

The Curious Case of the Indian Gambling Laws

Legal Issues Demystified

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The Gaming Laws of India: Gambling, Social And Casual Gaming

Games, whether in the form of gambling, or popular social or casual games, are enjoyed by people of all age groups across the globe for their entertainment value. In fact, gambling, irrespective of its many vices, has been a part of the Indian culture since time immemorial. Even before the six side dice was invented, Indians used the nuts of the *Bibhitaki* tree as dice. References to gambling can be traced to the *Mahabharata*, one of India's oldest mythological epics, in which the opponents were tested based on their skills at board and dice games rather than through wars.

The gaming industry has witnessed a paradigm shift with the evolution of television, digital and online gaming models. Following the increased internet penetration in the mid-1990s, from being targeted at academics to being used by the general population, internet-based online games gained popularity. The popularity of online gambling is best evidenced by the rapid growth of the virtual casino industry, which is yet to be tapped by the Indian market.

Mobile and online models received further impetus in India by the telecom revolution, penetration of internet and cable in substantial parts of the country, and the increasing popularity of new media with the masses. This huge size of the potential market in India has led to a surge in the number of online gaming sites over the last few years. The impact is evident by the rise in demand for quality game content, game developers, game developing companies and the gaming industry in general. Gaming as a whole is gaining increasing significance

as a major source of income and a profitable business venture worldwide. According to the FICCI-KPMG Indian Media and Entertainment Industry Report 2014, the Indian gaming industry showed growth of 25.5 per cent in 2013, is expected to grow at a CAGR of 16.2 per cent between 2013 and 2018.¹

Given the high growth potential of the gaming industry in India, many foreign entities are exploring possibilities to set up operations here. Similar trends are reflected in many industry related research reports which say that several global gaming firms have opened offices in India or have signed distribution agreements with leading Indian mobile game developers in order to distribute their products in India. While operating gaming businesses is easier in some countries of the world² where gaming is legal, the situation is not so easy in India where the laws are stringent.

With the advent of social and casual games both offline and online, the 'gaming' industry can now be said to comprise of 2 verticals – gambling in both traditional and online forms, and skill based social or casual gaming.

In this paper, we discuss the scope of gambling / gaming laws and the evolution of the gambling / gaming industry in India. To clarify, in this paper we have used the term 'gaming' to refer to social and casual gaming. However, under certain Indian laws, gambling activities are referred to as 'gambling', and specific references to the same may be included in this paper.

1. <http://www.ficci.com/spdocument/20372/FICCI-Frames-2014-KPMG-Report-Summary.pdf>
2. A few examples include Macau, Nepal, U.K. etc.

1. Gambling, Betting and Lotteries

I. Overview Of The Legal Framework Regulating The Gambling Industry

A. Physical Gambling & Sports Betting

Under the Constitution of India, the state legislatures have been entrusted with the power to frame state specific laws on 'betting and gambling'.³ The Public Gambling Act, 1867, is the central enactment on the subject, which has been adopted by certain states of India. The other states in India have enacted their own legislation to regulate gaming / gambling activities within its territory ("**Gambling Legislations**"). Most of these Gambling Legislations were enacted prior to the advent of virtual / online gambling and therefore primarily refer to gambling activities taking place in physical premises, defined as "gaming or common gaming houses".

Some Gambling Legislation regulating physical gambling and sports betting are as follows:

- Assam Gaming and Betting Act, 1970
- Bombay Prevention of Gambling Act, 1887
- Goa, Daman and Diu Public Gambling Act, 1976
- Karnataka Police Act, 1963
- Madhya Pradesh (C.P.) Public Gambling Act, 1867
- Madhya Bharat Gambling Act, 1949
- Orissa Prevention of Gambling Act, 1955
- Public Gambling Act, 1867 (applicable to Uttar

Pradesh, Punjab, Delhi and Madhya Pradesh)

- Punjab Public Gambling Act, 1867
 - Sikkim Online Gaming (Regulation) Act, 2008
 - Tamil Nadu City Police Gaming Rules, 1949
 - Tamil Nadu Gaming Act, 1930
 - The Andhra Pradesh Gaming Act, 1974
 - The Andhra Pradesh Gaming Rules, 1976
 - The Delhi Public Gambling Act, 1955
 - The J. & K. Public Gambling Act, 1977
 - The Kerala Gambling Act, 1960
 - The Meghalaya Prevention of Gambling Act, 1970
 - The Pondicherry Gaming Act, 1965
 - The Rajasthan Public Gambling Ordinance, 1949
 - The West Bengal Gambling and Prize Competitions Act, 1957
 - The West Bengal Gambling Rules, 1958
 - Uttar Pradesh Public Gambling Act, 1961
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B. Online Gambling

The State of Sikkim is the only state in India which has enacted a law for online gambling and sports betting. *The Sikkim 'Online Gaming (Regulation) Act, 2008'* was passed on June 28, 2008 with the dual objects of controlling and regulating online gaming through electronic or non-electronic formats, and imposing a tax on such games in the State of Sikkim. *The Sikkim Online Gaming (Regulation) Rules, 2009*, were subsequently passed on March 4, 2009 (and the same have been amended from time to time)

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

(“**Sikkim Online Gaming Laws**”). Other states such as Goa and Nagaland are contemplating enacting laws on similar lines.

C. Casinos

The Gambling Legislations regulate casinos in India. The Gambling Legislations of Goa, Daman & Diu⁴ and Sikkim⁵ allow gambling to a limited extent, under a license, in five star hotels. In Goa, the law also permits casinos on board an offshore vessel.

D. Lotteries

Under the Constitution of India, the central legislature has the power to enact laws with respect to lotteries.⁶ Lotteries have been expressly excluded from the purview of the Gambling Legislations and are governed by the central law - Lotteries (Regulation) Act, 1998 under which the Lottery (Regulation) Rules 2010 (“**Central Lottery Laws**”) and state specific rules have been framed (“**Lottery Laws**”). The Central Lottery Laws allow the state governments to organize, conduct or promote a lottery, subject to the conditions specified in the Central Lotteries Laws. The state governments may appoint an individual or a corporate as a “distributor or selling agent” through an agreement to market and sell lotteries on behalf of the organizing State. While some states such as Punjab, have gone to the extent of specifically providing for and approving online lottery systems⁷ to be governed by the state Lottery Laws, lottery is banned in certain states in India, for example Madhya Pradesh.

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

5. Sikkim Casinos (Control and Tax) Act, 2002 read with Sikkim Casino Games Commencement (Control and Tax) Rules, 2007 and Sikkim Casino Games (Control and Tax) Amendment Rules, 2011

6. Constitution of India, Seventh Schedule, List I, Entry No. 40.

7. AIR 1996 SC 1153

E. Horse Racing

Horse racing has been given a special status under the Gambling Legislations. Most legislations specifically exclude betting on horse races from within their purview. In *K R Lakshmanan vs State of Tamil Nadu*⁸ (“**Lakshmanan Case**”), the Supreme Court 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 analysis is interesting to note as this reasoning could possibly be used to justify other forms of betting as games of skill, especially sports betting.

II. Physical & Internet Gambling

The most common forms of gambling in India, from time immemorial, are the many versions of card games like *teen patti* (akin to flush), poker, rummy and bridge, as well as sports betting. With the dawn of technology, these games have effectively extended their reach and popularity via the digital medium. Most popular online gambling sites in India are card games sites hosting Rummy and Poker tournaments.

The Gambling Legislations were enacted when digital media and internet were uncommon and its reach was not as far as it is today. The Gambling Legislations deal with gambling in the context of a physical enclosure, termed a “common gaming houses”. Therefore, when these Gambling Legislations are read in the context of online and digital gambling, their interpretation and applicability gets complex.

A. Meaning of Gambling

‘Gambling’ as per most Gambling Legislations is understood to mean “the act of wagering or betting” for money or money’s worth.

Gambling under the Gambling Legislations however does typically not include (i) wagering or betting upon a horse-race/dog-race, when such wagering

8. AIR 1996 SC 1153

or betting takes place in certain circumstances, (ii) games of “*mere skill*” and (iii) lotteries (which is covered under Lottery Laws).

B. Games Of Skill Outside The Purview Of Gambling

The Gambling Legislations provide that the restrictions would not apply to games of “*mere skill*”.

The Supreme Court of India (“SC”) has interpreted the words “*mere skill*” to include games which are preponderantly of skill and have laid down that (i) the competitions where success depends on substantial degree of skill will not fall into category of ‘gambling’; and (ii) 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*”.⁹ Whether a game is of chance or skill is a question of fact to be decided on the facts and circumstances of each case.¹⁰ The judicial view has been very strict in this regard.

Thus, it may be possible that games which satisfy the test of “skill versus chance” are not regulated under the Gambling Legislations and may be legally offered through the physical as well as virtual mediums (including internet and mobile), throughout India.

In the case of *State of Andhra Pradesh v. K. Satyanarayana & Ors.*¹¹ (“**Satyanarayana Judgment**”), the SC specifically tested the game of rummy on the principle of *skill versus chance* and held that Rummy was not a game entirely based on chance like the ‘three-card’ game (i.e. ‘flush’, ‘brag’ etc.) which were games of pure chance. It was held that Rummy was a game involving a preponderance of skill rather than chance. The SC based its conclusion on the reasoning that Rummy requires a 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 in a 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 a predetermined pattern, but is dependent upon how the cards find their place in the shuffled pack. In this judgment the SC has also passingly observed that bridge is a game of skill. Presently, there has been no case in India where card games (apart from Rummy) have been tested against the principle of *skill versus chance*.

In most jurisdictions, including India, the growing popularity of Texas Hold’em Poker cannot be doubted. Though there is a lack of clear jurisprudence on this subject in India presently, there appears to be an increasing trend internationally considering Texas Hold’em Poker as a game preponderantly of skill, and not a game of chance alone.

C. Concept of Common Gaming Houses

Under the Gambling Legislations (except states like Assam and Orissa where gambling per se is an offence), most offences and prohibitions are in relation to a “common gaming house”.

Generally, under the Gambling Legislations, to qualify as a “common gaming house”, there should be (a) an enclosed physical premises such as a house or a tent; and (b) “instruments of gaming” kept or used in such enclosed physical premises for the purpose of accrual of profit or gain to the person owning, occupying, keeping such enclosed physical premises or using any such instrument of gaming in the enclosed physical premises; and (iii) profit or gain by way of charge for use of the same enclosed premises or “instruments of gaming” or otherwise. However, under certain Gambling Legislations, like Delhi, it may not be necessary for such “profit or gain” to accrue to the person owning, occupying or keeping such premises in order for it to qualify as a common gaming house for certain purposes/games only.

“*Instruments of gaming*” means ‘any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of

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

10. *Manoranjithan Manamyl Mandram v. State of Tamil Nadu*, AIR 2005 Mad 261.

11. AIR 1968 SC 825.

any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect to any gaming.¹² In today's context, there is a school of thought that believes that computer terminals used for gambling and servers on which gambling takes place and related e-records are maintained also constitute "instruments of gaming".

On analysis of the definition of "common gaming house" in general under the Gambling Legislations, it seems that the intention of the legislatures is to impose restrictions on the use of a physically enclosed premises for the purposes of making "profit or gain" from the use of such premises.

Thus, a private house should not ideally constitute a "Common Gaming House", 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 gambling purposes. Extending the same analogy to the digital world, when a person is accessing online gambling websites from his house, it would not be a "common gaming house".

