

Regulating a Fantasy for a Billion: Playing on a Smartphone in India

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Abstract

The fantasy gaming industry in India has moved forward at an unprecedented pace with limited oversight primarily based on 'self-regulation'. The absence of a clear regulatory mechanism for this industry has been highlighted in previous work, but no clear determination has been provided on how to deal with this issue. The current contribution seeks to provide a path ahead by suggesting that the government regulate the industry directly instead of an industry-operated self-regulatory framework which has had limited effectiveness till now. This suggestion has been made considering the significant size of the industry and the target demographic of the fantasy gaming sector, which consists of young individuals who may need considerable handholding in terms of financial prudence and gaming addiction. Data regarding the industry, demographics of the financial gaming sector and the current state of regulation has been obtained from secondary sources. This has been supplemented with judicial decisions, and government reports to identify critical problems and suggest potential solutions. The contribution makes a comparative analysis of Union (federal), state and self-regulation for the fantasy gaming industry in India to prescribe a regulatory path ahead. Considering the potential for growth of the fantasy gaming industry in India and the size of the market, regulatory developments in the country may be of interest globally to investors, fantasy gaming operators, researchers, and other governments willing to learn from the Indian efforts at regulation.

Keywords: Fantasy gaming; India; games of skill; self-regulation; sports leagues; regulatory framework

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Fantasy what?

'Fantasy games' refer to an online game where people form 'fantasy teams' consisting of players who are playing in a real-life match based on the perceived abilities of the players derived from past performance information, and then the teams formed by different persons are pitted against each other (Das, 2018). The player's performance in the real-life match is graded with points, and the fantasy team with greater cumulative points than other competing fantasy teams is considered the winner. Fantasy games or fantasy sports, as some refer to them, thereby provide the fantasy gamers (participants of the fantasy games), the opportunity to compete against each other based on their knowledge and skill in the selection of the player, subject to compliance of the rules of the particular fantasy gaming platform (Gupta & Mathur, 2020).

The term 'fantasy games' would have made most Indians scratch their heads a few years ago, and rightly so since the idea is comparatively recent in the country. The idea of forming fantasy teams originated in the United States of America ('US' or 'USA') in the 1960s. It exploded in the country since the mid-1990s due to internet availability. The US fantasy gaming market has been primarily regulated by the states, with 27 out of the 50 states having some type of legislation covering the subject. It is unregulated but allowed in 19 other states while being prohibited only in 5 states (Wood, 2022). The Fantasy Sports and Gaming Association (FSGA), the sole national body of fantasy sports operators in the USA, has disclosed that 20% of Americans aged 18 and above participate in fantasy sports, with the number of players in the country touching 50.4 million. Fantasy Football is the most popular game, with 54% of players participating, while fantasy basketball follows with 25% (FSGA, 2022).

In India, on the other hand, fantasy games were introduced in 2001 in a free-to-play format but exploded in popularity after the advent of the professional sports leagues last decade (KPMG, 2019). The availability of cheap high-speed internet on phones since 2016 has also propelled the growth of fantasy games in India (KPMG, 2020). Based on a demographic structure where over 50% of a population of over a billion people are below 30 years (Office of the Registrar General & Census Commissioner, India, 2020), and more than 700 million people use the internet, with a majority through smartphones (Telecom Regulatory Authority of India, 2020), fantasy gaming companies in India have access to a vast and ready market. The widespread availability of cheap smartphones, the preferred mode for accessing fantasy gaming platforms, and the growth of online payments have further aided this growth story (KPMG, 2019). It should therefore come as no surprise that an Indian fantasy gaming operator has claimed to be the largest fantasy gaming platform in the world, with over 130 million users (Dream 11, 2022).

The growth of fantasy games and the publicized negative consequences resulting from the popularity of these platforms has captured public attention like no other. It has created questions about legal compatibility and its potential impact on society in India. With the growth of fantasy games in India, cries of concern have arisen from different states in the country, with stories of people getting trapped into an addiction to fantasy games and, in some cases, people losing their lives due to crushing debt brought about by fantasy games. Fantasy gaming platforms have suffered lawsuits and criminal proceedings from participants who compare it to gambling (Kurian, 2021).

The fantasy gaming sector operates in a regulatory vacuum in most states with no clear central (federal/union) regulatory framework, a patchwork of state legislation, and judgments of higher courts.¹ This contribution highlights the need to immediately create a framework for regulating the Indian fantasy gaming industry to protect the stakeholders' interests, including players and the fantasy gaming operators. The article provides a rec-

¹India has two a two tiered higher judiciary laid down in its Constitution. Appeals from lower courts and tribunals reach the first tier of the higher judiciary, which are called the High Courts. There are 25 High Courts in India, each with their own separate territorial jurisdiction which may consist of one or more states. Appeals against decisions of each of these High Courts may be made to the highest court in the country, the Supreme Court of India. The Supreme Court of India is also a Constitutional Court.

ommendation for innovative regulatory efforts in India to be led by the Union government, supported by the states and fantasy gaming platforms based on the need to protect the interests of the Indian fantasy gamer, who, as per the findings herein, may be different from his peer in a developed country. Considering the size of the Indian market and its potential, regulatory developments in the fantasy gaming sector in the country may be relevant for fantasy gaming operators and investors across the world who may be planning to enter the market.

The rise and rise of fantasy gaming in India

India has the world's largest fantasy gaming user base, which currently stands at 160 million players (Majumdar, 2022). It is still, however, a smaller market in terms of revenue (USD 4.34 billion) as compared to the USA, which leads the world at USD 8.9 Billion (2021 data) (IBISWorld 2022; Federation of Indian Fantasy Sports & Deloitte, 2022). The growth of fantasy sports and sports leagues in India go hand in hand. The duration of the Indian Premier League ('IPL'), the premier cricket T20 tournament in the country,² is considered the period which sees the most participation of Indian users in the fantasy leagues. Cricket is the single most significant contributor, with an 85% share in Contest Entry Amount (CEA), and 77% of users indicate it as their preferred game (KPMG, 2020). Therefore, it is no surprise that a fantasy gaming company was the largest advertiser in the IPL held in 2021 (Tewari, 2021). Companies also seem to benefit from the IPL as they have disclosed a tremendous increase in users during the period (Farooqui, 2021) and generated close to INR 20 Billion (1 USD = approximately Indian Rupee (INR) 80) during IPL 2020 (Tewari, 2021). The popularity of cricket in India is unique compared to the rest of the world, where American Football takes prominence in the USA and Soccer in Europe.

