

Gaming Law Wrap

January 19, 2022

2021: A YEAR IN REVIEW FOR THE GAMING INDUSTRY IN INDIA

2021 cemented India's status as one of the fastest growing online gaming markets in the world. The industry, currently valued at USD 1.8 billion, is expected to become a staggering USD 5 billion market by 2025¹. The second year of the pandemic propelled this growth, with increased internet coverage, smartphones, adoption of digital payment methods, and burgeoning number of online users.

However, despite its stupendous growth, the industry continued to face State-wise regulatory uncertainty. Certain States amended their laws to prohibit all for-money gaming activities. High Courts stepped in and struck down some of these amendments as unconstitutional, providing respite to the skill gaming operators. On the other hand, the State of Meghalaya sought a more pragmatic approach by seeking to regulate online gaming through a licensing regime.

As we step into 2022, the Indian skill gaming industry is at a crossroads. As a significant source of investments and employment opportunities, the Central Government can no longer ignore its contribution to the Indian economy, and appears to be mulling the way forward. There have been promising indications that the Central Government may introduce a federal law to regulate the industry², which would go a long way in bringing business certainty. The future of the industry has also been considered in Parliament, with certain Ministers seeking to regulate and tax the industry³, while others have voiced support for a complete ban⁴.

As the long-term future of the industry looms in 2022, we recap on some of the latest regulatory updates in 2021, following from our [update in July](#).

1. All eyes on Karnataka, as High Court considers constitutionality of amendments prohibiting online skill games

The State of Karnataka introduced the *Karnataka Police (Amendment) Bill, 2021* ("Amendment") to amend the gambling-related provisions under the *Karnataka (Police) Act, 1963* ("Karnataka Act") in October 2021. Under the Amendment, both offering⁵ and participating⁶ in online gaming activities, including games of skill, is prohibited. Karnataka is one of the most populated Indian State, and thus an important market for operators. Accordingly, the introduction of the Amendment was a severe blow to the industry.

Following its introduction, several skill gaming operators challenged the constitutionality of the Amendment before the High Court of Karnataka⁷. The operators argued, among other grounds, that the Amendment was unconstitutional insofar as it sought to prohibit skill games. The Supreme Court has recognized that offering games of skill are protected under freedom of trade and business guarantees under the Constitution⁸. The operators also pointed out that the High Court of Madras had **recently struck down a similar amendment in Tamil Nadu**, which sought to prohibit online games of skill, as unconstitutional.

Per contra, the State sought to justify the constitutionality of the Amendment on the grounds of public order⁹, by arguing that it was a social legislation, whose object was to prohibit activities injurious to public health and order¹⁰.

During the course of the arguments, the State provided an oral assurance to the court that it would not take any precipitative action against the online skill gaming operators¹¹.

The High Court heard extensive arguments from both parties from October – December, and reserved its order in the matter on December 22nd, 2021. The court's judgment will likely determine the future of the online skill gaming industry in Karnataka.

2. Gujarat State Commission seeks to prohibit online games, citing concerns over money laundering and rampant sports betting

In the case of *Amit M. Nair v State of Gujarat*¹², a writ petition was filed before the High Court of Gujarat seeking, among other reliefs, (1) a declaration that online gambling was prohibited under the Gujarat Prevention of Gambling Act, 1887 ("Gujarat Act"), (2) orders banning/restricting online gambling and online Rummy within the State of Gujarat.

The High Court of Gujarat examined the Gujarat Act, which prohibited gambling activities in 'common gaming houses,' and observed that the definition of 'common gaming house' under the Gujarat Act did not currently refer

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to online activities, and would need to be expressly amended to include 'online gaming' within its ambit¹³. However, in view of the directions sought by the petitioner, and in the public interest, the court disposed of the petition in September, 2020, by directing the State of Gujarat to, (among others), treat the petition as a representation, and to deal with online games involving gambling played within Gujarat appropriately in accordance with its powers under the Constitution of India.

Following this matter, the Gujarat State Law Commission¹⁴, considered the matter of online gambling and released a report in October, 2021, suggesting that the Gujarat Act be amended to 1) expressly cover online gambling, by amending certain definitions¹⁵, and 2) enhance the penalties under the Gujarat Act.

