

THE DYNAMICS OF INCREASING LITIGATION COSTS: AN INDIAN PERSPECTIVE

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Introduction

“Let a lawsuit enter a household and rest assured, even the one who wins shall have lost everything.” So goes an anecdote passed on through generations of people who have borne the brunt of the tedious and, almost always, expensive procedure of fighting a case in a court of law.

The problem of expensive litigation is one that has been around since the time litigation itself began. The relationship between the cost involved in the process of litigation and the actual worth of the case involved is one that has been subject to scrutiny since time immemorial. In a way, people have grown accustomed to using the word 'expenses' and 'lawsuit' in a

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synonymous way. Generations of exploitative practices on the part of legal professionals are primarily to be blamed for this attitude of resentment the masses harbour towards the due process of law.

Generally speaking in a broad sense, there are various factors that cause the costs of the price of litigation to go to heights where an average citizen would not even dare to imagine. The factors which are responsible for the increased cost of litigation in our country are both direct and indirect in nature in that certain situations are easier to understand in context of the problem under scrutiny while others require a more precise knowledge of law to ascertain the extent to which it affects the matter at our hands.

We shall now look at some of the major factors that contribute to the increased cost of litigation in our country and how they are related in a way to each other as well:

Causes of Increasing Costs of Litigation:

1. Prevalence of Legal Ignorance: This is one of the leading reasons why the common man has developed an attitude that borders on utter disgust when it comes to matters of legal proceedings. The average Indian is nowhere near fluent in the matters of general legal knowledge that affects his day to day life. It is the harsh truth that the majority of the population of our country is not completely aware of the concept of the

personal rights and liberties that have been guaranteed to them by the Constitution of India. An ignorant person is more likely to be swindled by the many opportunists that our system generates. It is equally deplorable to note here that we mention the general public as being ignorant but all the while we tend to overlook the fact that there exists a large population of advocates that fall well below the standard of an advocate as envisaged by our Constitution framers. At this point in our opening stance it is imperative to address the fact that the issue of ignorance in relation to legal aspects extends from the general populace of our country to the qualified elite who are entrusted with the task of upholding the provisions as laid down in our Constitution. The existence of institutions that award degrees not on the basis of merit but on the sole basis of monetary value is rather disheartening and one might lose hope to learn that the future of the legal system rests partly on such individuals. A sparsely aware advocate might take longer to help his client than an otherwise more aware advocate, and the longer the proceedings for a lawsuit are extended, the longer the client has to incur expenditures.

2. Unnecessary Litigation and Problem of Pendency: Though this is a problem that deserves mention as a different topic altogether, it is nonetheless related to the problem of increasing the costs of litigation. The courts in our country currently face the monumental task of clearing up a colossal amount of cases that have accumulated over the years since we gained our

Independence. The figures are shocking to say the least and a number of factors ranging from inadequate infrastructure at the lower levels to acute shortage of judges are the reasons why India has a backlog of almost impossible cases. Once a case gets registered and the proceedings begin, the wheels of the litigation chariot lurch into motion ever so slowly. They carry the weight of only a specified number of cases after which the system grinds to a halt. Only when older cases are decided do the newer cases stand a chance of being resolved and decided. This directly implies that the longer the problem of pendency remains, the more expensive it is for a person to keep pursuing his dream of justice in a court of law.

3. Redundant Formalities and Inefficient system: Another great barrier that comes in the way of a person and the timely justice he deserves is the long list of formalities he has to endure before his case is finally heard in a court. Ranging from small court fees to the attendance required on the part of the litigants, there are a remarkably high number of formalities that a person must observe if he wishes to stand a chance of being heard, let alone provided justice. This is a fact that the Indian Judicial system is known for the efficient and timely manner with which it deals with the winding up of a case, albeit in a negative sense of the word. One fact can firmly be established even when looking from a general perspective that the Indian judicial system is ridden with numerous inefficiencies and endless loopholes that make the issues of speedy justice almost unheard of for a

