
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**CONTINGENCY FEE: SHOULD A CONTRACT BASED ON THE OUTCOME OF
THE CASE BE LEGALIZED IN INDIA?¹****ABSTRACT**

The term "contingency fee" brings to mind an image of an individual lawyer entering into an agreement with a single client to be paid a percentage of that client's recovery from an allegedly tortious injury, in addition, contingency fee agreements require clients to reimburse lawyers for certain charges (such as court filing fees or expert consultation fees) that lawyers advance on their clients' behalf. Contingency fee contracts are praised by supporters for their ability to provide access to courts and legal services to clients who would otherwise be unable to afford representation. Supporters believe that large payouts for contingency fee attorneys are reasonable compensation for their willingness to take on the risk of nonpayment and endure the costs of litigation while waiting for payment. Critics debate whether the return on risk is optimum or a "windfall," if contingency fee incentives increase or decrease lawyers' loyalty and the quality of services given and whether contingency fees lawyers serve as effective or ineffective "gatekeepers" to courts. This article concerns itself with the practice of contingency lawyering, where the lawyers charge fees based on the results of the case. In India, lawyers are not allowed to charge contingent fees, while, this has been an active practice in the USA. It is often assumed that a lawyer operating on a contingent fee agreement has an overwhelming desire to settle the case - in comparison to his client's interests - resulting in a lower-than-desirable settlement amount and a high settlement rate. This article goes on to explain why a contingent fee is required for India and proposes an approach for it. It also attempts to have a thorough discussion of the system's apparent advantages, disadvantages, and the Indian perspective in its current form.

INTRODUCTION

A contingency fee contract, in its most basic meaning, is a contract in which the lawyer's fees are contingent on the outcome of the case. In this contract, the lawyer agrees to charge the client a fee, accept it, and the client pays the lawyer a contingency fee only if the case is won. Instead of the lawyer charging the client for legal services, the lawyer will charge a share of the settlement or judgment award as a service fee. The fee charged is a percentage of the

¹Bhuvneshwari Rathore, 1st year B.A .L.L.B, School of Law, NMIMS Bangalore

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

recovery.²The percentage charged varies depending on the law firm and the case. A victory for the client would result in the lawyer receiving a sizable fee from the court's damages, but a verdict against the client would result in the lawyer receiving no fees.

BANNED IN INDIA

While this approach is common in nations such as the United States, Canada, and South Korea, India does not allow contingent fees. The Indian Bar Council expressly and strictly prohibits lawyers from charging their clients' contingent fees.

The Bar Council of India Rules state, in Part VI, Chapter II, Section II, Rule 20, that: "Rule 20: An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof."³ Simply put, contingent fee agreements between lawyers and clients are illegal in India. India is one of the few nations that do not allow contingent fee contracts. While the same has been effectively adopted in other Western nations⁴ and has opened doors to justice for most of the people, India has remained conventional in its approach.

According to the court in the landmark case of *Ganga Ram v. Devi Das*⁵, contingency fee contracts are void because they are contrary to public policy under Section 23 of The Indian Contract Act, 1872, where such a contract is entered into by an Advocate with his client, and because they do not comply with the legal profession's professional ethics norms, which include independence, honesty, and objectivity. In a lawyer-client relationship, the duties are owed by the lawyer to its clients. This includes matters such as client care, conflicts of interest, confidentiality, dealing with client funds, and fees.

In the case of *Jayaswal Ashoka Infrastructure (P) Ltd. v. Pansare Lawad Sallagar*,⁶ the Judge clarified that a contract in which an advocate requests payment based on the outcome of arbitration proceedings, where he acted as a "counsel" for the party and did not appear as an "advocate," is valid. The High Court observed, "The aforesaid observations are clear that concerning such an agreement in which a legal practitioner is not involved, the same would be legally enforceable. It is thus clear that an agreement of the aforesaid nature if entered into by

²Adam Shajnfeld, A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements, 54 N.Y. L. REV. 773, 774 (2009).

³Rule 20, Chapter II, Part VI, Bar Council of India Rules on Professional Conduct (As amended up to September 30, 2009).

⁴Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2(4) *The Eco. of Litigation* 27 (1976).

⁵61 P.R. (1907).

⁶Devika Sharma, Case Briefs, *Bom HC | Not unlawful for an Advocate to enter into a "contingent contract" while appearing in capacity of a "counsel" in arbitration proceedings*. (2019)

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

an Advocate would be against public policy and the same may not be so when third parties are involved.”

ADVANTAGES

1. **High-quality services by lawyers:** A contingency fee contract encourages the lawyer to give high-quality services to the client since her pay is contingent on either winning the case or reaching a favorable out-of-court settlement.
2. **Beneficial for low-income plaintiffs:** To summarize the financial component of such an arrangement, it allows the litigant to pay out the money granted by the court after their lawsuit or the amount obtained via settlement negotiations, rather than paying the legal costs upfront with her assets. As a result, a system like this would be extremely helpful to low-income litigants who are not able to pay such a large sum of money to the lawyers; they make up a sizable portion of the Indian population.
3. **No Up-Front Fees:** Using a contingency fee agreement for a case has several advantages, including the fact that you do not have to pay your lawyer upfront, and you are not saddled with enormous legal fees while your case is still pending. Many individuals feel that this will improve access to legal aid and the judicial system for individuals with lower means.⁷
4. **Incentive:** You may be confident that your attorney will devote their whole attention to your case. Your attorney will be extremely driven to do all in their power to achieve you the best possible result if they do not get paid until you get compensated.
5. **No Loss Costs:** Another benefit of choosing a contingency fee agreement is that you will not have to worry about paying a big attorney's fee if the case does not go as planned (although you may still be responsible for some administrative costs). This may give some individuals piece of mind—if your lawyer is ready to take the risk of not being paid for the job they do, you have a strong chance of winning your case.

