

Prospects of Litigation Financiers in India

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Abstract - The recent news on the creation of litigation finance platform in India by the world's leading litigation financing companies such as Australian Omni Brideway, United Kingdom's Innsworth Capital and profile Investment, and UAE's Phoenix Advisors, has attracted the attention of academicians and market participants. Litigation financiers fund the legal costs of a third party in exchange for a proportion of monetary award of the litigation, if it is successful. The concept of litigation finance is well known in many developed countries like United States, Australia, UAE, Singapore and United Kingdom etc., in India though the law permits litigation financiers under the nomenclature third party funding(TPF) which is seldom attracted the market attention. Due recent developments in the law, many firms in India particularly infrastructure firms have been entering TPF arrangements. Thus, there is a need to analyse the challenges and future prospects of litigation financiers in India. Therefore, in the present paper the researchers have made an attempt to analyse the challenges and future prospects of the litigation financiers in India by considering various macro-level factors.

Keywords: Litigation financiers, monetary awards, third party funding

I. INTRODUCTION

From Covid-19, probably the world economies are moving from bad to worse. All banks and economists announced they are in a severe recession. As economies are slowing down the priority of business is right now to conserve working capital and if possible, to get financial source which will help them to get a longer way as the economy is expected to face further slowdown in this financial year, in such conditions litigation financier's may help both business and individuals if there are crawling law suits.

Pending court cases in India have continually raising day by day. India has almost 4 crore pending cases in all courts. This includes Government cases, commercial cases, civil cases and criminal cases. Pandemic continue to be felt with the ultimate conclusion of claims likely delayed, putting more on cashflow. This back drop affected liquidity position of businesses and enquired about discharging of litigation cases which are pending in business. These were urged to corporates look forward Third Party Fund (TPF) or Litigation funds in India.

TPF also known as Litigation fund, is the non-recourse funding of litigation costs of a party by a funder in exchange for a share in the monetary award of the litigation, if successful. Without immediate burden to pay and decrease in working capital this make possible to business to litigation which are pending from many years.

1. Types of Litigation Finance:

As mentioned by Rowe, (2020) the academicians, financier and other interested parties have categorized

the litigation finance into the following the three categories:

- i. *Consumer litigation finance:* it is an entity providing litigation finance to an individual to pay attorney fees, expert witness fees, and personal living expenses.
- ii. *Commercial litigation financing:* Here the funding facility is provide to the commercial clients to pay different fees and costs such as legal fees or fund to run the business , providing working capital funding, fund to buy plant, property and equipment.
- iii. *Direct loans:* Here the litigation financiers directly provide a non-recourse loan directly to a client's law firm, allowing firms to represent clients they may otherwise not be able to represent as a result of the risk/reward balance.

2. Litigation Finance Industry Growth

The litigation finance is still in the developing process to advance as the mainstream financial product in the developed countries also. In the U.S. market Forty-one percent of litigation finance companies expect to develop the market beyond \$10 billion by the end of 2020(Rowe, 2020).

Rowe, (2020) in his study presented the review of some of the polls and some other findings. Some of the main findings of these polls are as follows:

1. In U.S. market around sixty-eight percent of lawyers expected that their litigation finance firms are believed to build risk-based practices, whereas 58 percent those firms whose firms already have a risk-based component believe their firms are likely to expand it.

2. There are around Seventy-eight percent of law firms expected that their third party funding makes them more competitive.

This shows that, the bright prospects of the industry in future. Further, Rowe, (2020) mentioned ‘Global 30 partner commented that more clients will be interested in contingency work given the current economic situation’.

Major Markets and Players

Due to its attractiveness the Litigation finance is growing across the globe. The leading firms in the industry are as follows:

Table-1: Leading firms in the Litigation Finance industry

Sl No.	Firm	Fund Size
1	Burford	\$2,900 million
2	Omni Bridgeway	\$1,500 million
3	Harbour	\$1,100 million
4	Therium	\$1,100 million
5	Longford	\$557 million
6	Parabellum	\$450 million
7	Woodsford	\$300 million
8	Augusta	\$298 million
9	Litigation Capital Management	\$150 million

Source: (Rowe, 2020)

3. Need of Litigation Fund in India

India was facing economic slowdown prior to Covid-19. From covid-19 lockdowns various businesses are under the water, they look forward to recovery. If there are any business litigations pending in such cases huge capital blocked. As litigation process takes time the businesses are not ready to spend on legal process. In such cases the litigation funds seems to be good. The need litigation fund is;

- 3.1 **To sort-out pending cases:** In India more than 3 crore cases pending, had affected on many activities of economy. This needs litigation fund where litigation financiers fund to claims to resolve.
- 3.2 **To meet expenses of litigation:** As litigations in India run for long time, the expense of litigation is also huge. But businesses are not in position to meet these expenses. They look for sources of finance, litigation financier help in this regard.
- 3.3 **To get additional capital:** With help of litigation finance, assets blocked in litigation are getting back to business, and then business will get additional sources of capital.
- 3.4 **To transfer risk:** The immediate burden of spending, as well as some of the risk, transferred to the litigation financier. The business could get much needed cash if the matter is won without having to party ways with working capital.

4. India’s Position in Litigation Fund

There was misconception that Litigation Fund is prohibited in India, because there is no legislative instrument regulating litigation fund. But it is legally recognised in India. The concept of litigation fund is allowed under the Civil Code of procedure 1908 in some states e.g.,

Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh by their respective state amendments to order XXV rules 1 &3 of Civil Procedure Code 1908. Although the remaining state have also not expressed any bar under any litigation against same.

The Supreme Court has clearly stated that such a contract is not illegal unless the advocate is the party receiving the contingent consideration.

