

(2021) 09 KL CK 0191

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 7785, 7851, 7853, 8440 Of 2021

Head Digital Works Private Limited

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 27-09-2021

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 19(6), 301

Code of Criminal Procedure, 1973 — Section 173

Kerala Gaming Act, 1960 — Section 2(1), 2(a), 3, 3(a)(i), 3(a)(ii), 3(a)(iii), 3(a)(iv), 3(a)(v), 3(a)(vi), 5, 7, 8, 11, 14, 14A

Citation : (2021) 09 KL CK 0191

Hon'ble Judges : T.R.Ravi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

T.R.Ravi, J.

1. The question raised in these writ petitions is regarding the power of the Government to include the game "Online Rummy played for stakes" within the purview of the Kerala Gaming Act, 1960 (hereinafter referred to as the Act or the Kerala Act). The petitioners are all companies which are engaged in the business of developing and offering online games of skill in India and they are aggrieved by the notification issued by the Government, amending the exemption notification issued on 30.09.1976 under Section 14A of the Act. The reference to the exhibits is as they are produced in W.P.(C)No.7785 of 2021 which is treated as the lead case.

STATUTORY PROVISIONS:-

2. The State of Kerala which was formed by including areas which were under the erstwhile Governments of Travancore, Cochin and Malabar Presidency, was governed with respect to Gambling, by the Travancore Public Gambling Act, III of 1071ME (corresponding to 1896), The Cochin Public Gambling Act, IV of 1082 ME (corresponding to 1907) and the Madras Gaming Act, 1930 (III of 1930). After

the formation of the State of Kerala, the Kerala Gaming Act, 1960 was enacted and the aforesaid enactments were repealed (to the extent it applied to the Malabar District, in the case of the Madras Act). The Kerala Gaming Act, 1960 was enacted to make better provision for the punishment of gaming and the keeping of common gaming houses in the State of Kerala. As per Section 2(1), "common gaming house" means any house, room, tent, enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent enclosure, vehicle, vessel or place whether by way of charge for the use of instruments of gaming or of the house, room, tent, enclosure, vehicle, vessel or place or otherwise howsoever; and include any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened, kept or used for the purpose of gaming. Section 2(2) defines "gaming" to include wagering or betting. Section 2(2) says that wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings or prizes in money or otherwise, in respect of any wager or bet, or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution.

3. The relevant portions of Section 3, and Sections 14 and 14A of the Act, which have a bearing on the issue to be decided read as follows;

"Section 3: Whoever-

(a) being the owner or occupier or having the use of any house, room, tent, enclosure, vehicle, vessel or place, opens, keeps or uses the same for the purpose of gaming-

(i) on a horse-race, or

(ii) on the market price of cotton, bullion or other commodity on the digits of the number used in stating the amount of such variation, or

(iii) on the amount or variation in the market price of any such commodity or in the digits of the number used in stating the amount of such variation, or

(iv) on the market price of any stock or share or on the digits of the number used in stating such price, or

(v) on the number of registration or on the digits of the number of registration of any motor vehicle using a public place, or

(vi) on any transaction or scheme of wagering or betting in which the receipt or distribution of winnings or prizes in money or otherwise is made to depend on chance, or

(b) xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx

(c) xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx

(d) xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx

shall be punishable with imprisonment which may extend to one year, or with fine which may extend to one thousand rupees, or both. Provided xxxxxxxx xxxxxxxxxxxx "

Section 14. Act not to apply to certain games.-Nothing in the foregoing provisions of this Act shall be held to apply to any game of mere skill wherever played.

Section 14A. Exemptions.-The Government may, if they are satisfied that in any game the element of skill is more predominant than the element of chance, by notification in the Gazette, exempt such game from all or any of the provisions of this Act, subject to such restrictions and conditions as may be specified in the notification".

4. Section 14A was introduced by Act 24 of 1973 by way of amendment. Subsequent to the introduction of Section 14A, the Government of Kerala issued Ext.P7 notification dated 30.09.1976, which reads thus:

"The Government of Kerala being satisfied that the element of skill is more predominant than the element of chance in the following games, hereby exempt those games from all the provisions of the said Act subject to the condition that no side betting shall be allowed in such games.

1. Rummy
2. Card games - 28, 56, 112
3. dart throw
4. ball throw
5. cup and coin; and
6. shooting contests"

GRIEVANCE OF THE PETITIONERS

5. As per Ext.P7 notification, the game of rummy was taken out of the purview of the Act. The notification does not speak about stakes and does not distinguish between Rummy played with stakes and without stakes. The only restriction in the notification is that no side betting shall be allowed. The Legislature, either at the time of introducing the Act or when Ext.P7 was issued, was not contemplating the growth of technology which would create possibilities of several games in the online platform other than games played in gaming house. Confronted with the games that were introduced in the online platform, the Government of Kerala issued Ext.P6 notification on 23.02.2021 whereby Ext.P7 notification was sought to be amended by inserting the words "except "Online Rummy" when played for stakes" after the words "rummy" shown under Sl.No. (1) in Ext.P7. It is aggrieved by this notification that the petitioners have approached this Court.

