



## ON LINE GAMING, GAMING LAWS & LEGAL PUZZELS IN INDIA

Pokémon Go by now needs little introduction. The Internet some time ago has been rife with guides about its gameplay and tales of mishaps and freak incidents. Pokémon Go is not the first or the only application of augmented reality (AR), but it is the first AR application that has made it into the mainstream. The app has been downloaded more than a 100 million times, had over 20 million daily active users in the US alone (more than Twitter), and had users spending more daily time on it than on Facebook.

There was also a huge uproar over the sweeping access permissions requested by the app (it could originally access and modify virtually all of iPhone users' Google accounts). But this was later clarified as a mistake by Niantic (the game's maker) and the app later only required access to basic account information. The Pokémon Go privacy policy allows Niantic to "share aggregated information and non-identifying information with third parties for research and analysis, demographic profiling and other similar purposes". How Niantic itself can use this information is also left open to interpretation. The privacy policy states: "***Our primary goals in collecting information and to provide and improve our Services, to administer your (or your authorized child's) use of the Services, and to enable you (or your authorized child) to enjoy and easily navigate our Services.***"

The game was also exploited by hackers (albeit in a different context) where they mounted a Distributed Denial of Service (DDoS) attack, bringing the game's servers down for a short period. The Indian Information Technology Act, 2000, and the rules under it would require the company to implement "reasonable security practices and procedures" i.e., among other things, not collecting sensitive personal information unless necessary; not retaining such information longer than required; providing the user an opportunity to review this information for accuracy; and having a comprehensive documented information security program. Personal information that is not sensitive is also subject to some protection measures. The company would also be required to designate a grievance officer to address user grievances.

Niantic has not formally launched the game in India, but it is no secret that it was being downloaded in the country. So, the question arises whether Niantic is bound by Indian laws if users have downloaded unauthorized versions of the app. Besides their provisions on IP, the app's terms of service require users to sign away various rights. The clause that has got the most attention is a mandatory arbitration clause, which requires users to waive their right to sue unless they opt out by email or regular mail within 30 days of downloading the app. This is a significant issue in jurisdictions.

The maker also disclaims liability for personal injury to users and trespass by users. But the fact that players have to hold their phone in front of them to play causes them to be distracted from their surroundings and has led to significant mishaps. Also, various Pokémon characters and Pokéstops (sites of in-game items) were located on private property, which required users to enter private property to obtain them. Under Indian law, what Pokémon Go players did would not be considered criminal trespass, because of the absence of any intent to do harm. However, the tort of trespass to land will apply as soon as there is (unjustifiable) entry into another's private property. One study found that, of a sample of more than 750 users, 85% admitted to playing while driving a car, and more than 10% admitted to trespassing while playing. To further complicate matters, the game was not even officially released in India! How were people playing?

This leads to a question about the legal relationship between Indian users and Niantic. The terms of service do not directly address this situation. Niantic can argue that as soon as a person uses the app, they are bound by the terms

of service, but users can argue that they are not bound by them since they never downloaded an official release in their own jurisdiction.

In the recent past the Karnataka Government has proposed to move a Bill to regulate all Clubs in Karnataka **“Karnataka Regulation of entry to public places and regulation of clubs Bill 2016”**, the bill among others also aims to put a stop to any sort of gaming inside the club and illegal activities (there is no further explanation as to what is other illegal activities and what is gaming), the same definitions are also mentioned in the Karnataka Police Act & the provisions for the prevention of gambling. The bill further states **“Any club found guilty of carrying on gaming, gambling etc.. the license shall be cancelled and lands given to such clubs on concession, lease shall be cancelled.”**

It is hard to believe that just 20 years ago, it was illegal to advertise gambling in the UK. Betting shops and casinos existed but were effectively banned from promoting their activities. Then in 1994 along came the national lottery and all of a sudden gambling became a good thing, and we do now have super casinos in Britain, people can gamble anywhere and at any time on their TVs, computers, phones, down the pub, in the supermarket or any corner shop.

In the backdrop of the above we need to understand the long-standing disputes as to what is gambling ?? is playing cards gaming or gambling, what is the difference between gaming & gambling, what is the difference between a game of chance & a game of skill...

Indian Constitution has divided law making powers between various states and the centre. Gambling is a subject that falls within the legislative powers of various states of India. Most of the states in India have prohibited gambling activities within the jurisdiction of their respective state. However, tourism and revenue generation has forced many states to allow controlled gambling in few states. These states are also required to safeguard the interest of locals from the evil of gambling. This is the reason why most of the states have now started either prohibiting the entry of the locals or making the entry fees very high thereby making the casinos or gambling houses available to rich only. Goa has been increasing the tariffs to deter the common man from visiting them. Because of an increase in tariffs, there has been a decrease in onshore casinos in the state. On the other hand, the Sikkim government has brought out an official notification prohibiting residents of the state from entering its two casinos to safeguard the interest of the local people. So, the trend is going in the direction of tourism and revenue generation by the states and restricting access to casinos for the locals.

As per the notification dated July 4, only persons having the photo identity card or passport issued from outside the State of Sikkim will be permitted entry into the Casinos. An amendment to the Sikkim Casino Games (Control and Tax) Rules, 2007, has been made to accommodate this change. A resident of Sikkim could challenge the state's rule in court as violation of Article 14 of the Indian Constitution that mandates that State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. But courts are favouring states when the restrictions placed on residents regarding certain forms of entertainment or recreation have been imposed in bonafide public interest. For instance, the Supreme Court had upheld the Kerala government's decision to curtail consumption of liquor in bars and other public places in larger public interest. The apex court had earlier also upheld bans on online lotteries in various states on the ground that it ruined the lives of several families.

