2021 SCC OnLine Mad 2762 : (2021) 5 Mad LJ 625 : (2021) 5 CTC 241 : AIR 2021 Mad 252 : (2021) 4 LW 97

In the High Court of Madras

(BEFORE SANJIB BANERJEE, C.J. AND AND SENTHILKUMAR RAMAMOORTHY, J.)

Junglee Games India Private Limited Represented by its Authorized Representative Rahul Nandkumar Bhardwaj and Another ... Petitioners;

Versus

State of Tamil Nadu Through Chief Secretary and Others ... Respondents.

W.P. Nos. 18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021 and W.M.P. Nos. 22409, 22411, 23962, 22389, 22391, 23398, 22400, 22370, 22372, 22373, 22374, 22404, 22408, 23964, 23965, 23969, 23970, 23971 of 2020, 7968, 7976 and 7983 of 2021

Decided on August 3, 2021, [Reserved On : 26.07.2021]

Advocates who appeared in this case:

For Petitioners in W.P. Nos. 18022, 18029 and 18044 of 2020 : Mr. A.K. Ganguli, Sr. Advocate & Mr. P.S. Raman, Sr. Advocate for M/s. Sashidhar Sivakumar, Pavitra V, Potharaju Ashutosh along with Mr. Bobby Chandhoke, Vaibhav Kakkar, Akhil Anand, Durga Bose Gandham, Siddharth Barua, Parth Agarwal, Praful Jindal, Ms. Lakshana Viravalli and Maithreyi Canthaswamy Sharma, Advocates

For Petitioners in W.P. Nos. 19374 and 19380 of 2020 : Dr. Abhishek Manu Singhvi, Senior Advocate and Mr. Mohan Parasaran, Senior Advocate along with Mr. Suhaan Mukherji, Mr. Varun Mathew, Mr. Nikhil Parikshith, Mr. L. Nidhiram Sharma, Mr. Ashwin Kumar, Mr. Arun Karthik Mohan and Ms. Ashwini Vaidialingam, Advocates

For Petitioners in W.P. Nos. 7354 and 7356 of 2021 : Mr. C. Aryama Sundaram Senior Advocate for M/s. Rahul Unnikrishnan

For Petitioner in W.P. No. 13870 of 2021 : Mr. Jay Sayta, Mr. Akshat Gupta and Mr. Adhithya Reddy, Advocates

For Respondents in all writ petitions : Mr. R. Shunmugasundaram Advocate-General assisted by Ms. Shabnam Banu, Advocate for the State

PRAYER in W.P. No. 18022 of 2020 : Petition under Article 226 of the Constitution of India seeking issuance of a writ of certiorari or any other appropriate writ or order or directions to call for the records of Act 1 of 2021, Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021

dated February 25, 2021 published in government Gazette No. 123 and quash the same. (Prayer amended vide order dated 19.3.2021 made in WMP. No. 7966/2021 in WP.18022/2020) and batch cases

The Order of the Court was delivered by

SANJIB BANERJEE, C.J.:— The petitioners complain of an over-paternalistic stance taken by the State in bringing about sweeping amendments to an existing law that, according to the petitioners, infringe their fundamental rights and are otherwise unreasonable to the point of being manifestly arbitrary.

2. The challenge here is to Part II of the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 (Act 1 of 2021), by which the Tamil Nadu Gaming Act, 1930 was amended (hereinafter referred to as the Amending Act). Substantially the same amendments to the Act of 1930 had been previously incorporated in an Ordinance promulgated on November 21, 2020. Act 1 of 2021 came into effect upon it being gazetted on February 25, 2021. The matter also brings to the fore the risks of introducing an amendment to an enactment that predates not only the Constitution, but also the Government of India Act, 1935, which broadly spelt out the areas in which the provincial legislatures could legislate upon.

3. The Amending Act has been challenged, not only on the ground that it turns the original statute on its head, but also in its expansive definition of a word that has been judicially interpreted and, thus, the seemingly blatant attempt to bypass the law declared by courts, including the Supreme Court, by the legal fiction created in the definition. The challenge here is not so much to the legislative competence, but to the extent that a law may be made in respect of a field or allied fields indicated in an Entry in the State List. In effect, the Amending Act, or the relevant part of the Ordinance that preceded it in 2020, has incorporated certain provisions to enlarge the scope and effect of the Act of 1930.

4. The amended statute prohibits all forms of games being conducted in cyberspace, irrespective of the game involved being a game of mere skill, if such game is played for a wager, bet, money or other stake. Among others, the three major features of the Amending Act appear to be the enlargement of the inclusive definition of the word “gaming”; the introduction of Section 3-A in the Act to prohibit wagering or betting in cyberspace (though it actually does much more); and, the replacement of the substance of Section 11 of the Act that originally exempted games of “mere skill” from the application of the statute and its substitution by including games of mere skill also within the fold of offences under the statute, if such games are played for wager, bet, money or other stake.

5. The petitioners can be bunched into three distinct groups : those

involved in providing, inter alia, the card game of rummy on the virtual platform; those involved, inter alia, in offering poker in cyberspace; and, a private body which seeks to regulate diverse forms of games offered to be played on the internet in the country in which the other petitioners, who provide platforms for playing the games, are members. Five sets of counsel have put forward the submission on behalf of the petitioners. The primary ground urged to assail the impugned legislation is in it apparently prohibiting games of skill, if played for any prize or stakes; which, according to the petitioners, is in flagrant disregard of the law laid down by the Supreme Court that competitions in games of skill are business activities and, thus, protected under Article 19(1)(g) of the Constitution of India.

6. The State finds itself in the lonely, opposite corner, as it seeks to assert the virtues of life without betting and gambling, the immorality involved in gaming and the ill-effects of gambling on large swathes of the society, particularly those from the economically weaker and socially backward sections. The State claims that even suicides have taken place upon a punter losing his all by playing one card game or the other on the internet. The State refers also to the possibility and likelihood of manipulation in games conducted on the virtual mode and repeatedly alludes to players and others being cheated, without indicating any material or particulars in such regard despite the court's prodding.

7. It may do well to see the 1930 Act as it stood before the Ordinance was introduced in November, 2020, particularly the nature of the mischief that it sought to prevent and the exercise being confined to games predominantly of chance. The Statement of Objects and Reasons pertaining to the 1930 Act recorded as follows:

> "The Madras City Police (Amendment) Act, 1929 was designed to deal with bucket shops in the City of Madras. There is increasing evidence of the fact that bucket shops are springing up outside the municipal limits. In order to deal with them effectively and to consolidate the law on gaming and keeping common gaming-houses throughout the province, this Bill extends to the Presidency, with the exception of Madras City, those provisions of the Madras City Police Act, 1888, as amended by the Madras City Police (Amendment) Act, 1929, which deal with bucket shops. It also combines, in the same Bill, the provisions of the Madras City Police Act, 1888 and the Towns Nuisances Act, 1889, which relate to gaming and the keeping of a common gaming-house."

8. The expression "bucket shop" obviously referred to unauthorised facilities extended in public places for speculating in general and using the funds of unwitting investors. The "bucket shop" technique involves firms indulging in such activities to profit off their clients. In Britain,

the "bucket shop" would refer to a brokerage house dealing in securities and commodities, where the brokerage house would hold on to a customer's orders rather than execute the same in the hope that it could buy or sell the stock or commodity at a greater profit.

9. The definition Section in the 1930 Act, prior to the impugned amendment, defined a "common gaming-house", "gaming" and "instruments of gaming" quite differently than now and Section 4(1) of the 1930 Act made only certain activities punishable:

> "4. Penalty for opening etc., for certain forms of gaming.-
>
> (1) Whoever-
>
> (a) being the owner or occupier or having the use of any house, room, tent, enclosure, vehicle, vessel or place, opens, keeps or uses the same for the purpose of gaming -
>
> (i) on a horse-race, or
>
> (ii) on the market price of cotton, bullion or other commodity or on the digits of the number used in stating such price, or
>
> (iii) on the amount or variation in the market price of any such commodity or on the digits of the number used in stating the amount of such variation, or
>
> (iv) on the market price of any stock or share or on the digits of the number used in stating such price, or
>
> (v) on the number of registration or on the digits of the number of registration of any motor vehicle using a public place, or
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> (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
>
> (b) being the owner or occupier of any such house, room, tent, enclosure, vehicle, vessel or place knowingly or willfully permits the same to be opened, occupied, kept or used by any other person for the purpose of gaming on any of the objects aforesaid, or
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> (c) has the care or management of, or in any manner assists in, conducting the business of, any such house, room, tent, enclosure, vehicle, vessel or place opened, occupied, kept or used for the purpose of gaming on any of the objects aforesaid, or
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> (d) advances or furnishes money for the purpose of gaming on any of the objects aforesaid with persons frequenting any such house, room, tent, enclosure, vehicle, vessel or place, shall be punishable with imprisonment for a term which may extend to two years and with fine which may extend to five thousand rupees, but in the absence of special and adequate reasons to

the contrary to be mentioned in the judgment of the Court -

(i) such imprisonment shall not be less than three months and such fine shall not be less than five hundred rupees for a first offence;

(ii) such imprisonment shall not be less than six months and such fine shall not be less than seven hundred and fifty rupees for a second offence; and

(iii) such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees for a third and subsequent offences."

10. The remainder of Section 4 of the 1930 Act pertained to others involved in the prohibited acts of gaming and also stipulated the punishments for such incidental activities. The horse-racing aspect was included by way of an amendment which was notified much later. Horse -racing has been held by the Supreme Court to be a game of skill. However, the other activities indicated in sub-clauses (ii) to (v) of Section 4(1)(a) of the 1930 Act are games of pure chance. Residuary sub-clause (vi) also prohibits any transaction or scheme of wagering or betting where the outcome depends on chance. Thus, the mischief that the original statute sought to address was the betting on games of chance.

11. Section 11 of the 1930 Act, prior to its obliteration and substitution by the Ordinance of November, 2020 and the impugned Act of 2021, read as follows:

"11. Saving of games of skill.-

Nothing in sections 5 to 10 of this Act shall be held to apply to games of mere skill wherever played."

