PUTTING THEIR MONEY AT STAKE IN THE STATE OF KARNATAKS, DESPITE JUDICIAL RECOGNITION THAT THE SAME DO NOT AMOUNTING TO GAMBLING / BETTING / WAGERING, AND THAT SUCH BUSINESS OF OFS COMPLAINT WITH THE CHARTER (AT ANNEXURE - D) HAS PROTECTION OF ARTICLE 19 (1) (G), OR IN THE ALTERNATIVE AND ETC.,

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY THROUGH VIDEO CONFERENCE, KRISHNA S.DIXIT. J., DELIVERED THE FOLLOWING:-

JUDGMENT

The tickling tone for this judgment can be set by what Lord Denning had humoured in **TOTE INVESTORS LTD. vs. SMOKER**[1]: *"...The defendant has in the past occasionally had a wager on a horse-race. Today she has been taking part in another game of chance or skill – the game of litigation..."*

All these petitions by the companies & individuals involving substantially similar questions of law & facts seek to lay a challenge to the validity of the Karnataka Act No.28 of 2021 (hereafter 'Amendment Act') whereby the Karnataka Police Act, 1963 (hereafter 'Principal Act') has been amended; the cumulative effect of these amendments, according to them, is the criminalization of

[1] (1968) 1 QB 509

playing or facilitating online games. After service of notice, the respondents having entered appearance through the learned Advocate General have filed their common Statement of Objections and Addl. Statement of Objections resisting the challenge.

II. A BRIEF DESCRIPTION AS TO WHO THE PETITIONERS ARE:

Petitioners in W.P.No.18703/2021 and W.P.No.19322/2021 are the societies registered under the Societies Registration Act. Petitioners in W.P.No.18729/2021, W.P.No.18732/2021, W.P.No.18733/2021, W.P.No.18738/2021, W.P.No.18803/2021, W.P.No.18942/2021, W.P.No.19241/2021 and W.P.No.22371/2021 are the companies incorporated under the Companies Act. Petitioners in W.P.No.19271/2021 and W.P.No.19450/2021 are the individuals. Some of the petitioners in the petitions filed by the companies happen to be Directors. All the petitioners are associated with online gaming in one or the other way. These games are rummy, carom, chess, pool, bridge,

cross-word, scrabble and fantasy sports such as cricket, etc.

III. GROUNDS OF CHALLENGE BRIEFLY STATED:

The challenge to the Amendment Act is structured *inter alia* on the following grounds:

(i) Lack of legislative competence since the Amendment Act does not fit into Entry 34, List II, Schedule VII of the Constitution of India vide **CHAMARBAUGWALA-I**[2], **CHAMARBAUGWALA-II**[3], **K.SATYANARAYANA vs. STATE OF ANDRHA PRADESH**[4] & **K.R.LAKSHMANAN vs. STATE OF TAMIL NADU**[5].

(ii) Violation of Article 21 since playing games & sports falls within the umbrella of 'right to life & liberty' that has been stretching precedent by precedent and

[2]AIR 1957 SC 628
[3] AIR 1957 SC 874
[4] AIR 1968 SC 825
[5] (1996) 2 SCC 226

violation of doctrine of privacy vide **K.S.PUTTASWAMY vs. UNION OF INIDA**[6].

(iii) Violation of fundamental right to freedom of speech & expression guaranteed under Article 19(1)(a) since playing games & sports of skill is a facet of speech & expression and that criminalizing apart from amounting to unreasonable restriction, is incompetent under Article 19(2).

(iv) Violation of fundamental right to profession/business guaranteed under Article 19(1)(g) read with Article 301 i.e., incompetent & unreasonable restriction vide **CHINTAMAN RAO vs. STATE OF MADHYA PRADESH**[7], **MOHD. FAROOQ vs. STATE OF MADHYA PRADESH**[8], game of skill not being a *res extra commercium (*CHAMARBAUGWALA-II, *supra)* and embargo being *de hors* Article 19 (6).

(v) Manifest arbitrariness **SHAYARA BANO vs. UNION OF INDIA**[9] since the Amendment Act fails to

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[6] (2019) 1 SCC 1
[7] (1950) SCR 759
[8] (1969) 1 SCC 853
[9] (2017) 9 SCC 1

recognize the blatant normative difference between a 'game of skill' and a 'game of chance', in gross derogation of *Chamarbaugwala Jurisprudence* of more than six decades.

(vi) The impugned legislative measure is a result of excessive *paternalism* & *populism*. The State is imposing its own notion of morality on the free & rational citizens by clamping a blanket ban on online games of skill. This is constitutionally unsustainable.

Petitioners in support of their case also press into service several other decisions of the Apex Court and of some High Courts which will be discussed in due course.

IV. RESPONDENTS' OBJECTIONS TO THE PETITIONS:

The respondents oppose the petitions on the grounds as summarized below:

(i) There was a Public Interest Litigation in W.P.No.13714/2020 seeking a direction for legislatively banning all forms of online gambling & online betting; a

Division Bench of this Court vide order dated 31.3.2021 directed the respondent-State to take a stand on the matter and accordingly, the Chief Secretary, Govt. of Karnataka had filed an affidavit to the effect that the State would come out with a legislation. The impugned Amendment Act has come on the Statute book pursuant to the assurance given to the Court.

(ii) In the preceding two decades or so, because of digital revolution, there has been a proliferation of online gaming platforms which engage in 'betting & wagering' unbound by time & place unlike traditional betting, and this has proved disastrous to the public interest in general and public order & public health in particular. The menace of cyber games having reached epic proportions, the police in the past three years or so, have registered about 28,000 cases, all over the State. Several persons have committed suicide and millions of families have been ruined. Therefore, the Amendment Act is made criminalizing wagering, betting or risking money on the unknown result of an event, be it a game

of chance or a game of skill. The persons owning these premises or online platforms wherein such games are played are also liable to be punished. The State derives legislative power under Article 246 read with Entries 1, 2, 6 & 34 of State List as widely interpreted by the Apex Court.

(iii) Amendment Act introduces clarificatory provisions to the effect that the provisions relating to gaming apply to online gaming & platforms, as well. Apart from making the offences cognizable & non-bailable, it makes the punishment more stringent commensurating with the gravity of the offence. However, if persons merely play a game of chance or a game of skill without risking cash or kind, they do not fall in the net of penal provisions.

(iv) The petitioners lack both the *locus standi* and the cause of action, there being no coercive action initiated against anyone of them or against anyone who made use of their online gaming platforms. Ordinarily,

anticipatory relief of the kind cannot be granted by a constitutional Court.

(v) Those of the petitioners who happen to be the companies incorporated under the erstwhile Companies Act, 1956 or the present Companies Act, 2013, being juristic persons cannot avail the fundamental rights guaranteed under Article 19(1) of the Constitution.

(vi) In support of their submission, the respondents *inter alia* bank upon the decisions of Apex Court in **JILUBHAI NANBHA KACHAR vs. STATE OF GUJARAT**[10], **GODFREY PHILLIPS INDIA LTD. vs. STATE OF UTTAR PRADESH**[11], **M.J SIVANI vs. STATE OF KARNATAKA**[12], **HIGH COURT OF GUJARAT vs. GUJARAT KISHAN MAZDOOR PANCHAYAT**[13], **BHARAT HYDRO CORPORATION LTD vs. STATE OF**

[10] (1995) SUPP 1 SCC 596
[11] (2005) 2 SCC 515
[12] (1995) 6 SCC 289
[13] (2003) 4 SCC 712

ASSAM[14], VARUN GUMBER vs. UNION TERRITROY OF CHANDIGARH[15], B.P.SHARMA vs. UNION OF INIDA[16], SYSTOPIC LABORATORIES vs. DR.PREM GUPTA[17], etc.

V. Having heard the learned counsel for the parties and having perused the Petition Papers, and after adverting to the Rulings cited at the Bar, we are inclined to grant indulgence in the matter for the following reasons:

1. AS TO WHAT THE IMPUGNED TEXTUAL CHANGES TO THE AMENDMENT ACT DOES TO THE PRINCIPAL ACT:

For ease of understanding, what the Principal Act prior to 2021 Amendment was and what it has become post Amendment, their relevant comparative texts are furnished in the following comparative tabular forms. Whatever has been added to or deleted from the Principal Act is shown in bold italics:

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[14] (2004) 2 SCC 523
[15] 2017 SCC online P&H 5372
[16] (2003) 7 SCC 309
[17] (1994) Supp. 1 SCC160

TABLE-1

(AMENDMENT TO DEFINITION CLAUSE i.e., SECTION 2)

	PRE-AMENDMENT	***POST AMENDMENT***
(1)	**Clause 3 of Section 2: "Common Gaming House";** means a building, room, tent, enclosure, vehicle, vessel or place in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, or keeping such building, room, tent, enclosure, vehicle, vessel or place, or of the person using such building, room, tent, enclosure, vehicle, vessel or place, whether he has a right to use the same or not, such profit or gain being either by way of a charge for the use of the instruments of gaming or of the building, room, tent, enclosure, vehicle, vessel or place, or otherwise howsoever or as subscription or other payment for the use of facilities along with the use of the instruments of gaming or of the building, room, tent, enclosure, vehicle, vessel or place for purposes of gaming.	**Clause 3 of Section 2: "Common Gaming House";** means a building, room, tent, enclosure, vehicle, vessel or place in which any instruments of gaming are kept or used for the profit or gain, **[*or otherwise*]** of the person owning, occupying, or keeping such building, room, tent, enclosure, vehicle, vessel or place, or of the person using such building, room, tent, enclosure, vehicle, vessel or place, whether he has a right to use the same or not, such profit or gain, **[*or otherwise*]** being either by way of a charge for the use of the instruments of gaming or of the building, room, tent, enclosure, vehicle, vessel or place, or otherwise howsoever or as subscription or other payment for the use of facilities along with the use of the instruments of gaming or of the building, room, tent, enclosure, vehicle, vessel or place for purposes of gaming.

(2)	**Clause 7 of Section 2:**"gaming" does not include a lottery but includes all forms of wagering or betting in connection with any game of chance, except wagering or betting on a horse-race [run on any race course within or outside the State], when such wagering or betting takes place. **Explanation (i) to Clause 7:** 'wagering or betting,' includes the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, in respect of any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution.	**Clause 7 of Section 2:**"gaming" means and includes online games, involving all forms of wagering or betting, including in the form of tokens valued in terms of money paid before or after issue of it, or electronic means and virtual currency, electronic transfer of funds in connection with any game of chance, but does not include a lottery or wagering or betting on a horse-race on any race course within or outside the State, when such wagering or betting takes place]. **Explanation (i) to Clause 7:** wagering or betting,' includes the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, in respect of any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution, ***any act or risking money, or otherwise on the unknown result of an event including on a game of skill and any action specified above carried out directly or indirectly by the playing any game or by any third parties.***

(3)	**Clause 11 of Section 2: "Instruments of Gaming"** includes any article used or intended to be used as a subject, or means of gaming, any document used for intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming.	**Clause 11 of Section 2: "Instruments of Gaming"** includes any article used or intended to be used as a subject or means of gaming, including computers, computer system, mobile app or internet or cyber space, virtual communication device, electronic applications, software and accessory or means of online gaming, any document, register or record or evidence of any gaming in electronic or digital form, the proceeds of any online gaming as or any winning or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming. **Explanation-** The words 'computer', 'communication device'. 'computer network', 'computer resource', 'computer system', 'cyber café' and 'electronic record' used in this Act shall have the respective meaning assigned to them in the Information Technology Act, 2000 (Central Act 21 of 2000).
(4)		**Clause 12A of Section 2:** "Online gaming" means and includes games as defined in clause (7) played online by means of instruments of gaming, computer, computer resource, computer network, computer system or by mobile

		app or internet or any communication device, electronic application, software or on any virtual platform.
(5)	**Clause 13 of Section 2:** "Place" includes a building, a tent, a booth or other erection, whether permanent or temporary, or any area, whether enclosed or open.	**Clause 13 of Section 2:** "Place" includes a building, a tent, a booth or other erection, whether permanent or temporary, or any area, whether enclosed or open ***including a recreation club or on virtual platform, mobile app or internet or any communication device, electronic application, software, online gaming and computer resource as defined in Information Technology Act, 2000 (Central Act 21 of 2000) or under this Act.***

