
ABSTRACT

In today's time relationship of employer and employee becomes very much important and with the increasing technology and economy the work is also increasing but how far the rights of these labour class are met? In this article authors have elaborated the condition of gig economy and how it is evolved over the course of time. The article discusses the definition and interpretation which is involved with gig and platform worker under the system of Code on Social Security. The role of COVID-19 has seriously affected the life of these gig and platform worker as they are denied the overtime wages and this affecting their income of many workers involved in these sectors. The article also highlights the role of International Labour Organisation in promoting the decent working environment to these workers and how can India take example from the US and the UK model in expanding the protection and rights to these gig and platform worker. The author has discussed various case law which are relevant in establishing the labour jurisprudence. Lastly a classification exists which demarcates 'Forced Labour' and 'Decent Work' in India which need to looked in better way in order to secure the betterment of these worker.

Key Words :-*Gig worker, Economy, ILO, Decent Work, Platform Worker, etc.*

Introduction

The economy with respect to gig and platform workers had always been under scrutiny as they bypass the labour laws prevailing all over the world. In simple words gig economy can be identified by the popularity of the temporary and mobile business works which are usually recruiting independent contractors and freelancers as compare to full-time workers.¹ The outdated system where the full-time employee generally change jobs and instead focuses on the lifelong profession is responsible for undermining the economic system.² This kind of system is controlled through the mobile phone which serves as a medium of calling the service which is carried through by the gig workers.

Gig Workers are defined under Section 2(35) of the Code on Social Security³ as those workers who participate in any work arrangement which is outside the traditional method of employment. This definition may even include 'platform worker' who under Section 2(60) of the Code on Social Security⁴ has defined these platform workers as those individuals who undertake to do platform work under this form of employment where any individual or any organization uses online means to get access to other organizations to solve the problem in exchange for payment.

The person classified as an employee is usually paid fixed wages on a periodical basis and contracted labour for a longer duration of work. Although in the case of gig and platforms workers are usually hired and paid temporarily. The worker who falls under this category includes platform worker like Uber and Ola drivers, Uber, and food-delivery aggregators like Zomato, Uber Eats, Domino's, and Swiggy. This system of platform workers has flourished for a very long time and moreover, it covers both market share and workforce, with about 200 million gig workers around the world.⁵

Gig workers can be classified as those workers who can be called 'independent contractors' instead of calling employees even though the work control is exercised by the platform as the work is decided by that mode and the relationship with employer and worker can be termed as 'partnerships. In the case of gig workers, they are denied to fall under the definition of

¹ Alex de Ruyter, Martyn Brown and John Burgess, *The Fourth Industrial Revolution*, 72(1) J. Int. Aff. 8 (2019).

² *Id.*

³ The Code on Social Security, 2020, Sec. 2(35).

⁴ The Code on Social Security, 2020, Sec. 2(60).

⁵ Orchie Bandyopadhyay, *Indian gig workers fight for social security benefits*, 8 March 2022, <https://www.britsafe.in/publications-and-blogs/safety-management-magazine/safety-management-magazine/2022/indian-gig-workers-fight-for-social-security-benefits/> (Last Accessed 13/04/2022).

'employee' and thus are denied all the benefits like minimum wage, paid maternity leave, social security benefits, and protection from occupational and health hazards, which have been given enough emphasis under labour statutes.

A gig economy can be divided into two sub-categories of work i.e., Crowdfwork,⁶ and the work which is done through the command of a mobile or computer application.⁷ In case of the Crowdfwork, the work is done through online mode which involves 'n' several institutions, companies, and individuals in communication through the internet which enables the consumer to employee globally.⁸ The nature of the work performed through this medium would be varying considerably which can range from the small task like completing surveys, compiling work, etc.⁹ and on the other hand, doing a complex task that involves coding.¹⁰