The situation may however be different where such gambling activities are carried out in places such as clubs or cyber cafés, where the cyber cafés derive profits by allowing the use of the computer terminals (which may be caught within the scope of "instruments of gaming").

Most of the Gambling Legislations refer to "any place" in the definition of "Common Gaming House". In the absence of a specific exclusion, the definition could include a server/portal/website providing means of gaming. Taking money for providing the online medium to play games may also fall within the ambit of profiteering from providing and maintaining "Common Gaming Houses". To put an end to this confusion, the online rummy websites have approached the Supreme Court¹³ (details of the case have been discussed below) to clarify whether the Gambling Legislations cover online gambling portals.

D. Offences, Offenders & Penalties

Most Gambling Legislations prohibit the act of:

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

The liability for offences under the Gambling Legislations usually vests with :

- The owner of the gaming/common gaming house;
- The person keeping or having charge of the gaming/common gaming house;
- The person gambling or possessing instruments or records of betting or suspected of gambling or possessing such instruments

All Gambling Legislations prescribe penalties which are more or less similar. The *Bombay Prevention of Gambling Act, 1887* imposes a fine and imprisonment for offenders. A first offence is punishable with a fine of at least INR 500 (approximately USD 8) and 3 months imprisonment, a second offence is punishable with a fine of at least INR 1,000

12. The Public Gambling Act, 1867

13. SLP No. 15371 / 2012

(approximately USD 15-20) and imprisonment for 6 months and a third or subsequent offence entails a fine of at least INR 2,000 (approximately USD 30-35) and imprisonment for one year¹⁴

E. Licenses for Physical & Online Gambling & Sports Betting

While all the above legislations prohibit gambling in common gaming houses, there are certain state legislations that have legalised some form of gambling and issue specific licenses to the gambling / gaming establishments. For instance, the West Bengal Gambling & Prize Competition Act, 1957 specifically excludes 'games of cards like Bridge, Poker, Rummy or Nap' from the definition of "gaming and gambling" and allows the organizing 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 place where the public may have access.

Further, under the Sikkim Gaming Laws, an interested person can obtain a "license" for the purpose of conducting online games such as Roulette, Black-jack, Pontoon, Puntobanco, Bingo, Casino Brag, Poker, Poker dice, Baccarat, Chemin-de-for, 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 take the prior approval of the state government to offer any other /addition online games under the license. The developments in relation to online gambling, sports betting as well as legislative developments in the State of Nagaland has been discussed in the Annexures.

F. Collection of a Stake from Players Playing Games- The Mahalakshmi & Gaussian Network Sagas

i. The Mahalakshmi Cultural Association case:

Another important issue that arises is whether the owners of gaming houses can collect stakes or derive profits from the players. In the *Satyanarayana* Judgment,¹⁵ the Supreme Court *inter alia* observed that clubs usually charge an additional amount for anything they supply to their members; the additional payments are used to manage the club and provide other amenities.' The court observed that merely charging an extra fee for playing cards (unless excessive) will not amount to the club making a profit or gain so as to render the club a common gaming house. The court has laid down this principle in general and has not particularly applied it to games of skill like rummy.

The courts of India have also held that while it is the right of the clubs to have recreational activities which are not prohibited, the authorities have the right to take appropriate proceedings against illegal games of betting, wagering, etc. Thus, the owners of clubs need to be careful about the manner in which services against which fee/stakes are collected from players are carried out, in order to avoid falling under the penal provisions of the Gambling Legislations.

In a subsequent case¹⁶ before the High Court of Andhra Pradesh, the court stated that penal statutes should be strictly construed and the benefit of any loophole in the statute was to be given to the accused. Therefore, it is for the legislature to intervene and amend the law, and lay down that playing rummy with stakes would also be 'gambling / gaming' within the meaning of the law.

In 2012 the Madras High Court in the matter of *Director General of Police, Chennai v. Mahalakshmi Cultural Association*¹⁷ interpreted the Satyanarayana Judgment differently in the context of a statute in *pari materia* and

14. Section 4 & 5 of the Bombay Prevention of Gambling Act, 1887

15. AIR 1968 SC 825.

16. *D. Krishna Kumar and Anr. v. State of A.P.*, 2003 CriLJ143

17. W.A.No. 2287 of 2011, Madras High Court.

held that rummy played with stakes would amount to gambling. This judgment had unsettled a rather settled position of law. The Supreme Court was seized of the matter by way of a Special Leave Petition filed by Mahalakshmi Cultural Association (“**Association**”). Certain online gaming websites (“**Intervenors**”) filed intervention applications on the apprehension that they would be subject to criminal prosecution like brick and mortar rummy providers. The Supreme Court heard arguments based on business models adopted – for example, in the context of online gambling, if a fee was collected for the services provided by the hosts of a website, as opposed to a buy-in for a particular game, would the same be considered ‘stakes’? The Intervenors were also asked to submit detailed affidavits by the Supreme Court, explaining the structure of the games offered, the fees charged for such games and the flow of profits in relation to the same.

It was expected that the Supreme Court would lay down guidelines on what business models (including online) would constitute gambling as restricted / prohibited under the gambling legislations of various states (even when skilled games were played for a fee / stake).

The SC on 13 August, 2015 disposed of the petitions of the Intervenors stating that it found that the impugned order did not deal with online Rummy and that it applied specifically to Rummy played in the brick and mortar format only. Further, the judges noted that the States had not taken any decision on whether the provision of online Rummy would constitute gambling under the Chennai City Police Act. Therefore, the SC was of the opinion that it was not necessary to entertain this petition. The SC also mentioned that the observations in the Impugned order may not necessarily relate to online rummy. The SC at this juncture was yet to deliver its verdict on the issue of taking stakes from Rummy in the offline context.

The 19th August 2015 saw under twist in the tale. The counsel for the Association stated that the trial court had passed an order on 11th October, 2014 by way of which the Association had been acquitted. Interestingly, the issue before the trial court brought by the prosecution was not based on the case of Rummy

(or any other 13 card game) but for members indulging in a game colloquially and locally called *Mangatha* “*ulle, velliye*” by betting money for profit. The counsel for the Association sought permission to withdraw the original writ filed before the Madras High Court and such permission was granted by the SC with an observation that since the writ petition is dismissed as withdrawn, the observations made by the Madras High Court in the Impugned Order or the matter before the SC do not survive as the writ is infructuous.

ii. Gaussian Network Case:

The question of whether a virtual platform could allow games of skills to be played for stakes also came up for consideration before the Delhi District Court.¹⁸ A petition was filed under Order 36 Rule 1 of the CPC seeking the opinion of the district court on *inter alia* whether there was any restriction in allowing participants to play games of skill for stakes with the intention of making a profit.

The Court had opined that it would be illegal to allow skill based games to be played for stakes in the virtual space. It observed that the degree of skill prevalent in games played in the physical form cannot be equated with the degree of skill involved while game was played online. The Court seems to have assumed that the degree of chance would increase in online gambling; and there was a possibility for manipulation of outcomes by cheating and collusion

April 21, 2016 saw a very unexpected turn of events. The Counsel appearing for Gaussian sought permission from the High Court to withdraw the revision petition. The Counsel argued that under common law as well as established case-law such as *R. M. D. Chamarbaugwalla v. Union of India*, *State of Andhra Pradesh v. K. Satyanarayana & Ors* and *K R Lakshmanan v. State of Tamil Nadu* there was a clear exception provided for games of skill in India. In states like West Bengal, offering games like Poker for stakes was permissible. The Nagaland Act also legitimised offering games of skill such as online Poker and online Rummy. The order of the Delhi District Court, therefore would limit the rights of

18. *M/s Gaussian Networks Pvt Ltd. v. Monica Lakhnupal and State of NCT*, Suit No 32/2012, Delhi District Court.

Gaussian even though it would be legal to offer such games under the Nagaland Act or West Bengal.

The Counsel for Gaussian requested that the approach followed by the Supreme Court while dismissing the Mahalakshmi case be taken in the present scenario also. As mentioned above, in the Mahalakshmi case, petitioners sought permission for the withdrawal of the original writ petition filed before the Madras High Court and permission for the same was granted by the Supreme Court of India. Consequentially, the proceedings before the Supreme Court of India became infructuous and the observations of the Madras High Court does not survive.

The High Court acceded to the request made by the parties and granted permission to withdraw the reference made before the Delhi District Court and the revision petition filed before the High Court. The observations of the District Court, thus, do not survive any longer.

The law continues to remain grey in terms of whether the state wise gambling enactments cover online gaming sites as well. The *Mahalakshmi Case* and the *Gaussian Network Case* could have been the turning point where it was expected that the SC and Delhi High Court respectively would lay down the law stating whether the state gaming enactments cover online models as well. However, the shadows of doubt on action on part of the judiciary is now clear and the dilemma of the online operators for the last four years has finally seen it's end.

2. Prize Competitions

Many popular games and contests in India are in the form of crossword puzzle prize competitions, missing word prize competitions, picture prize competitions, etc., in which monetary or other prizes are offered for the solving of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.

Traditionally, one would find a prize competition in a local newspaper or announced on the radio. However, in recent times, with the growing number of media outlets, prize competitions have begun to feature in different forms. For example, on television shows in the form of a puzzle, crossword or a picture prize competition where the viewers would subsequently send the solutions to the organizer by way of SMS or calls. Also, there have been a growing number of SMS driven competitions and online prize competitions.

These competitions are regulated under the various prize competition laws in India including the *Prize Competition Act, 1955* (“**Prize Competition Act**”) which is a central enactment. Only some of the states of India have passed resolutions to give effect to this law, being the states of Andhra Pradesh, Maharashtra, Tamil Nadu, Orissa, Uttar Pradesh, Madhya Pradesh, Punjab and Gujarat. Some states have also enacted separate laws for regulating prize competitions in their respective states, such as West Bengal. However, the definition of ‘prize competition’ in such state enactments is more or less similar to that in the Prize Competition Act.

The Prize Competition Act prohibits prize competition(s) in which the total value of the prize or prizes (whether in cash or otherwise) offered in any month exceeds INR 1,000 (approximately between USD 15 to 20), and prize competition(s) where the value of entries exceeds INR 2,000 (approximately between USD 30 to 35). Further, any person intending on conducting such prize competitions has to obtain a license to engage in such activities, and the details for obtaining such licenses are provided in the rules framed thereunder. Any person conducting competitions falling within the purview of the Prize Competition Act, that does not obtain a license, is punishable with imprisonment for a term up to 3 months, or with a fine which may

extend to INR 1,000 (approximately between USD 15 to 20), or with both. “Prize competition” has been defined by the Prize Competition Act as any competition in which “prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.”¹⁹

In the case of *Bimalendu De v. Union of India & Ors.*,²⁰ the legality of the popular show *Kaun Banega Crorepati* (“**KBC**”) was in issue. A public interest litigation was filed before the Calcutta High Court requesting that the game shows KBC (a game show based on the format of popular British show ‘*Who wants to be a Millionaire*’) and *Jackpot Jeeto* be prohibited from being telecast on television on the grounds that the same amounted to gambling, and were hence prohibited under the laws.

The court reviewed the provisions of the *West Bengal Gambling and Prize Competition Act, 1957* (which has an analogous provision to the Prize Competitions Act) and held that game show did not fit within the definition of a ‘prize competition.’

