

Now that online fantasy sports have got a legal nod

SURBHI KEJRIWAL & AYUSH NANDA



are, respectively, a partner at Khaitan & Co. and a senior associate at the firm

Joe Root has just dropped Rohit Sharma at second slip. While your heart that bleeds Blue skipped a beat, your head did some quick math. Joe Root is part of your online fantasy team, and he hasn't done you any favours by dropping a sitter.

Welcome to the world of online fantasy sports gaming. In a country with a fiercely loyal cricket fan base and a burgeoning fan base for other sports, including football, hockey, badminton, tennis and even kabaddi, the success of online fantasy sports seemed like a no-brainer.

But the growth of the online gaming industry in India has been punctuated by frequent questions, primarily in the form of public interest litigations (PILs) that challenge the very legality of online fantasy sports games and other games (including their online versions) such as rummy and poker, which are often played in private settings with real cash.

The question that Indian courts have asked while deciding if a game falls under

the category of “gambling” is whether winning the game requires skill or luck—and more of which of the two, on balance, if victory involves both. The distinction is crucial. Games of chance, such as a betting arrangement or a lottery, clearly fall under the ambit of gambling, thereby attracting restrictive provisions of law. However, games involving a substantial degree of skill are not within the purview of Indian gambling laws.

While determining whether a game involves skill or chance, courts in India have consistently adopted the “predominance of skill” test; i.e., checking if the game mostly involves skill, even if there is an element of chance at play.

In a boost for India's growing online gaming industry, the Bombay High Court recently upheld the legality of online fantasy sport gaming, calling it a game of skill and not chance. The court's judgement came in the *Gurdeep Singh Sachar Versus Union Of India And Others* case. Petitioner Gurdeep Singh Sachar had filed a PIL before the court against Dream11, a popular online fantasy sports portal, seeking directions to initiate criminal proceedings against the latter for its alleged violation of the Public Gambling Act, 1867. The PIL contended that Dream11 was conducting illegal operations of gambling/

betting/wagering in the guise of “online fantasy sports gaming” and was, therefore, in violation of the Act.

In his submissions to the court, Sachar referred to a 2017 judgement of the Punjab and Haryana high court in a case that was filed on similar grounds against Dream11. In that case, the court said that success in Dream11's fantasy sports depends on the user's exercise of superior knowledge, judgement and attention, which is a matter of skill and not a mere game of chance.

The court then went on to say that Dream11 is a legitimate business activity protected under Article 19(1)(g) of the Constitution of India (fundamental right to practise any profession or to carry on any occupation, trade or business).

Later, a special leave petition against the Punjab and Haryana high court judgement was dismissed by the Supreme Court.

The task at hand for the Bombay High Court was to determine whether Dream11 was conducting illegal operations of gam-

bling/betting/wagering in the guise of “online fantasy sports gaming”; and consequently, whether it was levying an inadequate goods and services tax (GST) on such services.

In a victory for Dream11, and the online fantasy sports industry at large, the court

ruled that no betting or gambling was involved in Dream11's fantasy game. The rationale behind this observation was that the result of any contest on Dream11 was not dependent upon the real-world result of a match, i.e., upon an actual team winning or losing a particular match.

The Bombay High Court relied on the stance taken by Indian courts on such matters earlier, including the Punjab and Haryana

high court verdict. It also relied on a previous Supreme Court judgement on the popular card game rummy, a case in which the apex court observed that despite there being an element of chance in a particular game of cards being played, if the game per se is preponderantly one of skill, it would neverthe-

less be classified as a game of “mere skill”. The court examining the Dream11 case also held that since online fantasy sports gaming was not gambling, there was no evasion of GST by Dream11.

The recent judgement has thrown open the floodgates for numerous potential fantasy sports operators to enter this nascent market in India. So far, while sports gaming has been in evidence, it has involved private, pure-fantasy video games played at home for the most part. Games that draw on real-life sports and are played among strangers, with real money on the line, are an altogether new market.

However, the main challenge for this emerging industry is not from the judiciary anymore, but from state legislatures, which have used their legislative powers in the past to bring some games that were previously held to be games of skill within the ambit of local gambling laws, dealing a blow to this sector (a recent ordinance by the Andhra Pradesh government had brought rummy within the fold of gambling).

Nevertheless, with demand for such games steadily rising, the industry seems to be sitting on a gold mine. What was once an indulgence could now be a job creator.

These are the authors' personal views

A court ruling in favour of Dream11 has thrown open a market that has enormous potential