The Gujarat Act currently exempts games of skill from its prohibitions¹⁶, and the report does not appear to seek to strike down this exemption, nor expressly prohibit online games of skill. Accordingly, the intent appears to be to preserve the exemption for games of skill. However, *confusingly*, the report cites the need to prohibit online Rummy, (which has been held to be a game of skill by the Supreme Court¹⁷), as one of the reasons for the amendments.

The report also points towards unabated online sports betting, the menace of money laundering through gambling sites, player addiction, and violation of foreign exchange laws by gambling websites, as reasons for introducing the amendments.

It remains to be seen whether the State Government will take up the recommendations of the Gujarat Law Commission at this stage.

3. Meghalaya introduces online gaming rules

In June, 2020, the State of Meghalaya had introduced the *Meghalaya Regulation of Gaming Act, 2021*, ("Meghalaya Act") which introduced a licensing regime for online games of skill and chance. While the Meghalaya Act laid out the broad contours of the licensing regime, it left the details to be fleshed out by the rules to be framed under the Meghalaya Act.

Thereafter, in December, 2021, the State introduced the *Meghalaya Regulation of Gaming Rules, 2021* ("Meghalaya Rules"). The Meghalaya Rules lay down the (1) eligibility criteria for applicants for licenses, (2) the procedure to apply for a license, (3) the procedure for grant of license, (4) grounds for suspension/cancellation of the license, (5) license conditions, (6) license fees, (7) composition of the Meghalaya Gaming Commission, (8) conditions for advertising games, (9) credit limits for players, and (10) dispute redressal mechanism between licensees and players, among others.

Under the Meghalaya Act, a license can only be issued to an Indian citizen or a legal entity incorporated in India¹⁸. The Meghalaya Rules further require that if an applicant for a license is a firm/company, the controlling stake must remain in India and all the executive decisions must be taken in India¹⁹. Further, licensees are required to set up an office in Meghalaya within 30 days of issuance of license²⁰.

The Meghalaya Act and the Meghalaya Rules²¹ have not been notified in the State Gazette, i.e., while they have been introduced, they are not binding law in the State of Meghalaya yet.

4. Government of Tamil Nadu appeals against Madras HC judgment striking down amendments to gaming Act

The High Court of Madras had **previously struck down** certain amendments introduced by the *Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021*, as unconstitutional in the matter of *Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors*²².

In November, 2021, the State of Tamil Nadu filed a special leave petition (i.e., a petition seeking permission to appeal) before the Supreme Court, seeking to appeal against the High Court's decision²³. It remains to be seen whether the Supreme Court will allow the petition, i.e., permit the State to appeal and hear the appeal, or dismiss the petition, i.e., seek not to interfere with the High Court's order.

5. Challenge to Odisha Gambling Act, 1955

Winzo, a popular Indian social gaming application, has filed a writ petition before the Odisha High Court challenging the *Odisha Prevention of Gambling Act, 1955* ("Odisha Act") as unconstitutional²⁴.

While a copy of the petition is not available in the public domain, as per reports²⁵, the challenge appears to be on similar lines to that in Karnataka, i.e., that the Odisha Act is unconstitutional insofar as it seeks to prohibit online games of skill when played for money, based on the manner in which 'gaming/gambling' is defined²⁶. The challenge is listed next on February 14, 2022.

While online skill gaming operators have traditionally blocked Odisha due to the manner in which gaming/gambling is defined, and the lack of an express exemption for games of skill under the Odisha Act, there are legal arguments available that the Odisha Act, (even as it currently stands), only prohibits games of chance, and accordingly games of skill may be offered in Odisha.

6. GST Council forms group to consider taxation of online gaming

The GST Council (apex member committee for administration of GST in India) formed a body of group of ministers on casinos, race courses and online gaming ("GoM") on May 24, 2021 with the following terms of reference:

- Examine the issue of valuation of services provided by Casinos, race courses and online gaming portals and taxability of certain transactions in a casino;
- Examine whether any change in the law is required for better valuation of these services; and
- Examine impact on other similarly placed services like lottery.

In October 2021, there were **reports** that the government may consider a single tax rate for online gaming, removing differentiation between game of skill and game of chance from GST perspective.

The GoM was supposed to submit its recommendation to the GST Council within six months (i.e. by November 24, 2021) from its date of formation. However, to the public knowledge, the recommendations have not been forwarded by GoM yet. Also, please note that final decision in this regard will be taken by GST Council only.