Similarly, the Bombay High Court²¹ has also held that the Prize Competition has a limited meaning and does not include games of skill and competitions such as KBC. As such, the Prize Competition Act only regulates a competition when prizes are offered for the solution of any numerical or alphabetical puzzle.

While the prize competitions are regulated under the Prize Competition Act and the state specific prize competition laws, depending on the facts and circumstances of each case, the Gambling Legislations may also get attracted while considering such competitions.

The *Tamil Nadu Prize Schemes (Prohibition) Act, 1979* (“**Tamil Nadu Act**”) regulates “prize schemes” in the state of Tamil Nadu. Under this enactment, there is a prohibition on the conduct or promotion of a prize

19. Section 2(d) of the Prize Competition Act

20. AIR 2001 Cal 30.

21. *News Television India Ltd. and Others v. Ashok D. Waghmare and Another*; 2006 (2) MhLJ431

scheme.²² The applicability of this provision is determined purely on the facts and circumstances of each case. If the game format includes the (i) purchase of goods; and (ii) draw of lots to select the prize winner from amongst the persons who have purchased the product, then such a game format would fall within the ambit of this enactment. Under the said enactment, there is no express exemption given for skill based (or preponderantly skill based) games/prize schemes.

Though the Prize Competition Act does not expressly cull out an exception for skill based games, the Supreme Court in the case of *R. M. D. Chamarbaugwalla v. Union of India*²³ laid down the principle that skill based or preponderantly skill based competitions were not sought to be regulated under the Prize Competition Act.

The Supreme Court looked at, *inter alia*, the intention of the legislators, the mischief that they sought to address under the legislation, and the history before the legislation was brought into force.

However, under the Tamil Nadu Act this position has not been clarified. Therefore, till the time the courts or the legislature specifically clarifies the legal position under the Tamil Nadu Act vis-à-vis skill based games/prize schemes, depending upon its appetite for risk, companies hosting such games/prize schemes have been relying on either of the interpretations. In view of the same, some entities in their terms and conditions for the games, expressly exclude players from the state of Tamil Nadu.

22. "Prize Schemes" has been defined as follows:

"prize scheme means any scheme by whatever name called whereby any prize or gift (whether by way of money or by way of movable or immovable property) is offered, or is proposed to be given or delivered to one or more persons to be determined by lot, draw or in any other manner from among persons who purchase or have purchased goods or other articles from shops, centers or any other place whatsoever specified by the sponsors of the scheme or on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in relation to such purchasers."

23. AIR 1957 SC 628

3. Skill Based / Casual and Social Gaming

'Casual games' typically refers to games like puzzles, adventure themed games, sports and action games, arcade games, card or board games, etc. This is a separate category of games than those which fall within the scope of the Gambling Legislations and the objective of casual games is not to bet or wager.

Casual games have always been one of the popular means of entertainment for the masses. While traditional board games have been popular world over for many decades now, electronic games first became popular with arcade game machines in countries like Japan and USA. These arcade games then gave way to video games and 'home entertainment' systems, such as Nintendo's Gameboy and Wii, Sony's Playstation series and Microsoft's Xbox series, which have now become a common fixture, starting with western countries, and moving to emerging markets such as India. These video games introduced their audiences to a whole new experience of gaming compared to the traditional board games and today such gaming businesses thrive on the online and mobile platforms too. Computer games have also become popular with the advent of the internet giving rise to 'online games', multiple player interfaces and the ease of interactions with players online. This has enabled casual games to carve a niche for themselves in the market. The mobile and smartphone revolution has added millions of new gamers and thousands of game developers, thanks to the popularity of 'app stores'. These application stores now make it possible for small teams to make and sell games that could, if they became popular, result in millions of downloads and millions in revenues.

Online fantasy sports have also become extremely popular today, both in India and abroad. This format of gaming consists of participants that role play as

owners, managers, or coaches of virtual / fictional sports teams. These games are offered to participants through different business models – paid-leagues, free-entry leagues, knock-out tournaments or any other tournament model, often based on statistics generated and/or points accrued by real individual players or teams of a professional sport. Participants have the ability to trade, buy, sell, rotate and substitute players in their teams before each round of matches, just like a real sports team manager/coach.

For example, in a typical online football fantasy game, a participant may choose 11 (eleven) players as a starting line-up, with a few additional players as substitutes. The outcome of the real football matches involving these players will determine the points that the participant attains. Each player is awarded points and consequently the participant's team as a whole achieves a certain amount of points (aggregate of each of the players' points and any bonuses, in any).

Another type of casual gaming is through social media – Social games such as Farmville, Cityville, etc. have impacted the way consumers use social networks, and Facebook is reckoned as one of the world's largest online gaming platforms.

The nomenclature "casual" does not do away with the fact that there are laws to regulate casual games. For example, since certain casual games may also be based on building up, arrangement, combination or permutation, of letters, words, or figures, the provisions of the Prize Competition Act and related prize competition laws may get attracted to such games. We have elaborated the provisions and applicability of the prize competition laws above in Chapter V (Prize Competitions) of this paper.

4. Legal and Regulatory Issues

I. Laws Affecting The Content Of Games

A. Pornographic and Obscenity Laws

Many games and gaming websites in India include content which may be considered objectionable under the pornographic and obscenity laws of India. For instance, some of the popular websites offer games which have animated caricatures of human beings, including women, depicted in a manner which may be construed as offensive as per the moral standards of India.

i. Indian Penal Code, 1860 and the Information Technology Act, 2008:

The Indian Penal Code (“**IPC**”) and the Information Technology Act, 2008 (“**IT Act**”) penalize the publication, distribution and transmission of obscene content. The IPC inter alia prohibits the sale, hire, distribution, exhibition, and circulation of any obscene object and also penalizes any person who engages, advertises, promotes, offers, or attempts to do any obscene activity.²⁴ The IT Act inter alia penalizes the transmission of any obscene content²⁵ or sexually explicit material in electronic form,²⁶ including child pornographic content.²⁷

24. Section 292 and 294 of the IPC.

25. Section 67 of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall on first conviction be punished with imprisonment for a term which may extend to 3 years and with fine which may extend to INR 500,000 and in the event of a second or subsequent conviction with imprisonment or a term which may extend to 5 years and also with fine which may extend to INR 1,000,000.

26. Section 67A of IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which may extend to 5 years and with fine which may extend to INR 1,000,000 and in the event of second or subsequent conviction with imprisonment for a term which may extend to 7 years and also with fine which may extend to INR 1,000,000.

27. Section 67B of the IT Act prescribes the following penalty: Any person contravening the provisions of this section shall be punished on first conviction with imprisonment for a term which

As per the IPC and the IT Act, any material which is lascivious or appeals to the prurient interest or which may deprave and corrupt persons, is considered obscene. In determining whether or not the games and the images depicted in the games are lascivious or appeal to the prurient interest, the court takes into consideration factors such as - (a) whether the work taken as a whole appeals to the prurient interest; (b) whether the work is patently offensive; (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value. The court also takes into account other factors depending on the facts and circumstances of the case.²⁸

Under both these legislations, liability could be in the form of imprisonment, ranging from three to seven years, or a fine in the range of INR 0.5 million (approximately USD 7500) to INR 1 million (approximately USD 15000), or both,²⁹ which may increase in case of repeat offenders. Further liability could be attracted under the IPC when obscene material is made available to young persons, (that is, below the age of 20 years).³⁰

ii. Indecent Representation of Women:

The *Indecent Representation of Women (Prohibition) Act, 1986* prohibits any indecent representation of women i.e. the depiction in any manner of the figure of a woman, her form or body in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or that likely to deprave, corrupt

may extend to 5 years and with fine which may extend to INR 1,000,000 and in the event of second or subsequent conviction with imprisonment for a term which may extend to 7 years and also with fine which may extend to INR 1,000,000.

28. *Director General, Directorate General of Doordarshan & Ors vs Anand Patwardhan & Anr*, Appeal (Civil) 613/2005; Supreme Court of India

29. Section 292, 293 and 294 of the IPC and 67, 67A and 67B of the IT Act.

30. Section 293 of the IPC provides that on first conviction, the offender shall be punished with imprisonment for a term which may extend to 3 years, and with fine which may extend to INR 2,000, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to 7 years, and also with fine which may extend to INR 5,000.

or injure the public morality or morals.³¹ The statute prohibits any such depiction, whether through advertisements or in publications, writings, paintings, figures or in any other manner and provides for penalty in connection with the same. The mode of transmission of advertisements is not specified and it may be construed that such advertisement may also be transmitted through the electronic form. This legislation also penalizes the circulation of any material (including a film, any writing or drawing) containing any indecent representation of women, and may get attracted if the casual games represent women in the manner stated hereinabove. The penalty for violating provisions of the *Indecent Representation of Women (Prohibition) Act, 1986* is imprisonment for a term of up to two years and fine of up to INR 2,000 (approximately USD 30-35) with provisions for more severe punishments in case of repeat offences.³²

B. Laws Affecting Action based and Violent Games

Many popular casual games, such as Grand Theft Auto, Call of Duty, etc., are action based games which specifically appeal to young gamers. The provisions of the *Young Persons' (Harmful Publications) Act, 1956* makes it an offence to print, publish or otherwise be involved in the printing, distribution or selling of any publication portraying the commission of offences, acts of violence or incidents of a repulsive nature in such a manner as would tend to corrupt young persons (that is, a person under the age of 20 years), and thus it assumes relevance in such cases. The liability under this legislation could be in the form of imprisonment for a term up to 6 months or fine or both.³³

31. Section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986.

32. Any person who contravenes the provisions of the act shall be punishable on first conviction with imprisonment of either description for a term which may extend to 2 years, and with fine which may extend to INR 2,000, and in the event of a second or subsequent conviction with imprisonment for a term of not less than 6 months but which may extend to 5 years and also with a fine not less than INR 10,000 but which may extend to INR 1,00,000.

33. Penalty shall be imprisonment which may extend to 6 months,

While the linkage between exposure of certain forms of games to teenagers and violence in society has not been tested in Indian courts, this issue has been subject to enormous interest and controversy in the USA, Europe, and other Asian countries. Some US states, including California, have previously passed laws to regulate the sale of certain types of videos to children, but the US Supreme Court invalidated the same saying that video games formed part of the constitutional right to free speech and hence could not be regulated.³⁴ The Supreme Court also ruled that there was evidence indicating that these video games cause violence in society. However, despite this ruling, the state of New Jersey is mulling over a law restricting the sale of video games to minors.³⁵

It is also interesting to note that countries such as USA and Canada have independent self-regulatory bodies such as the Entertainment Software Rating Board (ESRB), which assigns ratings in respect of age and content, and also issues various guidelines to the video and computer games industry.³⁶

C. Intellectual Property Rights Issues

Casual games are often theme based in nature and use pictures, musical notes, figures, characters etc. to add to the appeal of the games. Since all such works are subject to copyright protection in their individual right, the use of such copyrighted material in the games, without taking adequate permissions/licenses from the owner of copyrighted material, can trigger copyright infringement issues under the Copyright Act, 1957. The owner of the copyright can take civil³⁷ or criminal action against the infringer.³⁸

or with fine, or with both.