TABLE-2

(AMENDMENT TO SUBSTANTIVE PROVISIONS

NAMELY SECTIONS 78, 79, 80, 87, 114, 128A & 176)

	PRE-AMENDMENT	***POST AMENDMENT***
(6)	***Section 78 (1)(a)(vi):*** **Opening, etc., of certain forms of gaming.—**(1) Whoever,— (a) being the owner or occupier or having the use of any building, room, tent, enclosure, vehicle, vessel or place, opens, keeps or	***Section 78 (1)(a)(vi)(vii):*** **Opening, etc., of certain forms of gaming.—**(1) Whoever,— (a) being the owner or occupier or having the use of any building, tent room, enclosure, vehicle, vessel or place [or at cyber cafe or online gaming

	uses the same for the purpose of gaming— (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;	involving wagering or betting including computer resource or mobile application or internet or any communication device as defined in the Information Technology Act, 2000 (Central Act 21 of 2000)] opens, keeps or uses the same for the purpose of gaming,— (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 [skill of other]; (vii) On any act on risking money or otherwise on the unknown result of an event including on a game of skill; or]
(7)	***Section 79:*** Keeping common gaming house, etc. shall, on conviction, be punished with imprisonment which may extend to one year and with fine: Provided that,— (a) for a first offence, such imprisonment shall not be less than three months and fine shall not be less than five hundred rupees; (b) for a second offence, such imprisonment shall not be less than six months and fine shall not be less than five hundred	***Section 79:*** Keeping common gaming house, etc. shall, on conviction, be punished with imprisonment which may extend to ***three year*** and with ***fine up to rupees one lakh*** : Provided that,— (a) for a first offence, such imprisonment shall not be less than ***six months*** and fine shall not be less than ***ten thousand***; (b) for a second offence, such imprisonment shall not be less than ***one year*** and fine shall not be less than ***fifteen thousand*** rupees; and (c) for

	rupees; and (c) for a third or subsequent offence, such imprisonment shall not be less than nine months and fine shall not be less than one thousand rupees.	a third or subsequent offence, such imprisonment shall not be less than ***eighteen month*** and fine shall not be less than ***twenty thousand*** rupees.
(8)	***Section 80:*** **Gaming in common gaming-house, etc.—**Whoever is found in any common gaming-house gaming or present for the purpose of gaming shall, on conviction, be punished with imprisonment which may extend to one year and with fine: Provided that,-- (a) for a first offence such imprisonment shall not be less than one month and fine shall not be less than two hundred rupees; (b) for a second offence such imprisonment shall not be less three months and fine shall not be less than two hundred rupees; and (c) for a third or subsequent offence such imprisonment shall not be less than six months and fine shall not be less than five hundred rupees.	***Section 80:*** **Gaming in common gaming-house, etc.—**Whoever is found in any common gaming-house gaming or present for the purpose of gaming shall, on conviction, be punished with imprisonment which may extend to ***three years*** and with fine ***up to rupees one lakh***: Provided that,— (a) for a first offence such imprisonment shall not be less than ***six months*** and fine shall not be less than ***ten thousand*** rupees; (b) for a second offence such imprisonment shall not be less ***one year*** and fine shall not be less than ***fifteen thousand***; and (c) for a third or subsequent offence such imprisonment shall not be less than ***eighteen month*** and fine shall not be less than ***twenty thousand*** rupees.
(9)	**Section 87: Gaming in public streets.—**Whoever	**Section 87: Gaming in public streets.—**Whoever is

	is found gaming or reasonably suspected to be gaming in any public street, or thoroughfare, or in any place to which the public have or permitted to have access or in any race-course shall, on conviction, be punished with imprisonment which may extend to three months or with fine which may extend to three hundred rupees, or with both and where such gaming consists of wagering or betting, any such person so found gaming shall, on conviction, be punishable in the manner and to the extent referred to in section 80 and all moneys found on such person shall be forfeited to the Government.	found gaming or reasonably suspected to be gaming or ***aiding or abetting such gaming*** in any public street, or thoroughfare, or in any place to which the public have or permitted to have access or in any race-course shall, on conviction, be punished with imprisonment which may extend to ***six months*** or with fine which may extend to ***ten thousand*** rupees, or with both and where such gaming consists of wagering or betting, any such person so found gaming shall, on conviction, be punishable in the manner and to the extent referred to in section 80 and all moneys found on such person shall be forfeited to the Government.
(10)	***Section 114:*** **Penalty for entering area from which person has been directed to remove himself.—** Notwithstanding anything contained in section 61, any person who, in contravention of a	***Section 114:*** **Penalty for entering area from which person has been directed to remove himself.—** Notwithstanding anything contained in section 61, any person who, in contravention of a direction issued to him under sections 54, 55, 56 or

	direction issued to him under sections 54, 55, 56 or 63 enters the area from which he was directed to remove himself, shall on conviction, be punished with imprisonment for a term which may extend to two years, but shall not, except for reasons to be recorded in writing be less than six months, and shall also be liable to fine.	63 enters the area from which he was directed to remove himself, shall on conviction, be punished with imprisonment for a term which may extend to two years, but shall not, except for reasons to be recorded in writing be less than six months, and shall also be liable to fine ***which shall not be less than twenty five thousand but which may extend to rupees one lakh.***
(11)		***Section 128A:*** **Certain offences to be Cognizable, Non-bailable,-** (1) All offences under chapter VII except section 87; and all offences under section 90, 108, 113, 114 and 123 under chapter VIII shall be cognizable and non-bailable; (2) Offences under section 87 shall be cognizable and bailable ."
(12)	***Section 176:*** **Saving of games of skill.—**For the removal of doubts it is hereby declared that the provisions of sections 79 and 80 shall not be applicable to the playing of any pure game of skill	***Section 176:*** **Saving of games of skill.—**For the removal of doubts it is hereby declared that the provisions of sections 79 and 80 shall not be applicable to the playing of any pure game of skill ~~and to wagering by~~

	and to wagering by persons taking part in such game of skill.	~~persons taking part in such game of skill.~~

2. **AS TO WHAT IMPACT THE AMENDMENT HAS ON THE RIGHTS & LIBERTIES OF INDIVIDUALS:**

(a) The Karnataka Police Act, 1963 was enacted by the State Legislature for the regulation of police force, the maintenance of public order and for the prevention of gambling. It received the assent of the President of India on 18.01.1964 and came to be gazetted on 13.02.1964. This Act came into force with effect from 02.04.1965 as notified. The Act has been amended as many as a dozen times between 1965 and 2021. Except the 2021 amendment, the rest are not put in challenge. The Amendment Act i.e., the Karnataka Act No.28 of 2021 which has brought about a substantial & sweeping change to the Principal Act, received the assent of the Governor of Karnataka on 4.10.2021. It came into force on being published in the official gazette on 5.10.2021. The Amendment Act introduces an expansive definition of 'gaming' under Section 2(7) by including all online games which involve all forms of wagering or betting. The

definition of the term 'wagering or betting' itself is widened to engulf even a game of skill involving money or otherwise, however, excluding horse racing subject to certain conditions. Similarly, it expansively alters the definitions of 'common gaming house' under Section 2(3), 'wagering or betting' in Explanation (i) to Section 2(7), 'instruments of gaming' under Section 2(11), 'online gaming' under Section 2(12A), 'place' under Section 2(13). Thus, the amendment encompasses in its fold games of skill too, offered to users through the online platforms/portals/applications played with monetary stakes or not.

(b) Section 78(1)(vi) & (vii) post amendment proscribe the act of running online gaming platforms offering games of skill to its users. These expanded definitions are the building blocks of penal provisions such as Sections 78, 79, 80, 87, 114 & 128A. The net effect of Amendment Act is: owners of online gaming houses, providers of online gaming facilities and players of online games, all become offenders liable to be jailed &

fined in terms of penal provisions. Added, amended Section 128A makes these offences both cognizable & non-bailable. As mentioned in the Comparative Tables above, the definition of 'pure game of skill' under the Principal Act has undergone a substantial change by virtue of amendment. The amended section retains an exclusion for 'pure games of skill' while omitting the exclusion that benefited the players of games of skill with financial stakes, in the pre-amendment regime. The amended definition of 'gaming' prohibits online games of skill when played with monetary stakes, is not disputed by the respondents.

VI. A BRIEF HISTORY OF BETTING AND GAMBLING:

(a) Acclaimed jurist of yester decades late H.M.Seervai in his *magnum opus* 'Constitutional Law of India' Volume III, Fourth Edition, Tripathi, at paragraph 22.262 writes: *'If the decisions of the US Supreme Court, Supreme Court of Australia or Canada, or the decision of the Privy Council can be referred to for showing the evils*

of gambling, there is no reason why references should not be made to Hindu Law and to Hindu religious books, or to Mohammadan Law, to show that gambling had been condemned in India from ancient times'.

(b) Gambling is perhaps as old as mankind. Betting & gambling have always been a part of several civilizations. The Greeks and Romans were among the first to practise gambling. Most of the scriptures, native & foreign shun them. In India from time immemorial, sages had proscribed gambling as a sinful and pernicious vice. Sage *Kanvasha Ailusha* (*Aksha Maujavant)* had composed a cautionary poem/hymn in *Rig Veda* (10.34) which is titled "The Gambler's Lament". It comprises monologue of a repentant gambler who grieves the ruin brought on him because of addiction to the game of dice; this *Veda* (10.34) has a hymn which nearly translates to: *a gambler's wife is left forlorn and wretched; the mother mourns the son who wanders homeless, in constant fear, in debt and seeking money by theft in the dark of night.* In r*aajsooya* y*aag*, of middle *Vedic* period, a ritual game of dice used to be played in

which the game was rigged so that the king-to-be, would win.

(c) In Indian epic '*Mahaabhaarat*', King *Yudhistira* the eldest brother of *Paandavaas* gambles away his kingdom, brothers, wife *Draupadi* and lastly himself to his cousins i.e., Kauravaas and all they as stipulated go to woods. Yaajnavalkya Smriti has a verse which states that *son should not pay the paternal debt that was contracted for the purpose of liquor, lust or gambling.* Kaatyaayana Smriti states that *gambling, if cannot be stopped in the kingdom, should be discouraged by imposing tax.* Manusmriti injuncts that *gambling & betting, the king shall exclude from his realm since those two vices may cause the destruction of kingdom;* a wise man should not practise them even for amusement. Kautilya of *arthashaastr* fame treats all gamblers as cheats and therefore suggests severe punishment. A great Tamil book by Thiruvalluvar 'Tirukkural' fumes against gambling.