12. The prohibition under previous Section 4 of the Act confined gaming to games of chance as were specified and others by virtue of the residuary sub-clause (vi). It is in such milieu, since games of skill were not included in Section 4 of the Act, that the exemption in respect of games of skill indicated in Section 11 thereof covered the ancillary provisions in Sections 5 to 10 of the Act.

13. Apart from making changes in the definitions of "common gaming-house" and "instruments of gaming" to extend to computers and the world of cyberspace, the principal alterations introduced by the Ordinance and the succeeding Amending Act are found in the expansive meaning assigned to the word "gaming", the introduction of Section 3-A and the substitution of Section 11 of the Act of 1930:

"3. Definitions.— In this Act, unless there is anything repugnant in the subject or context,—

(a) ...

(b) "gaming" does not include a lottery, but includes any game

involving wagering or betting in person or in cyber space.

Explanation.— For the purposes of clause (b) and section 3-A, wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, including through electronic transfer of funds, in respect of any wager or bet, or any act which is intended to aid, induce, solicit or facilitate wagering or betting or such collection, soliciting, receipt, or distribution;"

"3-A. Wagering or betting in cyber space.—

(1) No person shall wager or bet in cyberspace using computers, computer system, computer network, computer resource, any communication device or any other instrument of gaming by playing Rummy, Poker or any other game or facilitate or organize any such wager or bet in cyberspace.

(2) Whoever wagers or bets in cyberspace using computers, computer system, computer network, computer resource, any communication device or any other instrument of gaming by playing Rummy, Poker or any other game or facilitates or organizes any such wager or bet in cyberspace, shall be punished with imprisonment which may extend to two years or with fine not exceeding ten thousand rupees or with both."

"11. Games of mere skill.— Notwithstanding anything contained in this Act, Sections 3A and Sections 5 to 10 shall apply to games of mere skill, if played for wager, bet, money or other stake."

14. Several other words and expressions relevant in the use of computers have been defined by referring to the respective meanings assigned to them in the Information Technology Act, 2000. In addition, the expression "cyber cafe" has been introduced in various provisions along with computers and related gadgets. The punishments for the offences in Sections 8, 9 and 12 have been enhanced and Section 13-B has been introduced pertaining to offences by companies. The Explanatory Statement for the Ordinance promulgated in November, 2020 makes out as follows:

"Gaming by means of cards, dice etc., in the form of betting or wagering has been banned in the cities of Chennai, Madurai, Coimbatore, Salem, Tiruchirappalli and Tirunelveli by the Chennai City Police Act, 1888 (Tamil Nadu Act III of 1888) read with Tamil Nadu Act 32 of 1987 and Tamil Nadu Act 51 of 1997 and in the rest of the State by the Tamil Nadu Gaming Act, 1930 (Tamil Nadu Act III of 1930). Playing games like Rummy, Poker etc., using computers or mobile phones, for money or other stakes, which are addictive in nature, have developed manifold, in the recent times. As a result, innocent people get cheated and incidents of suicide are

reported. In order to prevent such incidents of suicide and protect the innocent people from the evils of online gaming, it has been decided to ban wagering or betting in cyberspace by suitably amending the relevant enactments. Accordingly, the Government have decided to amend the Tamil Nadu Gaming Act, 1930 (Tamil Nadu Act III of 1930) and extend its application throughout the State for the purpose and to make consequential amendments to the Chennai City Police Act, 1888 (Tamil Nadu Act III of 1888) and the Tamil Nadu District Police Act, 1859 (Tamil Nadu Act XXIV of 1859).

2. The Ordinance seeks to give effect to the above decision."

15. According to the first set of petitioners that provides a platform for playing rummy on the virtual mode or in cyberspace, it is submitted that it is only a person who plays the game that can place a bet and no person not playing can bet on a game, or on its outcome, or on the successful player, or on anything else at all. Indeed, much submission has been made on the algorithms of some of the games offered online and the mode and manner of betting therein. In the context of the legal discussion necessary for the present purpose, the so-called checks and balances need not be gone into in great detail since the merit of the challenge to the impugned legislation is not impacted thereby.

16. The rummy companies contend that games of skill are distinct as a class and have been judicially differentiated in this country from games of chance. It is their submission that when the basis of the distinction is whether a game depends on chance or it depends on skill, the predominance test ought to be applied. They assert that the card game of rummy, per se, has been judicially recognised as a game of skill.

17. It is the further contention of such petitioners that the ageold distinction between skill and chance is vital and such distinction is imperative because, according to them, States do not have any legislative competence over games of skill, but may regulate games of chance. This, according to them, is a rational distinction that goes to the very root of competence. These petitioners suggest that when one is playing a game of skill, whether such game is played physically or virtually, it makes no difference. According to such rummy aficionados, only three major changes have been made to the existing statute : by including all virtual games in the fold of gaming; by specifically naming two card games; and, by excluding the existing exemptions. These petitioners submit that the amendments introduced are liable to be struck down on the grounds of lack of competence and unreasonableness. They also maintain that the amendments result in manifest arbitrariness as the prohibition introduced thereby is blanket, disproportionate and excessive. They say that in codifying exclusions, the State is more in the game of populism which is far removed from

the reality.

18. The rummy companies refer to excessive State policing and submit that the apprehension that citizens indulging in the activity which is sought to be prohibited would create an uncontrollable or chaotic jungle that the State cannot control, is a scare argument and the prohibition based on some imaginary apprehension cannot be upheld. They emphasise that there is a space for choice in the world and Part-III of the Constitution in this country merely recognises such rights as inhere in any human.

19. According to the first lot of petitioners, it matters little if one applies the stake or non-stake test, as it does not cure or benefit or improve the case at all. They suggest that the real test is whether the stakes are obtained as a result of chance or skill. According to them, Entry-34 in the Second List of the Seventh Schedule to the Constitution — "Betting and gambling" — is limited to the transfer of stake on chance only. They suggest that competitions limited to events of chance may even be prohibited by the State. However, these petitioners caution that one may not read up any Entry in the Lists to interpret it to say any more than it does in the ordinary sense, unless the word or words used in the Entry or the field described therein already carry a legal connotation.

20. The rummy petitioners refer to the kind of activities prohibited under Section 4(1)(a) of the Act prior to its amendment and submit that, apart from horse-racing which was notified in 1974 or thereabouts, the other prohibited activities clearly indicate that the emphasis of the enactment was to prevent gaming, where gaming was an activity dependent completely on chance. They also refer to Section 4-A that was inserted in 1975, at the same time that the prohibition of horse-racing was notified and submit that these statutory presumptions were relatable to the activities prohibited by Section 4(1) of the Act. These petitioners refer to the common thread of the activity of gaming running through the various provisions of the Act prior to its recent amendment and submit that right up to Section 11 of the Act and till its end, it is the game of pure chance that was prohibited.

21. In such context, these petitioners refer to the doctrine of *res extra commercium* as understood and judicially interpreted in this country to suggest that, like liquor, gambling may be regarded as immoral and, therefore, there may not be any absolute right to indulge in gambling, where gambling connotes an activity dependent overwhelmingly on chance. Such petitioners point out that the expression "games of mere skill", as contained in Section 11 of the Act prior to the recent amendment, was judicially interpreted to imply games predominantly involving skill. These petitioners concede that every future event depends, at least theoretically, on an element of

chance, but the activities understood as gaming involve almost no skill or the skill component is negligible.

22. On behalf of these petitioners, several of the provisions amended by the impugned Act are placed and the perceived anomalies therein demonstrated on the basis of the skill versus chance test. In particular, they refer to Sections 8 and 9 of the Act and the general philosophy of the impugned amendment that, regardless of a game or activity being wholly dependent on skill, if there is any bet or wager involved, it would constitute an offence within the meaning of the amended Act.

23. The rummy petitioners first refer to the two *Chamarbaugwala cases* decided by a Constitution Bench and the distinction brought out therein between a game of skill and a game of chance. In the first of the two cases cited, reported at AIR 1957 SC 699 (*State of Bombay* v. *R.M.D. Chamarbaugwala*), the issue involved was the rationale of declining the renewal of a licence to conduct a prize competition. The contention of the State before the Supreme Court was that there could be no business in promoting a prize competition and the violation of the writ petitioners' rights under Article 19(1)(g) of the Constitution did not arise. In the discussion on the validity of the Amending Act of 1952 that was before the Supreme Court, such court noticed that "Betting and gambling" as appearing in List-II in the Seventh Schedule to the Constitution was there in the Government of India Act, 1935. In the context of the definition of "prize competition" that included any competition in which the success did not depend to a substantial degree upon the exercise of skill, the Supreme Court referred to an English judgment that opined that even if a scintilla of skill was required for success the competition could not be regarded as of a gambling nature, but toned down the dictum and acknowledged that a game of substantial skill would not amount to gambling. The Supreme Court agreed with the proposition that "a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill." At paragraph 17 of the report, the court went on to say that a competition in which success does not depend to a substantial degree upon the exercise of skill "is now recognised to be of a gambling nature."

24. In the other *Chamarbaugwala case*, reported at AIR 1957 SC 628 (*R.M.D. Chamarbaugwala* v. *Union of India*), there is a more wholesome discussion on the skill versus chance aspect at paragraphs 3 to 6 of the report. The court also noticed that in the other *Chamarbaugwala* judgment it had held that "trade and commerce protected by Article 19(1)(g) and Article 301 are only those activities which could be regarded as lawful trading activities, that gambling is not trade but *res extra commercium* and that it does not fall within the purview of those Articles." Paragraph 5 of the report is of some

relevance:

> "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) and the question would have to be determined with reference to those competitions whether Sections 4 and 5 and Rules 11 and 12 are reasonable restrictions enacted in public interest. But Mr. Seervai has fairly conceded before us that on the materials on record in these proceedings, he could not maintain that the restrictions contained in those provisions are saved by Article 19(6) as being reasonable and in the public interest. The ground being thus cleared, the only questions that survive for our decision are *(1)* whether, on the definition of "prize competition" in Section 2(*d*), the Act applies to competitions which involve substantial skill and are not in the nature of gambling; and (*2*) if it does, whether the provisions of Sections 4 and 5 and Rules 11 and 12 which are, *ex concessi* void, as regards such competitions, can on the principle of severability be enforced against competitions which are in the nature of gambling."

