

LITIGATION FUNDING¹

This article will broadly cover the following aspects on the concept of litigation funding:

- What is meant by litigation funding?
- How do litigation funding arrangements work?
- Advantages of litigation funding.
- Is litigation funding legal?

What is meant by litigation funding?

Litigation funding is a term rapidly gaining popularity today across the world, it is an arrangement where a third party funds the litigation expenses of a party to a suit in exchange of reserving a fixed share in the pecuniary award granted to the party after the completion of the proceedings. In other words, when a funder funds the costs of legal proceedings for a party in order to have a share in the monetary award granted to that party by the court, it is called litigation funding.

Litigation funding mostly comes in picture when one of the parties lacks the resources to contest the dispute in the court. Litigation funding on the international level have created a big market for individuals and entities to get their disputes funded by a third party during the process of litigation to do their best in order to win the claim, without having to worry about their resources limiting them.

Litigation funding is not limited only to litigation proceedings; it has also marked its presence in the field of arbitration. Even though arbitration is considered as a cost effective method, with the increased adoption of arbitration, across the world, it has made even arbitrations proceedings high priced, leading parties to the dispute to take recourse of litigation or arbitration funding.

How does Litigation funding arrangements work?

Litigation funding arrangements take place on a non-recourse basis which means that the funded party is responsible to pay the funder his share only if they win the case. If the order isn't passed in the favor of the funded party, they are not entitled to repay the costs incurred by the litigation funder. Hence, it would be wrong to term litigation funding as a loan but can

¹ Vinay Kothari, Advocate and Komal Bhati, 4th year student B.A. LL.B., ICFAI, Hyderabad.

rather be compared to a venture capital or an asset purchase.² The third party funding the litigation can be an individual such as a businessmen looking for opportunities to invest and grow money or entities such as banks and investment companies.

Let's take a situation to understand better. For instance, there is an individual or a small entity anyhow managing to make a purchase of some hardware products for their business from a renowned corporation. Later there is an issue with regard to the purchased goods, which is reported back to the corporation but the corporation refuses to discharge their contractual liability laid down for such a situation. Now, how can the individual or the small entity who somehow managed to buy those hardware products can bear the cost of hiring an attorney to dispute their claim in the court of law for however long the case runs against such a renowned corporation, which in turn would have a whole team of lawyers to represent them in order to get them relieved from their duty. In such a situation, litigation funding will be a great option for the individual or the small entity to acquire funds to dispute the claim by promising a fixed share to the funder in the monetary award that would be awarded to them if the order is passed in their favor. Since the litigation funding arrangements are on non-recourse bases the individual or the entity would only have to pay the funder if they win the claim, they would be obligated to pay the funder in case they lost the claim.

Typically, the third party conducts an exhaustive analysis of the case before deciding to fund the litigation in order to assess the potential of the party to win the case. While analyzing they take variety of factors into consideration for which the party asking for funds has to share the necessary information required by the funder to carry out the analysis of the case. Such information shared between parties is often confidential, which is secured by way of a non-disclosure agreement to ensure the welfare of the parties involved in a litigation funding arrangement.

In United Kingdom, some of the litigation funders have built such a reputation that when they fund a case for a party it cues the Tribunal that their case has potential to win because only after an elaborate analysis of the case from their experts they decide to fund a case.³

Advantages of litigation funding:

It is widely known that in some complex cases the process of litigation can be both big-budgeted and a tedious task. The plaintiff and defendant both have to employ the best attorneys for the case and spending a huge amount of money for that has been a long-standing tradition, here litigation funding stands helpful.

² https://en.wikipedia.org/wiki/Legal_financing

³ Litigation Funding: A breakthrough for Avoidance Proceedings under IBC by Debajyoti Ray Chaudhuri and Radhika Agarwal <https://www.ibbi.gov.in/uploads/resources/7e99c866b866e02fa7b8549752e55914.pdf>

Litigation funding ensures that a claimant does not stay afar of justice just because they do not have the necessary resources to hire a attorney to represent them in the suit. When one party lacks the funds to contest the dispute, litigation funding can provide the party with a fair and equitable chance by hiring an equally competent representative as the opposite party to stand their ground in the court of law.

Law firms or entities also find that it gives them a chance to put their freed up capital to some other use which can give them increased revenue.

On the other hand, the funders think of it as a good investment opportunity as it stays unaffected by the economic cycles of the country or the world in order to invest and grow their money.

The funders find it convenient to invest after thoroughly assessing the claim, through which they have quite a clear picture of the chances of winning the claim, how much loss will they have to bear if the order isn't passed in the favor of the funded party and how profit will they be making upon winning the claim.

Is Litigation funding legal?