majority of the populace. The client on the other hand is the one who has to bear all the expenses while the proceedings go on. He is the one who is responsible to feed unscrupulous bribes to any official who threatens to impede the process of his attainment of 'justice'. This is again an important point that needs some further looking into. The fact is that the judicial machinery is, as has been stated earlier, suspended in a state of partial immobility and all it takes is a minute omission or petty mistake on the part of the person fighting for justice to bring things to a complete standstill. The system gives refuge to a vast number of people who in the guise of a legal beneficiary can extract money from poor litigants who are none the wiser. For anyone with even basic legal knowledge, it is rather easy to get extensions on court dates and even go so far as manipulate court proceedings. Many cases have been witness to the counsel of either party being involved in unhealthy practices. It is extremely rare for someone to go through the entire machinery of the courts without having to bribe an official or two. The fact that legal professionals in our country are paid rather paltry amounts as remuneration in comparisons to their Western counterparts is also responsible for this behaviour on the part of the officials involved. Insufficient pay scales in accordance with the posts of judges, a dearth of good advocates and the endless opportunities to mislead the client are the reasons why the cost of litigation has artificially gone up. The inefficient structure of the system and the dependence on a multitude of legal formalities

means that the time of the trial goes on increasing and that the cost incurred by the person fighting for his right takes a sharp turn in the upward direction.

4. Improper framing of charges: Another practical problem that is responsible for the unnecessary elongation in the duration of the litigation process is the improper framing of charges on the part of the authorities who are responsible for the initial stages of the investigation and legal proceedings. Formative evidence in the early phases of the case history is many a time overlooked, manipulated or sometimes completely not paid heed to. Witnesses are not questioned thoroughly or the FIR may be lacking precision in reporting. All these factors are responsible for the incorrect charges to be levelled against either of the two parties. This is related to our problem of increased costs because this can result in two things. Firstly, it may be the reason why a certain someone has been asked to continue on with proceedings for a period longer than would have been otherwise required had the correct charges been levelled. It may also entail the court to penalise someone on the lines of the wrong provisions and that may again lead to increased costs for the already burdened persons involved. This issue is not just for highly technical cases but for rather open and shut cases as well. The prime example is the latest case related to 'suspect' caste killings in the village of Khairlangi. There was enough evidence to invoke the Prevention of Atrocities Act (1989). Four members of a family were publicly humiliated and lynched. They were

profusely abused based on their caste and members of the family were hunted down and killed. Two females and two males were the victim of this sadistic act. Neither the Prevention of Atrocities Act nor Sec 354 of the IPC were invoked. The authorities claimed that benefit of doubt be given to the accused for various reasons and the killings were termed as something other than caste related killings. This is to support the point that improper framing of charges is also a prevalent practice that impedes the timely deliverance of justice and quintessentially questions the actual 'cost' of justice.

5. Absence of Settlement Culture & Alternate Dispute

Settlement: This particular point is a custom predominantly followed in the western world which has only just begun to emerge in India as a means to reach a mutual understanding without the unnecessary involvement of a court and the usual proceedings that leave both parties in a weaker financial state than when they started and all the more dissatisfied. Alternate Dispute Settlements are most popular in matrimony cases as well as property disputes or other cases relating to family issues where it is possible for the parties to converge and have a healthy discussion that may further lead to a harmonious settlement. ADR's are a less time consuming way of settling disputes for the main reason that they do not involve the usual routine visits to the courts and are easily negotiable. As stated earlier, the time it takes to settle a dispute is directly related to the costs incurred by the parties striving to seek justice. The prevalence

of this method might be beneficial in two ways. Firstly, it shall directly reduce the financial burden on the parties involved and helps them to reach a mutually agreed upon compensatory settlement. Secondly, it reduces the burden on the courts and the judiciary thereby not adding to the backlog of already existing cases and thus helping in alleviating a certain amount of stress on the judicial machinery. The relation between the issue of pending cases and increased costs has also been attempted to be clarified earlier.

