



November 2022

## Key Developments in the evolving landscape of Gaming law in India

India's online gaming industry is one of the fastest growing sectors of the Indian economy. The penetration of low-cost smartphones and reliable 4G networks, the inflow of domestic and foreign investment and snazzy marketing campaigns have together propelled the market value of the gaming industry to upwards of INR 300,00,00,000 (Indian Rupees three hundred crores). Today, India is one of the top 5 (five) mobile gaming markets in the world. However, this exponential growth has not come without its share of challenges. Indian lawmakers have come under significant pressure in recent times to curb the growth of real-money gaming, particularly online rummy and poker platforms that allow users to play for stakes. Numerous State governments have responded to this pressure and formulated laws that dilute the long-standing exemptions provided to games of skill under Indian gaming statutes. In this edition of JSA Prism, we take stock of the legal, regulatory and policy developments in the country's gaming sector.

### Tamil Nadu

In February 2021, the Government of Tamil Nadu notified the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 ("**TN Amendment Act**") to amend certain provisions of the Tamil Nadu Gaming Act, 1930. The TN Amendment Act amended the definition of 'gaming' to include "*wagering and betting in cyberspace*" and prohibited games of skill if played for wager, bet, money or other stake.

On August 3, 2021, the Madras High Court in *Junglee Games India Private Limited v. State of Tamil Nadu*<sup>1</sup> ("**Junglee Games Judgement**"), struck down the overarching ban on games of skill by the TN Amendment Act and clarified that games of skill which can be played online for stakes, such as rummy and poker, cannot be categorized as betting and/or gambling. The Madras High Court reiterated that rummy and poker are games of skill and not games of chance, and further clarified that there is no distinction between card games or board games such as chess or scrabble, for instance, being played physically (*offline*) or via cyberspace (*online*). A special leave petition is pending before the Supreme Court ("**Supreme Court**") filed by the Government of Tamil Nadu against the Madras High Court's judgement.

Most recently, on October 3, 2022, the Governor of Tamil Nadu gave his assent to the Prohibition of Online Gambling and Regulation of Online Games Ordinance, 2022 ("**Ordinance**"). Notably, the Ordinance's date of effect is yet to be notified by the Government of Tamil Nadu. The Tamil Nadu Legislative Assembly has also approved the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games, Bill 2022 – however, it has not yet been notified.

The key highlights of the Ordinance are listed below:

1. **Expanded definition of 'online gambling'**: 'Online gambling' under the Ordinance is linked to games of chance and will be prohibited in Tamil Nadu once the Ordinance takes effect. However, the definition of 'online game of chance' has been considerably widened – doing away with the judicially established *preponderance of skill test* and

<sup>1</sup> (2021) 5 CTC 241

including games which (a) are presented as involving any element of chance; (b) involve an element of chance which can only be eliminated by ‘superlative skill’; (c) involve cards, dice, wheels or such other devices which work on random or event generators (*discussed below*).