(d) *John Dunkley's 'Gambling: A social & moral problems in France', 1958 Edn.* discusses about the historicity of gambling in France. In 17th -18th centuries, French cities were attracting gamblers from all over Europe and the Resolution on Hazardous Games was passed way back in the year 1697 providing general guidelines on how to gamble and for easing the problems associated with gambling; however, French moralists were opposing the same contending: *"Gambling spoils an individual's ability to reason; gambling poisons gamblers' relations with others; gambling makes a gambler neglect his religious and social duties".* It is not impertinent to quote a stanza from ***Shakespeare's*** '*Merchant of Venice*':

> *"If Hercules and Lychas play at dice*
> *Which is the better man, the greater throw*
> *May turn by fortune from the weaker hand;*
> *So is Alcides beaten by his page,*
> *And so may I, blind Fortune leading me,*
> *Miss that which one unworthier may attain,*
> *And die with grieving."*

VII. CONSTITUENT ASSEMBLY DEBATES ON 'Betting & gambling':

(a) There was a considerable discussion in the Constituent Assembly on the introduction of Entry 34 in

the State List which was Entry 45 in the Draft Constitution. Two prominent members of the Assembly, namely, Mr. Shibban Lal Saksena & Mr. Lakshminarayan Sahu had suggested for the omission of this Entry from the constitutional document, under a wrong impression that if omitted, there would no longer be betting or gambling in the country. Dr. Ambedkar erased their impression by the following reply:

> *"I should like to submit to them that if this entry was omitted, there would be absolutely no control of betting and gambling at all, because if Entry 45 was there it may either be used for the purpose of permitting betting and gambling or it may be used for the purposes of prohibiting them. If this entry is not there, the provincial governments would be absolutely helpless in the matter... If this Entry was omitted, the other consequence would be that this subject will be automatically transferred to List I under Entry 91.... If my friends are keen that there should be no betting and gambling, then proper thing would be to introduce an article in the Constitution itself making betting and gambling a crime, not to be tolerated by the State. As it is, it is a preventive thing and the State will have full power to prohibit gambling".* ***CAD of 02.09.1949, Volume IX****.*

(b) It is relevant to note that Part III of our Constitution outlaws untouchability (Article 17), human

trafficking and begar (Article 23), child employment (Article 24). Part IV enacts Directive Principles of State Policy which Dr.Ambedkar called as the 'instrument of instructions'. It specifies a list of do's & don'ts that address the making of government policies. Article 47 directs prohibition of liquors & injurious drugs. It is relevant to mention that the Apex Court in **KHODAY DISTILLERIES vs. STATE OF KARNATAKA**[18]**,**observed that the trade or business in liquor is a *res extra commerciam* since the said commodity is inherently harmful and that law can completely ban its trade. Article 48 *inter alia* directs proscription of cow slaughter. However, there is no such prohibition expressly or impliedly suggested in respect of gambling although power to legislate concerning the same avails to the State vide Entry 34, List II, Schedule VII of the Constitution, as would be discussed *infra*.

VIII. AS TO LEGISLATIVE COMPETENCE & WIDER INTERPREATION OF LEGISLATIVE ENTRIES:

[18] (1995) 1 SCC 574

(a) The most important feature of Federal Constitutions like ours is the distribution & sharing of legislative power between the Centre and the States. Our Constitution has bodily adopted this scheme of Government of India Act, 1935 with small verbal changes, and with substantially enlarged legislative Lists enacted in Schedule VII; "*Betting and gambling*" was the term employed in Entry 36, List II in Schedule VII to the said Act too; the same is replicated in Entry 34 of the State List in the Constitution. This term is not defined in our Constitution nor was it defined in the Government of India Act. It does not find a place even in popular law lexicons, nor in the contemporary English dictionaries, either. However, the constituent words of the term, namely '*betting*' and '*gambling*' are individually and sometimes correlatively defined. Much assistance cannot be derived by turning to the dictionaries, as it is often said 'law is not the slave of dictionaries'. "*But I am not inclined to play a grammarian's role*" said Justice Hidayatullah in **SAJJAN SINGH vs. STATE OF**

RAJASTHAN[19]. No law sings its intent to the subjects. *One of the characteristics of enacted law* (constitutional law included) *is its embodiment in authoritative linguistic formulae. The very words in which it is expressed i.e., litera scripta constitute a part of the law itself. Legal authority is possessed by the letter of an enactment no less than by its spirit.* Therefore in the case of enacted law, a process of judicial interpretation becomes necessary for ascertaining its meaning & application.

(b) The first ground vehemently canvassed by petitioners is that the subject amendment could not have been enacted for want of legislative power. Drawing the attention of Court to Entry 34 of State List which employs the term *'Betting and gambling'* they contended that this term has acquired a constitutional significance having been so treated by the Apex Court in two *CHAMARBAUGWALLA* cases, *K.SATYANARAYANA* and *K.R.LAKSHMANAN, supra.* Learned Advocate General appearing for the respondents *per contra* contended that the legislative competence of the State extends to and

[19] AIR 1965 SC 845

beyond Entry 34. He points out Entry 1 (*Public order*), Entry 2 (Police), Entry 6 (*Public health and sanitation*) and Entry 26 (*Trade and commerce*) in the same List. According to respondents, the Amendment Act is a piece of '*ragbag legislation*', to borrow the words of Hon'ble M.N.Venkatachalaiah,J. in **UJAGAR PRINTS vs. UNION OF INDIA**[20].

(c) It has long been settled that the legislative power emanates *inter alia* from Articles 245 & 246 (now additionally Article 246A) of the Constitution and that the Legislative Entries are only the fields of law making. These Entries are mere legislative heads of enabling character designed to define and delimit the respective areas of legislative competence of the Union and the States. The legislative Entries in whichever List they occur should be interpreted with the 'widest amplitude' as observed in *JILUBHAI NANBHA KACHAR, supra*. The purpose of the enumeration of legislative power is not to define or delimit the description of law that the Parliament or the State Legislatures may enact in respect

[20] AIR 1989 SC 516

of any of the subjects assigned to them. Such a power constitutionally given is plenary in its content & quality. The enumeration is made to name a subject for the purpose of assigning to that power. The names or descriptions employed in legislation are usually of the briefest kind; it is more so when it comes to the constitutions. In this regard what **Gray J**., of US Supreme Court more than a century ago observed in **JUILLIARD vs. GREENMAN**[21]**,** becomes instructive. "*The Constitution ... by apt words of designation or general description, marks the outlines of the powers granted to the National Legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the sub-divisions of those powers, or to specify all the means by which they may be carried into execution...*".

(d) When a word or an expression acquires a special connotation in law, it can be safely assumed that the legislature has used such word or expression in its legal sense as distinguished from its common parlance

[21] (1883) 110 US 421

or the dictionary meaning. These legal concepts employed in a Constitution if construed by the Courts as such, acquire the constitutional spirit. Further when such terms are construed by the Apex Court to mean a particular thing, other Courts cannot venture to interpret the same to mean something else. What we are construing is a *constitutional concept*, i.e., *'Betting & gambling'* and not just two English words. Learned Advocate General's argument of 'widest amplitude' therefore cannot stretch the contours of a constitutional concept like this to the point of diluting its identity. Gambling, betting and other associated concepts are not of recent origin. They have been there in American and English realm of laws since centuries as mentioned in *CHAMARBAUGWALLA-1* itself. We are not required to start afresh every time we want to examine the operation of some terms employed in the Constitution, even if it transpires that these terms do need a revised construction; we have a basis from which we can start our critique. In **A-G FOR NSW vs. BREWARY**

EMPLOYEES UNION[22], the High Court of Australia (5 judges) observed "*...although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be...*".

IX. SCOPE OF ENTRY 34 IN STATE LIST; CHAMARBAUGWALA JURISPRUDENCE; GAMES OF SKILL vs. GAMES OF CHANCE:

Learned advocates appearing for the petitioners submitted that the term *'Betting and gambling'* employed in Entry 34, List II having been treated as a constitutional concept in *CHAMARBAUGWALLA I & II* and in the cases that followed, as distinguished from an ordinary legal concept this Court too has to construe it accordingly. They contended that substantially the Amendment Act being *pari materia* with the statutes of other States, the approach of this Court to the matter

[22] (1908) 6 CLR 469, 611-12

needs to be consistent with the relevant decisions of several High Courts in the country. They also notified that some of these have been affirmed by the Apex Court on challenge. Justice Oliver Wendell Holmes in **TOWNE vs. EISNER**[23], had said "*A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used...*". The two words namely "*Betting*" and "*gambling*" as employed in Entry 34, List II have to be read conjunctively to mean only *betting on gambling activities* that fall within the legislative competence of the State. To put it in a different way, the word "*betting*" employed in this Entry takes its colour from the companion word "*gambling*". Thus, it is betting in relation to gambling as distinguished from betting that does not depend on skill that can be regulated by State legislation; the expression "*gambling*" by its very nature excludes skill. It is chance that pervasively animates it. This interpretation of the

[23] 245 US 418 (1918)

said Entry gains support from the six decade old *CHAMARBAUGWALA* jurisprudence, as discussed below:

(i) In ***CHAMARBAUGWALA*-I,** *supra* the Apex Court *inter alia* was considering whether the Bombay Lotteries and Prize Competition Act, 1948, is a legislation relatable to Entry 34, List II, i.e., "*Betting and gambling*". To answer this question, the definition of "*prize competition*" in the said legislation was examined with all its constituents & variants such as "*gambling prize competition*", "*gambling adventure*", "*gambling nature*" & "*gambling competition*". After undertaking this exercise, the Court observed:

> *"...On the language used in the definition section of the 1939 Act as well as in the 1948 Act, as originally enacted, there could be no doubt that each of the five kinds of prize competitions included in the first category to each of which the qualifying clause applied was of a gambling nature. Nor has it been questioned that the third category, which comprised " any other competition success in which does not depend to a substantial degree upon the exercise of skill", constituted a gambling competition. At one time the notion was that in order to be branded as gambling the competition must be one success in which depended entirely on chance. If even a scintilla of skill was required for success the competition could not be regarded as of a gambling nature.*

> *The Court of Appeal in the judgment under appeal has shown how opinions have changed since the earlier decisions were given and it is not necessary for us to discuss the matter again. It will suffice to say that we agree with the Court of Appeal that a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill. Therefore, a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognized to be of a gambling nature."*

What emerges from the above observations is that: gambling is something that **does not depend** to a substantial degree upon the exercise of **skill**, and therefore something which **does depend**, ought not to be considered as gambling; as a logical conclusion, a game that involves a substantial amount of skill is not a gambling.

(ii) In **R.M.D.*CHAMARBAUGWALA*-II**, *supra* the Court was treating the question, whether it was constitutionally permissible for section 2(d) of the Prize Competition Act, 1955, which defined "Prize Competition" to take within its embrace not only the competitions in which success depended on chance but also those wherein success depended to a substantial

extent on the skill of player. What is observed in *CHAMARBAUGWALA*-I becomes further clear by the following observations in this case:

> *"... If the question whether the Act applies also to prize competitions in which success depends to a substantial degree on skill is to be answered solely on a literal construction of s.2 (d), it will be difficult to resist the contention of the petitioners that it does. The definition of 'prize competition' in s. 2(d) is wide and unqualified in its terms. There is nothing in the working of it, which limits it to competitions in which success does not depend to any substantial extent on skill but on chance...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 distinction between the two classes of competitions has long been recognised in the legislative practice of both the United Kingdom and this country, and the Courts have, time and again, pointed out the characteristic features which differentiate them. And if we are now to ask ourselves the question, would Parliament have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be ... The conclusion is therefore inescapable that the impugned provisions, assuming that they apply by virtue of the definition in s. 2(d) to all kinds of competitions, are severable in their applications to competitions in which success does not depend to any substantial extent on skill..."*

(iii) In ***K. SATYANARAYANA***, the Apex Court was examining as to whether the rummy was a game of chance or a game of skill. Strangely, *CHAMARBAUGWALAS I & II* do not find a reference in this decision; however, what the Court observed being consistent with the said decisions and the following observations are profitably reproduced:

> *"12. ... The game of rummy is not a game entirely of chance like the "three-card" game mentioned in the Madras case to which we were referred. The "three card game which goes under different names such as "flush", "brag" etc. Is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. WE cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the card is not according to any set pattern* but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is no skill involved in it..."

