industry. The diverse geography that India offers, not just the Indian population, but also the tourists it attracts, gives further boost to the potential that India has to offer.

History of Indian culture speaks of innumerable episodes of gambling, in spite of its many vices. References of gambling can be traced to one of the oldest mythological epics of India, Mahabharata, in which the opponents' skills at board and dice games were tested rather than by waging wars. In fact, even before the six side dice was invented, Indians used the nuts of the Bibhitaki tree as dice.

Many years hence, mobile gaming, television and online gaming businesses have received great impetus owing to the telecom revolution, penetration of internet and cable in substantial parts of the country and easy accessibility of affordable mobile and gaming devices.

A number of foreign players are exploring possibilities to set up shop in India. However, their aspirations are saddled by myriad of stringent laws in India. Through this article we introduce the readers to the maze of Indian laws which one needs to factor in while structuring any gambling operations in India.

A. The Matrix of Gambling statutes *Physical Gaming & Casinos*

Under the Constitution of India, the State Legislatures

have been entrusted with the power to frame state specific laws on 'betting and gambling'.² While, the Public Gambling Act, 1867, is a central enactment on the subject it has been adopted only by certain states of India. The other states legislatures have enacted their own legislation for regulating gaming activities within their state ("Gaming Legislations").

Most of these Gaming Legislations were enacted prior to the advent of virtual gaming and therefore primarily regulate and prohibit physical gaming and gambling in physical premises defined as "gaming or common gaming houses". However, there are some states where gaming per se is prohibited.

There are certain states that have legalised some form of gaming and issue specific licenses to the gaming establishments. For instance, the legislation in the State of West Bengal³ specifically excludes 'games of cards like Bridge, Poker, Rummy or Nap' from its definition of "gaming and gambling" and allows the organisation of such games on procuring a permit from the Commissioner of Police in Calcutta or the District Magistrate or the Sub-divisional magistrate when such game is played in any public place.

'Gaming' as per most Gaming Legislations is understood to mean "the act of wagering or betting" for money or money's worth but does not include wagering or betting upon a horse-race/dog-race (when such wagering or betting takes place in certain circumstances), games of "mere skill" and lotteries.

Keeping in sync with international practice, even the apex court of the country, the Supreme Court of India ("SC"), has interpreted the words "mere skill" in a manner to include games which are preponderantly

¹ Constitution of India, 1950, Seventh Schedule, List II, Entry No. 34.

² West Bengal Gambling & Prize Competition Act, 1957

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

⁴ Manoranjithan Manamyil Mandram v. State of Tamil Nadu, AIR 2005 Mad 261.

⁵ The Goa, Daman and Diu Public Gaming Act, 1976.

⁶ Sikkim Casinos (Control and Tax) Act, 2002 read with Sikkim Casino Games commencement (Control and Tax) Rules, 2007 and Sikkim Casino Games (Control

of skill despite there being an element of chance. Whether a game is of chance or skill is usually a question of fact to be decided on the facts and circumstances of each case.⁵

Thus, if structured carefully, it would be possible to legally offer games which satisfy the test of *skill versus chance* through the physical as well as virtual medium (including internet and mobile), throughout India.

With respect to casinos, Goa allows licensed casinos in five star hotels and on board offshore vessels. In fact the casinos give a boost to the ever increasing tourist population in Goa. Daman & Diu⁶ and Sikkim⁷ also allow casinos to a limited extent under a license.

Online Gaming

The State of Sikkim is so far the only state in India which has enacted a law for online gaming and sports betting. ‘*The Sikkim Online Gaming (Regulation) Act, 2008*’ was passed with an object of controlling and regulating online gaming through electronic or non-electronic formats, and to impose a tax on such games, in the State of Sikkim.⁸ An interested person can obtain a “license” for the purpose of conducting online games such as such as Roulette, Black-jack, Pontoon, Puntobanco, Bingo, Casino Brag, Poker, Poker dice, Baccarat, Chemin-de-fer, Backgammon, Keno and Super Pan 9 and sports betting, including its organization, management or promotion or negotiation or receipt of bets. Further, a licensee can obtain the prior approval of the State government of Sikkim to offer any other /addition online games under the license.