34. http://www.nytimes.com/2011/06/29/arts/video-games/what-supreme-court-ruling-on-video-games-means.html?_r=0

35. <http://arstechnica.com/gaming/2013/04/new-jersey-ignores-supreme-court-in-pushing-for-violent-game-legislation/>

36. <http://www.esrb.org/index-js.jsp>

37. Such as injunction, suit for damages or account of profits.

38. Copyright infringement or abetment of the same is punishable with imprisonment for a term which may vary between 6 months to 3 years and fine which may vary between INR 50,000 to INR 2,00,000.

Popular titles may also be protected under the trademark law of India. More often than not, competitors may try to piggy back on the popularity of game titles or series titles (titles for a series of games). In India, titles can be registered and protected as trademarks under the Trade Marks Act, 1999. Unregistered titles which are popular may be protected under common law if they have acquired a secondary meaning in the judgment of the target customers. The owner of the trademarks can take civil³⁹ or criminal action against the infringer.

In India, a user of an unregistered trademark cannot sue another party for infringement of its trademark but may institute only a passing off action against the defaulting party. However, to successfully defend a passing off action, the proprietor of the title will need to prove that the titles of the games (especially popular games), or get-up of the title logos is distinctive, and the public identifies these with the proprietor, which would not be required if the trademark is registered. The proprietor will also need to prove that the defaulting party has been using the marks deceptively and passing off their goods or services as that of the former.

On the flip side, especially in the case of online / social and casual games, since any software as well as visual content, music, characters etc. that are developed for the purpose of a game are protected by copyright and trademark laws (as applicable), the game developer / owner of such content will have the right to commercially exploit such content. Increasingly, it has been seen that most lucrative facets of casual and social gaming are licensing of intellectual property and merchandising.

In addition to the rights described above, the software related to certain types of games / functionalities within the games can also be protected by way of a patent right. While software as such is not patentable in India, certain countries such as the US allow the patenting of software. This distinction between the patent regimes is of importance in relation to games that are made available online. A game developed in India, when offered online and made available / downloaded in a country like the US, may be found to be infringing patent rights held over similar functionalities by any person such a country.

39. Such as injunction, suit for damages or account of profits.

D. Personality Rights Issues

In order to attract gamers, many games such as the FIFA series or the Fallout Franchise, use the caricatures, likeness, voice, reputation or popularity of a celebrity for a commercial benefit without authorization from the celebrity. This may result in violation of the celebrity's personality rights which is a combination of the privacy and publicity rights of a person. A violation of such rights would result in the court passing an order restraining the company or person owning the game from displaying/exhibiting these games or using the image of the celebrity in such games and/or award damages to the celebrity for harm caused to the reputation of the celebrity.

In India, personality rights have traditionally not been recognised by the courts. However, recently the Madras High Court in the case of *Shivaji Rao Gaikwad v. Varsha Productions ("Defendant")*⁴⁰ witnessed the celebrated actor 'Rajinikanth' seeking an interim injunction restraining the Defendant from using his name, image / caricature / style of delivering dialogues in the film "Main Hoon Rajinikanth" and other forthcoming films so as to infringe his copyright, infiltrate his personality rights or cause deception in the minds of the public leading to passing-off. The court granted the interim injunction and stayed the release of the impugned film, the name of which was later changed to "Main Hoon Rajini".⁴¹

As regards the copyright in the name "Rajinikanth," the court held that *only the first owner can claim copyright and would be entitled to a licence of copyright; so far as the name 'Rajinikanth' is concerned, nobody being able to give definite knowledge of when the name came into inception and by whom; further, the name 'Rajinikanth' has been used in different movies on several occasions; hence, no one can claim exclusivity as regards the material in public domain.*

Regarding the personality rights, the court observed that 'personality rights.' while not defined in any particular statute, have been identified by courts in India in various judgements such as *ICC Development (International) Ltd. v. Arvee Enterprises*.⁴² The court held

40. CS(OS) 598/2014

41. <http://indianexpress.com/article/entertainment/bollywood/faisal-saif-changes-title-of-main-hoon-rajinikanth-film/>

42. 2003 (26) PTC 245

that such rights vests in those who have attained the status of celebrity. If any person uses the name of a celebrity without his/her permission, the celebrity is entitled to an injunction, if the said celebrity could be easily identified by the use of his name by the others. Since the celebrity in the instant case was easily identifiable in relation to the movie, the court granted him an injunction. The court additionally held that infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when celebrity is identifiable.

Thus, in a similar manner, games using celebrity images/caricatures/voice/style etc. without due authorization, may be held to be infringing the respective celebrity's personality rights.

II. Telecom Laws Applicable To Social Gaming

A recent study by market research⁴³ firm Nielsen provided an interesting insight into the usage of mobile phones in India. As per the study, voice calls and texting accounted for only 25% (twenty five percent) of smartphone usage whereas multimedia, games, apps and Internet browsing made up the rest. Importantly, games were the most popular category among paid apps, with nearly 3 out of 5 users (58%) paying for games. There are certain telecom laws that are particularly important to consider by the gaming companies while evaluating their business models.

A. SMS Related Laws

In light of various complaints made against spam calls and SMSes, the Telecom Regulatory Authority of India ("TRAI") issued the *Telecom Commercial Communications Customer Preference Regulations, 2010* ("Regulations") which seeks to prohibit Unsolicited Commercial Communications ("UCC").

These Regulations prohibit the transmission of SMSes to subscribers who have elected not to receive such

messages. Under these Regulations, subscribers have been given the option of registering either under the fully blocked category or the partially blocked category depending on their preferences.

In the fully blocked category, a subscriber opts not to receive any type of commercial communication, while the partially blocked category enables subscribers to receive commercial communications only in the categories they have chosen. Therefore, in the event that a subscriber has registered under the fully blocked category, he should not be sent any type of promotional/ commercial messages/calls.

Whereas, subscribers under the partially blocked scheme may choose from a selection of categories including: banking, insurance, financial products and credit cards; real estate; education; health; consumer goods and automobiles; communication, broadcasting and entertainment; IT; and tourism.

However, certain SMSes do not need to adhere to the above mentioned restrictions and may be sent to any subscriber. Such messages are known as transactional messages, i.e. messages that represent a transaction undertaken by the subscriber, for example, messages regarding banking transactions, ticket reservations, etc. since these SMSes are generated pursuant to a request made by the subscriber himself.

Interactive games modeled around SMSes typically face the following embargos:

- The Regulations lay down that only an entity registered with the TRAI ("Telemarketer") may send commercial communication and that no other entity shall send commercial communication.
- There are other restrictions placed on commercial communication, such as, these messages can only be sent from 9 AM to 9 PM and no commercial communication can be sent thereafter.

Therefore, interactive SMS based games need to be structured carefully so that SMSes qualify as transactional messages.

Further, telemarketers sending commercial communication have been prohibited from receiving incoming messages. This poses a challenge when the

43. *Smartphones Keep Users in India Plugged In*, dated June 2, 2013. Available at: <http://www.nielsen.com/us/en/newswire/2013/smartphones-keep-users-in-india-plugged-in.html>. Last visited: August 31, 2014.

interactive games require responses to be sent via SMS by the subscriber. However, we have observed that most interactive games in India are now structured in a manner that the number which the participant needs to respond to is included in the body of the text with instructions to reply to the designated number instead.

B. Activation of Value Added Services

After various complaints regarding the activation of value added services (“VAS”) without the authorization of subscribers and the consequent deduction in balance of the subscribers, the TRAI enacted specific regulations to ensure that consumers are not charged incorrectly/ excessively for any VAS.

The TRAI has imposed various obligations on telecom operators including:

- Informing the consumer, through SMS, on activation of a VAS, the validity period of such service, the charges for renewal and the procedure for the consumer to unsubscribe from the service;
- Before subscribing to a VAS, the operator must obtain confirmation from the consumer via an SMS within 24 hours of activation of the VAS. The consumer must be charged only if such confirmation is received, failing which, the VAS must be discontinued;
- In case a VAS is offered via WAP or mobile internet, explicit consent of the consumer is required via an online consent gateway as is detailed in TRAI’s directions.

Though the TRAI has placed all these obligations on telecom operators we have observed that most VAS agreements between the game developers and telecom operators typically involve the telecom operator passing on its obligations to the VAS provider. Further, telecom operators typically also require the VAS provider to comply with all applicable laws and further indemnify the telecom operator in the event of any loss/penalty.

Therefore, in the event that an interactive game is designed to be centered around regular SMSes being

activated on a subscriber’s handset, the game developer must be mindful of such obligations that may be applicable to such games.

III. Other Laws Affecting The Gaming / Gambling Industry

A. Foreign Direct Investment & Foreign Technology Collaborations in Gambling 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

- lottery, including government, private lottery, online lotteries, etc; and
- 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. Certain operations such as fantasy sports games offered in India may be classified as games in which an element of skill predominates elements of chance, an argument can be made that foreign direct investment may be permitted in such games. However, in the absence of any precedent wherein the scope of the phrase, ‘*lottery, gambling and betting*’ has been analyzed by the regulators from a FDI Policy perspective, there is a possibility that the regulators may take a different view since these are matters of government policy.

Further, 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 gambling / gaming business needs to be carefully structured to

avoid risks under the FDI Policy. 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 2,00,000 (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.

B. Restrictions under Exchange Control Regulations

Under the *Foreign Exchange Management Act, 1999* (“**FEMA**”) read with *Foreign Exchange Management (Current Account Transaction) Rules, 2000* (“**Current Account Rules**”), remittance of income from winnings from lottery, racing/riding or any other hobby is prohibited. Though in letter remittance for the purpose of betting is not prohibited, keeping in view the spirit of this provision, remittance for the purpose of betting or any prizes to any player in foreign currency may potentially contravene these rules and incur penalties which may extend up to three times the amount remitted. Further, remittance of monies from India, by Indian players to gaming sites is prohibited. We have discussed the developments in relation to E-wallets and the *Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015* in the Annexures.

C. Intermediary Guidelines Notified under the IT Act

In April 2011, the *Information Technology (Intermediaries guidelines) Rules, 2011* (“**Intermediary Guidelines**”) were notified under the IT Act, which require intermediaries like ISPs and other intermediaries to *inter alia* observe necessary due diligence and publish rules and regulations and user agreements for access or usage of the bandwidth provided by the intermediary. The term ‘intermediary’ has been defined under the

IT Act⁴⁴ to include “*telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes*”. Thus, along with ISPs, even websites which serve as aggregators for third party games shall qualify as intermediaries.

As part of the obligation set out in the Intermediary Guidelines, such rules and regulations and user agreements need to include terms which *inter alia*, inform the users of the bandwidth not to host, display, upload, modify, publish, transmit, update or share any information that is relating to or encouraging gambling, or contains obscene content etc. or is otherwise unlawful in any manner whatever. It appears that the rule has been included with the purpose of, among other things, discourage any activity of gaming/gambling that may be unlawful under the Gambling Legislations in the country.

Additionally, an intermediary, upon obtaining knowledge by itself or being brought to actual knowledge by an affected person, shall act within 36 hours to disable content found to be in infringement of the Intermediary Guidelines.⁴⁵ We understand that as an industry practice the intermediaries have already been including such terms in their user agreements and other policies and have been either temporarily or permanently been blocking gambling and gaming content as and when they receive any take down notices from the authorities or others. The Registrars accredited with the *Internet Corporation for Assigned Names and Numbers* (“**ICANN**”) have also been blocking the websites on their own. However, since the law expressly imposes inserting such terms as an obligation on the intermediaries, the intermediaries may increasingly block such websites *suo motu* or on notices from the Department of Telecom (“**DOT**”) or similar authorities.

