

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3047 OF 2022**

PLAY GAMES 24X7 PVT LTD,
A company incorporated under the
Companies Act 1956, represented by its
Authorized Representative,
Mr Malay Kumar Shukla,
having its registered office at 5th floor,
Central Wing (B), Tower-4, Nesco IT Park,
Nesco Centre, Western Express Highway,
Goregaon (E), Mumbai 400 063

... PETITIONER

~ VERSUS ~

- 1. RESERVE BANK OF INDIA,**
Through Chief General Manager,
Foreign Exchange Department,
Central Office Building, 19th Floor,
Shahid Bhagat Singh Road,
Mumbai 400 001
- 2. DEPARTMENT FOR PROMOTION
OF INDUSTRY AND INTERNAL
TRADE,**
Ministry of Commerce and Industry,
Government of India, having address at
Udyog Bhawan, New Delhi 110 011.

... RESPONDENTS

APPEARANCES

FOR THE PETITIONER Mr Janak Dwarkadas, Senior

**Advocate, with Zal
Andhyarujina, Senior
Advocate, Shilpi Jain, Hursh
Meghani, Vaibhav Kakkar,
Sanjeev Sharma, Keshav
Pareek, Sahil Arora & Abhishek
Niharge, i/b Mehul Shah.**

**FOR RESPONDENT NO.1 Mr Prasad Shenoy, with parag
Sharma, Aditi Pathak, Kirti
Ojha & Vijay Salokhe, i/b
BLAC & Co.**

**FOR RESPONDENT NO. 2 Mr Ram Apte, Senior Advocate,
with NR Bubna.**

**CORAM : G.S.Patel &
S.G. Dige, JJ.**

DATED : 18th January 2023

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** By consent, rule made returnable forthwith and the Petition is taken up for final disposal. We heard parties at some length yesterday.

2. The Petition turns very narrowly on the facts of this case. There is no larger question of law that falls for determination. The Petitioner is a corporate entity that inter alia designs and develops software related to games of skill. It uses its software products online on a website and on mobile applications. The target audience is the Indian market. The website is www.rummycircle.com. The

mobile applications go by the name *my11circle* and *rummycircle*. These games platforms are entirely developed and operated domestically, that is to say in India. The Petitioner has two offices in Bangalore and Mumbai and employs over 500 people.

3. On 30th September 2020, the Petitioner had 96.18% foreign shareholding on a fully diluted basis. Its annual turnover was Rs.1429 crores. For the financial year 2019–2020, the Petitioner paid over Rs. 120 crores towards direct taxes and more than Rs. 260 crores in indirect taxes. Foreign Direct Investment or FDI connotes the subscription by foreign entities in an Indian entity. Typically, a foreign entity will infuse funds into an Indian entity as consideration for taking up a part of the shareholding or a percentage shareholding in the Indian entity. This is a highly regulated area and is controlled inter alia by the provisions of the Foreign Exchange Management Act 1999 (“**FEMA**”) along with the relevant rules, regulations, press notes and policies as issued periodically. The policy is framed by the Department for Promotion of Industry and Internal Trade (“**DPIIT**”).

4. The relevant regulations include are the Foreign Exchange Management (Transfer of issue of security by a person resident outside India) Regulations 2000 issued under a notification dated 3rd August 2000. Under the 2000 Regulations, a non-resident could purchase shares of an Indian company subject to certain terms and conditions including entry routes, sectoral caps or limitations and various conditions. These are set out in Schedule 1 of the 2000 Regulations and in the applicable policy document. Among the

various conditions under the 2000 Regulations is that the Indian entity that receives foreign investment, against which it proposes to issue and allot shares to a non-resident, must (i) report the remittance received within 30 days of receipt as required by paragraph 9(1)(A) of Schedule 1 of the 2000 Regulations; and (ii) it must file a form in a prescribed format within 30 days of allotment of shares in accordance with paragraph 9(1)(B) of Schedule 1.

5. The 2000 Regulations were substituted with the Foreign Exchange Management (Transfer of issue of security by a person resident outside India) Regulations 2017.

6. As is evident from what is set out above, the reporting must be done within the prescribed timelines. There is a proviso in paragraph 8 of Schedule 1 of the 2000 Regulations. This inter alia says that if shares (or convertible debentures, as the case may be) are not issued within 180 days of the inward remittance, the consideration is required to be refunded to the remitter.