While litigation funding is still making its way through India, it has been quite popular around the world. In United Kingdom, litigation funding is accepted by the courts as a legitimate and legal. They have their own "*Code of Conduct for Litigation Funders*", making way for a fair practice of litigation funding.

In India, litigation funding is not expressly legalized and nor is it regulated by any provisions but some judicial precedents grant permission for the same adhering to some caveats and conditions. It has been made clear through these precedents that an advocate to a case cannot enter into a third party funding agreement with their client. Such arrangements can be revoked if found to against public policy or extortionate and unconscionable.

Jurisprudence of litigation funding in India:

Ram Coomar Condoe vs. Chunder Canto Mujherjee of 1876 is known to be the first precedent on litigation funding. In this case, the Privy Council was of the following view whilst discussing about third party funding arrangements –

“Lordships hold that the specific English law of maintenance and champers has not been introduced into India, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy.

That a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had just title to property, and no a means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy—effect ought not to be given to them.”⁴

In 1900 , **RE N. F. Bhandara v N.R.**, the Bombay High Court was of the following view regarding a lawyer entering into a litigation funding arrangement with his client:

“That for an Advocate of this Court to stipulate for, or receive, a remuneration proportioned to the results of litigation or a claim whether in the form of a share in the subject-matter, a percentage, or otherwise, is highly reprehensible, and I think it should be clearly understood that whether his practice be here or in the mofussil he will by so acting offend the rules of his profession and so render himself liable to the disciplinary jurisdiction of this Court.”⁵

Again, in the case of **Re: Mr. 'G', A Senior Advocate** on 27 May, 1954 Supreme Court of India cleared the question of whether a lawyer can enter into third party funding arrangements with their clients or not?

The above stated case was brought against Mr G, a senior advocate to show cause why disciplinary action should not be taken against him for entering into a third party funding arrangement with his client. In this case, the client couldn't afford the fee for litigation and so he entered in an agreement with the advocate about his fees regarding the litigation, where he stated that out of the recoveries the advocate may take 50% of the amount recovered and the he will by Wednesday deposit Rs. 200 in the advocate's account or give personally towards expenses. The advocate was unwilling to work on these terms but when he was pressed to do so and when he realised that unless he agreed the client would probably lose a just claim he reluctantly agreed.

Whilst discussing about third party funding arrangements the court held that it can be accepted at once that a contract of third party funding would be legally unobjectionable if no lawyer was involved. The rigid English rules of champerty and maintenance do not apply in India, so if this agreement had been between what we might term third parties, it would have been legally enforceable and good.

⁴ Judgment of the Lords of the Judicial Com millee of the Privy Council on the Appeal of Ram Coomar Coondoo and others v. Chunder Canto Mookerjee, from the High Court of Judicature at Fort William in Bengal; delivered 25th November, 1876.

⁵ RE N. F . Bhandara vs N.R , 1900, Bombay High Court.

To the point presented by Mr. G where he relied on the practice in some of the American States, where an agreement by an attorney to purchase part of the subject-matter of the litigation is upheld. The court was of the following views:

“We do not propose to enter into this because what may be harmless in one country may not be so in another.

We see no reason why we should import what many feel is a mistake, even in the country of its origin, from another country and seek to perpetuate their error here when a sound and healthy tradition to the contrary already exists in our Bar. The reasons for exacting these high standards in this country, where ignorance and illiteracy are the rule, are even more important than they are in England where the general level of education is so much higher.”

Hence, the court held Mr.G liable for professional misconduct.

Most recently in the case of **Bar Council of India v AK Balaji**, 2018, the Supreme Court of India elucidated that third party funding is allowed in India with a restriction that lawyers cannot fund their client’s suit. The court stated “In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. In U.S.A., lawyers are permitted to fund the entire litigation and take their fee as a percentage of the proceeds if they win the case. Third Party Litigation Funding/Legal Financing agreements are not prohibited.”⁶

Certain states such as Maharashtra, Uttar Pradesh, Orrisa and Madhya Pradesh have introduced the term “financer” for a case by way of amendments made to Order XXV, Rules 1 and 2 of the Indian Code of Civil Procedure 1908 (Code).

In India, litigation funding can create a huge market for itself. Many cases do not make it to the court due to lack of funds, there are many businesses and MSMEs who often have a valid claim but could not fight the dispute as they do not have the required resources, funding such cases can be beneficial in many ways for both the funder and the funded party.

Will litigation funding bring along with it certain unwritten and lesser spoken negatives which travel the Court corridors, is Indian judicial system ready for a codified and regulated litigation funding, will litigation funding bring real Justice to the seekers who at times have to forego the case due to unaffordable heavy weights. These are certain issues which come along with newly conceptualized of litigation funding.

⁶ https://main.sci.gov.in/supremecourt/2012/13890/13890_2012_Judgement_13-Mar-2018.pdf