Speculation is rife that other states such as Goa may also be contemplating enacting laws to regulate online gaming.

However, new guidelines⁹ for intermediaries had been notified under the Information Technology Act 2008, owing to which ISPs may increasingly block gaming websites suo motu or on notices from the Department of Telecom or similar authorities. The guidelines require the intermediaries like ISPs to observe due diligence and include terms in their user

agreements discouraging the users to carry out any activity in relation to or encouraging gambling. Therefore, even if an activity is considered legal in a state, under the federal IT law, one may continue to run the risk of ISPs blocking websites.

Lotteries

Lotteries, on the other hand, have been expressly excluded from the purview of the Gaming Legislations and are governed by the central law¹⁰, Lotteries (Regulation) Act, 1998 under which the Lottery (Regulation) Rules 2010 and state specific rules have been framed. The law allows the state governments to organize, conduct or promote a lottery, subject to the conditions specified therein. The state governments may appoint an individual or a corporation as a “distributor or selling agent” through an agreement to market and sell lotteries on behalf of the organizing State. However, lottery is banned in certain states in India like Madhya Pradesh.

B. Prohibitions under the Gaming Legislations

Most Gaming Legislations prohibit¹¹ the acts of:

- Owning, keeping, occupying or having care and management of a gaming house/ common gaming house;
- Advancing or furnishing money for the purposes of gaming to persons frequenting any such gaming house;
- Gaming in a common gaming house or being present for the purpose of gaming in a common gaming house;
- Gaming in any public street, place or thoroughfare;
- Printing, publishing, selling, distributing or in any manner circulating anything with the intention of aiding or facilitating gaming.
- Gaming per se (This is not applicable to every state. Only the Gaming Legislation of states like Orissa prohibit the act of gaming itself)

The intention of the legislature seems to be largely to impose restrictions on use of a physical enclosed premises for the

purposes of making “profit or gain” from the use of such premises for gaming. Thus, gaming in a private house should ideally not be prohibited especially if there is lack of intent on the part of the owner to derive any profit or gain from the use of his house for gaming purposes. In some states like Delhi the element of profit or gain to the person owning, occupying or keeping such premises may not be necessary.

There is a strong argument to support the analogy that even when a person is accessing online gaming websites from his house, he would not be liable for any offences under the Gaming Legislations. In accordance with the principles of interpretation of statutes, penal provisions are to be construed strictly and unless the legislature specifically amends the law, one would tend not to read a virtual medium to be covered under the prohibitions. This again is subject to a number of caveats for the website owners. For instance, the situation maybe different where such gaming websites are accessed through public places such as clubs or cyber café where the cyber cafes derive profits by allowing the use of the computer terminals. In this case, the likelihood of triggering the prohibitions is higher.

These factors become extremely relevant at the time of structuring and determining the restrictions to the audience that an online gaming website can offer its services.

C. Legality of playing Rummy & Poker tournaments

Games of Skill or Chance?

In the case of *State Of Andhra Pradesh v K. Satyanarayana & Ors*¹² (“Satyanarayana Judgment”), the SC specifically tested the game of Rummy on the principles of skill v chance and held that Rummy is not a game entirely of chance like the ‘three-card’ game (i.e. ‘flush’, ‘brag’ etc.) which are games of pure chance. It was held that Rummy is mainly a game involving preponderance of skill rather than chance. The SC based its conclusion on the reasoning that Rummy requires certain amount 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 chance element in Rummy is of the same level as that involved in a deal at a

and Tax) Amendment Rules, 2011

⁷ The Sikkim Online Gaming (Regulation) Rules, 2009, were subsequently passed on March 4, 2009 (and the same have been amended from time to time)

⁸ In April 2011

⁹ Under the Constitution of India, the central legislature has the power to enact laws with respect to lotteries (Constitution of India, Seventh Schedule, List I, Entry No. 40).

game of bridge. 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 upon how the cards find their place in the shuffled pack. Presently, there has been no case in India where such card games (except Rummy) have been tested against the principle of skill versus chance. But by reference the SC has stated flush and brag to be games of chance and bridge to be a game of skill.

