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SOCIAL SECURITY AND EMPLOYEE BENEFITS: LEGAL RAMIFICATIONS FOR BOTH COMPANIES AND EMPLOYEES

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I. ABSTRACT

The enormous population and lack of adequate opportunities have increased the proportion of unorganised workers which in turn requires initiatives to protect the interests of the workers in the informal sector. The secondary data such as published articles and Government reports has been utilised for the study. The paper attempts to analyse the social security frameworks, schemes and judicial interventions in safeguarding the rights of the workers. The limitations are emphasized in the paper such as inadequate definition, enforcement mechanisms, funding, etc. The implications for the employees, employers and companies are further highlighted. The paper concludes that despite the reforms both judiciary and legislative, the mechanisms to safeguard the interests of the unorganised workers remains regressive due to implementation gap between reforms and their actual enforcement.

Key words: Unorganised workers, Enforcement mechanisms, Implementation gap.

II. INTRODUCTION

The Indian labour market is overwhelmingly dominated by the vast majority of unorganised employment, comprising the backbone of the labour workforce. Though over 90 percentage of the workforce constitutes unorganised and informal sector contributing to the majority of the national income, they remain most vulnerable and neglected section. These workers include domestic workers, street vendors, platform workers, agricultural, construction labourers, gig and platform workers with absence of paid leave, medical benefits, fixed working hours, sufficient wages, secure working environment, in certain instances even basic wages is denied reflecting the depth of exploiting nature of the sector. Even several laws exists, the laws cover the organised sector leaving the unorganised workers either inadequately covered or excluded. The surveys indicate that the unorganised sector employs majority of workforce since organised sector is

incapable to provide adequate employment opportunities. As a result the employment is causal and contractual and thus subjugated to socio economic implications. To address these challenges, the state has undertaken legislative and policy initiatives to extend social security unorganised sector. The Unorganised Workers Social Security Act, 2008 is one such initiative which was later incorporated into Code on Social Security, 2020 which explicitly extended protection to gig and platform workers. Despite the initiatives the state lags behind in terms of enforcement. The global assessments indicate the lack of sufficient framework under Indian regime. The Indian Constitution implicitly recognises the unorganised workforce and state's responsibility to ensure protection to the informal sector through directive principles under Articles 41, 42, 47 such as right to living wage, public assistance, just and humane conditions. These constitutional goals reflect the foundation of social order and social security in

India. Though the unorganised sector provides majority of employment opportunities and access to livelihood, it parallelly exposes them to socio – economic risks. The legislative measures have attempted to fill the void but remained meagre due to insufficient enforcement and institutional mechanisms. Hence, the social security to informal sector extends beyond mere labour regulation encompassing socio – economic justice and equitable economic development.

III. DEFINITIONS

A. Social Security

As defined by the ILO, social security is the security provided by the society under institutional framework against the risks which the members are exposed to where such risks cannot be mitigated by their own ability or in combination with the fellow members. This includes sickness, old age and death associated with a man's inability to provide for himself and his dependants.

Philadelphia Declaration, 1944 and Income Security Recommendation (No. 67) has defined social security as a fundamental human right, which aims at providing assistance for those who are incapable of working due to disability, unemployment, maternity, old age which is further reaffirmed under UDHR, ICESCR.

Social Security under the Code on Social Security delivers a range of social security benefits, including as health insurance, maternity benefits, old age security, and disability benefit.

B. Unorganised sector

The First National Labour Commission has identified certain constraints to define unorganised sector, which incapacitates the group of workers, such as Casual nature of employment, illiteracy, establishment with low capital investment, fragmented nature of establishment, and monopoly power of the employer.

The unorganised worker as defined Section 2(86) in the Code on Social Security, 2020

includes home based worker, self employed worker, wage worker in the unorganised sector and the workers in the organised sector not covered under the Industrial Disputes Act, 1947. Section 2(m) of the Unorganised Workers Social Security Act, 2008 provides the similar definition.

According to National commission for Enterprises in the Unorganised Sector (NCEUS), the unorganised sector includes unregistered proprietorship or partnership entities with less than 10 workers, involved in production or sales of goods and services. These entities are not registered with the government and operate with fewer resources, comparatively less efficiency, small market size, lower wages, non-standard hours of work.

IV. LEGAL FRAMEWORK THAT REGULATES SOCIAL SECURITY TO UNORGANISED SECTOR

A. Unorganized Workers' Social Security Act, 2008

Unorganised workers are defined as those who engage in home based work, wage based and self-employed.