25. At paragraph 10 of the report, the Supreme Court recorded the State's submission that the impugned Act in that case was relatable to Entry-34 in the State List. However, on an overall appreciation of the legislation, the court observed that by virtue of "the declared object (*of the Act*) and the wording of the statute, we are of opinion that the competitions which are sought to be controlled and regulated by the Act are only those competitions in which success does not depend to any substantial degree on skill." The principle is summarised at paragraph 23 of the report:

> "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. Nor does the

> restriction of the impugned provisions to competitions of a gambling character affect either the texture or the colour of the Act; nor do the provisions require to be touched and re-written before they could be applied to them. They will squarely apply to them on their own terms and in their true spirit and form a code complete in themselves with reference to the subject. 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."

26. The rummy petitioners next refer to a judgment reported at AIR 1968 SC 825 (*State of Andhra Pradesh* v. *K. Satyanarayana*), where it has been clearly held at paragraph 12 of the report that "it cannot be said that Rummy is a game of chance and there is no skill involved in it." Upon rendering such finding, the court agreed that the conviction against the respondents before it had been rightly set aside by the High Court. However, the court cautioned, in the same paragraph, as follows:

> "12. ... Of course, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of rummy or any other game played for stakes, the offence may be brought home. ..."

27. The next judgment cited by the rummy petitioners has also been copiously placed by the other lots of petitioners. It is necessary to dwell on such judgment reported at (1996) 2 SCC 226 (*Dr. K.R. Lakshmanan* v. *State of Tamil Nadu*) rendered by a three-member Bench. Paragraph 2 of the report sets out the questions that arose for consideration. These questions range from what amounted to gambling, to the meaning of the expression "mere skill", to whether horse-racing was a game of chance or a game of mere skill and whether wagering or betting on horse-races amounted to gaming as defined in the relevant statute. The court referred to the definition of "gambling" from *Black's Law Dictionary* (6th Ed) and opined that gambling amounted to the "payment of a price for a chance to win a prize." The court then referred to a game of chance being one that is determined entirely or in part by lot or by mere luck, like the throw of the dice, the turning of the wheel and the shuffling of the cards. The judgment reasoned that a game of skill may necessarily involve an element of chance, but the success therein would depend "principally upon the superior knowledge, training, attention, experience and adroitness of the player." By way of example, the court observed that golf, chess "and even rummy" were considered to be games of skill. The court referred to the *Chamarbaugwala cases* and the concept of gambling as enunciated therein before observing as follows at the end of paragraph 9 of the report:

> "9. ...
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> This Court, therefore, in the two *Chamarbaugwala cases*, 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. ..."

28. The Supreme Court went on to refer to how the expression "game of mere skill" in Section 11 of the same Act that now falls for discussion, prior to its amendment, had been interpreted in *K. Satyanarayana* to mean mainly and preponderantly a game of skill in the context of the game of rummy. Paragraphs 33 and 34 of the report have been placed several times as all the petitioners submit that in the light of such dictum rendered by the Supreme Court, the impugned Amending Act in this case has to be struck down:

> "33. The expression 'gaming' in the two Acts has to be interpreted in the light of the law laid down by this Court in the two *Chamarbaugwala cases*, wherein it has been authoritatively held that a competition which substantially depends on skill is not gambling. Gaming is the act or practice of gambling on a game of chance. It is staking on chance where chance is the controlling factor. 'Gaming' in the two Acts would, therefore, mean wagering or betting on games of chance. It would not include games of skill like horse-racing. In any case, Section 49 of the Police Act and Section 11 of the Gaming Act specifically save the games of mere skill from the penal provisions of the two Acts. We, therefore, hold that wagering or betting on horse-racing — a game of skill — does not come within the definition of 'gaming' under the two Acts.
>
> "34. Mr. Parasaran has relied on the judgment of the House of Lords in *Attorney General* v. *Luncheon and Sports Club Ltd.* [[1929] A.C. 400 : 1929 All ER 780] and the judgment of the Court of Appeal in *Tote Investors Ltd.* v. *Smoker* [(1967) 3 All ER 242 : [1967] 3 WLR 1239 : [1968] 1 Q.B. 509], in support of the contention that dehors Section 49 of the Police Act and Section 11 of the Gaming Act, there is no 'wagering' or 'betting' by a punter with the Club. According to him, a punter bets or wagers with the totalizator or the bookmaker and not with the Club. It is not necessary for us to go into this question. Even if there is wagering or betting with the Club it is on a game of mere skill and as such it would not be 'gaming' under the two Acts."

29. The court concluded, at paragraph 51 of the report, that horse-racing was neither gaming nor gambling as defined and envisaged

under the statutory provisions and, as such, held that the penal provisions of the statute would not be applicable to horse-racing, which was a game of skill.

30. A single Bench judgment of the Andhra Pradesh High Court reported at (1998) 5 ALD 126 (*Executive Club Formed by Lalitha Real Estates Pvt. Ltd.* v. *State of Andhra Pradesh*) has been brought to bear on what would amount to a game of skill to which the penal provisions of the relevant statute in Andhra Pradesh would not apply. Rummy was held to be a game of skill on the basis of the dicta in *K. Satyanarayana* and *K.R. Lakshmanan* and the concept of gambling in the *Chamarbaugwala cases*.

31. For similar purpose, a single Bench judgment reported at (2005) 1 ALD 772 (*Patamata Cultural and Recreation Society* v. *Commissioner of Police*) has been placed. Again, the wording in the gaming statute in Andhra Pradesh and the exclusion of a game of skill weighed with the court. The judgment also refers to an old Calcutta case reported at (1907) 6 Cri LJ 421 (*Hari Singh* v. *Emperor*) which interpreted the meaning of gaming in the relevant statute as follows:

> "If a game is one of skill, it is not an offence under the Gaming Act; if it is a game of mere chance, it is; where the chief element of a game is one of skill, the game is not an offence, although there is an element of chance in it."

32. The Andhra Pradesh judgment also notices a Division Bench judgment of the Calcutta High Court reported at AIR 1914 Cal 532 (*Ram Newaz Lal* v. *Emperor*) where a game of mere skill was understood to imply "pure skill, skill and nothing else." However, in the light of the dicta in *K. Satyanarayana* and *K.R. Lakshmanan*, a game of mere skill would be one where the success predominantly depends on skill though it may not depend only on skill.

33. Two other unreported judgments of the Andhra Pradesh High Court, an Order dated October 29, 2015 passed on W.P. No. 30597 of 2014; and, another Order dated September 9, 2011 passed on W.P. No. 24533 of 2011, have been cited for the proposition that rummy is a game of skill.

34. The next ground urged on behalf of the rummy petitioners pertains to the extent to which a degree of paternalism may be exercised by the State and the sense of morality that may be enforced in enacting a statute. These petitioners submit that on both counts, the statute must satisfy the test of reasonableness under Article 14 of the Constitution, it must not infringe the rights guaranteed under Article 19 of the Constitution and it must also conform to the modern rule of proportionality which is increasingly applied to assess both the appropriateness of administrative decisions and the validity of any impugned provision of law.

35. In such context, these petitioners first refer to a judgment reported at (2019) 3 SCC 429 (*Indian Hotel and Restaurant Association (AHAR)* v. *State of Maharashtra*) that dealt with dance performances in hotels and restaurants. The discussion in the judgment pertaining to the extent the State can go in imposing morality on its citizens has been placed from paragraphs 77 to 80 of the report. While the court accepted that certain activities may be perceived as immoral per se, like gambling and prostitution, it raised a doubt regarding the present understanding of gambling. The court observed that activities which were once immoral may no longer be regarded as such, as societal norms keep changing. The court also held that any legislation by which the State seeks to impose its notion of morality or exercise social control must also pass the muster of constitutional propriety.

36. In the next case cited, reported at (2008) 3 SCC 1 (*Anuj Garg* v. *Hotel Association of India*), the Supreme Court referred to the *parens patriae* power of the State and observed that the subject-matter of the exercise of such power has to be assessed on the twin counts of its necessity and the trade-off or adverse impact, if any. The court also left it open for a legislation brought under such authority to be subjected to a constitutional challenge on the ground of the right to privacy. The Supreme Court cautioned that "majoritarian impulses rooted in moralistic tradition … (*should*) not impinge upon individual autonomy." At paragraph 50 of the report, the tests were formulated:"the legislative interference should be justified in principle"; and, "the same should be proportionate in measure."

37. In the Constitution Bench judgment reported at (2018) 10 SCC 1 (*Navtej Singh Johar* v. *Union of India*), that the petitioners have next referred to, the effects doctrine has been emphasised. Paragraph 428 of the report is instructive:

> "428. When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the Constitution, what is determinative is its effect on the infringement of fundamental rights. [*Kerala Education Bill, 1957, In re*, AIR 1958 SC 956 at para 26; *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305 at para 42; *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248 at paras 43, 49; *Bennett Coleman and Co.* v. *Union of India*, (1972) 2 SCC 788 at para 39; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 at para 19.] This affords the guaranteed freedoms their true potential against a claim by the State that the infringement of the right was not the object of the provision. It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The

individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights."

38. The Constitution Bench judgment reported at (2016) 7 SCC 353 (*Modern Dental College and Research Centre* v. *State of Madhya Pradesh*) advocating the doctrine of proportionality has been placed by the petitioners to contend that the blanket prohibition of betting in cyberspace and, in particular, several provisions of the 1930 Act being extended even to games of skill would fall foul of such doctrine. Upon noticing the importance of the expression, "in the interest of the general public" in Article 19(6) of the Constitution, the Supreme Court observed that whether the impugned provisions of any statute or rules amount to reasonable restrictions or are seen to have been brought in the interest of the general public, the exercise that is required to be undertaken is to balance the fundamental right to carry on occupation under Article 19(1)(g) of the Constitution on the one hand and the restrictions imposed on the other. It is this balancing act that is described as the doctrine of proportionality in such context and the four facets thereof are indicated as follows:

"60. …

(*i*) it is designated for a proper purpose;

(*ii*) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;

(*iii*) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally;

(*iv*) there needs to be a proper relation ("*proportionality stricto sensu*" or "*balancing*") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."