44. Section 2(1)(w) of the IT Act: “intermediary”, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes

45. Regulation 3(4) of the Intermediary Guidelines

In the landmark judgment of *Shreya Singhal v. Union of India*,⁴⁶ known for the Supreme Court striking down the controversial section 66A of the IT Act, the Supreme Court also read down the provisions of the Intermediary Guidelines related to blocking of content. Recognizing the concern related to preemptive blocking of content by intermediaries so as to not attract potential liability, the Supreme Court read down the obligation of intermediaries. The court has now interpreted the term “actual knowledge” to only include court or government orders. Thus the obligation to block content has only been limited to cases where the intermediary receives a court or government order.

D. Anti-Money Laundering Laws:

In India, the *Prevention of Money Laundering Act, 2002* (“PMLA”) is the law which prevents money laundering activities. The PMLA was amended by the *Prevention of Money Laundering (Amendment) Act 2012*, which brought about significant changes to the compliance procedures required under the PMLA. Among other things, entities carrying out the activities for playing games for cash or kind (including casinos) (“**Gaming Entity**”) are also required to adhere to the provisions of the PMLA and related rules (“**Rules**”).⁴⁷

The PMLA requires reporting entities⁴⁸ to maintain records of transactions⁴⁹ and documents evidencing identity of their clients in accordance with the Rules.⁵⁰

46. 2015 5 SCC 1

47. The Prevention of Money-laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005, prescribes the nature and value of transactions for which records are required to be maintained by a financial institution.

48. Section 2(wa) of the PMLA, “reporting entity” means a banking company, financial institution, intermediary or a person carrying on a designated business or profession;

49. The term ‘transaction’ is defined under rule 2(h) of the Rules as: “transaction” means a purchase, sale, loan, pledge, gift, transfer, delivery or the arrangement thereof and includes- (i) opening of an account; (ii) deposits, withdrawal, exchange or transfer of funds in whatever currency, whether in cash or by cheque, payment order or other instruments or by electronic or other non-physical means; (iii) the use of a safety deposit box or any other form of safe deposit; (iv) entering into any fiduciary relationship; (v) any payment made or received in whole or in part of any contractual or other legal obligation; (vi) any payment made in respect of playing games of chance for cash or kind including such activities associated with casino; and (vii) establishing or creating a legal person or legal arrangement.”

50. Section 12 of the PMLA

The following documents are required to be maintained by Gaming Entities:

- i. Record of all transactions, including:⁵¹
 - All cash transactions of the value of more than INR 1,000,000 (approx. USD 15,000) or its equivalent in foreign currency
 - All series of cash transactions integrally connected to each other which have been individually valued below INR 1,000,000 (approx. USD 15,000) or its equivalent in foreign currency where such series of transactions have taken place within a month and the monthly aggregate exceeds an amount of 1,000,000 (approx. USD 15,000) or its equivalent in foreign currency
 - All transactions involving receipts by non-profit organizations of value more than INR 1,000,000 (approx. 15,000) or its equivalent in foreign currency
 - All suspicious transactions⁵² whether or not made in cash.
 - All cross border wire transfers of the value of more than INR 500,000 (approx. USD 7,350) or its equivalent in foreign currency where either the origin or destination of fund is in India.
 - All purchase and sale by any person of immovable property valued at fifty lakh rupees or more that is registered by the reporting entity, as the case may be.

51. Section 2(g) of the Rules: “Suspicious transaction” means a transaction referred to in clause (h), including an attempted transaction, whether or not made in cash, which to a person acting in good faith— (a) gives rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the Act, regardless of the value involved; or (b) appears to be made in circumstances of unusual or unjustified complexity; or (c) appears to have no economic rationale or bonafide purpose; or (d) gives rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism;

52. Section 2(g) of the Rules: “Suspicious transaction” means a transaction referred to in clause (h), including an attempted transaction, whether or not made in cash, which to a person acting in good faith— (a) gives rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the Act, regardless of the value involved; or (b) appears to be made in circumstances of unusual or unjustified complexity; or (c) appears to have no economic rationale or bonafide purpose; or (d) gives rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism;

ii. Records of the identity of the clients which are required to be maintained:

It has been provided that every reporting entity at the commencement of any account-based relationship with its client must:⁵³

- a. Identify its client;
- b. Verify their identity;
- c. Obtain information on the purpose and intended nature of business relationship;

Additionally, in all other cases, the reporting entity must verify identity while carrying out:

- i. Transaction of an amount equal to or exceeding INR 50,000 (approx. USD 733) whether conducted as a single transaction or several transactions that appear to be connected, or
- ii. All international money transfer operations

The PMLA also provides provisions regarding inquiry and penalties in case of non-compliance with the obligations mentioned above. The director⁵⁴ on his own person, or upon any application made by any authority, office or person, make such inquiry or cause such inquiry to be made, as he thinks fit to be necessary.⁵⁵ If in the course of any inquiry, the director finds that a reporting entity or its designated director on the Board or any of its employees have failed to comply with the obligations under the PMLA, he may *issue a warning in writing; or direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific*

*instructions; or direct such reporting entity or its designated director on the Board or any of its employees, to send reports at such interval as may be prescribed on the measures it is taking; or by an order, impose a monetary penalty on such reporting entity or its designated director on the Board or any of its employees, which shall not be less than INR 10,000 but may extend to INR 100,000 for each failure.*⁵⁶

iii. Know Your Customer (KYC) norms and Anti-Money Laundering (AML) standards under the PMLA

Additionally, the RBI through a Master Circular⁵⁷ has laid down certain KYC norms and Customer Identification Procedure (“CIP”)⁵⁸ to be followed by banks and financial institutions for opening of accounts and monitoring transactions of suspicious nature for the purpose of reporting the same to appropriate authority such as Financial Intelligence Unit – India⁵⁹ and RBI.

Considering the development of technology and cashless transactions the KYC norms also suggest that agents through whom credit/ debit/ smart or gift cards are issued must also be subjected to due diligence and KYC measures. The norms lay out that before issuance of such card to any client, banks must ensure that all appropriate KYC procedures are duly applied before issuing the cards to the customers.⁶⁰

53. Rule 9(1) of the Rules

54. “Director” or “Additional Director” or “Joint Director” means a Director or Additional Director or Joint Director, as the case may be, appointed under subsection (1) of section 49.

55. Section 13(1) of the PMLA

56. Section 13(2) of the PMLA

57. Know Your Customer (KYC) norms / Anti-Money Laundering (AML) standards/Combating Financing of Terrorism (CFT)/ Obligation of banks and financial institutions under PMLA, 2002, RBI/2015-16/42 DBR.AML.BC.No.15/14.01.001/2015-16

58. Clause 3.2.1 of the Master Circular: *The CIP means, “undertaking client due diligence measures while commencing an account-based relationship including identifying and verifying the customer and the beneficial owner on the basis of one of the Officially Valid Document (“OVD”)”.*

59. Under the Department of Revenue, Ministry of Finance

60. Part II of the Master Circular

Annexure - I

Nagaland to issue online gaming licenses for skill games

Publisher: World Online Gaming Law Report

The State of Nagaland, which is located in eastern India has recently passed *The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2016* (“Act”). The Act contemplates issuance of online gaming licenses for skill games. This is a first of its kind legislation in India, consequently, it has created a lot of excitement among Indian as well as international operators. The Act as such is a very short piece of legislation, therefore only when the government issues rules in support of the Act, clarity will emerge as to how the Act will be operationalised.

In India, gaming and gambling are a State subject i.e. each State is free to legislate on the said subject for activities within its State.⁶¹ Most Indian States have legislations in place that prohibit certain gambling activities, but skill based games are specifically excluded. State legislations do not define what is meant by ‘game of skill’; but the Supreme Court of India in various judgements has clarified that when a game has a preponderance of skill over chance, then such game would be considered to be a game of skill. The primary objective of the Act is to prohibit gambling, and to regulate and promote ‘online games of skill’ within Nagaland.

I. Test For Games Of Skill

The “preponderance of skill” test as laid down by the Supreme Court of India⁶² has been considered in the Act

as the key element in determining whether or not a game is ‘game of skill’. A “game of skill” would include all games where there is a preponderance of skill over chance, including where the skill relates to (i) strategizing the manner of placing wagers or placing bets, (ii) selection of a team or virtual stocks based on analysis, or (iii) the manner in which the moves are made, whether through deployment of physical or mental skill and acumen.

Certain games such as chess, card games like bridge, poker, rummy, napoleon; virtual sports, and fantasy sports leagues have been delineated as “games of skill” in the First Schedule to the Act. The Act contemplates the First Schedule to be a moving schedule, i.e. the Government may either on its own or on representation of any party, update it to include new games of skills. Further, games declared to be a “game of skill” by (i) courts in India or internationally or by statutes; (ii) games for which competitions and tournaments are conducted, or (iii) games which can be determined to be “games of skill” may get included in the Schedule.

This suggests that though certain games may not listed in First Schedule, representations may be made by a potential licensee to include additional games and the government may update the First Schedule if it is convinced on the skill element.

II. Profit Motive is permitted

Revenue models adopted by the licensee may involve earning revenue through advertising, claiming a percentage of the winnings and/or charging a fixed fee for membership, as per the Act. Thus, a licensee may follow a profit motive based model. Recently before the Supreme Court of India, in *Mahalakshmi Cultural*

61. Constitution of India, Seventh Schedule, List II, Entry No. 34 allows states in India to enact their own legislations to regulate gaming / gambling activities within its territory

62. *State of Andhra Pradesh v. K. Satyanarayana & Or* AIR 1968 SC 825. The game of Rummy was held to be a game involving preponderance of skill rather than chance based on the fact that Rummy required 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.

Association. v. Dir. Inspector Gen. of Police & Or,⁶³ the issue of profiteering on skill based games was discussed and debated, however it was not specifically decided. However, based on various earlier Supreme Court and State High Court judgements, it can be argued that since skill based games are excluded from gaming legislations, profiteering activities on such games should be permitted. This position should assist a licensee to offer skill games to residents of other Indian States as well, as discussed below.

III. Licenses

In so far as conditions of license / eligibility criteria are concerned, there are certain hurdles and ambiguities in so far as involvement of foreign operators are concerned, especially if they are involved in gambling activities. Some of the issues are as follows:

- i. A license may be granted to a person, company or limited liability company incorporated in India, and having a substantial holding and controlling stake in India. This may be a point of concern for Indian companies that have or propose to have foreign investments and consequently a degree of foreign shareholding.
- ii. The executive decision making powers and processes of the licensee would be required to be performed within India.
- iii. Technology support, including hosting and management of the website, placement of the servers would need to be within India.
- iv. Applicant for a licence cannot be the entity having any interest in any online or offline gambling activities in India or overseas. It is not clear how the government would interpret 'gambling activity', nor is it clear whether the group company of the potential licensee could be involved in gambling activity.

In order to ensure predictability and accountability in the procedure for grant of licence, the Act mandates that the licensing authority make a decision within 6 months from the date of receipt of an application, on whether or not to issue a license to an applicant.

The Act clarifies that licensees may offer "games of skill" on their website, mobile platform, television or any other online media.

