

QUERIST: FIFS

1. The Querist Federation of Indian Fantasy Sports (FIFS) is seeking my opinion on the applicability of the proposed 2021 Amendments to the Karnataka Police Act, 1963 ("**1963 Act**") to Online Fantasy Sports (OFS).

2. **Introduction:**

OFS is a skill based digital entertainment/interactive sports engagement platform where sports fans/participants create their own virtual teams made up of real-life players from upcoming matches and earn points based on the performance of these real-life sports players in a real-life sports match. The format is predominantly skill based as it works on the same pattern as a selector of an offline sport wherein the selection of a team is predominantly dependant on the skill of a selector. A user/participant's skill lies in (a) monitoring the real-world players and their performances over a period of time; (b) creating a team based upon the information about the game; (c) information about player statistics, (d) injury news, (e) off the field incidents, (f) venue of the match, (g) weather conditions, etc.

3. **Judicial Pronouncements:**

The format of the online fantasy sports as a 'game of skill', has been consistently recognized by multiple High Courts across India and the Supreme Court of India, including in its recent order dated 30.07.2021 in SLP (C) bearing Diary No. 18478 of 2020 titled as '**Avinash Mehrotra vs. State of Rajasthan & Ors.**'

4. The High Court of Punjab and Haryana in **Varun Gumber v. Union Territory of Chandigarh 2017 SCC OnLine P&H 5372 : 2017 Cri LJ 3827**, vide its judgment dated 18.04.2017, expressly held that:

“8. ... I am of the view that playing of fantasy game by any participant user involves virtual team by him which would certainly requires a considerable skill, judgment and discretion. The participant has to assess the relative worth of each athlete/sportsperson as against all athlete/sportspersons available for selection. He is required to study the rules and regulations of strength of athlete or player and weakness also. The several factors as indicated above submitted by the respondent-company would definitely affect the result of the game. ...”

5. The SLP arising out of the said judgment of the High Court of Punjab and Haryana was dismissed by the Supreme Court of India on 15.09.2017 in SLP (C) Diary No. 27511 of 2017. Therefore, the said order of the High Court of Punjab and Haryana has attained finality.
6. The Rajasthan High Court in **Chandresh Sankhla v. State of Rajasthan and Ors. 2020 (2) RLW 1602**, by its judgment dated 14.02.2020, upheld the ratio laid down in **Varun Gumber case**.
7. The Rajasthan High Court in **Ravindra Singh Choudhary v. Union of India**, D.B. Civil Writ Petition No. 20779/2019 *inter alia* considered the charter of FIFS and held that online fantasy sports is not gambling:

“11. ... It is also clear that offering the fantasy games of Dream-11 involving substantial skills is a business activity and not wagering having protection granted by Article 19(1)(g) of the Constitution. ... We are, therefore, of the view that the issue whether the fantasy games played on the platform of respondent No.5 are or are not gambling/betting activities was thus closed and decided in favour of respondent No.5...”

22. ... This legitimate business activity having protection under Article 19(1)(g) of the Constitution contributes to Government Revenue not only vide GST and income tax payments, but also

by contributing in increased viewership and higher sports fan engagement, thereby simultaneously promoting even the real world games.

23. ...we are of the independent view, **particularly based on the Charter of FIFS**, of which Dream-11 is a Member, that a participant of online fantasy sports platforms offered by the Dream-11 App, who enrolls in an online fantasy sport game and puts monetary stakes therein, performs a role similar to that of a real life team manager/selector, which requires use of substantial knowledge, strategy, skill, and adroitness against other participants. A participant is actually **playing an online sport and not gambling**, betting or wagering on the outcome of any game or an event inasmuch as the result achieved by a player of online fantasy sports on completion of the corresponding real life match, is wholly independent of the final result or outcome of such real life match / game / event.”

8. The order dated 30.07.2021 of the Supreme Court of India in **SLP (C) (Dairy) No. 18478 of 2020 titled as ‘Avinash Mehrotra vs. State of Rajasthan & Ors.’**, assumes significance as it takes note of the various orders passed by the different High Courts and while dismissing a Special Leave Petition, challenging the judgment dated 14.02.2020 passed by the Rajasthan High Court in **Chandresh Sankhla v. State of Rajasthan and Ors. 2020 (2) RLW 1602**, held that the issue regarding the legality of online fantasy sports is no longer *res-integra* i.e., is settled in the following terms:

“This matter is no longer res integra as Special Leave Petitions have come up from the Punjab & Haryana High Court and have been dismissed by this Court as early as on 15.06.2017. Also, from the Bombay High Court, Special Leave Petitions have been dismissed on 04.10.2019 and 13.12.2019.”

