

**2019 SCC OnLine Bom 13059 : (2020) 72 GSTR 75 : (2019) 30
GSTL 441 : (2019) 3 AIR Bom R (Cri) 467**

In the High Court of Bombay

(BEFORE RANJIT MORE AND BHARATI H. DANGRE, JJ.)

Gurdeep Singh Sachar ... Appellant

Versus

Union of India and Others ... Respondent

Criminal Public Interest Litigation Stamp No. 22 of 2019.

Decided on April 30, 2019

Dr. Sujay Kantawala instructed by *Sarosh Damania* for the petitioner.

Vikram Nankani, Senior Advocate with *Lavesh Nankani*, *Ramnath Prabhu* and *Prithviraj* instructed by *Nikhil Rungta* for respondent No. 3.

Ms. Sangeeta D. Shinde, APP for the State.

The judgment of the court was delivered by

RANJIT MORE J.—Rule. Rule is made returnable forthwith and, by consent, the matter is heard finally.

2. Heard Dr. Kantawala, learned counsel for the petitioner and Mr. Nankani, learned senior counsel for respondent No. 3.

3. The petitioner claims himself as a public spirited advocate practising in this High Court, and seeks directions to initiate criminal prosecution against respondent No. 3—a company named "Dream 11 Fantasy Pvt. Ltd.", firstly for allegedly conducting illegal operations of gambling/betting/wagering in the guise of online fantasy sports gaming, which as per the petitioner shall attract penal provisions of the Public Gambling Act, 1867, and secondly for alleged evasion of Goods and Services Tax (GST) payable by it by violating the provisions of Goods and Services tax Act and the rule 31A of the CGST Rules, 2018.

4. The petitioner has placed on record a copy of the print-out taken from the web-site of respondent No. 3 for giving the details and manner of selecting virtual teams and playing free or paid online fantasy games on internet on the web-site of respondent No. 3. It is the case of the petitioner that players can create different virtual teams for playing fantasy games.

Admittedly, for understanding and getting a know-how of the game, option to play for free is also available on the website. He, however, claims that the fantasy games are such that after some time people tend to pay with their hard earned money, instead of playing for free. According to him, these fantasy games are nothing but means to lure people to spend their money for quick earning by taking a chance, and

most of them end up losing their money in the process, which is thus gambling/betting/wagering, being different forms of "gambling". According to his belief, a fantasy game of this nature is merely a game of chance or luck, which is totally dependent upon the luck of a player on a particular day. He further claims that upon entering in various contests and putting alleged bet money in them, the player receives a tax invoice in which tax is being charged only on the amount received and retained by respondent No. 3 towards platform fee say 20 per cent., and not on the entire money which is put a stake by the player. For the balance 80 per cent. amount only "acknowledgement" is given. Admittedly, this "acknowledgement" amount collected from each player is pooled in an escrow account and their contribution ultimately gets distributed amongst the players themselves as prize money immediately upon conclusion of game, as a result of which, some players get more than their contribution, and some lose money. According to the petitioner, since these activities are nothing but "gambling" or "betting" even if this acknowledgement amount is separately kept in an escrow account and not retained by respondent No. 3, GST would be payable even on this amount. However, since GST is not being paid on this "acknowledgement" amount by respondent No. 3 and since the activities such as those being conducted by respondent No. 3, are nothing but "betting" or "gambling", the same according to the petitioner shall be governed by rule 31A(3) of the CGST Rules, 2018. According to him, like horse racing the said rule shall apply even in such fantasy games amounting to gambling and/or betting and/or wagering, and thus GST shall be payable on 100 per cent. amount collected by the respondent No. 3, which shall be under proper classification so as to pay tax at 28 per cent. instead of at 18 per cent. The petitioner in effect submits that the activities of respondent No. 3 is nothing but "gambling"/"betting", and for promoting gambling/betting and for evading payment of CGST/IGST, suitable action shall be taken for criminal prosecution of the said respondent No. 3.