(iv) In ***K.R. Lakshmanan***, a Three Judge Bench of the Apex Court was examining the *vires* of amendments to the Madras City Police Act, 1888 and the Madras Gaming Act, 1940 whereby the exception carved out for wagering on horse-racing from the definition of "gaming" was deleted, much like the effect of the Amendment Act herein which *inter alia* widens the definition of "gaming" to include "wagering on games of skill", that hitherto enjoyed constitutional protection. Having considered *CHAMARBAUGWALAS-I & II*, *K.SATYANARAYANA* and some notable decisions of foreign jurisdictions, the Court succinctly stated the difference between a game of chance and a game of skill, as under:

> *"3. The new Encyclopedia Britannica defines gambling as "The betting or staking of something of value, with consciousness of risk and hope of gain on the outcome of a game, a contest, or an uncertain event the result of which may be determined by chance or accident or have an unexpected result by reason of the better's miscalculations". According to Black's Law Dictionary (Sixth Edition) "gambling involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of consideration, an element of chance and a*

reward... Gambling in a nut-shell is payment of a price for a chance to win a prize. Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. In these games the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution or the dealer has dealt with the cards. A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated- is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player."

"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. ... 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... 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."

X. AS TO WHAT OTHER HIGH COURTS IN THE COUNTRY VIEWED GAMES OF SKILL AS:

(i) The Punjab & Haryana High Court in **VARUN GUMBER,** *supra* held that the fantasy games predominantly involve skill and therefore, do not fall within gambling activities and that the said games are protected u/a 19(1)(g) of the Constitution. The matter went to the Apex Court in **SLP No.026642/2017** and came to be dismissed on 15.9.2017.

(ii) A Division Bench of Hon'ble Bombay High Court in **GURDEEP SINGH SACHAR vs. UNION OF INDIA**[24] was considering in PIL jurisdiction as to whether playing of fantasy games by virtual teams amounted to gambling. Having discussed *CHAMARBAUGHWALAS, K.R.LAKSHMANAN,* etc., answered the question in the negative specifically recording a finding that the success in dream 11 fantasy sports depends upon users exercise of skill based on superior knowledge, judgment and attention, and that the result of the game was not dependent on the winning or losing of the particular team in the real world game on any particular day. The

Court said "*It is undoubtedly a game of skill and not a game of chance*." The matter was carried upward to the Apex Court in **SLP (Criminal) No.43346/2019** which came to be dismissed on 13.12.2019.

(iii) The Division Bench of Hon'ble High Court of Madras in **JUNGLEE GAMES INDIA PRIVATE LIMITED vs. STATE OF T.N[25],** having extensively discussed the two *CHAMARBAUGWALAS* and *K.SATYANARAYANA* as further developed in *K.R. LAKSHMANAN*, has invalidated Act 1 of 2021 which had amended the Tamil Nadu Gaming Act, 1930, as being *ultra vires* the Constitution. The observations at paragraph 125 of the judgment are profitably reproduced below:

> *" 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*

[24] (2019) SCC OnLine BOM 13059
[25] (2021) SCC Online MAD 2762 (DB)

K.R.Lakshmanan also instruct that the concept of betting in the Entry cannot cover games of skill..."

(iv) Following the Apex Court Rulings and the above Madras decision, a learned Single Judge of Hon'ble Kerala High Court in **HEAD DIGITAL WORKS PRIVATE LIMITED vs. STATE OF KERALA**[26] quashed a statutory notification that was issued under Section 14A of the Kerala Gaming Act, 1960 which had proscribed online rummy played for stakes. The Court at paragraph 36 of its judgment observed: *".... As such playing for stakes or playing not for stakes can never be a criterion to find out whether a game is a game of skill. ... The game of Online Rummy will also have to be held to be a game of skill..."*

(v) A Division Bench of Hon'ble Rajasthan High Court in **RAVINDRA SINGH CHAUDHARY vs. UNION OF INDIA AND OTHERS**[27] was considering in PIL jurisdiction as to whether online fantasy sports/games

[26] (2021) SCC Online Ker 3592
[27] 2020 (4) RLW 3322 (Raj)

offered on *dream 11 platform* amounted to gambling/betting. Having *inter alia* referred to CHAMARBAUGWALA and K.R.LAKSHMANAN, the question was answered in the negative and writ petition was dismissed with costs. The Court also discussed its decision in **CHANDRESH SANKHLA vs. STATE OF RAJASTAN**[28] which had already considered the said issue. Further, challenge to the said decision in **AVINASH MEHROTRA vs. STATE OF RAJASTAN**[29] came to be repelled by the Apex Court on 30.7.2021. It is relevant to mention that the Court referred to the decision of New York Supreme Court in **WHITE vs. CUOMO**[30]**,** which had taken the view that games of the kind were games of chance. This should be a complete answer to the learned AG who heavily banked upon decision of a US Court in support of his contention.

Note: The collective ratio unmistakably emerging from all the decisions mentioned in paragraphs IX & X above put succinctly is: *A game of chance and a game of*

[28] (2020) SCC Online RAJ 264
[29] SLP No.18478/2020
[30] 2020 NY Slip Op 00895, decided on 6.2.2020

skill although are not poles asunder, they are two distinct legal concepts of constitutional significance. The distinction lies in the amount of skill involved in the games. There may not be a game of chance which does not involve a scintilla of skill and similarly, there is no game of skill which does not involve some elements of chance. Whether a game is, a 'game of chance' or a 'game of skill', is to be adjudged by applying the ***Predominance Test:*** *a game involving substantial degree of skill, is not a game of chance, but is only a game of skill and that it does not cease to be one even when played with stakes. As a corollary of this, a game not involving substantial degree of skill, is not a game of skill but is only a game of chance and therefore falls within the scope of Entry 34 in the State List.*

XI. AS TO THE VIEW OF FOREIGN JURISDICTIONS ABOUT GAMES OF SKILL:

(i) In **UNITED STATES OF AMERICA vs. LAWRENCE DICRISTINA**[31], the Second US Circuit of Appeal, New York, tossed out the conviction and vacated the

[31] 886 F. Supp. 2d 164, decided in 2012

indictment of Mr. Lawrence who ran the warehouse wherein the poker game Texas Hold' Em was played. He was taking 5 % of each nights earning to cover the cost of his staff & profit for himself. In this game, the pot went not to the luckiest among the participants, but to the most deft i.e., the player who could guess his opponents' intentions and disguise his own, make calculated decisions on when to hold & fold, and quickly decide how much to wager. A waitress floated around with food & drinks and play lasted until breakfast. Judge Jack B. Weinstein held that poker is more a game of skill than a game of chance and therefore, game operators cannot be prosecuted under vague federal law that prohibits running an illegal gambling business. Although this decision was reversed in appeal, the finding that poker is a game of skill, is left undisturbed.

(ii) **'The Gambling Law Review: Israel** by Liran Barak (Herzog Fox & Neeman) dated 07.06.2021 states that: *The Israeli Penal Law 5737-1977 places a general ban on gambling activity, including all forms of lotteries,*

betting and games of chance. Further restrictions under the Penal Law outlaw ancillary services pertaining to gambling such as the operation of venues where gaming activity takes place. Chapter 12 of the Penal Law defines 'prohibited game' as a game at which a person may win money, valuable consideration or a benefit according to the result of a game, those results depending more on chance than on understanding or ability. The Supreme Court of Israel in October 2018 decided a tax dispute in between **AMIT AMESHVILLI RAFI vs. ASSESSING OFFICER[32], TEL AVIV (4)** relating to winnings generated by a poker player in tournaments outside the country and opined that poker may not be a game of chance.

(iii) **'The Gambling Law Review: Australia'** by Jamie Nettelson, Shanna Protic Dib and Brodie Campbell dated 07.06.2021 mentions about a gambling case in **LOTTOLAND AUSTRALIA PTY LTD vs. AUSTRALIAN COMMISSION AND MEDIA AUTHORITY[33],** decided by

[32] Decided by Supreme Court of Israel in Civil Appeal No.476/17
[33] 2019 NSWSC 1041

the Supreme Court of New South Wales which having analysed the distinction between a 'bet' and a 'game' in the context of Interactive Gaming Act 2019 (IGA) held that petitioner's products are betting products and it was providing a 'lawful gambling service' in compliance with the IGA. The inarticulate premise of this judgment is that gaming activities that involve skill do not fall into prohibited categories of gambling i.e., nearly our *predominance test.*

XII. AS TO DIFFERENCE BETWEEN ACTUAL GAMES & VIRTUAL GAMES, AND IF ALL ONLINE GAMES ARE GAMES OF CHANCE:

The vehement contention of Learned Advocate General that gaming includes both a *'game of chance'* and a *'game of skill'*, and sometimes also a combination of both, is not supported by his reliance on **M.J SIVANI vs. STATE OF KARNATAKA**[34]. We are not convinced that *M.J. SIVANI* recognises a functional difference between actual games and virtual games. This case was decided on the basis of a wider interpretation of the definition of *'gaming'* in the context of a legislation which

was enacted to regulate the running of video parlours and not banning of video games; true it is that the Apex Court treated certain video games as falling within the class of *'games of chance'* and not of *'games of skill'*. However, such a conclusion was arrived at because of manipulation potential of machines that was demonstrated by the reports of a committee of senior police officers; this report specifically stated about the tampering of video game machines for eliminating the chance of winning. This decision cannot be construed repugnant to *Chamarbaugwala* jurisprudence as explained in *K.R.LAKSHMANAN*. We are of a considered view that the games of skill do not metamorphise into games of chance merely because they are played online, *ceteris paribus*. Thus, SIVANI is not the best vehicle for drawing a distinction between actual games and virtual games. What heavily weighed with the Court in the said decision was the adverse police report. It is pertinent to recall Lord Halsbury's observation in **QUINN vs.**

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[34] 1995 (6) SCC 289

LEATHAM[35]: that a case is only authority for what it actually decides in a given fact matrix and not for a proposition that may seem to flow logically from what is decided. This observation received its imprimatur in **STATE OF ORISSA vs. SUDHANSU SEKHAR MISRA**[36].

XIII. AS TO ENTRY 1 (Public Order), ENTRY 2 (Police) & ENTRY 26 (Trade and commerce) IN THE STATE LIST BEING THE FIELDS OF LEGISLATIVE POWER.

(a) The learned Advocate General appearing for the respondents and the learned Advocate Mr. Shridhar Prabhu appearing for the intervener passionately contended that the power to enact a statute can be traceable to Articles 245 & 246 read with multiple legislative Entries; this as a proposition is correct vide UJAGAR PRINTS, *supra*. They rely *inter alia* upon Entry 1 (Public order) and Entry 2 (Police). However, the invocability of this proposition is stoutly disputed by the petitioners in the given fact matrix of the case. The vehement contention of learned AG that several persons and families have been ruined because of online games

[35] (1901) A.C 495
[36] AIR 1968 SC 647

and that all over the State, police have registered thousands of cases, may be arguably true. With the proliferation of online platforms, owing to the digital revolution, the entire landscape of gaming has undergone a 'cataclysmic change'. Young minds are prone to addiction to the cyber games, cannot be much disputed. All this however, does not fit into the parameters of Entry 1 (Public order) and Entry 2 (Police), of the State List howsoever liberally one may construe them. Games of skill have been judicially held to be 'business' activities protected under Article 19(1) (g) vide *CHAMARBAUGWALA-II: at* paragraph 5 it is observed:*"...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)..." It* is pertinent to mention that in the said decision Apex Court also observed that power to regulate games of skill lies with the State Legislature under Entry 26, List II i.e., Trade and commerce. If that be so, an activity which is not a *res extra commercium* cannot intrinsically give rise to any

issue of '*Public order*'. There is no scope for invoking Entry 2 in the State List, either.