6. No laws for regulating fees of professionals: It is interesting to note a certain point before we delve deeper into this particular issue. The costs involved in the litigation process are varied. They differ from the court fees to the expense of filing and the cost of the counsel employed by the person seeking justice. The startling fact is that while the court fees and the other charges relating to the proceedings of the court are compulsory and non-negotiable, they form only a small portion of the actual costs a person has to bear. Mostly it is the fees of the counsel that makes litigation so costly. It is all the more astounding that there exists no law or provision which aims at regulating or capping in any way the fees charged by the lawyer employed by someone. The Indian Advocates Act goes a long way in describing the qualification required for an advocate and also mentions the proper code of conduct. But it does not in any manner put a restriction on the fees charges by the same. The closest provision that prevents the advocate from exploiting the client is the one

which states that the advocate shall not be party to any gains monetary or otherwise resulting from the victory of his client. But again, the upper limit is not fixed. The absence of any law or provision to control the fee structure of advocates has been the reason why some advocates charge astronomical amounts. The tragic part is that when it comes to fighting for justice, the common man is helpless and has to seek professional help from registered advocates. Since there are no rules to oblige the advocate to adjust his fee structure in any manner, the unfortunate client has to somehow manage to pay the fees. This is the scene throughout the country where even mediocre and sub-standard advocates have begun indiscriminately exploiting the masses on the pretext of providing justice.

Repercussions of Increased Costs for Providing Justice:

1. Masses lose faith in the system: The most apparent fallout of the problem of expensive litigation is that the masses begin to lose faith in the judiciary. They begin to question the relevance of such an elaborate Constitution. The trust of the masses is important for any public institution because it is for the public and eventually the common man that these public institutions have been put in place. The judiciary is no different. Though it is the only non-elected part of the government and the offices of the judges are immune from public opinion to a large extent in comparison to the executive and the legislature, it exists to uphold the laws meant to better govern these people and protect

their rights. If the judiciary is the one that is responsible for the disease rather than the cure, then the people take no time in labelling the judicial set up as a set up meant only to exploit and demean the masses from behind a curtain of red-tapism and constitutional jargon understood by a privileged few.

2. Essence of the Judiciary is lost: In the prolonged abuse of the common man and the unrelenting pursuit of ill-gained wealth on the part of the legal fraternity, somewhere down the line the very essence of the judiciary is diluted beyond recognition. The motive and the purpose why the judiciary was setup, why it was conferred with such intense discretionary powers and why it was kept aloof from the dirty game of politics seems to have very little meaning when the same judiciary who was to undertake the task of protecting the common Indian citizen from the evils of society is itself a perpetuating factor for the malpractices that plague society. When judges stoop down and accept bribes or when an advocate manipulates evidence, the spirit with which this almost revered institution was setup becomes polluted. It is a serious issue that affects the rationale behind the morals and the ethics which the judicial system guarantees to every man, woman and child of India. The judiciary is the means through which a true democracy can reach down to the lowest levels of society. So in retrospect, it is all the more important for the judiciary to uphold the values, virtues and morals that it so vehemently should protect. It should be a beacon that lights the way to better ethical and social standards in the

society and not bring darkness into the lives of those who sacrifice and toil for justice in the corridors of courthouses.

The Government's Attempts:

It would not be a fair evaluation of the topic if we were to perceive this issue as merely a lost cause and a one-sided story. Though the dangers of the prevailing conditions are ominous to say the least, it would not be out of place to highlight a few points that can be efficiently utilised by all those who seek justice. These points are basically mechanisms that exist today and can prove highly useful in providing high quality and reasonable justice to the people who need it the most.

1. Fast track courts: There has been a lot of debate on the functioning of the fast track courts which have been a recent introduction into the legislative sphere. This is a new concept that evolved out of the need to provide basic, affordable and legitimate hearing to people who cannot afford to toil for years on end with no concrete consequences. Fast track courts have been highly successful and have gone a long way in relieving the higher judicial bodies of a portion of their original workload. Only recently it was announced that the fast track courts would be given a stimulus to encourage them to maintain their performance. Fast track courts have been able to efficiently reduce the litigation costs owing to the fact that they address one of the basic flaws that cause the cost of litigation to increase.

They reduce the redundancy and the lapses caused due to large time gaps in between judicial proceedings. They focus on quick and transparent judgements that save the person from repeated attempts at seeking justice. Decisions are given in a fraction of the time that it would take a conventional set up to do the same. These courts have been a real support system in providing affordable and timely justice.

2. Consumer oriented mechanisms: The Indian Judicial system has also been responsible for setting up of Consumer Courts throughout the country. With the increasingly important role of the consumer in today's society, the judicial system has come up with a specialised kind of court which is consumer oriented. These courts are easily accessible to the common man and remove the hindrances that otherwise plague the market in an economy where unfair trade practices and competition between rival production houses have resulted in the consumer being duped time and again.