The situation in India becomes worse for gig and platform workers as they are denied the overtime wages and this effect their income, the recent situation during the time of COVID-19 pandemic has added insult to injury where it is seen that 87%¹¹ of them are earning below Rs.15,000 per month and in the absence of the social security and work benefits, their workers stand in the position of losing their jobs.¹² The study conducted for food delivery drivers of Zomato and Swiggy has shown these drivers are not provided with any kind of protection or any compensation even when they are course of employment and these workers suffer any kind of injury. The study has shown that these Uber and Ola drivers spend the majority of their day driving cars, and bikes which even results in deteriorating their mental and physical health. However, the lacking of these statutory protection and employment benefits is because they do not receive any kind of support from their employer.¹³ The Supreme Court while adjudging the case of the *Indian Federation Of App Based Transport Workers v. Union of India*¹⁴ where it

⁶ Valerio De Stefano, "The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd-Work and Labour Protection in the 'Gig-Economy'", Conditions of Work and Employment Series Report, no. 71, International Labour Organization (ILO), Geneva: 2016.

⁷ R. Smith and S. Leberstein, Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy, National Employment Law Project (New York 2015) (hereinafter "Smith et. al").

⁸ *Id.*

⁹ L. Irani, Justice for Data Janitors, PUBLIC BOOKS (2015).

¹⁰ Fayomi et. al., The global opportunities in online outsourcing, WORLD BANK REPORT (2015).

¹¹ The Digital Hustle, Gig Worker Financial Lives Under Pressure, September 2020, <https://flourishventures.com/wp-content/uploads/2020/10/FlourishVentures-GigWorkerStudy-India-FINAL-2020-09-29.pdf> (Last Accessed at 13/03/2022).

¹² Behind the veil of Algorithms: Invisible Workers, A Report on Workers in the Gig Economy, <https://pudr.org/sites/default/files/2021-12/PUDR%20report%20on%20gig%20workers-%20Behind%20the%20Veil%20of%20Algorithms.pdf> (Last Accessed at 13/03/2022).

¹³ Protecting Workers in the Digital Platform Economy, Investigating Ola and Uber Drivers' Occupational Health and Safety, <https://cis-india.org/raw/ifat-itf-protecting-workers-in-digital-platform-economy-ola-uber-occupational-health-safety-report> (Last Accessed on 13/03/2022).

is prayed before the court to recognize the condition of gig and platform workers under the '*unorganized workers*' so that necessary steps can be taken to make an obligation towards these platform workers to provide them all the necessary benefits.

In this article, the authors have made an attempt to discuss the current position of gig workers in India falling within the domain of employment, the existence of forced labour jurisprudence in the India scenario, the role of the international labour Organisation in imparting decent working condition and situation of gig worker being subject to forced labour, the example set by the UK model to expand the scope and rights of gig workers.

The Existing Legal Regime

The recently introduced legislation by the government of India on Code on Social Security, 2020 has dedicated a Chapter on the gig and platform workers. The aim of the legislation is made to direct the Centre and State government to create State-funded welfare policies which can provide insurance, pension plans, maternity and childcare benefits. The statute demarcates the responsibility of the State whereby they recognize that workers are being exploited but still nothing is being done the companies where these gig workers are employed.

On the contrary, persons who fall under the '*unorganized worker*' is those who are legally entitled to receive all the benefits in the period of employment whereby it becomes the responsibility of the employer to contribute to provident funds, gratuity, and maternity benefit which in any case employee gets during the period of employment. The employer making any default in such contribution would be liable to give a fine or any kind of punishment that the statute provides.

The classification between the gig and platform worker and an unorganized worker given under the Code on Social Security is that seen whereby the legal protection is not provided in the former case. In today's context, the Code of Social Security does not provide the implementation of the government schemes, and neither any worker is allowed to enforce this right from the court. In contrast to the situation where an employer has been bound to provide this benefit to these workers, the needs of the workers would be fulfilled and thus it becomes imperative that these gig and platform workers are recognized as '*employees*' so that greater protection can be awarded to these gig and platform worker.