(b) The expression "*Public order*" in the State List implies an activity which affects the public at large and therefore, individual instances that do not generate public disorder may not fit into the same. The Apex Court in **BANKA SNEHA SHEELA vs. STATE OF TELANGANA**[37] observed: "*There can be no doubt that for 'public order' to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects 'law and order' but before it can be said to affect 'public order', it must affect the community or the public at large.*" Added, the cases registered by the police are for the games that have eventually become offences after the amendment which is put in challenge and therefore, much cannot be derived from the factum of such registration. It is also relevant to quote the observations

[37] (2021) SCC Online SC 530 at para 13

of the Apex Court in **SUPT. CENTRAL PRISON vs. RAM MANOHAR LOHIA**[38]:

> *"... The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act. The restriction made 'in the interest of public order' must also have reasonable relation to the object sought to be achieved i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause..."*

XIV. AS TO ENTRY 6 (Public health and sanitation) IN STATE LIST:

(a) Learned Advocate General and Mr. Sridhar Prabhu next contended that: the World Health Organization (WHO) is the United Nations Specialized Agency for health. Being an intergovernmental agency, it works in collaboration with its Member States and provides leadership on global health matters by shaping the health research agenda, setting norms & standards articulating policy options, providing technical support to countries and monitoring and assessing health trends. India is a party signatory to the WHO w.e.f. 12.1.1948.

[38] (1960) 2 SCR 821

Since 2014, WHO having conducted research and activities relating to the public health implications of the excessive use of internet, computers, smart phones & other similar electronic devices, has in the 11th edition of the International Classification of Diseases (ICD-11) of 2018 clinically recognized the same as a pernicious syndrome. The pattern of gaming behaviour is of such a nature & intensity that it results in marked distress or significant impairment in personal, family, social, educational or occupational functioning. The health concerns associated with gaming behaviour are not limited to gaming disorder but extend to other aspects of health such as insufficient physical activity, unhealthy diet, problems with eye sight or hearing, musculoskeletal problems, sleep deprivation, aggressive behaviour & depression and psychosocial functioning. They drew attention of the Court to the relevant part of the WHO literature at Annexure-R2, Volume I of the Statement of Objections dated 23.11.2021 contending that our Constitution being an organic document, the term 'Public health and sanitation' in Entry 6 of the State List

should be broadly interpreted to include online games of the kind.

(b) The above view ingeniously canvassed by the learned Advocate General for the respondents and Mr.Shridhar Prabhu for the Intervener is bit difficult to agree with and reasons are not far to seek: that our Constitution as any other, is an organic document is true. However, that *per se* does not lend credence to the contention that the policy considerations of International Organizations like WHO functioning under UN aegis or recognition, should necessarily influence the interpretation to be placed on the constitutional provisions in general and the legislative Entries in the State List, in particular. Article 51 of the Constitution *inter alia* directs fostering respect for international law and treaty obligations. This direction essentially addresses the Parliament and the Central Government inasmuch as the power to legislate in respect of matters concerning International Conferences, Treaties and Agreements is exclusively vested in the Parliament vide Article 253 read with Entry 97 of the Union List. Entry

14 of this List confers on the Union Parliament exclusive power to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries". Also Entry 10 of that List provides for 'Foreign affairs; all matters which bring the Union into relation with any Foreign Country'. Article 253 is intended to make it clear that the power to enter into treaties conferred on Parliament, carries with it, as incidental thereto, a power to invade the State List to enable the Union to implement the treaty. Thus a law passed by Parliament to give effect to an international convention shall not be invalidated on the ground that it contained provisions relating to the State subjects. In view of all this, the meaning and scope of the Entry in question cannot be widened, when the contours of law in this regard have already been earmarked in a catena of decisions of the Apex Court.

XV. AS TO RIGHT TO SPEECH & EXPRESSION UNDER ARTICLE 19(1)(a) AND RIGHT TO LIFE & PERSONAL LIBERTY UNDER ARTICLE 21:

(a) Petitioners argue that playing of games of skill is a form of speech & expression guaranteed under Article 19(1) (a) and that it is one of the facets of personal liberty as well protected under Article 21 and therefore, there cannot be unreasonable restriction on the same. They submit that any legislative restriction for being valid has to pass the muster of Article 19(2) of the Constitution which enumerates specific grounds and that there is a heavier onus resting on the shoulders of the State to justify restriction which constitutes an absolute embargo. Learned Advocate General contends to the contrary pointing out the likely ill-effects of online gaming in general and their *behavioural addiction potential* qua the younger generation in particular. He submits that under our constitutional scheme, no rights of individuals are accorded in absolute term and that individuals' interest has to yield to the larger societal interest. According to him, the Amendment Act having been enacted keeping this in mind, cannot be faltered in Judicial Review. He also submits that in matter like this the judicial organ of the State should show due

deference to the decisions of the Co-ordinate organ namely the Legislature.

(b) In **Harvard Law Review** VOL-IV, December, 15, 1890, Samuel D Warren (Attorney) and Louis D Brandeis (later, Judge of US Supreme Court) in December, 1890 had prophetically wrote:

> *"...Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and process of the mind, as words of literature and art, goodwill, trade secrets, and trademarks. This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."*

The freedoms guaranteed *inter alia* under Articles 19 & 21 have been broadening from precedent to precedent, needs no elaboration. The right to speech & expression

has expanded to include even a right to vote vide **UNION OF INDIA vs. THE ASSOCIATION FOR DEMOCRATIC REFORMS**[39]. Similarly, the march of law from **A.K.GOPALAN vs. STATE OF MADRAS**[40] *to K S PUTTASWAMY*, *supra* has broadened the contours of right to life & personal liberty, exponentially. Several rights guaranteed in Part III of the Constitution are no longer treated as water tight compartments, since they have correlative content and each illuminates the penumbra of other by interplay. Political, social & economic changes have entailed the recognition of new rights such as right to privacy. The following observations in *K.S PUTTASWAMY*, expounding on freedom & liberty are worth reproducing:

> *"The notion that liberty only consists of freedom from restraint does not complete the universe of its discourse. Broader notions of liberty are cognizant of the fact that individuals must be enabled to pursue their capacities to the fullest degree. This approach to understand the content of freedom construes the ability to lead a dignified existence as essential to the conception of liberty and freedom... If true freedom is to be achieved through the removal*

[39] (2002) 5 SCC 294
[40] (AIR 1950 SC 27)

of conditions which cause social and economic deprivation, the role of the State is not confined to an absence of restraint. On the contrary the State has a positive obligation to enhance individual capabilities... In the realization of basic rights, the State is subject to positive duties to further the fulfillment of freedom..."

(c) **GAMES: THEIR NATURE & IMPORTANCE TO MEANINGFUL LIFE:**

(i) Eric Berne, M.D, an acclaimed Canadian psychiatrist (1910-1970) in his "**GAMES PEOPLE PLAY**" (Penguin-1964) analyses games as "*an ongoing series of complimentary ulterior transactions to a well defined, predictable outcome. Descriptively, it is a recurring set of transactions, often repetitious, superficially plausible, with a concealed motivation; or, more colloquially, a series of moves with a snare or 'gimmick'. Games are clearly differentiated from procedures, rituals, and passtimes by two chief characteristics: their ulterior quality and pay-off...*" What is written on the blurb is even more instructive: "*We all play games. In the workplace, in the bedroom, even, when we are not aware of it. Every personal encounter is a mental contest, an opportunity to assert our will.*"

(ii) Games involve the psychology of relationships and variable patterns of behaviour that reveal the hidden feelings & emotions of individuals and their underlying motivations. Games, art & culture have a sort of psychological singularity. Games have artistic & recreational value. Whether online or offline, they are designed to entertain as well as to inform. Games have emotive content whose effects tend more toward the cognitive. The thin line between entertainment and information often becomes elusive. Games arguably may not convey a discernible message, but even the non-cognitive forms of expressions can be a means of promoting self-development and therefore, do not readily fall within the *'unprotected category of expression.'* The interactivity of online games does not cut their status as expression, but enhances the expressive impact of a medium. Playing of games creates a mood as an abstract art, apart from causing a subtle shaping of thoughts which characterizes all artistic expression. These provisions of our constitution having become expansive by the judicial process do not deny protection to '*abstract*

painting, avant-garde music and nonsensical poetry'. Therefore, the games of skill fall within the protective contours of Article 19(1)(a) & Article 21, of course subject to reasonable restriction by law.

(d) Judge Antonin Scalia of US Supreme Court had famously remarked, *"If you had to pick...one freedom...that is the most essential to the functioning of a democracy, it has to be the freedom of speech."* In **SECRETARY, MINISTRY OF INFORMATION AND BROADCASTING, GOVERNMENT OF INDIA AND OTHERS vs. CRICKET ASSOCIATION OF BENGAL AND OTHERS**[41], the Apex Court considered the question of right to telecast sports event, *inter alia* referring to Article 10 of the European Convention on Human Rights which reads:

> *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."*

[41] (1995) 2 SCC 161

Thereafter, the Court summarised the law on the freedom of speech & expression under Article 19(1)(a) as restricted by Article 19(2) thus: - *"The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-fulfilment. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts..."* The Court dealt with the right of telecasting sports and observed:

> *"In a team event such as cricket, football, hockey etc., there is both individual and collective expression...However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained... The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right."*

XVI. VIRTUAL GAMES AND ELEMENTS OF EXPRESSION AS US COURTS VIEW THEM:

(a) The enactment of Part III of our Constitution by the Constituent Assembly and its progressive interpretation by the Courts was influenced *inter alia* by the American jurisprudence. The growth of legal thought that occurs on a farthest foreign soil does influence others around the globe which has become small due to advancement of science & technology. The Apex Court in **INDIAN EXPRESS NEWSPAPERS vs. UNION OF INDIA**[42] observed:

> *"While examining the constitutionality of a law which is alleged to contravene Article 19(1)(a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration...".*

The above observations of Hon'ble E.S.Venkataramiah J. justifiably prompt us to look to how the American law of freedom of speech & expression has been shaped by judicial process over the decades.

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[42] (1985) 1 SCC 641

(b) In 1915, the US Supreme Court in **MUTUAL FILM CORPORATION vs. INDUSTRIAL COMMISSION OF OHIO**[43], was considering the validity of Ohio statute that required distributors to submit their films to the Board of Censors before they could be presented for the public view. The Court had held that motion pictures were not a form of expression eligible for constitutional protection under the First Amendment. However, after 37 years, this view was laid to rest in **JOSEPH BURSTYN, INC vs. WILSON**[44] wherein it has been observed that the motion pictures do not fall outside the category of *'unprotected expression'* in terms of First and Fourteenth Amendments.

(c) Till 2001 i.e., **AMERICAN AMUSEMENT MACHINE ASSOCIATION vs. KENDRICK**[45], Courts had denied constitutional protection to video-games. Cases of this kind arose from Municipal Ordinances restricting access to arcades. However, in **INTERACTIVE DIGITAL**

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[43] 236 US 230
[44] 343 US 495 (1952)
[45] 244 F.3d 572

SOFTWARE ASSOCIATION vs. ST. LOUIS COUNTY[46] Courts held that they too constitute a form of expression presumptively entitled to constitutional protection and that they do not fall into any '*categories of unprotected speech'*.

