

FANTASY SPORTS AND ONLINE GAMBLING: A VIEW THROUGH LEGAL LENS

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ABSTRACT

Fantasy sports apps in India have seen a huge rise in the number of users over the past few years. According to Klynveld Peat Marwick Goerdeler (KPMG), India, the fantasy sports market might bring in more than 100 billion Indian Rupees (INR) in foreign direct investment over the following several years and generate over 1.5 billion online transactions by 2023.

In this article, the authors have aimed to analyse the legality of online gambling in India by understanding its status in India. The authors in this article talks about how fantasy sports are different from online gambling and what is the view of the courts regarding both of them. This article also intends to discuss the debate of 'chance v. skill' in light of the legality of fantasy sports. Further, to understand this, various case laws have been discussed. Further, this article also discusses the possible measures that can be taken for better regulation of fantasy sports in the Indian diaspora.

Keywords: Fantasy sports, Online Gambling, Chance, Skill, Regulation.

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I. INTRODUCTION

In India, more than 500 million people are linked to each other on a daily basis due to advances in mobile technology.⁴⁰ The internet has provided Indians with access to a variety of online platforms and services that were previously unavailable, and online gaming is one of the foremost industries to benefit from this.

In line with a report released by the Federation of Indian Fantasy Sports (FIFS) and Deloitte India, India is the largest fantasy sports market in the world, with over 13 crore users. The fantasy sports market in India is expected to increase by 38 percent CAGR from Rs 34,600 crore in Fiscal Year 21 to an estimated Rs 1,65,000 crore in Fiscal Year 25.⁴¹

The rise in online gaming has also exacerbated the hike in online gambling activities in India. Many Fantasy gaming apps like *Teen Patti* and *Dream 11* base their business model on online gambling or betting. A fantasy sport is a game that is played over several rounds (i.e., a single match, or an entire league). Participants form virtual teams by selecting players and acting as managers for their virtual teams. These virtual teams contest against one another for points based on the outcome or accomplishments of real athletes or teams competing in professional sports matches. The participant whose virtual team earns the most points over the course of the rounds is the winner. Fantasy sports have acquired relevance, as they give sports lovers the opportunity to play virtually and make them learn about the nuances and strategies of sports.

Fantasy sports claim that you could win lakhs of rupees in an instant on their platform. However, this method of making quick cash seems to be similar to gambling. It has all the characteristics, too — an entrance fee, large payouts, and betting on real-life players competing in competitive games. However, fantasy sports are legal by virtue of many judgments of the Supreme Court and High Courts. This paper will analyse the logic behind its legality and the need for uniform legislation to limit the legislative ambiguities related to online gambling and fantasy games.

⁴⁰ Nandita Mathur, *India now has over 500 million active Internet users: IAMAI*, LIVEMINT (May 5, 2020, 05:48 PM), <https://www.livemint.com/news/india/india-now-has-over-500-million-active-internet-users-iamai-11588679804774.html>.

⁴¹ Maryam Farooqui, *India becomes world's biggest fantasy sports market with 13 crore users: Report*, money control (Jan. 18, 2023, 11:04 PM), *India becomes world's biggest fantasy sports market with 13 crore users: Report*.

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II. WHAT IS ONLINE GAMBLING?

According to the Black's Law dictionary, to gamble means *"to play, or game, for money or other stake; hence to stake money or other thing of value on an uncertain event. It involves, not only chance, but a hope of gaining something beyond the amount played."* Therefore, in other words, gambling (also described as betting) is the wagering of money or other valuables (referred to as "the stakes") on an unknown result with the prime goal of earning money or material goods.

Any form or type of gambling that takes place over the internet is known as online gambling or internet gambling. Casinos, digital poker, and sports betting are all examples of this. Many countries have restrictions or prohibitions on online gaming. It is, however, legal in many states of the United States, many regions of Canada, the majority of European Union memberstates, and many Caribbean nations.⁴²

III. STATUS OF ONLINE GAMBLING IN INDIA

In its latest policy change, Google allowed apps related to betting or gambling on its Play store in 15 countries, including Canada, the USA, and Australia. However, the new policy will not apply to India, as India is not on the list of countries where apps related to gambling are permitted. The explanation for this, according to reports, is that state governments have issued directives outrightly banning such apps. Paytm and Paytm First Games, for example, for allegedly allowing sports betting and daily fantasy sports, were recently temporarily barred from the Google Play store, as they violated Google's terms of service.⁴³ As a consequence, the App Store interface prevents the installation of several gambling applications.