5. At the outset, it is submitted on behalf of respondent No. 3 that the main issue raised by the petitioner is substantially decided in a judgment dated April 18, 2017 passed by the honourable Punjab and Haryana High Court, in another such petition filed against respondent No. 3, which is also referred in the petition. Admittedly, the said judgment dated 18th April, 2017, records the introduction of Dream 11—the online gaming platform of respondent No. 3 for online fantasy sports games, and gives in detail the activities carried out on their platform. After detailed consideration of the facts as well as law, the honourable Punjab and Haryana High Court categorically held that success in Dream 11's Fantasy Sports basically arises out of user

exercise of superior knowledge, judgment and attention thus as per their skill ; and that their fantasy games are exempt from the application of the penal provisions, in view of section 18 of 1867 Act, and held that they have protection guaranteed under article 19(1)(g) of the Constitution of India. A SLP against this judgment of Punjab and Haryana High Court was admittedly dismissed by the honourable Supreme Court vide order dated September 15, 2017. Despite this admitted position, the petitioner effectively seeks to reopen not only the issue decided therein, but also seeks to reopen a judgment of three judges Bench of the honourable Supreme Court in Dr. K. R. Lakshmanan v. State of Tamil Nadu [1996] 86 Comp Cas 66 (SC) ; [1996] AIR 1996 SC 1153 which was relied upon by the Punjab and Haryana High Court to hold that since success in Dream 11's fantasy sports basically arises out of user's exercise of superior knowledge, judgment and attention, it is a game of skill and not a game of chance. The three judges bench of the honourable apex court held that the "horse racing" is not gambling, and is a game of skill, nor of mere chance. The petitioner erroneously claims that these judgment are per incurium. It is the case of respondent No. 3 that such frivolous and misconceived petitions are being filed by targeting them before different forums in the guise of PILs, and even the present petition is abuse of process of law, and each of the petitioner's claim for seeking criminal prosecution of respondent No.3 is on such frivolous grounds, which lack in bona fide and merits. In the written submissions tendered on behalf of respondent No. 3, it is also contended that the online fantasy sports gaming conducted by it is predominantly game of skill, where users/participants create virtual teams comprising as many players as in real life teams, e.g., in cricket, he creates team of 11 real players out of the 30 probables, for upcoming matches. There has to be a mix of players from both the competing teams between whom the real life matches being played. The users/participants compete against such virtual teams created by other users/participants. The winners are decided based on points scored, using statistical data generated by the real-life performance of the players on the ground. Further, the deadline to create a team is latest by the official match start time. No changes can be made after the deadline. The participants do not bet on the outcome of the match and merely play a role akin to that of selectors in selecting the team. The points are scored by the participants for the entire duration of the whole match and not any part of the match. Their online fantasy sports gaming are "games of skill" and not any "games of chance" and therefore outside the purview of rule 31A(3). It was submitted that present PIL is gross abuse of the process of the court and ought to be dismissed in the light of the judgment of the honourable Supreme Court in State of Uttaranchal v.

Balwant Singh Chaufal (2010) 3 SCC 402.

6. After perusing the records and considering the arguments, there are mainly two issues which arise for consideration :

(a) Whether the activities of respondent No. 3 amount to "gambling" or "betting" ?

(b) Whether there is any merit in the allegation of violation of rule 31A(3) of the CGST Rules, 2018 and erroneous classification ?

7. In respect of the first issue, after considering the very same activities of respondent No. 3 at considerable length, it has already been held by the Punjab and Haryana High Court that the activities performed by the respondent No. 3 do not amount to "gambling", even as per the Public Gambling Act, 1867. Respondent No. 3 refers and relies on the findings contained in the said judgment. Admittedly, SLP filed thereagainst has been dismissed. The Punjab and Haryana High Court has categorically held that these are games of skill and not games of chance. Various judgments have been referred and relied upon in the said judgment. There is no reason to take a different view. The Punjab and Haryana High Court has relied upon a three judges Bench decision of the honourable apex court in Dr. K. R. Lakshmanan v. State of Tamil Nadu [1996] 86 Comp Cas 66 (SC) ; [1996] AIR 1996 SC 1153 ; (1996) 2 SCC 226, wherein it was held as under (pages 74, 75 and 81-83 in 86 Comp Cas) :

"9. On the same day when this court decided in State of Bombay v. R. M. D. Chamarbaugwala, AIR 1957 SC 699, the same four-Judge Bench presided over by S. R. Das, Chief Justice, delivered judgment in another case between the same parties titled R. M. D. Chamarbaugwala v. Union of India, AIR 1957 SC 628. The validity of some of the provisions of the Prize Competitions Act (42 of 1955) was challenged before this court by way of petitions under article 32 of the Constitution. Venkatarama Ayyar J. speaking for the court, noticed the contentions of the learned counsel for the parties in the following words (page 630) :