7. Broadly, the provisions of the 2000 Regulations have not been materially changed under the 2017 Regulations. The current regime also includes the Foreign Exchange Management (Non-debt Instrument) Rules 2019 and the Foreign Exchange Management (Mode of Payment and reporting of non-debt instruments) Regulations 2019.

8. Paragraph 9(1) of the Petition says that although the Petitioner received foreign remittances at diverse periods between

2006 and 2012 and it issued equity instruments i.e., shares, to certain non-resident investors, the Petitioner had committed certain 'procedural' or 'technical' contraventions under FEMA. These are specified to mean delays in the filings of the prescribed forms and reporting of the inward remittances and also delays in the allotment of shares.

9. Not all inward remittances and share issuances were so affected. Some undoubtedly were. These non-compliant contraventions were reported and the 1st Respondent, the Reserve Bank of India ("**RBI**") said by its letter of 30th July 2012 that the forms could not be accepted as placed because of these contraventions. However, the RBI clearly stated in this communication that the contraventions could be compounded provided an application was made in the appropriate format with the prescribed fees together with supporting documents within 45 days. The Petitioner did so. It filed an application on 30th August 2012 under Section 15 of FEMA read with the Foreign Exchange Management (Compounding Proceedings) Rules 2000. A copy of that application is also annexed.

10. The RBI took on record the forms on a without prejudice basis, i.e., without prejudice to the compounding procedure.

11. On 1st February 2013, the RBI returned the compounding application and directed the Petitioner to approach its Foreign Exchange Department. The Petitioner approached that department on 21st March 2013. In response, the foreign exchange department

of the RBI in turn directed the Petitioner to approach the then department of Industrial Policy and Promotion, now the DPIIT, ostensibly to seek a clarification for eligibility to receive FDI in the first place. Leaving aside the arguments and submissions in the Petition, and telescoping somewhat the factual narrative, it seems that although the Petitioner made representations to the DPIIT three times, it received no response. There is of course the Petitioner's case that it was not bound to seek any such clarifications from DPIIT.

12. Be that as it may, on 13th March 2020 the Petitioner filed yet another compounding application. The response to this, from the RBI on 2nd September 2020, was to return the 2020 compounding application pointing out that a clarification from the DPIIT as to the permissibility of the Petitioner's business application had not yet been submitted.

13. The Petitioner made a detailed representation in 2020 to the RBI's Deputy Governor. Further correspondence followed. On 5th May 2021, the Petitioner filed the present Petition against the RBI, then the sole Respondent. On 5th October 2021, this Court allowed an application for amendment by the Petitioner. On 16th December 2021, we directed that DPIIT be joined as a party respondent to the Petition.

14. The short question that falls for consideration is whether, for the relevant period, it can be said that the business activity of the Petitioner was illicit, prohibited by law, or illegal such that it would

be disentitled to receive foreign investment at all. If so, there would be no question of compounding. Specifically, the question is whether the online, i.e., website-based and mobile application games constitute 'gambling' as understood in law in this country.

15. To set the stage for the factual conspectus, and since, as we have noted earlier, dates are relevant, we note from a somewhat mischievously captioned 'convenience' compilation tendered by Mr Dwarkadas, that the dates of remittances are between 23rd June 2006 and 1st February 2012. It is the activity of the Petitioner for this period that must be addressed. This is only logical because the errors and the non-compliances by the Petitioner were for this period or during this period. The compounding application or applications by the Petitioner all related to this period and none other. This is the only period with which we are concerned.

16. Having been joined as the 2nd Respondent to this Petition, DPIIT was served. It did not, as we have noted above, reply to the representations. It did file an Affidavit in Reply. This is dated 18th February 2022..

17. Mr Apte, learned Senior Counsel for DPIIT, draws our attention to paragraphs 4 and 5 of this Affidavit. These are at pages 471 and 472 of the paper book and at pages 138 and 139 of the compilation. We reproduce these below:

"4. I say that Respondent No. 2, upon examination of the issue, observed from the website of the Petitioner Company that besides 'Rummy' it is also engaged in conducting other games namely 'Teen-Patti' (three card

game) and 'Call it right' through its website, which fall under the category of Gambling and Betting. Since Gambling and Betting was a Prohibited Sector as per the Consolidated FDI Policy Circular dated 28.07.2017 (FDI Policy 2017) and Petitioner was in violation of the FDI policy, the reference dated 23.03.2018 was forwarded by Respondent No. 2 to Enforcement Directorate (ED) under intimation to RBI (Respondent No. 1) for taking necessary action vide Letter dated 25.05.2018. Hereto annexed and marked **Exh. "C"** is Para 5.1 on "Prohibited Sectors" under the FDI Policy 2017. Hereto annexed and marked **Exh. "D"** is the copy of letter dated 25.05.2018 sent by Respondent No. 2 to ED along with enclosures.