2. **Prohibition of online rummy and online poker:** The Ordinance seeks to prohibit online rummy and online poker in Tamil Nadu stating that online versions of games involving any ‘random outcome generator’ cannot be compared to their offline counterparts (*discussed below*). This is despite the *Jungle Games* Judgement, which held that poker and rummy are games of skill and protected business activities under Article 19 of the Constitution of India; and the Hon’ble High Court of Kerala’s judgement in *Head Digital Works v. State of Kerala*<sup>2</sup> (“**Head Digital Works Judgement**”) which held that there is no distinction between an online and offline games of skill.
3. **Random outcome generators:** The Ordinance seeks to introduce a new dimension to the game of skill *versus* game of chance debate by raising questions about random outcome generators involved in judicially accepted games of skill such as poker and rummy. In its preamble, the Ordinance states that in case of online games (*including online rummy*) the algorithms for random outcome generators are known to developers and hence are actually *pseudo* random outcome generators. Additionally, the Ordinance states that there is no mechanism available to audit the server architecture of gaming systems, such games can be played with bots, and artificial intelligence can be used to manipulate games to be unfair to players. The Ordinance also notes that there is no scientifically validated algorithm to test *pseudo* randomness. Consequently, the Ordinance seeks to ban games which are *pseudo* random and regulate games which have minimal or negligible randomness as a factor.
4. **Tamil Nadu Online Gaming Authority to regulate online games:** The Ordinance enables the Government of Tamil Nadu to set up the Tamil Nadu Online Gaming Authority (“**Authority**”). The Authority’s role includes (a) regulation of all forms of online games (*including games which do not involve money or other stakes*); (b) issuance of certificates to online games providers; (c) identification of online games of chance to be specifically prohibited from being played for stakes; (c) overseeing the functioning of online games providers in Tamil Nadu; (d) collection and maintenance of information and data with regard to the activities of online games providers; (e) resolution of grievances and complaints relating to online games providers; and (f) formulating regulations relating to time limits, monetary limits and age restrictions (“**Regulations**”) relating to online games.
5. **Framework for local online games providers:** All local online games providers (*i.e., online games providers whose management/control of services are based in Tamil Nadu; or whose services are hosted in Tamil Nadu*) must apply for registration certificates from the Authority within 30 (thirty) days from the Ordinance taking effect. Such local online games providers will be granted a 90 (ninety) day sunset period where they may operate without registration. Notably, this requirement would apply to all local online games providers (*including those which operate online games which do not involve money or other stakes*). Such certificate of registration is to be valid for a period of 3 (three) years. Non-compliance will be punishable with imprisonment of up to 3 (three) years and fine of up to INR 10,00,000 (Indian Rupees ten lakhs).
6. **Framework for non-local online games providers:** The Ordinance prohibits non-local online games providers from (a) providing online gambling services in Tamil Nadu; (b) offering any online game of chance, specified in the schedule of the Ordinance (currently the schedule only contains rummy and poker, however the Authority has the power to expand the schedule from time to time), for stakes in Tamil Nadu; and (c) offering any other online game contrary to the Regulations in Tamil Nadu (collectively “**Non-Compliant Games**”). Non-compliance will be punishable with imprisonment of up to 3 (three) years and fine of up to INR 10,00,000 (Indian Rupees ten lakhs).
7. **Due diligence by non-local online games providers:** Non-local online games providers will be required to either (a) implement geo-blocking technology to block users from Tamil Nadu from accessing their non-compliant games; or (b) implement due diligence requirements to restrict users from Tamil Nadu from accessing their Non-Compliant Games. Notably, a list of due diligence requirements has been specified in the Ordinance – which involve notification, on-boarding and contractual restrictions.

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<sup>2</sup> WP (C) No. 7785/2021

8. **Prohibition of advertisements and fund flow to online games of chance:** The Ordinance seeks to prohibit advertisements of online gambling and online games of chance, such as online rummy and online poker. It also seeks to prohibit banks, financial institutions and payment gateway providers from enabling transactions which facilitate online gambling, online rummy and online poker.
9. **Penalties against users:** The Ordinance provides for penalties against users/players of online gambling, online poker and online rummy for stakes – prescribing penalties of up to 3 (three) months' imprisonment and fine of up to INR 5,000 (Indian Rupees five thousand). However, first offences by users/players may be compounded.

## Kerala

Section 14 of the Kerala Gaming Act, 1960 ("**Kerala Gaming Act**") states that it does not apply to 'games of mere skill' i.e., games which are mainly and preponderantly a game of skill. Section 14A of the Kerala Gaming Act also permits the Government of Kerala to notify games of skill to be exempt from the provisions of the Kerala Gaming Act. The Government of Kerala had, in 1976, issued a notification under Section 14A – exempting rummy from the purview of the Kerala Gaming Act, with the exception of 'side betting' on such games. However, on February 23, 2021 the Government of Kerala issued a notification ("**Notification**"), stating that "*online rummy when played for stakes*" would not be exempt from the provisions of the Kerala Gaming Act.

