



THE LEGALITIES OF ONLINE GAMBLING: A CRITICAL ANALYSIS.DOCX

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Introduction

Gambling has existed in India since time immemorial with references to it in ancient literature as well as popular culture. The negative repercussions that come with it led to the development of various regulating frameworks to curb it. While discussing the legalities of running a horse-racing club in *KR Lakshmanan v State of Tamilnadu*, Justice Kuldip Singh observed that “*The crucial question to be determined is whether a horse-race run on the turf of the club is a game of `chance' or a game of "mere skill"*”. This article intends to provide an overview or an insight into the questions that are to be pondered upon in order to determine whether a certain bet or a wager amounts to gambling. The article attempts to do an intricate study on determining whether a certain event is predominantly a game of skill or chance and the mechanisms involved in determining its legality.

Defining Gambling: The Broad Spectrum What amounts to Gambling?

The act of Gambling requires 3 elements:

1. Staking of an amount
2. A reward usually higher than the amount staked
3. Act of uncertainty, Chance.

Gambling in short is a staking of money for a chance to win more money.

Games can be classified into three categories:

1. Game of skill- chess, cricket etc.
2. Game of pure chance - three cards, Mankatha where there is no requirement for any skill
3. Game of mixed skill and chance- Rummy

In the Game of mixed skill and chance, the test of predominance is applied to categorise the game. If in a game of mixed chance and skill, the element of chance predominates, the game would be categorised as a game of chance. Whereas, if the element of skill predominates over chance, the game would be categorised as a game of skill.

Traditional Forms of Gambling

Does the act of Gambling depend on the underlying nature of the game i.e., of skill or chance?

So whether it is a game of skill or a game of chance, both games have one aspect in common and that is the outcome of the game. No player of the game knows with certainty the outcome of the game and it always remains an uncertain event until the game concludes. Hence placing stakes on an outcome of a game, irrespective of whether it is a game of skill or chance amounts to Gambling.

For example, let's take Mankatha which is a game of chance. Suppose 2 players A and B are placing a stake of INR 1000 each on the outcome of a game of Mankatha, the outcome of the game is determined by a particular card number falling on the inside or outside. So there is no skill involved in it, it is nothing but a game of chance. In this, if C and D, who are spectators, place a stake in the game, it amounts to gambling.

Secondly, placing stakes in the outcome of the Game of Cricket which is purely a game of skill. Suppose A and B are the spectators of the match India vs Pakistan and Dhoni is on Strike. Placing stakes on whether Dhoni will go for a 6 on this ball is purely on the skill set of Dhoni and even though putting a stake on this will amount to gambling, there is no difference if it is a game of skill or chance. If there is a chance of uncertainty it will amount to gambling.

RMD Chamarbaugwalla & Anr vs Union of India

The Supreme Court has laid down the difference between a Game of skill and chance in as follows:

1. Game of Skill and Game of Chance form two distinct and separate categories.
2. Once a game's character is determined, it must fall under either of the two categories.
3. Games of Skill enjoy constitutional protection under Article 19(1)(g) and are subject to reasonable restrictions under Article 19(6), whereas games of chance do not enjoy constitutional protection under Article 19(1)(g) as they are "*Res extra Commercium*" which means "*outside the scope of commerce*".

Even if Prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known, such an activity would amount to betting and gambling. For

example, if a person stands near a roulette and stakes an amount of INR 1000, the ball will stop at 15 and if the ball stops at 15 the person will be rewarded for his forecast. This also amounts to Gambling.

State of Andhra Pradesh vs K. Satyanarayana & Ors (AIR 1968 SC 825)

The Question before the Hon'ble Supreme Court in this case was whether a club named Crescent Recreation Club which was raided by the circle inspector was being used as a "Common Gambling House" and whether the persons present in the club during the raid were gambling. The fact alleged was that Rummy was played for stakes and that the club was making profits from such games of Rummy.

Section 3 of the Public Gambling Act, which was pari materia to the Hyderabad Act in question, defined a "Common Gambling House". Section 6 prescribed a statutory presumption against the persons present in the common gambling house to have been present there for gambling until the contrary is proven.

