The Legal Considerations of Blockchain Gaming in India

Why in news?

The vast scope and potential of blockchain technology has attracted the gaming industry over the past few years.

What are blockchain games?

> *Blockchain is a decentralised database that stores information. As new data comes in, it is entered into a fresh block. Once the block is filled with data, it is chained onto the previous block, which makes the data chained together in chronological order.*

- Blockchain games are online video games that are developed integrating blockchain technology into them.
- **NFTs** - NFTs represent in-game virtual assets that can be owned by players, such as maps, armor or land.
- These NFTs act as asset tags, identifying ownership of the in-game assets, and are stored on the blockchain.
- There is also scope for transfer of in-game assets from one game to another making the in-game assets marketable.
- **Cryptocurrency**- Cryptocurrency such as tokens based on the Ethereum blockchain, may be used for the purchase of in-game assets.
- These in-game purchases usually enable gamers to buy items like extra lives, coins and so on directly from the game.
- **Gaming coins**- Gaming coins such as Axie Infinity and Enjin Coin are in-game cryptocurrency which may be used for the purchase of in-game assets.
- These gaming coins may be purchased from crypto exchanges or be acquired as winnings in games that have adopted the play-to-earn model.

Are blockchain games legal in India?

- Since blockchain is merely the underlying technology, there is no express regulation of it in India.
- However, it would be suitable to explore the legality of the games from the lens of existing Indian gaming regulation.
- **Games of skill *vs.* games of chance-** The Supreme Court recognized that no game is purely a ‘game of skill’ and almost all games have an element of chance.
- A ‘dominant element test’ is to be utilized to determine whether chance or skill is the dominating element in determining the result of the game.
- The dominant element may be determined by factors such as superior knowledge, training, experience, expertise or attention of a player have a material impact on the outcome of the game.

- Staking money or property on the outcome of a ‘game of chance’ is prohibited and subjects the guilty parties to criminal sanctions but staking on the outcome of a ‘game of skill’ is not illegal per se and may be permissible.
- **Common gaming house-** Owning or keeping or being present for the purpose of gaming in a common gaming house is ordinarily prohibited in terms of the state gaming laws.
- Courts have clarified in the past that the mere charging of an extra fee to facilitate playing the game or to maintain the facilities may not necessarily be seen as making a profit or gain.

Where does blockchain gaming lie within this framework?

- Other than states such as Sikkim, Nagaland, and Telangana, which recognize online gaming, in most states and union territories, there is currently a lacuna in gaming law.
- It can be inferred that each blockchain game must first pass as a ‘game of skill’, as against a ‘game of chance’, to legally be made available in most Indian states.
- The Supreme Court has rejected the video games being ‘games of skill’, as the outcomes of these games could be manipulated by tampering with the machines and the skill of players could not be a dominant factor of the game.
- Delhi District Court has held that a gaming portal would be covered within the definition of a ‘common gaming house’, if it were to take commission / earn revenue from the game offered.
- In 2021, the Finance Ministry has announced that the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021, was to be tabled in the Parliament that seeks to prohibit all private cryptocurrencies.
- If the legislature does indeed successfully place a ban on private cryptocurrencies, then, the existing blockchain games relying on cryptocurrencies would be considered illegal in India.
- Also, it was announced in Budget Speech that the income from the transfer of any ‘virtual digital assets’ would be subject to income tax at the rate of 30%.

What intellectual property protections may be available to blockchain games?

- **Patents-** For a blockchain game or any of its elements to be patented in India, it will need satisfy the patentability requirements of:
    - being a new product or process (having novelty)
    - involving an inventive step (having a feature that involves technical advancement or having economic significance or both)
    - being capable of industrial application
- In terms of Section 3(k) of the Patent Act, 1970, computer programs are per se not inventions and hence, cannot be patented.
- However, judicial pronouncements have clarified that if an invention has a *technical contribution or a technical effect* then it would be patentable.
- The Office of the Controller General of Patents, Designs and Trade Marks has issued the CRI Guidelines, stating that ‘databases’ would be considered computer programs and are not patentable.
- Game developers or publishers may seek patent protection for any element of the game (such as its game play method) which has led to technological advancement as in case of the US.
- **Trademarks -** A trademark is used as an identifying mark to determine the source of a particular good or service, and is obtained to protect the goodwill and reputation of the brand.
- Any distinguishing mark in a blockchain game or NFT may be trademarked.
- In India, certain underlying aspects of the blockchain game may be trademarked, including
    - the name of the game

    - a tag line attached to it
    - the logo of the game
    - the character names in the game
    - the name of the in-game currency (similar to the trademark for the name ETHEREUM in the US)
- If the inventor of an NFT decides to give proprietary names to their own tokens, then such names may be protected as trademarks.
- **Copyrights-** In India, artistic work, musical work, cinematographic films, dramatic works, sound recordings and computer software are capable being of being protected under copyright law.
- Although there is no specific provision in the Copyright Act that deals with video games, copyright protection of video games may be sought under the category of 'multimedia products'.
- Certain aspects of blockchain games, such as the artwork and sounds used in the game as audiovisual work along with the underlying source code as a literary work can be copyrighted.

What is the step forward?

- Key to the growth of blockchain technology is regulation which ensures that it is permissible to offer such games in the Indian territory and also offers protection in the form of intellectual property rights.
- Concerns such as privacy and cyber security, lack of clarity in application of financial regulations would need to be addressed.
- The Advertising Standards Council of India (ASCI) has introduced guidelines for advertising of virtual digital assets and linked services that disclaimers be included in advertisements and terms such as 'currency' not be used in them.
- **Recommendations**

1. Seeking legal counsel on whether their game is likely to be identified as a 'game of skill' and whether they are likely to be identified as a 'common gaming house'
2. Scrutinizing the games to understand which elements can be modified
3. Re-consider the use of cryptocurrency in the games, or seek out alternatives to the use of cryptocurrency, in view of the possible ban as mentioned in the bill
4. Factoring the recently introduced tax on virtual digital assets into their pricing model
5. Seeking requisite intellectual property protection for elements of their games that are capable of such protection
6. Ensuring that any advertising be compliant with the ASCI's Guidelines for Advertising of Virtual Digital Assets and Linked Services.

Reference

1. https://indianexpress.com/article/explained/explained-legal-considerations-blockchain-gaming-7817450/



SHANKAR
IAS PARLIAMENT
Information is Empowering