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INTRODUCTION

The Argus Technology Newsletter discusses recent developments in technological advances or milestones or events. As lawyers, we enjoy delving into the legal nuances and implications of technological changes and analysing their impact on our clients and their activities. It is said that law always lags behind technological advances and there could be some truth behind such statement, but there is no reason for lawyers to lag behind technological advances.

The Argus Technology Newsletter is not meant to be a substitute for your regular technology periodical. Instead, we hope and promise to offer a lawyer's insights into technological change and innovation.

Argus Partners has developed a strong and a robust technology and data privacy practice, which spans transactional advisory, corporate and regulatory advisory as well as contentious matters and disputes. Whilst physically the attorneys are based out of our Mumbai, Delhi & Bangalore offices, the team is servicing clients across the globe on Indian legal issues in technology and data privacy.

Online Games of Skill V. Games of Chance: The Judicial Saga Continues

Article Contributed by Dhruv Bhatnagar (Senior Associate) and Smriti Tripathi (Associate)

Gambling has been one of our oldest pastimes and human beings have, over the ages, taken a varied approach to the regulation of gambling. Recently, there have been two developments in India, one involving a judgment passed by the Kerala High Court and the other, a proposed amendment to the gaming law in Karnataka, which are rather at odds with each other.

Kerala High Court lifts ban on online rummy

Through a recent judgment in [Head Digital Works Private Limited v. State of Kerala](#), the Kerala High Court has lifted the ban on online rummy, imposed by the Kerala Government through a [notification](#) dated February 23, 2021 (“**2021 Notification**”). Essentially, the 2021 Notification amended a prior notification dated September 30, 1976 (“**1976 Notification**”) which had exempted rummy from the ambit of the Kerala Gaming Act, 1960 (“**Gaming Act**”) which outlaws ‘wagering’ and ‘betting’. The 2021 Notification removed “[online rummy when played for stakes](#)” from the purview of this exemption. Both these notifications were issued under [Section 14A](#) of the Gaming Act which empowers the Kerala Government to exempt through notification, games wherein “[the element of skill is more predominant than the element of chance](#)”.

The petitioners, who were companies engaged in the business of providing online skill-based games in India, assailed the 2021 Notification as arbitrary for creating an artificial distinction between ‘rummy’ and ‘online rummy’. They further alleged that, merely because ‘online rummy’ was ostensibly addictive, does not change the fact that it is still predominantly a game of skill to which the Gaming Act would not apply.

Against this backdrop, the Kerala High Court was called upon to, *inter-alia*, decide the following core issues: (a) is rummy a game of skill, and therefore, outside the ambit of the Gaming Act?; (b) if rummy is a game of skill, would online rummy also be a game of skill?; and (c) does inclusion of stakes to online rummy make any difference to the nature of the game?

The verdict

On the issue regarding the nature of rummy, the Kerala High Court reaffirmed the Supreme Court’s verdicts in [State of Andhra Pradesh v. K. Satyanarayana](#) and [K.R. Lakshmanan v. State of Tamil Nadu](#) wherein it was held that, rummy is mainly and preponderantly a game of skill. On this basis, the Kerala High Court ruled that even absent a notification under Section 14A of the Gaming Act, rummy would still have been exempted from the provisions of this state legislation by virtue of being a “[game of mere skill](#)” under [Section 14](#) thereto.

Secondly, the Court held that, the reasoning adopted by the Apex Court in the aforesaid cases regarding the nature of rummy, would apply equally to online rummy, making it a game of skill.

Thirdly, the inclusion of stakes has no bearing on the fundamental nature of a game and, therefore, cannot be used as a criterion to determine whether a game qualifies as a game of skill or chance. Thus, irrespective of whether rummy or online rummy are played for stakes, they would remain games of skill which fall outside the ambit of the Gaming Act.

Lastly, the Court declared the 2021 Notification as arbitrary and violative of [Articles 14 and 19\(1\)\(g\)](#) of the Constitution since: (a) the notification had been wrongfully issued in respect of a game which already stands exempted from the provisions of the Gaming Act; and (b) considering that playing rummy does not constitute ‘gambling’ or ‘gaming’ under the Gaming Act, curtailing the business of entities that provide a platform for online rummy is unlawful.

Analysis

The *Head Digital Works* ruling is yet another positive judicial development for online gaming platform providers, after the Madras High Court’s recent verdict in [Junglee Games v. State of Tamil Nadu](#), wherein portions of the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 were struck down for, *inter-alia*: (a) disproportionately curtailing the fundamental right to trade guaranteed under Article 19(1)(g) of Constitution, by imposing a blanket ban on online games irrespective of the skill involved in them; (b) being enacted in excess of the legislative competence of the state legislature; and (c) violating the law laid down by the Supreme Court in [K.R. Lakshmanan \(supra\)](#) and the [State of Bombay v. R.M.D. Chamarbaugwala](#) that ‘games of skill’ do not constitute wagering or betting. The Madras High Court also held that though the State Governments have exclusive legislative competence under Entry 34, List II of the Constitution of India to enact laws on ‘betting and gambling’, their competence had to be read to be confined to betting on games of chance, as ‘gambling’ had been judicially interpreted to mean betting or wagering on games of chance.