⁴² Alan Draper, *Countries Where Online Gambling is Legal*, THE SPORTS DAILY (Dec. 23, 2022, 10:42 PM), <https://thesportsdaily.com/news/countries-where-online-gambling-is-legal/>.

⁴³ Jagmeet Singh, *Google Play Allows Gambling, Betting Apps in 15 New Countries Including US, Canada, and Australia*, GADGETS. NDTV (Dec. 23, 2022, 11:09 PM), <https://gadgets.ndtv.com/apps/news/google-play-gambling-betting-apps-policies-update-15-more-countries-us-canada-2359919>.

IV. HOW ARE FANTASY SPORTS DIFFERENT FROM BETTING

The main reason for the gaining popularity of fantasy sports is that it gives the players a chance to test their knowledge about the game. When a player predicts a good team, they feel great about their judgement and it makes them believe that they have a good understanding about the game which makes them feel proud.⁴⁴ Fantasy sports is very much different from betting as the result in betting is solely based on luck unlike fantasy sports where there is a need for skill to win. Fantasy sports can be regulated by the government unlike betting. In India, Federation of Indian Fantasy Sports (FIFS) is one such body which is devoted to work for best practices in online fantasy sports. Betting can be done by any person but in fantasy sports a person needs to submit details like bank account number, pan card, KYC details by which it can be ascertained that the person playing such games is eligible for it or not. Moreover, Fantasy sports is very much transparent as compared to Betting as in fantasy sport the players can check the team made by their opponents and there isn't any chance for fraud and also the payment is done through online certified gateways and hence eliminates the chance for illegal transactions.

V. LEGISLATIVE AMBIGUITY REGARDING FANTASY SPORTS

India's gambling laws are complex. There is absence of pan-India law for betting and gambling as the same comes under the State List as Entry 34. (i.e., List II of the Seventh Schedule).⁴⁵ This ensures that only the state legislature has the authority to enact betting and gaming legislation. Therefore, each state now has its own gambling act. Though Fantasy sports is not specifically mentioned under seventh schedule but till date it is kept under the ambit of gambling. As per Public Gambling Act, 1867 it was clearly mentioned that games involving skills will not come under the ambit of the act.⁴⁶ The 276th Law commission report was also of similar view and it held that a game involving skill should not be considered as gambling.⁴⁷ The commission wanted the legislature to interfere in the issue rather than outrightly banning it. Even Niti Aayog in its December 2020 report has talked about the lack

⁴⁴ EM Buzz, *here's why fantasy sport is different from betting*, EAST MOJO (Jan. 18, 2023, 11:21 PM) <https://www.eastmojo.com/sports/2022/04/19/heres-why-fantasy-sport-is-different-from-betting/>.

⁴⁵ The Constitution of India, 1950, Schedule VII, List II, State List, Item 22 (Betting and gambling).

⁴⁶ Public Gambling Act, 1867, § 12, No. 3, Acts of Parliament, 1867, (India).

⁴⁷ Law Commission of India, Report No. 276 on Legal Framework: Gambling and Sports Betting Including in Cricket in India, (July 2018).

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of clarity regarding legislation of fantasy sports in India and how the ambiguity is affecting the growth of the industry. It also emphasised on various judgements given by the Indian courts in favour of deciding the legal status of fantasy sports in India.⁴⁸

When we look at the terms of conditions of Dream11, a fantasy sports app, it does not allow the residents from Nagaland, Sikkim, Assam, Andhra Pradesh, Telangana and Odisha to play any contest on its platform.⁴⁹ The reason for this is that the legislation of these states proclaims that a game which is a mixture of chance and skill cannot be played for money but all other states have a different legislation which does not impose such restrictions.

VI. FANTASY SPORTS AND ONLINE GAMBLING IN THE COURTS OF LAW

As the definition indicates, gambling refers to any activity in which a fee is charged in exchange for a chance to win a prize. For an action to be termed as gambling, the deciding factor for the victory of a person should be his luck and not his skill or knowledge. Courts in the USA commonly use some tests to determine whether the degree of skill required in influencing the outcome of a game is adequate to avoid violating a state's gambling laws. The *Dominant Factor test* examines if the game's result is influenced more by the contestants' skill than by luck. Similarly, in *Material Element test* and *Any Chance test*, it barely matters whether skill is a major, or even decisive, factor in the outcome of the game. If chance influences the game, it will be considered gambling.⁵⁰ In other words, to categorise a game as gambling, it should be a 'game of chance' rather than a 'game of skill.' A 'game of chance' is any game in which there is nothing a person can do to win, i.e., his knowledge or skills cannot help him reach the top. Instead, all he needs is a stroke of good luck to be the best player. In contrast, a 'game of skill' can be any game where a person's skill is of utmost importance, and the result of the game depends upon his expertise rather than his fortune.