– Tanisha Khanna & Gowree Gokhale

You can direct your queries or comments to the authors

¹ <https://www.bcg.com/en-in/mobile-gaming-market-opportunity-in-india>

² The Ministry of Electronics and Information Technology appeared to indicate that the Central Government was considering a central law to regulate the industry: https://www.medianama.com/2021/08/223-rti-government-nline-gambling-regulation/?utm_source=feedbumer&utm_medium=feed&utm_campaign=Feed%3A+medianama+%28Medianama%3A+Digital+Media+In+India%29.

³ It was also reported that the Prime Minister's Office was considering the way forward for the industry: <https://www.outlookindia.com/website/story/sports-news-pmo-steps-in-as-online-gaming-industry-faces-uncertain-times/384515>, <https://www.medianama.com/2021/06/223-prime-ministers-office-real-money/>

⁴ <https://theprint.in/india/governance/bjp-mp-sushil-modi-wants-online-gaming-taxed-regulated-says-youngsters-getting-addicted/775838/>

⁵ <https://www.g2g.news/not-skill-game-it-is-kill-game-vice-prez-naidu-says-in-rajya-sabha-on-online-games>

⁶ Section 78(1)(a) – (c)

⁷ 78 (2) Whoever is found in any building, room, tent, enclosure, vehicle, vessel or place referred to in sub-section (1), gaming on any of the objects specified in that sub-section, or present, or aids or abets, for the purpose of gaming on any such object shall, on conviction, be punished with imprisonment which may extend to one six months month or with fine which may extend to five hundredten thousand rupees or with both.

Any person found in any such building, room, tent, enclosure, vehicle, vessel or place during any gaming therein on any of the objects specified in sub-section (1) shall be presumed, until the contrary is proved, to have been there for the purpose of gaming on such object.

⁸ *All India Gaming Federation v. State of Kamataka (W/P 18703/2021)*

⁹ RMD Chamarbaugwala & Anr v Union of India [1957] 1 SCR 930

¹⁰ Under Article 19(2) of the Indian Constitution, a State may impose reasonable restrictions on the right to carry on any trade or business in the interest of, *inter alia*, public order.

¹¹ <https://www.freepressjournal.in/legal/fpj-legal-karnataka-high-court-reserves-orders-in-challenge-to-online-gaming-ban>

¹² <https://www.newindianexpress.com/states/karnataka/2021/oct/29/no-precipitative-action-against-online-gaming-ops-state-tells-karnataka-hc-2377070.html>

¹³ R/Writ Petition (PIL) No. 146 of 2020

¹⁴ The court held that a plain reading of the definition of 'common gaming houses' indicated that it was completely silent on the aspect of 'online gambling,' and the prohibition was only attracted if an individual was caught playing cards/Rummy in a gambling den in the State of Gujarat. An individual playing 'online Rummy' could not be arrested or booked for the offence of gambling.

¹⁵ The Commission is only a recommendatory, and not a legislative body. It makes suggestions for legal reform to the State Government, which the State Government may take up at its discretion.

¹⁶ The report suggests amending the definition of 'place' under the Gujarat Act to include 'virtual platforms, mobile apps or internet or any communication device, electronic application, software, online gaming and computer technology as defined in the Information Technology Act, 2000...'

¹⁷ Section 13 of the Gujarat Act: Saving games of mere skill: Nothing in this Act shall be held to apply to any game of mere skill wherever played

¹⁸ State of Andhra Pradesh vs K. Satyanarayana & Ors 1968 AIR 825

¹⁹ Section 4(2), Meghalaya Act

²⁰ Rule 4(d), Meghalaya Rules

²¹ Rule 11(e), Meghalaya Rules

²² Rule 1(b), Meghalaya Rules, and Section 1(3), Meghalaya Act

²³ WP Nos.18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021

²⁴ The State of Tamil Nadu v. Jungle Games India (SLP (C) 019988/2021)

²⁵ *Tic Tok Skill Games v. State of Odisha WP 34338/2021*

²⁶ <https://www.g2g.news/exclusive-odisha-gambling-act-manifestly-arbitrary-and-unreasonable-winzo-games-before-the-high-court/>

²⁷ (b) "gambling or gaming" does not include lottery and means a play or game for money or other stake and includes betting and wagering and other act, game and contrivance by which a person intentionally exposes money or things of value to the risk or hazard of loss by chance;

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