9. **AMENDMENT & SCOPE OF OBJECT AND REASONS:**

The object of the Karnataka Police Act, 1963 was to deal with the maintenance of public order in the context of prevention of gambling.

10. The Statement and Object of the original Karnataka Police Act, 1963 is as under:

“At present in the different Areas of the State there are different laws for the regulation of police force, the maintenance of public order and allied matters and also for the prevention of gambling. It is proposed to have one uniform law on these subjects for the entire State. Hence this Bill.”

11. The object of the 2021 Amendment *inter alia* is stated as under:

STATEMENT OF OBJECT AND REASONS

It is considered necessary to further amend the Karnataka Police Act, 1963 (Karnataka Act 4 of 1963) to provide for,-

(iii) *enhance the punishment for gaming for the orderly conduct of citizens and to wean them away from the vice of gambling;*

... Hence this Bill.”

12. By the 2021 Amendments, the State Government has, *inter-alia*, amended the definition of gaming as under:

“2. Definitions.—*In this Act, unless the context otherwise requires,—*

(7) *“gaming” means and includes online games, involving all forms of wagering or betting, including in the form of tokens valued in terms of money paid before or after issue of it, or electronic means and virtual currency, electronic transfer of funds in connection with any game of chance, but does not include a lottery or wagering or betting on horse-race run on any race course within or outside the State, when such wagering or betting takes place,*

Explanation.—*In this clause,—*

(i) ‘wagering or betting,’ includes the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, in respect of any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution, any act or risking money, or otherwise on the unknown result of an event including on a game of skill and any action specified above carried out directly or indirectly by the players playing any game or by any third parties”

...

78. Opening, etc., of certain forms of gaming.—(1)
Whoever,—

(a) being the owner or occupier or having the use of any building, room, tent, enclosure, vehicle, vessel or place or at cyber café or online gaming involving wagering or betting including computer resource or mobile application or internet or any communication device as defined in the Information Technology Act, 2000 (Central Act 21 of 2000), opens, keeps or uses the same for the purpose of gaming,—

(vi) on any transaction or scheme of wagering or betting in which the receipt or distribution of winnings or prizes in money or otherwise is made to depend on chance or skill of other; or

(vii) on any act on risking money or otherwise on the unknown result of an event including on a game of skill;
or

176. Saving of games of skill.—For the removal of doubts it is hereby declared that the provisions of sections 79 and 80 shall not be applicable to the playing of any pure game of skill”

13. **ISSUE**

The issue which arises for consideration is whether the Karnataka Police Act as amended can apply to OFS, a skill-based team selection format which is distinct from online games.

14. This issue has to be seen in the context of the fact that the OFS platform and the format in which it is played have been subject to judicial

scrutiny by multiple High Courts and the Supreme Court which have settled the issue that it is skill predominant, and is protected under Article 19(1) (g) of the Constitution.

15. AMENDMENT INAPPLICABLE TO OFS:

Seen in this light and the constitutional position covering the subject (which the state no doubt would have taken into account while making the amendments) the legislative wisdom would be to frame laws in conformity with the judgments and orders passed by the Supreme Court and the constitutional mandate flowing from Article 14 and 19(1) (g).

The Karnataka Police Act seeks to deal with the mischief of illegal betting and gambling and pretended games of chance to prevent members of the public/users from risking money. The intent of the legislature was not to cover legitimate business activity which is evident from the substantive section 2(7) and in line with the settled legal position that OFS based on FIFS charter, does not amount to wagering or betting. OFS platform is based on predominance of skill entitling them to charge platform/service fee and prize pool money which is distributed amongst the winners. The charging platform/service fee and collection of prize pool money and its distribution among users was dealt with by the Bombay High Court which found that this did not amount to betting, gambling or wagering.

In view of recognition of OFS as skill predominant and the business being protected under Article 19(1) (g) there is no underlying basis to artificially include OFS by expanding the ambit and scope via the Explanation route.

