



MAY JUN 2021 19 May 2021

Fantasy Becomes Reality

By *Gambling Insider*



Ranjana Adhikari, co-head, Gaming Practice Group, and Tanisha Khanna, senior member, Gaming Practice Group, Nishith Desai Associates, speak about the latest advancements in the fantasy sports sector in India, and how current laws are accounting for growth

Sports is an important part of the culture of India, with cricket having its largest fan following and broadcasting viewership. As the most anticipated cricketing tournament of 2021, the Indian Premier League (IPL) has delivered on its promise and the networks have seen unprecedented ratings and viewership. While the pandemic has led to a temporary suspension of the event, the numbers so far look promising.

Yet this boost in the interest of home-bound viewers this pandemic, has catapulted the interest of customers towards fantasy sports sites and apps. In 2020, when businesses countrywide were grappling to cut spend, popular fantasy operators like the unicorn Dream 11 and Mobile Premier League bagged coveted sponsorship opportunities with IPL, clearly showcasing the serious money these platforms were willing to expend on advertising and growing their business. The fantasy sports Industry in India had a user base of almost 90 million users as of 2019, and is expected to be worth US\$ 3.7 billion by 2024.

While the fantasy sports business has grown, the irony that increases each day is the inconsistencies in policies of each Indian state and their approach towards gaming in general. The year 2020 witnessed a slew of public interest litigations filed compelling the states to decide on the legality of these

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gaming formats, including fantasy sports. On the other hand, the curiosity and interest of foreign investors and operators eyeing the Indian fantasy sports market has only grown in the last year. This article gives a quick snapshot on some key questions that one would have when looking to tap the Indian fantasy sports market.

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How are the Indian gaming laws structured?

India follows a state-wide regime where gaming and gambling laws, or gaming enactments, are concerned. Most gaming enactments exempt games of skill, which include games where there is a preponderance of skill over chance.

Following public litigations and pleas, states like Telangana, Andhra Pradesh and Tamil Nadu amended their respective laws, the result of which is that the skill games played for stakes are no longer exempted under these state gaming enactments. This development did have a commercial impact on many skill-gaming operators' business in the last year as these states are cash rich with internet savvy population rising there. This was in spite of the fact that the Supreme Court of India has previously ruled that offering games of skill are protected as legitimate business activities under the fundamental right of freedom of business guarantees under the Constitution of India.

Do fantasy sports qualify as games of skill and can be offered legitimately?

Whether a particular game format is that of skill or not is always a question to be determined on the facts of the case. Certain states like Meghalaya and Nagaland have recognised and classified 'virtual sports fantasy league games' and 'virtual team selection games' as games of skill under their respective gaming enactments. Previously, the Supreme Court had recognised that betting on horse racing was a game of skill in the case of K R Lakshmanan vs. State of Tamil Nadu, and the principles from this case may support arguments that sports betting too, is a game of skill. This case was an important precedent that was relied on by courts in India while opining on the format offered by Dream 11. This is the only version of fantasy sports which has been tested before any court in India. The version offered by Dream 11 has been recognised as a game preponderantly of skill by the High Courts of Punjab and Haryana, Rajasthan, and Bombay. Certain special leave petitions were dismissed against these judgments by the Supreme Court, too. However, while hearing a special leave petition against the judgment of the High Court of Bombay, the Supreme Court imposed a stay on the judgment of the High Court. Accordingly, the issue is pending consideration by the Supreme Court. However, in the interim, the judgements of the courts of Punjab and Haryana and Rajasthan have not been stayed or overturned and continue to hold good.

While evaluating any fantasy game format, one would need to ascertain whether the game formats pass the tests set out in the Fantasy Sports Cases and the Lakshmanan Case. To give a quick flavour of the kind of criteria set out, we have listed a few below:

- Whether the drafting of a virtual team involves assessment of the relative worth/abilities of athletes as against other athletes available for selection, or in the case of horse racing, assessment of the horse, the jockey, etc. as against other horses.
- Whether a user is required to study the strengths and weaknesses of athletes in order to make their selection.
- Whether the rules of the game require users to exercise their skills of judgment and knowledge of sports, i.e., adherence to a budget, upper cap on players which can be selected from a single team, selection of a captain and vice-captain whose points are multiplied, etc.

While we have discussed the impact of the Indian Gaming Enactments on fantasy sports, while evaluating the size and scalability of the business, one would also need to consider other restrictions under Indian laws as well. For example, under the Foreign Exchange Management (Current Account Transactions) Rules, 2000, there is a prohibition on making remittances out of income from racing, riding, or any other hobby, as well as remittance for the purchase of football pools, sweepstakes, and so on. While cross pooling of players to increase liquidity on the platform, this must be borne in mind. Further, the relevant foreign exchange laws in India prohibit foreign investment in 'gambling and betting, including casinos,' This law doesn't define what amounts to "gambling and betting" for the purposes of any investment or a foreign technology collaboration. However, one can argue that investment into skill-gaming businesses should not attract this prohibition, and relying on the cases above, the investment in a fantasy sports business should not restrict these prohibitions. Apart from this, there are general restrictions and conditions imposed on investments coming into India from neighbouring countries, which may require the prior approval of the Government.

Policy movement in favour of fantasy sports industry

Until such time that there is no nation-wide law to address the legality of these operators, the operators will continue to deal with the uncertain and instable policies of each state of the country. But with the spotlight on the industry players during the last IPL coupled with the rise in investments and job opportunities that the fantasy sports industry have contributed to the Indian economy, the government is certainly sitting up and taking notice of their presence. Interestingly, the Niti Aayog, a policy think tank of the Government of India, released the Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India, which recommends creating a national-level safe harbour for fantasy sports as a game of skill. This is hailed to be a significant step for the industry towards receiving the blessing as a nationwide legitimate business. But this policy paper does not have the effect of law and is recommendatory in nature. There has also been a simultaneous great push from the industry for the government to recognise fantasy sport as a sport rather than a mere gaming activity.

The presence of multiple state laws governing gaming activities, and contrary precedents with respect to game formats set by various High Courts, have created a haphazard legal framework for gaming operators. So there's a need for robust federal legislation identifying games of skill and prescribing standards for operators to follow, which will significantly improve business certainty. But in spite of these hurdles, the fantasy sports industry continues to thrive in India, one of the most promising markets for fantasy sports operations.

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