



## ERGO

*Analysing developments impacting business*

### ONLINE GAMING ON A WINNING STREAK: INDUSTRY CELEBRATES TWO "LANDMARK" RULINGS

12 August 2021

#### I. MADRAS HC ORDER: PAPA DON'T PREACH: MADRAS HIGH COURT STRIKES DOWN ANTI GAMING LAW AS UNCONSTITUTIONAL "STATE PATERNALISM"

##### **Introduction:**

The High Court of Madras (**Madras HC**) has struck down Part II Tamil Nadu Gaming and Police Laws (Amendment) Act of 2021 (**Amendment**) which had amended the Tamil Nadu Gaming Act 1930 (**Act**) that had banned all forms of online games with stakes as ultra vires the Constitution of India (**Constitution**).

The Amendment *inter alia* banned betting or wagering in cyberspace and also games of skill played for a wager, bet, money or other stakes. The Madras HC deemed that the Amendment was passed by the State Government "*capriciously, irrationally and without adequate determining principle such that it is excessive and disproportionate*".

The order passed by the division bench of the Madras HC comprising of Chief Justice Sanjib Banerjee and Justice Senthilkumar Ramamoorthy comes as a huge shot in the arm for one of India's fastest growing industry that is buoyed by the vastly young demographic that is techno-savvy in India with an ever increasing digital adoption in Tier-2 and Tier-3 cities with access to smartphones, internet data penetration, low prices and growing number of broadband users amongst other factors for this growth. Despite its robust growth, the gaming sector has more often than not had to face the brunt in the form of overzealous legislature seeking to adopt a paternalistic approach.

##### **Brief Facts:**

The State Government of Tamil Nadu had promulgated an ordinance on 20 November 2020 (refer to our [Ergo](#)) amending the Tamil Nadu Gaming Act, 1930. Post the ordinance, the state legislature had passed the Amendment on 4 February 2021 prohibiting all forms of games being conducted in cyberspace, irrespective of the game involved being a game of mere skill, if such game is played for a wager, bet, money or other stake. Playing online games such as poker and rummy involving stakes would invite imprisonment of up to 2 years or a fine up to INR 10,000 or both in Tamil Nadu.

The major changes brought about by the Amendment were:

- The definition of 'gaming' had been amended to include gaming in 'cyberspaces';

- The replacement of Section 11 of the Act that originally exempted games of 'mere skill' from the application of the statute and its substitution by including games of mere skill also within the fold of offences under the statute, if such games are played for wager, bet, money or other stake; and
- The introduction of Section 3A of the Act to prohibit wagering or betting in cyberspace.

The Statement of Objects and Reasons for the Amendment said that playing online games that are addictive had developed manifold in recent times. Innocent people got cheated and incidents of suicide were reported. To prevent such incidents and protect innocent people from the evils of online gaming, it was decided to ban wagering or betting in cyberspace.

A series of petitions were moved by private online gaming companies, challenging the Amendment banning online games in the State since November 2020. The Petitioners questioned the legal validity of the Amendment and the primary contention put forth by the Petitioners was that the Amendment prohibits games of skills, if played for any prizes or stakes, which is at odds with the law laid down by the Supreme Court that games of skills are business activities and are protected under Article 19(1)(g) of the Constitution.

The State contended that there cannot be any absolute right to practise any profession or to carry on any activity, trade or business and they are subject to reasonable restrictions under Article 19(6) of the Constitution. The State's main contention was that the Amendment seeks to put a stop to the deleterious effect of gambling.

### **Analysis and Decision by the Madras High Court:**

While disregarding the Amendment, the Madras HC said that by imposing a wide-ranging complete ban, the Amendment has failed the least intrusive test and fallen afoul of Article 19(1) (g) of the constitution.

The Madras HC observed that, since the Amendment puts a complete restriction, the onus fell on the State to justify the course that it took. The State made no attempts to suggest that an alternative course of action was not feasible and a complete restriction was the only option. In this light, the Madras HC held the Amendment to be patently arbitrary, unjust, especially in the backdrop of the judicial precedents that govern the field.