The learned Magistrate who tried the case thought that the offence was proved, because of the presumption since it was not successfully repelled on behalf of the present respondents. The learned Judge made 2 points:

1. First referred to Section 14 of the act which provides that nothing done under the act shall apply to any game of mere skill wherever played and he was of the opinion on the authority of two cases decided one by Madras High Court and other by Andhra High Court stating that the game of rummy was a game of skill and therefore the act did not apply to the case. He also held that there was no profit made by the members of the club from the charge for the use of cards and the furniture and the room in the club by the players and therefore the definition of common gambling house did not apply to this case. In accepting the reference, the learned single judge in the High Court did not express any opinion upon the question of whether the game of Rummy can be described as a game of skill.

He relied upon the second part of the proposition which the Sessions Judge had suggested as the ground for acquitting the accused, namely, that the club was not making a profit but was only charging something as a service charge.

It was held that

1. Game of Rummy is mainly and predominantly a game of skill
2. From the facts it is said that the Club was only charging a fee to meet the expenses and costs, and no evidence of gambling or of the club making profits and gains from rummy games was found.
3. Since Rummy is mainly and preponderantly a game of skill and there is no element of Gambling or proof that the club was making profits and gains from games of rummy, the protection under Section 14 to games and mere skills was extended to the club by the Hon'ble Supreme Court.
4. The Hon'ble Supreme Court however held that if on facts, it had been proved that 5 points per game of rummy was charged by the Club, then the club would qualify as a common gambling house, which in other words meant that the players of rummy in the club were gambling.

So in conclusion when rummy is predominantly a game of skill, when players with stakes, the players of rummy can be said to be gambling and betting. Therefore undoubtedly there is evidence of gambling in some way that satisfies it.

Definition of Gaming under the Mysore Act Section 2(7):

(a) Gaming means all forms of wagering and betting in connection with any game of chance.

(b) By way of an explanation, the game of chance is defined to include

- I. A Game of chance and skill combined, and
- II. A pretended game of chance or a pretended game of skill combined.
- III. A game of chance does not include any athletic game or sport i.e., games of pure skill only. In other words, through the statute, the state legislature has deemed it appropriate to exclude wagering and betting in connection with games of pure skill.

As per the Hon'ble Supreme Court Gaming is to play any game whether of skill or chance for money or moneys worth and the act is not less gaming because the game played is not in itself unlawful and whether it involved or did not involve skill.

Video gaming therefore is associated with stakes or money or money's worth on the result of a game, be it a game of pure chance or of mixed skill and chance.

So for a commoner or a novice, it is difficult to play video games with skill, ordinary common people who join the game can hardly be credited with skill for success in the game. The forecast is nothing better than a shot at a hidden target.

Whether a particular video game is a game of skill or a game of chance or mixed chance or skill requires to be determined on the main element namely, skill or chance.

If it is a game of pure or mixed chance and skill, it is gaming. Even if the game is for amusement or diversion of a person from his usual occupation for entertainment, it would constitute gaming.

KR Lakshmanan vs State of Tamil Nadu & Anr (1996 2 SCC 226)

It is another example of the Hon'ble Supreme Court distinguishing between playing the game and the act of wagering and betting on the outcome of the game which is being played, which act is nothing but betting and gambling.

The following questions were raised in the case:

1. What constitutes gambling?
2. Whether the running of horse races by the club is a game of chance or a game of mere skill?
3. Whether wagering or betting on horse races is gambling as defined by the police act and the Gaming Act?

The expression gaming forming part of the Madras City Police Act, 1888 and Madras Gaming Act, 1930 came up for consideration before the Hon'ble Supreme Court in this case. The expression gaming as it stood prior to the Madras city police and Gaming Amendment Act, 1949 included wagering and betting except on a horse race.

1. If such wagering and betting takes place on the date of race and
2. In a place or place within the race enclosure with such authority controlling such a race has with the sanction of the state government set apart for the purpose.

In this case, A club operates and conducts horse races. Race meetings are held in the club racecourses in Madras and Ooty, for which bets are made inside the race course premises. Admission to the race course is by tickets, entrance fee is prescribed by the club. A separate entrance fee is prescribed for the first and the second enclosure. About 1.5% of the entrance fee represents the entertainment tax payable to the commercial tax department of the State govt. The remaining goes to the club's account.

Betting on horses, and participating in the races may be made either at the club's totalizators by purchasing tickets of Rs 5/- denomination or with the bookmakers who are licensed by the club and operate within the first enclosure. The Totalizator is an electronically operated device which pools all the bets and after deducting betting tax and club charges, works out a dividend to be paid out as winnings to those who have backed the successful horses in the race. Bookmakers, on the other hand, operate on their account by directly entering into contracts with the individual punters who come to them and place bets on horses at the odds specified by the bookmakers. The Bookmakers issue to the punters printed betting cards on which the bookmaker's name, the name of the horse backed, the amount of bet and the amount of prize money payable if the horse wins are entered.

