



Online Gaming – To be or not to be

TBA BULLETIN SPECIAL EDITION

Recently, the Madurai Bench of the Madras High Court in the D Siluvai Vanance v. States Crl OP (MD) No. 6568 of 2020), has observed that a regulatory framework to monitor and regulate online gaming is the need of the hour. The Court said that the regulation of the sector would encourage investment and could lead to technological improvement and generation of revenue and employment.

The most legitimate route to online gaming in India is by obtaining a Government issued 5 year License for online gaming from Nagaland / Sikkim. The fees are steep and contributions to the government kitty is high on the route.

The rest of India is dabbling in confusion and conflicting views of “to be or not to be”.

Can India separate this vertical of tech as e-commerce from Gaming?

Online Gaming companies are rearing to go! COVID-19 has only pressed the accelerated pedal for the sector. The global attention the tech companies are offering through feuds and marking territories is contributing to the critical mass.

As per a report by Maple Capital Advisors, the Indian gaming industry would be valued at USD 3,750 Million by 2024.

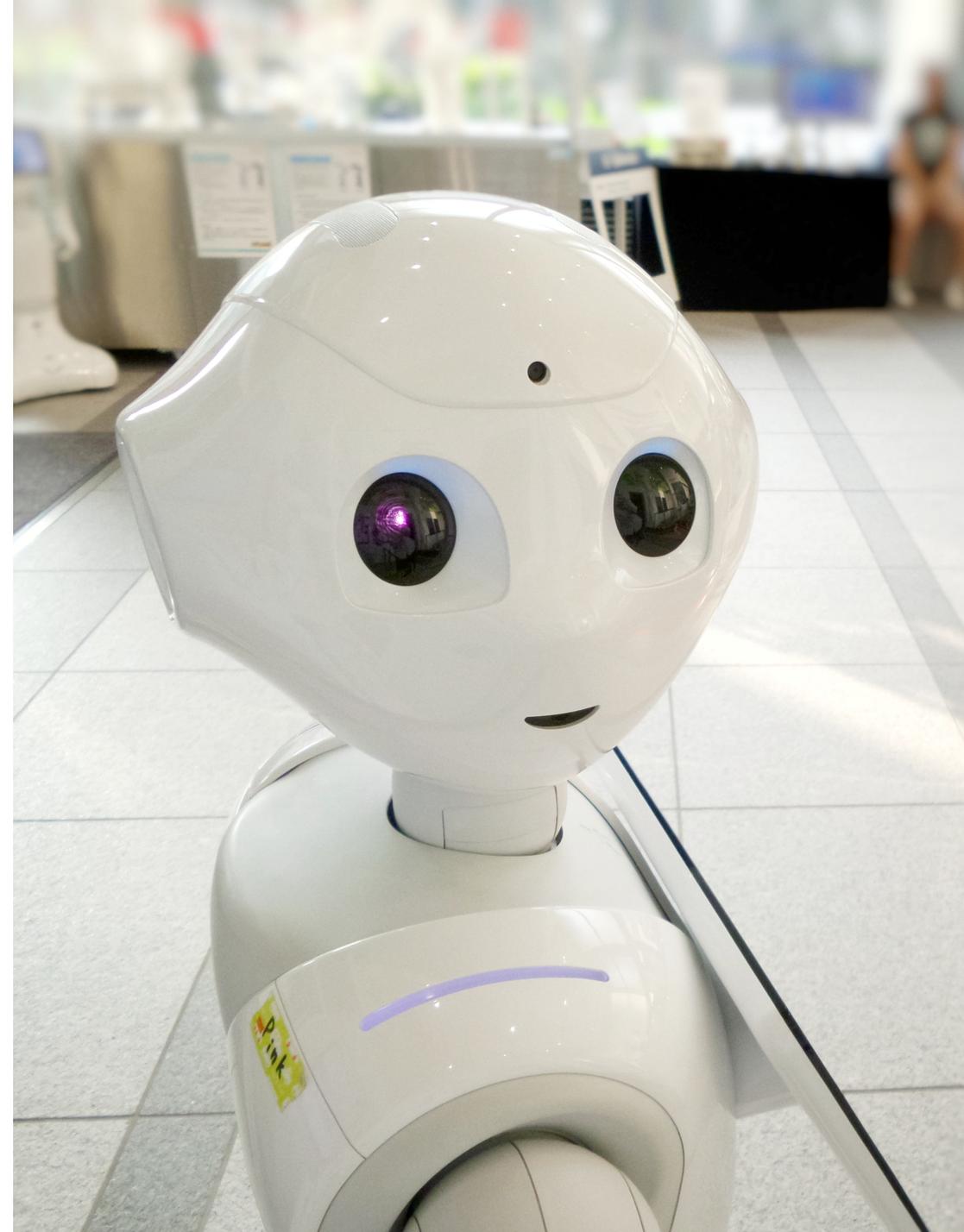
Online gaming websites like Paytm First Games and Gamerji saw a 200% and 50% increase in their user base in March, 2020.