The District Administration is mandated to register the unorganised workers and issue identity cards to them.

Under the act, the Central and the State Government frame schemes for the unorganised sector covering housing, education, insurance cover, etc. and National Social Security Board and State Social Security Boards is constituted to advise upon the implementation of the schemes.

Facilitation centres are created to disseminate information and facilitate access to schemes.

The act subsequently absorbed into The Code on Social Security, 2020.

Drawbacks of the Act

The act is limited in its scope as it didn't cover unorganised worker, it also had implementation gaps, lack of accountability provisions and inadequate funding schemes.

B. The Code on Social Security, 2020

The code provides definitions including gig workers, platform workers, home based workers and the definitions unorganised worker, unorganised sector, social security has been extended which enables the applicability of social security schemes to cover contemporary categories of workers.

Under section 6, the National Social Security Board and State Unorganised Worker' Board has been established for the unorganised, gig and platform workers, under which schemes related to the unorganised, gig and platform workers are formulated.

Under Section 15 of the act, several schemes are established. Employee's Provident Fund Scheme is created. Employee's Pension Scheme is framed for providing widow or widower pension, superannuation pension, retirement pension, permanent total disablement pension, nominee pension. Employee's Deposit Linked Insurance Scheme for providing life insurance or other schemes shall be framed under this code for the benefit of the self-employed.

Under the Section 141, Central and State Government shall constitute separate social security fund for the welfare of the unorganised, gig and platform workers.

Under Section 45, the Central Government may formulate schemes for the unorganised, gig and platform workers and their families for the provision of benefits under Employee's State Insurance Corporation.

Section 109-114 of the code is about social security to unorganised worker. The Central and State Government frames schemes for workers of the unorganised sector like housing, education, health, medical, maternity benefits where such schemes are funded by government funds, CSR contribution, employer, employee contribution. The Government must ensure registration of the employees to be eligible for benefits, creation of facilitation centres and helpline numbers, as well as maintain proper records of the schemes for transparency.

Drawbacks of Social Security Code, 2020

The code thrives to be a consolidated framework but the code has inherent limitations. One such criticism is the ambiguous definition of the gig, platform and unorganised workers. The absence of clear distinction between different forms of labour makes it difficult to frame targeted welfare schemes and to lay down duties of employers. The second criticism is the concentration of authority in the central government, which might hinder addressing the region specific issues. Despite the creation of social security fund, the code lacks clarity on funding, contribution and implementation thus questioning the practical aspects. The Social Security Code and Industrial relations code is contradictory in term of rules for fixed term gratuity. According Social Security Code 5 years of continuous period has to be served for gratuity exception is made to the fixed term workers, where gratuity is paid on the basis of terms of contract and according to the Industrial relations code, gratuity is paid after 1 year of service, thus creating confusion regarding gratuity rules for employees with less than 1 year of contractual term. The employees are mandated to give their Aadhar details to avail the benefits, pertaining to the Aadhar judgement, Aadhar details are mandatory only in cases of benefits associated with the consolidated fund. Since the social security is based on contributions from employer and employee the requirement of Aadhar details conflicts with Aadhar judgement. The significant focus of the government has been on the economic development rather than equitable distribution thus rendering informal sector vulnerable to joblessness and economic instability.

V. SCHEMES UNDER SOCIAL SECURITY

Life and Disability Cover : Life and Disability Cover is made accessible with Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY) and Pradan Mantri Suraksha Bima Yojana (PMSBY). Under PMJJBY, people between 18-50 years with bank or post office account are covered where they join an auto debit insurance scheme with

annual debit of Rs. 436 and insurance cover up to Rs. 2,00,000 in case of death of the insured.

The PMSBY is applicable to people between 18-70 years. It is a consent based auto deduction scheme. The coverage is Rs. 2,00,000 in case of accidental death or permanent total disability and Rs.1,00,000 in case of partial permanent disability with annual deduction of Rs. 20 per year.

Ayushman Bharat-Pradhan Mantri Jan Arogya Yojana: The scheme covers up to Rs.5,00,000 for secondary and tertiary care hospitalisation for the eligible families. The beneficiaries are identified through Social Economic Class Census of 2011 in urban and rural areas.

Pradhan Mantri Shram Yogi Maan-Dhan (PM-SYM): PM-SYM is an old age pension scheme introduced in 2019, covering workers between 18-40 years with income equal to or less than Rs. 15,000 who are not covered under employees state insurance corporation, employees provident fund. The half of the contribution is paid by the workers and the equal amount is contributed by the Government payable by the LIC. The scheme provides around Rs. 3000 per month after 60 years of age to the workers.