39. The petitioners next rely on a judgment reported at (2019) 1 SCC 1 (*K.S. Puttaswamy* v. *Union of India*) where the Constitution Bench considered whether the right to privacy was guaranteed under Part-III of the Constitution. The doctrine of proportionality was discussed at great length with reference to some of the judgments already noticed and the varying Canadian and German approaches in such regard were noted. At the end of the day, the court summarised the doctrine of proportionality to be principles that seek to safeguard citizens from excessive government measures. It went on to add that the cost or burdens of the measure must not clearly exceed the likely benefits, which is described as the "ends" or "ends-benefits"

proportionality and the impugned measure should "impair as little as possible the right or freedom in question". The court noticed the modern conflict between an individual or collective right and a legitimate government interest in regulating such right and embraced the doctrine of proportionality as the "defining doctrinal core of a transnational rights-based constitutionalism" at paragraph 1276 of the report.

40. The petitioners have also brought the Constitution Bench judgment in the *Triple Talaq case* reported at (2017) 9 SCC 1 (*Shayara Bano* v. *Union of India*) to emphasise on the concept of manifest arbitrariness. Paragraph 87 of the report not only speaks of the thread of reasonableness that runs through Part-III of the Constitution, but also of substantive due process:

> "87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709 when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."

41. At paragraph 101 of the report, the Supreme Court describes manifest arbitrariness in the context of a statute to be something done by the legislature capriciously, irrationally and without adequate determining principle such that it is excessive and disproportionate. The court went on to emphasise that "arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

42. A more recent judgment on virtual currency reported at (2020) 10 SCC 274 (*Internet and Mobile Association of India* v. *Reserve Bank of India*) has been cited by the petitioners for the discussion therein on the challenge to the impugned Reserve Bank circular on the ground of Article 19(1)(g) of the Constitution and the doctrine of proportionality. At paragraph 193 of the report, the court observed that the imposition of any restriction on the exercise of a fundamental right may be in the form of control or prohibition; but when the exercise of a fundamental

right is prohibited, the burden of proving that a total ban on the exercise of the right alone may be in public interest "lies heavily upon the State." The court referred to a judgment reported at (1969) 1 SCC 853 (*Mohammed Faruk* v. *State of Madhya Pradesh*), which has also been cited by the petitioners here and the Constitution Bench formulation of the parameters while testing the validity of a law imposing a restriction on carrying on a business or a profession. The tests in *Mohammed Faruk* were reiterated:

> "(*i*) its direct and immediate impact upon … the fundamental rights of the citizens affected thereby;
>
> (*ii*) the larger public interest sought to be ensured in the light of the object sought to be achieved;
>
> (*iii*) the necessity to restrict the citizens' freedom;
>
> (*iv*) the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public; and
>
> (*v.*) the possibility of achieving the same object by imposing a less drastic restraint."

43. The judgment also referred to the four-pronged test enunciated in *Modern Dental College and Research Centre*. In a sense, the tests laid down in both *Mohammed Faruk* and *Modern Dental College and Research Centre* were taken to be similar.

44. The rummy petitioners next rely on the tests of reasonableness qua Article 19 of the Constitution enunciated in the judgment reported at (2004) 1 SCC 712 (*Dharam Dutt* v. *Union of India*) and, in particular, the observation that the onus of demonstrating that the impugned legislation comes within the permissible constitutional limits and that the restriction imposed is reasonable would shift to the State upon a prima facie case of violation on such counts being made out. Paragraph 49 of the report is relevant in such regard:

> "49. In spite of there being a general presumption in favour of the constitutionality of the legislation, in a challenge laid to the validity of any legislation allegedly violating any right or freedom guaranteed by clause (1) of Article 19 of the Constitution, on a prima facie case of such violation having been made out, the onus would shift upon the respondent State to show that the legislation comes within the permissible limits of the most relevant out of clauses (2) to (6) of Article 19 of the Constitution and that the restriction is reasonable. The Constitutional Court would expect the State to place before it sufficient material justifying the restriction and its reasonability. On the State succeeding in bringing the restriction within the scope of any of the permissible restrictions, such as, the sovereignty and integrity of India or public order, decency or morality etc. the onus of showing that restriction is unreasonable would shift back to the

> petitioner. Where the restriction on its face appears to be unreasonable, nothing more would be required to substantiate the plea of unreasonability. Thus the onus of proof in such like cases is an ongoing shifting process to be consciously observed by the Court called upon to decide the constitutional validity of a legislation by reference to Article 19 of the Constitution. The questions : (*i*) whether the right claimed is a fundamental right, (*ii*) whether the restriction is one contemplated by any of clauses (2) to (6) of Article 19 and (*iii*) whether the restriction is reasonable or unreasonable, are all questions which shall have to be decided by keeping in view the substance of the legislation and not by being beguiled by the mere appearance of the legislation."

45. The petitioners also refer to a judgment reported at (2003) 7 SCC 309 (*B.P. Sharma* v. *Union of India*) for the discussion therein as to what would be reasonable restrictions within the meaning of Article 19(6) of the Constitution to curtail the rights under Article 19, particularly under Article 19(1)(g). At paragraphs 14 and 15 of the report, the Supreme Court observed that citizens are free to choose any trade, business, calling or profession and the manner and terms in which they carry on their profession; but the State may, in the interest of the general public, impose reasonable restrictions which may be thought necessary. The court observed that "nobody can be considered to have a fundamental right to carry on such business, trade, calling or profession like gambling, betting or dealing in intoxicants or an activity injurious to public health and morals." However, the court interpreted the expression "in the interest of the general public" to imply matters pertaining to "public health and morals …, economic stability …, stability of the country, equitable distribution of essential commodities at fair prices … for maintenance of purity in public life, prevention of fraud and similar considerations."

46. A judgment reported at AIR 1945 Mad 164 (*Public Prosecutor* v. *Verajlal Sheth*) has been placed for the acceptance in that case of the definition of "gaming" in the *Oxford English Dictionary* as "the action or habit of playing at games of chance for stakes; gambling" and the definition of "wager or bet" to be "A promise to give money or money's worth upon the determination or ascertainment of an uncertain event."

47. The first lot of petitioners rest upon citing a judgment reported at (1999) 8 SCC 74 (*Thampanoor Ravi* v. *Charupara Ravi*) for the proposition that when a word or expression acquires a special connotation in law, it must be assumed that the legislature has used the word or expression in its legal sense and not with reference to common parlance or the dictionary meaning. These petitioners submit that since betting and gambling had already been included in the Government of India Act, 1935 and had been judicially interpreted even

before the Constitution came into effect, the enlargement of the scope of the word "gaming" in the Amending Act would, in effect, amount to widening the scope of the field embodied in Entry-34 of the State List.

48. The next set of petitioners, who are also mostly involved in offering betting on rummy on their platforms, seek to make a distinction between betting and gambling. They suggest that gambling is now understood as involving an activity of pure chance, where skill is either not involved or involved to the most minimal extent. These petitioners exhort that the entirety of the field in Entry-34 of "Betting and gambling" must be understood in such context and it is only the betting involved in gambling which is covered by the field in the Entry and not betting per se. They refer to Entry-36 in the corresponding list in the Act of 1935 and the pre-constitutional connotation of gambling that is deemed to be the basis for the Entry. These petitioners assert that the attempt at widening the definition of gaming, in effect, amounts to the impermissible enlargement of the scope of legislative competence.

49. They refer to the *Chamarbaugwala cases* where the use of skill has been seen to be permissible as a business activity and entitled to protection under Article 19(1)(g) of the Constitution. They refer to the history of the regulation of gaming and the prohibition in certain areas before copiously referring to the judgment in *K.R. Lakshmanan.*

50. These petitioners place a judgment reported at AIR 1958 SC 560 (*State of Madras* v. *Gannon Dunkerley and Company*) where the construction of Entry-48 in the State List fell for consideration. The Constitution Bench observed that expressions used in the Lists must be interpreted in their legal sense and cannot be construed in the popular sense. The court concluded that the expression in the relevant Entry was a *nomen juris*, implying that it had an accepted and well-recognised legal connotation.

51. These petitioners next rely on a Constitution Bench judgment reported at (1989) 2 SCC 645 (*Builders' Association of India* v. *Union of India*) where the constitutionality of the Forty-sixth Amendment of 1982 was questioned. In dealing with the issue, the court observed that a State could make a law as long as it was within its authority, but frowned on any attempt to override a judicial pronouncement without removing the defect that was noticed in the judgment.

52. The second lot of petitioners refer to rummy as a game of skill and the judicial pronouncements in such regard before proceeding to cite another Constitution Bench judgment reported at (2002) 2 SCC 459 (*Koluthara Exports Ltd.* v. *State of Kerala*) for the proposition that however well-intentioned a legislation may be and whatever social purpose it may profess to serve, the enactment could be invalidated if the State had no authority in such regard.

53. These petitioners next place a Constitution Bench judgment reported at (2005) 1 SCC 394 (*E.V. Chinnaiah* v. *State of Andhra Pradesh*) which dealt with affirmative action in general. The petitioners cite paragraphs 30 and 31 of the report where the doctrine of pith and substance has been referred to. The court observed that the stated objects of the enactment may not be the only criteria for assessing the validity thereof, as the court would examine "not only the object of the Act as stated in the statute but also its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the State."

54. A nine-judge Bench decision reported at (2007) 2 SCC 1 (*I.R. Coelho* v. *State of Tamil Nadu*) has been placed by these petitioners for the proposition that judicial review is a basic feature of the Constitution. The court held in that case that the separation of powers between the Legislature, Executive and the Judiciary was also one of the basic features of the Constitution and it was the duty of the court to enforce constitutional limitations.

55. The next judgment placed is also one rendered by a Constitution Bench, reported at (2014) 12 SCC 696 (*State of Tamil Nadu* v. *State of Kerala*), where it was observed that no provision of law may be enacted contrary to a judicial pronouncement without removing the mischief noticed in the judgment. At paragraph 15 of the report, the Supreme Court laid down the primary test for determining whether an enactment or a provision had been brought in only to nullify a previous judgment:"to see whether the law and the judgment are inconsistent and irreconcilable so that both cannot stand together."