ARGUMENTS IN SUPPORT OF PETITIONERS' CAUSE

6. Sri Mukul Rohatgi, learned Senior Advocate appearing on instructions from Sri P.Martin Jose, contends that Section 14A of the Gaming Act is made to grant exemption and not to take away an exemption which is already granted. He submits that Ext.P7 notification, while exempting rummy from the provisions of the Gaming Act, only prohibited side betting and did not say anything about playing for stakes. The Senior Counsel points out that while rummy played with stakes would be valid going by the contents of the notification, "Online Rummy" which is in no way different from the game rummy when played for stakes, would come within the purview of the Gaming Act as per Ext.P6 notification. This according to the learned Senior Counsel is without any rationale and arbitrary. The learned Senior Counsel referred to the contentions of the State in the counter affidavit and submitted that what is stated is more in the nature of a moral lecture than a legal contention. It is submitted that the contention that an "Online Rummy" game is addictive does not by itself make it a game of chance so as to come under the purview of the Gaming Act. In that context, it is submitted that even lotteries are very addictive, but it is promoted by the State itself. It is further submitted that the apprehensions regarding the children playing the game is more of a parental problem rather than a legal issue. Referring to paragraph 21 of the counter affidavit, it is submitted that the statement that rummy played for stakes is punishable is without any basis whatsoever, and is without any statutory backing.

7. The learned Senior Counsel submitted that Section 14 of the Act specifically excludes games of skill. It is submitted that 'skill' means 'predominant skill' since every game involves an element of chance. According to him, the game can become a gamble only if the chance is predominant and based on that bets are made. It is submitted that rummy played in club on a table is a permitted activity and "Online Rummy" played using the platform provided by the petitioners is only in the nature of a virtual court and does not in any manner differ from the game rummy which is played in a club house. Reference is made to Section 11 of the Act which says that it shall not be necessary, in order to convict any person of keeping a common gaming house, or of being concerned in the management of any common gaming house, to prove that any person found playing at any game was playing for any money, wager or stake; and it is contended that as far as games which come within the purview of the Act are concerned, stakes or no stakes is immaterial. According to him, rummy which is a game of skill, is taken out of the purview of the Act by operation of Section 14 of the Act. The fallacy of the notification Ext.P6 according to the learned Senior Counsel is that by mere inclusion of stakes, the game of Online rummy is converted into a game of chance. The learned Senior Counsel submits that stake has nothing to do with either chance or skill. The Senior Counsel drew support from the decisions of the Hon'ble Supreme Court in *Dr.K.R.Lakshmanan v. State of Tamil Nadu & Anr.* reported in [(1996) 2 SCC 226], and *State of Andhra Pradesh v. K.Satyanarayana* reported in [AIR 1968 SC 825] which will be considered later in

the judgment.

8. Sri Joseph Kodianthara, Senior Advocate, instructed by Sri Sharad Joseph Kodianthara, appearing for the petitioners in the connected writ petition submits that Merriam Webster's dictionary (Web Version) defines "side betting", but the same does not include playing for stakes. Reference is made to the judgments of the Madhya Pradesh High Court in Harbanslal Premnath v. State of M.P & Ors. reported in MANU/MP/0278/1980 at para.11, Superintendent and Remembrancer of Legal Affairs v. L.E.Renny & Ors. reported in [AIR 1936 Calcutta 184] and H.S.Online Marketing Pvt. Ltd. v. State of Gujarat & Ors. reported in MANU/GJ/0601/2013 to buttress the argument regarding side betting. The learned Senior Counsel also contended that Ext.P6 amounts to a violation of the fundamental right to do business and is liable to be struck down as arbitrary and unreasonable. It is the contention that what is stated in the notification is not a restriction, but a total prohibition of the business. The Senior Counsel also pointed out the manner in which the Online Rummy game was played which has been detailed in the writ petition and contended that for all practical purposes, the manner of playing the game is the same as in playing rummy across a table. It is submitted that the factors like considerable skill in holding and discarding cards, memorising the fall of cards, skill involved in building up of Rummy are as much present in playing Online Rummy as in the case of Rummy played over a table, which are factors that were taken into account by the Hon'ble Supreme Court in the judgment in Satyanarayana (supra).

9. Sri S.Sreekumar, Senior Advocate adopted the arguments of the learned Senior Counsel Sri Rohatgi and Sri Joseph Kodianthara and submitted that in paragraphs 18 and 19 of the judgment in K.R.Lakshmanan (supra) it has specifically been laid down that rummy is a game of skill. The learned Senior Counsel referred to Ext.P7 and submitted that many of the games included there are actually games of skill and not of chance.

10. Sri Santhosh Mathew appearing for the petitioner in W.P. (C)No.8440/2021 submitted that Act itself will not apply to the game of rummy, since rummy is a game of skill. According to him, no notification itself was required under Section 14A for the purpose of excluding rummy from the purview of the Act, since the game is covered by Section 14 of the Act. Reference is made to the judgment in Satyanarayana (supra) at paragraphs 3, 5 and 12 to say that the game of rummy is not a game of chance.

11. The counsel referred to Ext.P3 judgment of a Division Bench of this Court in W.P.(C)No.2096/2021, which was filed in public interest. In paragraph 8 of the judgment this Court observed that from the statement made on behalf of the Government it is revealed that the existing law, does not bring online gambling or online betting, within the purview of the Kerala Gaming Act, 1960, and inclusion of the same in the existing enactment is a legislative function. After placing on record the submission on behalf of the respondents, this Court directed to take appropriate decision on the aspect of inclusion of online

gambling and online betting, within the purview of the Kerala Gaming Act, 1960, within a period of two weeks. According to the counsel, this judgment was the reason why the notification Ext.P6 was issued by the Government. A contention has been taken that even though it was conceded that what was required was a legislative function, what is done now is an executive function. The counsel further points out that the judgments of the Hon'ble Supreme Court in K.R.Lakshmanan (supra), M/s Executive Club v. State of A.P. reported in [1998 SCC OnLine AP 415], D.Krishnakumar & another v. State of A.P. reported in [2002 SCC OnLine AP 810] and Ramachandran K. v. Circle Inspector of Police, Perinthalmanna reported in [2019 SCC OnLine Kerala 6788] also support the contention that "Online Rummy" cannot be treated as a game of chance and brought within the purview of the Act. To contend that executive instructions cannot take the place of law, reference is made to the decisions in Bhishambar Dayal Chandra Mohan & Ors v. State of U.P. & Ors. reported in [(1982) 1 SCC 39] at paragraph 41, Bijoe Emmanuel & Ors. v. State of Kerala & Ors reported in [1986 3 SCC 615] at paragraphs 16 and 17 and K.S.Puttaswamy & Anr. (Aadhaar) v. Union of India & Anr. reported in [(2019) 1 SCC 1].