PM Street Vendor's Atma Nirbhar Nidhi (PM SVANidhi) Scheme: Government introduced the scheme in 2020, to assist the street vendors with working capital, who were severely affected by COVID-19.

National Pension Scheme for Traders and Self Employed Persons (NPS-Traders), provides old age pension to retailers, shopkeepers with annual turnover below Rs. 1.5 crore.

Pradhan Mantri Kisan Man Dhan Yojana (PM-KMY), provides monthly pension to small and marginal farmers of Rs. 3000 upon attaining 60 years, where Rs. 55 to Rs. 200 monthly contribution is to be made by the beneficiary.

Pradhan Mantri Kisan Samman Nidhi (PM-KISAN): This scheme provides yearly financial assistance of Rs. 6,000 to small and marginal farmers.

e-Shram portal: Introduced in 2021, as a National Registry of Unorganised workers to facilitate the accessibility of Welfare schemes to unorganised workers. As the e-Shram portal is linked with PM-SYM, the workers can access PM-SYM schemes with ease, the portal is also linked with National Career Service (NCS) portal to ease the search for job opportunities.

The Atal Pension Yojana (APY) is a pension program that offers retirement income to workers in the unorganised sector.

The National Social Assistance Programme (NSAP) is a centrally sponsored scheme that provides pensions for widows, elderly, disabilities and families below the poverty line, benefits are provided through Direct Benefit Transfer.

Apart from these there are other schemes that are applicable to the economically disadvantaged section of the society wherein such schemes can encompass the informal workers within its framework.

Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS): This scheme provides means of livelihood in rural areas, by guaranteeing 100 days of employment in a year.

Public Distribution System (PDS): The food security is assured by providing essential food supplies at subsidised rate.

There are other schemes such as Indira Gandhi National Disability Pension scheme where Rs. 300 is provided per month for economic stability.

Varishta Pension Bima Yojana (VPBY): It is old age pension scheme regulated by LIC.

Pradhan Mantri Matru Vandana Yojana: Under this scheme Rs.5000 is paid in three instalments to pregnant and lactating mother on first birth.

VI. JUDICIAL INTERVENTION IN STRENGTHENING THE POSITION OF INFORMAL WORKERS

The judiciary has played a critical role in expanding social security to the unorganised sector which earlier remained outside the

purview of the statutes, the scenario later changed by the Code on Social Security, 2020. The Judiciary has attempted to interpret the constitution in such a way to make the unorganised sector inclusive of the welfare schemes.

Since the legislative framework does not adequately protect the workers of the unorganised sector the judiciary has interpreted the constitutional mandates progressively to expand the scope of protection.

In Menaka Gandhi case, the court held that right to live includes not mere physical existence but a right to live with human dignity.

In the case of Francis Coralie v. Union Territory of Delhi, the right is not confined to mere animal existence, it is something beyond meagre physical existence. The right encompasses the right to live with human dignity along with other basic necessities such as clothing, shelter, nutrition, freedom of expression and movement, social life and interactions with other humans.

In People's Union for Democratic Rights v. Union of India, the denial of minimum wages amounts to forced labour under Article 23.

In Bandhua Mukti Morcha v. Union of India, the court laid down that it is the state's duty to rehabilitate the bonded labourers, the court associated relocation and rehabilitation with human dignity under Article 21.

The right to life and liberty under Article 21 includes right to livelihood and the term life extends beyond mere animal existence, the judicial attempt has established interconnection between right to life and livelihood.

In Daily Rated Casual Labour v, Union of India, the court held equal pay for equal work irrespective of the nature of the employment.

In State of Maharashtra v. Chandrabhan, Bombay Civil Services Rule, 1959, was held to be unconstitutional as it paid only nominal subsistence during the pendency of an appeal.

In Olga Tellis v. Bombay Municipal Corporation, it was held that the right to life cannot be denied except under the procedure established by the law. The case established that depriving a person of his means of livelihood deprives the person's right to life, which is reaffirmed in the directive principles such as Article 39(a) and Article 41 requiring the state to ensure right to work and means of livelihood.

In Delhi Development Horticulture Employees' Union v. Delhi Administration, the workers engaged in work for more than 240 days demanded for regularisation of employment as right under Article 21, which the court rejected and laid that though right to livelihood is a part of Article 21 but it does not ensure right to employment owing to capacity of the state to provide employment opportunity to all.