A July 2020 report by an industry body of the Indian fantasy gaming operators- The Federation of Indian Fantasy Sports ('FIFS'), has documented the success story of fantasy gaming in India. The report reveals that the industry has grown nearly 50 times since 2016, from 2 million users that year to 90 million users in 2019 (Gupta & Mathur, 2020). The industry is expected to grow at a compound annual growth rate (CAGR) of 38% (Farooqui, 2022). The number of fantasy gaming platforms has also increased from around 10 in 2016 to more than 140 in 2019, and the market is dominated by a few major platforms led by Dream11 (KPMG, 2020). The amount of money paid for playing fantasy games, referred to as CEA, reached over INR 160 billion in Financial Year 2020, showing a nearly tenfold growth since 2018.

With such growth rates and a large market, the fantasy gaming sector has received the highest share of foreign investment among gaming startups, with close to 58.9% of the total funding received by the electronic gaming industry worth around USD 180 million in value between 2014 and the first half of 2020 (Salman, 2021). A large amount of funding indicates tremendous investor interest who believe the market will expand further in the upcoming years to reach a value of USD 3.7 billion by 2024 (IBEF, 2021).

As revealed in the upcoming section of this article, considering the broad reach of the fantasy gaming industry, the status of the average fantasy gamer, and the amount of money involved, it becomes essential to understand who are the key fantasy gaming operators, the identity of the players and how the industry can be supervised or regulated. This is particularly important since prior research has indicated that sports fans who participate in fantasy sports are more likely to get involved in gambling rather than limit themselves to fantasy gaming (Kupfer & Anderson, 2021). The lines have further blurred between fantasy gaming and betting, with several offshore betting platforms operating games similar to those used by fantasy gaming platforms (Dubey, 2020).

²Cricket is a game played by two opposing teams of 11 people across three popular formats- T20 (average duration of 3 hours), One day (played over 8 hours), or Test cricket (played over 5 days, approximately 8 hours each day). The T20 format is used in the Indian Premier League (IPL) which is a cricket league consisting of 10 franchisee teams owned by private owners, and each team represents a different city.

Gambling and betting are illegal and prohibited in most states in India, and the Union government has made substantial efforts to ensure that public and unregulated online gambling and betting do not become popular in the country.³ The Government at the Union level has identified that unregulated online betting can lead to significant financial and socio-economic risk for citizens, particularly those of a younger age group (Ministry of Information & Broadcasting, 2022). The state governments also support this idea which is reflected by the fact that only two out of 28 states and one among eight union territories in the country currently permit gambling after obtaining licenses and that permission is conditional and limited to only tourists visiting these states (local residents not allowed). An Indian High Court has expressed concern and requested immediate regulation by the Government on online gambling while also flagging the issue of online gaming, even though it has deemed gaming legal (*Amit M Nair v. State of Gujarat*, 2022). Another Indian High Court has expressed concern over unemployed youth being lured by the potential to earn money by playing games and has compared online gaming sites to virtual gambling houses (*D. Siluvai Venance v. State*, 2020). The Delhi High Court diverted a petition requesting regulation of fantasy games to the Government, asking it to look into the concerns raised (*Tarun Chandiok v. Union of India & Anr.*, 2021). Since courts, the state and Union governments, and authors have expressed concern over the unregulated operation of fantasy games, efforts for their regulation may be considered the prudent need of the hour.

Who are the players spending the billions, and can they afford to pay it?

For a country like India, whose per capita net national income at current prices stands at around USD 2000 (Ministry of Finance, Department of Economic Affairs, 2022), the question which then emerges is who is spending the billions on fantasy games and are the people with the lowest income spending the money on these games rather than on essentials. For perspective, the average American fantasy sports player makes 20 times more at USD 40,000 per year (FSGA, 2022). A linked question here is whether the players understand the risks behind spending on fantasy games, if they can afford to spend money on fantasy games, and whether they have made it a full-time profession.

A review of the publications on the topic reveals that a small number of independent researchers and the industry have sought to answer this question behind the demographics of the fantasy gaming player.

A study by Sondhi (2019) mentions that it is the 'first of its kind in the Indian sub-continent', covering only adults between 18 and 35. A group was chosen based on their exploratory study, which revealed that fantasy gamers were primarily in this age group (Sondhi, 2019). Most respondents (~70%) were male, a pattern the author considered similar to USA and Canada. The study revealed that the fantasy gamer could be divided into three main groups: Game centric (those who play the fantasy game in the real sport that they love), Control centric (those who play fantasy games since making teams gives them a sense of control), and entertainment seeking (those who build teams to have good entertainment and fun).

Additionally, the study by Sondhi (2019) revealed some crucial insights based on categorizing the fantasy gamer into three groups. It emerges that the entertainment seeker is generally older (26–35 years), while control seekers and game-centric players are primarily students (18–25 years). The study also makes a key finding regarding the income levels of the players. It suggests that nearly 90% of the fantasy gamers had an annual income below INR 500,000 (USD 6300), and only 5% of the fantasy gamers had yearly incomes above INR 1,000,000 (USD 12600). The study also reveals that the Indian fantasy gamer generally plays for less than two hours per week. The paper, while novel and vital, may,

³India has a quasi federal structure of government. The country is called a 'Union of states' with legislative powers being separated between the Union Government (similar to a Federal Government, also sometimes referred to in India as the Central Government), and the State Governments. The legislative powers of the union and state governments are separated through the Constitution of India, 1950, which specifies the areas of competence of each government level through its Seventh Schedule.

however, present an incomplete picture regarding the education level of the Indian fantasy gamer since most respondents were graduates (86%), a very high number considering that the percentage of graduates in the country is 8.2% as per the last census (PIB, 2015).