DISADVANTAGES

⁷Ken LaMance, *Contingent Fee Basis: Negotiating Your Contingent Fee* (2020)

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

1. **Less amount for the plaintiff**: Another fundamental flaw in this sort of settlement is that if the case is properly adjudicated, the lawyer receives a large proportion of the recovery amount that the court awards to the plaintiff as compensation. The plaintiff will be left with the sum less the lawyer's promised payment, which may be little in the end and may even fail to achieve its intended goal of assisting the injured party.
2. **Impact on litigants**-The use of contingency fee agreements has been defended based on improving access to justice. They make it possible for the poor to get legal representation in court. Litigation expenses, such as the expense of bringing the lawsuit, the time it takes to resolve it, and the dangers it poses, are frequently incurred before the final judgment is obtained. In the existing system, lawyers get paid in advance for these expenses. This means that people who are having trouble gathering finances are discouraged from continuing their lawsuits. This defines the aim of the legal system, which is to pay the aggrieved party and discourage future wrongdoers.
3. **Risks along with it**-As a result, it is a high-risk endeavor for the lawyer who puts time and money into a case and adds to the client's motivation to win the case. The lawyer has to bear with the risks of contingent fee arrangements. Obtaining an insufficient award that is insufficient to cover the expenditures, even though the case has been won. When a case is lost, there is no remuneration. The damages are sufficient, yet the defendant is unable to pay them. While the lawsuit is underway, the laws in question alter to the plaintiff's detriment. The possibilities make up the risk factor in a lawyer's fees, allowing him to charge a larger rate than usual.

CONTINGENT FEES FROM THE INDIAN PERSPECTIVE

It is thought that having a financial stake in the result of a lawsuit may create willful incentives for lawyers to engage in unethical behavior to win the case, which might be harmful to the interests of justice. Furthermore, in India, the legal profession is seen as honorable, with the lawyer always putting the client's interests ahead of his own. Even after the case is ended, the complexity of the legal system makes it difficult for the client to assess the strength and worth of the case and the services offered by the lawyer.⁸

This aligns the interests of both the lawyer and the client, and both will benefit since the lawyer will be motivated to put up a greater effort in the case. Some may claim that the ability to charge a contingent fee will promote access to justice for litigants, however, this perspective is

⁸ Satvica Dixit, *Concept of Contingency Fees of Advocates: Indian and American Perspective*(2019)
For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

not recognized in India since the courts have consistently found that if the main purpose of taking up a case is to enhance access to justice, an advocate's right to collect any fees can be relinquished and not made contingent on the case's outcome.

In India, it is a well-known truth that the effort-based pay system is far superior to the result-based pay system. Consequently, rather than focusing on the results, it is more effective to reward the lawyer for his constructive efforts. This aligns the interests of both the lawyer and the client, and both will benefit since the lawyer will be motivated to put up a greater effort in the case. It raises the possibility of customers being exploited by attorneys with better talent and knowledge who charge high fees because, unlike in industrialized countries, clients' literacy and awareness levels in India are similarly low.

APPROACH FOR ITS LEGALIZATION

A contingency fee contract should get legalized in India based on some regulations and along with that; there would be consequences of enabling lawyers to charge a contingency fee as well. The regulations may identify or limit the types of contingency fee cases that can be assessed. The proportion of contingency fees that can be charged can also be prescribed by regulations. Most nations have effectively adopted such contracts, while others are mobilizing to do so. Contingent fees do not have to be uncontrolled, and a limit can be imposed on them to prevent lawyers from taking advantage of their clients. Contingent fees are not necessarily against the law since, even though the lawyer has a vested interest in the outcome of the case, he still has a reputation to protect.

This mechanism, overall, would help to increase the efficiency of the legal services market. It addresses the issue of access to justice for the low-income plaintiffs who are not able to afford the legal fees of a lawyer. It provides an approach to the access-to-justice problem, thus boosting social and consumer welfare. As a recompense for the risk they assume, lawyers might demand a greater fee under contingency fee arrangements. This, on the other hand, may entice them to prey on consumers with less information. The prohibition on contingent fees acts as a barrier to entry into the legal market; nevertheless, permitting them can be beneficial to a new professional. Furthermore, contingency fees can assist to eliminate frivolous litigation. Section 35 A of the CPC deals with the award of compensatory costs for false and frivolous litigation.⁹ Lawyers are given an incentive to act as gatekeepers of the judicial system by basing their income on the outcome of the case. They can evaluate the merits of the claims and pursue only those that have a good chance of succeeding. This is predicated on the premise that lawyers

⁹S.35-A (1) of Code of Civil Procedure

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

have more knowledge and expertise than clients when it comes to determining the case's merits and chances of victory. And can also be used to replace legal assistance, which the Indian government has historically been ineffective at delivering. As a result, contingency fees can aid in the promotion of social welfare.

In a nation like India, where many people lack the financial means to pay a lawyer's fees, such a contract is critical. As a result, people avoid going to court with their problems. Contingent fee contracts would undoubtedly open the doors of justice for these individuals. It can be beneficial and crucial if they are designed to maximize benefits while minimizing negative incentives and impacts. This would help India develop a more economically efficient legal services industry.



For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>