Like in most jurisdictions, even in India, the growing popularity of Texas Hold'em Poker cannot be doubted. There is lack of clear jurisprudence in India on whether Texas Hold'em Poker is a skilled based game. In the absence of any statutory law or Indian precedents, the Indian Courts tend to look at the case laws of other countries.

Interestingly, Karnataka High Court recently clarified that no specific license or permission was required in Karnataka for conducting the game of poker if it played as a game of skill, the court did not go into the substantial merits of whether poker as was proposed to be played is a game of skill under Indian laws.¹³

Collection of stakes at the Rummy & Poker tournaments

Another important issue that arises especially for online poker and rummy tournament websites is whether the owners hosting the tournaments (and other games of skill) can collect stakes or derive profits from the players.

The Madras High Court¹⁴ in 2011 held that rummy played with stakes would amount to gambling and unsettled a rather settled position of law. Different interpretations by different high courts give rise to ambiguities on the position of law on collection of stakes from the game of rummy. However, this matter is in appeal before the SC which has

currently temporarily stayed the operation of this order. While the said appeal pertains to playing Rummy with stakes in physical premises, certain online platforms offering Rummy have also filed Special Leave Petitions before the SC challenging the Madras High Court order and the said cases have also been combined with the appeal pending before the SC. This will perhaps be one of the most critical decisions for the industry and all eyes are set on the court's impending verdict.

D. Prohibitions for Foreign Direct Investment & Foreign Technology Collaborations in Gaming Industry

Under the Foreign Direct Investment Policy (FDI Policy) of India issued by the Ministry of Commerce & Industry, Government of India, Foreign Direct Investment (FDI) is prohibited in entities involved in (i) 'lottery, including government, private lottery, online lotteries, etc; and (ii) gambling and betting including casinos etc. The terms 'lottery, gambling and betting' have not been defined under the FDI Policy. Hence, one may rely on the statutes in pari materia, judgments (both domestic and foreign), dictionaries etc. for the meaning of these terms.

The FDI Policy also prohibits foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract for lottery business and gambling and betting activities. Thus, any arrangement between Indian and foreign entities for conducting gaming business needs to be carefully structured to avoid risks under the FDI regulations. For violating the FDI Policy, one may have to pay a penalty of up to thrice the sum involved where such amount is quantifiable, or up to INR 200,000 (approx. USD 4000) where the amount is not quantifiable, and where the contravention is a continuing one, further penalty which may

extend to INR 5,000 (approx. USD 100) for every day after the first day during which the contravention continues.

E. Can India be a destination for foreign gaming business?

Usually, while the local partners bring in the local reach and knowledge about the customers in the territory, the foreign player would be responsible for the technology and standardizing processes. A number of complex yet creative structures are possible. However, while structuring such ventures, the interplay between federal and state laws must be borne in mind and one needs to be careful that the prohibitions of FDI and foreign technology collaborations are not triggered. Apart from the Gaming Legislations and FDI restrictions, one needs to be also aware of the Indian laws relating to exchange control, payment systems, anti-money laundering etc. which may restrict the manner in which the businesses are structured.

While one can certainly place a bet on the land of spices being a worthy gamble to make, the risk is high and the stakes even higher. With the federal elections coming up, it would be interesting to see whether the government now looks at profiting from the growing gaming business or imposing further restrictions.

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¹⁰ All Gaming Legislations prescribe penalties which are more or less similar. The Bombay Prevention of Gambling Act 1887 imposes fines and imprisonment for offenders. A first offence is punishable with a fine and imprisonment of at least INR 500 and 3 months respectively; a second offence with a fine and imprisonment of at least INR 1,000 and 6 months respectively and a third or subsequent offence with a fine and imprisonment of at least INR 2,000 and imprisonment for one year respectively

¹¹ 1968 AIR 825.

¹² Indian Poker Association and Ors. v. State of Karnataka and Ors Writ Petition Nos. 39167 to 39169 of 2013 decided on October 8, 2013.

¹³ Director General of Police, Chennai v. Mahalakshmi Cultural Association W.A.No. 2287 of 2011