The winning punters collect their money directly from the bookmaker concerned. The net result is that 75% of the total collections of each race are distributed as prize money for winning tickets, 20% is paid as betting tax to the state government and the remaining 5% is retained by the club as commission. Similarly, the bookmakers collect from their punters, besides the bet amount specified in the betting card, 20% bet taxable to the state and 5% as commission from the total collections and also from the total receipt of the bookmakers. According to the appellant, the punters who bet at the totalizator or with the bookmakers have no direct contract with the club.

So, horse racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained Jockey can touch the winning post. It is proven that horse racing is a game where the winning depends substantially and preponderantly on skill. So it is found that Horse riding is a game of skill and playing the game is not illegal.

The Hon'ble Supreme Court held that:

- a) The game of horse racing is a game of skill and playing games per se is not illegal and will not amount to Gaming or Gambling.
- b) The expression 'Gaming' includes wagering and betting. Wagering and Betting do not include Wagering and Betting on horse races subject to the satisfaction of twin conditions.
 - The wagering and betting must happen on the date of the race.
 - The wagering and betting must happen within such race enclosures which such authority controlling such race has, with the sanction of the State Government, set apart for the purpose.

Only wagering and betting are protected by the enactments which satisfy the twin conditions mentioned above.

"Betting on horse racing or athletic contests involves the assessment of a contestant's physical capacity and the use of other evaluative skills."

If wagering and betting are found in bucket shops or any house, house room, tent, streets, enclosures or any other place away from the club, then the same amounts to Gaming or Gambling and will be prohibited.

If the Hon'ble Supreme Court ever intends to bless wagering and betting on all games of skill, then the wagering and betting found in bucket shops or any house, house room, tent, enclosures, streets or any other places away from the club, must also be held to be legal as wagering and betting are being done on a game of skill i.e., horse racing.

When the Hon'ble Supreme Court explicitly renders a finding that if wagering and betting on horse racing happens in such places, it would amount to gaming, what is explicitly saved by the Hon'ble Supreme Court is only wagering

and betting inside the club subject to twin conditions. This is because of the legislative design of enactment. In other words, wagering and betting on horse racing as a whole is prohibited and if done would amount to Gambling or Gaming. However, since the enactments have made an exception to wagering and betting on horse racing subject to twin conditions being met, such wagering and betting satisfying the twin conditions alone would not amount to Gaming or Gambling.

In ordinary and common parlance, gambling connotes taking a chance. In the usual sense, there is no distinction made between chance and skill or the preponderance of either in an activity which may be seen and understood to amount to gambling. However, betting in the ordinary sense, cannot be divorced from gambling since the risk-taking element in gambling is betting. The activity of betting or wagering implies an element of speculation on the happening of a certain event, whether or not the persons involved in betting or wagering or gambling have any control over the event as long as there is some element of prize to win for forecasting the outcome of the event.

Philosophically and realistically, every future event depends on an element of chance. There may be no greater need to look beyond the pandemic raging across the globe to appreciate such truism. Even in the ordinary case, when a person promises to meet another on the next day, there are several presumptions that go into such a promise and they are based on the ordinary course of things. It is possible that a tsunami takes place during the interregnum and even the simple act of meeting a person is impossible to be executed.

Sporting activities are replete with upset results. An upset implies that the outcome has been contrary to the ordinary expectation. The expectation is fed by the history of the performances of the two parties that precede the particular encounter. Whether in the boxing ring in the football arena or on the cricket pitch, it is the hope of a different outcome than what is predicted that impels the underdog and results in instances like the Rumble in the Jungle of 1974 or of the arguably the greatest upset in football history at Belo Horizonte in 1950 or in the felling of the mighty West Indies at Lords in 1983. The activity involved in every case was a game of pure skill, yet the unfancied triumphed and such moments are regarded as seminal moments and go down as a part of sporting folklore.

Every game or activity depends on an element of chance. One team at a cricket match may bat in perfect sunshine on a flat wicket, but the other may bat on a different wicket even during rain intervening in the interregnum. However, ordinarily, it is expected that the more skilful would take the unexpected chance element in its stride and the greatest upsets still remain etched in our memories because the expected dexterity of the acknowledged skill was felled by the less gifted.