16. Applying the ratio of the judgments and the orders of the Supreme Court and judgments of multiple High Courts, it follows that OFS has been expressly recognized as a predominant game of skill (and not as betting/wagering/gambling) as online fantasy sport involves substantial skill and its outcome is not dependent upon winning or losing of a particular team in real world on any given day.
17. The Amendment to the Karnataka Police Act, *inter alia* amending Section 2, Section 78, Section 128A and Section 176 of the 1963 Act, whereby the explanation to the definition of 'gaming' under Section 2(7) includes within its ambit "any act or *risking of money or otherwise on the unknown result of an event including on a game of skill* and any action specified above carried out directly or indirectly by the players playing any game or by any third parties".
18. The 2021 Amendment *vide* its amendment to Section 78 of the 1963 Act has made any act of risking money on the unknown result of an event including on a game of skill punishable with an imprisonment which may extend to 3 years.
19. There are several flaws and legal infirmities in this Amendment namely:
- a. The purpose and legal effect of an Explanation to a statutory provision is to explain or clarify certain ambiguities. An Explanation cannot be a substantive provision or enlarge or expand the scope of the definition it seeks to explain. In the present case the explanation contradicts the main enactment as the intent of the 2021 Amendment is to target betting and

wagering on games of chance (any intrusion into the arena of games of skill for OFS with respect to OFS via the Explanation would be unenforceable). The definition of gaming under Section 2(7) does not include within its scope or ambit games of skill. However, by virtue of the Explanation, the Karnataka Police (Amendment) Act brings in within the definition of gaming, any act or risking money, or otherwise on the unknown result of an event including a game of skill. Thus the scope of gaming as defined under the Act has been illegally expanded.

- b. The Supreme Court in the case of **Hardev Motor Transport v. State of M.P.**, (2006) 8 SCC 613 held:

“31. The role of an Explanation of a statute is well known. By inserting an Explanation in the Schedule of the Act, the main provisions of the Act cannot be defeated. By reason of an Explanation, even otherwise, the scope and effect of a provision cannot be enlarged.”

- c. Section 176 of the 1963 Act, gave exemption to persons taking part in games of skill. The Amendment Act has deleted the said exemption so granted to persons taking part in games of skill.
- d. The words “pure game of skill” is not defined under any gambling statute. The Calcutta High Court (**Ram Newaz Lal v. Emperor, 23Ind. Cas.484**) while considering the question whether “ring game is a mere of pure skill, within the meaning of Section 10 of the Bengal Public Gambling Act held that the word “mere” used is derived from its Latin origin and imports the meaning “pure skill”. This interpretation was also considered by the Madras High Court in the case of **Junglee Games v. The State of Tamil Nadu**.

- e. In the case of online fantasy sports, multiple High Courts and the Supreme Court have upheld that fantasy sport is a game of 'mere skill'. On a purposive interpretation the Saving provision in Section 176 can be applied to Fantasy Sports as regards its applicability of the charging sections under sections 79 and 80.
- f. Resultantly, the expression "pure game of skill" has to be read *eiusdem generis* to the words "game of mere skill".
- g. Pay-to-Play OFS is not gambling/betting/wagering irrespective of the fact whether they are played for money or otherwise. Even though the Act defines the term "wagering or betting" to include inter alia any act of risking money or otherwise on an unknown result in a game of skill in the light of judgments of the High Courts and the order passed by the Supreme Court which recognise fantasy sports, even when played for money or otherwise would not amount to gambling/betting/wagering.
- h. Nature and format of fantasy sports distinct from gaming: OFS is distinct from gaming as a participant is actually playing an online sport and is not gambling, betting or wagering as the result achieved by any participant is not dependent on the outcome of any game or an event. It is well settled that fantasy sports is not gambling/betting/wagering and has been accorded protection under Article 19(1)(g) of the Constitution of India as a legitimate business activity.
- i. Rajasthan High Court in **Ravindra Singh Chaudhary v. Union of India**; D.B. Civil Writ Petition 20779/2019 held:

“22. We also agree with the submission of respondent No.5 that the fantasy sports formats like that of Dream-11 are globally recognized as a great tool for fan engagement, as they provide a platform to sports lovers to engage with their favorite sports along with their friends and family. This legitimate business activity having protection under Article 19(1)(g) of the Constitution contributes to Government Revenue not only vide GST and income tax payments, but also by contributing in increased viewership and higher sports fan engagement, thereby simultaneously promoting even the real-world games.”.

