Case for third party funding

Such funding can improve access to justice

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Third party funding in arbitration, or litigation funding, is a concept where an unrelated party to a dispute finances the legal cost of one of the parties. The speculative investor receives part of the damages owed or recovered by the financed party in exchange for the funding. This form of funding is widely used in commercial arbitration and various litigations around the world. It is believed that this form of financing improves access to justice by providing advance funding and support against a lengthy and expensive litigation process.

Historically, this form of funding was prohibited under the doctrines of maintenance and champerty. Maintenance deals with assistance to maintain litigation by an unconnected third party by providing finance. Champerty, a form of maintenance, refers to paying litigation costs by a third party for the objective of attaining a share of the proceeds of litigation. The need for such prohibition can be ascertained from its background. Feudal lords in medieval England would often trouble their enemies by financing frivolous lawsuits and thereby burdening courts.

Need of the hour

However, the current era seems to shrug off such concerns because the need of the hour is to increase our access to justice. Hence, rules against maintenance and champerty have been relaxed in various jurisdictions, including England, the U.S., Canada and Australia.

In the context of India, interestingly, there was no bar on maintenance or champerty. However, many such arrangements where an advocate is a party are categorically precluded in view of Supreme Court decisions and the Bar Council of India rules. These arrangements would include ones where there is a personal interest of the advocate in the outcome of the dispute or agreements of contingency fees. To sum it up, "non-lawyer third party funding" is lawfully admissible in India.

Even in the context of advocates, there was the controversial 2019 decision given by the Bombay High Court in the *Jayaswal Ashoka Infrastructures Pvt. Ltd. v Pansare Lawad* case, where the court decided that a contingent fee agreement entered by an advocate to represent his client before an "arbitrator" was not void. Therefore, what flows is a difference in how law deals with an arrangement of contingency fees between an advocate and client before a court where it renders it impermissible, and an advocate and client before an arbitral tribunal where such an arrangement is valid. The readers must, however, be informed that the above mentioned decision has been appealed against.

Litigation risks

The practice of third party funding must become prevalent in India. This is not only because third party funding plays an instrumental role in opening access to the court system but also helps businesses manage their litigation risks in a better manner. This risk can be managed because the third party may conduct an additional analysis of the case.

However, while advocating for the enhancement of access to justice, we must also ensure that there are amendments. One of the most heated debates about third party financing in international arbitration is the disclosure of this kind of funding. We can take inspiration from the Hong Kong International Arbitration Centre's rules, the proposed changes in the International Bar Association rules and other such organisations, which stipulate that when a funding agreement is concluded, the funded party must notify the other party, the arbitral tribunal or emergency arbitrator in writing of the fact that a financing agreement has been concluded, along with the identity of the third party sponsor.

In order to streamline the process in India, we are seeing the advent of organisations such as the Indian Association for Litigation Finance.

Third party funding can definitely improve access to justice, but we must also ensure that scenarios like the ones that arose during the medieval period do not come up.

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