

Online Gaming – as grey as ever!

Introduction

A district court of Delhi (“**Court**”) recently expressed its **opinion** under order XXXVI of the Code of Civil Procedure, 1908 in the case of Gaussian Network Pvt. Ltd vs. Monica Lakhanpal and Ors.¹ The Court ruled that online games played with money are illegal in states that prohibit gambling and websites hosting such games cannot be offered protection under article 19(1) (g) of the Indian Constitution.

This newsletter analyses the judicial opinion of the Court in the aforesaid case.

1. Background

At the outset, there is no specific regulation on online gaming per se. Public Gambling Act, 1867 (“**Act**”), existing from the days of British Raj defined the term “common gaming house” and covered gaming and gambling within its ambit. With the enactment of the Constitution of India² gambling became a state subject. Thereafter, states have the authority to make or amend their respective state gambling laws. Out of the total of twenty eight states in India, Goa and Sikkim are the only two states which permit gambling while the rest prohibit it, either in accordance with their respective gambling law or the Act.

Given the aforesaid background, the Court placed reliance upon the Act, various state gambling acts (*Bombay, West Bengal, etc.*) and judicial precedents, discussed below, while expressing its opinion on online gaming.

2. Brief facts

Mr. Anuj Gupta, director of Gaussian Network Pvt. Ltd (“**Company**”), proposed to launch a website offering online games of chess, billiards, rummy, poker, bridge and snooker. The intent was that the players play against each other and the website charges commission up to 5% on the winning hand. The Company claimed to provide a social gaming platform. Ms. Monica Lakhanpal, an independent investor, agreed to invest a sum of INR 500,000 in the Company. However, her financial contribution was solely dependent upon **legalities of the games** to be launched on the website. The parties were unclear about the legality of online games played with stakes and, hence, approached the Court. The civil courts of India, under order XXXVI allow a party to seek court’s opinion on ambiguous issues. Since the law on online gaming is opaque, the Court expressed its opinion on the questions raised by the parties.

¹Suit no 32/12 judgment dated September 17, 2012.

² The Indian Constitution came into being on November 26, 1949. Schedule VII of the Constitution defines three lists: Union, State and Concurrent (*which specify the field of legislation of the Union and the State*). Entry 34 of State List covers gambling and betting.

3. Issues

The key questions posed to the Court were as follows:

- (a) Whether games of chess, rummy, billiards, snooker, bridge and poker are games of skill?
- (b) Whether wagering and betting on games of skill amounts to gambling?
- (c) Do any restrictions exist on playing games of skill online, with stakes, where the website makes profit?
- (d) Are games of skill considered business activities protected under the Constitution of India?
- (e) Can directors of the Company, hosting websites, offering games of skill be liable for any penal action?

4. Opinion of the Court

Keeping in mind the background provided above, the Court was of the opinion that online games played with stakes are illegal in states which prohibit gambling. The answers and the reasoning provided by the Court to the questions raised are discussed under specific heads below.

4.1 Games of skill and betting on games of skill

The Court drew a distinction between a game of skill and a game of chance and described game of skill as one which involved ability, strategy, physical co-ordination, technical expertise and knowledge, whereas a game of chance is one in which there is no element of skill and winning is solely dependent upon chance/luck. The Court's view was that the Supreme Court had already settled in the case of *Dr. K.R. Lakshmanan vs. State of Tamil Nadu*³ that games of rummy, bridge, golf, billiards and chess are games of skill. Similarly, in the case of *RMD Chamarbaughwala vs. UOI*⁴ Supreme Court ruled that wagering and betting on a game of skill does not come within the ambit of gambling. The Court placed reliance on the two Supreme Court rulings and held a similar view with regard to rummy, bridge, golf, billiards and chess. Poker, in the opinion of the Court, is a sheer game of chance similar to flash and outside the definition of game of skill.