5. I say that it is observed from the website of the Petitioner, www.games24x7.com, that in addition to "Rummy" and fantasy cricket game "My11circle", "Ultimate Teen Patti" game is also offered by the Petitioner through a separate mobile application. Teen Patti or the 'three-card' game has been held to be a game of pure chance and accordingly falls under the category of "Gambling and Betting Activities" which is a prohibited sector under the extant FDI Policy. I, therefore, say that the Petitioner appears to be in violation of the extant FDI Policy and is not entitled to any relief. Hereto annexed and marked **Exh. "E"** is the copy of screenshots from website of the Petitioner."

18. We note for completeness that this stand by DPIIT is also reflected in a letter it addressed on 25th May 2018 to the Enforcement Directorate. A copy is at page 595 of the paper book or page 199 of the convenience compilation.

19. The Affidavit in Rejoinder deals with the Affidavit in Reply by DPIIT in this way:

“BACKGROUND OF PETITIONER’S BUSINESS ACTIVITIES:

4. The Petitioner is engaged in the business of providing a platform for competitive games of skill and tournaments including rummy and fantasy league sports games for the Indian market on the Internet on its websites www.RummyCircle.com; and www.my11circle.com and mobile applications ‘RummyCircle’ and ‘My11Circle’ offered on android and iOS based smartphones and some other casual/social games offered through other mobile applications and distributed to users through reputed platforms like the Google Play Store and Apple AppStore all across the world (websites and mobile applications collectively referred to as **“Platforms”**). The Petitioner undertakes its activities in full compliance with the FDI Policy and none of the activities of the Petitioner amount to gambling / betting as per extant laws. Casual/social games are not considered to be “gambling” under gaming laws in India and across international jurisdictions as no ‘prizes’ or ‘rewards’ of monetary or tangible value are involved and therefore, these are played and offered worldwide through reputed distribution channels like the Google Play Store and Apple AppStore. These casual/social games offered by Company do not have any prize or reward in terms of cash or anything having monetary/tangible value, and these are played by the users for leisure or social purposes. The revenue for the Petitioner from these casual/social games is mainly generated through in-app purchases of virtual goods by the users and in small part through placement of advertisements in these games. These virtual goods like chips, diamonds etc. are common place in such casual/social online games which can be used by the player

for only in-game uses like to play a game, make cosmetic changes to game character, upgrade virtual goods in the game or progress in the game but cannot be redeemed for cash or anything having monetary/tangible value.

5. Specifically, pursuant to its business activities, the Petitioner offers the following online games through its Platforms:

- (i) **Online rummy**: The Petitioner has been offering the skill-based game of online rummy since 2009 and continues to offer the same as of date.
- (ii) **Fantasy league games**: The Petitioner also offers fantasy league games which are based on the skill of user and such fantasy league games are being offered since 2019 and continues to offer the same as of date.
- (iii) **Social Games**: In addition, the Petitioner (and also its wholly owned subsidiary — U Games Private Limited (“**Subsidiary**”)) has been offering certain social and casual games including Ultimate Teen Patti and Call it Right (*collectively*, “**Social Games**”). In this regard, the Social Games business of the Petitioner was transferred to its Subsidiary with effect from April 1, 2021. Since the Respondent no.2 has specifically referred and made profound and unfounded allegations in relation to Ultimate Teen Patti and Call it Right, the details of the same are mentioned below:
 - a. **Ultimate Teen Patti**: **The Ultimate Teen Patti game (“UTP”) is being offered since February 2, 2015. UTP is a casual/social game which does**

not involve any prizes that can be won by the players in cash or anything of monetary/tangible value. The major source of revenue for the Company/Subsidiary through UTP is the in-app purchases made by users to buy virtual chips that are required to play this game. **There is no monetary/tangible prize or reward that can be won by the players based on the outcome of these games.** Further, a very small part of the revenue from UTP is generated through advertisements placed in the games. The Company pays Goods and Services Tax (“GST”) on such in-app purchases and ad revenue.