As said earlier, the main issue is the inclusivity of the informal sector in the labour laws including domestic workers, street vendors and other employments where there is lack of adequate regulatory oversight. According to the ILO, 81% of the women and 60% of the men in India are employed in this sector and are consequently subjected to income, safety risks, etc. Among the other kinds of employment, house helps and domestic workers are exposed to profound implications often affected by non-standard working hours, lack of fixed minimum wages and no agreements defining terms of employment. The National Sample Survey Office's report reveals that around 58% work with no written agreements and 83% are entirely outside the scope of social security. As a result, the workers are left with no remedies in case of exploitation.

The judiciary has taken initiative in addressing these challenges, one such case is Vishaka v. State of Rajasthan, where sexual harassment in workplace has been held violative of Article 14, 15, 21 and the term workplace extends to women engaged in the informal sector. Moving forward, the state has taken institutional initiatives, the National Commission for Women has attempted to bring Protection of Women

Domestic Workers Bill, 2010, the bill aimed at recognising as well as extending social security benefits to domestic workers. The bill has not come into force which shows the gap between formulation and the actual implementation. The Ministry of Labour and Employment, has attempted to extend minimum wages to domestic workers, indicating the effort to standardise the workers condition in the informal sector.

In the case, Daily Road Casual Labour v. UOI, classification of employees as temporary and permanent or regular staffs was held to be violative of Article 14 and 16 of the Constitution, similarly Article 7 of the ICESCR, 1996 is also violated. The non-payment of minimum wages is held to exploitation of labour.

In Delhi Jal Board v. National Campaign For Dignity and Rights of Sewerage and Allied Workers, lack of initiative by the legislature, policy makers and those responsible for putting in place effective mechanisms of social security or compensation in case unforeseen death or accident related to the job, for the workers employed through contractors for inherently hazardous jobs. Judiciary has assumed proactive role in assuring social security to unorganised sector.

The States such as Kerala and Karnataka have attempted to recognise the domestic work as form of labour which is evident through the establishment of Domestic Workers Welfare Boards to provide social security to domestic workers.

The Supreme Court has recently intervened to strengthen the standpoint of informal workers. The Court has mandated the Central and State Government to register the unorganised workers to enable them to access the welfare schemes and the court has mandated One Nation One Ration Card to ensure food security to the migrant workers.

Despite these initiatives, lack of national legislation, implementation gaps and the lack of awareness of the domestic workers prevents

them from approaching the legal remedies, such factors contributes to the need for comprehensive legislation.

VII. RAMIFICATION FOR COMPANIES AND EMPLOYERS

Reclassification risks: The employer obligations towards the casual and contract workers have expanded owing to the role of judiciary, labour inspectors and legislative measures. The terms and arrangements of work has been scrutinised to determine whether the independent contractors and collaborators are termed as employees, to allow them to claim the benefits. The employer liabilities becomes intensive when such collaborators are identified to be the part of employment arrangements, which in turn imposes obligation on the part of employers to retrospectively register the such workers, the registration facilitates the entitlement to the social security benefits. Recent reforms and regulatory measures is striving to acknowledge the platform workers as employees where conditions such as economic dependence, employer supervision or integration into business operation. Such reforms places retroactive obligations on employers to mandatorily register the previously unlisted workers in benefit policies and programs, to deposit the unpaid contribution along with interests on the unpaid claim. The instance in Spain reflects how regulatory measures can change the dynamic of contact workers employment arrangements and thereby levy subsequent financial burden on the employers.

According to the empirical studies, the term based and temporary workers are entitled to same social security arrangements as the permanent staffs according to the legal frameworks but the implementation and registration procedures reveals gap between the statutory framework and actual practice. Though the law requires the employers to register the workers and pay social security benefits, the employers fail to register the temporary, platform workers and thus non-payment of contributions, such failures is identified through labour inspections or

complaints. The legal frameworks outline the employer obligations but the fulfilment of the obligations are to be ensured through inspections, monitoring registration and payment of benefits, which otherwise remains a law on paper. The employers are at the risk of dual liabilities, where the obligation to pay exists in the form of statutory compliance and in case of non-compliance, once it is discovered the obligation to pay unpaid contributions with penalties and interests arises. Employers are exposed to financial risks in terms of retroactive payment and independent contractors may have to bear entire burden of contribution or greater costs. Thus, the reclassification recognises workers as employees, in such a case the employer has to bear the payment obligations retroactively with penalties.