A later study undertaken by Bhattacharya et al. (2020) includes a broader group of participants aged between 18–50 years, and the authors found that fantasy sports are most popular in the age group between 18 and 25 years, while a minuscule number (2%) in the highest age group of 26–50 years were involved in fantasy games (Bhattacharya, Nimkar & Karkera, 2020). The study further revealed that while love for the sport and game interest were the biggest reasons for participation in fantasy games (20.7 and 15%, respectively), money and prize (11.8%) was also a significant driver for fantasy gamers. An important contribution of this study was providing greater clarity on time spent by the gamers on fantasy games, and crucially it found that 72.6% of the gamers spend more than 2 hours a day on these platforms, thereby indicating a strong affinity towards the platform (Bhattacharya, Nimkar & Karkera, 2020).

The industry has also undertaken research in the domain of fantasy gaming demographics. A report by the Indian Federation of Sports Gaming and Nielsen from 2018 reveals that most fantasy gamers (72%) are between 25–35 years (IFSG, 2018). A later publication supports this finding (Sethi, 2020), and it is similar to the age of the average fantasy sports user in the USA (Farquhar & Meeds, 2007). The location of the Indian fantasy gamer extends across the country, and it has been revealed that tier 2 and tier 3 centres led the growth, with player numbers increasing by 150–200% before the pandemic (Sethi, 2020). Currently, 50% of the transactions on fantasy gaming platforms are initiated from these Tier 2 and 3 cities (Federation of Indian Fantasy Sports & Deloitte, 2022).⁴

A critical problem that emerges is that people with the lowest income levels spend a higher sum on fantasy gaming than people with higher income levels. This interesting factoid was revealed in a 2019 survey which disclosed that 21% of people with an income below INR 300,000 per annum spend more than INR 1001 on fantasy gaming platforms, while for people who earn above INR 1 million, only 6% of the population spent an amount above INR 1001 (Statista, 2022).

A 2019 report by a prominent consultancy firm available on the website of FIFS reveals some stark figures showing that fantasy gaming platforms are more prevalent among lower-income groups who may be considering it as a source of income and may also be spending more time and money on these platforms. It was revealed that 40% of players with income less than INR 300,000 per annum (the lowest income group in the survey) visit fantasy gaming platforms more than five times a week. The corresponding figure is only 12% for people with income above INR 1 million per annum, which is the highest income group considered in the survey (KPMG, 2019). The critical red flag here is that it is the lowest income group with the largest share of respondents (39%) who view fantasy gaming platforms as an opportunity to earn money rather than utilize their sports knowledge. The converse is true for people who fall in the highest income bracket. The highest percentage of this category among survey respondents consider fantasy sports as an opportunity to utilize their sports knowledge rather than earn money (KPMG, 2019).

Further scrutiny of the report brings out more figures which may indicate that the lower-income categories or people in the hinterland and small towns may be prone to overuse fantasy gaming platforms. This is reflected by the statistics which show that while only 12% of the users in significant cities engaged with fantasy gaming platforms more than five times a week, the figure was significantly higher in other cities where 58% of users engaged with fantasy gaming platforms for more than five times in a week. Additionally, users who were unemployed and students were significantly more likely to consider games as earning opportunities and use them for making money (KPMG, 2019). This would go against the true spirit of the fantasy games as skill games for fan engagement and

⁴The classification of centers of population into different Tiers is made by the Reserve Bank of India (India's Central Bank) through its Master Circular on Branch Authorization Data available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10714&Mode=0>, Retrieved February 10, 2023.

amusement and would indicate that the games are being considered as a means of sustenance, a development which has not been found acceptable by the NITI Aayog, the national policy-making organization of India (NITI Aayog, 2021).

A common finding from this data is that the average Indian fantasy gamer may be a young individual (up to 35 years of age) living in Tier 2 or 3 cities with a limited income and ability to spend on games. He/She is, however, spending a significant amount of time on these games, which can be over 2 hours a day. These issues raise several red flags on whether this average Indian fantasy gamer is diminishing his quality of life and expending excess resources on fantasy games, which still operate as an unregulated industry. Considering that the demographic of the Indian fantasy gamer is different from other developed nations such as the USA, a unique ground-up approach is required. Replicating regulation and regulatory structures from high-income developed countries may not be of much assistance.

Another cause for concern that may be behind unfortunate incidents involving fantasy gamers is the rise in popularity of 'Daily Fantasy Sports' or DFS in India. In DFS, players vie for prize pools or prizes based on performance in a single match by their fantasy team, which means that they take part in multiple prize competitions (potentially one or more every day), thereby maximizing potential losses across the period of the tournament or league where their team is a part of. This is different from old fantasy gaming leagues, where the performance of players and fantasy teams was judged over an entire tournament or league season. Considering the more significant factor of luck in daily results, DFS is considered closer to games of chance (Das, 2018). It also has other features, such as high event frequencies, many games and consistent gaming opportunities, making it a more prominent concern (Griffiths, 2017).

DFS, operated by unregulated fly-by-night operators without a well-defined format and loosely framed rules, takes fantasy sports closer to gambling and may need to be regulated as such (Lindholm, 2021). The situation which strengthens this argument is that the state of New York and the Internal Revenue Service (IRS) in the USA already consider DFS as gambling (Weston, 2021). It must be noted here that all forms of DFS may not be similar to gambling, particularly if fantasy gamers are not allowed to select all players from the same team, rules are provided and stable, fantasy teams are locked before the start of the real-life sports event, and players are allowed to form only one team for any particular real-life sports event.

Users have noted themselves and quoted their friends to indicate that they do not understand the nuances behind the fantasy games, particularly DFS, while continually moving towards a 'kind of addiction' to these games (Sharma, 2021). While a few industry-linked studies have tried to distance online games from addiction and its negative impacts (Kathuria & Vaidya, 2021), the Indian Government has also recognized the problem of addiction due to online games and has stated that "playing online games leads to a serious gaming addiction" (Ministry of Education, 2021). With the fall in incomes, rising unemployment, and a large number of fantasy gaming companies choosing to broadcast rags-to-riches stories on ads, there is a threat that a large number of users will look towards fantasy games as a source of income or become addicted to them if steps are not taken to provide clear rules on their functioning.