The Act contemplates issuance of rules which will prescribe the manner and format for applications for a license, or the terms and conditions under which a license may be issued. Such rules may also address aspects such as license fees payable and annual fees payable by operators to the State Government.

IV. Games of Skill offered Pan India

The Act allows a licensee to offer "games of skill" in other Indian States, where such games are not classified as gambling. Thus, States where games of skills are excluded from the ambit of the gambling legislation, are territories where it is permissible for a licensee to offer its skill based games. This adds a layer of legitimacy to operations by licensees by taking into account the regulatory framework at the point of consumption.

Earlier, in 2009 the Sikkim Government allowed for online gaming to be offered from the territory of the state. However, based on advice from the federal government, restrictions were imposed whereby sites offering online gaming could be accessed only within the geographical borders of Sikkim.

The Act acknowledges the power of each State to regulate the gaming activity within its jurisdiction. It has therefore established a framework for addressing issues that various States may have with the extra territorial operations of the licensee. If any State is of the opinion that the licensee was offering its games in that State in violation of the Act or local laws of the relevant State, it may inform the Nagaland Government of such violation.

63. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/mahalakshmi-case-update-online-rummy-operators-get-some-respite.html?no_cache=1&cHash=8c7a963cbo963roedd4a35552557dad4

Various State specific gaming legislations seek to regulate activities in a “common gaming house”. Contemporaneously, it may be argued that a common gaming house could also include a server/portal/website providing means of gaming. Therefore, any operator falling afoul of any State level gaming legislation may be open to being prosecuted by a state government. The Act may provide a safe harbour to such operators.

V. Penalties

In case a licensee was found to be engaging in “games of chance or gambling activities”, it would be liable to a fine of INR 20,00,000 (approx. USD 30,000) in the first instance and may be extended to simple imprisonment in case of a repeat offender. Although the Act does not specify, it is likely that imprisonment would extend to directors and other officers in charge of the company in the event of a repeated offence.

VI. Licensing Authority

The Act provides that the State Government may designate an authority or body to monitor and regulate activities of the licensees to ensure compliance under the Act, and to settle disputes arising out of the licensees’ activities.

VII. Way ahead

Taking into consideration the challenging legal landscape in India, obtaining a licence under the Act may provide an added level of protection for an operator. In the event of any prosecution being initiated against a licensed operator, the fact that such games were being offered under a legitimate licensing regime may constitute a line of defence. It would assist the licensee to argue that under a legislative regime the games are considered to be games of skill.

Once the rules are published by the Nagaland government, several grey areas in the Act are likely to be clarified.

Annexure - II

India Update: Sports Betting and Skill Games

I. Mahalakshmi Case Reaches the Chequered Flag

The Supreme Court of India (“**Supreme Court**”) recently delivered two orders in the eagerly followed Mahalakshmi Case.⁶⁴ Until the ruling of the Madras High Court in 2012 (“**MHC Order**”),⁶⁵ it was fairly settled in that prohibitions under the Indian gaming legislation did not apply in the case of games of skill and therefore one could collect stakes or make profits from games of skill. However, the Madras High Court held that although rummy is a game of skill, it would if played with stakes, amount to gambling. The matter then went on appeal to the Supreme Court. On August 13, 2015, proceedings took an interesting twist when the Supreme Court observed in its order that the MHC Order had not dealt with online rummy, and therefore any observations made within in the MHC Order did not necessarily apply to this game. The Supreme Court did not however deliver its verdict on the issue of collecting stakes and making profit from rummy played offline.

However, on August 19, 2015 the appellants in the matter stated that a trial court had previously passed an order acquitting them. In light of the acquittal, the appellants sought permission to withdraw the original writ petition filed before the Madras High Court and this permission was granted by the

Supreme Court. The Supreme Court disposed of the matter and observed that the MHC Order and any other orders made by the Supreme Court during the course of the matter become irrelevant and ineffective.

The uncertainty regarding the applicability of State gambling enactments to online gaming sites persists. This also means that the position of the law on collecting stakes from games of skill reverts to the original position asserted by many previous court judgments i.e. games of skill fall outside the scope of the State gambling laws and therefore stakes may be collected or profit generated from such games. The Supreme Court certainly missed an opportunity to fill the gap in the law and shed light on the accompanying issues. However, operators of online poker websites would be well advised to await the outcome of developments in another case pending before the Delhi High Court (“**DHC**”), where the question of whether games of skill can be offered for money on virtual platforms was considered.⁶⁶ In this case, prior to the revision petition filed before the DHC, a district court in Delhi opined that when skill based games are played for money in the virtual space, this renders them illegal, and also that the degree of skill involved in playing these games in physical form could not be equated with those played online. The next hearing on this matter is scheduled for January 2016.

64. Mahalakshmi Cultural Association v. The Director, Inspector General of Police & Ors. [Special Leave Petition (Civil) 15371 of 2012, Supreme Court of India]

65. The Director General of Police v. Mahalakshmi Cultural Association [(2012) 3 Mad LJ 561]

66. Gaussian Networks Private Limited v. Monica Lakhanpal and Anr. 4 Sikkim Online Gaming (Regulation) Amendment Act, 2015 notification issued by the Law Department, Government of Sikkim dated August 19, 2015

II. Sikkim curtails operation of online gaming license

The Sikkim State Government on August 19, 2015, amended⁶⁷ the Sikkim Online Gaming (Regulation) Act (“**Sikkim Online Gaming Act**”) restricting the offering of “online games and sports games” under the licences issued under the said Act to physical premises of gaming parlours within the geographical boundaries of the state of Sikkim through intranet gaming terminals.

Initially, the Sikkim Online Gaming Act contemplated that the licences would allow the licensee to offer the games⁶⁸ across India via their websites, and not be restricted to the State of Sikkim. However, when the go-live licenses were issued a few months ago, the terms carried certain restrictions by virtue of which such online gaming services may be offered only within the state of Sikkim through an intranet connection, thereby restricting the service to people located within the geographical territory of Sikkim. This amendment was brought in to avoid a discrepancy in the terms and conditions of the licenses issued and the wording of the Sikkim Online Gaming Act. This amendment is bound to have a significant impact on the business plans of the licensees given that there were huge investments made in procuring the licenses and setting up the supporting infrastructure based on the expectation that they would be able to offer the games to players across India. The Sikkim Government also recently

clarified⁶⁹ that the “online gaming levy” payable by a licensee company to the Sikkim Government would remain status quo, i.e. at the rate of 10% of the gross gaming yield (the total amount of all bets or stakes made, and the price of all chances sold; less the value of all winnings and prizes due, in the course of the online gaming or sports gaming during the period in question) or INR 50,000,000 (approximately USD 767,690), whichever is higher,⁷⁰ until the Sikkim Government deems it necessary to review and revise the online gaming levy.

III. Delhi District Court declares that cricket betting is not illegal

A district court in New Delhi (“**Court**”) recently acquitted popular Indian cricketer S. Sreesanth and 35 others in the infamous betting and fixing case pertaining to events during the Indian Premier League cricket tournament in 2013 (“**IPL**”). In dealing with the arguments, the Court made an interesting and encouraging observation on the point of whether cricket was a game of skill for the purpose of gambling laws. The Court observed that cricket is purely a game of skill as it requires “extensive training, practice and expertise and skills in the players.” Taking into consideration factors such as, inter alia, knowledge, study, practice, ability, hand-eye co-ordination, speed, stamina, strength, precision and the mental alertness involved in the various facets of the game, the Court found cricket not to be a game of chance, but a game of skill exempted from the definition of “gambling” under Section 12 of Public Gambling Act, 1867 (“**Public Gambling Act**”).⁷¹ The Court made reference to the decision by the Supreme Court in *K. R. Lakshmanan v. State of Tamil Nadu* (“**Lakshmanan Case**”),⁷² wherein

67. Sikkim Online Gaming (Regulation) Amendment Act, 2015 notification issued by the Law Department, Government of Sikkim dated August 19, 2015

68. Under Rule 3 of the Sikkim Online Gaming (Regulation) Rules, 2009, read with Sikkim Online Gaming (Regulation) Amendment Rules 2009 notification issued by Finance, Revenue and Expenditure Department, Government of Sikkim dated 1st August, 2009, the following games can be conducted online under a license issued under the Sikkim Online Gaming Act: (i) Roulette, (ii) BlackJack, (iii) Pontoon, (iv) Punto Banco, (v) Bingo (vi) Casino Brag, (vii) Poker, (viii) Poker Dice (ix) Baccarat, (x) Chemin-de-for, (xi) Backgammon, (xii) Keno, (xiii) Super Pan 9. (xiii) sports betting on sports games such as football, cricket, lawn tennis, chess, gold, horse-race and such other sport games (which involve prediction of the results of the sporting events and placing a bet on the outcome, in part or in whole, of such sporting event)

69. Vide Notification No. FIN/DSSL/(531)2015-16 issued by the Finance, Revenue and Expenditure Department, Government of Sikkim on June 19, 2015

70. Vide Notification No. 337/FIN/DSSL/972 issued by the Finance, Revenue and Expenditure Department, Government of Sikkim on April 1, 2010

71. Section 12 of the Public Gambling Act - 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.”

72. AIR 1996 SC 1153

betting on horse racing was held to be a game of skill, since factors such as the fitness and skill of the horse and jockey could be objectively assessed by a person placing a bet. Applying the rationale of the Lakshmanan Case, the Court stated that betting on the outcome of a game of cricket would not constitute an offence under the Public Gambling Act. The order was delivered by the lower court and therefore may not serve as a binding precedent. However, the order appears to be an encouraging sign for sports betting businesses and indicates a trend of growing judicial acceptance of the legality of sports betting.

IV. CBDT issues clarification on disclosure of offshore winnings routed through e-wallets

The Central Board of Direct Taxes (“**CBDT**”) recently released a circular with certain “clarifications on tax compliance for undisclosed foreign income and assets”⁷³ (“**Circular**”). The Circular clarifies that a person having funds, subject to tax in India but on which tax was not paid, lying in offshore e-wallets / virtual card accounts maintained with online gaming / poker websites and having made profits therefrom is required to disclose to the Indian tax authorities all the details in relation to these accounts. The Circular states that that an e-wallet / virtual card account is similar to a bank account where inward and outward cash movement takes

place. Hence, the same valuation and declaration of such accounts should be made by persons as in the case of a bank account, in order to comply with certain tax compliance requirements under Chapter VI of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (“**Black Money Act**”).

The Black Money Act was recently enacted to tax foreign undisclosed income and assets of tax residents of India and will take effect from April 1, 2016, i.e. from the financial year April 1, 2015 to March 31, 2016. Non-disclosure of foreign income and assets is subject to 30% tax with a penalty of three times the tax due and rigorous enforced imprisonment of between 3-10 years. The Black Money Act provided for a one-time compliance opportunity (or amnesty) for a limited period for those affected, giving them a chance to bring their tax affairs into order by September 30, 2015, until which time the penalty for failure to make a disclosure in respect of an asset, being one or more bank accounts having an aggregate balance not exceeding the equivalent of INR 500,000 at any time during the previous year,⁷⁴ did not apply.

It is also relevant to note that remittances out of lottery winnings and remittances for purchase of lottery tickets, banned/ proscribed magazines, football pools, sweepstakes etc. are prohibited⁷⁵ under the Foreign Exchange Management (Current Account Transactions Rules) Rules, 2000 (“**Current Account Rules**”). However, although in-letter remittance for the purpose of betting is not explicitly prohibited, it may be construed as such when viewed in light of the spirit and purpose for which the provision was enacted.