56. The third lot of petitioners refers to games like rummy and horse -racing being games of skill and quote several Supreme Court judgments, some noticed before, in such regard. They also rely on a judgment reported at (1996) 7 SCC 637 (*Indian Aluminium Company* v. *State of Kerala*) for the principle recognised at sub-paragraphs (8) and (9) of paragraph 56 of the report. In essence, the judgment declares that the legislature cannot overrule, revise or override a judicial decision without changing the underlying conditions such that "if those conditions had existed at the time of declaring the law as invalid ... the previous decision would not have been rendered ..."

57. Of the several petitioners who have challenged the Amending Act, one is a federation or association of the entities that provide games on the virtual platform or cyberspace. Such petitioners read the amending provisions and submit that the irrationality therein is apparent. They maintain that Entry-34, in its use of the word "Betting" refers to the betting that goes with gambling, where gambling has a specific legal connotation that it pertains to a game or activity of pure chance which cannot be controlled by any element of skill. These

petitioners contend that the Act of 1930 was intended to only cover gaming and as to what amounted to gaming is indicated in Section 4 (1)(a) of the Act, except the reference to horse-racing therein which has been judicially found to be a game of skill. These petitioners emphasise that betting on any gambling activity amounts to gaming as has been judicially understood and as was originally the intention of the statute. Equally, such petitioners assert that betting on non-gambling activity would not amount to gaming and the obliteration of the distinction by the Amending Act makes the Amending Act unreasonable and fall foul of Article 14 of the Constitution.

58. These petitioners refer to some of the original provisions in the 1930 Act to submit that all forms of gaming had not been prohibited, but the prohibited activities were confined to any transaction or scheme of wagering or betting in which the receipt or distribution of winnings or prizes in money or otherwise depended on chance.

59. Such petitioners lay considerable emphasis in the artificial widening of the definition of "gaming" as brought about in Section 3(b) of the Act and the Explanation thereto. They also suggest that the definition of "instruments of gaming" in Section 3(d) of the Act in its use of the word "other" in the expression "any other article" makes computers and like gadgets instruments of gaming by a legal fiction, which should not stand judicial scrutiny. Similarly, these petitioners refer to the word "other" in the expression "any other instrument of gaming" and submit that to the extent games of skill are identified as gaming activities by the legal fiction used in the definition of "gaming", the impugned provisions are directly contrary to judicial pronouncements and otherwise unreasonable and excessive. They claim that the impugned Amending Act is contrary to the dictum in *K.R. Lakshmanan* and should not be countenanced since it does not address the mischief noticed in *K.R. Lakshmanan*, but seeks to override the dictum nonetheless.

60. These petitioners say that the effect of the Amending Act runs beyond any game played in cyberspace and amended Section 11 of the Act pertains also to physical forms of games, but to the extent newly introduced Section 3-A of the Act and the other incidental provisions target all games played in cyberspace for stakes, they are colourable and unreasonable exercise of authority, as there can be no distinction between card games, particularly like poker and rummy, being played in physical form or on the internet.

61. These petitioners seek to make a distinction between betting and wagering, though the authorities that they cite in such regard do not necessarily support the same. According to these petitioners, a wager would be between two or more persons involved in the conduct of the activity, whereas betting would be by persons only interested in

the outcome of the activity, but not involved in the conduct thereof. They rely on a judgment reported at AIR 1942 PC 19 (*Ismail Lebbe Marikar Ebrahim Lebbe Marikar* v. *Bartleet and Company*) where, however, betting and wagering had been understood to imply the same activity in the context of a wagering contract under Section 30 of the Contract Act, 1872.

62. In *Black's Law Dictionary* (11th Ed), "bet" is described as "something (especially money) staked or pledged as a wager", while "wager" is defined as "money or other consideration risked on an uncertain event; a bet or gamble". A wager is also seen to be a promise to pay money or other consideration on the occurrence of an uncertain event. "Gambling", on the other hand, is said to be the act of risking something of value, especially money, for a chance to win a prize and "gaming" is said to imply gambling. A "game of chance" is described as a game wherein the outcome is determined by luck rather than skill and a "game of skill" is said to be a game in which the outcome is determined by the player's superior knowledge or ability, not chance.

63. In the *New Oxford Dictionary of English*, "betting" is said to be the action of gambling money on the outcome of a race, game or other unpredictable event, while "wager" is described to be the more formal term for bet.

64. These petitioners refer to the principles enunciated in the *Chamarbaugwala cases* and specifically rely on paragraph 20 of the report in *K.R. Lakshmanan*, where the expression "mere skill" has been held to "mean substantial degree or preponderance of skill."

65. These petitioners read the Statement of Objects and Reasons of the 1930 Act and submit that the impugned amendment goes not only against the purpose of the statute, but also against the tenor of the original provisions. They recount the history of the legislation pertaining to gaming in this State beginning with the Madras City Police Act, 1888, the Act of 1930, the amendment introduced to the Act of 1930 in 1949 by, inter alia, including horse-racing as a gaming activity, to the belated notification thereof in or about 1975, to the *K.R. Lakshmanan* judgment holding that horse-racing was a game of skill and to the Ordinance brought about late in 2020 which metamorphosed to the impugned Act 1 of 2021.

66. According to these petitioners, there is no reason for prohibiting all forms of betting in cyberspace, which is a controlled area and allowing wanton betting in physical form where it cannot be regulated with any degree of certainty. Apart from the specific challenge on the grounds of irrationality, unreasonableness and excessive exercise of authority in amending the definition section and introducing Section 3-A in the statute, these petitioners are particularly critical of Section 11

as amended, by which the latitude that was shown to games of skill has been reversed and games of skill have been equated with games of chance without any distinction. Their specific contention in wanting amended Section 11 to be struck down is founded on six grounds : that it seeks to bypass judicial pronouncements that have stood the test of time without tackling the mischief noticed in such judgments; that no guidelines are indicated for protecting the right under Article 19(1)(g) of the Constitution; that it amounts to absolute prohibition which is unwarranted and impermissible; that no attempt is made to restrict or regulate or apply the doctrine of proportionality or find the least intrusive measure to deal with the perceived menace; that it is per se manifestly arbitrary and otherwise vague; and, that it is contrary to the purpose for which the original statute was enacted.

67. These petitioners refer to the apparent confused state of mind of the legislature in the use of the expression "in person or in cyber space" in Section 3(b) of the Act without there being any sequitur to betting in person, though Section 3-A of the Act prohibits all form of betting in cyberspace alone.

68. These petitioners submit that the impugned Amending Act is so convoluted, confusing and self-contradictory that it is liable to be struck down in its entirety as the rule of severability cannot be brought into play in the context of the overarching unreasonableness and irrationality in the impugned legislation. For such purpose, these petitioners refer to a judgment reported at AIR 1961 SC 268 (*Bullion and Grain Exchange Ltd.* v. *State of Punjab*). The Constitution Bench in such case referred to the *Chamarbaugwala cases* to discuss whether a statute could be severed and the invalid parts separated from the rest to strike down only the offending portions. The test seems to be to apply the rule of severability and strike down only the invalid parts if it appears to the court that the legislature would have enacted the valid part if it had known that the rest of the statute would be invalid. The second rule would be that if the valid part which is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, the entirety of the legislation has to be rejected.

69. These petitioners refer especially to poker being a game of skill as recognised in the 276th Report of the Law Commission of July, 2018 intituled *Legal Framework : Gambling and Sports Betting including in Cricket in India.* In paragraph 3.34 of the report, poker is referred to as a game of skill "because more skilful players will always win over the less skilled or novice players." The skills necessary to be a successful poker player are also noticed at paragraph 3.35 of the report.

70. These petitioners rely on an American judgment reported at 886 F. Supp. 2d 164 (*United States of America* v. *Lawrence DiCristina*)

where, after receiving expert evidence, it was concluded that poker was a game of skill. Though the judgment was reversed in appeal, the finding that poker was a game of skill was left undisturbed.

71. A fourth lot of petitioners refers to the scope of the original Act of 1930 being limited to prohibiting gambling in public space by indulging in pure games of chance and criticises the irrational incorporation of the recent amendments that completely destroy the architecture of the statute.

72. Such petitioners refer to a judgment reported at 2017 SCC OnLine P&H 5372 (*Varun Gumber* v. *Union Territory of Chandigarh*) as to what would amount to a game of skill. They refer to Entry-33 in the State List and suggest there is complete confusion in the manner of change brought about by the Amending Act. Such petitioners question the legislative perception that if two persons privately play rummy in an enclosed place it may not disturb public order or cause any nuisance, but if the same two persons play rummy on the internet, it would be criminal, as the impugned legislation makes it out to be.

73. The last line of submission on behalf of the petitioners has been to indicate the algorithms of the card games played on the internet in the country and which platforms were available for any resident in this State to access till the Ordinance came into effect. The emphasis in such regard is on the protective mechanism which is followed to screen the players, obtain and maintain a record of their identities, track their locations and accept payments only through recognised forms of debit or credit cards or other online modes of payment. The intending players are required to submit a recognised government document as proof of identity, which is verified by the platform before access is given to such person.

74. As to the forms of rummy played, it is submitted that there are three types of games : points rummy; pool rummy; and, tournament rummy. A minimum of two persons can play at a table and a maximum of six. No spectators can gain access to watch a game and only the players actually playing the game are the persons at the relevant table. It is submitted that two decks of cards are ordinarily used on the basis of a random number generation software developed by the world leaders in such field, iTech Labs of Australia.

75. The petitioners submit that an event or an activity that is not criminal in the real world cannot be banned in cyberspace. They also suggest that the interpretation of the word “betting” takes colour from the word “gambling” which is used in conjunction therewith in the relevant Entry; as the two words and the activities they connote in the context would be governed by the *ejusdem generis* and *noscitur a sociis* rules of interpretation. These petitioners rely on a Constitution Bench judgment reported at (2005) 2 SCC 515 *(Godfrey Phillips India*

Limited v. *State of Uttar Pradesh*) for such purpose.

