

## MADRAS HIGH COURT GRANTS A WIN TO THE GAMING INDUSTRY

### 1. INTRODUCTION

The Madras High Court (“HC”) recently quashed those amendments to the Tamil Nadu Gaming Act, 1930 (“TN Act”) which had imposed a blanket ban in the State of Tamil Nadu (“State”) on all games (including online games) played for stakes. The ban was imposed earlier this year by bringing previously-exempted skill games within the ambit of ‘gaming’<sup>1</sup> as defined in the TN Act. The HC held that not only were the amendments violative of the fundamental right to a profession, business, trade or occupation, but were also beyond the legislative competence of the State legislature under the relevant legislative entry<sup>2</sup> of ‘betting and gambling’ as provided under the Constitution of India (“Constitution”).

### 2. BACKGROUND

In November 2020, the Governor of Tamil Nadu promulgated The Tamil Nadu Gaming and Police Laws (Amendment) Ordinance, 2020 (“Ordinance”) which amended the TN Act. The Ordinance extended the TN Act, which governs gaming and gambling in the State, to the online medium and also nullified the existing exemption for games of skill thereby prohibiting all games when played for stakes.

The Ordinance was soon followed and replaced by The Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 (“Amendment Act”) which was enacted in February 2021 and had provisions identical to the Ordinance.

A prominent online gaming platform Junglee Games India Pvt. Ltd. filed the first among multiple other writ petitions in the HC in December 2020, initially challenging the constitutional validity of the Ordinance and thereafter of the Amendment Act primarily on the grounds of violation of the petitioners’ fundamental right to trade, occupation, business and profession under Article 19(1)(g) of the Constitution (“Article 19(1)(g) Rights”). Similar petitions were also filed by other online gaming companies including PlayGames24X7, Head Digital Works and GamesKraft Technologies. All these petitions were clubbed and heard together under the cause title of *Junglee Games India Pvt. Ltd. & Anr. v. State of Tamil Nadu*<sup>3</sup>. In March this year, the All India Gaming Federation (“AIGF”), a not-for-profit gaming industry body added itself as a party in the matter with the permission of the HC.

The petitioners mainly challenged the wide meaning of “gaming” as enlarged by the Amendment Act (which now included all forms of skill gaming), the legislative competence of the State to regulate skill games and also the arbitrariness of the Amendment Act in imposing a complete ban on all games played for stakes.

<sup>1</sup> ‘Gaming’ under the state gaming laws in India has a different connotation than what gaming is usually understood to mean in common parlance now. Most of the state gaming laws are colonial-era and pre-internet statutes and were enacted to prohibit gambling, i.e., staking money or money’s worth on games of chance. It is in this sense that these state laws use the term gaming and sometimes even use gaming and gambling interchangeably. The common thread running through all these state gaming laws is that they expressly exempt games of skill from their prohibitions. The impugned amendments under discussion in this article attempted to remove this skill games exemption from Tamil Nadu’s state gaming law.

<sup>2</sup> Entry 34 of List II under Schedule VII to the Constitution.

<sup>3</sup> WP No. 18022/2020.

### 3. ISSUES

The petitioners contended that the ban imposed on playing of games of skill for stakes is in direct violation of the law laid down by the Supreme Court<sup>4</sup> that competitions in games of skill are business activities protected under Article 19(1)(g) Rights. They also argued that the Amendment Act was disproportionate<sup>5</sup>, manifestly arbitrary<sup>6</sup> and had turned the object<sup>7</sup> of the original TN Act on its head by imposing a complete ban on all games when played for stakes.

They also contended that games of skill have been judicially differentiated as distinct from games of chance and that Entry 34 in List II<sup>8</sup> (“**Entry 34**”) viz. “*Betting and gambling*” is limited to placing stakes on games of chance only, and consequently, the state legislatures do not have any legislative competence to make laws on games of skill under this Entry 34.

Therefore, the broad issues before the HC were:

- (a) Whether the Amendment Act is violative of the petitioners’ Article 19(1)(g) Rights? (“**Issue 1**”);
- (b) Whether the Amendment Act is disproportionate and manifestly arbitrary? (“**Issue 2**”); and
- (c) Whether the State legislature has competence to legislate on games of skill under Entry 34? (“**Issue 3**”).

### 4. ISSUE 1: VIOLATION OF FUNDAMENTAL RIGHTS

#### 4.1 The HC struck down Part II of the Amendment Act which amended provisions of the TN Act as being violative of the petitioners’ Article 19(1)(g) Rights.

The HC observed that though Article 19(6) permits reasonable restrictions on Article 19(1)(g) Rights, by imposing such a wide-ranging blanket ban the State has completely failed to meet the “least intrusive measure” test<sup>9</sup> and, therefore, the impugned amendments fall foul of Article 19(1)(g) of the Constitution.

### 5. ISSUE 2: TESTS OF PROPORTIONALITY AND MANIFEST ARBITRARINESS

#### 5.1 The HC came down heavily on the Amendment Act and at different junctures, termed it “*overbearing*”, “*unreasonable*” and “*manifestly arbitrary*”.

The HC noted that by imposing a wide-ranging blanket ban on *all* games played for stakes (whether of skill or chance) merely on the basis of anecdotal evidence of a few suicides and the subjective perception of the evil of addiction, the Amendment Act became disproportionate to the objects it set out to achieve. The HC also held that the legislature had acted capriciously, irrationally and without adequate determining

<sup>4</sup> In the case of *R.M.D. Chamarbaugwalla v. Union of India* (1957 SCR 930).