The Madras HC held that the doctrine of severability does not apply since the Amendment is so convoluted that the amended meaning of 'gaming' runs through all the provisions and it is not possible to save any provision. The Amendment is violative of Article 19(1)(g) and Article 14 of the Constitution.

The Madras HC went on to state that there appears to be little doubt that both rummy and poker are games of skill as they involve considerable memory, working out of percentages, the ability to follow the cards on the table and constantly adjust to the changing possibilities of the unseen cards. With regard to poker, the Madras HC states that while it may not have been recognized in any previous judgment in this Country to be a game of skill, but the evidence in such regard as apparent from a previous American case even convinced the Law Commission to accept poker as a game of skill in the 276<sup>th</sup> Law Commission Report ('**Report**'). (Law Commission of India, Report No. 276, Legal Framework: Gambling and Sports Betting including in Cricket in India)

Finally, while the Madras HC concluded that the Amendment is disproportionate to the object it sets out and that no part of it can be saved, it has kept the door open for Tamil

Nadu to bring in a new law in relation to betting/ gambling that is constitutionally sacrosanct.

## II. GAME, SET & MATCH: SUPREME COURT UPHOLDS LEGALITY OF ONLINE FANTASY SPORTS

### Introduction:

The Supreme Court (**SC**) has reaffirmed the judgments passed by the Punjab & Haryana High Court (**P&H HC**) and the Bombay High Court (**Bom HC**), and upheld judgment passed by Rajasthan High Court (**Raj HC**), where the legality of the online fantasy sports format as offered by Dream11 as a 'game of skill' was sustained.

The P&H HC, the Bom HC and the Raj HC have all upheld the legality of online fantasy sports gaming in India, ruling that that the online fantasy sports offered by Dream11 are preponderantly a game of skill and therefore outside the ambit of gambling / betting legislations (refer to our [Ergo](#) (Raj HC verdict), [Ergo](#) (Bom HC verdict)).

### Brief Facts:

A Special Leave Petition (SLP) was filed against the order of the Raj HC dated 14 February 2020, wherein the Raj HC had dismissed a Public Interest Litigation which sought to stop the alleged illegal game of gambling and betting offered by Dream11.

The Division Bench of the Raj HC had concluded that in view of the pronouncements in the P&H HC and the Bom HC, the issue of treating the Dream 11 game as having any element of betting / gambling is no more res integra and reiterated that the result of a Dream 11 game was not dependent upon the real-world result of a match, i.e., upon a team winning or losing a match, thus amounting to a 'game of skill'.

### Analysis and Decision by the SC:

The Division Bench of the SC comprising of Justice RF Nariman and Justice BR Gavai while dismissing the Special Leave Petition stated "*This matter is no longer res integra as Special Leave Petitions have come up from the P&H HC and have been dismissed by this Court as early as on 15.06.2017. Also, from the Bom HC, Special Leave Petitions have been dismissed on 04.10.2019 and 13.12.2019.*"

With this judgement, coupled with the dismissal of Special Leave Petitions against orders of P&H HC and Bom HC, it seems there is kosher at least as far as the legality of the fantasy sport model offered by Dream 11 and such legal formats could be no more open to scrutiny.

### Comments:

Both these judgments come as a shot in the arm for the mushrooming gaming industry in India as corridors for other states to formulate a progressive regulatory regime have been opened up. While the Madras HC observed that the provisions of the Amendment are so absurd that they leave no choice open to an individual and that Tamil Nadu has taken a high-handed approach in regulating online gaming, the SC judgment has brought about much joy to the rapidly growing online fantasy sports gaming market in India.

These judgments will hopefully pave the way for a nuanced legislation for online gaming in India. For far too long, the regulatory ambiguities in the gaming sector have become an impediment to the growth of this sector and in achieving its potential. With the support of the legislation in formulating a clear policy in place for the gaming sector, India's gaming industry can grow exponentially and can take bigger and faster strides

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in boosting the economy (including in Government coffers), creating employment and injecting investments in India.

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