76. The State retorts by referring to its unquestionable authority to legislate in the field of "Betting and gambling" by virtue of the relevant Entry in the State List. The State seeks to give a background to why the Ordinance and the subsequent Act were necessary. The State fairly accepts that the impugned legislation "seeks to ban gambling, which includes games like rummy and poker, irrespective of the stakes involved in the game, if the same is played for stakes or money". The State commends the contents of an affidavit affirmed on its behalf on April 15, 2021, by the Deputy Secretary in the Home Department, to the court and copiously places excerpts therefrom.

77. According to the State, the policy decision to bring in the legislation was taken "after multiple instances of suicides have been reported across the State, given the addictive tendency of these games and the financial losses" that they result in. The State submits that the games like "Rummy Circle" which are offered by some of the petitioners, have 30 million registered players and about 50,000 new players every day. The State perceives the recent statistics to suggest that the target audience for these games are the young and uneducated as the games offer "easy incentives by way of real cash as prizes". The State says that the very nature of the games which have been prohibited is such that an initial amount is deposited by the player following which the player keeps betting with more sums of money depending upon the fall of cards; and, given the addictive tendency that such games prey on, the player tends to raise his stakes in the hope of a bigger win. The State points out that online gambling has been banned in Andhra Pradesh, Telangana and Kerala and stresses on the deleterious effect of gambling.

78. The State contends that the petitioners cannot assert any right under Article 19(1)(g) of the Constitution because the games offered amount to "gambling/betting activity despite being a game of skill since it is being played for a financial or other stake". The State maintains that there cannot be any absolute right to practise any profession or to carry on any activity, trade or business and they are subject to reasonable restrictions under Article 19(6) of the Constitution. The State accepts that not only have the named games of rummy and poker been banned when played for stakes, but all other online games have also been banned, if played for any stakes.

79. The State has made copious references to the 276th Report of the Law Commission. In particular, Chapter VIII of the said Law Commission Report has been read out to demonstrate the deleterious effects of gambling. In such regard, the said Report speaks of gamblers being often tempted to play for longer durations and "up the ante when

it appears to them that they are just about to win". This, according to the said Report, "is, quite often than not, a mirage and ... manifests itself as loss chasing, wherein gamblers keep on playing in an effort to recover their incessantly accruing losses".

80. The Law Commission Report also refers to the possibility of technology being "manipulated to increase the degree of chances involved in the game" and alludes to the Information Technology Act, 2000, to suggest that provisions may be made "to curb the gambling or betting activities on the ground that such activities appeal to the prurient interest or tend to deprave or corrupt persons".

81. However, the Law Commission perceived online betting and gambling to be covered under Entry 31 of List I of the Seventh Schedule to the Constitution since they were "offered and played over media". The recommendation is for the Parliament to enact a model law "for gambling that may be adopted by the States or, in the alternative, the Parliament may legislate in exercise of its power under Articles 249 or 252 of the Constitution".

82. Elsewhere in its recommendations, the said Report suggests that horse-racing and "other skill-centric games may also be afforded" an exemption. The further recommendations indicate that "Gambling and betting, if any, should be offered by Indian licenced operators from India possessing valid licences granted by the game licensing authority". In support of the suggestion that the gambling and betting activities must be regulated, the said report justifies that vulnerable sections of the society ought to be protected from being exploited by the ill-effects of such activities and suggests that the vulnerable class could include youth and children below the age of 18 "and those who are below poverty line and to whom, as a social measure, Central/State Governments provide subsidies to their Jan Dhan Account for sustenance".

83. The State commends the laudable objects that prompted the amendment as indicated in the Explanatory Statement to the Ordinance. The State maintains that all online games are invariably open to manipulation and, as such, no distinction need be made in such regard between games of chance and games of skill. As to the amended Section 11 of the Act, the State perceives that the non-obstantate clause therein operates in respect of newly introduced Section 3-A of the Act, which is a substantive provision and in respect of Sections 5 to 10 thereof which are said to be procedural provisions. It may be said, however, without any hesitation, that not all of the provisions in Sections 5 to 10 of the Amended Act are procedural. At least Sections 8 and 9 make out offences and provide penalties for the commission of such offences.

84. The State then refers to a Full Bench judgment of this court

reported in AIR 1927 Mad 583 (*Narayana Aiyangar* v. *K. Vellaichami Ambalam*). The judgment was rendered in the context of a chit fund. The Bench referred to how "wager" was defined in the context of a wagering contract and opined that chit fund transactions needed to be regulated in the interests of the public and to avoid perpetration of fraud on poor and innocent persons.

85. The State next places reliance on a Constitution Bench judgment reported at AIR 1965 SC 307 (*Krishnachandran* v. *State of Madhya Pradesh*). The matter involved the conviction of the appellant before the Supreme Court under a State law pertaining to gambling. The court noticed the wider meaning attributed to the word "gaming" in the statute. The argument before the court was that the impugned provisions were in derogation of Articles 19 and 21 of the Constitution because they unreasonably impaired the right of assembly and the right to hold and enjoy property and, as such, contrary to the wholesome manner of living life. The court observed that the legislative competence had not been questioned and held as follows at paragraph 7 of the report:

> "7. ...
>
> Once it is conceded that gambling is an evil and it is rightly so conceded here, the interests of public order, morality or the general public require that it be eradicated and the only question which survives is whether the law made to do this is unreasonable in its restriction upon the guaranteed rights. ..."

86. The challenge to the provisions was repelled and the appeal failed. The petitioners herein, however, submit that the dictum in the case should not be considered as it was a judgment rendered before the seminal decision in *Maneka Gandhi* ((1978) 1 SCC 248 : AIR 1978 SC 597). According to the petitioners, the law as it stood prior to *Maneka Gandhi* did not require any reasonableness of the procedure to be looked into; but the position has now altogether changed.

87. The sheet-anchor of the State's submission is the dictum rendered by a two-member Bench in the judgment reported at (1995) 6 SCC 289 (*M.J. Sivani* v. *State of Karnataka*). The question before the Supreme Court was whether video games were required to be regulated. The material before the court revealed that some of the video games were operated with two-way or four-way joysticks, push buttons, volume controls, steering wheels, accelerators, gun-trigger controls or potentiometers and every video game was operated by an electronic machine. The court observed in *M.J. Sivani* that gaming as defined in the relevant statute included both a game of chance and a game of skill and also a combination of both and that the element of gaming was the prizes or consideration. The court held that for an ordinary person or a novice it was difficult to play a video game with

skill and the regulation of such activity by the impugned legislation was in accordance with law. In applying the test of reasonableness, the Supreme Court observed that the broad criterion was whether the law struck a proper balance between social control on the one hand and the right of the individual on the other and whether the restriction was in proportion to the evil and the prevailing conditions at the relevant time.

88. However, what cannot be missed is that the judgment pertained to a law that regulated gaming activity and may not have completely prohibited the same even in a broad medium. Paragraph 36 of the report also included the caveat that if any licence was rejected on any irrelevant ground it was open to the aggrieved party to challenge the same.

89. Two further judgments reported at (2005) 8 SCC 534 (*State of Gujarat* v. *Mirzapur Moti Kureshi Kassab*) and 2018 Cri LJ 1842 (*The Director General of Police* v. *S. Dillibabu*) have been placed by the State. The first of the judgments, rendered by a seven-member Bench, has been brought for the proposition that the power to regulate includes the power to prohibit. The other judgment is founded on the doctrine of *res extra commercium* as judicially interpreted in this country.

90. At paragraph 46 of the report in *Mirzapur Moti Kureshi*, the Supreme Court observed that “regulation” includes “prohibition” but cautioned that “in order to determine whether total prohibition would be reasonable, the court has to balance the direct impact on the fundamental right of the citizens as against the greater public or social interest sought to be ensured”. Several other passages from the judgment have been placed, including from paragraph 69 of the report, to the effect that the Statement of Objects and Reasons may be looked into to appreciate the extent and urgency of the evil which was sought to be remedied by the statute, “in addition to testing the reasonableness and the restrictions imposed”. At paragraph 79 of the report, the court held that “it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of the general public...”

91. The Division Bench judgment of this court in *S. Dillibabu* merely observed, in the light of the *Chamarbaugwala* judgments being placed before it, that activities being of gambling nature cannot be regarded as trade or commerce and no one can claim any right in respect of such activities under Article 19(1)(g) of the Constitution.

92. The substance of the State's submission is that the legislature as the rightful representative of the people in the State perceives betting in cyberspace to be pernicious and since the State has exclusive authority under the Constitution to legislate in the field of betting, the

amending statute passes muster as the object of the legislation is to arrest the addiction of gambling and ensure that citizens do not rush to their doom by falling prey to such addiction. Such argument conveys an element of the legislature's sense of morality in seeking to protect the residents in Tamil Nadu that the State perceives it to be in greater public interest than any individual's right to trade on his skill.

93. The State's final submission is by referring to a judgment rendered by this court several months back calling upon the State to take appropriate steps to curb gambling in the light of suicides and other ill-effects resulting therefrom. However, the relevant judgment has not been placed as no mandamus could have been issued to legislate nor can the impugned provisions of the Amending Act be attributed to the court.

94. At the end of the day, a balance has to be struck between the extent to which the State can impose restrictions to protect a class or certain classes of persons and the reasonableness of such restrictions qua the ordinary individual who may resist the same, whether or not the statutory measure is intended to protect such individual.

95. Oftentimes, when the State takes a paternalistic attitude, it seeks to legally regulate private life. This brings about a conflict between both the authority and the desirability on the part of the State to legislate in areas where it perceives that the individual in general or certain classes of individuals require protection and the private rights of the individual and every citizen's freedom of choice. State paternalism, by and large, is understood to mean the phenomenon in which the State acts as the guardian and protector of its citizens or a class or classes of citizens who are perceived to be vulnerable in certain situations or are thought to be generally weak and incapable of protecting themselves. When a statute is attacked on the ground of overbearing paternalism, a cost-benefit analysis is called for, not in mathematical terms, but only to assess whether by and large the benefit in the form of public good outweighs the cost of the individual being deprived of his choice.

96. State paternalism through legislation can span the ordinary areas of protecting children or women or the elderly or persons with disabilities by enacting remedial statutes to undo the historical or longstanding neglect or oppression or exploitation of certain classes of persons and even to protect persons performing certain duties, as in the workspace. Paternalistic legislation may regulate the conduct of an activity depending on where, as a result of the limitation of resources involved in such activity, regulation is deemed imperative; or, it may seek to regulate the perceived undesirability of the over-indulgence in certain activities.