- b. Call it right: The game — Call it Right was launched by the Petitioner on July 15, 2013, and it was offered only in western markets outside India. The Petitioner had stopped offering Call it Right since 2017 and at present the Petitioner or the Subsidiary are not offering the game — Call it Right. **In this game also there were no prizes in cash or anything of monetary/tangible value offered by the Petitioner to the winners.** Call it Right was primarily intended for international markets and thus, was distributed through Facebook, Apple App Store, Yahoo games and Google Play Store across the world.

It is humbly submitted that, Casual/social games are not considered to be ‘gambling’ under gaming laws in India and across international jurisdiction as no ‘prizes’ or ‘rewards’ of monetary or tangible value are involved. Accordingly, in the absence of the element of reward being absent from Casual / Social Games, these games are not seen as ‘gambling’ under Indian laws. These are widely played and offered worldwide through reputed distribution channels like the Google Play Store and Apple AppStore. These casual/social games offered by the Petitioner do not have any prize or reward in terms of cash or anything having monetary/tangible value and these are played by the users for leisure or social purposes. The revenue for the Petitioner from these casual/social games is mainly generated through in-app purchases of virtual goods by the users and also in small part through placement of advertisements in these games. These virtual goods like chips, diamonds etc. are common place in such casual/social online games which can be used by the player for only in-game uses like to play a game, make cosmetic changes to game character, upgrade virtual goods in the game or progress in the game but cannot be redeemed for cash or anything having monetary/tangible value.”

(Emphasis added)

20. The Rejoinder also says:

“25. These virtual chips used in UTP and Call it Right have no utility other than for playing the game on the mobile application or for acquisition of certain virtual in-game items or access to additional levels and features within the game itself. There are no cash rewards or rewards of monetary or tangible value that are given to players of UTP and/or and Call it Right, based on winning any game

whether with friends or against other online players. Further, it must be noted that there is no incentive, in terms of reward in money or money's worth, for a player to purchase the virtual chips for playing the game. Further, even if a user wins the game of UTP and/or Call it Right, such user is granted virtual chips which can be utilized for obtaining certain virtual in-game items, cross levels in the game or playing additional number of games using those virtual chips. The virtual chips used to play the game and the chips won while playing such game can never be redeemed for money and neither be used for seeking refund or be used to obtain goods with tangible value and money's worth. Except for the specific mobile application through which the game is offered, the virtual chips issued by the Petitioner cannot be used to play games on any other application / platform whatsoever. Therefore, even by virtue of winning the game, a user is not granted any reward or prize whatsoever and is merely conferred an opportunity to play additional games or acquire certain virtual in-game items/additional powers which do not have any monetary or tangible value. The virtual chips can only be used by the players in the game and cannot be transferred between players. The use of these virtual chips is strictly limited to in-game usage.

26. In fact, the aforesaid aspects are also made abundantly clear by the Petitioner to all the users/players through its Terms of Service as applicable for UTP and Call it Right. Specifically, the Terms of Service of UTP (enclosed as Exhibit 4) amongst other aspects clearly provide the following:

- *“The Service may include an option to buy virtual goods upon payment of real money. These virtual goods shall not be redeemable for anything of value under any circumstances whatsoever. All purchases are final and are not*

refundable, transferable or exchangeable, except when specifically permitted by Games24x7 at its sole discretion. Transactions in virtual goods outside of the Service are prohibited and would amount to a violation of the Terms.”

- *“You understand that the virtual goods in your user Account do not carry any monetary value and cannot be sold or refunded for any reason whatsoever.”*
- *“There shall be no cash refund for any reason whatsoever in the event of the termination of your Account.”*

While the Call it Right game is no longer offered by the Petitioner, the applicable Terms of Service for Call it Right when the same are also offered contained similar terms and conditions. The Terms of Service for Call it Right are enclosed as Exhibit 5. Therefore, the users / players playing UTP and Call it Right are aware of these aspects including the fact that there is no possibility of winning or redeeming anything of monetary or tangible value (even in case such user wins the game or series of games). The other Social Games that are offered by the Petitioner are also offered in a similar manner and all the aspects articulated herein and below in the context of UTP and Call it Right are applicable and relevant for other Social Games as well.”