(d) The US Supreme Court in **BROWN vs. ENTERTAINMENT MERCHANTS ASSOCIATION**[47] was considering the challenge to a California law that restricted the sale or rental of violent video-games to minors. **Justice Antonin Scalia** reasoned that such a law does not comport with the First Amendment inasmuch as these games too, qualify for protection under the shadow of Amendment on par with books, plays & movies, although they communicate ideas through familiar literal devices and features distinctive to the medium. The Court *inter alia* observed that the basic principles of freedom of speech do not vary with a new and different communication medium.

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[46] 329 F 3d 954 (8th Cir 2003),
[47] 564 US 786 (2011)

(e) The views of **Prof. Paul E Salamanca**, University of Kentucky College of Law expressed in *'VIDEOGAMES AS A PROTECTED FORM OF EXPRESSION'* published in Georgia Law Review, Vol. 40, No.1 (2005) PP 153-206 are instructive:

> *"...Courts have properly concluded that the First Amendment protects video games as a form of expression. These games possess all the characteristics of an art form. First, like other art, they are representational. They may look like universes full of gothic architecture, labyrinthine tunnels, and grotesque characters, but in fact they are electronic representations of such things, much like paintings, movies, or TV shows. Second, video games often have aesthetic value. The architecture depicted in a video game, for example, can be magnificent, squalid, or both. Indeed, many schools now teach the art and science of creating interactive video games. Third, these games often tie music and narration to the player's movement through the various levels, and these features can be every bit as evocative as the soundtrack of a film or broadcast. Finally, video games often build upon powerful, elemental themes, just like fairy tales or epic poems... "*

XVII. AS TO REASONABLE RESTRICTION UNDER ARTICLE 19(2) ON RIGHT TO SPEECH & EXPRESSION UNDER ARTICLE 19(1)(a) AND REGULATION OF PERSONAL LIBERTY UNDER ARTICLE 21:

(a) What a former Associate Justice of the US Supreme Court, Anthony Kennedy observed in **UNITED**

STATES vs. PLAYBOY ENTERTAINMENT GROUP, INC.,[48] is worth quoting:

> "*When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature, objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.*"

The Hon'ble Supreme Court in **SHREYA SINGHAL vs. UNION OF INDIA**[49] observed:

> "11. *This last judgment is important in that it refers to the "market place of ideas" concept that has permeated American Law. This was put in the felicitous words of Justice Holmes in his famous dissent in Abrams v. United States, 250 US 616 (1919), thus: "But*

[48] 529 U.S. 803 (2000)
[49] (2015) 5 SCC 1*supra* at paragraph 11

> *when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."*

(b) **Robert H. Bork**, a Judge of U.S. Court of Appeals for the D.C. Circuit, in his article *"Neutral Principles and some first Amendment Problems, published in Indiana Law Journal,* Vol. 47: Issue 1 (1971), writes: *"An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavours...."* Given the possibilities of expression in any medium, the guarantee enacted in Article 19 (1) (a) & (g) and Article 21 have to be broadly construed as to protect all forms of activities that further the self-realization of value. That is a premise implicit in these provisions. The Court interpreting the fundamental guarantees has to identify

zones in which free people could experiment and develop their personalities in terms of enhanced character and virtue without causing excessive, immediate or discernible harm to others. Online games do not have any such demonstrable effect.

(c) The predicate for Article 19(1)(a) is poised to include not only artistic expression having an outward effect upon socio political thought but also inarticulate expression having a predominantly inward effect. What Justice Louis Brandies famously said in **WHITNEY vs. CALIFORNIA**[50] is worth reproducing:

> *"Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile…They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction;*

[50] 247 US 357 (1927)

that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies..."

XVIII. AS TO *'SCARE ARGUMENT'* OF THE STATE VERSUS RESEARCH STUDIES AND EMPIRICAL DATA:

(a) The vehement contention of learned Advocate General appearing for the State that the Amendment Act has been brought in to curb the menace of online gaming which, has deleterious effect on the societal interest, has to be examined on the touchstone of the provisions of Articles 19 & 21. The freedoms enumerated *inter alia* in these Articles are those great in basic rights which are recognized as the natural rights inherent in the status of any individual. But none of these rights is absolute; although being inalienable rights, they are liable to suffer reasonable restrictions that may be imposed by law. The 'scare argument' of deleterious effect is not supported by the empirical data loaded to the record of the case and by

the research material available in the public domain. What the experts have opined is briefly stated below:

(i) The Discussion Paper titled *"THE EPIDEMIOLOGY AND IMPACT OF GAMBLING DISORDER AND OTHER GAMBLING-RELATED HARM"* published by WHO Forum on alcohol, drugs and addictive behaviors dated 26-28 June 2017 states:

> "*Problem gambling is one of the negative impacts of the post mid-1980s gambling expansion... concerns about these impacts on the part of civil society and governments has led to policy and other initiatives intended to reduce harm associated with this expansion. There has been a focus on problem gambling and the provision of information, self-help and treatment... problem gambling and other gambling related harm are not widely regarded as a health issue or priority...Many of the non-gambling risk and protective factors for at-risk and problem gambling are common to other mental health and addiction disorders. Reducing these risk factors and strengthening protective factors can be expected to have health and social benefits that extend beyond problem gambling and gambling related harm...Additional risk factors identified in a number of studies include living in high deprivation neighbourhoods, membership of particular religious groups, lack of formal education and unemployed status...It appears likely that the combination of heightened vulnerability, economic and social disadvantage and high gambling exposure plays a major part*

in problem gambling development (Abbott, 2017a). "

(ii) The National Centre for Responsible Gaming (NCRG) in its White Paper titled *"Internet Gambling: An Emerging Field of Research"* by Christine Reilly and Nathan Smith, having referred to the Harvard Study on internet gambling i.e., *"The road less travelled: Moving from distribution to determinants in the study of gambling epidemiology",* Can J Psych. 2004; 49 (8) (504–516) concludes:

> *"Both, the online gaming industry and the field of research on the health risks of this form of gambling are in their infancy. It is, therefore, premature to assume that Internet gambling will have deleterious health effects. The next phase of research will be vital to better understanding how to interpret "disordered" patterns and testing the effectiveness of responsible gaming interventions.*"

(iii) **Professor Malcolm K. Sparrow**, John F. Kennedy School of Government, Harvard University, in his research study titled "CAN INTERNET GAMBLING BE EFFECTIVELY REGULATED? MANAGING THE RISKS (2009)" writes:

> *"Some studies have claimed an association between increased gambling exposure and increased incidence of problem gambling. In addition, commentators have suggested that the increased accessibility inherent in online gambling magnifies such risks. However, more recent studies specific to online gambling, most conducted since the advent of legal and regulated online gambling, have indicated that online gambling does not inherently encourage excessive gambling. Most gamblers placed fewer than four bets per day, and sports gamblers tended to moderate their play based on their wins and losses; i.e., they played less often when they lost money and more often when they won money. Also, a large-scale British study in 2007 found no increase in the rate of problem gambling in the United Kingdom since 1999 despite a large increase in the number of new gambling opportunities... We believe that regulators should be able to design sufficient protections to prevent any significant growth in problem gambling that results from legalization. Moreover, a proportion of the tax revenues and licensing fees derived from the U.S.-based industry could be used to substantially bolster the level of support for educational programs and services...."*

(iv) Mr. Shridhar Prabhu appearing for the Intervener draws our attention to the following observations of **European Court of Justice** in ***CARMEN MEDIA GROUP LTD VS. LAND SCHLESWIG-HOLSTEIN***

AND INNENMINISTER DES LANDES SCHLESWIG-HOLSTEIN CASE[51] decided on 8th September 2010.

> "*It should be noted that, in the same way, the characteristics specific to the* ***offer of games of chance*** *by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator…the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.*"

What we cannot miss from the above is the nature of game focused in this judgment of a foreign Court. A careful perusal of the same unmistakably reveals that the Court was dealing with games of chance and its ill-

[51] European Court decision in C-46/08, 08-09-2010

effects, and not with the games of skill which happen to be the jugular vein of these Writ Petitions.

(b) As internet gaming/online gaming in the form of business continues to evolve exponentially, participation increases, particularly among young people who are comparatively more familiar with the new technology. It is likely that the problems associated with such games may surface in due course. Regulation of online gaming based upon study & research will have to evolve to further the understanding of the impact of this mode of access based on the experience and incidence of behavioural addictions & disorders. This should be a data driven exercise to be undertaken on empirical evidence. Theoretical models for *betting & gaming* and *problem gambling* have been developed on the basis of traditional gaming, largely not considering the recent emergence of internet modes. It is important to revisit these conceptual models to verify if they account for pathological gambling among internet users and whether any new variables or interactions should be included to

explain the emergence of problems associated with online gaming. This is necessary to structure a more comprehensive & scientific understanding of how people develop gambling problems.

(c) It is relevant to state that before going for a statutory embargo on online gaming, the State had not constituted any Expert Committee to undertake a scientific study & empirical research as to the arguable ill effects of online games specific to socio-economic & cultural conditions in the State. We hasten to add that for the exercise of plenary power of legislation, our Constitution does not prescribe any such study or research as a *sine qua non.* However, when the policy content of a statute is sought to be defended on the ground of its intrinsic merits and technological advancement, it is but ideal for the State to place on record the necessary material for substantiating its stand. This view is consistent with CHINTAMAN RAO, *supra.* When the legislative competence and the reasonableness of the law are in challenge, the

contention of the State that even Leader of the Opposition in the Legislative House supported the measure is not significant.

(d) In K.S PUTTASWAMY, *supra* while considering data and informational privacy, what the Apex Court observed:

> *"Technology questions the assumptions which underlie our process of reasoning. It reshapes the dialogue between citizens and the State. Above all, it tests the limits of the doctrines which democracies have evolved as a shield which preserved the sanctity of the individual...India has participated in and benefited from the reconfiguring of technology by the global community. We live in an age of information and are witness to a technology revolution that pervades almost every aspect of our lives. Redundancies and obsolescence are as ubiquitous as technology itself. Technology is a great enabler. Technology can be harnessed by the State in furthering access to justice and fostering good governance... The hallmark of freedom is autonomy & control over one's life and image as portrayed to the world. Privacy safeguards individual's autonomy and recognises the ability of the individual to control vital aspects of his life. Every individual is clothed with dignity & liberty so that he is free to do what he will consistent with the freedom of others and to develop his faculties to the fullest measure to live in happiness & peace. "*

Science & technology are indisputably intertwined with the social and private lives of the citizenry world over. Online gaming too is a product of technological advancement. Online games as contra-distinguished from gambling are also a form of expression and partake the character of business. It may be also a pursuit of happiness that falls within the contours of liberty & privacy of an individual. As already stated above, placing an absolute embargo on this may take away any positive development and benefit that the State may be able to achieve by otherwise balancing the competing interests of the society and the individual. It may be said that while the State has a vested and legitimate interest in the protection of its citizenry, the individual too has a vested right to partake in the recreation of gaming in exhibition of individual skills albeit responsibly. Therefore, a regulation in this regard ought to include technological solutions in the field, in order to better enable a safe and responsible gaming behavior & environment. The integration of data science & governance, corporate social responsibility and

individualized responsible gaming programs and/or other regulations may allow legal development to keep pace with technological advancement.

XIX. AS TO ARTICLE 19 (1) (g) AND ENTRY 26 (TRADE AND COMMERCE) IN STATE LIST:

(a) The Apex Court while considering CHAMARBAUGWALA-II, *supra* opined that *"...we find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject matter of a fundamental right guaranteed by the Article 19(1)(g) ."* It also reproduced the observation of the US

Supreme Court in **UNITED STATES vs. KAHRIGER**[52] and **LEWIS vs. UNITED STATES**[53]: *"...there is no constitutional right to gambling..."* In view of the settled position of law, it hardly needs to be stated that gambling, i.e., the *'games of chance'* do not enjoy any Constitutional protection since they are *mala in se.* It is open to the legislature to absolutely prohibit them as is done to the trades in noxious or dangerous goods or trafficking in women. However, *games of skill* by their very nature stand on a different footing.