Categories of games are played online, include, casual games like Clash of Clans and PUBG played for fun and not any money, skill games played in arcades, and real money games played against each other for stakes.

Online platforms offering real money games often offer traditional games like rummy, poker, etc. on a digital platform.

The legal framework is entering crystallisation, several petitions pending before major High Courts¹ is soon to drive it to regulation.

1. Petitions pending at the AP HC, SC, Madras HC



Existing Legal Framework Regulating Gambling in India

While gaming is separated by “game of skill” from gambling, lets see how it got here.

These statutes were enacted before online gaming/ gambling came into existence. Thus, the inadequacies are for gambling taking place in physical premises and consequent lack of provisions for online gambling websites.



- As per list-II of the seventh schedule of the Constitution, the State governments have the authority to legislate on matters related to gambling and betting.
- States like, Uttar Pradesh, Delhi and Madhya Pradesh have adopted the pre-independence Public Gambling Act, 1867 prohibiting any game based on chance or probability, except lotteries.
- Other states have legislations to regulate online gambling within their territory.
- Sikkim, Nagaland and Telangana are states with regulations for online gaming. Telangana refuses it on grounds of no exception for game of skill or chance. It has *ordinances under challenge with the AP High Court supporting “a policy of zero tolerance against gambling which has serious impact on the financial status and well-being of the common public”*.
- Sikkim and Nagaland have legitimised it through legislations governing for online gaming licenses issued by the Government for 5 years.
- Gaming laws in Goa and Daman and Diu allow certain table and board games on certain offshore vessel after attaining authorisation from the Government.

Test of Gambling or a Game of Skill

In India the divide is on Gambling or Game of Skill.

Games	Status	Rationale
Skill Based	Permitted	<ul style="list-style-type: none"> [in gaming the stake is laid by the players on the game and the result of the game depends upon the skills of the players.]² SC held that games involving a 'substantial or preponderant' degree of skill would amount to games of 'mere skill' as laid down by Section 12 of the Public Gambling Act and similar relevant sections under various other state gaming acts.³
Chance Based	Prohibited	<ul style="list-style-type: none"> Card Games, Flush, Brag, Three Cards [SC]⁴ in a bet or a wager, the winning or losing of stake depends primarily upon the happening of an uncertain event.⁵ For Poker double up, blackjack and pacman there was no scope for using one's skill to arrive at a desired result, as the electronic machines on which these games were played could be tampered with resulting in the chances of winning becoming completely unrelated to the skill of the player⁶ [Poker is considered a Game of Skill in West Bengal. It is considered a game of Chance in Gujarat since it involves stakes]⁷
Mixed	Largely Permitted	<ul style="list-style-type: none"> Rummy [required a certain amount of skill since the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding] where success depends on substantial or preponderant degree of skill will not fall into the category of gambling. Despite there being an element of chance, if a game is primarily a game of skill, it would nevertheless be a game of mere skill.⁸

1. Petitions pending at the AP HC, SC, Madras HC

4. Andhra Pradesh v. K. Satyanarayan (AIR 1968 SC 825)

7. Gujarat High Court (Dominance Games Pvt. Ltd. vs State of Gujarat & 2 Ors.)

2. Public Prosecutor v. Veraj Lal Sheth, AIR 1915 Mad 164

5. Andhra Pradesh v. K. Satyanarayan (AIR 1968 SC 825)

3. K.R. Lakshmanan v. State of T.N. (1996) 2 SCC 266

6. M.J. Sivani v State of Karnataka, AIR 1995 SC1770

8. Public Prosecutor v. Veraj Lal Sheth, AIR 1915 Mad 164

THE TESTS COURTS APPLIES FOR OFFLINE GAMING

- Whether or not a substantial element of skill is involved in the game;
- The preponderance test to see if the game involves a preponderant element of skill;
- Materiality test to check the material impact the chance element and the skill element have on the outcome of the game.

There isn't such clarity on whether these tests would also be applicable on games that are offered on online platforms.