(Emphasis added)

21. In light of the rival pleadings, is the DPIIT’s stand tenable? Are any of the gaming offerings of the Petitioner ‘gambling’?

22. Before proceeding, we note the far more neutral stand taken by Mr Shenoy for RBI. He correctly points out that the RBI is not concerned with an assessment of the nature of the business or the activity. It only needs for its records some authority, body or court to state unequivocally that the activity is not illegal. This is necessary because there is no way in which the RBI can permit a compounding of an illegal activity. That is in fact the totality of RBI's concern. If the activity is permissible, then an application for compounding will be processed in accordance with law. If the activity is illegal, prohibited or otherwise illicit, it cannot gain legitimacy because of compounding. There may well be other consequences as well on account of the inflow and whether or not this was reported but the RBI is not presently concerned with those matters either. The difficulty with the Petition as it was originally framed, Mr Shenoy submits, and we think correctly, is that it proceeded on the basis that RBI should *assume* the legitimacy of the activity and allow the compounding application. The RBI could not do so. Equally, it could not itself assess the legitimacy or otherwise of the business. Hence, Mr Shenoy submits, the RBI was justified in directing the Petitioner to obtain the necessary clarifications. Equally clearly, the RBI could hardly suggest the Petitioner that they should approach a Writ Court. The RBI therefore directed the Petitioner to get the clarification from the only authority empowered under the statute to make such an assessment, viz., the DPIIT.

23. On DPIIT's Affidavit and letter to the Enforcement Directorate, since these are now under challenge, the RBI has nothing whatever to say. It does not contest DPIIT's position. But it equally does not support the Petitioner. Mr Shenoy's instructions

are only to say that the final outcome must be the decision of the Court. The RBI will then act accordingly.

24. What is it that the DPIIT Affidavit and its letter require us to gauge? To our mind, two questions arise. One is factual. The other is entirely jurisprudential.

25. The factual aspect in turn has two facets. The first is about the period or the time in question. The second is about the actual nature of the activity. As we have seen the relevant period is 2006 to 2012. What the DPIIT seems to have done is to have visited the Petitioner's website at rummymcircle.com and found that there was an offering called *Ultimate Teen Patti* and another called *Call it Right*. The Affidavit clearly says that these were noted on the Petitioner's website. The DPIIT asked for no explanation from the Petitioner. It sought no clarification. It sought no explanation as to the nature of these games or offerings. There is nothing to indicate that the DPIIT, in response to the Petitioner's applications, called on the Petitioner to explain when these online games were first offered, how they were conducted, what they involved or any other material particulars. The Affidavit and the letter to the ED from the DPIIT clearly show that the DPIIT proceeded *only on the basis of the name*, i.e., the label attached to the name; in another manner of speaking, *because 'Teen Patti', therefore gambling*.

26. It is in this context that the answer in the Rejoinder, extracted above is important. First, as to the period. *Ultimate Teen Patti* was not in fact introduced until February 2015. *Call It Right* was

launched in July 2013. Both are beyond the reporting period for which compounding is to be sought. It is difficult to see, therefore, how a subsequent activity of 2013 and 2015 could have rendered illegal or illicit previous activities for the period 2006 to 2012.

27. But that is not the end of the matter. The Rejoinder explains at some length that whatever be the name, neither of these offerings at all partakes of the nature of ‘gambling’ as understood in Indian jurisprudence and is explained more than once by decisions of the Supreme Court. Specifically: there are no rewards. There are no prizes. The submission by Mr Dwarkadas is that if there is a game purely of chance and there is no element of reward, gain or a prize to be won, then it is not gambling. It is not illegal, he points out, for two people to simply toss a coin unless one stands to gain some reward by that chance activity.

28. He invites attention to two decisions of the Supreme Court, and we believe he is right that we need not in fact look much further. The first is of course the celebrated decision of the Supreme Court in *RMD Chamarbaugwala v Union of India*.¹ The second is a decision by a three-Judge Bench of the Supreme Court in *Dr KR Laxmanan v State of Tamil Nadu & Anr*.²

29. *Laxmanan*’s case has extensive reference to *RMD Chamarbaugwala* (as also to the companion decision in *State of Bombay v RMD Chamarbaugwala*),³

1 AIR 1957 SC 628.

2 1996 (2) SCC 226.