On September 27, 2021, the Kerala High Court in the Head Digital Works Judgement overturned the Notification, holding that since rummy has already been found to be a game of skill by the Supreme Court, it is automatically exempt from the Kerala Gaming Act. The Kerala High Court also held that since rummy is a game of skill, online rummy would be a game of skill as well; and whether a game of skill is played for stakes has no bearing on whether it is a game of skill or not.

## Karnataka

On October 4, 2021, the Government of Karnataka notified the Karnataka Police (Amendment) Act, 2021 ("**Karnataka Amendment**") to amend the Karnataka Police Act, 1963. The Karnataka Amendment prohibited all forms of gaming which include wagering or betting, including games of skill. The Karnataka Amendment was also vague in relation to the operation or hosting of gaming platforms from Karnataka, even if the games themselves were not being offered to users in Karnataka. Additionally, the Karnataka Amendment made the majority of gaming-related offences cognizable and non-bailable.

Notably, the High Court of Karnataka in *All India Gaming Federation v. State of Karnataka*<sup>3</sup> struck down the provisions of the Karnataka Amendment which (a) sought to prohibit wagering and betting on games of skill and (b) had made the gaming-related offences cognizable and non-bailable – for being in violation of the fundamental rights enshrined in the Constitution of India.

## Rajasthan

On October 16, 2020, the High Court of Rajasthan in *Ravindra Singh Chaudhary v. State of Rajasthan*<sup>4</sup> ruled on a writ petition alleging that Dream 11's fantasy sport games amounted to sports betting, and gambling activities/games of chance.

The High Court of Rajasthan held that since the results of a fantasy game depend on (a) the skill of a participant and not sheer chance; and (b) winning or losing of virtual team created by the participant is also independent of the outcome of the game or event in the real world, the format of online fantasy games offered by Dream 11 is a game of

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<sup>3</sup> 2022(1)KCCR513

<sup>4</sup> Civil WP No. 20799/2019

mere skill and, as a legitimate business, has protection under Article 19(1)(g) of the Constitution of India. The decision by the High Court of Rajasthan was upheld by the Supreme Court.

## Meghalaya

The Government of Meghalaya has announced that it plans to repeal the Meghalaya Regulation of Gaming Act, 2021 (“**Meghalaya Gaming Act**”) which not only regulates games of skill under a licensing regime, but also permits licensed gambling. Once repealed, online games of skill will no longer require a license to be provided in Meghalaya; however, gambling will no longer be permitted in the State.

## Other key developments in the gaming sector

### 1. Inter-ministerial panel to regulate online gaming

An inter-ministerial panel (“**IM Panel**”) has been set up by the Central Government to come up with a centralised regulation and identify a nodal ministry to govern online gaming. The IM Panel, through the proposed regulations, is expected to promote online gaming as a business while also putting in place regulatory measures for protecting gamers. As one such measure for protecting gamers, the IM Panel is reportedly planning on introducing rules to govern the amount of money a player spends in a game. The regulations are expected to be published for public consultation this month. That said, it is pertinent to note that under Entry 34, List II, of the Constitution of India, each State Government has the power to set out legislations governing betting and gambling within such state. Accordingly, state specific restrictions with respect to gambling, and betting including any online games of chance with stakes (unless removed by the relevant State Government) will continue to be applicable, even if centralised regulations on online gaming are issued by the Central Government. Unless State Governments amend their existing legislations in line with such centralized regulations, the regimes across different states with respect to online games of chance with stakes will continue to be asymmetrical.