<sup>5</sup> The test of proportionality requires that an administrative/executive/legislative action be proportionate to the mischief at which it was aimed. The measures adopted must be proportionate to the pursued objective. This test has been affirmed and followed in numerous judgements in India.

<sup>6</sup> The test of “manifest arbitrariness” involves a determination as to whether something is done capriciously, irrationally and/or without adequate determining principle by the legislature. Discussed elaborately by the Supreme Court of India in the landmark judgements of *Justice K.S.Puttaswamy (Retd.) v. Union of India*, 2018 (3) SCC 797; *Shayara Bano and Ors. v. Union of India*, AIR 2017 SC 4609; and *Navtej Singh v. Union of India and Ors.*, (2019) 1 SCC (LS) 443.

<sup>7</sup> Prohibiting and penalizing betting or wagering on games of chance.

<sup>8</sup> Under the Seventh Schedule to the Constitution.

<sup>9</sup> If a reasonable restriction is required to be imposed on a fundamental right, it should be the least intrusive one possible.

principle while enacting the Amendment Act and hence the Amendment Act had become manifestly arbitrary.

The HC said there was an absence of any scientific or empirical study to justify the Amendment Act and also observed that the impugned amendments “*may be seen to have been born out of a sense of morality and a bid to play to the galleries in election season...*”<sup>10</sup>

Taking note of the Statement of Objects & Reasons of the original TN Act, the HC said that no attempt was made by the State to indicate what forced it to bring in such sweeping changes to a statute that was originally intended to only curb wagering on an outcome of chance.

## 6. ISSUE 3: LEGISLATIVE COMPETENCE OF THE STATES UNDER ENTRY 34

### 6.1 The HC held that “**Betting and gambling**” in Entry 34 has to be read as empowering the State government to only legislate on *betting related to gambling*, which in turn means betting on games of chance, and should not be read so as to provide the State with betting as a separate legislative head.

The HC agreed with the contention of the petitioners that the legislative competence of the State government under Entry 34 cannot be enlarged so as to include within it the power to legislate on games of skill, but observed that the State could reasonably claim such competence under other heads of legislation such as ‘public order’<sup>11</sup>, ‘trade and commerce within the state’<sup>12</sup> or ‘sports, entertainment, amusements’<sup>13</sup>, provided it could justify the need for and extent of such a law, and also discharge the burden of proportionality.

However, in addition to keeping the door ajar for the State to claim legislative competence for placing restrictions on games of skill under other heads of legislation (provided they pass constitutional muster), the HC also held that State government could frame future laws “conforming to constitutional sense of propriety” in the field of betting and gambling (subject to the interpretation provided to this field in the judgement).

## 7. INDUSLAW VIEW

By virtue of this judgment, the previous position under the original TN Act is reinstated, whereby there is a clear exemption for games of skill under Section 11.<sup>14</sup> However, though the real money gaming operators can resume their operations in the State, the reprieve may be short-lived as the new<sup>15</sup> State government announced on the very next day after this judgment that it would soon bring in a new law to ban online games like rummy and poker played for stakes.<sup>16</sup>

However, given the observations and the grounds on which the HC has struck down the Amendment Act, the State government will not only need to justify the need for any ban that they may impose in the future, but will also have to substantiate the new law with empirical evidence and background research to show

<sup>10</sup> Paragraph 112 of *Jungle Games India Pvt. Ltd. & Anr. v. State of Tamil Nadu*, WP No. 18022/2020.

<sup>11</sup> Entry 1 in List II of Schedule VII to the Constitution of India.

<sup>12</sup> Entry 26 in List II of Schedule VII to the Constitution of India.

<sup>13</sup> A part of Entry 33 in List II of Schedule VII to the Constitution of India.

<sup>14</sup> “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.”

<sup>15</sup> A different political party was in power in the State when the Amendment Act was passed. Despite the political rivalry with its predecessor, the new dispensation agrees with the erstwhile State government on the need to ban online gaming for stakes in the state. The new State government has criticised its predecessor for having drafted such a poor law which failed the test of constitutionality in the HC.

<sup>16</sup> Akshaya Nath, “Tamil Nadu to soon bring law for banning online rummy games, informs minister”, *IndiaToday.in*, August 4, 2021, available at <https://www.indiatoday.in/law/story/tamil-nadu-to-soon-bring-law-soon-for-banning-online-rummy-games-informs-minister-1836712-2021-08-04> (last visited on 30th August, 2021).

that the ban fulfils the 'test of proportionality' and also that the ban is the 'least intrusive' measure possible to curb the alleged mischief.

Thus, it seems the HC has made the re-introduction of a blanket ban difficult in the State and this is expected to have a positive impact for the industry keeping in mind the prospective laws and amendments anticipated in other states like Uttar Pradesh, Karnataka<sup>17</sup>, Rajasthan & Madhya Pradesh.

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**Date:** September 02, 2021

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<sup>17</sup> This judgment and its observations were recently raised by an advocate during court proceedings in a public interest litigation matter in the Karnataka High Court wherein the petitioner has sought a law for online gaming. The counsel stressed that the Karnataka state government should frame its new law keeping in mind what has been said by the Madras HC.