Video Games & Virtual Spaces

The world of Video Games and games played in virtual spaces:

- The Supreme Court has held that while the prize competitions (with a pre-determined ambiguous solution) and competition where the winner is determined by draw of lotteries is gambling and cannot be afforded protection of freedom of trade and commerce under Article 19(1)(g) (*right to practice any profession, or carry on any occupation, trade or business*) of the Constitution, Game of Skill may be afforded such protection.
- The Court, has clarified that reasonable restrictions or conditions may be imposed on video games based on chance. Constitutional protection Article 19(1)(g) does not apply to the owners of video game parlours.
- The Delhi District Court held that playing skill-based games **for money** in the virtual space, renders them illegal. Skills required to play games in physical form cannot in any circumstances be equated to playing these games on online mediums.
- The Court believes since there is always a possibility of manipulation of outcomes by cheating and collusion in online gaming, it can be assumed the degree of chance in the game would increase.¹⁰

9. In State of Bombay v R.MD. Chamarbaughwala, AIR 1957 SC 699; Sivani v. State of Karnataka, (1995) 6 SCC 289

10. Gaussian Networks Private Limited v. Monica Lakhanpal and State of NCT, Order of the Delhi District Courts dated November 19, 2012 in Suit No. 32 of 2012. .

Due to the difference in laws implemented by the States, online servers of gaming websites would have to use the geo-location feature to prevent the players from certain states from participating in such games. This geo-location restriction is normally surpassed by people through virtual private networks, people may use this to change their location and access the website.

Incase of international websites, imposition of the prohibition becomes harder.



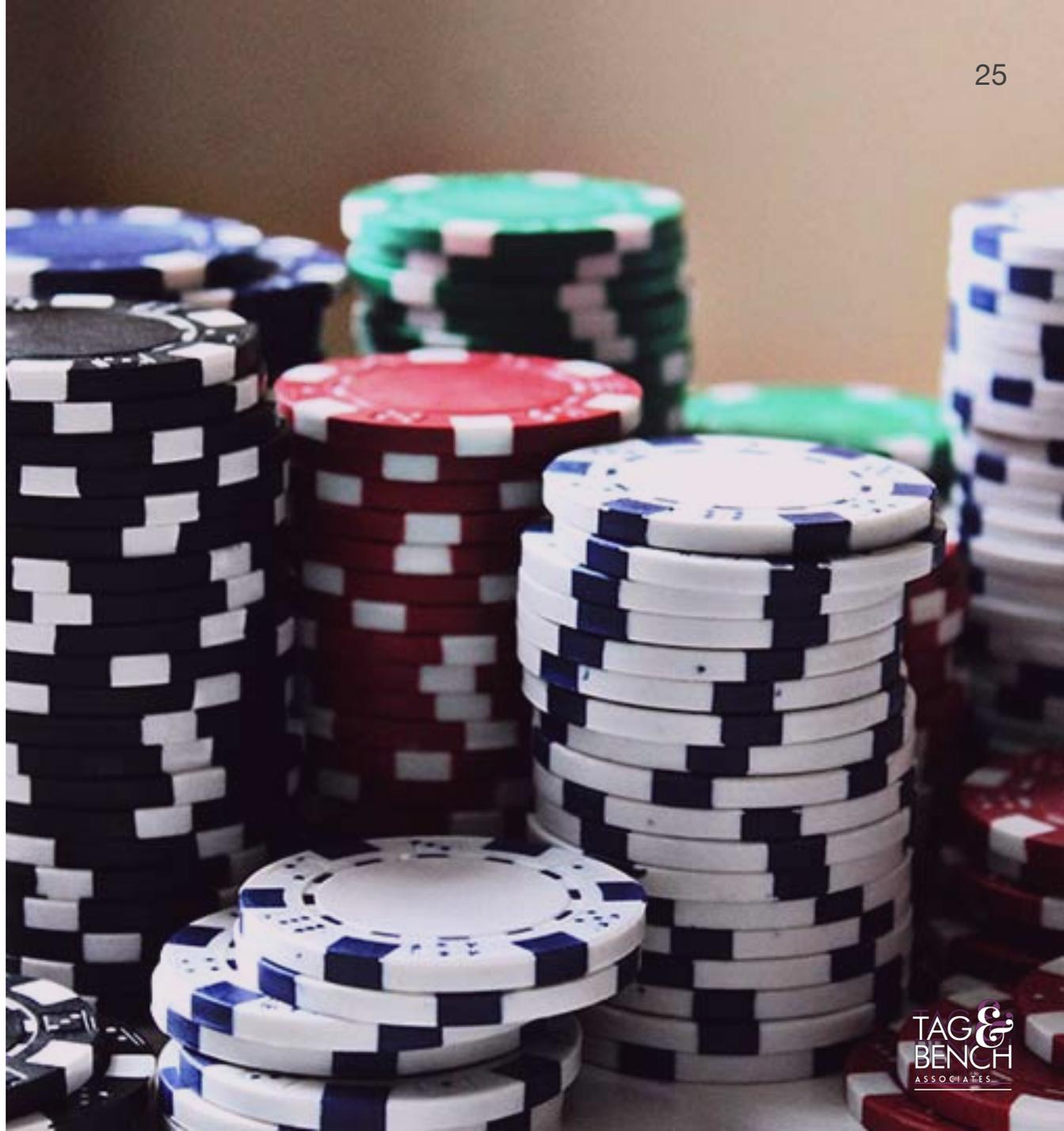
Position of Various Online Games

Fantasy Sports.