The regulation of fantasy games, particularly DFS, is inadequate in India since there is no common framework for registering or licensing fantasy games. At present, any person with access to a payment gateway and Goods and Services Tax (GST) registration can open up a new fantasy gaming platform. Considering the scale of funds involved in the industry, the countrywide reach and the broad public participation, the threshold for operation is lower than probably even operating a restaurant that requires a Food Safety and Standards Authority of India (FSSAI) registration and a clutch of local permits.

The discussion on the abovementioned issues points to a common need for regulation. Considering the vulnerable demographic of the fantasy gamer in India, regulation becomes vital to protecting them from exploitation. Regulating the industry has emerged as

a challenge for India, with varied concerns among the different stakeholders. The critical challenge for India and potentially many other countries is ensuring effective regulation, which is supported by the industry and sidelines unregulated players while ensuring that regulatory barriers are not exceedingly high. High barriers may promote a parallel underground sector, as seen in sports betting across many jurisdictions (Holden, 2019). If countries want, they may regulate DFS separately from fantasy sports which require participation in multiple events. No one size may fit all, but the key here would be to distinguish fantasy sports as a game of skill, from sports betting, by laying down clear terms for the fantasy sports industry to function. If separately regulated as a game of skill, fantasy gaming may have greater acceptability because gambling and betting invite social opposition in many countries.

The following sections discuss the efforts at regulating the fantasy gaming industry in India across different levels, the hurdles encountered in this process, the need to include all stakeholders' perspectives in the regulatory process, and suggestions for resolving the hurdles.

Regulation for the fantasy gaming industry: The soldier missing in action

As the first step in this process, considering that laws governing fantasy gaming in India are scattered, it is first essential to understand if they are legal, unregulated or illegal. After understanding this determination, it would be possible to understand the need for regulation and how it may be structured.

The legal status of fantasy games in India

A key hurdle for regulation that the government had expressed for a long time was the perceived lack of clarity on the status of fantasy games as games of skill or as games of luck (Ghosh, 2022; Deccan Herald, 2021). If they had been classified as games of chance, they would be illegal under the already existing legislation in India - Public Gambling Act, 1867.

Fortunately, the judgments of the Indian High Courts and the Indian Supreme Court support the understanding of scholars that fantasy games involve a predominantly greater element of skill than luck (Naha, 2019; Kamath, Adhikari & Gokhale, 2016; Misra, Saha & Ranganathan, 2020; Gokhale & Sharma, 2018; Getty, Li, Yano, Gao, & Hosoi, 2018). While applying the test of skill v. luck, the courts decided that fantasy games could not be classified as gambling due to the requirement of substantial skill and knowledge (Kapadi, 2021).

The courts have also found that Fantasy games may enjoy a safe harbour for skill games as provided under the Indian Constitution (Article 19(1)(g)) for legitimate trade and profession (See the table below), along with similar protection for games of skill under the Public Gambling Act, 1867 and a majority of the state-wise gaming laws. The test for making such a determination was laid down by the Supreme Court of India in a two-part test in the *State of Andhra Pradesh v. K. Satyanarayana*.⁵ Under this test, it has to be determined whether the game has a preponderance of skill and if the game organizer makes any profit or gain from the activity (Kamath, Adhikari & Gokhale, 2016).

The Indian High Courts of Punjab & Haryana, Bombay and Rajasthan have evaluated the fantasy gaming platform (Dream 11). They have found it to be a game of skill, as discussed in the table below. The High Court of Rajasthan has also scrutinized the Charter of a self-regulatory body of the fantasy gaming industry - FIFS, and found that games complying with the Charter of FIFS may be considered games of skill.

⁵State of Andhra Pradesh v. K. Satyanarayana, Supreme Court of India, 1968 AIR 825

Table 1

List of judicial decisions on fantasy gaming in India

Title of the Case and Citation (if any)	Court and date of the decision	Finding of the court	Fantasy gaming platform under review
Shri Varun Gumber v. UT of Chandigarh & Ors., 2017 Cri LJ 3827	High Court of Punjab and Haryana, April 18, 2017	Playing a fantasy game by a participant user involves a virtual team and requires considerable skill, judgment and discretion. The participants also have to assess the relative worth and study rules on the strength and weaknesses of the players while playing. Element of skill is predominant, and the fantasy game does not fall within the ambit of gambling. The game enjoys protection under Art. 19(1)(g) of the Constitution of India.	Dream 11
Varun Gumber v. UT Chandigarh & Ors, Diary No(s). 27511/2017	Supreme Court of India, September 15, 2017	No decision on findings. Petition dismissed against the decision of High Court of Punjab and Haryana in Shri Varun Gumber v. UT of Chandigarh & Ors., 2017 Cri LJ 3827	Dream 11
Gurdeep Singh Sachar v. Union of India and Ors., CPIL Stamp No. 22 of 2019	Bombay High Court, April 30, 2019	Dream 11 is a game of skill since the success of the player in Dream 11's fantasy sports depends upon the user's exercise of skill based on superior knowledge, judgment and attention, and the result thereof is not dependent on the winning or losing of a particular team in the real-world game on any specific day.	Dream 11
Gurdeep Singh Sachar v. Union of India and Ors. SLP Diary No. 43346/2019	Supreme Court of India, December 13, 2019	No decision on findings. Petition dismissed against the decision of Bombay High Court in Gurdeep Singh Sachar v. Union of India and Ors., CPIL Stamp No. 22 of 2019. Appeal allowed only on the issue of applicability of GST.	Dream 11