(b) Learned Advocate General appearing for the State contends that: the games of chance being *res extra commercium,* the games of skill fall within the field of *'Trade & commerce'* under Entry 26 of State List. The fundamental right *inter alia* of trade & business is guaranteed under Article 19(1) (g) and therefore, the same is subject to reasonable restrictions imposed under Article 19(6). A reasonable restriction may also include an absolute embargo. Regard being had to enormous

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[52] (1953) 345 US 22
[53] (1955) 348 US 419

adverse implications of online gaming on the society in general and the younger generation in particular, the Amendment Act is made criminalizing the cyber games. In support of his contention, he banks upon CHAMARBAUGWALAS, K.R.LAKSHMANAN & M.J. SIVANI, *supra*. He draws attention of the Court to a spate of suicides in the State, a plethora of criminal cases registered by the police and to the debates in the Legislative Assembly that culminated into the Amendment Act. He contends that the policy of proscribing cyber games is a matter left to the legislative wisdom and the writ Court should loathe to interfere.

(c) Learned advocates appearing for the petitioners do not much dispute that the State has power to regulate the business activities, as provided under Article 19(6). They contend that in view of CHINTAMAN RAO & MOHD. FAROOQ *supra,* the onus lies on the State to demonstrate the reasonableness of restrictions and that where the restriction amounts to absolute embargo, this onus is onerous vide **NARENDRA KUMAR**

vs. UNION OF INDIA[54]. They draw attention of the Court to the observations of Madras High Court in JUNGLEE GAMES, *supra*, to the effect that the State has not adopted the 'least intrusive approach test' and therefore, the Amendment Act should be voided. They also invoke the doctrine of proportionality for the invalidation of impugned legislative measure.

(d) The online gaming activities played with stake or not do not fall within the ambit of Entry 34 of the State List i.e., 'Betting and gambling', if they predominantly involve skill, judgment or knowledge. They partake the character of business activities and therefore, they have protection under Article 19(1(g). Apparently, the games of skill played online or offline with or without stakes, are susceptible to reasonable restrictions under Article 19(6). The Amendment Act brings in a blanket prohibition with regard to playing games of skill. The version & counter version as to the nature & reasonableness of the restrictions need to be

[54] (1960) 2 SCR 375

examined in the light of norms laid down by the Apex Court. In a challenge laid to the validity of any legislation on the ground of violation of Fundamental Rights *inter alia* guaranteed under Article 19(1), on a *prima facie* case of such violation being made out, the onus would shift to the State to demonstrate that the legislation in question comes within the permissible limits of the most relevant out of clauses (2) to (6). When exercise of Fundamental Right is absolutely prohibited, the burden of proving that such a total prohibition on the exercise of right alone would ensure the maintenance of general public interest, lies heavily upon the State. While adjudging a case of infringement of fundamental rights, what is determinative is not the intent of the legislature but the effect of the legislation. Legislative action that is too disproportionate or excessive, may suffer invalidation on the ground of 'manifest arbitrariness' under Article 14 as discussed *infra*. **Judge Aharon Barak** of Supreme Court of Israel in his book 'PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS', succinctly puts the doctrine of

proportionality: "*It requires that a rights-limiting measure should be pursuing a proper purpose, through means that are suitable and necessary for achieving that purpose and that there is a proper balance between the importance of achieving that purpose and the harm caused by limiting the right*".

(e) In examining reasonableness of restrictions, both substantive & procedural aspects enter the fray. That is to say, the Court should consider not only factors such as the duration & extent of the restrictions but also the circumstances and the manner in which their imposition has been authorized. This apart, nature of the business sought to be restricted is also relevant vide **COOVERJEE B. BHARUCHA vs. EXCISE COMMISSIONER**[55]. This needs to be done on statute to statute basis since there cannot be a universal pattern of reasonableness. What the Apex Court said in CHINTAMAN RAO, *supra* is worth adverting to:

> "*The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be*

[55] AIR 1954 SC 220

arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause(6) of Article 19, it must be held to be wanting in that quality".

(f) In a recent decision i.e., **INTERNET & MOBILE ASSN. OF INDIA vs. RESERVE BANK OF INDIA[56],** while striking down a complete prohibition of crypto currency by the Reserve Bank of India, the Apex Court observed:

"*The parameters laid down in Md. Faruk are unimpeachable. While testing the validity of a law imposing a restriction on the carrying on of a business or a profession, the Court must, as formulated in Md. Faruk, attempt an evaluation of (i) its direct and immediate impact upon of 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*

[56] (2020) 10 SCC 274

drastic restraint...But nevertheless, the measure taken by RBI should pass the test of proportionality, since the impugned Circular has almost wiped the VC exchanges out of the industrial map of the country, thereby infringing Article 19(1)(g). On the question of proportionality, the learned Counsel for the petitioners relies upon the four-pronged test summed up in the opinion of the majority in Modern Dental College and Research Centre v. State of Madhya Pradesh.109 These four tests are (i) that the measure is designated for a proper purpose (ii) that the measures are rationally connected to the fulfillment of the purpose (iii) that there are no alternative less invasive measures and (iv) that there is a proper relation between the importance of achieving the aim and the importance of limiting the right. The Court in the said case held that a mere ritualistic incantation of "money laundering" or "black money" does not satisfy the first test and that alternative methods should have been explored...We cannot and need not go as far as the majority had gone in Bank Mellat. U.K. has a statute where standards of procedure for judicial review are set out and the majority decision was on the application of those standards. But even by our own standards, we are obliged to see if there were less intrusive measures available and whether RBI has at least considered these alternatives..."

We also shall be benefited by looking to what the Apex Court said in SHAYARA BANO *supra*:

"It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can

be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14...The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

(g) The Amendment Act puts *games of skill* and *games of chance* on par, when they are poles asunder, in the light of obtaining jurisprudence. The games of skill, in addition to being a type of *expression,* are entitled to protection under Article 19(1)(g) by virtue of their recognition as *business*. There are competing interests of State and the individual, which need to be balanced by employing known principles such as doctrine of *proportionality, least restrictive test & the like*. A line has to be drawn to mark the boundary between the appropriate field of individual liberty and the State action

for the larger good ensuring the least sacrifice from the competing claimants. As already mentioned above, the Amendment Act puts an absolute embargo on the games of skill involving money or stakes. Learned Advocate General contended that the State was not in a position to apply the '*least restrictive test*' and that the prohibition being the objective of the Amendment Act, there is no scope for invoking the said test at all. This amounts to throwing the baby with bath water.

(h) In a progressive society like ours, imposing an absolute embargo, by any yardstick appears to be too excessive a restriction. In such cases, a heavy burden rests on the State to justify such an extreme measure, as rightly contended by the petitioners. There is no material placed on record to demonstrate that State whilst enacting such an extreme measure, has considered the feasibility of regulating wagering on games of skill. If the objective is to curb the menace of gambling, the State should prohibit activities which amount to gambling as such and not the games of skill

which are distinct, in terms of content and produce. The State action suffers from the vice of paternalism since there is excessive restriction on the citizens freedom of contract. However, the ground of legislative populism does not avail against the plenary power of legislation. It has long been settled that *the motive of the legislature in passing a legislation is beyond the scrutiny of courts* vide a Five Judge Bench decision of the Apex Court **T VENKATA REDDY vs. STATE OF ANDHRA PRADESH**[57].

(i) A mere likelihood or propensity of misuse of online gaming platforms, without anything more, does not constitute a legal justification for the banning of commercial activities. Article 300A has been expansively construed to include intangible property like intellectual property which is a product of original thought and skill, i.e., creation of the mind, and essentially used in commerce vide **K.T.PLANTATIONS vs. STATE OF KARNATAKA**[58]. An activity predominantly involving skill

[57] AIR 1985 SC 724
[58] (2011) 9 SCC 1

cannot be readily banned at a stroke of *legislative pen*. In any organized society, *knowledge, wisdom, talent & skill* are the invaluable tools for wealth generation. They are the unseeming ingredients of economic rights such as rights to profession, property, etc. Our Constitution modelled on the principle of 'limited government' normally frowns upon the measures which stultify & negate these *invaluables*, whether acquired by Man or gifted by his Maker. On the contrary and ideally speaking, State in the larger public interest has to create an atmosphere which nurses them. Story of civilizations is replete with instances of *bonsaing* of economies in communities that failed to do this. An absolute embargo on the business activities runs the risk of invalidation, unless the State produces relevant material for the ouster of '*least restrictive test'*. This test is normally employed as a *'Litmus Test'* in judicial review of State action in all civilized jurisdictions .

(j) The Apex Court in INDIAN EXPRESS *supra* extended protection to the Press with the following reasoning:

> *"...Newspaper industry enjoys two of the fundamental rights, namely the freedom of speech and expression guaranteed under Article 19 (l) (a) and the freedom to engage in any profession, occupation, trade, industry or business guaranteed under Article 19 (1) (g) of the Constitution, the first because it is concerned with the field of expression and communication and the second because communication has become an occupation or profession and because there is on invasion of trade, business and industry into that field where freedom of expression is being exercised..."*

The games of skill as we have reasoned out above involve elements of expression and therefore enjoy regulatable protection under Article 19(1)(a), it has long been settled that these games apparently having business characteristics are protected under Article 19(1)(g). Therefore the above observations in Indian Express equally apply to the case of petitioners. However, the Amendment Act does not critically adjust the boundaries of existing category of protected activities i.e., games of skill with the unprotected acts of gambling. Instead, State has created a wholly new category of medium-based-regulation when change of medium *per se* does not alter the true nature & content of the games. The

permissible limits of restriction recognized by Chamarbaugwalas are thus trampled, by proscribing the online games by lock, stock & barrel. *To scuttle the ship is not to save the cargo: to jettison may be.*

(k) The Tamil Nadu Gaming and Police Laws (Amendment) Act 2021 that was put in challenge before the Madras High Court and the Amendment Act impugned herein are substantially similar in their text, context, object & effect. They have been structured with the same jurisprudential concepts. What the Hon'ble Madras High Court in JUNGLEE GAMES *supra* observed being equally applicable to the Amendment Act here is profitably reproduced:

> "*The amended statute prohibited 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. Also, the main features of the Amending Act was to enlarge the inclusive definition of the word 'gaming' where the Section 3-A was introduced in the Act to prohibit wagering or betting in cyberspace 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."

XX. AS TO WHETHER CHAMARBAUGWALA JURISPRUDENCE HAS LOST RELEVANCE DUE TO ADVANCEMENT OF SCIENCE & TECHNOLOGY:

(a) Learned Advocate General appearing for the State in his imitable style and vociferously contended that: the provisions of an organic Constitution like ours have to be construed keeping in view contemporary socio-economic developments and the new challenges associated with the same. There has been a paradigm shift in the whole lot of activities in the society owing to advancement of science & technology. New implications and difficulties are cropping up in the society justifying innovative ventures on the part of the State to effectively manage them. A greater leverage needs to be conceded to the State in devising appropriate measures for curbing the menace of online gaming. He passionately submitted that what was true of things that happened in the bygone decades i.e., when CHAMARBAUGWALAS were decided, need to be examined afresh. In support of this,

he cites the decision in SIVANI *supra* contending that the absolute embargo on videogames has been upheld by the Apex Court, despite CHAMARBAUGWALAS. He also refers to a Public Interest Litigation in W.P.No.13714/2020 between **SHARADA D.R. vs. STATE OF KARNATAKA**[59] in which a direction was sought for banning of all forms of online gambling and betting disposed off on 26.10.2021 by this Court, and that the Amendment Act has been enacted keeping in view the same.