12. Sri N.Manoj Kumar, State Attorney appearing on behalf of the Government submitted that gambling and betting come under Entry 34 in List II and the State is empowered to legislate on the same. According to him, "Online Rummy" is not a game predominantly of skill and there is an element of cheating involved and even the deal of cards is manipulated. Referring to the decision in Ramesh Chandra Kachardas Porwal v. State of Maharashtra, [(1981) 2 SCC 722], it is submitted that a prayer for a writ of certiorari will not lie against a subordinate legislation and only a declaration can be sought for. Reference is made to State of Bombay v. R.M.D. Chamarbaugwala reported in [AIR 1957 SC 699], R.M.D. Chamarbaugwala v. Union of India reported in [AIR 1957 SC 628], Satyanarayana (supra) and M.J.Sivani & Ors. v. State of Karnataka & Ors. reported in [(1995) 6 SCC 289]. It is submitted that the notification does not violate either the Parent Act or the plenary legislation nor is it against the Constitution and hence there are no grounds available to challenge the same. It is submitted that the Act came into force in 1960 and only Section 14 was then available. On 22.11.1967, the judgment in Satyanarayana (supra) was delivered. The said decision was under the Andhra Act where, only Section 14 was available and there was no provision like Section 14A at that point of time. It was in 1973 that Section 14A was introduced. A contention is hence raised that the judgment in Satyanarayana (supra) cannot be applied on all fours, since the Hon'ble Supreme Court was not considering a case wherein the enactment contained a provision in the lines of Section 14A. Reference is also made to the decision in Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise & Anr. reported in [(2016) 3 SCC 643].

ISSUES TO BE DECIDED

13. On the basis of the submissions made by the counsel on either side, the

following questions arise for consideration;

- a) Is Rummy is a game of mere skill, so as to take it out of the purview of the Act, as provided in Section 14 of the Act ?
- b) Is Rummy a game in which the element of skill is more predominant than the element of chance, and can be exempted from the provisions of the Act only by means of a notification ?
- c) Whether Rummy when played for stakes, becomes a game neither covered by Section 14 nor by a notification issued under Section 14A ?
- d) If Rummy is a game of skill under Section 14, can Online Rummy also be stated to be a game of skill and not of chance ?
- e) Does inclusion of stakes for playing Online Rummy, make any difference to the nature of the game as a game of skill ?
- f) Does the power available to the State to issue a notification under Section 14A to exempt a game, clothe it with a power to notify a game which is a game of mere skill under Section 14 ?
- g) Whether a writ of certiorari to quash Ext.P6 notification is maintainable ?
- h) Whether the petitioners are entitled to a declaration that Ext.P6 notification is arbitrary, illegal and in violation of Articles 14 and 19(1)(g) of the Constitution of India ?

CONSIDERATION

14. A game of rummy with a difference. The Counsel have placed all their cards on the table. My effort is to arrange them in sets and to declare. If I arrange the cards skillfully and declare, then "Rummy is a game of MERE skill". If I arrange the cards without any skill and still manage to declare, then "Rummy is a game of chance". Since much water has flown below the bridge, the only skill possibly required is to understand the precedents having a binding force. And since the cards were placed before me online, this could possibly be named Online Rummy.

15. In the two Chamarbaugwala cases (supra) decided in the year 1957, the Apex Court was considering whether the declining the renewal of licence to conduct a prize competition, which is contended to be a business, would amount to violation of the rights under Article 19(1)(g) of the Constitution. The Court held that a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill. The Court held that Article 19(1)(g) only protects those activities which can be regarded as lawful trading activities and that gambling is not a trade but *res extra commercium*. It was held that the enactment by which the control and regulation of the prize competition can only have application with regard to competitions in which success does not depend on any substantial degree of skill.

16. Ten years later, the question whether the game 'Rummy' is a game of chance or of skill, came to be considered by the Hon'ble Supreme Court, in *Satyanarayana (supra)*. The question that was considered was whether the premises of a club known as the "Crescent Recreation Club" situated in Secunderabad was being used as a common gambling house and whether the persons who were found to be playing the game Rummy for stakes, at the time of a raid by the police could be said to be gambling therein. The Magistrate convicted the accused. On a revision petition filed by the accused, the Sessions Court referred the issue to the High Court under Section 438 of the Code of Criminal Procedure, recommending the quashing of the conviction and the setting aside of the sentences. A learned Single Judge of the High Court accepted the recommendation, against which the State had approached the Hon'ble Supreme Court. The statutory provision which was considered by the Apex Court was Section 14 of the Public Gambling Act, 1867, which is similar to Section 14 of the Kerala Act. In paragraph 12 of the judgment, the Hon'ble Supreme Court held as follows:

"12. We are also not satisfied that the protection of Section 14 is not available in this case. The game of rummy is not a game entirely of chance like the "three-card" game mentioned in the Madras case to which we were referred. The "three card" game which goes under different names such as "flush", "brag" etc. is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is no skill involved in it. Of course, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of rummy or any other game played for stakes, the offence may be brought home. In this case, these elements are missing and therefore we think that the High Court was right in accepting the reference it did."