Continued on next page

Chandresh Sankhla v. State of Rajasthan, 2020 SCC OnLine Raj 264	High Court of Rajasthan, February 14, 2020	Dismissed the case with the finding that “ <i>the issue of treating the game ‘Dream 11’ as having any element of betting/gambling is no more res integra in view of the pronouncements by the Punjab and Haryana High Court and Bombay High Court and further the SLPs have also been dismissed against the orders of these High Courts.</i> ”	Dream 11
Tarun Chandiok v. Union of India & Anr. W.P.(C) 7654/2020	Delhi High Court, October 8, 2020	Government to look into whether fantasy gaming acts were working in compliance with existing laws.	All fantasy gaming platforms
Ravindra Singh Chaudhary v. UOI and Ors 2020 (10) TR 3426	High Court of Rajasthan, October 16, 2020	Determined that the format of the online fantasy game offered by Dream 11 is a game of mere skill and the business has protection under Article 19(1)(g) of the Constitution of India.	Dream 11
Saahil Nalwaya v. State of Rajasthan, D.B. Civil Writ Petition No. 2026/2021	High Court of Rajasthan, July 27, 2021	Online fantasy sports offered under the Charter of FIFS are recognized as business and enjoy protection under Article 19(1)(g) of the Constitution of India.	All online fantasy sports offered under the Charter of FIFS
Avinash Mehrotra v. State of Rajasthan, Diary No. 18478/2020	Supreme Court of India, July 30, 2021	No decision on findings. Petition dismissed against the decision of High Court of Rajasthan in Chandresh Sankhla v. State of Rajasthan, 2020 SCC OnLine Raj 264	Dream 11

These decisions of the Indian Supreme Court and High Courts (listed in Table 1) have cleared the air on Fantasy Games (in most cases, Dream 11) as games of skill. This is expected to provide much-needed clarity on the status of these games as not being covered under the ambit of gambling and encourage the government to regulate them as skill games. The green light of the courts to the specific fantasy gaming operators in different gaming operators should not be considered as approval for all fantasy games. The legality of a fantasy gaming application has to be decided on a case-by-case basis on the predominance of skill tests (Gupta & Mathur, 2020). This is required because no Union or state law till now has defined the features of a legal fantasy game which may be used to test their permissibility as a game of skill. Also, no list of approved games of skill has been provided under any legislation, meaning that for every new fantasy game challenged in a court, its legality has to be tested afresh.

A point of complication here is the state and Union governments’ unclear legislative

competence to regulate the subject of fantasy gaming. In India, the Union and states have exclusive competence in specified areas of List I and List II of the Seventh Schedule of the Indian Constitution respectively, and the Union cannot generally supersede the state on subjects in List II. If it were indeed considered to be included in the legislative competence of the states as being covered under betting and gambling, then solely states would be able to legislate on the subject (List II - State List, Seventh Schedule of the Constitution of India, 1950, Entry No. 34). Alternatively, if it were deemed to be a competence of the Union as covered under communication and broadcasting (List I - Union List, Seventh Schedule of the Constitution of India, 1950, Entry No. 31), then only the Union would be able to legislate, and states may not have a say on the issue. As we deliberate in detail in the sections below, the subject remains unclear and open to debate.

Regulation of Fantasy Games by the Union

Leaving an industry with such reach and financial power as the fantasy gaming sector without any form of regulation is fraught with risks. At the Union Government Level (Federal level if compared to countries with a federal government structure), the sole attempt at legislating on the subject was through a Private Member's Bill introduced in the Lower House of the Indian Parliament earlier this year.⁶ The Bill attempted to cover the entire domain of 'online gaming' under one umbrella of a federal regulator and has not found support from the government as yet.

An understanding that the Government is entirely unaware of the problem would perhaps be incorrect. The Union Government has taken initial steps to regulate the industry through two modes. First, by tightening the advertising regulations for the fantasy gaming industry, and second, through discussion with stakeholders on an adequate regulatory framework.

The regulation of advertising for the fantasy gaming industry has been made by the Union Government indirectly through the Advertising Standards Council of India (ASCI), a self-regulatory body of the advertising industry in India operating under a code for self-regulation. ASCI has been vested with powers by the Indian government to regulate ads on cable television in India. Certain other sectoral regulators have also recognized the ASCI code in India, such as the Insurance regulator and the Drug regulator, as the standard for compliance in advertisements released by companies under these regulators' supervision (ASCI, 2022).

The ASCI released guidelines on December 15, 2020, which required that all real-money gaming operators, including fantasy gaming operators, insert disclaimers on their advertisements and design them in a manner where online gaming is not presented as an income source or employment opportunity. The introduction of guidelines on advertising seems to have had a limited impact on the intention of the online gaming sector to promote responsible advertising since more than 80 complaints against online gaming companies were dealt with in the next two months after the release of the guidelines by the ASCI (Hindu Businessline, 2021).⁷ While ASCI seems to be trying to act on rogue players, complaints about ads continue to pile on in the background (Bose, 2021).

A particular cause for concern here is that while the members of the All India Gaming Federation (AIGF), which calls itself the 'apex industry body for Online Skill Gaming in India'⁸ have explicitly committed to adhering to the ASCI guidelines through a 'Charter on Online Games of Skill' (All India Gaming Federation, 2022), many platforms within AIGF

⁶The Online Gaming (Regulation) Bill, 2022, India, Bill No. 78 of 2022.

⁷All real money gaming operators in India are required to comply with the guidelines released by ASCI. In case of instances of non-compliance, ASCI receives complaints from the consumers, institutions, industry and also its own sources and then sends it to a dispute resolution body called the Consumer Complaints Council (CCC). The CCC then asks the advertiser to provide his response to the complaints. After receiving all the information, if the CCC determines that the advertisement violates the guidelines, then they are asked to be removed from broadcast. A detailed description of the Complaints procedure is available at https://ascionline.in/images/pdf/asci_complaints_procedures.pdf, Retrieved February 10, 2023.

⁸AIGF, <https://www.aigf.in/>, Retrieved September 24, 2022.

continue to violate them. Further, many fantasy gaming operators are also not covered by the AIGF.⁹ The lack of adequate membership and non-compliance even by members raises questions on the effectiveness of these self-regulatory organizations as a viable mechanism for supervising the industry. Even while this debate continues on the appropriate path for legislation, fantasy gaming ads continue to appear on television in violation of the ASCI guidelines (Khosla, 2022), indicating young people in remote villages win millions of rupees through online games. This violation of ASCI guidelines on promoting online games as an income source shows that the guidelines may be complied with on paper, but compliance in true spirit is limited.