97. Pronounced and excessive paternalism on the part of the State is another definition for authoritarianism and may even amount to repression, particularly when a statute prohibits or restricts some activity that the individual may otherwise have complete and unrestricted freedom to indulge in. The State perceives the ordinary individual or the class protected to be vulnerable, unable to protect themselves and the likely victim of the consequences of indulging in such activity or being excessively exposed thereto. Like a parent seeking to protect her child and assuming that the child is incapable of deciding what is good for her and what is not, the State considers the individual or class of individuals sought to be protected as defenceless and incapable of making the correct choice. The more natural the activity that is sought to be controlled, the greater is the degree of authoritarianism in the elimination of the exercise of choice by the individual or the class of individuals sought to be protected as vulnerable by legislation born out of State paternalism.

98. But before assessing the appropriateness of the extent of State paternalism oozing out of the impugned legislation, a brief peek into history and a general discussion on gambling and how it has been judicially interpreted, may be in order.

99. In course of the Constituent Assembly debates, divergent views were expressed when it came to including betting and gambling in the State List. While some members perceived the activities to be so pernicious that they ought not even be included in any List, there were others who also wanted the relevant entry carried over from Entry-36 of the Provisional List in the Government of India Act, 1935 to be deleted, but for completely different reasons. However, Dr. Ambedkar reminded the members that if the field was not included, the States would have no power to legislate over the same as the residuary and what was not specifically provided for in the State List could be understood to fall within the exclusive domain of the Parliament.

100. In ordinary and common parlance, gambling connotes taking a chance. In the usual sense, there is no distinction made between chance and skill or the preponderance of either in an activity which may be seen and understood to amount to gambling. However, betting, in the ordinary sense, cannot be divorced from gambling since the risk-taking element in gambling is betting. Notwithstanding the considerable industry on the part of the petitioners to distinguish betting from wagering and either of such activities from gambling and seeking to suggest a mathematical formulation of the extent of chance involved in gambling or betting involved in gaming, the activity of betting or wagering or gambling implies an element of speculation on the happening of a certain event, whether or not the persons involved in betting or wagering or gambling have any control over the event as

long as there is some element of prize to win for forecasting the outcome of the event.

101. Philosophically and realistically, every future event depends on an element of chance. There may be no greater need to look beyond the pandemic raging across the globe to appreciate such truism. Even in the ordinary case, when a person promises to meet another on the next day, there are several presumptions that go into such promise and they are based on the ordinary course of things. It is possible that a tsunami takes place during the interregnum and even the simple act of meeting the person is impossible to be executed.

102. Sporting activities are replete with upset results. An upset implies that the outcome has been contrary to the ordinary expectation. The expectation is fed by the history of the performances of the two parties that precedes the particular encounter. Whether in the boxing ring or in the football arena or on the cricket pitch, it is the hope of a different outcome than what is predicted that impels the underdog and results in instances like the Rumble in the Jungle of 1974[1] or of, arguably, the greatest upset in football history at Belo Horinzonte in 1950[2] or in the felling of the mighty West Indies at Lords in 1983[3]. The activity involved in every case was a game of pure skill, yet the unfancied triumphed and such moments are regarded as seminal moments and go down as part of sporting folklore.

103. Every game or like activity depends on an element of chance. One team at a cricket match may bat in perfect sunshine on a flat wicket, but the other may bat on a sticky wicket upon rain intervening in the interregnum. However, ordinarily, it is expected that the more skilful would take the unexpected - the chance element - in its stride and the greatest upsets remain etched in our memories because the expected dexterity of the acknowledged skilful was felled by the less-gifted.

104. Gambling and gaming have developed secondary meanings in judicial parlance. Indeed, such words had attained such connotations in the pre-constitutional era that the *nomen juris* cannot be shrugged off to understand such words to mean or imply anything other than how they have been judicially interpreted. Irrespective of what meanings are ascribed to these words in dictionaries, gambling is equated with gaming and the activity involves chance to such a predominant extent that the element of skill that may also be involved cannot control the outcome. A game of skill on the other hand, may not necessarily be such an activity where skill must always prevail; however, it would suffice for an activity to be regarded as a game of skill if, ordinarily, the exercise of skill can control the chance element involved in the activity such that the better skilled would prevail more often than not. The

vagaries of the unknown and unpredictable and yet possible, must be kept out of consideration to determine whether an activity is a game of skill. Even in everyday life, one never ceases to ponder over what could have been if the alternative had been chosen. Seen from the betting perspective, if the odds favouring an outcome are guided more by skill than by chance, it would be a game of skill. The chance element can never be completely eliminated for it is the chance component that makes gambling exciting and it is the possibility of the perchance result that fuels gambling.

105. Much has been submitted on behalf of the petitioners to confine the operation of the doctrine of *res extra commericum* as judicially interpreted in this country to only the obviously pernicious. The underlying suggestion in course of such submission has been that somehow the element of morality involved has to be reduced, possibly to the vanishing point, if it impinges on the rights guaranteed under Part III of the Constitution, not to speak of Article 19 thereof alone.

106. *Res extra commercium* has been defined by juxtaposing such expression to *res in commercio* at the beginning of an article by Senior Advocate Arvind P. Datar and Advocate Rahul Unnikrishnan published in (2017) 3 SCC J-1 *(Kerala Liquor Ban : Revisiting Res Extra Commercium & Police Power)*. The authors trace the etymological roots of the doctrine of *res extra commercium* to Roman law as being things incapable of ownership as opposed to *res in commercio* pertaining to those capable of ownership. The article argues that though the doctrine of *res extra commercium* was appropriately invoked in a 1951 judgment of the Supreme Court in a matter pertaining to shebaitship, the principle has been incorrectly applied thereafter, ever since the days of the *Chamarbaugwala cases*.

107. Whether or not the jurisprudence in such regard is corrected in future, there appears to be a much greater element of morality involved in what activities would be regarded as *res extra commercium*, as the expression is now judicially interpreted in this country, than what may be gleaned to be the constitutional sense of morality. While prostitution, consumption of poison, robbing or dacoity may appeal even to the most liberal to be pernicious; the consumption of alcohol or even the exercise of the choice of gambling, when used in the ordinary sense, may not appear so vile to many. There may be a difference of opinion between a person and his neighbour as to what may be perceived to be the constitutional sense of morality, whether in general or in respect of a particular field of activities, but the difference ought only to be in degrees and not poles apart unless the individual sense of morality tinges the perception. Again, the understanding of the constitutional sense of morality may depend on the mores of the time since the Constitution is regarded as a living document and not pegged

to the time of its adoption.

108. Since the discussion here has to be confined to the validity of the impugned Amending Act, the several tests enunciated in the authoritative judicial pronouncements brought to bear on the subject by the parties need to be understood and applied. For a start, *K.R. Lakshmanan* instructs that when a game of skill is distinct from a game of chance, on the preponderance of the skill element involved, the activity would be protected by Article 19(1)(g) of the Constitution and competitions involving games of skill have to be regarded as business activities.

109. A person may be gifted in card games or another's talent may lie in word games. Rationally, such persons should be free to exploit their skills; and only reasonable restrictions that do not completely blunt their chance to show off or make a living out of their skills may be permissible. The sweeping wording of Section 3-A of the amended Act of 1930, coupled with the expansive definition of “gaming” injected therein, eliminates any chance of display of skill in any game on the virtual mode if any stakes, however little, are involved. Cyber cafes and computers and related hardware cannot, by themselves, be places or instruments of gaming. Yet, the legal fiction introduced by the enhanced potency given to the word “gaming” has the effect of a kind of Midas touch in whichever provision the word is used.

110. Section 11 of the amended Act, indeed, turns the existing statute on its head, as the petitioners complain. What was once the exemption or escape provision has now been given the most claustrophobic stranglehold and has the possibility of bringing about the most ridiculous and unwanted results if applied in letter and spirit. There is also a self-contradiction apparent from the activities which may be regarded as gaming in terms of Clause (vi) of Section 4(1)(a) of the Act and the sweeping inclusion of even games of skill in Section 11 thereof. Though Section 3-A of the Act is confined to cyberspace, the reference to Sections 5 to 10 of the Act in Section 11 thereof makes such provision applicable even to physical forms of games and outlaws the activities indicated in Sections 8 and 9 of the Act if the game is played for the slightest of stakes or any form of prize.

111. Indeed, there may be a self-contradiction in Section 4(1)(a) of the Act itself upon the change of the definition of gaming and Section 4 (1)(a) being read in such light. Since the definition of gaming now includes wagering or betting, upon any person playing any game in the physical form and in which there is any wagering or betting within the meaning of the expanded definition, including the Explanation in Section 3(b) of the Act of 1930, the activity may amount to an offence. Even as the amended provision greatly enhances the meaning of gaming as used in the said Act, the wagering and betting components

of the definition are further widened by the Explanation to the definition; as would be evident from the words "wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise…".

112. Again, since Section 11 of the Act does not apply the operation of such provision to Section 4 thereof, there is a further contradiction. By virtue of Section 4(a)(1)(vi) of the Act, despite betting being involved in course of the playing of a game, it may be possible to contend that no offence would have been committed if the game indulged in was primarily a game of skill. That ought to be the interpretation of Section 4(1)(a) of the Act on the basis of the previous judicial pronouncements since Clause (vi) of sub-section (1) has, per force, to be restricted to a game of chance and not applied to a game of skill. Thus, despite no offence under Section 4(1) of the Act of 1930 being made out for playing or participating in a game of skill, if any betting and wagering - within the meaning of such expression as indicated in the Explanation to Section 3(b) of the Act - is involved in a game of skill, by virtue of Sections 8 and 9 of the Act an offence is made out of the same activity. As a result, a simple game of football or volleyball played for bragging rights between two teams or a tournament which awards any cash prize or even a trophy, would, by the legal fiction created by the definition, amount to gaming and thereby outlawed. The relevant persons may be punished for the offences committed under Sections 8 and 9 of the Act.