3 AIR 1957 SC 699.

30. In *Laxmanan*'s case what was in question was a State Act abolishing wagering and betting, another act that sought an acquisition and transfer of the Madras Race Club and, in this, and specifically in context of horse racing, the concept of gambling. This is apparent from paragraph 2 of the judgment at the forefront. The Supreme Court framed three questions. We reproduce these:

“2. From the pleadings of the parties and the arguments addressed before us by the learned counsel the following questions arise for our consideration:

1. **What is ‘gambling’?**
2. **What is the meaning of expression “mere skill” in terms of Section 49-A of the Madras City Police Act, 1888 (The Police Act) and Section 11 of the Madras Gaming Act, 1930 (the Gaming Act)?**
3. **Whether the running of horse-races by the club is a game of “chance” or a game of “mere skill”?**
4. **Whether ‘wagering’ or ‘betting’ on horse-races is ‘gaming’ as defined by the Police Act and the Gaming Act?**
5. **Whether the horse-racing — even if it is a game of ‘mere skill’ — is still prohibited under Section 49-A of the Police Act and Section 4 of the Gaming Act?**
6. Whether the Madras Race Club (Acquisition and Transfer of Undertaking) Act 1986 (the 1986 Act) gives effect to the policy under Article 39(b) and (c) of the Constitution of India (the Constitution) and as such is protected under Article 31-C of the Constitution. If not, whether the 1986 Act is liable to

be struck down as violative of Articles 14 and 19(1)
(g) of the Constitution.”

(Emphasis added)

31. Then in paragraph 3, the Supreme Court looked at, first, a common definition of ‘gambling’ from the New Encyclopaedia Britannica and then considered the definition in Black’s Law Dictionary. Paragraph 3 of the decision reads thus:

“3. *The New Encyclopaedia Britannica* defines gambling as “The betting or staking of something of value, with consciousness of risk and hope of gain on the outcome of a game, a contest, or an uncertain event the result of which may be determined by chance or accident or have an unexpected result by reason of the better’s miscalculations”. According to *Black’s Law Dictionary* (Sixth Edition) “**gambling involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of consideration, an element of chance and a reward**”..... **Gambling in a nut-shell is payment of a price for a chance to win a prize.** Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all **modes of chance**. In these games the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution or the dealer has dealt with the cards. A game of skill, on the other hand — although the element of chance necessarily cannot be entirely eliminated — is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. Golf, chess and even Rummy are considered to

be games of skill. The courts have reasoned that there are few games, if any, which consist purely of chance or skill, and as such a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. **It is the dominant element — “skill” or “chance” — which determines the character of the game.**”

(Emphasis added)

32. The discussion then took into account the observations in *State of Bombay v RMD Chamarbaugwala*. It also considered in paragraph 9, the rival contentions in *RMD Chamarbaugwala v Union of India*. One of the considerations was what should be the approach where the game was not purely of skill or purely of chance but involved a substantial degree of skill. Ultimately, the conclusion in paragraph 20 taking into account the two *Chamarbaugwala* cases as also the previous decision of the Supreme Court in *State of Andhra Pradesh v K Satyanarayana*,⁴ was set out in paragraph 20 thus:

“20. The judgments of this Court in the two *Chamarbaugwala* cases and in the *Satyanarayana* case clearly lay-down that (i) the competitions where success depends on substantial degree of skill are not ‘gambling’ and (ii) despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of “mere skill”. We, therefore, hold that the expression “mere skill” would mean substantial degree or preponderance of skill.”

(Emphasis added)

4 AIR 1968 SC 825.

33. We believe that although it was applied to horse racing, because of the distinction between mere skill and pure chance, the observations of the Supreme Court in paragraph 21 in *Laxmanan's* case are most relevant. They read thus:

“21. The crucial question to be determined is whether a horse-race run on the turf of the club is a game of ‘chance’ or a game of “mere skill”. The relevant pleadings before the High Court in the writ petition were as under:

“Racing is really a test of equine speed and stamina. The horses are trained to run and their form is constantly watched by experts....

As stated earlier, racing is not a game of chance. Experts on racing throughout the world would bear testimony to the fact, and indeed it has been so recognised, by decisions, that the result of a horse race on which bets are placed is not based on pure chance. A considerable degree of skill does into the operation. It starts from the breeding and training of the race horse on which much talent, time and money are expended by trained persons, jockeys have also to be specially trained and equipped. The horses themselves are not necessarily consistent in fitness, which is the reason why horses are exercised openly and watched carefully by representatives of the Press and their observations widely published. Thus, the inherent capacity of the animal, the capability of the jockey, the form and fitness of the horse, the weights carried and the distance of the race at the time of the race are all objective facts capable of assessment by race goers.