In terms of the second approach to undertake discussions with industry players, the premier Indian Government policy-framing body, the NITI Aayog, has taken the initial step by publishing a Discussion Paper of a regulatory framework for fantasy games. Immediate steps are warranted to implement, at the very least the suggestions in the Discussion Paper (NITI Aayog, 2021). The release of the Discussion Paper is significant since the NITI Aayog is the Indian Government's premier policy think tank, and the government indicated the release of the Discussion Paper as a step towards regulation (Thakur, 2021a). The other key recent action by the Union Government has been to form an inter-ministerial task force to suggest measures to regulate online gaming under a union law with the NITI Aayog CEO also as a member (Bhardwaj, 2022).

In the Discussion Paper, suggestions by the NITI Aayog, including forming a self-regulatory organization with an independent oversight board, are very relevant. Still, a slightly more hands-on approach may be required from the government regarding the sector's regulation, considering the stakes and larger public interest involved. At best, the policies prescribed by the NITI Aayog, if implemented, may be regarded as soft-touch regulation, which may be inadequate considering the significance of this industry. The critical balancing factor here would be balancing the need for efficient regulation of the fantasy gaming industry while ensuring that the fantasy gaming business does not move to offshore unregulated platforms or grow as an underground industry due to burdensome rules. Regulating such offshore or underground platforms would be a daunting task.

If not the Union, have the states stepped in to fill the regulatory void?

The Union Government has presented an unclear assessment of its competence to regulate fantasy gaming. While initially, in 2019, the Union Government seems to have recognized the competence of state governments to regulate fantasy gaming as a state-level legislative subject under the Indian Constitution (List II - State List, Seventh Schedule of the Constitution of India, 1950, Entry No. 34) (Radhakrishnan, 2019; Kamath, Adhikari & Gokhale, 2016), by categorizing it as betting and gambling, the response of the Government has been more cautious in recent days.

Come 2022, while the Union Government still seems to recognize the power of the state governments to regulate fantasy gaming under Entry No. 34 (betting and gambling) as mentioned above (Thakur, 2022; Thakur, 2022a, Thakur, 2021), it has also admitted that "fantasy sports and its associated online platforms are emerging as a sector" (Thakur, 2022b). Even while indirectly recognizing that fantasy gaming may be a sport, the Union Government has stated that state governments have the power to regulate it since 'sports' is a subject on which states have the competence to legislate (Thakur, 2021a).

This change in view seems to mirror the opinions of the High Courts of Madras and Karnataka in the cases *Junglee Games v. State of Tamil Nadu* (W.P. Nos. 18022 of 2020 etc., judgment dated August 3, 2021) and *Galactus Funware Technology v. State of Karnataka* (W.P. No. 18703/2021, judgment dated February 14, 2022) respectively, wherein games of skill were not deemed to be covered by Entry No. 34 allowing their regulation by states

⁹As per data on <https://www.aigf.in/membership/our-members/> (Retrieved September 24, 2022) only 65 fantasy gaming operators are members of AIGF out of around 150 companies in the domain (data from IBEF, <https://www.ibef.org/blogs/india-has-a-huge-potential-for-fantasy-sports>, Retrieved July 14, 2022).

as betting and gambling. Considering that fantasy gaming has been declared as a game of skill, it would thereby not come under the ambit of regulation of states as betting and gambling, but if considered as a sport, may arguably fall under their legislative competence under Entry No. 33 (List II - State List, Seventh Schedule of the Constitution of India, 1950), which covers sports, entertainments and amusements (*Junglee Games v. State of Tamil Nadu* (W.P. Nos. 18022 of 2020 etc., judgment dated August 3, 2021)). Judicial scrutiny of the states' competence to legislate under Entry No. 33 can be expected.

Unsurprisingly, considering the discussed response of the Union Government that fantasy gaming may be regulated by states in any case, either as a sport or betting and gambling, they have been more proactive in dealing with complaints against fantasy gaming companies. This is a part of a broader trend also seen in the Asia Pacific wherein state lawmakers have been considered to be more aware of the local public sentiments towards gambling (Das, 2021). The approach taken by states for regulation can be divided into three main categories:

1. Banning Fantasy games altogether
2. Regulating fantasy games through appropriate legislation or taking steps towards the same
3. No steps for regulation, and absent regulatory framework

Across India, an overwhelming majority of states have no regulatory framework to deal with fantasy games, with none in the pipeline and falling into the third category. The states of Andhra Pradesh and Telangana have banned online games involving money or stakes (including fantasy games). This follows the states of Assam and Orissa, which already contained similar provisions with expansive definitions of betting and gaming, respectively, and thereby effectively acted as a barrier for fantasy gaming operators. Even the states of Karnataka and Tamil Nadu unsuccessfully moved towards a complete ban through an amendment to the existing laws. In Karnataka, the Karnataka Police (Amendment) Act 2021 was passed by the legislature, but the Karnataka High Court struck down the amendments, meaning that fantasy gaming players remain operational for the time being. Similarly, the amendments by the state of Tamil Nadu to ban online gaming with money through the Tamil Nadu Gaming and Police Laws (Amendment) Act of 2021 were also struck down by the Madras High Court.

A small number of states (4 out of 28) have regulated fantasy games or have commenced regulating them. The pioneer among these states was Nagaland which brought about the Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015, to specifically regulate and license operators of games of skill, including fantasy games. Sikkim, which already has a law to regulate gaming, has a broad definition for "online games" in the Sikkim Online Gaming (Regulation) Act, 2008, which would probably extend to fantasy games as well. Meghalaya chose a slightly different path of regulating both online and offline games under a single law, the Meghalaya Regulation of Gaming Act, 2021 and included fantasy games (the term used in the legislation is 'virtual team selection games') within the scope of 'games of skill' which require licenses to operate. The law mentioned above in Meghalaya is reported to have been repealed due to opposition from local groups (NET, 2022).