In *Dhrangadhara Chemical Works Ltd. v. the State of Saurashtra*¹⁵ the apex court has devised twin tests of ‘*supervision and control*’. Under this doctrine, it states that a relationship of employer-employee will be established where the employer will exercise the supervision and control on any work which is performed by the employee and the way in which work has been done. Taking an example in the present context platform workers like Uber and Swiggy were determining the remuneration received that would be received by the drivers, the routes they take would undertake, supervising all the online transactions, and laying down criteria for penalizing them for the violation of their terms by deducting from their payment.¹⁶ Thus, it can be said their involvement is not only limited to acting as a third-party facilitator. The control over the work and performance all fulfill the test laid down in the Dhrangadhara case, thereby creating an ‘employer-employee’ relationship.

Take an example of places like California which is one of the earliest jurisdictions to recognize the labour framework which involves platform-based workers. In the year 2018, the California apex court came with a ruling of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.¹⁷ Which set out AB5 Bill and hence was later ratified by the California State Legislature in 2019. The judgment is significant because it has not only shifted the burden of proof on the worker who is independent contractors who are the hiring entity for platform workers but the definition is expanded by including platform worker in the definition of ‘employees. As per the 3-pronged ABC test introduced in this case, the worker who falls under the category of independent contractor only if they are

- (a) there is no sort of command and direction which is made from the end of the employer;
- (b) the work is different than what can performed in course of employment.
- (c) is involved in an independent trade where the nature of the work is similar to that of the hiring entity.¹⁸

All criteria must be met and if it is the case where even one of those is not applying to a worker, then they will be falling under the category of ‘employees’ and all resulting rights will be

¹⁵ *Dhrangadhara Chemical Works Ltd. v. State of Saurashtra* 1957 AIR 264.

¹⁶ Kuwar Singh, Why Ola drivers and customers hate its mobile wallet, October 10, 2018, <https://qz.com/india/1343493/why-ola-drivers-and-customers-hate-its-mobile-wallet/> (Last Accessed at 13/03/2022)

¹⁷ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal. 5th 903.

¹⁸ *Id.*

provided. The basis to exclude particular occupation from the ABC test is also mentioned in the Code.¹⁹

It can be seen as a positive step in vouching for the labour rights of these gig workers, however, there is a clear dearth of applying it in a practical manner of application given in *Dynamex judgment*²⁰, such as overlooking the existing needs of the stakeholder who have an interest in the law. In cases where a worker who is employed as platform workers, they seek to maintain their freedom from the relationship of employer-employee and they have to surrender certain advantage like the flexible working timetable, the ability of the gig worker to reject the gig which is given the hiring entity, receiving the gig rather than any fixed salary, and any other tax deduction which is given from the end of the independent contractors. The worker falling under this category would include various workers like freelancers writers, photographers, musicians, and various artists who perform any artistic work²¹ and engage in performing gig work rather than their usual employment.²² Apart from that the business structure of some of the entities where the accidental effect of this test will result the employer to the risk of the misclassification of workers²³ which includes different types of penalties.²⁴ The approval of this Bill coming into force has met huge criticism and protest from various organization as this law include a wide category of worker.

The apex court in the United Kingdom has gone far to recognize the relationship which is based on the unilateral and pervasive control which controls the exercise on the performance of work in *Uber BV v. Aslam & Others*.²⁵ Even the courts in other countries like Spain, and France have followed the same footstep laid down in *the Uber BV* case. Furthermore, the EU's draft regarding protecting the platform worker starting from December 2021, clearly set a good model to establish legal protection for platform workers and the manner of performing work that is regulated. The apex court of UK stated that whenever any person books his ride with the help of Uber app, then it is the app which decides the fare and it is not the discretion of the

¹⁹ §2750.3, Labour Code, California.

²⁰ *Supra*.

²¹ The Gig Is Up – Redefining Employment for Platform Workers, <https://indiacorplaw.in/2020/01/gig-redefining-employment-platform-workers.html>.