The Hon'ble Supreme Court in categorical terms stated that the Court is not satisfied that the protection of Section 14 is not available in the case. The use of the double negative can only mean that the protection of Section 14 is available in the case of a game of Rummy.

17. The Hon'ble Supreme Court had occasion to consider the issue once again in the year 1996, while dealing with a case of horse-racing, in *K.R.Lakshmanan (supra)*. The Hon'ble Supreme Court was considering the question from the point of view of horse-racing within the premises of the Madras Race Club. In

paragraph 3 of the judgment, the Hon'ble Supreme Court took note of the definition of the word "gambling" contained in the The New Encyclopaedia Britannica, 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" and the definition in Black's Law Dictionary which says "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". The Hon'ble Court held that Gambling in a nutshell is payment of a price for a chance to win a prize. (emphasis supplied). After comparing with a game of skill, the Court held that a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance and that it is the dominant element - 'skill' or 'chance' - which determines the character of the game.

18. In paragraphs 8 and 9 of the judgment, on the question whether the games which depend to a substantial degree upon the exercise of skill come within the stigma of "gambling", the Apex Court referred to the two Chamarbaugwala cases (supra), and held that a competition, success wherein does not depend to a substantial degree upon the exercise of skill, is now recognised to be of a gambling nature. The Apex Court held that gambling is not trade and as such is not protected by Article 19(1)(g) of the Constitution. It has further been authoritatively held that the competitions which involve substantial skill are not gambling activities. Such competitions are business activities, the protection of which is guaranteed by Article 19(1)(g) of the Constitution. Paragraphs 19 and 20 of the judgment in K.R.Lakshmanan(supra), which are very relevant for deciding the issue in these cases are extracted below:

"19. We may now take up the second question for consideration. Section 49 of the Police Act and Section 11 of the Gaming Act specifically provide that the penal provisions of the two Acts shall not apply to the games of "mere skill wherever played". The expression "game of mere skill" has been interpreted by this Court to mean "mainly and preponderantly a game of skill". In State of A.P. v. K. Satyanarayana [(1968) 2 SCR 387 : AIR 1968 SC 825 : 1968 Cri LJ 1009] , the question before this Court was whether the game of rummy was a game of mere skill or a game of chance. The said question was to be answered on the interpretation of Section 14 of the Hyderabad Gambling Act (2 of 1305-F) which was *pari materia* to Section 49 of the Police Act and Section 11 of the Gaming Act. This Court referred to the proceedings before the courts below in the following words:

"The learned Magistrate who tried the case was of the opinion that the offence was proved, because of the presumption since it was not successfully repelled on behalf of the present respondents. In the order making the reference the learned Sessions Judge made two points: He first referred to Section 14 of the Act which

provides that nothing done under the Act shall apply to any game of mere skill wherever played and he was of opinion on the authority of two cases decided by the Madras High Court and one of the Andhra High Court that the game of rummy was a game of skill and therefore the Act did not apply to the case." (emphasis added)

This Court held the game of rummy to be a game of mere skill (emphasis supplied) on the following reasoning:

"We are also not satisfied that the protection of Section 14 is not available in this case. The game of rummy is not a game entirely of chance like the 'three-card' game mentioned in the Madras case [Somasundaram Chettiar, In re, AIR 1948 Mad 264 : 49 Cri LJ 434] to which we were referred. The 'three-card' game which goes under different names such as 'flush', 'brag' etc. is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that rummy is a game of chance and there is no skill involved in it."

20. The judgments of this Court in the two Chamarbaugwalla cases and in the Satyanarayana case [(1968) 2 SCR 387 : AIR 1968 SC 825 : 1968 Cri LJ 1009] clearly lay down that (i) the competitions where success depends on substantial degree of skill are not 'gambling' and (ii) despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of "mere skill". We, therefore, hold that the expression "mere skill" would mean substantial degree or preponderance of skill."

Later, in paragraph 33, the Apex Court observed that "Gaming is the act or practice of gambling on a game of chance" (emphasis supplied).

DIVISION BENCH DECISION IN RAMACHANDRAN (SUPRA)

19. A question came up before a Division Bench of this Court in Ramachandran (supra), whether playing rummy by members of a club in the club premises would be a kind of gambling punishable under Sections 7 and 8 of the Kerala Act. The Bench considered two unreported judgments of this Court in CrI.M.C.No.4077 of 2018 and CrI.M.C.No.8949 of 2017, wherein the learned Single Judge had quashed the First Information reports submitted by the Police officer before the Judicial Magistrate, relying on Satyanarayana (supra). The Court settled the issues to be decided in paragraph 10 of the judgment as under:

10. The primary questions that emerge are,

- (1) Whether the game of rummy is a game of skill or chance liable to be regulated under the Kerala Act or rules framed thereunder?
- (2) Whether the premises of a club known as 'Sopanam Arts and Sports Club' situated at Angadipuram were being used as a common gaming house?
- (3) Whether the petitioner, who was the office bearer of the club, at the time of raid by the Police could be said to be instrumental in conducting common gaming house?
- (4) Whether playing rummy at the club is gambling as defined under the Kerala Act?
- (5) Whether the game of rummy even if it is a game of mere skill is still prohibited under Sections 7 and 8 of the Kerala Act?
- (6) Whether Sections 7 and 8 of the Kerala Act either expressly or impliedly exclude the game of rummy as a game of skill?
- (7) Whether the Police is competent to set the criminal law in motion in accordance with the Kerala Act, if a case is registered by the Police under Sections 7 and 8 of the Kerala Act based on credible information or reasonable doubt that the activities carried on by the club or its members are not in accordance with law and thereby indulging in unlawful activities or nuisance?