The standard approach among these three states (Nagaland, Meghalaya and Sikkim) was the introduction of a licensing process, which has been replicated by the fourth state (Rajasthan) that has released draft laws for public discussion on the subject in May 2022. Rajasthan, through the proposed Rajasthan Virtual Online Sports (Regulation) Bill-2022, aims to establish a mechanism of a recognized Self-Regulatory Authority for specific purposes, including certification of games and a Virtual Online Sports Commission for exercising state government oversight.

It, therefore, emerges that fantasy games are unregulated at the Union Government level and across most states (21 out of 28 states) in India. This provides a free run to the

fantasy gaming operators, barring the subject of advertising, which has been partially regulated. Considering the financial heft of the industry, the number of fantasy gaming players, and India being the largest market for fantasy games, this status quo is unacceptable, and there is a need for urgent regulation to provide guard rails to the industry.

What next? — The options that remain

In the absence of Union or state legislation, the alternative step could be self-regulation. The limited experience of self-regulation and the preferred suggestion of the NITI Aayog for the fantasy gaming sector has not been very positive till now. A case in point is that the government had to step in and remind online gaming companies about the need to comply with advertising guidelines and promote separate guidelines on advertising for the games (Ministry of Information & Broadcasting, 2020). Compliance by gaming operators with advertising guidelines has been a significant problem area, even in the presence of self-regulatory organizations, raising questions about their effectiveness (Sarkar, 2022).

To top it all, a single industry body (like the FSGA in the USA) also does not exist in the fantasy gaming sector in India. At present, the two major bodies, AIGF and FIFS, both contain fantasy gaming operators. Even these two prominent industry bodies represent less than half the total of over 150 fantasy gaming players operating in India.¹⁰ An attempt to form a single industry body may be an uphill task, and even if successful, the success may be short-lived (Vinfotech, 2021).

While the situation of multiple private self-regulatory bodies in India is not novel, the effectiveness of this model is yet unknown if it is planned that they are provided with regulatory powers to police erring members. Alternatively, the model for a single self-regulatory body backed by the Government with limited policing capabilities, such as the ASCI for the advertising industry, has met with reasonable success, as seen from the compliance rates. If multiple self-regulatory bodies are permitted, detailed scrutiny of the charters may be required to provide uniformity in regulation and an unintended race to the bottom for less stringent terms in the Charter. A model charter published by the government with minimum acceptable membership conditions may be helpful.

In line with the discussion and the issues highlighted above, there is a need to identify that unlike the approach of state governments to regulate all forms of internet gaming through a single umbrella law, fantasy games may need separate legislation with adequate coverage on issues such as limits on spending, gaming addiction and a clear framework for licensing of fantasy gaming operators and the games that they permit. A reference for this purpose may be made to the recent ‘Fantasy Contests Act’, which has been enacted in the state of Colorado, USA, wherein they have provided a clear definition of a ‘Fantasy Contest’, thereby differentiating it from gambling and also called for licensing of operators running such contests.¹¹

Similar legislation in other Indian states or at the Union level could serve the dual purpose of regulating the sector and bringing in valuable licensing revenue. The key to such legislation would rest on two pillars.

First, it is essential to understand that any attempt to regulate fantasy gaming must be coordinated between states and the Union government, considering that legislative competence on the subject is yet unclear. Experts suggest that the Union Government may also be able to regulate fantasy games (Adhikari, 2022) and, as reports indicate, may even be willing to do so (Kalra, Singh, & Ahmed, 2022). Indications of attempts at such regulation can also be seen in the inclusion of ‘matters related to online gaming’ under the Ministry of Electronics and Information Technology (‘Meity’) in the Government of India (Allocation

¹⁰As per data on <https://www.aigf.in/membership/our-members/andhttps://fifs.in/members/> (Retrieved July 14, 2022), AIGF has 45 and FIFS has 20 members out of around 150 companies in the domain (data from IBEF, <https://www.ibef.org/blogs/india-has-a-huge-potential-for-fantasy-sports>), Retrieved July 14, 2022.

¹¹State of Colorado, “Fantasy Contests Act,” https://leg.colorado.gov/sites/default/files/2020a_1286_signed.pdf, Retrieved December 5, 2022.

of Business) Rules, 1961 and the circulation of draft rules to regulate online gaming intermediaries.¹² Even then, the proposed regulations do not explicitly cover fantasy games, and even if such regulation, if undertaken, should be in consultation with the states. In addition to this, any effort at regulation by the government (Union or state) should also ideally consider inputs from the fantasy gaming industry bodies and involve them in the regulatory framework.

Second, there is a need for a clear definition of ‘fantasy games’ and guidelines which specify that fantasy games should have a preponderance of skill over luck (Raza, Sekhar & Singh, 2021). Considering that there may be subjectivity in deciding on the skill v. luck question (Dey, 2021), a clear objective test criteria laid down in law will ensure regulation while not making it a shadow license for operators of pure games of luck.

Framing the criteria would potentially require discussions among the different stakeholders. Still, fortunately, an initial starting point for such debate is available in the form of the Guiding Principles for Online Fantasy Sports Platforms in India put forward in the NITI Aayog discussion paper (NITI Aayog, 2021). Reference can also be made to the definition of fantasy gaming in laws enacted by different states in the USA¹³. Elements, in addition to the preponderance of skill, which may form a part of the criteria, and emerge from these sources, are: direct linkage between the performance of the actual player and fantasy player, knowledge of value and prizes before the event, formation of teams based on knowledge of past performance data and statistics, winning outcomes based on multiple events, and need to include the performance of multiple athletes belonging to different teams.

Bearing these issues in mind, a slightly different approach which can be more in line with the light-touch approach suggested by the NITI Aayog, is a requirement for registration of the fantasy gaming operator (based on compliance with the set criteria) and their games with a single countrywide registration authority which would only register the gaming operators while leaving the regulation to the self-regulatory organization suggested by the NITI Aayog (NITI Aayog, 2021). This can be an improvement to the setup of a pure self-regulatory framework. With this approach, the Government can keep a close watch on the functioning of the industry, the actions of the different registered operators, and their compliance with the prevalent legislation. This will also prevent fly-by-night operators since the burden of registering with a Government authority with necessary documentation may act as a deterrent for such players. Ultimately, with registration in place, the government may also seek regular updates on legal compliance from all the registered operators. If it notices lacunas, it can move for further regulation.