Gaming and Gambling have developed secondary meanings in judicial parlance.

Gambling is equated with gaming and the activity involves chance to such a predominant extent that the element of skill that may also be involved cannot control the outcome. Whereas a game of skill on the other hand may not necessarily be such an activity where skill must always prevail, it would suffice for an activity to be regarded as a game of skill if, ordinarily the exercise of skill can control the chance element involved in the activity such that the better skilled would prevail more often than not. The unpredictability of the unknown and yet possible must be kept out of consideration to determine whether an activity is a game of skill.

Dream 11

Dream 11 is one of the world's leading platforms for online fantasy sports games and fantasy cricket, fantasy kabaddi and fantasy football games have been offered by them since about 2012 in partnership with reputed websites and social media platforms, with a wide user base. Dream 11 is a company that is duly incorporated

having a Certificate of Incorporation issued to them by the Registrar of Companies, Ministry of Commerce, Govt. of India. A Service Tax registration is issued to them by the Central Excise Department, They have been granted a PAN by the Income Tax Authorities, with whom they have been assessed for more than 5 years. These Statutory Authorities have not found anything amiss in their business model of providing services. They not only remit service tax and income tax as applicable to them but also deduct and remit applicable withholding tax on user winnings to the competent authority. Their partners include reputed financial institutions, payment gateway service providers, websites and social media portals, website/hosting services providers and other service providers, whose engagement reflects their standing and reputation.

What is a Fantasy Sports Game?

Fantasy sport, also called rotisserie sport or roto, is any of a number of games that permit a person to play either a virtual game or a virtual season of a sport. In fantasy sports, the fans pose as both general manager and field manager of their team, building a roster through a draft and trades and making lineups in pursuit of the greatest statistical production. The two most prominent fantasy sports in the U.S.—where the majority of fantasy sports are played—are fantasy baseball and fantasy gridiron football.

The three Dream 11 Cases

1. Varun Gumber v. Union Territory of Chandigarh (Punjab and Haryana High Court) (2017 SCC Online P&H 5372)
2. Gurdeep Singh Sachar v. Union of India (High Court of Bombay) (2019 SCC Online Bom 13059)
3. Ravindra Singh Chaudhary v. Union of India & Ors (High Court of Rajasthan) (2020 SCC Online SC Raj 2688)

The Petitioners before the respective High Courts approached by way of public interest litigations (except Punjab and Haryana High Court) and sought criminal investigation to be initiated and Dream 11 be prosecuted under the respective Gaming/Public Gambling Acts of the State. The allegations levelled by the respective Petitioners that the games in Dream 11 were only Games of Chance and not Games of Skill, were dismissed by the High Courts and it was declared that Fantasy Games in Dream 11 were games of 'mere skill'. Since the games in Dream 11 were games of 'mere skill', it was held that such games enjoyed Constitutional protection under Article 19(1)(g) and could not be brought under the purview of the respective Gaming/Public Gambling Acts.

Requirement of material and considerable skills by the user in 'drafting' of a virtual team and 'playing' fantasy sports game:

- (a) Drafting a virtual team involves the exercise of considerable skill as the user must first assess the relative worth of each athlete/sportsperson against all athletes/sports-persons available for selection. The user has to study the rules and make evaluations of the athlete's strengths and weaknesses based on these rules.
- (b) Furthermore, a user's virtual team cannot entirely or substantially consist of athletes from a single real-world team. In the case of fantasy cricket and fantasy football games, the Dream 11 rules stipulate that not more than 7 of the 11 athletes in the virtual team may be from a single real-world team. This stipulation ensures that the user has to exercise greater skill in acquainting himself with the athletes of both participating real-world teams in a single match and prevents a user from creating a circumstance resembling the act of betting on the performance of a single team to win the match/league.

(c) As per the mechanism for the election of a virtual team in Dream 11's fantasy sports game, each virtual player available for drafting into a virtual team is attributed a value in credit points and each user's virtual team is prescribed a maximum budget in points. Dream 11 specifies the price of drafting a virtual player based on the player's relative value and ability. Thus, any selection decision by a user in drafting a virtual team must also consider the opportunity cost of selecting a particular athlete in such a user's virtual team that does not exceed the prescribed budget in credit points.