113. The amended Act encompasses within its sweep all sporting activities, if played for a prize, whether between two class teams in a school or between two schools in an inter-school competition, if there is a trophy to be won; leave alone the ATP prize-money or ranking tournaments organised in the city. Goodbye to IPL and Test matches, too, from Tamil Nadu since cash rewards are offered therein.

114. The wording of the amending Act is so crass and overbearing that it smacks of unreasonableness in its every clause and can be seen to be manifestly arbitrary. Whatever may have been the pious intention of the legislature, the reading of the impugned statute and how it may operate amounts to a baby being thrown out with the bathwater and more. And, irrespective of the noblest of intentions, the effect of the provisions of the impugned statute is the primary consideration for assessing the validity thereof.

115. There is little doubt that the State has the authority by virtue of the Constitution to enact a law pertaining to betting and gambling; just as the State has due authority in such regard, inter alia, in respect of public order; sports, entertainments and amusements; and, offences against laws with respect to any of the matters in the State List. The petitioners here have not challenged the legislative competence in such

sense that the State lacks the power to enact any law pertaining to betting and gambling. Their case is that the scope of betting and gambling has been so vastly enlarged than what the Entry connotes and despite the key word of "gambling" therein having previously been judicially interpreted, that the act of extending the field amounts to usurpation of an authority that the State has not been conferred under the relevant Entry. To a great degree, the petitioners are justified on such count.

116. At the same time, the expansion of the field, so to say, can also be seen to be the unreasonableness of the impugned legislation or the complete disconnect thereof with any element of proportionality, though high authorities command that proportionality must instruct any legislative action if it seeks to curb any right guaranteed by the Constitution.

117. There is no doubt that the activity of gambling and the inextricable element of betting involved therewith has a deleterious impact on certain individuals and can even be ruinous. So much is accepted. The immediate question that arises is whether it was necessary to go the distance that the Amending Act has charted out to completely stultify and negate skill altogether. If, prima facie, the impugned legislation is seen to impose restrictions or altogether curb the exercise of skill in a particular domain, the onus is on the State to justify not only the need therefor but also the extent thereof. No attempt has been made in such regard apart from the anecdotal reference to some suicides and the subjective perception of the evil of addiction.

118. Even if there was some material before the Assembly, whether or not any discussion was held in such regard, the same may have gone some distance in the State discharging its onus and the court yielding to the wisdom of the legislature in a matter pertaining to the larger public good. But the State does not even attempt to indicate what impelled it to bring in such sweeping changes to a statute that was originally intended to curb any wager on an outcome of chance. The State makes no endeavour to demonstrate that any lesser form of curbs may not have sufficed. It is in such light that the impugned legislation must be seen to be so unreasonable as to be branded as manifestly arbitrary, particularly against the backdrop of the judicial pronouncements that hold the field.

119. More often than not, laws are enacted in this country without adequate research or empirical studies being conducted to assess the impact thereof or the ability of the law to tackle the mischief intended to be eradicated and far too often the good is clubbed with the bad as there is no informed alternative to choose from. In the absence of any scientific or empirical study to justify the proposed action, the

impugned legislation may be seen to have been born out of a sense of morality and a bid to play to the galleries in election season in a societal ethos where smoking and drinking are regarded as less immoral than when indulged in before elders; and, superstitious notions and false senses of vanity continue to prevail as real education is still at a premium despite literacy rates increasing and thousands qualifying each year to add a few letters after their names. That the Bill faced no opposition in the House has more to do with the optics just ahead of the State elections.

120. It is true that, broadly speaking, games and sporting activities in the physical form cannot be equated with games conducted on the virtual mode or in cyberspace. However, when it comes to card games or board games such as chess or scrabble, there is no distinction between the skill involved in the physical form of the activity or in the virtual form. It is true that Arnold Palmer or Severiano Ballesteros may never have mastered how golf is played on the computer or Messi or Ronaldo may be outplayed by a team of infants in a virtual game of football, but Viswanathan Anand or Omar Sharif would not be so disadvantaged when playing their chosen games of skill on the virtual mode. Such distinction is completely lost in the Amending Act as the original scheme in the Act of 1930 of confining gaming to games of chance has been turned upside down and all games outlawed if played for a stake or for any prize.

121. There appears to be a little doubt that both rummy and poker are games of skill as they involve considerable memory, working out of percentages, the ability to follow the cards on the table and constantly adjust to the changing possibilities of the unseen cards. Poker may not have been recognised in any previous judgment in this country to be a game of skill, but the evidence in such regard as apparent from the American case even convinced the Law Commission to accept the poker as a game of skill in its 276th Report.

122. The present matter does not turn merely on the two games named in Section 3-A of the amended Act being regarded as games of skill. The absurdity of the amended provisions has more to do with all forms of games - where games must be understood to be distinct from gaming, whether in the ordinary parlance or as per the convoluted meaning ascribed to it in the impugned legislation - being prohibited in cyberspace, if played for any prize or stake whatsoever. The cause for bringing the amendments does not appear to have any nexus with the effect that has resulted thereby; and that, in essence, is the unreasonableness and grossly disproportionate feature of the impugned statute.

123. That does not imply that some form of regulation, or even prohibition in some limited respects, may not be brought in by the

State legislature in respect of the field of betting and gambling in Entry -34 of List II of the Seventh Schedule to the Constitution. But, it may be better not to take a chance or gaze into the future in respect of an uncertain event or traverse into the forbidden arena of advance ruling. All that can be said is that the Amending Act is so unequivocally audacious that it rules out any element of choice that an individual may exercise. The impugned statute is invalid in its every pore, such that no part of it can be salvaged or permitted to be retained. The all pervasive impact of the wide definition of gaming seeks also to brush aside the law of the land as recognised by the Supreme Court and, to the extent that the Amending Act seeks to undo the effects of dicta that may be regarded as *stare decisis*, it cries out to be struck down as invalid. The unwavering mantra of the impugned legislation is prohibition and not regulation. The Amending Act fails the constitutional test as stricter scrutiny has to be exercised when vast swathes of apparently permissible activities are sought to be prohibited rather than regulated.

124. The manner in which the matters are specified in the Entries in the Lists in the Seventh Schedule to the Constitution calls for special attention. Article 246 of the Constitution refers to the Entries in the various lists as “matters enumerated”. The Entries are also seen to be fields in which the competent legislature may legitimately legislate. Several of the Entries, however, cover many matters. The use of the punctuations comma and semi-colon and the conjunction “and” in the Entries appear to be with a deliberate design and tell their own story : that when several matters are mentioned in an entry with either the conjunction, when there are two matters, or with both the comma and the conjunction, when there are more than two matters, such matters indicate the breadth of the field covered by the Entry : for example, Entries 4, 5 and 6 of List I and Entries 16 and 31 of List II. But where the punctuation semi-colon is used between two sets of matters, the Entry indicates allied or related fields but distinct nonetheless : for example, Entries 2, 19 and 41 in List I and Entries 10 and 15 in List II.

125. It is in such light that “Betting and gambling” in Entry 34 of the State List 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.

126. In the State bringing in the Ordinance in November, 2020, which was later adopted as the Amending Act, the legislature erred in expanding its field of legislation by widening the scope of gambling and ascribing a connotation to betting that the relevant Entry in the State List does not envisage. It is true that the Entry "Betting and gambling" appears, at first blush, to cover the possible distinct fields of betting and gambling; but the law as declared defines gambling as a game of chance which skill cannot control; and, the authority conferred on a State legislature by the relevant Entry appears to be confined to the arena of betting in games of chance. Viewed in such perspective, the impugned legislation does not appear to be genuinely referable to the field of legislation allotted to the State under Entry-34 of the State List.

127. At the same time, the Amending Act and the law laid down on the subject in a plethora of judgments are so inconsistent and irreconcilable that both cannot stand together. Even the Law Commission's recommendations stressed on regulation and not prohibition. In the chit fund case of *Narayana Aiyangar* that the State has relied on, the emphasis is on the need for regulation in the interests of the public. There is no doubt that *M.J. Sivani* read the word "gaming" in a wider sense when it observed that "a game of pure chance or mixed chance and skill, it is gaming"; but such dictum of a two-Judge Bench rendered in 1995 must be seen to have been tempered by the clear enunciation of the law in such regard in the later judgment of *K.R. Lakshmanan*, rendered by a three-Judge Bench, when it observed that gaming would mean wagering or betting on games of chances and it "would not include games of skill …". Again, *M.J. Sivani* upheld a legislation that the Supreme Court described to be "to regulate running of the video games".

128. In the light of the foregoing discussion, the legislation assailed herein has to be regarded as something done by the legislature capriciously, irrationally and without adequate determining principle such that it is excessive and disproportionate, to borrow the words of *Shayara Bano*.

129. The doctrine of severability would also not apply in the present case as the concept of the expanded meaning of gaming runs through the entirety of the Amending Act; so much so that it cannot be gauged with any element of certainty as to which part of the amendments the legislature would have intended to be retained as valid even if the legislature was aware that some parts thereof were invalid. In fine, it

must be said that the Amending Act in its application to the Act of 1930 is so disproportionate to the objects that it sets out to achieve that no meaningful part of it - even a sliver - can be reasonably allowed to be retained or upheld as valid.

130. Accordingly, the impugned Part II of the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 (Act 1 of 2021), which amends the Tamil Nadu Gaming Act, 1930, is declared to be ultra vires the Constitution in its entirety and struck down as a consequence. Nothing herein will prevent an appropriate legislation conforming to the constitutional sense of propriety being brought in the field of betting and gambling by the State.

131. W.P. Nos. 18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021 are allowed as indicated above. As a consequence, W.M.P. Nos. 22409, 22411, 23962, 22389, 22391, 23398, 22400, 22370, 22372, 22373, 22374, 22404, 22408, 23964, 23965, 23969, 23970, 23971 of 2020, 7968, 7976 and 7983 of 2021 are closed. Whatever the financial losses the petitioners may have faced, since the object of the exercise by the State cannot be seen to be as pernicious as the law enacted for the purpose was, there will be no order as to costs.

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[1] Muhammad Ali's upset win over George Foreman at Kinshasa, in then Zaire.

[2] The USA beat England 1-0 at the 1950 FIFA World Cup Finals.

[3] India won the Prudential World Cup cricket final in London.