

A TALE OF TWO STATES: SKILL GAMES ON INDIA'S RADAR

Ranjana Adhikari and **Tanisha Khanna** of Nishith Desai Associates explain how two state courts in India have given drastically different interpretations of the law around skill games.

The last couple of months in India have witnessed interesting developments with respect to games of skill. While the High Court of Punjab and Haryana (“PH Court”) has strengthened the view that fantasy sport is a skill game in a well-argued ruling, the government of Telangana has taken a hardline approach and enacted two ordinances in a bid to outlaw all gaming activities within Telangana, including skill games. Prior to exploring these developments in our article below, we have set out a brief overview of India’s gaming laws to set the tone and context to these changes.

Summary of India’s gaming laws

Indian gaming laws are state-specific, with each state given the exclusive right to regulate ‘betting and gambling’ within their territory under the Constitution of India¹ (“Constitution”). Nevertheless, certain states in India have adopted the central law, the Public Gambling Act, 1867 (“Central Act”). The vast majority, however, have independently enacted separate legislations to regulate gaming and gambling activities within their territory (“State Enactments”).

The Central Act and most of the State Enactments are archaic laws, introduced prior to the advent of virtual/online gambling. Therefore, in keeping with the time in which they were introduced, they

expressly prohibit gambling activities within physical premises defined as ‘common gaming houses’. It is debatable whether these State Enactments (except for the states of Nagaland, Sikkim and now Telangana) include internet within their purview as well. Most State Enactments also carve out an exception for games of ‘mere skill,’ which has been interpreted by the Supreme Court of India to mean games which are *preponderantly* of skill².

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High Court of Punjab and Haryana: first Indian court to rule fantasy sport to be predominantly skill-based

The PH Court recently ruled that fantasy sports³ betting is a predominantly skill-based game⁴. The PH Court’s ruling has provided respite to fantasy sports operators by safeguarding them from the prohibitions under the Central Act as it had been made applicable to Punjab and Haryana⁵ (“Punjab State Enactment”).

A petitioner (“Player”) was a customer of the respondent company Dream 11 Fantasy Private Limited (“Dream 11”) and claimed

to have fallen prey to the alleged gambling business of Dream 11 through its website <https://fantasycricket.dream11.com.in>. Following the rules of the play, the player created virtual cricket and football teams and joined various leagues. The player bet on his virtual teams, and lost the entire amount he had bet, a sum of INR 50,000 (£610/€660). The player consequently approached the PH Court to issue directions to initiate investigation or criminal investigation against Dream 11, alleging that fantasy sports were not based on skill, but were purely gambling activities.

In its defence, Dream 11 described the nature of fantasy sports to the PH Court, and the integral skills required by a player in effectively drafting virtual teams and partaking in leagues. The crux of Dream 11’s arguments in contending that skill predominated chance in playing fantasy sport is as follows:

A participant, while drafting his team, is required to:

- assess players and evaluate the worth of a player against the other available players keeping aside bias for an individual or a team;

¹ List II, Entry 34, Seventh Schedule of Constitution of India.

² State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699.

³ Fantasy sport is a game which takes place over a number of rounds (i.e. a single match, or an entire league). Participants select players to build virtual teams, and act as managers of their virtual teams. These virtual teams compete against one- another to collect points based on the results/achievements of real sportspeople or teams in professional sporting events. The winner is the participant whose virtual team garners the maximum number of points across the rounds.

⁴ CWP No.7559 of 2017.

⁵ The Public Gambling Act, 1867, was made applicable to the State of Punjab and Haryana via the Public Gambling (Punjab Amendment) Act, 1929.

- adhere to an upper credit limit, and ensure that the team did not entirely/substantially consist of players from a single real-world team. This pivotal precondition also ensured that a player did not create a situation resembling the act of betting on the performance of a single real-world team;
- evaluate a player's anticipated statistics, for example, in the case of a batsman in a fantasy cricket game, the batting averages, total runs, number of centuries, etc. This evaluation was based on past statistics, as well as prevailing circumstances such as age, player injuries etc.

In playing in the fantasy game, a participant was also required to constantly monitor the scores of athletes drafted by him, and make substitutions where necessary. He also had the opportunity to avail of Dream II's free-to-play variants to test his skill and gain experience.

Dream II made the argument that the player had been unable to perform well in the fantasy game as he had failed to exhibit the aforementioned skills.

Apart from the aforementioned factual arguments made by Dream II, it also relied heavily upon the landmark judgment of the Supreme Court ("SC") in *K.R. Lakshmanan v State of Tamil Nadu*⁶ ("Lakshmanan Case") in which the SC had held that betting on horse races was a game of skill. The PH Court studiously analysed the Lakshmanan Case, in which it had been held that the inherent capacity of the animal, capability of the jockey, the form and fitness of the horse, distance of the race etc., were all objective factors capable of assessment by race-goers. Thus, betting on horse races was a game of 'mere skill'. The PH Court construed that the SC had held that competitions in which success depended upon a substantial degree of skill were not gambling, and despite there being some element of chance, if a game was

"Telangana State's Ordinance I makes plain that games of skill with elements of chance could not be described as 'skill games', thus rummy was not a game of skill"

preponderantly of skill, it would be a game of 'mere skill'. Pertinently, the PH Court also held that since fantasy sports did not amount to gambling, Dream II was conducting a business activity protected under Article 19(1)(g)⁷ of the Constitution.