'Now, the contention of Mr. Palkhiwala, who addressed the main argument in support of the petitions, is that prize competition as

defined in section 2(d) would include not only competitions in which success depends on chance but also those in which it would depend to a substantial degree on skill ;. .. that even if the provisions could be regarded as reasonable restrictions as regards competitions which are in the nature of gambling, they could not be supported as regards competitions wherein success depended to a substantial extent on skill, and that as the impugned law constituted a single inseverable enactment, it must fail in its entirety in respect of both classes of competitions. Mr. Seervai.

who appeared for the respondent, disputes the correctness of these contentions. He argues that "prize competition", as defined in section 2(d) of the Act, properly construed, means and includes only competitions in which success does not depend to any substantial degree on skill and are essentially gambling in their character ; that gambling activities are not trade or business within the meaning of that expression in article 19(1)(g), and that accordingly the petitioners are not entitled to invoke the protection of article 19(6); and that even if the definition of "prize competition" in section 2(d) is wide enough to include competitions in which success depends to a substantial degree on skill and sections 4 and 5 of the Act and rules 11 and 12 are to be struck down in respect of such competitions as unreasonable restrictions not protected by article 19(6), that would not affect the validity of the enactment as regards the competitions which are in the nature of gambling, the Act being severable in its application to such competitions.'

The learned judge thereafter observed as under (page 631) :

'We must hold that as regards gambling competitions, the petitioners before us cannot seek the protection of article 19(1)(g). ..

(5) As regards competitions which involve substantial skill, however, different considerations arise. They are business activities, the protection of which is guaranteed by article 19(1)(g).. .'

Finally, Venkatarama Ayyar, J. speaking for the court, held as under (page 637) :

'(23) Applying these principles to the present Act, it will not be questioned that competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clear cut as that between commercial and wagering contracts. On the facts there might be difficulty in deciding whether a given competition falls within one category or not ; but when its true character is determined, it must fall either under the

one or the other. The distinction between the two classes of competitions has long been recognised in the legislative practice of both the United Kingdom and this country, and the courts have, time and again, pointed out the characteristic features which differentiate them. And if we are now to ask ourselves the question would Parliament have enacted the law in question if it had known that it would fail as regards competitions involving

skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be. The conclusion is, therefore, inescapable that the impugned provisions, assuming that they apply by virtue of the definition in section 2(d) to all kinds of competitions, are severable in their application to competitions in which success does not depend to any substantial extent on skill.'

This court, therefore, in the two State of Bombay v. R. M. D. Chamarbaugwala, AIR 1957 SC 699 and R. M. D. Chamarbaugwala v. Union of India, AIR 1957 SC 628, has held that gambling is not trade and as such is not protected by article 19(1)(g) of the Constitution. It has further been authoritatively held that the competitions which involve substantial skill are not gambling activities. Such competitions are business activities, the protection of which is guaranteed by article 19(1)(g) of the Constitution. It is in this background that we have to examine the question whether horse-racing is a game of chance or a game involving substantial skill.

19. We may now take-up the second question for consideration. Section 49 of the police Act and section 11 of the Gaming Act specifically provide that the penal provisions of the two Acts shall not apply to the games of 'mere skill wherever played'. The expression 'game of mere skill' has been interpreted by this court to mean 'mainly and preponderantly a game of skill'. In State of Andhra Pradesh v. K. Satyanarayana (1968) 2 SCR 387, the question before this court was whether the game of rummy was a game of mere skill or a game of chance. The said question was to be answered on the interpretation of section 14 of the Hyderabad Gambling Act (2 of 1305 F) which was pari materia to section 49 of the Police Act and section 11 of the Gaming Act. This court referred to the proceedings before the courts below in the following words (at page 827 of 1968 AIR) :

'The learned magistrate who tried the case was of the opinion that the offence was proved, because of the presumption since it was not successfully repelled on behalf of the present respondents. In the order making the reference the learned sessions judge made two

points : He first referred to section 14 of the Act which provides that nothing done under the Act shall apply to any game of mere skill wherever played and he was of opinion on the authority of two cases decided by the Madras High Court and one of the Andhra High Court that the game of rummy was a game of skill and, therefore, the Act did not apply to the case.'