Building the road ahead by filling the potholes

The ultimate goal of any future regulator and the government should be to protect consumer interests. Through the Discussion Paper, the NITI Aayog has shown a balanced intent and willingness to listen to all stakeholders. This opportunity should be used to cover some of the issues which were not covered in the Discussion Paper. Considering that it has now been reported that the Prime Minister’s Office itself has sought information on the topic, it may be understood that there is significant interest being attached to the subject, and if desired, necessary steps for regulation may be undertaken (Bose, 2021). The synergy between the stakeholders, inter alia the Union Government, the State Governments and the fantasy gaming operators, remains a crucial target for successfully regulating this already massive industry (CUTS International, 2022).

To start with, the potential fantasy gaming addiction issue, which has been recognized as a problem area, should be tackled right at the beginning (Columb, Griffiths &

¹²Meity, Draft notification for amendment to IT Rules 2021 for Online Gaming (for Public Consultation), <https://www.meity.gov.in/writereaddata/files/draft%20notification%20for%20amendment%20to%20IT%20Rules%202021%20for%20Online%20Gaming.pdf>, Retrieved February 10, 2023.

¹³Definition of fantasy games is found in state legislation of 27 States in the United States

O’Gara, 2020; Irvine, 2020; Bhat, 2022; Ibarra, 2016). An additional issue linked to possible fantasy gaming addiction is the issue of increased internet addiction among fantasy gaming players (Columb, Griffiths & O’Gara, 2020). In India, the ASCI has mentioned the issue of potential addiction under the guidelines, but the Discussion Paper has not covered the subject. Considering the impact of fantasy games on society, their broad reach, large player base and large amounts of revenue generated, a mere statutory warning in the ads may be highly inadequate. Steps must be taken to introduce gaming addiction treatment helplines and exclusion frameworks through which players can register to be blocked from fantasy gaming platforms and also seek help from counsellors in case they face an addiction challenge (PSA Legal Counsellors, 2021).

The next key issue is the imposition of spending caps which can be self-imposed or mandated by rules. These spending caps, which should be maintained across platforms, will protect users from uncontrolled spending on the platforms. Mere information about losses a player suffers is highly inadequate and may even be counterproductive in encouraging them to spend more money to overcome their losses.

Irrespective of whether the state chooses the path of government control or self-regulation, an important issue which would mandatorily require state intervention and enforcement is a complete ban on marketing and offering pay-to-play schemes for individuals less than 18 years old. The ASCI Guidelines specifically prevent depicting persons under 18 playing online games for real money winnings or a suggestion of the same. The Indian Government understanding the seriousness of the problem of payment of money on online games has already released a public advisory to limit expenditure on online games (Ministry of Education, 2021). Considering that the young population was found to form the overwhelming majority of players, ensuring that they cannot get addicted to pay-to-play games and remain shielded from possible financial troubles remains key (CUTS International, 2021).

A few news reports of youth moving towards suicide due to the financial impacts of fantasy gaming have emerged (Sidhu, 2020; Bhat, 2022; Riza, 2022). While incidents of suicide among the young population are already very high (Bilsen, 2018; Cohen, 2022), and no known peer-reviewed publication or government data have linked suicides, financial problems and fantasy gaming, there is still a need to be abundantly cautious. With the understanding that young male individuals with limited income remain the largest group of fantasy gaming players in India, special protection measures may be required for this group. Further, since young males already have a high suicide rate in low and middle-income countries (WHO, 2019), and they form the largest group of fantasy gaming players, data of any untoward incidents regarding them are more likely to emerge.

An equally important issue is the inclusion of a grievance redressal framework for player disputes and the creation of a specialized mechanism for resolving consumer disputes arising from fantasy gaming platforms within the Consumer Protection Laws (Mittal & Sabu, 2021). If the fantasy gaming industry continues to operate regulated, consumer protection should not take a back seat to other concerns such as addiction and financial security (PSA Legal Counsellors, 2021). Leaving dispute resolution to an industry-operated self-regulatory body may not be recommended, considering the large number of players, the amount of money involved and the significant share of players with low incomes who may not be able to afford the costs incurred in bringing a dispute to such a body.

Considering the specialized nature of the industry, a separate regulator may be required, or the suggested government registration authority may act as the regulator for player disputes. In the absence of such an authority, player disputes may go unaddressed. If the current regulatory mechanism is considered sufficient, specialized rules may be framed for dealing with consumer complaints linked to fantasy gaming, as seen for e-commerce platforms and direct selling schemes in India.

In the near future, regulatory intervention will become a necessity, at least in a limited manner, with the potential for continued growth in the sector. As discussed above, the effectiveness of self-regulatory organizations in the fantasy gaming industry has been

questionable, and a completely hands-off approach from the government may not provide an adequate answer. The government (ideally at the Union level with the consent of the states) may be required to maintain some degree of control, mainly to deal with issues that may require immediate action and to deal with potential problems from influential rogue members who may block any action in an industry run self-regulatory body. A path similar to the one taken by ASCI in regulating advertising, wherein it was provided limited statutory backing and continued support by the government, may be an option. This, blended with the separation of regulatory frameworks for season-long and DFS, with more stringent conditions for the latter, may answer the most immediate issues.

Challenges, however, lie in the path since there is already fragmentation in the form of multiple industry associations (FIFS and AIGF) and different governments at the Union and state levels. A few states, based on the understanding that they have legislative powers on gaming under the Indian Constitution, have already taken the path to regulate (e.g. Nagaland and Sikkim) or ban fantasy games (e.g. Andhra Pradesh and Telangana). Convincing them to come on a single platform may prove to be a difficult task. The Union government needs to consult with all stakeholders and reach an agreement about a potential solution at the earliest to protect the interests of the fantasy gaming industry and the citizens. If a successful regulatory model emerges from the coordination of the Indian Union (federal) and state governments for regulation, it can potentially act as a case study for other countries where the fantasy gaming industry is now rapidly developing and governments face similar issues of concern such as DFS and low-income level of the players.

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