The PH Court held, relying on the Lakshmanan Case, that playing fantasy sports too required considerable skill, judgment and discretion. The wide gamut of factors that a participant would need to assess, as elucidated above, would undoubtedly affect the result of the fantasy game. In drafting players, a participant was required to study the rules and regulations and the strength and weaknesses of athletes. Success in Dream II's fantasy sport product therefore had its genesis in a user's knowledge, judgment and attention. Thus, the element of skill predominated the outcome of the fantasy game, and fantasy sport was a game of 'mere skill,' which did not amount to gambling.

Gamechanger: Telangana outlaws skill games

The Government of Telangana has promulgated two ordinances that have, for the time being at least, put the operators working in in a state of limbo. The two ordinances coming into force have taken the industry by storm and were swiftly challenged before the High Court of Hyderabad ("Hyderabad HC") in *Auth Rep, Head Infotech (India) Pvt. Ltd., Hyderabad & Anr vs. Chief Secy, State of Telangana, Hyderabad & 3 Ors*⁸ ("Telangana Proceedings") by several online rummy operators ("rummy operators").

On June 17, 2017, the Telangana State Gaming (Amendment) Ordinance, 2017 ("Ordinance I") was promulgated by the Governor of the state of Telangana ("Telangana"). Ordinance I made plain that games of skill which had elements of chance could not be described as 'skill games', and rummy was not a skill game as it involved elements of chance. In addition, while the Telangana State Enactment only made gaming within physical premises ('common gaming houses') an offence, Ordinance I changed the law to make online gaming an offence in the state as well.

The following are the two key challenges posed by the rummy operators to Ordinance I in the Telangana Proceedings:

- The State of Telangana did not have the legislative competence to enact Ordinance I. The Supreme Court ("SC") had ruled in *R.M.D Chamarbaugwala v Union of India*⁹ ("Chamarbaugwala Case") that the business of offering skill games did amount to gambling and fell within the fundamental right to carry out trade or business, a guaranteed protection under the Constitution¹⁰. Hence, the State legislature did not have the authority to prohibit skill games (including predominantly skill-based games).
- Rummy has previously been held to be a game of skill by the SC in *State of Andhra Pradesh v K. Satyanarayan*¹¹ ("Satyanarayan Case"). It was not up to Telangana to contradict the SC's finding of fact by legislatively declaring that Rummy was a game of skill. Telangana countered these challenges on the basis of the SC's observations in the

⁶ AIR 1996 SC 1153.
⁷ Article 19(1)(g) of the Constitution of India states that all citizens have the right to practice any profession, or to carry on any occupation, trade or business.

⁸ Auth Rep, Head Infotech (India) Pvt. Ltd., Hyderabad & Anr vs. Chief Secy, State of Telangana, Hyderabad & 3 Ors WPMP 24819/2017.

⁹ AIR 1957 SC 628.

¹⁰ Article 19(1)(g) of the Constitution.

¹¹ State of Andhra Pradesh v. K. Satyanarayan 1968 AIR 825.

Satyannarayan case, in which it said that rummy, *when played for stakes*, amounted to gambling and was not protected as a fundamental right under the Constitution. Even if playing Rummy was protected under the Constitution, Telangana could impose reasonable restrictions¹² on the right in the interest of the general public. The Government of Telangana also raised issue with the online gaming companies for manipulating gameplay.

Perhaps in direct response to the irrefutable challenges to Ordinance I posed by the rummy operators, the State moved to enact another ordinance¹³ ("Ordinance II") to amend the Telangana Gaming Act, 1974. Ordinance II came into effect immediately.

Will it create a domino effect?

In order to counter the rummy operator's contention on the basis of the legislative incompetence of the State to enact Ordinance I, Ordinance II removed the skill games exception in its entirety from the State Enactment of Telangana. In addition to this, Ordinance II classified the acts of risking money or otherwise on an unknown result of any event including on a game of skill as 'betting and wagering.'

As an interim measure, on July 13, 2017, the judge in the Telangana Proceedings restricted Telangana from taking action against the conduct of any operators' business outside the boundaries of the State of Telangana. This was operational for four weeks from the date of the order.

It would be pertinent to see if the orders in this matter have a domino effect in the other states or fortify the principles further to protect games of skill.



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¹² Article 19(6) of the Constitution.

¹³ Telangana Gaming (Second Amendment) Ordinance, 2017.

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