

Third Party Litigation Funding And The Indian Legal System

written by Sakshi Agarwal | January 25, 2022



Owing to the understanding that most legal pathways are pecuniary sinkholes, third-party litigation funding is being increasingly favoured by groups interested in furthering their claims without losing more than they gain. It is clear to any observer that the burgeoningly complex Indian litigation system is a demonstration of the country's robust economic activity and heightened commercial movement arising out of the contractual arrangements between parties across various industrial sectors. Legal disputes remain an increasingly prevalent aspect of the marketplace and so do the explosive costs associated with litigation.

Further, the economic disruption caused by the pandemic has not only steered the interests of parties towards external litigation funding but has also garnered interests from funders to undertake diversified risk investments. The article seeks to analyse the legal position of the concept along with a brief overview of the contradictory viewpoint present with reference to the Indian jurisdiction.

Third-party litigation funding refers to the financing of litigation costs by an external entity for one of the parties (in dispute) in exchange for a share – contingent upon the outcome of the dispute in favour of the party that was financed. It represents the speculative interest of the external entity. The concept has momentum in forms of disputes besides litigation, such as domestic and international commercial arbitration. Considering India's enthusiasm in filing cases at ICC and SIAC and the accelerated costs of litigation, global investors have been drawn toward the Indian litigation market.

A distinctive feature that attracts parties to the process is 'non-recourse funding.' With the pandemic slowing down the pace of business in India, industries like the insurance sectors, construction & engineering are likely to witness a surge in entering into litigation financing arrangements.

Overview Of Third Party Litigation Funding Across The Legal Landscape

While the concept of third party funding in litigation has remained in conflict with the doctrines of maintenance and champerty, Indian courts have always hinted towards a balanced approach – taking a cautious view of the financial status of the dispute and giving due recognition to the concept of third party litigation funding in the interest of promoting fair access to justice. For instance, the Supreme Court of India has held that arrangements

regarding litigation funding are enforceable in India and the bar is upon the lawyers from indulging in any such act.

Despite the implicit recognition by Indian courts, there is no express legislation regulating third-party financing of litigation disputes in the country. It is only under Order XXV that some states (Maharashtra, Madhya Pradesh, Gujarat, and Karnataka) have acknowledged the concept within their territories and have stated instances where the financiers may be impleaded as parties to the dispute and can be induced to furnish security on behalf of the plaintiff.

The apex court has recently revisited and affirmed the position of third party litigation funding in terms of litigation costs in India and has clearly held that while unrelated parties are free to provide for the litigation costs, lawyers are expressly prohibited from entering into any such arrangements with their clients as it goes against the letter and spirit of the law. The courts have further adopted a cautious approach in determining the viability of a third party litigation funding arrangement by testing it against the contours of public policy. If the courts find any arrangement to be extortionate or inequitable, they may refuse to permit it.

Differing Views On Third Party Litigation Finance In India

While this system is still at a nascent stage, on-going debate has prompted an extensive examination into its viability for the future of this industry. There are divergent views among the supporters and critics on the desirability of the practice in India. The advantages of equalizing the bargaining power between the parties to contest their claims, allowing corporates to thrust their capital into diverse investments, making justice accessible to those who otherwise would have not pursued their legitimate claims due to financial constraints and the uncertainties surrounding the investment market due to the crippling effects of the pandemic have furthered the interests of financiers in undertaking investments in this segment. The critics strongly contend that the emergence of this industry is likely to encourage frivolous litigation, thereby further burdening the judicial system. However, there exists a strong rebuttal against the view. Since the financiers undertake claim assessment analysis as to the succeeding of the claim, the probability of pursuing frivolous litigation does not arise because it not only puts their monetary interests at risk but also casts an aspersion upon the image of the financiers.

Thus, no third-party would be interested in pursuing a claim that will prove to be detrimental to their position in the market. Additionally, if a claim of such nature appears in a suit, the courts are likely to repudiate it at the stage of admission, thereby eliminating any such possibility of allowing frivolous claims in court to progress.

The Way Forward

Before the concept of external litigatory financing becomes a norm in India, there is a need for regulatory legislation that specifically addresses the concerns of transparency and confidentiality in such arrangements. A balanced approach is required which will promote the concept in India while addressing the ethical concerns related to it. However, it would be pertinent to mention here that the innate limitations of our Indian judicial system may act as a hindrance towards the growth of this practice in India because the financiers would be interested in making time-bound investments.

This is also given the extensive period that the case usually takes to

progress and how the execution of arbitral awards remains a deliberative issue in India. While the concerns surrounding litigation funding in India continue, a few self-governing initiatives have entered into the market domain. One prominent among them is the Indian Association for Litigation Finance (IALF), which aims to create and promote the knowledge and development of litigation finance in India. It is hoped that such initiatives will set the stage right for the development of third-party litigation finance in India.

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