### 2. Group of Ministers constituted to suggest GST on gaming industry

A group of ministers (“**GoM**”) was constituted to suggest the GST rate on casinos, race courses and online gaming. The applicable rate of GST is 28% on games of chance, and the skill gaming industry pays 18% GST on the commission or gross gaming revenue (GGR) (*i.e.*, the fee charged by online gaming operators). The GoM is seeking a legal opinion on the applicable tax rate and on differentiating between the 3 (three) sectors (casinos, horse racing, and online gaming), before making its final recommendations to the GST Council.

### 3. Advertisements on games of chance, sports betting and games of skill

Advertisement of games of skill are permitted in most States and are regulated under the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 (“**Advertisement Guidelines**”).

Under the Advertisement Guidelines, gaming advertisements are prohibited from (a) presenting online gaming for real money winnings as an income opportunity or an alternative employment option; (b) promoting or encouraging gaming by depicting any success associated with the winners of real money through such online gaming; and (c) depicting any person under the age of 18 (eighteen) years or who appears to be under the age of 18 (eighteen) years engaged in playing a game of online gaming for real money winnings.

Additionally, the Advertisement Guidelines require all online gaming advertisements to carry a disclaimer stating “*This game involves an element of financial risk and may be addictive. Please play responsibly and at your risk*”.

Most Indian States prohibit publication of games of chance and gambling related advertisements. The Ministry of Information and Broadcasting (“**MIB**”), in light of the recent advertisements promoting betting on sporting events such as Indian Premier League, has issued the advisory on ‘Advertisements of Online Betting Platforms’ on June 13, 2022 (“**MIB Advisory**”). The MIB Advisory notes that a number of advertisements of online betting websites / platforms are appearing in print, electronic, social and online media and that such advertisements are prohibited

in most parts of India. It has also stated that such advertisements are misleading and do not appear to be in conformity with the Consumer Protection Act, 2019. The MIB Advisory advises against displaying or targeting betting and gambling related advertisements to the Indian audience. The MIB Advisory has been addressed to newspapers, TV channels, publishers of news and current affairs content, and is copied to social media intermediaries.

## GST notices issued to gaming companies

The Directorate General of GST Intelligence (“DGGI”) has begun cracking down on online gaming operators in India for alleged tax evasion. The DGGI reportedly expects to recover approximately INR 2.5 lakh crores in taxes from such online gaming operators.

Notably, the DGGI has issued a notice to online gaming company GamesKraft Technology Private Limited for an amount of INR 2,10,00,00,00,000 (Indian Rupees twenty one thousand crores).

### Gaming Law Practice

With the advent of the Internet, mobile gaming, eSports and the proliferation of sports wagering we represent technology providers for internet and mobile gaming, various operators and payment solution companies seeking to work with and form partnerships with this industry. Our lawyers have substantial experience in all facets of gaming laws, covering a range of issues confronted by our clients within the industry, including those related to technology, equipment, and faced by service provider to the industry. Additionally, our teams support clients in regulatory and compliance matters, including assisting our clients in obtaining regulatory approvals, drafting internal compliance procedures and, conducting internal investigations in connection with alleged regulatory violations. In recent years, JSA has built a niche in advising online/mobile gaming, gambling and e-sports companies and technology providers. JSA also counsels such businesses in a range of corporate matters, including financings, mergers & acquisitions, labour and employment matters, and all facets of litigation.

JSA helps navigate all the complexities of the industry, and our experience stretches across the complete spectrum of gaming and esports, including: (a) Interactions with regulatory bodies; (b) Structuring and negotiating agreements between the various parties involved in this highly regulated industry; (c) Advising on the aspects of a game may categorize it to be gambling; (d) Drafting terms and conditions of a game, mobile gaming applications, e-sport tournaments and other such events/competitions; (e) Advising on compliance matters, including regulations in internet and mobile gaming; (f) Conducting and supporting internal audits, investigations and diligence exercises.

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23 Ranked Lawyers



15 Practices and  
18 Ranked Lawyers



7 Practices and  
2 Ranked Lawyers



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