(b) We do appreciate the above submissions of the learned Advocate General. However, that does not much come to the rescue of respondents. True it is: *Constitution is intended to enure for ages to come and consequently, to be adapted to the various crises of human affairs. It is unwise to insist that what the provisions of the constitution meant to the vision of its makers must mean to the vision of our time. They should be interpreted to meet and cover changing conditions of*

[59] In W.P.No.13714/2020 disposed off on 26.10.2021

social and economic life. A Constitution states not rules for the passing hour but the principles for an expanding future. At the same time, the meaning of the Constitution does not change with every ebb and flow of economic events. A constitution is not a storehouse of fossilized principles. It is a living law of the people and accordingly its provisions need to be construed by all the organs of the State.

(c) However, the submission of learned Advocate General overlooks one important factor: CHARMARBAUGWALAS were decided decades ago is true, but that jurisprudence has been validated time and again by the Apex Court in K.R.LAKSHMANAN (1996) and other subsequent cases. Thus it is not that what was decided in CHARMARBAUGWALAS is being re-visited for the first time now. In the recent past, several High Courts in the country have followed the same after critical examination viz., VARUN GUMBER (P&H-2017), GURDEEP SINGH (BOMBAY-2019), RAVINDRA SINGH (RAJASTAN-2020), JUNGLEE GAMES (MADRAS-2021), HEAD DIGITAL WORKS (KERALA-2021), *supra*. Some of

these cases went to Apex Court and came to be affirmed, the latest being AVINASH MEHROTRA, *supra* decided on 30.7.2021. All this is already discussed at paragraphs (IX) & (X) above. We need not refer to SIVANI again since it is already discussed in detail *infra*. The PIL case does not in any way come to the rescue of the respondents since the prayer therein is related to banning of all online gambling as such. Apparently, case of the petitioners is not one of gambling; their business does not involve any act which is determined by the *wheel of fortune*.

XXI. AS TO DISCRIMINATION AND VIOLATION OF EQUALITY UNDER ARTICLE 14:

(a) Learned Advocates appearing for the petitioners are justified in complaining that the Amendment Act is violative of Article 14 of the Constitution inasmuch as it does not recognize the long standing jurisprudential difference between a *'game of skill'* and a *'game of chance'* which animates the scheme of the Principal Act, even post-amendment. Consequently, in the eye of Amendment Act, the persons who play games of chance

and the persons who play the games of skill (in terms of predominance test) unjustifiably made to constitute one homogenous class. Our Constitution does not permit things which are different in fact or opinion to be treated in law as though they were the same. The doctrine of equality enshrined in Article 14 is violated not only when equals are treated unequally but also when un-equals are treated equally disregarding their difference vide **E.P.ROYAPPA vs. STATE OF TAMIL NADU**[60] wherein the Apex Court observed:

> *"... The basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose J., "a way of fife", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an*

[60] AIR 1974 SC 555

act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action an (ensure fairness and equality of treatment. They require that State action must be based on valent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. ."

(b) The amended definition of 'gaming' excludes in so many words, '*a lottery or wagering or betting on horse-race run on any race course*' in a given circumstance. The Apex Court in K.R.LAKSHMANAN *supra* held that, horse-racing is a '*game of mere skill*' and therefore, it is '*neither gaming nor gambling*'. If the legislative policy is to protect the games of skill from being treated as proscribed, the Amendment Act being unjustifiably selective in that suffers from a grave constitutional infirmity. It offends the clause of '*equal protection of the laws*' enacted in Article 14, since protection is unreasonably sectarian. The equal protection clause would be diluted into a mild constitutional injunction that the State shall treat as

equal in law only the horse-racers who are equal in fact with other players of games of skill. For saving such a blatant discrimination, the respondents have failed to establish the reasonable basis on which such a classification is founded and the rational nexus identifiable between the differentia of and the object sought to be achieved by such a classification vide **STATE OF WEST BENGAL vs. ANWAR ALI SARKAR**[61].

(c) Learned Advocate General pressed into service the decision in SHREYA SINGHAL, *supra* to justify classification between '*actual games*' and '*virtual games*' and that the Amendment Act that would focus the latter would not suffer any infirmity on the touchstone of equality clause. He contends that there is an *intelligible differentia* between online media and offline media as recognized by the Apex Court and therefore, the legislature in its wisdom has chosen to proscribe the online games since they are injurious to public interest. True it is that, the Apex Court treated online media being

[61] AIR 1952 SC 75

different from offline. However, such a differential treatment was in the context of distinction that lies between dissemination of information via traditional media and dissemination of information via online media. Whilst there are multiple layers of prior editorial control in case of publication through traditional media, such layers may not exist in the case of publication of information through online media, as information in the case of latter "travels like lightning". It hardly needs to be stated that the cases at hand are not one of unregulated information travelling at the speed of lightening. We are at loss to know how the observations made in the decision would advance the case of respondents, when its contextual substratum is miles away from that of these petitions. The ratio in this decision being relevant albeit for different reasons is discussed below.

XXII. AS TO MANIFEST ARBITRARINESS AND VOIDING OF PLENARY LEGISLATIONS:

(a) The expression "pure game of skill" as employed in legislations of the kind i.e., Section 176 of the Principal Act has been judicially construed to be

"mere skill" and that the games mainly & preponderantly involving skill, fall into this class. The expanded meaning of 'gaming' under Section 2(7) as amended, broods through the entirety of the Amendment Act, which paints *'games of skill'* and *'games of chance'* with the same brush. However, Section 176 of the Principal Act even post amendment continues to maintain the distinction between these two classes of games. The original heading of this section '***Saving of games of skill***' now also continues. In English Parliamentary practice, '*headings and marginal notes are not voted or passed by Parliament, but are inserted after the Bill has become law*' states **Maxwell on Interpretation of Statutes**, 12th Edn. Butterworths at page 11. Of course, since 2011, there is change in practice. In India, even headings are part of the Bill and are voted in the legislature. They provide the context for the substantive part of the section. They are there for guidance. Therefore, they cannot be ignored. Due significance has to be attached to the heading of a section in a statute. The substantive text of Section 176 makes the penal provisions enacted in Sections 79 & 80

inapplicable to *'any pure game of skill' i.e.*, a game predominantly involving skill. However, the Amendment Act deletes the term *"and to wagering by person taking part in such games of skill"* from the text of this section. Thus the amended definition of *'gaming'* under Section 2(7) to the extent it does not admit the difference between skill games and chance games, is in direct contradiction to the amended Section 176 which intends to maintain such a difference. The very definition of 'gaming' as amended, suffers from the vice of over-inclusiveness/over-broadness of the idea of gaming as enacted in the charging provisions of the Act that are animated by *CHAMARBAUGWALA Jurisprudence*. The content of 'gaming' as capsuled under Section 2(7) thus bruises the legislative intent enacted in Section 176 *ab inceptio* and continued post-amendment, for protecting a class of citizens who plays the games of skill and therefore, fits into the text & context of this provision.

(b) In **SHAYARA BANO vs. UNION OF INDIA**[62], the Hon'ble Supreme Court broke a new ground i.e., *'manifest arbitrariness'* for the invalidation of plenary legislations, as well. Following observation therein is profitably reproduced:

> *"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14.The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14".*

In the considered view of this Court, the impugned legislative action that has clamped an absolute embargo

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[62] (2017) 9 SCC 1

on all games of skill defies the principle of proportionality and is far excessive in nature and therefore violates Article 14 of the Constitution on the ground of '*manifest arbitrariness*'

(c) The rule of law is recognized by the Apex Court as a '*basic feature*' of our Constitution vide **KESAVANANDA**[63]. It is one of the imperatives of *rule of law* that, laws which regulate the act/conduct of persons or entities must give a fair notion of such act/conduct that is forbidden or required of them. A statute which "*...leaves open, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against...*' offends this postulate of *rule of law* and therefore, is liable to be voided on the ground of '*manifest arbitrariness*'. When a Statute is obscure or admits plural meanings with little for a common citizen to choose between them, there is absolute intractability of the language used. They operate as statutes of violence

[63] KESAVANANDA BHARTI vs. STATE OF KERALA, AIR 1973 SC 1461

to the sensible citizens since they do not allow them to live securely under the rule of law. The Amendment Act suffers from the infirmity of this kind inasmuch as Section 2(7) which encompasses all games regardless of skill involved, renders the charging provisions enacted in section 176 read with Sections 79 & 80 of the Principal Act so vague that the men of common intelligence will not be in a position to guess at its true meaning and differ as to scope of its application and therefore, is liable to be voided.

(d) The above view of ours gains support from the following observations of the Hon'ble Madras High Court in JUNGLEE GAMES, *supra*:

> *"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."

XXIII. AS TO INCHOATE CAUSE OF ACTION: RIGHTS UNDER ARTICLE 19(1)(a) & (g) NOT AVAILING TO JURISTIC PERSONS:

(a) The vehement contention of learned Advocate General that whether a game predominantly involves skill or not, is a question of fact and therefore, without there being a criminal case in this regard, the challenge to the legislation is premature, cannot be agreed to. In our Constitutional Jurisprudence, for laying a challenge to legislation, registration of a crime thereunder is not a *sine qua non*. Even otherwise, such criminal cases have already been registered by the police and that a Co-ordinate Bench of this Court in W.P. No.19287/2021 between **BHAVIT SHETH vs. STATE OF KARNATAKA** has granted stay of all further proceedings. This apart, Court non-suiting the petitioners on this ground as urged by the respondents is tantamount to a physician turning away a potential patient stating that the

gangrene is yet to develop, when, pathological conditions galore. Anticipatory relief against the legislative action is not unfamiliar to constitutional adjudication. An argument to the contrary could risk the liberty of citizens.

(b) The contention of the learned Advocate General that the Fundamental Rights under Article 19 do not avail to the non-citizens and therefore, petitions are misconceived, cannot be countenanced inasmuch as there are several citizens before this Court who have laid a challenge to the legislations. Secondly, the Apex Court in **DELHI CLOTH AND GENERAL MILLS vs. UNION OF INDIA**[64] *supra* has disagreed with contention of the kind by the following observations:

> "*Thus apart from the law being in a nebulous state, the trend is in the direction of holding that in the matter of fundamental freedoms guaranteed by Article 19, the rights of a shareholder and the company which the shareholders have formed are rather coextensive and the denial to one of the fundamental freedom would be denial to the other. It is time to put an end to this controversy but in the present state of law we are of the opinion that the petitions should not*

[64] AIR 1983 SC 937

be thrown out at the threshold. We reach this conclusion for the additional reasons that apart from the complaint of denial of fundamental right to carry on trade or business, numerous other contentions have been raised which the High Court had to examine in a petition under Article 226. And there is a grievance of denial of ' equality before law as guaranteed by Article 14. We accordingly over-rule the preliminary objection and proceed to examine the contentions on merits."

In the above circumstances, these writ petitions succeed:

1. The provisions of Sections 2, 3, 6, 8 & 9 of the Karnataka Police (Amendment) Act 2021 i.e., Karnataka Act No.28 of 2021 are declared to be *ultra vires* the Constitution of India in their entirety and accordingly are struck down.

2. The consequences of striking down of the subject provisions of the Karnataka Police (Amendment) Act 2021 i.e., Karnataka Act No.28 of 2021 shall follow. However, nothing in this judgment shall be construed to prevent an appropriate legislation being brought about

concerning the subject i.e., *'Betting & gambling'* in accordance with provisions of the Constitution.

3. A Writ of Mandamus is issued restraining the respondents from interfering with the online gaming business and allied activities of the petitioners.

No order as to costs.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE

Snb/cbc