20. The contentions before the Court were to the effect that playing the game of Rummy with stakes amounted to gambling and Sections 7 and 8 of the Kerala Act will be attracted. In paragraph 19 of the judgment the Division Bench observed that going by the decisions considered, it is clear that if the club is used as a gaming house for the purpose of playing rummy for stakes and all persons physically present there are found playing rummy, then they are certainly accused in the eye of law, provided the detecting officer has complied with Section 5 of the Kerala Act before making such a raid or inspection in the club. In paragraph 20, the Division Bench specifically held that Section 2(a) of the Kerala Act is not in pari materia with the Hyderabad Gambling Act, which arose for consideration before the Apex Court in *Satyanarayana* (supra). In paragraph 21, the Division Bench observed that even though Section 14A of the Kerala Act provides for issuance of a notification exempting any game, the playing of which depends predominantly on skill, from all or any of the provisions of the Act subject to such restrictions and conditions as may be specified in the notification, admittedly (emphasis supplied), no such notification was issued by the Government exempting the game of Rummy played for stakes. There appears to be some confusion regarding the above observation. Exhibit P7 is a notification issued exempting Rummy from the provisions of the Act without any qualification as to whether it is played for stakes or not. The only condition in the notification is that side betting is not allowed. Side betting and stakes are different from each other and as such it may not be correct to say that there is no notification issued by the Government. It would appear from the judgment that Exhibit P7

was not placed before the Court for consideration. In paragraph 26, the Division Bench observed that the definition contemplated under the Kerala Act with regard to common gaming house does not exclude Rummy for stakes played within the club, even if the club is not making profit from the business. This observation also may not be fully correct because Section 14 clearly says that a game of mere skill is exempted from the provisions of the Act and the Hon'ble Supreme Court has specifically held that the game Rummy is a game of mere skill. Hence, there is no requirement for any exclusion of a common gaming house where rummy is played for stakes since such an exclusion is already available under Section 14. In paragraph 28 of the judgment, the Division Bench observed that there cannot be any doubt that playing rummy for stakes within the club premises is an offence, provided the Police conducted search in accordance with Section 5 of the Kerala Act. The Court further held that playing rummy for innocent pastime is not an offence and is certainly a game of skill, as held on Satyanarayana (supra). The Division Bench noticed the two Judge Bench decision of the Hon'ble Supreme Court in M.J.Sivani (supra), wherein the Court had observed that gaming is to play at any game, whether of skill or chance for money or money's worth and the act is not less gaming because the game played is not in itself unlawful and whether it is involved or did not involve skill. The later decision in K.R.Lakshmanan (supra) was rendered by a Three-Judge Bench in which Justice B.L.Hansaria who was a member of the Bench which decided M.J.Sivani (supra) was also a member. The observations in M.J.Sivani (supra) was considerably tempered down in the decision in K.R.Lakshmanan (supra). It is worthwhile to note that in Satyanarayana (supra), the Hon'ble Supreme Court did not hold that rummy played for innocent pastime alone is a game of skill and that if it is played for stakes, it becomes a game of chance.

21. In paragraph 30, the Division Bench has observed that it cannot agree that playing rummy for stakes within club premises by professional gamblers is a game of skill and that the issue has to be looked at from the social perspective as well. One of the petitioners herein had filed an application seeking review of the above said judgment of the Division Bench. By order dated 11.10.2019, another Division Bench of this Court dismissed the review petition. While dismissing the review petition, the Bench considered Section 14A of the Act and the judgment in Satyanarayana (supra) and Dr.K.R.Lakshmanan (supra). In paragraph 7 of the order, it was held that there is no dispute about the fact that in view of Ext.P7 notification, playing rummy is excluded from the provisions of the Act and that the Hon'ble Supreme Court has held that element of skill is predominant than the element of chance in the game of rummy. Regarding the question whether rummy played for stakes will amount to a violation of the provisions in the Act or not, the Bench expressed the view that it is a matter that has to be decided on a case to case basis. It further stated that if it is just playing rummy without any side betting, the notification protects the parties involved in it. But, in a case where rummy is played for stakes, the issue might be different which has to be dealt with on a case to case basis.

THE DECISION IN RAMACHANDRAN (SUPRA) - WHETHER RENDERED PER INCURIAM AND HENCE NOT A BINDING PRECEDENT

22. The legal proposition that a decision which is rendered per incuriam and sub silentio cannot be treated as a binding precedent is no longer res integra. 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent (sic) statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. (See A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602], observations of Lord Goddard in Moore v. Hewitt [(1947) 2 All ER 270 (KBD)] and Penny v. Nicholas [(1950) 2 All ER 89 (KBD)] and Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. [(2001) 6 SCC 356] . 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (See Young v. Briol Aeroplane Co.Ltd. [1944] 2 All.ER 293] and State of U.P. v. Synthetics & Chemicals Ltd. [(1991) 4 SCC 139]

23. In paragraph 14 of the judgment in N.Bhargavan Pillai v. State of Kerala, reported in [(2004) 13 SCC 217], the Hon'ble Supreme Court held that the view, if any, expressed without analysing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam.

