

## Gaming Law Wrap

August 09, 2021

### HIGH COURT OF MADRAS STRIKES DOWN AMENDMENT TO TAMIL NADU GAMING ACT, 1930 PROHIBITING FOR MONEY ONLINE GAMES OF SKILL

- The High Court of Madras ("**Court**") has struck down certain amendments<sup>1</sup> introduced by the *Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021*, ("**Amendment Act**") as unconstitutional in the matter of *Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors*<sup>2</sup>.
- The Court held that the complete prohibitions on for money online games of skill under the Amendment Act were unreasonable, excessive, and manifestly arbitrary, thereby falling afoul of Article 19(1)(g) of the Constitution<sup>3</sup>.
- The State's legislative competence to enact laws pertaining to 'betting and gambling' under the Constitution of India<sup>4</sup> ("**Constitution of India**") was confined to betting on *games of chance*. Even if the State may have power to legislate on games of skill under other entries, the complete prohibition on games of skill was considered disproportionate.

#### BACKGROUND

- In November, 2020, the Governor of Tamil Nadu promulgated the Tamil Nadu Gaming and Police Laws (Amendment) Ordinance, 2020 ("**TN Ordinance**") which amends the Tamil Nadu Gaming Act, 1930 ("**TN Gaming Act**"), the Chennai City Police Act, 1888 and the Tamil Nadu District Police Act, 1859 (collectively, "**TN Police Acts**").
- A press release was issued by the Government of Tamil Nadu along with the TN Ordinance highlighting the rationale for its promulgation, i.e., the fact that innocent people, especially youngsters, had been cheated by online gaming providers and committed suicide due to online gaming in the State.
- The amendments introduced by the TN Ordinance were thereafter incorporated into the Amendment Act, with certain modifications, in February, 2021.
- The skill gaming operators had therefore, stopped offering their games in TN from November, 2020.
- The challenge was principally\* to the following amendments:
  - (i) Expansive definition of 'gaming': The definition of 'gaming' was been expanded to include '*any game*' involving *wagering or betting in person or in cyberspace*, thereby taking within its fold even games of skill. As per the explanation to the definition, 'wagering or betting' was deemed to include activities typically carried out by an operator such as collection or soliciting of bets, receipt or distribution of winnings/prizes including through electronic means, in respect of wagers and bet, or any act intended to aid or induce such activities ("**Explanation**").
  - (ii) Prohibition on wagering or betting in cyberspace/facilitating or organising wagering or betting: An express prohibition on wagering or betting in cyberspace, by playing Rummy, Poker, or any other game, or facilitating or organising wagers or bets in cyberspace, on such games was introduced<sup>5</sup> under Section 3 A of the Amendment Act. The Explanation was made applicable to Section 3 A, thereby also prohibiting the collection, solicitation of bets, receipt and distribution of winnings, etc., in cyberspace, under Section 3 A.
  - (iii) Prohibition on games of skill in lieu of exemption: The exemption for games of skill under Section 11 of the TN Gaming Act was replaced with a provision to the effect that the prohibitions and penalties under the TN Gaming Act, as well as certain procedural provisions (relating to search and seizure, evidence, etc.) would apply to games of skill when played for wager, bet, money or other stakes<sup>6</sup>.

[\*There were certain other amendments introduced under the Amendment Act, which we have not discussed as it was not the focus of the challenge in this case.]

- The petitioners in this case were 1) Rummy operators, 2) Poker operators, and 3) the All India Gaming Federation, a self-regulatory body with several skill gaming operators as members.

#### JUDGMENT

The Court upheld the challenge to Part II of the Amendment Act, and struck it down as ultra vires the Constitution in its entirety.

We have discussed the key holdings of the Court below:

Overall, the Court pointed towards several provisions of the Amending Act which contradicted each-other, and accordingly held that the overall wording of the Amendment Act was overbearing, thoroughly unreasonable, and

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manifestly arbitrary.

### (i) Relevant entries of relevant State Power

- The Constitution divides legislative powers between the Central Government and the States under different 'entries' in three lists. The State Governments have exclusive legislative competence under Entry 34, List II of the Constitution of India to enact laws on 'betting and gambling.'
- The Court held that the State's legislative competence under Entry 34 had to be read to be confined to betting on *games of chance*, as 'gambling' had been judicially interpreted to mean betting or wagering on games of chance. Relying upon the cases of *KR Lakshmanan v State of Tamil Nadu & Anr*<sup>7</sup> and *RMD Chamarbaugwala & Anr. v Union of India & Anr.*<sup>8</sup> the Court observed that the Supreme Court had also held that Entry 34 *could not* cover games of skill.
- However, the Court observed that the State may derive legislative competence to regulate games of skill under the alternative entries of Public Order<sup>9</sup>, Trade and Commerce<sup>10</sup>, or Entertainment and Amusements<sup>11</sup>, subject to such regulations/restrictions being proportionate to their objects.