Particularly significant in *Head Digital Works (supra)* is the Kerala Court’s neutrality towards mode/ platform of play, and its endorsement of the same set of principles, espoused by the Supreme Court in respect of rummy played physically, for determining the nature of online rummy. This reasoning keeps pace with evolving digital technology and should offer a compelling defence, at the very least, against unjustified attempts to outlaw games of skill merely because they are played online. Equally relevant is the Court’s recognition of the 2021 Notification’s arbitrariness and the consequent violation of the petitioners’ fundamental right under Article 19(1)(g) of the Constitution of India, once again offering a compelling ground to challenge disproportionate attempts to regulate online gaming.

The *Head Digital Works (supra)* and *Junglee Games (supra)* rulings are likely to have persuasive value before other High Courts, such as the [Telangana High Court](#), where similar issues are *sub judice*. However, these decisions do not confer any immunity from regulation to online skill-based games.

By virtue of their power under [Entry 34, List II, Seventh Schedule](#) to legislate over "[betting and gambling](#)", state legislatures can continue to enact sweeping legislations banning online gaming. , which is precisely what the Karnataka Government is attempting to do with the [Karnataka Police \(Amendment\) Bill, 2021, which is discussed in detail below](#).

Karnataka Legislature proposes to ban online gaming

The Karnataka legislature has passed the Karnataka Police (Amendment) Bill, 2021 (“**Amendment**”) to amend the Karnataka Police Act, 1963 (“**KPA**”) in order to ban all forms of gambling in the state, including online gambling. The Amendment, which has been notified in October 2021, aims to strengthen the KPA to make gambling a cognisable and non-bailable offence and “curb menace of gaming through the Internet, mobile apps.” The Amendment explicitly bans and criminalizes all forms of online gaming where stakes are involved any payment is required to be made by the participants, including games of skill.

The Amendment has amended the meaning of gaming in Section 2(7) of the KPA to mean and include “*online games, involving all forms of wagering or betting, including in the form of*

tokens valued in terms of money paid before or after issue of it, or electronic means, and virtual currency, electronic transfer of funds in connection with any game of chance... Further, in the definition of 'wagering or betting', the Amendment has included "*any act of risking money or otherwise on the unknown result of an event including on a game of skill.*" Thus, the Amendment also places betting on a person's skills in the category of gambling.

Further, the Amendment enhances maximum punishment for owners of gambling centres from one year to three years of imprisonment and fines from Rs 1000 to Rs 1 lakh. The minimum punishment proposed is six months instead of the current one month and a fine of Rs 10,000 instead of Rs 500.

Coming close on the heels of the judgments in *Head Digital Games (supra)* and *Junglee Games (supra)*, the Amendment has faced strong resistance from the gaming industry. The Internet and Mobile Association of India ("IAMAI"), the industry body representing Internet and tech companies, has stated that the Amendment will hurt Karnataka's position as the country's startup hub and will lead to loss of jobs and revenue for the state. The All India Gaming Federation, a self-regulating gaming body, along with three other gaming operators, has already filed a writ petition in the Karnataka High Court challenging the legality of the Amendment.

It is hoped that the Telangana High Court and the Karnataka High Court will issue a ruling similar to the ones in *Head Digital Works (supra)* and *Junglee Games (supra)* and acknowledge that the State's legislative competence under Entry 34, List II of the Constitution of India does not extend to games of skill.

Concluding remarks

Considering the popularity of online games and the [promising growth potential](#) for the gaming industry in India, a centralised regulatory framework is the need of the hour. This is because the extant regulatory regime requires gaming platform providers to adhere to a divergent set of state regulations/ laws on online gaming, which is extremely cumbersome to comply with given the ubiquity of the internet. A light-touch regulatory approach, as [recommended](#) by the NITI Aayog, coupled with definitive clarity from the Supreme Court on the extent to which states can and should regulate online skill-based games, should provide a much needed impetus to this sunrise industry.

India Antitrust Probe Finds Google Abused Android Dominance

Article Contributed by Aishwarya Manjooran (Associate)

The Competition Commission of India ("CCI") began looking at Google's Android business in India in 2019, after receiving complaints from 2 (two) Indian junior antitrust research associates and a law student, about the tech giant abusing its dominant position. After finding preliminary evidence of such abuse, the CCI ordered a full investigation into the matter, as reported by Reuters in 2019. In 2021, the CCI, at the end of its two-year anti-trust probe, has come to the conclusion that Google has abused the dominant position of Android in India to illegally hurt competitors. Though investigation reports by the director-general of the CCI are confidential and should be accessible only to the parties being investigated, CCI's probe report in this matter has been cited by multiple publications.