Besides the 'game of skill' and 'game of chance,' there are some games in which luck along with skill play a vital role. In these games, the knowledge, experience, and ability of a person

⁴⁸ Niti Aayog, Report on Guiding Principles for the Uniform National- Level Regulation of Online Fantasy Sports Platforms in India, (Dec. 2020).

⁴⁹ C.C. Chengappa, *Which states have banned Dream11 in India?* THE BRIDGE (Apr. 15, 2022, 12:13 PM), <https://thebridge.in/esports/dream-eleven-states-banned-india-fantasy-sport-25922>.

⁵⁰ Neil Braslow, *A Legal Guide to Skill Gaming*, Braslowlegal.Com (Jul. 15, 2020), <https://braslowlegal.com/blog/2020/7/15/a-legal-guide-to-skill-gaming>.

are indispensable, accompanied by luck. The above tests play a major role in determining the legality of such games.

Like the Courts in the USA, the Indian Judiciary too, devised certain tests. In *State of Andhra Pradesh v. K. Satyanarayana & Or.*,⁵¹ The Supreme Court established the "preponderance of skill" test to determine whether a game is based on skill or chance. It was held that the game of Rummy involves preponderance of skill rather than chance as Rummy needs an unquestionable amount of skill when played. Memorisation is required for the fall of the cards and the building up of Rummy needs considerable skill in holding and/or discarding the cards.

A constitutional bench of the Supreme Court in *Dr. KR Lakshmanan v. State of Tamil Nadu & Anr.*⁵² held that for a game to be termed as gambling, the luck factor should predominate the skills. However, it should not be considered gambling if there is some element of luck, but the game is principally a game of skill. In another case, *State of Bombay v R.M.D Chamarbaugwala*⁵³, the test of preponderance was used by the Supreme Court to interpret the words 'mere skill.' The test of preponderance determines whether a game is based more on skill or on chance. The Court, in its judgment, stated that games of skill are primarily games of ability or adeptness. "A competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill," the Court opined.

VII. LEGALITY OF FANTASY SPORTS – CHANCE OR SKILL

To determine whether fantasy games should come under the ambit of gambling, firstly, we need to decide whether or not it falls under the category of "game of chance" or "game of skill." The Niti Aayog in its report emphasised that there isn't any specific test to determine whether a game is a game of chance or of skill and hence different criteria can be used to determine the same.⁵⁴ Fantasy sports are skill-based activities, according to studies conducted by several prominent academic institutions, including the Indian Institute of Management.⁵⁵

⁵¹ *State of Andhra Pradesh v. K. Satyanarayana & Ors.*, AIR 1968 SC 825.

⁵² *K.R. Lakshmanan (Dr) v. State of T.N.*, (1996) 2 SCC 226.

⁵³ *State of Bombay v. R.M.D. Chamarbaugwala*, AIR 1957 SC 699.

⁵⁴ *Supra* 4.

⁵⁵ Tech Desk, *Fantasy sports are skill dominant, finds IIMB-Cartesian study*, THE INDIAN EXPRESS, <https://indianexpress.com/article/technology/tech-news-technology/fantasy-sport-dream-11-iimb-cartesian-study-6165065/> (Dec. 13, 2019, 12:14 PM).

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Researchers from the Massachusetts Institute of Technology (MIT) and Columbia University compared data from fantasy cricket and basketball platforms to stock market data. They concluded that fantasy sports players are more skilled than mutual fund managers who run stock portfolios.⁵⁶

Before 2015 fantasy sports were not considered to be a game of skill explicitly by any law or by any ruling of the court in India but in 2015, to promulgate a law which expressly placed such type of sports under the category of game of skill. The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 established a licensed system for skill games and section 2(3) of the act specifically identified fantasy sports as a game of skill. However, after this Act, various Indian Courts in their judgments have ruled that fantasy sports are a game of skill and not a game of chance.