- j. Punjab and Haryana High Court in **Varun Gumber v. Union Territory, Chandigarh**; CWP No.7559 of 2017, has held:

“b) Any fantasy sports game offered by them is a game which occurs over a predetermined number of rounds (which may extend from a single match / sporting event to an entire league or series) in which participating users select, build and act as managers of their virtual teams (constituted of real players or teams) that complete against virtual teams of other users, with results tabulated on the basis of statistics, scores, achievements and results generated by the real individual sportspersons or teams in certain designated professional sporting events. The winner of such fantasy sports game is the participant whose virtual team accumulates the most number of points across the round(s) of the game.”

20. Once OFS is held to be a game of skill by judicial dicta, the provision of aforesaid nature in labelling such a game as gambling, merely because it involves some stakes, is in the teeth of the aforesaid judicial pronouncements.

21. Accordingly, a game of “Pure Skill” is equivalent to a game of mere skill as the use of a pre-fix ‘pure’ will not change/alter its character as being a game of skill. The deletion of the explanation from Section 176

is a colourable exercise of power to criminalize a legitimate business activity.

22. The amendment to the explanation to Section 2(7) of the 1963 Act, seeks to convert a game of skill into a game of chance by expanding the definition of gaming so as to include a game of skill within its ambit. Thus the 2021 Amendment creates a new non-existent category of a game of skill as gambling/ betting/ wagering and makes it a punishable offence under the 1963 Act. To this extent the explanation in the 2021 Amendment, is manifestly arbitrary and violative of Article 14 of the Constitution of India.

23. The 2021 amendment to the Police Act has imposed a blanket ban on games of skill in complete contravention of the judgments of the Supreme Court and the High Courts which have held that games of skill are protected under Article 19(1) (g) and cannot be prohibited (at best can be regulated in line with the doctrine of proportionality).

24. In the format of OFS the amounts pooled in the escrow account is an 'actionable claim', which is to be distributed amongst the winning participating members on the basis of the results achieved by their respective virtual teams. The winning participating members have a legal/enforceable claim to same under the Transfer of Property Act, 1872. This cannot be treated as betting/gambling or wagering.

25. Hence OFS based on the approved FIFs charter cannot be equated with or have any nexus with the activity of a wager as has been done under the Amendment.

26. The 2021 Amendment Act essentially seeks to curb the menace of wagering or betting in connection with a game of chance to prevent users from risking money/getting cheated. Thus the partial inclusion of games of skill via the Explanation in the amended 2021 Act goes beyond the object and purpose of the amendment and is unlikely to withstand judicial scrutiny in the light of a catena of judgments and orders with respect to OFS.

27. **a.** The 2021 Amendment has turned the original 1963 Act on its head by penalizing a game of skill; the 1963 Act was enacted to curb the menace of gambling i.e., a game of chance.

b. The KPA has automatically sought to extend the definition of gaming to *inter alia* cover OFS which is against the order of the SC. The amendment is a colourable exercise of power as the legislature has travelled beyond its legislative competence by equating a skill predominant format with betting/gambling or wagering.

28. The Supreme Court had settled this legal issue in the landmark judgment of **R.M.D Chamarbaugwala & Anr. V. Union of India**, 1957 SC 628 where it has categorically held that competitions which involve skill are business activities are entitled to protection guaranteed under Article 19(1)(g) of the Constitution of India.

29. Recently, the Kerala High Court quashed a notification by the State Government as being unenforceable as the game is predominantly a game of skill.

30. It is pertinent to mention a recent judgment of the Madras High Court in the matter of **Junglee Games India Private Limited & Anr. v. State of Tamil Nadu & Ors.**, (W.P. No. 18022 of 2020) where it struck down the Tamil Nadu gaming and Police Laws (Amendment) Act, 2021 which imposed a ban on any game, played with stakes on the internet and declared the act as ultra vires of the Constitution. The Court held that under Entry 34 of the State List, concept of betting would not cover games of skill. The relevant extract from the aforesaid judgment is as follows:

“118. It is such light that “Betting and Gambling” in Entry 34 of the State List has to be seen t has to be seen, where betting cannot be divorced from gambling and treated as an additional field for the State to legislate on, apart from the betting involved in gambling. Since gambling is judicially defined, the betting that the State can legislate on has to be the betting pertaining to gambling; ergo, betting only on games of chance. At any rate, even otherwise, the judgments in the two Chamarbaugwala cases and in K.R. Lakshmanan also instruct that the concept of betting in the Entry cannot cover games of skill. Although the State could contend with some degree of justification that its legislative competence extends beyond Entry 34 by drawing on, for instance, Entries 1, 26 or 33, in such event, the State should have discharged the burden of establishing proportionality. For reasons detailed in preceding paragraphs, by imposing a wide-ranging blanket ban, the State has completely failed to meet the “least intrusive” measure test and, therefore, the impugned amendment falls foul of Article 19(1)(g) of the Constitution.”

31. Seen in this light the 2021 amendment would be ultra vires of Article 19(1)(g) of the Constitution of India, 1950 in view of the judicial precedents and orders.

32. The Home Minister of Karnataka in his recent statement stated that the amendment allows online skill games but not betting or wagering on

them and that the games are not barred per se and only gambling for various sports and games are banned. This indicates the intent is not to;

- i. overreach the law
- ii. bypass judgments and orders of the Supreme Court

33. The Government has also stated that it is in the process of framing rules which will address any ambiguity surrounding the law. The rules will bring greater clarity and iron out ambiguities (this statement highlights that the legislative intent is clear but this has not been translated in terms of the language in the amendment, which could be a case of poor draftsmanship).

34. Representations have been filed seeking clarity by taking into account the constitutional position and the judgment of the Supreme Court and multiple High Courts. Thus, if any action is taken at this stage prior to the rules being framed it would be hasty and misconceived.

35. The querist/members of the Querist can take recourse to legal remedies to seek protection including interim relief.

36. Resultantly, applying the ratio of the various judgments and the orders of the Supreme Court, OFS cannot be brought within the ambit of the definition of 'gaming' u/s 2(7) of the amendment to the KPA.

37. There is yet another dimension/facet. The Information Technology Act 2000 has been framed under Entry 31, List 1. Under the Act, Information Technology (Intermediary Guidelines and Digital Ethics Code) Rules, 2021 were notified on 25th February 2021 have been framed. This

applies to the OFS operators as intermediary under section 79 of the Information Technology Act, 2000. This field is an “occupied field”.

38. The 2021 amendment to the extent it encroaches into an “occupied field” is repugnant to it. It is well settled that in the event of repugnancy, the Parliamentary legislation prevails and the State law shall “to the extent of the repugnancy” is void.

39. CONCLUSION:

- I. Online Fantasy Sport platform, has consistently been held as a skill predominant and as a legitimate business activity, duly protected under Article 19(1)(g) of the Constitution of India.
- II. Judicial pronouncements of the Supreme Court of India and multiple High Courts have also approved the FIFS charter.
- III. Having already judicially determined that the game is game of skill and it cannot be given the character of ‘gambling’ by legal fiction and prohibited.
- IV. An expansive definition of gaming under the amendment goes beyond the object and purpose of the amendment itself (which deals with gaming in the context of gambling to wean away citizens from the vice of gambling) and is a blatant attempt to bypass court judgments and orders and is against the clear finding that OFS played on the FIFS charter would not amount to gambling.
- V. A legitimate business activity cannot be made punishable and termed as wagering or betting by means of an explanation added by 2021 amendment in Karnataka Police Act, 1963. The State Legislature by following the above amendment route cannot curb or criminalize a legitimate online fantasy game which involves

substantial skill and a business activity of online sport and not wagering or betting.

- VI. In the totality of the facts and circumstances and the settled position of law, OFS would not be covered under 'gaming' as defined in section 2(7) of the Karnataka Police (Amendment) Act 2021. Resultantly the amendment to the Karnataka Police Act would not be applicable to OFS.

In view of the above, the operators who are members of the Association can very well continue their legitimate operation and the 2021 Karnataka Amendment shall not affect their legitimate business activity nor the Amendment adversely affect their rights to carry on their business activity as per the approved FIFS charter, much is protected under Article 19(1)(g) of the Constitution of India.

40. LEGAL REMEDY:

In the event any action is taken, OFS operators can challenge the same by way of a writ petition before the High Court and seek interim measures of protection including 'no coercive action'

Ashok Bhushan
(JUSTICE ASHOK BHUSHAN)