- Dream 11, a fantasy gaming website becoming India's gaming first unicorn is a testament to the fact that online fantasy sports is gaining momentum in the country.
- Courts believe whether a fantasy sport is a game of chance or a game of skill is to be decided on the working of the games.
- In Varun Gumber v. Union Territory of Chandigarh, the Punjab and Haryana High Court, 2017, (4) RCR (Criminal) 1047 held that the games offered by Dream11 were 'games of skill'.
- Later, in Gurdeep Singh Sachar v. Union of India, Criminal PIL Stamp No. 22 of 2019 the Bombay High Court held that the fantasy sports offered by the platform were 'games of skill'. The Courts were of the opinion that these games involved the use of *considerable skill, judgement and discretion by the users*, since they had to assess the strengths and weaknesses of the players.
- As per the Court, it was primarily the assessment of the user which determined the success or failure of fantasy sports games.
- Rajasthan High Court also upheld the validity of fantasy sports as a game of skill in Chandesh Sankhla v. State of Rajasthan (Judgment dated 14th February 2020 in D.B.C.W.P. No. 6653 of 2019.)

Casino Games.

- Most of the casino games are predominantly based on chance, they are treated as betting and gambling activities and are prohibited under the laws of most of the states.
- The legislation in Sikkim has laid down games such as Roulette, Casino Brag and Blackjack as games of skill. A license needs to be obtained for offering these games through the state wide intranet, to be offered only within the State of Sikkim.
- The License is initially granted for 5 years at very high fee of INR 10 Lakhs per game per annum for first 3 years and INR 25 Lakhs for a banquet of games + 0.5% gross royalty then INR 20 Lakhs and INR 50 Lakhs for the next 2 years.



Social Games.

- The games which do not offer any prize money are referred to as social games, generally, such games are not considered as gambling under the acts regulating gaming.
- Intellectual property laws, IPC, Indecent Representation of Women (Prohibition) Act, 1986 or the IT can be used by the authorities to take action against such games.



Lotteries

- State Governments are empowered to organise, conduct and promote lotteries under the Lotteries (Regulation) Act, 1998 and the Lotteries (Regulation) Rules, 2010.
- Physical lotteries are banned in certain states such as Madhya Pradesh, while states like Sikkim regulate physical lotteries.
- Legislations in states like Punjab provide for online lotteries.
- Private lotteries have been prohibited under Section 294A of the Indian Penal Code, 1860.
- States like Andhra Pradesh, Gujarat, Karnataka and Maharashtra have repealed the IPC section and have enacted their own legislation prohibiting all kinds of private lotteries except non-profit lotteries.

Poker.

- The position of Poker in India is mixed.
- States like West Bengal, Nagaland and Sikkim consider it as a game of skill, while the High Court of Karnataka in *Indian Poker Association v. State of Karnataka*, 2013 SCC Online KAR 8536 held that Poker, if played as a game of skill does not require a license under the Karnataka Police Act, 1963.
- Courts in States of Gujarat and Maharashtra, Poker is a game of chance and is considered as a gambling activity in these states.

Experts claim that poker is largely a game of skill as people require certain qualities like agility, analytical skills, etc to win poker games. Additionally, the online gaming industry is currently developing algorithms for card shuffling, etc. that would help remove the aspect of chance in game.

Legislations Regulating Online Gaming Websites

State Legislations Governing Online Gaming Websites

The Sikkim Online Gaming (Regulation) Act, 2008

- First Indian legislation to expressly permit and regulate online gaming. The License under this Act, legitimises *Roulette, Black Jack, Pontoon, Punto Banco, Bingo, Casino Brag, Poker, Poker Dice, Baccarat, Chemin-de-for, Backagammon, Keno, Super Pan 9, sports betting on games* (prediction of the results of the sporting events and placing a bet on the outcome), either in part or in whole, of such sporting event, and including football, cricket, lawn tennis, chess, gold, horse-racing, etc.
- License restricted to offering online games and sports games to the physical premises of 'gaming parlours' through intranet gaming terminals within the geographical boundaries of the State.