This court held the game of rummy to be a game of mere skill on

the following reasoning at page 828 :

'We are also not satisfied that the protection of section 14 is not available in this case. The game of rummy is not a game entirely of chance like the "three-card" game mentioned in the Madras case to which we were referred. The "three card" game which goes under different names such as "flush", "brag", etc., is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that rummy is a game of chance and there is no skill involved in it.'

20. The judgments of this court in the two State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699 and R. M. D. Chamarbaugwala v. Union of India, AIR 1957 SC 628 and in the Satyanarayana case (1968) 2 SCR 387, clearly lay-down that (i) the competitions where success depends on a substantial degree of skill are not 'gambling' and (ii) despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of 'mere skill'. We, therefore, hold that the expression 'mere skill' would mean substantial degree or preponderance of skill."

8. The petitioner himself admits that in the "How to Play" link of the website, the steps to start playing are as follows :

"Follow these 5 easy steps to get started* :

* Select A Match :

Select any of the upcoming matches from any of the current or upcoming cricket series.

* Create your team :

Use your sports knowledge and showcase your skills to create your Dream 11 team within a budget of 100 credits.

* Join a contest :

Join any Dream 11 free or cash contest to win cash and the ultimate bragging rights to show off your improvement in the free/skill contest on dream 11.

* Follow the match :

Watch the real match and track you fantasy scorecard (updated

every two minutes)

* Withdraw your winnings :

Instantly withdraw your winning from your Dream 11 account (One Time Verification required)."

9. The petitioner has relied upon the definition of "betting or gambling" in the Finance Act, 1994 as contained in definition in section 65B(15) thereof, as follows :

"S. 65B. Interpretations :. . . .

(15) 'Betting or gambling' means putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring."

It is evident that the expressions "betting" or "gambling" were used interchangeably in section 65B(15) of the Finance Act, 1994. Again the test applicable was whether it was a game of chance or game of skill. Only if the result of the game/contest is determined merely by chance or accident, any money put on stake with consciousness of risk and hope to gain, would be "gambling" or "betting". There is no merit in the submission that the result of their fantasy game/contest shall be considered as merely by chance or accident notwithstanding involvement of substantial skill. The petitioner claims that the result would depend largely on extraneous factors such as, who amongst the players actually play better in the real game on a particular day, which according to the petitioner would be a matter of chance, howsoever skilful a participant player in the online fantasy game may be. The petitioner has lost sight of the fact that the result of the fantasy game contest on the platform of respondent No. 3, is not at all dependent on winning or losing of any particular team in the real world game. Thus, no betting or gambling is involved in their fantasy games. Their result is not dependent upon winning or losing of any particular team

in real world on any given day. In these circumstances, there is no plausible reason to take a contrary view than that taken by the honourable Punjab and Haryana High Court, which judgment has already been upheld by the honourable Supreme Court in the SLP filed against respondent No. 3 itself. Moreover, the said issue is also covered by a judgment of three judge Bench of the honourable Supreme Court, to which detailed reference is made in the order of the honourable Punjab and Haryana High Court. It is thus clear that the activity of respondent No. 3 do not amount to "gambling" or "betting" or "wagering" even if the definition contained in the Finance Act, 1994 is taken into consideration.

10. The allegation of the petitioner regarding GST evasion or erroneous classification is also directly based on the outcome of the above first issue. Only, if their online fantasy sports gaming is "gambling" or "betting", there is a scope to infer possibility of any tax evasion.

11. In this context, meaning of the expressions "supply" and "consideration" and Explanatory Notes to Classification 998439 would be relevant. Section 7 of CGST Act defines the scope of the expression "supply". It reads as under :

"7. Scope of supply.—(1) For the purposes of this Act, the expression 'supply' includes— . .

(2) Notwithstanding anything contained in sub-section (1)—

(a) activities or transactions specified in Schedule III ; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services".

12. The said Schedule III referred in section 7(2) of the Act reads as under :

"Schedule III

[See section 7]

Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

1 to 5.. ..

6. Actionable claims, other than lottery, betting and gambling."

13. Thus, the activities mentioned in Schedule III under the CGST Act are not taxable as the same are neither "supply" of goods nor "supply" of services. The entry in Schedule III relevant for the instant case is entry 6 which includes actionable claims, other than lottery, betting and gambling.