The Punjab & Haryana High Court, in *Varun Gumber v. U.T. Chandigarh*⁵⁷, held *Dream 11*'s gameplay skill-based, and stated that the gameplay of fantasy sports requires considerable skills, judgement, and discretion. The individual must calculate the potential worth of each athlete, taking into consideration their strengths and weaknesses when selecting the players. The factor of skill has the most significant influence on the result of the matches as the outcome is ultimately determined by how well the evaluation of the players is done by the participant.

In *Gurdeep Singh Sachar v. Union of India*⁵⁸ The High Court of Bombay observed that fantasy sports are different from betting, as winnability in fantasy sports had little to do with a team's performance in the real world. In the case of *Dream 11*, the participants make their own virtual team by selecting individual players according to their analysis. Hence, instead of the overall performance of the actual team, the performance of the individual players becomes essential. If that player does better in the live match, the participant will score points accordingly. The Court relied upon the judgement of *Varun Gumber v. U.T., Chandigarh*. It ruled that the activities and offerings of *Dream 11* (fantasy website) were legitimate and that they were not illegal gambling or betting operations disguised as online fantasy sports gaming.

⁵⁶ Vishal Misra et. al, *Is It Luck or Skill: Establishing Role of Skill in Mutual Fund Management and Fantasy Sports*, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, https://devavrat.mit.edu/wp-content/uploads/2020/08/report_skill.pdf (last visited May 9, 2021).

⁵⁷ *Varun Gumber v UT Chandigarh*, 2017 SCC OnLine P&H 5372 : 2017 Cri LJ 3827.

⁵⁸ *Gurdeep Singh Sachar v. Union of India*, 2019 SCC Online Bom 13059 : (2019) 3 AIR Bom R (Cri) 467.

The decisions of the Gurdeep Singh Sachar case and Varun Gumber case were challenged in the Supreme Court, which was dismissed immediately.

VIII. MEASURES FOR BETTER REGULATION OF FANTASY SPORTS

As emphasised by NITI Aayog the sector has a great potential to bring foreign investment and create jobs and hence fantasy sports need to be regulated in a better manner in order to get the best out of it. Presently there are many lacunas which can hamper the growth of the sector and removing these lacunas will result in the development of the sector and in turn will influence the nation's development. The following measures can be taken to ensure a better regulation of Fantasy sports: -

- Different laws for different states result in ambiguity which affects the functioning of such platforms so there should be a uniform law throughout the country regarding fantasy sports and the subject should be brought from the state list to the central list.
- There is a need for a separate recognition of online fantasy sports and the sector of online fantasy sports should be considered as a separate subject under the seventh schedule and should be separated from gambling which will result in better legislation and development of the industry.
- A separate regulatory body should be made at the central level to regulate fantasy sports and no regulation should be made at state level as it will create uniformity and which in turn will bring in foreign investment.

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IX. CONCLUSION

Fantasy games are like a boon to the people who never get tired of talking about the technicalities and nuances of sports. Users of online fantasy game platforms have to weigh several variables, including the statistical success of the players, past records, weather conditions, among others, to be ahead of their competitors. Therefore, terming it as a guess work is not fair as it is a lot more than mere prediction.

For the most part, the fantasy sports industry is self-regulated by industry bodies like the All India Gaming Federation, ensuring that online gaming is conducted ethically. Nevertheless, gambling applications are at the whim of payment platforms and state governments, which can restrict an app based on “legislative ambiguity.” The Andhra government banned online gambling games by passing the amendment bill in 2020. According to Andhra Pradesh Home Minister M Sucharita, online gambling could encourage criminal behaviour in society and maximise the rate of organised crimes such as fraud and money laundering.⁵⁹

The Courts of law in the country have time and again judged that fantasy sports and games that include the performance of skills are out of the ambit of gambling. Thus, the Parliament has the option of passing legislation that can define, structure, and regulate the rules and regulations regarding fantasy sports and bring uniform law applicable throughout the country. The states will not have any right to question the legislation, as states’ right to make laws is limited to the matter of gambling and betting.

⁵⁹ PTI, *Andhra Pradesh Passes Gaming Amendment Bill to Ban Online Games*, NDTV, <https://www.ndtv.com/india-news/andhra-pradesh-passes-gaming-amendment-bill-to-ban-online-gaming-2332856> (last updated Dec. 2, 2020).