24. While considering the principle of per incuriam, the Hon'ble Supreme Court in the decision in Indore Development Authority v. Shailendra reported in [(2018) 3 SCC 412], in paragraphs 206, 210 and 211 held as follows:

"206. The concept of "per incuriam" signifies those decisions rendered in ignorance or forgetfulness of some inconsistent statutory provisions, or of some authority binding on the court concerned. In other words, the concept means that a given decision is in disregard of the previous decisions of the court itself, or that it was rendered in ignorance of the terms of an applicable statute or of a rule having the force of law.

xxxx xxxx xxxx

210. In MCD v. Gurnam Kaur [MCD v. Gurnam Kaur, (1989) 1 SCC 101] , it was held that decision of ignorance of rule is per incuriam, the Court has observed:

"11. ... A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute."

211. In State of M.P. v. Narmada Bachao Andolan [State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639 : (2011) 3 SCC (Civ) 875 : AIR 2011 SC 1989] , this Court has observed:

"67. Thus, "per incuriam" are those decisions given in ignorance or

forgetfulness of some statutory provision or authority binding on the court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

25. Applying the above legal principles, with all due respects to the Division Bench at my command, the conclusions drawn in the judgment do not appear to be in accordance with the statutory provisions and the law laid down by the Hon'ble Supreme Court in the decisions on Satyanarayana and K.R.Lakshmanan (supra). In my humble opinion, the judgment of the Division Bench, does not consider the following aspects:

a) Section 14 of the Act is in pari materia with Section 11 of the Madras Gaming Act, 1930, Section 49A of the Madras City Police Act, 1888 and Section 14 of the Hyderabad Gambling Act (Act 2 of 1305 F) 1867, and the words "game of mere skill" has been interpreted to mean "mainly and preponderantly a game of skill" by the Hon'ble Supreme Court in Satyanarayana and K.R.Lakshmanan (supra). (See paragraph 18 supra)

b) The Hon'ble Supreme Court has rendered a specific finding that Gaming is the act or practice of gambling on a game of chance. (See paragraph 33 of K.R.Lakshmanan supra) It can be seen that the Hon'ble Supreme Court has clearly laid down that in order to come within the meaning of gaming, there should be gambling on a game of chance. Gambling on game of skill will not come within the purview of gaming going by the judgment, wherein the Hon'ble Supreme Court was considering the game of horse-racing.

c) The Division Bench has extracted paragraph 20 of the judgment in K.R.Lakshmanan (supra) (noted as paragraph 18 in 1996 KHC 691). The Supreme Court has laid down the law in detail in paragraphs 19, 20 and 33 of the judgment (extracted in paragraph 18 supra) but the same appears to have been lost sight of.

d) What follows from the judgments in Satyanarayana and K.R.Lakshmanan (supra) is that Rummy is a game of mere skill, falling within the ambit of Section 14 of the Act and is necessarily out of the purview of the Act. Once the game comes within Section 14, none of the provisions of the Act will apply to the game of Rummy. The Division Bench has not considered the effect of Section 14, read with the above said judgments of the Hon'ble Supreme Court.

e) The observation of the Division Bench in paragraph 21 of the judgment that no notification has been issued under Section 14A of the Act, notifying Rummy played with stakes as exempted, is apparently without noticing Ext.P7 notification.

f) Since Rummy already comes within the purview of Section 14, there is no requirement of any notification under Section 14A exempting it from the

provisions of the Act. However, Ext.P7 notification cannot be said to be without any purpose, since it ensures that Rummy if played, accompanied by side betting, comes within the purview of the Act. The above statutory provisions and their impact on the issue has not been considered by the Division Bench.

g) The Division Bench has in paragraph 7 identified 7 questions that emerge. Questions 1,4,5 and 6 alone are relevant for the purpose of this case. The question No.1 posed does not require any detailed consideration in the light of the binding decision of the Apex Court in Satyanarayana and K.R.Lakshmanan (supra). Question No.4 appears to be a mistake since the word 'gambling' is not defined under the Kerala Act and only the word 'gaming' is defined. Regarding Question No.5, application of Sections 7 and 8 itself will depend on the question whether Rummy is covered by Section 14 or not. The Division Bench has not considered Section 14 of the Act at all. Question No.6 also appears to be a mistake since exclusion of a game of skill from the Kerala Act is under Section 14 and not under Sections 7 and 8. Sections 7 and 8 only provide for penalty in case gaming is carried on in a common gaming house.

h) Paragraph 14 of the judgment extracts the statutory provisions that needed to be looked into for deciding the issue, according to the Division Bench. A reading of the paragraph shows that the most relevant statutory provisions contained in Sections 3 and 14 have not even been considered.

I) Section 3(a) deals with 6 kinds of gaming, which are covered by the Act. Section 3(a)(i) to (v) deal with certain particular activities identified as gaming. Section 3(a)(vi) is more general in nature but covers only 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.(emphasis supplied). The above statutory provision is very much in tune with the law laid down by the Apex Court that Gaming is the act or practice of gambling on a game of chance.

j) The conclusion of the Division Bench in paragraph 28 that "in view of the various decisions of the Apex Court, there cannot be any doubt that playing rummy for stakes within the club premises is an offence" appears in my humble opinion to be not factually correct since the Apex Court in the judgments in Satyanarayana and K.R.Lakshmanan (supra) did not hold that Rummy played for stakes is an offence.

With all respects to the Division Bench, I have to conclude that the decision in Ramachandran (supra) is per incuriam the statutory provisions contained in Section 3 and 14 of the Kerala Gaming Act and the law laid down by the Hon'ble Supreme Court in paragraph 12 of Satyanarayana (supra) and paragraphs 19 and 20 of K.R.Lakshmanan (supra).