### (ii) Excessive restrictions on Games of Skill in violation of Article 19(1)(g)

- Article 19(1)(g) of the Constitution grants citizen the fundamental right to practice any profession, or to carry on any occupation, trade or business. However, this right is not absolute, and reasonable restrictions can be imposed by the State in the interest of the general public<sup>12</sup>.
- The Court relied upon the case of *Lakshmanan* case (supra) in which the Supreme Court (relying upon *Chamarbaugwala*) recognized that games of skill were distinct from games of chance. Games of skill were not gambling and were business activities protected under Article 19(1)(g) of the Constitution.
- The Court held that skilled players had the right to exploit their skills and make a living off their skills, and only reasonable restrictions should be imposed on such right. The prohibitions under Section 3 A, coupled with the expansive definition of 'gaming' completely prohibited any opportunity to exercise such skills in respect of online games played for stakes.
- The exemption for games of skill had been replaced with a complete prohibition, which would bring about '*ridiculous and unwanted results if applied in letter and spirit.*'
- Accordingly, the court held that the Amendment Act was unreasonable to the extent of being manifestly arbitrary, particularly in the background of judicial pronouncements. By imposing a wide ranging and blanket prohibition on games of skill, the Amendment Act fell afoul of Article 19(1)(g), especially considering the proportionality principle.

### (iii) Prohibitions under the Amendment Act disproportionate to object sought to be achieved

- Any restriction sought to be imposed by law, on a right guaranteed under the Constitution must satisfy the test of 'proportionality,' i.e., must be proportionate to the object of the law.
- The Court acknowledged that the object of the Amendment Act was to protect the public from gambling and betting, which had the potential to be ruinous.
- However, it held that the State had failed to justify the need for a total prohibition on even games of skill, apart from anecdotal references to suicide and perception of the 'evil' of the addiction.
- The State had failed to justify the need for such sweeping amendments to a legislation originally intended to prohibit betting/wagering only on games of chance. The State had also not demonstrated why a lesser form of restrictions would not have sufficed.
- Accordingly, the Amendment Act was unreasonable and a disproportionate.
- The Court also pointed out that it was unreasonable and disproportionate to specifically prohibit games of skill such as Poker or Rummy (which involved considerable memory, mathematics, observation, and adapting playing techniques based on the unseen cards) if played in cyberspace and for any prize/stake.
- It was observed that in relation to such card games or board games (such as chess or scrabble), there was no difference in the skills involved while playing in the physical form or online. The cause for introducing the Amendment Act had no nexus with its effect, and therefore these prohibitions were unreasonable and grossly disproportionate.

For the reasons discussed above, the court struck down the amendments to the TN Gaming Act introduced by the Amendment Act as *ultra vires* the Constitution in its entirety. However, the Court clarified that the State was at liberty to introduce another appropriate legislation conforming to '*Constitutional sense of propriety.*'

### CONCLUSION AND TAKEAWAYS

The Court's judgment was a welcome relief for the thriving online skill gaming industry in India, which had ceased to offer its games in Tamil Nadu, a significant market, in view of the prohibitions introduced under the Amendment Act. For the moment, online skill gaming operators may commence operations in Tamil Nadu. However, this may be a short-lived relief.

Soon after the judgment was pronounced, the Law Minister of Tamil Nadu, S. Regupathy announced that the State Government of Tamil Nadu would soon enact a new law to ban online Rummy in the State, along with appropriate justification, for the welfare of the public. While the indication at this stage is that the ban would only cover online Rummy, it would need to be seen whether the new law could also include other online games of skill.

The Court in its judgment has indicated that the State Government can derive legislative competence to enact such a prohibition on games of skill under alternative entries of the Constitution (i.e., apart from Entry 34 on '*betting and gambling*') as discussed above. In view of the Court's order, however, the onus would lie heavily on the State Government to justify the necessity of a total ban, and demonstrate how prohibiting a constitutionally protected activity is proportionate to the object sought to be achieved. This may be practically difficult for the State Government

to demonstrate. If other skill games apart from Rummy are sought to be prohibited as well, the Government would have to demonstrate this in relation to the other games too.

Therefore, the skill gaming industry may not be completely ‘off the hook’ in Tamil Nadu.

– **Tanisha Khanna & Gowree Gokhale**

You can direct your queries or comments to the authors

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<sup>1</sup> Part II of the Amendment Act amended the TN Gaming Act, whereas Parts III and IV of the Amendment Act deleted the gambling – related prohibitions from the Police Acts. Part II has been struck down by the Court.

<sup>2</sup> WP Nos.18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021

<sup>3</sup> Freedom to practise any profession, or to carry on any occupation, trade or business

<sup>4</sup> Entry 34, List II, Constitution of India

<sup>5</sup> **3-A. Wagering or betting in cyberspace-** (1) No person shall wager or bet in cyberspace using computers, computer system, computer network, computer resource, any communication device or any other instrument of gaming, by playing Rummy, Poker or any other game or facilitate or organize any such wager or bet in cyberspace.

(2) Whoever wagers or bets in cyberspace using computers, computer system, computer network, computer resource, any communication device or any other instrument of gaming by playing Rummy, Poker, or any other game or facilitates or organizes any such wager or bet in cyberspace, shall be punished with imprisonment which may extend to two years or with fine not exceeding ten thousand rupees or with both.

<sup>6</sup> 11. Games of mere skill.— Notwithstanding anything contained in this Act, sections 3A and sections 5 to 10 shall apply to games of mere skill, if played for wager, bet, money or other stake.

<sup>7</sup> 1996 AIR 1153

<sup>8</sup> AIR 1957 SC

<sup>9</sup> Entry 1, List II, Constitution of India

<sup>10</sup> Entry 26, List II, Constitution of India

<sup>11</sup> Entry 33, List II, Constitution of India

<sup>12</sup> Article 19(6), Constitution of India

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