The various legal developments that have led to an increase of instances in litigation fund in this sector include inter alia, such as

- 1) Specific Relief Act 1963
- 2) Arbitration and Conciliation Act 1996
- 3) Bombay High Court order dated 7/3/2019
- 4) The Insolvency and Bankruptcy Code 2016

5. Limitation under Existing Legislative Framework:

Till the date, in India there is no legislative instrument regulating Litigation Fund. This created confusion in the mind of investor to make investment Litigation Fund. When the Government take steps to Regulate Litigation Fund which boost to Litigation Financier to make investment.

6. Challenges for Litigation Financier in India:

- 6.1 **Unorganised Market:** In India there is unorganised market where many pending litigation cases have been bought and sold to opportunistic investor by desperate litigants. This may hurdle to investor because there may be chance to lost litigation which had good value.
- 6.2 **Opposition from Lawyers:** The lawyers in India are expressly opposed to funding to litigation. From litigation fund they lost huge amount of fees. This could bear a structural limitation for funders.
- 6.3 **Non availability of historical data:** Funders need historical data of pending cases to analyse risk associated with each case. Such relevant data is a work in progress in India and will take a few years to consolidate.
- 6.4 **Changes in Environment:** In India Litigations were pending from many decades. From this, many factors like roster changes during the progress of the case lead to an inherent unpredictability in the system that is not conducive to risk assessment.
- 6.5 **Sharing of Risk with lawyers:** In India the lawyers cannot part of litigation finance. But funders want to share risk with lawyers appearing for the funded party. This makes funders to think to enter into India.
- 6.6 **Return on Investment:** Funding Company usually want a return on their investment within 5 years. But in Indian, litigation system is susceptible to delays and cases may take more than 5 years to be resolved. This is also hurdle to investors to make investment.
- 6.7 **Opposition from Public:** In litigation finance, there may be chance to fund cases which are against to public interest. This influenced public to oppose litigation finance in India and also for Government to regulate legally. This also restrict to funders.

- 6.8 **Confidentiality of information:** Confidentiality of information pertaining to litigation should be ensured. If any information about cases leaked there may chance to lose cases. This is difficulty faced by investors.
7. **Future Prospectus Litigation Fund in India:**
- 7.1 **Framing of Regulation:** As there is high need of litigation fund in India, Government of India legalise the litigation fund to get benefit of unproductive fund which are hidden in litigation cases.
- 7.2 **Global fund investors:** In India thousand crores blocked in litigation cases. Almost all International litigation fund wants some share in Indian market, especially when claimant looking forward for funders to resolve litigation cases.
- 7.3 **Huge Demand for Litigation Fund from Real Estate and Insurance company customers:** As real estate customers are desperately seeking refund from builders who have failed to complete projects. Other high claim rejections in India are Insurance issues that give enough scope for litigation finance to be utilised for accessing justice against bit opponent.
- 7.4 **Arbitration through Litigation Fund:** Litigation Fund is not only limited to litigation finance, but covers arbitration disputes as well. India is making all efforts to become an arbitration hub because it is cost effective.
- 7.5 **Local Investors:** Litigation Financier in India is less because of less knowledge of Litigation fund. But knowing the benefits of litigation fund, there may be chance to rise in local investors in India in future.
- 7.6 **Benefits to businesses:** Litigation finance not only helps to resolve cases; it is also a Widley accepted tool of risk transfer for businesses. The is bigger the corporate higher is its insolvency in litigation. Litigation fund is the smartest tool to mitigate legal costs. Corporates in India wants to take advantage of litigation fund which transform their legal department from cost centres to revenue centres. These led to high demand for litigation finance in India from businesses.

II. POSSIBLE STRUCTURE OF LITIGATION FUND IN INDIA

As in India there are many cases which are pending for judgement, huge amount of assets of individuals and institution become unproductive. This led to scope for litigation fund. In India Litigation Fund can be funded in two major fields. They are

- 7.7 **Consumer Litigation Financing:** In India more than 5lakh cases (as per statistics provided by National Consumer Disputes Redressal Commissioners on 30/11/2020). Consumer Litigation Fund deals primarily with personal injury, divorce and small claims in which the plaintiff is typically not well

funded. As for this more scope investment of litigation fund for investors.

- 7.8 **Commercial Litigation Financing:** Commercial Litigation Finance is typically arranged for disputes involving antitrust, intellectual property and business contract issues. In India more than 3crore plus cases pending in commercial filed (as per financial express survey, 2021). From this more than 1000 crore get rid. This affected ranking of World's bank "Easy of Doing Business". The Litigation Fund not only funds to resolve litigation but also recommend for arbitration process. This increased scope for Litigation Fund.

III. CONCLUSION

Litigation fund is known to be upcoming trend in all commonwealth countries. The entry of Litigation financiers to Indian market opened doors for litigation fund in India. It would be very attractive to many in the infrastructure and real estate, space, large supplier whose large amount blocked in litigation. In the present paper we made an attempt to analyse the growth of litigation financiers, the need of the litigation financiers in Indian market and challenges associated with the litigation fund and based on these we presented the prospects of litigation financiers in the Indian market.

However, there appears to be no legal bar against litigation finance at this moment in India. But demand of litigation finance in India forced Government to look forward for legal regulation. There are many foreign investors looking forward for Government regulation. However, there are many challenges in litigation finance in India like less knowledge of litigation finance, no legal regulation opposition from public and lawyers etc.. Driving over these limitations many international Third-Party Fund Company are eyeing the Indian market cautiously weighing their options. If India market regulated by framing laws, litigation finance may help poor litigants recover their money as well as introduce an incentive for investors to use their funds in an unexplored domain.

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