RECENT DECISIONS ON ONLINE GAMES

26. In the decision in Varun Gumba vs Union Territory of Chandigarh & Ors. reported in [2017 SCC Online P&H 5372], a learned Single Judge of the High

Court of Punjab & Haryana held that an online game Dream fantasy 11 is a game of skill, applying the principles laid down by the Hon'ble Supreme Court in Satyanarayana and K.R.Lakshmanan (supra). A Division Bench of the Bombay High Court considered the very same issue of Dream 11 fantasy sports in the judgment in Gurdeep Singh Sachar v. Union of India reported in [2019 SCC OnLine Bom 13059] and agreed with the decision of the Punjab and Haryana High Court. A Division Bench of the High Court of Rajasthan had also considered the very same game Dream 11 in its decision in Chandresh Sankhla vs State of Rajasthan & Ors. reported in [2020 SCC Online Raj 264] and held that there is no element of betting or gambling involved and that it is a game of skill and not a game of chance. SLP (Civil) Diary No.18478/2020 filed by one Avinash Mehrotra against the judgment of the Rajasthan High Court was dismissed by the Hon'ble Supreme Court by its order dated 30.07.2021, wherein it is observed that Special Leave Petitions filed against the judgments of the Punjab and Haryana High Court and the Bombay High Court were dismissed on 15.06.2017 and 04.10.2019 & 13.12.2019 respectively.

27. A Division Bench of the High Court of Madras in a batch of writ petitions considered the validity of the amendment introduced by the Tamil Nadu Government to the Tamil Nadu Gaming Act, whereby 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 stakes was prohibited and struck down the amendment. In the judgment in Jungle Games India Private Limited & Anr. v. The State of Tamil Nadu & Ors. reported in [2021 SCC OnLine Mad. 2767], the Division Bench found that when it comes to card games or board games such as Chess etc. when played in the physical form or in the virtual mode, there is no distinction on the basis of the skill involved. The Bench found that rummy is a game of skill. The Court found that by expanding the field of legislation by widening the scope of gambling, the legislature has erred and the legislation cannot be referable to the field of "betting and gambling" in Entry 34 of the State List. The judgment also noticed that the judgment in M.J.Sivani (supra) has been tempered down by the subsequent decision of a Three-Judge Bench in K.R. Lakshmanan (supra).

28. In Executive Club v. State of A.P., reported in [1998 SCC OnLine AP 415], it was held that Rummy is a game of skill. In D.Krishnakumar v. State of A.P., reported in [2002 SCC OnLine AP 810], it was held that playing Rummy for stakes is not an offence. The Court held further that unless the statute is amended so as to include playing rummy for stakes within the definition of Gaming, no action can be taken.

CONTENTION ON BEHALF OF THE STATE

29. Now, let me consider the contentions raised by Sri N.Manoj Kumar, State Attorney, on behalf of the Government. The Counsel referred to certain observations made by the Apex Court in Chamarbaugwala (supra) [AIR 1957 SC 699] which read "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 Article 19(1)(g). We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Article 301". The above observations are not in any way challenged since they apply in all cases where the element of gambling is involved over a game of chance. The observations will not however be of any help in cases where the statute excludes games where mere skill or predominant skill is involved. The Counsel referred to paragraph 12 in *Satyanarayana* (supra) which has been extracted above to submit that the observation "if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home" clearly shows that Rummy played for stakes is an offence. I am unable to accept the above proposition. The above said observation has necessarily to be read with the first sentence in paragraph 12 of the judgment which says that protection of Section 14 is available in the case. Section 14 deals with games of mere skill. The observation referred to by the State Attorney can hence only take in situations like "side betting" during a game of Rummy, which has been taken care of by Ext.P7 notification and to profit or gain made by the owner of the house or club from the game of rummy or any other game played for stakes. What matters is not the stakes but the profit or gain made by the owner of the house. "Side betting" is not a term that the law is not aware of. In the decision in *Legal Remembrancer v. L.E.Renny* reported in [AIR 1936 Cal. 184] and *In re Mannyla Naidu* reported in [AIR 1944 Mad.447], it was held that the game of dart is a game of skill. It was further observed in the judgments that the person who is actually playing the dart game, is playing a game of skill, but for the persons who are side-betting for them, the game will not be a game of skill but will be a game of chance. The State of Kerala should be presumed to be aware of the law when it issued Ext.P7 notification, specifically excluding the game of Rummy, with a rider that side betting shall not be allowed.

30. Reference is then made to the observations of the Hon'ble Supreme Court in paragraphs 11 and 18 of *M.J.Sivani* (supra), that "To game" is to play any game, whether of skill or chance, for money or money's worth. A game no doubt, can be one of skill or of chance, or predominantly of skill or predominantly of chance. However, Section 14 excludes games of mere skill and the judgments of the Apex Court have interpreted "mere skill" to mean "predominantly of skill". The effect of the observation in *M.J.Sivani* (supra) has to be understood along with the law laid down by the Three-Judge Bench in *K.R.Lakshmanan* (supra) later, which has

been dealt with in detail in earlier paragraphs. In paragraph 18 in M.J.Sivani, the Apex Court observed that no one has inherent right to carry on a business which is injurious to public interest and that trade and business attended with danger to the community may be totally prohibited or be permitted subject to such conditions or restrictions as would prevent the evils to the utmost. However, what is sought to be done in the case on hand is not a prohibition of Online Rummy as a trade of business which is dangerous to the community. Instead, the game Online Rummy is sought to be exempted from the provisions of the Kerala Act, to a limited extent when it is not played for stakes, as a game predominantly of skill. Such a notification is totally ill-conceived in my opinion since, the moment online rummy is recognised as a game predominantly involving skill, it will come within the purview of Section 14 of the Kerala Act and nothing more is required to take it out of the purview of the other provisions of the Kerala Act, which speak of penalty for gaming. So also, stakes cannot be the criterion for assessing whether a game is one involving skill or chance.