²² David Wagner, "Here's How AB5, California's New Freelancer Law, Could Affect You", December 31, 2019, available at <https://laist.com/news/ab5-california-gig-economy-workers-uber-lyft-freelance-writers-musicians-dynamex-lorena-gonzalez> (Last Accessed at 13/03/2022).

²³ *Ibid* 21.

²⁴ Gregg Fisch, Sheppard Mullin, Chris Bell, and Chris Parker, "Unintended consequences of Dynamex decision could affect California's health care employers", San Francisco Business Times, October 8, 2019, available at: <https://www.bizjournals.com/sanfrancisco/news/2019/10/08/unintended-consequences-of-dynamex-decision-could.html> (Last Accessed at 13/03/2022).

²⁵ *Uber BV v Aslam and others* [2021] UKSC 5.

driver to decide and then charge the fare from the customer. Ultimately making the Uber decide how much the driver will earn depending upon the work they do.

The apex court in the UK was of a unanimously view that whenever a ride is booked through the software platform like the Uber app it is the software which is devised in such a way that itself decide the fare and drivers are not at discretionary position to charge any fare extra than fixed by the app and this is how the software Uber dictates over the drivers as it decided how much driver would be paid and amount of the work they do. By now this is the most exhaustive ruling which have come in the favour of the gig worker where the court has considered different condition to justify their conclusion.

1. The money/ payment that the driver would be receiving would be decided by the Uber app and not the driver.
2. The contract which has been made for the Uber driver will not be changed or modified, thus giving it a form of a long-term contract in an employee-employer setting.
3. The Uber app has the full authority decision where the app will decide whether to accept the ride or decline the ride.
4. The drivers has the responsibility to carry out `a certain level of user rating which can determine the continuance of their work with Uber.
5. The intermediary is created between the driver and the user by the Uber app and thus full regulation is governed by the Uber software.

The Dutch High Court²⁶ has made the ruling last month considering all aspects of work being engaged between the Uber and the Uber driver it forms an employment contractual relationship and that's it becomes important to protect the right of the platform workers and policy framework would serve the purpose. This is the grey area where even China is taking positive steps to create a stability between labour rights and the growth of digital apps through any platform.²⁷

On a similar notion, it can be said India should take steps to recognize these gig and platform workers. It becomes important to recognize the nature of employment is not only limited to Code on Social Security but it should extend to the payment of minimum wage, protection, and compensation being granted for occupation in hazardous places under the Occupational Safety

²⁶ Anthony Deutsch and Toby Sterling, Uber drivers are employees, not contractors, says Dutch court, September 13, 2021.

²⁷ Peter Bengtsen, China's Forced Labour Problem, March 21, 2018, <https://thediplomat.com/2018/03/chinas-forced-labor-problem/> (Last Accessed on 13/03/2022).

and Health and Working Conditions Code. A holistic approach for gig and platform workers is the need of the hour to avoid exploitation

Demarcation of ‘Forced Labour’ and ‘Decent Work’ in India

The Constitution sets a mandate under Article 23 to take steps against any kind of ‘forced labour’²⁸ and in *People’s Union for Democratic Rights v. Union of India*²⁹, the apex court has interpreted to hold that there persists a constant threat of starvation and lack of economic safety which might force many workers to take up the job that comes their way even after they are offered low-quality jobs and nature of work is not of better quality. This degree of coercion which continues to persist in the labour market breaks down where no compensation is being paid and finally the court held that the application of the right can be horizontal applied and by this means that private employers can be made responsible for creating such working condition which results in forced labour.