3. RTI and PIL: The most innovative and radical changes have been brought about in the contemporary period with the introduction of the Right to Information Act and the Public Interest Litigation. These are mechanisms through which an individual can approach the judiciary directly and ask for information and remedies. RTI is a method through which any citizen of India can seek information on any matter, except matters relating to national security, and it is the duty of the authorities mentioned to provide the fullest information to the

best of their abilities. This is helpful because a person is likely to be satisfied with the information he desires and would eventually dissuade him from taking unnecessary legal action and add to the already gigantic heap of cases waiting to be heard. So in a way the person seeking information is satisfied while another frivolous litigation is avoided. PIL along with Class Action is an adopted approach adapted to Indian requirements. PIL is unique in the way that it loosens the stance of the court on the requirements of locus standi. These two methods enable an informed and concerned citizen to observe and act from a distance and not get involved.

4. Legal Services Authorities Act, 1987: This has proved to be the silver lining in the system which seeks to especially protect and preserve the rights of those individuals who are unable or less able to defend their rights in a court of law. It is specifically aimed at those sections of the society which may be easy targets for exploitative agents like corrupt officials and advocates. The main thrust of this act is that it shall provide free legal support to those persons who are unable to afford it. They shall be duly represented and the fees of the counsel shall be paid by the Legal Committee for as long as the proceedings go on. This goes a long way in supporting the underprivileged classes and affirms their faith in their government. It also adds to the bulwark of the image of the state as a welfare state. The poor, handicapped, women, mentally unstable and other less fortunate sects are supported by this act. It has also led to significant

reduction of spending on the part of the people pursuing litigation and the time taken to reach a decision has also reduced.

Ground realities:

The ground reality is that even though we have the longest and the most comprehensive constitution in the world, there are still innumerable loopholes through which scheming agents have found ways to exploit the general masses and abuse the legal position they enjoy. People have been known to sell off their ancestral property, land and family jewels in order to pay for the litigation costs. Some of these sacrifices have gone in vain and their records have been lost in the endless number of files that accumulate day by day in the courthouses of our country.

The present scenario is such that the litigation procedure is being viewed as nothing more than legal conundrum where so called experts argue about provisions unknown to the common man and decide upon facts which may or may not be present. Dates are extended mercilessly and the burden is always on the poor litigants. The process of appearing in courts and eventually winning a case is now out of the reach of an average hard-working Indian citizen because he simply cannot afford the charges of fighting for something that should rightfully be his. It would not be too blatant to say that justice belongs to those who can afford it. Only the rich and the influential get to enjoy the privileges so clearly mentioned in the Constitution.

The Way Forward:

“Injustice anywhere is a threat to Justice everywhere.” Only an enlightened society can be a progressive society. The way forward from the present fix that we have found ourselves to be in should be through a multidimensional approach:

1. Educate the masses: This should be the main focus of the administration and leading legal authorities in the country. The level of awareness of the people should be addressed with paramount care and utmost caution. Legal camps as have been undertaken by various educational institutions are a prime example. The people need to wake up from this condition of apathy that so shockingly has numbed their minds. When the people are better informed about their rights and duties, they are more likely to take informed decisions. They will less likely be tricked into paying colossal sums of money to conniving advocates. Citizens shall be aware of the procedures regarding litigation and shall be safeguarded against unnecessary expenditure.

2. Control on the court fee and regulation of advocate fees: Both the court fees and the fees of the advocates should be subject to regulation and scrutiny. In matters pertaining to the court fees, too little a fee amount should be discouraged. The fees should be high enough to dissuade the practice of frivolous litigation and low enough to facilitate the weaker sections of the society to seek legal help. Advocates' fees should be

controlled beyond a certain point. This would ensure that the citizens of the country are ensured of sound legal counsel.

Conclusion

From the above account it would seem obvious that the conditions surrounding a typical litigation process are not the most encouraging at this point of time. Though, from the recent developments in the area it is evident that the administration is trying hard to amend the past mistakes and focus on a brighter future. We as members of the legal fraternity have the responsibility of bringing about the change that we want to see.

References

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