31. Yet another contention advanced by the State Attorney is that Section 14A was brought in to remove the substratum of the decision of the Hon'ble Supreme Court in Satyanarayana (supra). It is contended that once the notification was issued under Section 14A, the process was complete. It is contended that the State has ample powers to take away the effect of the judgment by a legislative process. It is further contended that since power to grant exemption vide issuance of a notification includes the power to modify, Ext.P6 notification cannot be found fault with. It is also contended that the issuance of a notification under Section 14A is a legislative exercise and not a mere executive order capable of being set aside by the issuance of a certiorari. The question regarding the power to issue a writ of certiorari is no longer relevant since the petitioner has sought amendment of the writ petition by addition of a prayer for declaration. The contention that Section 14A takes away the substratum of the decision in Satyanarayana (supra) is not legally sustainable. The judgments of the Apex Court in Satyanarayana and K.R.Lakshmanan (supra) are rendered interpreting the scope of the words "mere skill" which are the very same words contained in Section 14 of the Kerala Act. As long as Section 14 remains in the Statute Book, Section 14A will not have the effect of removing the substratum as contended by the State Attorney. So also, with Section 14 in the Statute Book, Section 14A is rendered superfluous to a great extent, particularly with regard to games like Rummy, which has been declared by the Hon'ble Supreme Court as a game of "mere skill".

32. Even though reliance was placed on paragraph 22 of the decision of the Apex Court in Sri Bhagwati (supra) to submit that the legislature is presumed to know the law when it enacted Section 14A, I am of the opinion that the said knowledge of the legislature does not take away the power of the Court to consider the constitutionality of a legislation. Moreover, the said argument is actually double-edged, since it can be said that the legislature knowing fully well of the judgment in Satyanarayana (supra) chose to retain Section 14 in the Kerala Act. The

contentions of the State Attorney regarding the effect of Ramachandran (supra) has already been considered in the preceding paragraphs and are not being repeated. As far as Entry 34 in List II of Schedule 7 of the Constitution of India is concerned, the article takes in "betting and gambling". It has already been held by the Hon'ble Supreme Court that the game Rummy will not come under "gambling" since "gambling" can only be on a game of chance. The legislature was also aware of this legal position when it specifically included Section 14 in the Act. Ext.P6 notification which is contended to be legislative in nature, cannot stand the test of constitutionality since under the guise of legislating on "betting and gambling", there cannot be any legislation on something which is not betting or gambling. Ext.P7 to a certain extent be justified, if it is to be read as prohibiting side-betting in a game of skill.

CONCLUSIONS

33. On the basis of the considerations above, I go back to the issues identified in para.13 of this judgment. On the first issue whether Rummy is a game of mere skill, I hold on the basis of the binding judgments of the Apex Court in Satyanarayana and K.R.Lakshmanan (supra) and the statutory provisions contained in Sections 3 and 14 of the Kerala Act that Rummy is a game of mere skill. On the question whether Rummy is a game in which 'element of skill' is more predominant than the 'element of chance', and can be exempted from the provisions of the Act only by means of a notification, I hold that even without a notification being issued under Section 14A, Rummy remains to be a 'game of mere skill' as the word has been interpreted by the Hon'ble Supreme Court in Satyanarayana and K.R.Lakshmanan (supra). On the question whether Rummy when played for stakes becomes a game neither covered by Section 14 nor by a notification issued under Section 14A, I hold that the "mere skill" contained in Section 14 and "any game the element of skill is more predominant than the element of chance" contained in Section 14A do not suggest that skill in playing a game is in any manner dependent on stakes. 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. On the question whether Online Rummy is a 'game of skill' and 'not of chance', I hold that on the very same reasoning adopted by the Hon'ble Supreme Court to find the game of Rummy as a 'game of skill', the game of Online Rummy will also have to be held to be a 'game of skill'. On the question whether inclusion of stakes for playing Online Rummy would make any difference to the nature of the game as a game of skill, I hold in the negative and declare that Online Rummy played either with stakes or without stakes remains to be a 'game of skill'. On the question whether the power available to the State to issue a notification under Section 14A to exempt a game, clothe it with a power to notify a game which is a game of mere skill under Section 14, I hold that once a game comes within the purview of Section 14, any notification under Section 14A exempting it further as a game involving skill predominantly is only a superfluous, and even without such a notification, the game stands exempted. The question whether a prayer for a writ of certiorari to quash Ext.P6 notification

is maintainable does not really arise for consideration, since one of the writ petitions already had a prayer seeking declaration and the other writ petitions have been amended including a prayer for declaration. On the question whether the petitioners are entitled to a declaration that Ext.P6 notification is arbitrary, illegal and in violation of Articles 14 and 19 (1) (g) of the Constitution of India, I hold in the affirmative. It is hereby declared that Ext.P6 notification is arbitrary, illegal and in violation of Articles 14 and 19(1)(g) of the Constitution of India, since the notification has been issued in relation to a game which already stands exempted from the provisions of the Act under Section 14 of the Kerala Act and since the game does not come within the meaning of 'gambling' or 'gaming', providing a platform for playing the game, which is in the nature of business cannot be curtailed. I hold that Ext.P6 notification is in effect a prohibition of Online Rummy played for stakes and not a reasonable restriction under Article 19(6) of the Constitution of India.

34. In the result, Ext.P6 notification is declared as arbitrary, illegal and violative of the fundamental rights guaranteed to the petitioners under Articles 14 and 19(1)(g) of the Constitution of India and hence not enforceable. The writ petitions are allowed.