Having discussed the first two questions collectively, the Court concluded that rummy, bridge, golf, billiards and chess are games of skill, and when played with stakes, do not amount to gambling. On the other hand, the Court ruled that poker is a game of chance as it does not involve skill. Finally, Court remained silent on the status of snooker. It seems as though it has left it on the parties to decide if it is a game of skill or chance.

4.2 Games of skill played with stakes online where the website makes profit

The Court stated that when a gaming portal/website retains a portion of prize money by way of commission it acts as a gaming house. It placed reliance on the definition of

³ AIR 1996 SC 1153.

⁴ AIR 1957 SC 628.

“**gaming house**” in the Bombay Gambling Act as “*any house, room or place whatsoever, in which any instrument of gaming is kept or used for profit or gain of the person owning, occupying using such house, room or place by way of charge for the use of such house, room or place or otherwise howsoever.*” The Court stated that if chess, billiards, rummy and bridge were played online and the portal did not charge any commission, it would not be illegal. Since the website planned to charge commission it would act like a gaming house covered by the provisions of the Bombay Gambling Act, and, therefore, illegal in states which prohibit gambling.

This explanation provided by the Court is first of its kind. Never before has a court compared a website offering games of skill to a gaming house, particularly, when the Act clearly states that games of skill are out of its purview.

4.3 Games of skill considered business activities and protected under the Indian Constitution

Though the Court ruled that games of skill are business activities protected under Article 19(1) (g) of the Indian Constitution *i.e.* covered by the right to freedom of trade and commerce, it stated that when games are played online the skill involved is reduced tremendously. The Court has discriminated between games played in physical form and games played online. In its opinion, rummy, bridge, golf, billiards and chess (*games of skill*) when played in physical form with money are legal, but when played online, involving prize money and commission for the website come under the purview of gambling. This makes it illegal in states which prohibit gambling and cannot be covered by Article 19(1) (g). The Court went a step ahead and stated that even though the games mentioned above may be permitted they cannot be considered legal when operated by a gaming house and, therefore, online business activity cannot be protected under the Indian Constitution.

4.4 Penal liability of directors of websites offering online games

By virtue of the explanation provided above, online business activity was declared illegal. Consequently, the directors of companies which offer online games would have to bear penal liability. The Court held that websites offering online games replaced traditional casinos/gaming houses as they charge commission. Even though the Court held that Directors will bear penal consequences, yet the opinion is silent on the quantum. Under the Act, the penalty for owning a gaming house is INR 200 (*approximately \$4*) or imprisonment for two months.

5. Analysis

The Court has given an unusual interpretation of the Act. For the first time, games of chance or skill played with stakes online will be illegal when the website charges commission. The act of charging commission has been equated with “**gaming house**”. According to the Court, the games of skill conducted with the profit motive are *extra commercium i.e.* not included under trade or business.

The distinction drawn between games of skill played online and played in physical form, as stated above, has been criticized. The Court seems to have ignored the legal provisions

pertaining to games of skill in the Act. **Section 12 of the Act clearly states that its provisions will not apply to a game of skill.** Therefore, to state that game of skill when played with stakes online is illegal, incorrect and contrary to the existing statute.

While the opinion is not a judgment but it will have persuasive value and could hinder the growth of the online gaming industry in India, which has expanded exponentially in the last few years. Despite the fact no appeal lies against an opinion of a court, the petitioner has appealed to the Delhi High Court. It is to be seen whether it agrees with the district court or passes a reverse judgment.

It is noteworthy that a similar petition, Mahalakshmi Cultural Association v. Director General of Police, pending in the Supreme Court, raises the question whether a game of skill can be played with stakes and if profit can be made on such games.

Conclusion

In view of the above, it can be rightly concluded that states in India are in dire need of a specific law on online gaming. Sikkim is the only state which has enacted the Sikkim Online Gaming Act, 2008 and issues licenses for setting up online gaming websites with servers located in Sikkim. But again, as online gaming is not explicitly covered under legislations of other states, there is great ambiguity on accessing these online gaming websites from parts of India other than Sikkim.

In the absence of a precise law on online gaming (*except in Sikkim*), the position may remain grey until specific regulation is enacted.

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