In *National Textile Workers vs P.R. Ramakrishnan and Others*³⁰ the apex court has placed the value on the principle of the Constitution which goes beyond the meaning of forced labour and emphasis giving importance to social order under which promises are made to provide a meaningful way of participation of workers. This can also be reflected in the notions laid down in the DPSP which guides the government policy in achieving the social welfare goals. On looking at the objectives laid down in Article 39³¹ the emphasis has been given to the role of the State in ensuring the necessary means of livelihood for all the individuals so that no forced employment can seriously affect the health of the worker. Apart from that Articles 42³² and 43³³ which makes the direction upon the government so that beneficial legislation can be created to promote just and humane conditions of work to ensure the standard of living is maintained and opening opportunities for all.

According to Article 23 of the Universal Declaration of Human Rights³⁴ along with the International Labour Organisation advocates for the *decent work*³⁵ which includes all aspects of working like fair wages, decent working hours, occupational safety, and the provision of

²⁸ INDIAN CONSTITUTION. Art. 23.

²⁹ *People’s Union for Democratic Rights v. Union of India* 1982 AIR 1473.

³⁰ *National Textile Workers vs P.R. Ramakrishnan and Others* 1983 AIR 75.

³¹ INDIAN CONSTITUTION. Art. 39.

³² INDIAN CONSTITUTION. Art. 42.

³³ INDIAN CONSTITUTION. Art. 43.

³⁴ The Universal Declaration of Human Rights. Art.23.

³⁵ Decent work indicators, https://www.ilo.org/integration/themes/mdw/WCMS_189392/lang--en/index.htm (Last Accessed on 13/03/2022).

social security benefits which are to be considered within the ambit of the basic rights, apart from that India has ratified ILO's Abolition of Forced Labour Convention, 1957 which makes prohibition the States from using any kind of labour for economic development as mentioned in Article 1(b).

Thus, the Indian State for legal fiction that prevents the application of employment rights which are granted to gig and platform workers is suggestive of the use and exploitation of labour for their economic development and is contrary to the international commitment

In this way, the rights of gig and platform workers rights cannot be lessen merely by the application of minimum wage laws. The platform should be provided so that work they performed they should be legally held accountable for providing them with the safe working conditions and social security benefits that can lay the foundation for a standard life cycle.

Government here owes a duty where it needs to take steps to identify and prevent exploitative practices which can result in forced labour. In *Bandhua Mukti Morcha v. Union of India*³⁶, the apex court held that government cannot disown their duty towards safe working conditions and cannot state that because there is a lack of courts order on the exploitation of workers as this case represented from the side of the petitioner. It owes the responsibility of actively taking the cognizance of incidents in cases of exploitation and taking measures to ensure the work environment remains safe.

Conclusion

India has a surging population and we constantly suffer from the problem of unemployment as a large chunk of the population is still engaged in unskillful work, which shows the vulnerability of workers engaged in online platforms. Thus, we need the classification of a worker employed on these online platforms and also the regulation which can govern these workers to protect their rights. It is time, when we need to evolve with time as presently many works, are done through technology and the role of customer behaviour becomes much more important in classifying these workers and preserving their rights.

With the expansion of the economy and demand for work increases and on the other expand even the gig economy expansion which is about to create 90 million jobs in India, the result of the *IFAT* petition has come at the perfect time where it is time for when government steps in and take some crucial steps. The Constitution provides responsibility on the government to

³⁶ *Bandhua Mukti Morcha vs Union of India & Others* 1984 AIR 802.

ensure that companies cannot conceal the evasive technology which can deny them rightful pay and benefits where there are limited employment opportunities left for the worker, which is coupled with economic insecurity, mental stress, forced gig, and platform workers where they enter into the contract where minimum wages and social security is not provided reasonably. Any amendment in the labour statutes to bring gig and platform within the ambit of 'unorganized workers' depending upon the work they perform, would ameliorate the condition of workers and will entitle them the basic protection and benefits from the side of their employer. What can be done at least is a threat of sanction which lies upon the legal recognition as 'unorganized worker' will create a mandate over the employers to create better working conditions and offer them minimum statutory benefits. Though it is realized that true equity in the labour market is never possible and India still being a developing country some steps are urgently needed to protect the right of these workers.