73. Clarifications on Tax Compliance for Undisclosed Foreign Income and Assets”, Circular No. 15 of 2015 dated September 3, 2015 issued by Central Board of Direct Taxes (TPL Division), Department of Revenue, Ministry of Finance, Government of India. Available at: http://www.incometaxindia.gov.in/communications/circular/circular15_2015.pdf. Last accessed: October 10, 2015

74. Proviso to section 42 of the Black Money Act

75. Schedule 1 of the Current Account Rules

Annexure - III

India Update: Sports Betting and Skill Games

Publisher: I gaming Business

India has certainly been a centrepiece in the business plans of many gaming companies of late, due to a raft of interesting legal and legislative developments in the region. While the Lodha Committee recommended legalising sports betting in the cricket-crazy Indian subcontinent, the State of Nagaland is looking at regulating skill-based games under a license regime - a different approach to doing so under existing gaming laws in other states. Our article also provides some key updates on sports betting, online poker and skill based gaming.

I. Sports Betting Legalization recommended by Lodha Committee

The Supreme Court of India tasked a three member committee comprising of former judges of the Supreme Court with recommending reforms to the practices and procedures of the Board of Control for Cricket in India (BCCI), among other things (“**Lodha Committee Report**”).⁷⁶ The Report recommended legalizing sports betting in India, which was a shot in the arm for the proponents and lobbyists in this area. The Lodha Committee considered the issues of match-fixing in relation to the popular cricket tournament, Indian Premier League (“**IPL**”). According to the Report, match-fixing undermined the integrity of the sport by attempting to unduly alter the course of a match. Match-fixing constitutes a criminal offence and so is punishable under the law. However, sports betting was a completely different

animal, the report concluded; it could be effectively dealt with under a robust legal framework, with its potentially harmful effects to society mitigated by adequate regulation.

The Lodha Committee Report noted that legalising betting in a similar manner to the United Kingdom would benefit the game of cricket as well as the Indian economy in the long term. This recommendation was similar to that of a prior committee, the Justice Mudgal Committee, also constituted by the Supreme Court, who also emphasised that sports betting would need to be regulated and legalised by the Government of India in order to safeguard the integrity of the game of cricket, curb malpractices, and earn tax revenue for the Government.

The Lodha Committee Report also proposed the introduction of several pertinent provisions for sports betting in India, including:

- Sports betting only to be offered by licensed betting houses with framework regulations to be developed around this;
- Licences to be cancelled and penal sanctions to be imposed in cases of violations;
- The establishment of a regulator to oversee issue of licenses as well as monitor betting houses and cricketplayers;
- A strict disclosure regime for cricketers regarding their interests/relationships with licensed betting houses. With regard to ensuring the latter, betting by persons involved in the conduct of the game of cricket, such as administrators, players, match officials, team officials, owners, etc., would be prohibited in order to minimise instances of conflict of interest from arising.

76. http://www.sportstarlive.com/multimedia/archive/02682/lodha_full_2682954a.pdf

II. Online Poker on tenterhooks: the Gaussian case

The online poker community in India is closely watching and awaiting the verdict in the case of M/s Gaussian Networks Pvt Ltd. v. Monica Lakhanpal and State of NCT, now before the High Court of Delhi.

To give a background to this case, the District Court in Delhi (“**Court**”) considered the question of whether games of skill can be offered for money on virtual platforms. The petitioners had filed a petition under Order 36 of the Code and Civil Procedure Code (“**CPC**”) seeking the opinion of the Court on the question, amongst others, whether there was any restriction on collecting stakes and making profit from skill games played on websites. The court had opined that when skill-based games are played for money in the virtual space, this renders them illegal, and also that the degree of skill involved in playing these games in physical form could not be equated with those played online. It is important to note that this particular judgment is only binding on the parties to the matter, and that it has already been challenged before the Delhi High Court. This is the only matter currently dealing with the skill versus chance test in the context of the online world.

The hearing on the matter took place on January 21, 2016. During this hearing, one of the arguments put forward by the revisionist was that under every existing statute in relation to gaming, poker qualified as a ‘game of skill.’ They also disputed the order on the grounds that poker remained a game of skill regardless of whether it was played online or offline. Interestingly, the State of NCT Delhi stated that it would be making arguments before the Delhi High Court. The State had not presented its case earlier, ahead of the District Court of Delhi. The counsel appearing on behalf of the State mentioned that they would be relying on the cases of KR Lakshmanan v. State of Tamil⁷⁷ Nadu⁷⁸ and Senior Electric Inspector v. Laxmi Narayan Chopra . It is likely that the State

of NCT Delhi will oppose the revision petition, and rely on these cases to bolster the argument that the term “Common Gaming House” as defined in various gaming legislations should be contemporaneously construed to include a virtual gaming portal. The revision petition will be heard again on April 21, 2016.

III. Nagaland: paving the way to regulated skill gaming

A Special Committee of the Government of Nagaland is presently considering passage of the Nagaland ‘Prohibition of Gambling and Promotion and Regulation of Online Games of Skill’ Bill, 2015 (“**Nagaland Bill**”).

This would allow a person to provide portals for games classified as ‘games of skill’, including card games such as chess, poker, bridge and rummy, as well as virtual sports and fantasy sports leagues.

Under the Nagaland Bill, a game would require a preponderance of skill over chance in determining the outcome to be considered as a game of skill. Elements required as evidence of this include (i) strategizing the manner in which wagers or bets are placed, (ii) selection of a team or virtual stocks, or (iii) determination of the manner in which the moves are made. To ensure the contemporaneity of the statute, games that have been declared as, or determined to be, games of skill by Indian or international courts or by statute; and games for which domestic and international competitions and tournaments are conducted, would constitute ‘games of skill’ under the Nagaland Bill.

An entity or a person interested in offering games of skill on a website, mobile platform etc., and earning revenue from it would have to initially obtain a licence from the state government. The revenue models contemplated by the Bill include (i) advertising revenue, (ii) claim of a percentage of winnings or (iii) charging a fixed fee.

77. AIR 1996 SC 1153

78. AIR 1962 SC 159

A licence will be issued only to a person or entity that is incorporated in India. A licensee would also be required to establish a territorial nexus with India; the executive decision-making process and powers would have to be located within India. In addition, the technological support services such as hosting and management of websites, as well as hosting of the servers, would have to be located in India. An interesting aspect is that only persons who do not have an interest in any online or offline gambling activities, in India or any other country, are eligible to receive a licence under the Act.

A Licensee would be forbidden from providing 'games of skill' to players from territories where such games are prohibited or were considered to constitute gambling. A state government which is of the opinion that a licensee was operating there in contravention of the Nagaland Bill or any other laws may bring this to the notice of the Licensing Authority established under the Nagaland Bill. Though the Nagaland Bill has faced stiff opposition from religious groups, it is likely that it will be passed in the near future, as it would give a timely boost to the local economy, bringing in more taxes and businesses.

Annexure - IV

Fantasy Sports: Your ‘Suitable Bet’ in India: Can the ‘Dream Teams’ legally tap the cricket frenzied Indian population?

Publisher: American Gaming Lawyer

Fantasy sports have in recent times been a sensation in countries such as the United States and United Kingdom. It is reported that the American National Football League (NFL) is the most popular fantasy sport in the US and was worth around USD 11 billion in revenue in 2013 alone, according to Forbes. In the US and Canada, there are estimated to be around 41 million users that play fantasy sports.⁷⁹ 1 Fantasy Premier League, the official fantasy football game based on the English Premier League, with over 3 million users, is one of the most popular fantasy sports games in the UK.

While India has a fair amount of catching up to do, the numbers look positive. The Indian obsession with cricket is certainly no secret. The last few years have also seen a significant rise in the popularity of other sports and introduction of a number of sporting events such as the Indian Super League (ISL) - a national football league in India and the Pro Kabaddi League.⁸⁰ The growth of the sports enthusiasts is clear from the burgeoning television viewership, advertisements, merchandising, fan clubs and so on associated with the rise in popularity of such sports in India. With the number of Internet users in India expected to touch 500 million 2017, with as many as 400 million users accessing the

Internet through their mobile phones,⁸¹ India would be an obvious destination and business choice for fantasy sports operators. Fantasy sports generally refer to games where members of the public are invited to build and manage virtual teams consisting of real-life sportsmen and compete against fellow users based on statistics generated and/or points accrued by such real-life sportsmen or teams in certain professional sporting events. Users play a role akin to a virtual team coach and would generally have the ability to trade, buy, sell, rotate and substitute sportsmen in their teams before each round of matches, similar to that of a real sports team coach.

I. The Matrix of Gambling Laws in India

Such as in the US, gaming is a state level legislative subject in India. A specific law on regulating and promoting online games of skill, i.e. Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Bill, 2015 (“**Nagaland Bill**”) was recently tabled before the legislative assembly in the state of Nagaland in India. The Nagaland Bill defines ‘games of skill’ to be games where there is a preponderance of skill over chance, including games where the skill lies in team selection or selection of virtual stocks based on analysis. Further, it is specified that ‘virtual sport fantasy league games’ and ‘virtual team selection games’ would constitute ‘games of skill,’ and it is further clarified that games

79. *Where everyone is a team manager*, dated December 13, 2015. Available at: <http://timesofindia.indiatimes.com/india/Where-everyone-is-a-teammanager/articleshow/50156569.cms> Last accessed: February 29, 2016

80. *A sport of Indian origin played by teams of seven on a circular sand court. The players attempt to tag or capture opponents and must hold their breath while running, repeating the word ‘kabaddi’ to show that they are doing so.*

81. *Mobile users may constitute 80% of Internet users by 2017*, dated February 20, 2016. Available at: <http://economictimes.indiatimes.com/tech/internet/mobile-users-may-constitute-80-of-internet-users-by-2017/articleshow/51070141.cms>. Last accessed: February 29, 2016

of skill may be virtual sports based. The Nagaland Bill is presently under review by a select committee and has not been passed by the state legislature yet. There is presently no similar legislation in other states that regulate fantasy sports. The question then arises whether the gambling legislations, either central or state, impose any restriction or prohibition on conduct of such games. The Public Gambling Act, 1867, a central enactment on betting and gambling has been adopted by certain states in India. Other states have enacted their own legislations to regulate gaming/gambling activities including online gaming activities in some cases (The Public Gambling Act, 1867 along with the state-wise legislations are hereinafter referred to as “**Gaming Enactments**”). The Gaming Enactments read along with relevant case-laws in India make an exception for games of skill or preponderantly of skill. The Supreme Court of India (“**Supreme Court**”) has interpreted the words “mere skill” to include

- 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’; and
- 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”⁸²

Whether a game is of chance or skill is a question of fact to be decided on the facts and circumstances of each case. Thus, games which satisfy the test of “skill versus chance” are not regulated under the Gaming Enactments and may be legally offered through the physical as well as virtual medium (including Internet and mobile) throughout India. While deciding as to the question of “skill versus chance”, Indian courts have adopted the test followed by the US 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.”