Indian population is very enthusiastic about sports and sports related activities. Indian sports has got a boost in the form of online gaming that has transformed physical sports into virtual sports, e-games, e-sports, online games, fantasy sports, etc. As on date we have no dedicated online gaming and online gambling laws in India. Similarly, we have no dedicated fantasy sports law in India till now. This is in line with the existing game laws like online poker, online rummy, online lotteries, etc that are still not governed by any dedicated Indian law. The result is inevitable i.e. online card games in India are in limbo and legal troubles.

Before discussing about legality of fantasy sports it is pertinent to know a little about it. Briefly speaking, a fantasy sport is an online game that involves selection of and competition among virtual teams for points. These points can be redeemed in multiple ways and money or cash is one of them. However, when cash for stakes is involved, a fantasy game or sport is required to comply with additional techno legal compliances. The present trends among fantasy sports stakeholders in India is to apply the tests of traditional rummy to online poker, online rummy and

fantasy sports. However, this is a wrong approach. It is strongly recommend that online poker, online rummy, online lotteries, fantasy sports, etc require customised and separate treatment than simply applying the **skills v chance criteria**. Even the central government and Supreme Court of India are cautious about these issues and they have deliberately refrained from commenting upon the legalities of online games in India. Without going into much details, it is sufficient to say that relying solely upon **skills v chance** criteria for running online poker, online rummy, fantasy sports, etc would be a big mistake.

As far as India is concerned, there is no clear regulatory framework that can be looked upon to decide legality or illegality of online poker, online rummy, online card games, fantasy sports, etc. However, there are some very complicated techno legal compliances that are required to be complied with to clear an online gaming or fantasy sports website from legal troubles. Unfortunately, online gaming and fantasy sports websites in India are not complying with these techno legal requirements and they are on the wrong side of Indian laws.

Recently the Indian government has clarified about the Foreign Direct Investment (FDI) in E-Commerce Sector of India. As per the “Consolidated FDI Policy Circular 2015” (FDI Policy), FDI is prohibited in lottery business including Government/private lottery, online lotteries, etc and gambling and betting including casinos etc. Recently the Crime Investigation Department (CID) of the Andhra Pradesh police had sought a ban on the website of “**Playwin**” which had allegedly been selling online lotteries banned in the state. As on date, online gaming, online gambling and lotteries websites are not complying with the internet intermediary compliances and cyber law due diligence requirements prescribed under the Information Technology Act 2000. Similarly, almost all of the online poker websites in India are violating one or other laws of India. Although online gaming market in India is booming yet regulatory compliances cannot be ignored. It seems online gaming and online gambling industry of India is not considering regulations while conducting their businesses in India.

Even the banks, payment gateways and online payment merchants, mobile payment vendors, etc supporting these online poker, online rummy, online card games and fantasy sports websites can be held liable for not following cyber law due diligence norms as they have blindly approved online payment option to these illegal and law breaking websites. These banks and payment gateways can also be held liable for money laundering, FEMA violations and assisting in tax evasion. If such banks, payment gateways and online payment merchants have already approved such illegal and law breaking online poker, online rummy, online games and fantasy sports websites in India, it is in their own interest to cancel such approval immediately. The banks etc must ask them to first comply with applicable techno legal compliances and then support their claims with a proper techno legal consultancy and opinion from a reputed law firm.

In the past, Kerala refused permission to Future Gaming Solutions India Private Ltd to sell Nagaland lotteries in the state. A social worker had knocked judiciary’s doors praying for immediate ban on unauthorized and alluring online lotteries. Promoted by other states within Maharashtra, he contended that over 1,300 bogus online lotteries under various strange names are operating here and ruining lives of millions. A division bench comprising justice Bhushan Gavai and justice Swapna Joshi issued notices to central and state governments seeking their reply in the matter.

Online Gaming is a multi-crore industry in India. Despite this fact, we have no dedicated Online Gaming and Online Gambling Laws in India. This has made the Legal Position regarding Online Games like Rummy, Poker, etc really confusing and murky. Due to diverse legal actions and situations, the matter has reached before the Supreme Court of India. However, there are great misunderstandings and misconceptions regarding the nature of present legal proceedings before the Indian Supreme Court.

For instance, the core issue before the Supreme Court pertains to Legality of playing Rummy with Cash Stakes. Supreme Court in this case is not concerned with Online Rummy and it is definitely not concerned with Online Poker, Supreme Court has categorically mentioned that it would not decide the legality of online poker or online rummy till the Indian government comes out with a policy decision in this regard. In the past Supreme Court asked the Indian government to clarify its stand regarding online rummy but the government refused to provide any opinion in this regard. Thus, legality of online poker or online rummy is still a grey area and online gaming and gambling

stakeholders must comply with the applicable laws of India till Indian government comes up with some policy or law in this regard.

The position on date is that online card games websites in India are already in limbo and now the Supreme Court of India has made this position more uncertain and legally vulnerable. As per the latest order of the Supreme Court, it has refused to decide the legality or illegality of online games like poker, rummy, etc. The Supreme Court has clarified that the present petitions before it pertain to offline rummy only and managing online rummy or online poker is still a legally risky area.

Now the ball is in Indian government's court and it has to come up with rules and regulations regarding online game and online gambling activities in India. The Indian government has to decide not only about the **skills versus gambling criteria** but also the techno legal aspects that are attributable to use of technology in on line gaming.