Thus the prediction of the result of the race is not like drawing 3 aces in a game of poker. Rather, it is the result of much knowledge, study and observation.....

Horse-racing has been universally recognised as a sport. Horsemanship involves considerable skill, technique and knowledge and jockeys have to be specially trained over a period of years. Whether a particular horse wins at the race or not, is not dependent on mere chance or accident but is determined by numerous factors, such as the pedigree of the animal, the training given to it as well as the rider, its current form, the nature of the race, etc. Horse racing has been held judicially to be a game of skill unlike pure games of chance like Roulette or a Lottery.”

The above quoted averments have not been specifically denied in the counter-affidavit filed before the High Court.”

34. Thus, the predominant element of the activity — skill or chance — determines the character of the game. But to constitute ‘gambling’, both conditions must be met: (i) it must be predominantly a game of chance, *and* (ii) it must be played for reward.

35. DPIIT does not show on Affidavit or otherwise that there is any element of reward in either the so-called *Ultimate Teen Patti* or the *Call it Right* game. It does not show that it asked for such a clarification at all. The ‘Terms of Service’ on the Petitioner’s website, quoted above, that there was no reward at all. We have

therefore a situation where there is a categorical statement made by the Petitioner on its own that none of its activities involved 'gambling', as understood in Indian jurisprudence, that is a game of chance with no element of skill, for any gain or reward.

36. If we view it like this, and given the material, we do not see any other way to it, the mere positioning of these two games (that too after 2012) on the Petitioner's website cannot render illicit or illegal any activity on the Petitioner's website or mobile platforms, let alone for the earlier reporting period in question.

37. This is the factual and legal position as it emerges from the record before us. We must clarify that whether it is for a past period or for an ongoing or future period, it is undoubtedly necessary that the Petitioner must remain clear of any illicit or prohibited gambling activity, whatever the platform. If this is illegal in India, it does not become legitimate merely because it is online or because foreign investors have put money into it. We have the statement made across the Bar and which we will of course have to accept as an undertaking to the Court that at no point will the Petitioner's activities involve gambling, so long as it is prohibited by our law. The mere fact that there is a game of chance on the website does not in itself make the activity gambling unless there is an accompanying reward or promise of a reward.

38. It is also clear that for any further foreign investments or FDI equity allotments that the Petitioner makes, it will necessarily have to comply with all applicable statutes. It may indeed have to be

subjected to scrutiny yet again. We do not exempt the Petitioner from any of these requirements.

39. The result of this brief discussion, and we do not believe a longer discussion is really warranted in the facts and circumstances of the case, is that Rule must be made absolute in terms of prayer clause (a-1), which reads thus:

“(a-1) For a Writ of mandamus or any other writ or order or direction in nature thereof, directing the Respondent to fulfil its statutory duty to consider and decide the compounding application of the Petitioner by compounding the Procedural FEMA Contraventions which specifically pertain to (i) the reporting contraventions of Paragraphs 9(1)(A) of Schedule 1 of FEMA 20 (*for delay in reporting foreign remittances received*); (ii) the reporting contraventions of Paragraph 9(1)(B) of Schedule 1 of FEMA 20 (*for delay in filing of the Form FC-GPR*); and (ii) contravention of Paragraphs 8 of Schedule 1 of FEMA 20 (*for delay in allotment of shares to non-residents*).”

40. We also make direct the RBI in view of our judgment today to consider the application by the Petitioner for compounding the non-compliances for the period 2006 to 2012 noted above.

41. At this stage, Mr Shenoy states that a fresh application will be required. The Petitioner will submit that within two weeks. We proceed on the basis that this application will not be confronted with a problem of delay in filing. If there is any such delay, we hereby condone it.

42. The Fresh application will be decided by the RBI as expeditiously as possible and preferably in four weeks from the date of application. The only reason for specifying a period is that the compounding pertains to 2006 to 2012 and the Petition itself has been pending before us for much too long.

43. The Petition is disposed of in these terms.

44. No costs.

(S. G. Dige, J)

(G. S. Patel, J)