Misclassification occurs when an employer labels a worker as an independent contractor rather than employee in order to escape from liability to pay contributions, such misclassification results in payment of arrears, penalties. Tax obligations also arise in the process of rectifying misclassifications and further legal proceedings in this regard. Similarly, the social security framework is affected as a whole where the workers lose access to job security, minimum wages, pension and insurance policies, thus hindering worker protection as well as social insurance system. The platforms and transient workers further elevate the administrative and regulatory challenges. The studies reveal that the identification of misclassification and its impact on social security system is complex. The penalty for such misclassification varies in according to the national regime though criminal liabilities for tax obligations, civil liability for non-payment, depositing unpaid claims, penalties, etc. The Microsoft case reveals the retroactive financial liability to pay claims and costs. Though the misclassification temporarily saves cost, the consequent liability owing to failure in fulfilling social security obligations outweigh the temporary benefits.

Employers find it difficult to administrate the payroll of workers with irregular wage patterns and their registration, payment of regular contributions makes the administration more complex. Along with managing payroll, employers are also required to maintain information related to wages, hours of work, work done, which is complicated due to workers association with different platforms and unstable work schedule. The lack of awareness among employees, insufficient regulatory mechanism leads to irregular patterns of contribution.

VIII. LEGAL RAMIFICATIONS FOR EMPLOYEES

The entitlement to benefits is evident in papers but vacuum exist between legal frameworks and actual practice.

Healthcare and maternity benefits depends upon the enrolment of the workers in the social security programs which in turn depends upon the standard employment arrangements. Similarly the old age security schemes are linked with formal employment arrangements, where worker lies outside the scope of such arrangement and is rather governed by contractual arrangements and not falling under the category of employee loses the access to such schemes. The accident and disability compensation is based on workplace injury, thus workers outside the scope of formal employment arrangements lose the ability to access the same.

The employers fail to make payments of claims despite existence of statutory obligations. Though temporary workers are entitled to same benefits as permanent employees, the ineffective enforcement mechanism, weaker compliance monitoring and obliviousness of workers weakens the benefit mechanisms. Penalties are imposed due to non-compliance under statutory frameworks but the effectiveness of such penalties remain disproportionate and do not guarantee efficient delivery of intended benefits.

The social security benefits are interlinked with specific employer and the regular contribution

by the respective employer, owing to the transient nature of nature of jobs in informal sector such as casual work, the contributions so far accrued to the worker may stop or may even make it's access impossible to them. The emerging gig and platform work further elevates this problem as they are termed as independent contractors, thus making it non mandatory for the employers to provide contributions. This leads to magnification of the difference between the access to benefits by the traditional employees and that of workers in unorganised sector. The studies recommend creation of benefit system which is portable, to ensure continuity of benefits despite the changes in job. The establishment of third category between employees and independent contractors is recommended due to incapacity to accommodate gig and platform workers in these categories. The quasi employees can be created in this regard to accommodate gig and platform workers where they still depend on employer as well as retain autonomy, thus by terming them as independent contractors denies them benefits. The third category of employees can be granted minimal social security such minimum wages, insurance, thereby balancing the employers rights and employer liabilities but employers may deliberately place employees in third category to escape assuming full liability. Employee's access to grievance redressal is dependent upon the formal employment arrangement in such case the informal sector workers are as such denied the accessibility.

IX. INTERNATIONAL PRACTICES ON SOCIAL SECURITY

SOUTH AFRICA: South Africa has established the Unemployment Insurance Fund (UIF) and National Health Insurance (NHI) to provide social security in the form of healthcare and economic stability

ARGENTINA: Argentina has implemented Universal Child Allowance program aimed at providing assistance to children improving their education, healthcare.

COLOMBIA: Colombia has implemented Subsidised Health Regime has significantly improved health care of low income population by providing financial aid.

KENYA: National Hospital Insurance Fund (NHIF) has been introduced in Kenya to provide facilitate access to healthcare facilities to the workers not covered under Government Social Sector Schemes.

BRAZIL: The Bolsa Familia program provides financial assistance, the program has positively reduced poverty and improved social inclusion.

X. CONCLUSION

Social Security is a key aspect in ensuring economic and social justice to the unorganised workers. The Unorganised Workers's Social Security Act, 2008 and its integration under Code on Social Security, 2020 though shows progressive development of policy reforms, it still remains inadequate owing to regulatory and implementation gaps. The significant issue lies in ensuring access to benefits to vulnerable section of workers. Simplified registration, strong institutional framework is essential to achieve the intended goal. The collaborative effort by the Government, Employers and Employees plays a major role in strengthening social security mechanism. By reducing the gap between legal framework and its actual implementation results in inclusivity and maximising access to welfare schemes by the informal workers.

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