(d) Therefore, users engaged in participating in Dream 11's fantasy sports games read and understand the rules of the game published by Dream 11, and make their assessment of athletes and the selection of athletes in their virtual team on the basis of the anticipated statistics of their selection; for example, in the fantasy cricket game, a user needs to evaluate, in the case of a batsman, the anticipated statistics for multiple categories such as batting average, total runs, number of half-centuries and centuries (which attract additional points), strike rate, number of catches and stumpings (for a wicket keeper), and in the current or previous series), economy rate, five-wicket hauls. Such evaluation by the user is based on a wealth of statistics from past matches from which to evaluate future performances, but these need to be analysed in light of factors such as age, statistical trends, current form, injuries, the athlete's statistics in particular stadia and against particular opponents, and other material causative factors that will have a bearing on the athlete's performance. Users must also follow the news to acquaint themselves with selection decisions as they are permitted to change their team up to sixty minutes prior to the commencement of a match, before the squads are announced at the toss.

(e) Furthermore, users have to select one player from amongst their virtual team selection as a 'captain' and another player as the 'vice-captain', with the points accumulated by the designated captain doubled, and the points accumulated by the designated 'vice-captain' multiplied by 1.5, and added to the overall points-tally of such user's virtual team. Therefore, selecting the right captain and vice-captain are critical to the success of the virtual team, with a good captain or vice-captain in the Dream 11 fantasy points and not one who displays good leadership skills, and which assessment requires the user to follow the sport closely and to evaluate the potential of a player in light of the scoring metrics of the fantasy sports game.

(f) In the course of such selection of teams and making decisions on the drafting of players and designated captains/vice-captains, the user must also overcome team biases and prejudices while selecting athletes. For example, the user must avoid overrating athletes who play for his favourite team and underrating other athletes because they play for a disfavoured team. The user must develop a strategy to create a team that is balanced in a manner consistent with the user's overall strategy with a focus on winning fantasy points.

(g) The online fantasy sports games offered by them through the Platform require material and considerable skills in terms of 'drafting' and 'playing' which are the determinative factors in the results of the game and winning outcomes.

The Hon'ble Supreme Court held Dream 11 to be a game of skill and does not amount to Gambling.

The members shall not be allowed to play any kind of games with stakes or make a profit or gain out of the games played except games of skills without stakes.

Even If the law permits the playing of all games with skills or otherwise, even then playing any of these games with stakes or wagering is impermissible.

DRAWING THE CURTAINS: A PARTING NOTE:

A game of chance and a game of skill although are not poles asunder, they are two distinct legal concepts of constitutional significance. The distinction lies in the amount of skill involved in the games. There may not be a game of chance which does not involve a scintilla of skill and similarly, there is no game of skill which does not involve some elements of chance. Whether a game is, a 'game of chance' or a 'game of skill', is to be adjudged by applying the Predominance Test: a game involving a substantial degree of skill, is not a game of chance, but is only a game of skill and that it does not cease to be one even when played with stakes.

If one bets on a game, it becomes gambling and there is no need or requirement that on betting or having declared it as gambling, the underlying nature of the game should change its character from a game of skill to a game of chance, there is no such mandate.

A game of skill will continue to remain a game of skill whereas wagering or betting even on a game of skill will continue to be gambling. Neither can the nature of the game, eclipse the activity of gambling nor is there a necessity for having declared an activity as gambling, the nature and character of the underlying game should change.

Since what is common to both Games of Skill and Games of Chance when it comes to gambling is when somebody plays it for stakes or bets on it based on the uncertain and unknown outcome for higher rewards, the sheer act of betting on the uncertain and unknown outcome for higher rewards, becomes an act of gambling. It is impossible to yield in law that betting and gambling on cricket which is a game of skill is legal and permissible whereas betting and gambling on a three-card game is illegal and impermissible.

When somebody bets on the outcome of a cricket match which is uncertain, or bets on the outcome of a three card game, which is equally uncertain, neither law nor courts can make a

distinction between the two and declare the former to be legal and the latter to be illegal. Likewise, it would be legally unacceptable and impermissible to make any distinction between the individuals or institutions which bet or gamble. Whether it is a game of cricket, which is a game of skill, or an online game of rummy, which is preponderance of skill, whoever plays for stakes or bets, to win on an uncertain event i.e., the outcome of the game, it simply becomes gambling. The law cannot make any distinction whether it is Dhoni or Kohli who bets on the outcome of a cricket match or the spectators who watch it live or the viewers who watch it on a television screen, whoever does it, does the act of betting and gambling.

Online gaming platforms are treated as illegal when a game of chance is involved in those platforms.