The June report of the CCI's investigations unit apparently states that Alphabet Inc's Google has reduced "*the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of Android,*". The Report also purportedly claims that

Google's practice and mandatory requirement of having its apps pre-installed by device manufacturers is in violation of the Competition Act, 2002. The report has also raised questions on Google Play Store policies and asserts that the same are "one-sided, ambiguous, vague, biased and arbitrary".

On September 23, 2021, Google petitioned the Delhi High Court to order CCI to keep the CCI's director-general's report confidential. And the court has informed Google that the regulator has agreed to accept Google's request to keep its submissions confidential.

Apart from this investigation by the CCI, Google also faces several probes by the CCI into its payments app and smart television markets. The corporation has also been scrutinized in Europe, the United States, and other parts of the world and was fined \$180 million by South Korea's antitrust authority earlier in September for banning customised versions of Android.

A total of 62 entities, including Microsoft, Amazon and Apple responded to queries from CCI during the course of this investigation. In a statement to Reuters, the tech giant has responded that it looks forward to engaging with the CCI to demonstrate how "Android has led to more competition and innovation, not less."

Read more on this, [here](#), [here](#) and [here](#).

Non-Fungible Tokens: An Overview

Article Contributed by Rabia Rahim (Associate)

Recently, Non-Fungible Tokens or "NFTs" have gained immense popularity. The hype over NFTs is largely due to the surge in sale of NFTs over the past few months (Quarter 3 of FY 21-22 reported trade worth \$10,70,00,00,000 (Dollars ten billion seven hundred million)). However, NFTs were not introduced in the recent past; they have been in existence since the year 2015. Even though it has been six years since its introduction to the tech world, NFTs are commonly misperceived as assets in themselves, much like cryptocurrencies. Other than the fact that both NFTs and cryptocurrencies are secured by blockchain technology, and that there is a legal vacuum in which both these tech creations operate, there are hardly any other similarities between the two.

While cryptocurrencies are defined by their own value and can be exchanged like physical currencies, NFTs are unique tokens establishing ownership of an underlying asset ("Underlying Asset"), which cannot be exchanged as the term 'Non-Fungible' suggests. In other words, owning an NFT means that the person is the certified owner of an asset underlying the NFT, unless the contrary has been agreed to. The asset underlying an NFT can be anything ranging from art and collectibles to memes and even real estate.

NFTs are created by executing smart contracts which assign ownership rights in the NFT and deal with the terms of transferability or assignability of the NFT. On its execution, the smart contract triggers the code designed to create or 'mint' an NFT. NFTs are usually traded using cryptocurrencies and just as in the case of cryptocurrencies, the traction towards NFTs is owing to the belief in the long term returns that tech investments would offer; but whether investments in NFTs are safe, is a tricky question to answer.

An NFT can only have one owner at a time and by virtue of its unique metadata, NFTs can neither be replicated nor modified by an external agency. Transferring and assigning the ownership of NFT would be at the discretion of the owner of the NFT and does not guarantee the transfer of the copyrights in the Underlying Asset, unless so stated explicitly. Since NFT is hosted on a public ledger, ownership in NFT is accessible to the public and hence easily verifiable, in other words, ownership disputes will be easily resolvable.

NFTs are essentially deeds and have a million possibilities surrounding its use and development. It may also be argued that NFTs are ‘derivatives’ (since they derive their values from Underlying Assets) and therefore ‘securities’ under the Securities Contracts (Regulation) Act, 1956 (“**SCRA**”). However, if NFTs are derivatives, they would be illegal since Section 18A of the SCRA requires derivatives to be traded only on an authorised stock exchange. It can also be argued that NFTs are not derivatives, since NFTs usually do not derive their value from underlying financial instruments such as stocks or commodities, but instead form an underlying non-financial asset such as a painting, which is not a “security” under the SCRA.

NFTs could become one of the most interesting tech creations, but with the potential they hold, also come risks, those which cannot be mitigated without adequate regulations to that effect. If the *Cryptocurrency and Regulation of Official Digital Currency Bill, 2021* is passed by Parliament and comes into force, private cryptocurrencies will become illegal in India and consequently, trading in NFTs would also decrease considerably, since NFTs are usually traded with cryptocurrencies. A ban on private cryptocurrencies will hamper the movement towards absolute digitalisation and threaten the anonymity of the private purchasers who prioritise their privacy. While a complete ban on private cryptocurrencies may not be the solution, regulation of NFTs should be such that it protects both the investors as well as the creators and prevents misuse of NFTs for illegal activities such as money laundering.

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