14. In the instant case, admittedly, there is no dispute that the amounts pooled in the escrow account is an "actionable claim", as the same is to be distributed amongst the winning participating members as per the outcome of a game. But, as held hereinabove since the activities of respondent No. 3 do not amount to lottery, betting and gambling, the said actionable claim would fall under entry 6 of the Schedule III under section 7(2) of the CGST Act. Therefore, this activity or transaction pertaining to such actionable claim can neither be considered as supply of goods nor supply of services, and is thus clearly exempted from levy of any GST.

15. Thus, there is no merit in the submission that the entire deposit received from the member is taxable. It is also erroneously contended that even this amount shall be included in the definition of expression "consideration" as per section 2(31) of the Act, which reads as under :

"(31) 'consideration' in relation to the supply of goods or services or both includes—

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government ;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government :

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply."

The scope of definition of "consideration" extends only in relation to "the supply of goods or services or both". Since, the said activity or transaction relating to the actionable claim qua the amounts of participants pooled in escrow arrangement, for which only acknowledgement is given, is neither supply of goods nor supply of services, the same is clearly out of the purview of the expression "consideration".

16. Since the CGST Act itself do not allow the imposition of tax on such "actionable claim" in relation to the online fantasy sports gaming of respondent No. 3, it being other than lottery, betting and gambling, the said rule 31A(3) of the CGST Rules, 2018 cannot be read in such a manner so as to override the parent CGST Act. The said rule 31A(3) reads as under :

"31A. Value of supply in case of lottery, betting, gambling and horse racing.—.. .

(3) the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100 per cent. of the face value of the bet or the amount paid into the totalisator."

Since the actionable claim in the online fantasy sport gaming of respondent No. 3 are amongst such actionable claims as per Schedule III and section 7(2) of the Act, which are not considered as "supply of goods" or "supply of services", rule 31A has no

application. Moreover, actionable claim referred to in rule 31A is limited to only activities or transactions in the form of chance to win in "lottery" or "betting" or "gambling" or "horse racing in a race club". Thus, rule 31A which is restricted only to such four supplies of actionable claim, has no application in this case.

17. It is further claimed by the petitioner that respondent No. 3 is liable to levy GST at 28 per cent., however, respondent No. 3 wrongfully, to evade tax, claims classification under entry 998439 on the sum received by it as platform fees. Even this submission is wholly misconceived. The "Explanatory Notes" to the said classification under entry 998439 read as follows :

"Explanatory Notes to the Scheme of Classification of Services :
998439 Other on-line content n.e.c.

This Service Code includes games that are intended to be played on the internet such as role-playing games (RPGs), strategy games, action games, card games, children's games : Software that is intended to be executed on-line, except game software, mature theme, sexually explicit content published or broadcast over the internet including graphics, live feeds, interactive performances and virtual activities ; content provided on web search portals, i.e., extensive database of internet addresses and content in an easily searchable format ; statistics or other information, including streamed news ; other non-line content not included above such as greeting cards, jokes, cartoons, graphics, maps.

Note : Payment may be by subscription, membership fee, pay-per-play or pay-per-view.

This Service Code does not include :

- software downloads cf. 998434
- on-line gambling services, cf. 999692
- adult content in on-line newspapers, periodicals, books, directories, cf 998431." (emphasis supplied)

The said entry, as clarified in these Explanatory Notes, evidently covers host of online games which are intended to be played on the internet and involve payment by subscription, membership fee, pay-per-play or pay-per view. The said entry however excludes on-line gambling services. Since the online fantasy sports gaming of respondent No. 3 are not gambling services, respondent No. 3 is not in error in paying GST under this entry for its on-line gaming activities, by paying applicable GST at 18 per cent.

18. The authorities have therefore not taken any coercive steps against respondent No. 3, and rightly so. No case for issuing any directions is made out. It is seen that the entire case of the petitioner is wholly untenable, misconceived and without any merit. It can be seen

that success in Dream 11's fantasy sports depends upon 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 particular day. It is undoubtedly a game of skill and not a game of chance. The attempt to reopen the issues decided by the Punjab and Haryana High Court in respect of the same online gaming activities, which are backed by a judgment of the three judges bench of the apex court in Dr. K.R. Lakshmanan [1996] 86 Comp Cas 66 (SC) ; [1996] AIR 1996 SC 1153, that too, after dismissal of SLP by the apex court is wholly misconceived.

19. Rule discharged. The criminal PIL is dismissed. No order as to costs.

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