Games which satisfy the test of “skill versus chance” do not attract the prohibitions under the Gaming Enactments and may be legally offered through

physical as well as virtual medium (including Internet and mobile) throughout India (though it may be prudent to exclude the states of Assam and Orissa given the complicated provisions under the statutes of each of these states). Therefore, one would need to analyze the format of a game of fantasy sports and assess whether it requires higher elements of skill to play the game than mere chance. Presently, there has been no case in India where fantasy sports games have been tested against the principle of skill versus chance. In the absence of any judicial precedents, while testing the games of fantasy sports, the Indian courts may evaluate these games against the principles established under principles laid down for other games (like Rummy and horse racing) in Indian cases as well as principles applied in foreign jurisdictions. For instance, in the case of *K.R. Lakshmanan v. State of Tamil Nadu*,⁸³ the SC held that betting on horse racing was held to be 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.

II. Preparing for the Ultimate “Match” – Meeting the “Game of Skill” Test

Typically, at the outset of the game, when the user of the fantasy sports website enters a tournament, he starts at the same footing as the other users participating in the game. From here, the user needs to build a fantasy team for himself based on the players available and various factors like salary caps or team value caps imposed.

Arguably, selection of players requires the users to utilize their knowledge (gathered through systematic research), attention, experience and adroitness of sports and thorough understanding of the scoring system and rules applicable for the fantasy sports website. To add to the layer of skill, the user must also find a balance among the team members to fit within the other limitations like maximum number

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

83. AIR 1996 SC 1153

of players that can be selected from a real world team, salary caps or team value caps imposed in the tournament.

Users may be required to assess the relative worth of each player and choose a team that would achieve optimum results. The user would generally need a good understanding of the game, along with being updated with the sport. One may also need to take into consideration various factors prior to each round of games, such as playing conditions, venues of the relevant matches, present and recent form of the players including against their respective opponent, weaknesses and other factors such as injuries, form of the team at large, age of the player and so on. There is a substantial amount of skill involved in this assessment as users would need to be aware of the developments in the sport and make rational decisions in their team selection prior to each scheduled fixture so as to achieve a best-possible points tally.

III. Cross Border Liquidity of Winnings Pool— An Issue Unresolved

Under the Foreign Exchange Management (Current Account Transaction) Rules, 2000, cross border liquidity among Indian players and foreign players is a challenge.

IV. A Slice of the Pie for Overseas Stakeholders?

Under the Foreign Direct Investment Policy (“**FDI Policy**”)⁸⁴ of India issued by the Ministry of Commerce & Industry, Government of India, Foreign Direct Investment (“**FDI**”) is prohibited in entities involved in:

- lottery, including government, private lottery, online lotteries, and so on; and
- gambling and betting including casinos, and so on.

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, dictionaries, and so on for the meaning of these terms.

The intention of the policy makers seems to be to curb investment in gambling activities dependent preponderantly on chance. Since certain fantasy sports games offered in India can be classified as games in which the element of skill predominates over chance, this industry should be held to fall outside the above prohibition.

V. Road Map Ahead

Fantasy sports have certainly gained a fair share of traction over the last couple of years in India due to the advent in popularity of sports such as football and Kabaddi coupled with technological advancements in the country. As previously explained, playing fantasy sports involves a substantial degree of skill by a user due to numerous factors elucidated above and hence such games should fulfil the “skill versus chance” test and should not attract prohibitions under the Gaming Enactments. Therefore, India is and should continue to be an attractive destination for foreign fantasy sports operators to expand their operations.

84. Available at: http://dipp.nic.in/English/policies/FDI_Circular_2015.pdf last visited on March 10, 2016

Annexure - V

India's Gaussian case and its impact on skill game portals

Publisher: World Online Gambling Law Report

Since 2012, the online gaming industry has been on tenterhooks owing to two important matters before courts in India dealing with online rummy and online poker. During the last ten months both matters have been disposed of. Interestingly, in both matters there was no clear order from the courts in favour of online games but the industry seems to have benefited from the absence of adverse orders. In India, gambling is a state subject i.e. each state can legislate its own laws. Therefore, each court order has to be viewed in the context of law applicable in the relevant state.

I. Background to the Gaussian Network Case

In 2012, Gaussian Network Pvt. Ltd., the operator of a popular Indian gaming site Adda52.com ('Gaussian') and Monica Lakhanpal ('Investor') approached the Delhi District Court ('Delhi District Court') under the provisions of Order 36 of the Code and Civil Procedure Code ('CPC') of India, to seek its opinion with respect to various issues pertaining to online gaming portals (the 'Gaussian Network case').⁸⁵

Two of the salient questions were:

- Whether there was any restriction on playing games of skill with stakes on profit making websites?
- Whether wagering and betting on games of skill made the activity 'gambling'?

The Delhi District Court opined that when skill based games were played for money online, it would be illegal. The Court observed that the degree of skill in games played in a physical form cannot be equated with those played online. The Delhi District Court may have assumed that the degree of chance increases in online gaming, and there is a possibility of manipulation including randomness, cheating, and collusion in the online space. The fact that such issues could be addressed by employing technology and effective fraud control checks put in place in the systems was not considered. The Delhi District Court also considered the order of the High Court of Madras ('Madras High Court') in the matter of Director General of Police v. Mahalakshmi Cultural Association⁸⁶ ('Mahalakshmi case') in which the playing of rummy for stakes in bricks-and-mortar rummy clubs was held to be illegal.

II. Impact of the Delhi District Court Order

The order of the District Court was binding only on the parties to the petition. Thus, this opinion did not necessarily by itself alter the position of law in India. However, the authorities and other courts started taking the opinion of the Delhi District Court into account when dealing with decisions pertaining to gaming portals.

85. *M/s Gaussian Networks Pvt Ltd. v. Monica Lakhanpal and State of NCT*, Suit No 32/2012, Delhi District Court.

86. *W.A.No.2287 of 2011.*

III. Challenge to Delhi District court order

In 2014 Gaussian filed a civil revision petition before the High Court of Delhi ('Delhi High Court') challenging the Delhi District Court's order. Gaussian reiterated its argument that under every statute in relation to gaming, poker qualified as a game of skill, and also that poker remained a game of skill whether it was played online or offline. In the meantime, the appeal to the Mahalakshmi case was admitted in the Supreme Court of India⁸⁷ ('SC'), which is the highest court in India, and the decision of the Madras High Court was stayed. Various online rummy website operators intervened before the SC, as the Madras High Court order impacted their operations in India as well. Therefore, the hearing for the Gaussian Networks case was kept pending before the Delhi High Court, as the determination by the SC could have had an impact on the decision by the Delhi High Court. In the *Mahalakshmi* case, the Supreme Court came tantalizingly close to settling the position regarding the legality of taking stakes on online rummy. However, in August 2015 the Government of Tamil Nadu made a statement before the SC that it had not taken any decision on whether online rummy fell foul of the law or not. Therefore, the SC did not make any comments on the legality of online rummy websites and their commercial models. The original matter in the Madras High Court was withdrawn and all adverse observations in the entire matter with respect to the illegality of playing rummy for stakes were rendered ineffective.⁸⁸

IV. Position in other states

Pertinently, the High Courts of Karnataka and Calcutta had stated in various matters that in situations where poker is played as a game of skill, there was no objection to the games being organised

87. *Mahalakshmi Cultural Association v. The Director, Inspector General of Police & Ors* SLP (C) No(s).15371/2012.

88. A detailed analysis of the proceedings in the *Mahalakshmi* case may be found at: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/mahalakshmi-case-update-online-rummy-operators-get-some-respite.html?no_cache=1&cHash=8c7a963cb096310edd4a-35552557dad4

and run by various individuals in the bricks-and-mortar format and they had prevented the local police from harassing individuals who conducted poker tournaments.⁸⁹ In another interesting turn of events, early in 2016 the State of Nagaland in India introduced the Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act 2015 ('Nagaland Act'), which allowed a licensing regime for the operation of skill based online gaming websites in India.⁹⁰ The licence under the Nagaland Act recognizes games like rummy, poker and fantasy sports to be skill games and allows them to be offered on the portals of licensees.

V. The unexpected twist at the last hearing

The 21 April 2016 hearing before the Delhi High Court saw a very unexpected turn of events. The counsel appearing for Gaussian sought permission from the Delhi High Court to withdraw the revision petition. The counsel argued that under common law as well as established case law such as *R. M. D. Chamarbaugwalla v. Union of India*,⁹¹ *State of Andhra Pradesh v. K. Satyanarayana & Ors*,⁹² and *K R Lakshmanan v. State of Tamil Nadu*,⁹³ there was a clear exception provided for games of skill in India. In states like West Bengal, offering games like poker for stakes was permissible. The Nagaland Act also legitimized offering games of skill such as online poker and online rummy. The order of the Delhi District Court therefore would limit the rights of Gaussian even though it would be legal to offer such games under the Nagaland Act or in West Bengal.

The counsel for Gaussian requested that the approach followed by the SC while dismissing the

89. *Indian Poker Association v. State of Karnataka*, WP Nos. 39167 to 39169 of 2013 (Karnataka HC), *KizhakkeNaduath Suresh v. State of West Bengal & Others* W. P. No. 13728 (W) OF 2015 (Calcutta HC).

90. 6. Refer to our hotline on the Nagaland Act: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/new-law-passed-in-the-state-of-nagaland-in-india-to-regulate-online-gaming.html?no_cache=1&cHash=718a88d1671944099971b8a1a53bf812

91. AIR 1957 SC 628.

92. AIR 1968 SC 825.

93. (1996) 2 SCC 226

Mahalakshmi case also be taken in the present scenario. As mentioned above, in the Mahalakshmi case, petitioners sought permission for the withdrawal of the original writ petition filed before the Madras High Court and permission for the same was granted by the SC. Consequentially, the proceedings before the SC became ineffective and the observations of the Madras High Court do not survive.

The Delhi High Court acceded to the request made by the parties and granted permission to withdraw the reference made before the Delhi District Court and the revision petition filed before the High Court. It also ordered that the observations of the District Court do not survive.

VI. Way Forward

While in most states prohibitions under gambling laws do not apply to skill games, some uncertainty was created due to the *Mahalakshmi* case and the

Gaussian Network case with respect to online skill game portals, which has now been put to rest. It will be business as usual for the skill game portals. In some states gaming *per se* is prohibited. Therefore, the two court orders will not have any impact on the legal position in those states. Nagaland State has taken a progressive step to introduce a licensing regime for skill based gaming portals. Insofar as poker is concerned, it seems that more and more states are now acknowledging it as a game of skill.

The law however continues to remain grey on the applicability of the prohibitions under state gambling enactments to online (non-skill) gaming sites.

With online gaming business models gaining momentum, more and more states are likely to review their position with respect to the online space. The conflict between Central laws and state laws will have to be resolved to ensure the growth of this industry.

About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

As a firm of specialists, we work with select clients in select verticals on very complex and innovative transactions and disputes.

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The Government of India (GOI) also envisions airport infrastructure investment of US\$ 11.4 billion under the Twelfth Five Year Plan (2012-17). It has opened up the airport sector to private participation. The Airports Authority of India (AAI) also aims to bring around 250 airports under operation across the country by 2020. We at NDA accordingly prepare ahead, envisaging the coming 10 to 15 years, in order to provide clients appropriate insights based on our understanding of current as well as future legal and regulatory issues.

Our ability to innovate is endorsed through the numerous accolades gained over the years and we are also commended by industry peers for our inventive excellence that inspires others.

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A brief below chronicles our firm's global acclaim for its achievements and prowess through the years.

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