Nagaland

- Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 regulates online gaming websites.
- The Act defines gambling as an act of wagering or betting on games of chance but does not include betting or wagering on games of skill.
- The Act defines games of skill to “include all games where there is preponderance of skill over chance, including where the skill relates to strategizing the manner of placing wagers or placing bets or where the skill lies in team selection or selection of virtual stocks based on analysis or where the skill relates to the manner in which the moves are made, whether through deployment of physical or mental skill and acumen”.
- The Act lays down that the following games are games of skill: *Chess, Sudoku, Quizzes, Binary Options, Bridge, Poker, Rummy, Nap, Spades, Auction, Solitaire, Virtual Golf, Virtual racing games, including virtual horse racing, virtual car racing, etc., Virtual sports, including virtual soccer, virtual cricket, virtual archery, virtual snooker/ bridge/ pool, Virtual fighting, Virtual wrestling, Virtual boxing, Virtual combat games, Virtual adventure games, Virtual mystery and detective games, Virtual stock/ monopoly games, Virtual team selection games, Virtual Fantasy Games*
- Further, Explanation to Section 2(3) lays down that games *which have been declared as games of skills by Indian and International Courts or Statutes* would be considered as games of skill.
- The Act permits parties to obtain license for online gaming websites.
- The license obtained under this Act would be applicable throughout India except in the states expressly prohibiting betting/wagering of any sort like Assam, Orissa, Telangana and Gujarat.

Telangana

- The State of Telangana has expressly prohibited gambling as a whole, both online and offline through Ordinances date June and July, 2017.
- As per the first Ordinance games of skills which have part element of chance cannot be termed as 'skill games' this contravenes with the judgements of the Supreme Court in cases like Andhra Pradesh v. K. Satyanarayan (AIR 1968 SC 825).
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- Online gaming is an offence in the state. The second Ordinance removed the exception of games of skill altogether.

These ordinances were enacted with the object of implementing "a policy of zero tolerance against gambling which has serious impact on the financial status and well-being of the common public".

Information & Technology Act 2020

- The statutes are silent on online gaming, which requires reliance on the Information Technology Act for curbing/regulating offences related to online activity. The Information Technology Act does not particularly mention online gambling.
- The regulator rely on the powers provided under the IT Act to block certain websites to prevent people from accessing them. Sections 67 and 69-A of the Technology Act, empower the regulator to take necessary steps to curb gambling and betting activities on the ground that these activities tend to deprave and corrupt people.

Since gambling is not defined in the IT Act, it becomes a little difficult to take action against foreign betting websites which are hosted in countries where gambling is legal.

Common Gambling Houses

- States of Orissa and Assam, have prohibited gaming for money;
- most of the state legislations prohibit gambling, prohibit betting or wagering agreements which take place in common gambling houses.

These houses are basically an enclosed physical premise (like a house or a tent) where instruments of gaming are kept or used for the purpose of profit or gain to the person owning or occupying such a physical premise. Additionally, some profit or gain must be made by charging people for using the enclosed premises or instrument of gaming.

In the case of digital gambling, people access online gambling websites from their house, which does not fit within the definition of a “common gaming house”. But, online websites often take money for providing an online medium to play games, which puts them in the ambit of profiteering from providing and maintaining Common Gaming Houses.

Does this make online gaming platforms Common Gaming Houses?

Law Commission – legal framework on gambling and sports betting in India

The Supreme Court in *Cricket Control in India v. Cricket Association of Bihar & Ors.* (2016) 8 SCC 535 asked the law commission to look into the matter of legalising gambling in India, as suggested by the Lodha Committee.

The law commission in its report in July, 2018, emphasized that betting and gambling in India should be banned, since one-thirds of the Indian population was living below the poverty line, and gambling activities might lead to extreme financial losses.

It also highlighted the benefits of legalizing gambling in India such as regulation of money laundering and fraud, and providing support to the tourism and IT industry in the country.

The report took into consideration that prohibition of online gambling might not be successful due to the transnational character of the online platforms. It also highlighted that since there was a large potential of gambling online the Government must take into consideration the possible loss of revenue and employment generation which could be caused due to the ban on online gambling.





Conclusion

- Economy needs to bounce back after the massive set back the world has seen;
- It is “*all hands on the deck situation*”;
- Gaming, online gaming could be a big contributor towards taking the growth much desired;
- In India, the sector is patchily regulated, it is an opportunity to regulate it and harness the potential;
- Do we see it as tech and will we do it as skillfully as rest of e-commerce?

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