SOCIAL SECURITY FOR GIG WORKERS, WITH A SPECIAL FOCUS ON CAB DRIVERS

S Kamesh*

ABSTRACT

Cab aggregators like Uber have been widely accused of various offences lately, and one of them is their classification of 'drivers' as third-party contractors and not 'employees'. Aggregators do so, for two major reasons, one is to exempt themselves from any form of vicarious liability, for the acts of workers and the second reason is, to avoid the burden of providing social security benefits upon the workers as mandated by international and domestic labour laws. This article aims to explore the nature of the contract between aggregators and workers through decided case laws, regulation of these 'intermediaries' through various legislations, and new social security policies and laws that are introduced for 'gig/platform workers' in India.

INTRODUCTION

The main commotion started in 2015, when an Uber driver named Shiv Kumar Yadav, was sentenced to life by the Delhi High Court, for the offence of raping a passenger in the cab. It was shocking because as per the NCRB (2016) report, 38,947[1] women were raped that year and Delhi was dubbed to be the rape capital of India, the case received public outrage and people started becoming sceptical about taxi services, especially cab aggregators like 'uber' and 'ola'. Following the case, the Delhi government imposed a general ban on all taxi services[2] and for the first time brought 'aggregators' into the ambit of radio taxi licensing rules by modifying it and explicitly stating that "*Licensees, including app-based taxi aggregators like Uber, must abide by all relevant statutes, including the Motor Vehicles Act, 1988, and the Information Technology Act, 2000*".

Slowly, the veil of aggregators/intermediaries was lifted in different jurisdictions and Uber has had a history of being accused of unethical business practises, sexual harassment in the

*BA LLB, THIRD YEAR, SCHOOL OF LAW, SASTRA UNIVERSITY, THANJAVUR.

[1] https://www.hindustantimes.com/india-news/83-dip-in-crimes-against-women-in-2020-ncrb-report-101631730781414.html

[2] https://www.bbc.com/news/world-asia-india-30390691

workplace, suppression of the nature of employment of its drivers, wage disputes, evasion of local regulations and disregard for domestic laws of respective countries where they were operating. Various class action lawsuits were filed by uber drivers against Uber for not entitling them to various benefits. This curious case, brought attention to the 'status of drivers, working for cab aggregators' and whether these aggregators can be held liable for the acts of drivers, and whether these 'gig workers' are entitled to social security benefits or not. Through a series of judicial pronouncements, we can see how the position has evolved both in Indian as well as foreign jurisprudence.

In 2022, the district consumer forum of Thane district in *Kavita S. Sharma V. Uber India*[3] issued a landmark decision holding Uber liable for the acts of its drivers. The platforms have consistently stated and maintained that the workers are not employees but are 'independent contractors' and that they merely provide technological solutions to connect the needs and wants of society.

This decision has effectively held platforms liable for the acts of independent contractors/gig workers who otherwise would not want to classify the drivers as employees but as mere third-party contractors. There are two underlying reasons for such classification,

- Exemption from liability for the acts of the drivers in the course of employment;
- Resultant social benefits, need not be conferred upon them if they are not 'employees' we will move into the question of Uber's liability, whether the drivers are independent workers or employees of uber from this case.

The basic facts of the case are that due to the negligent act of the uber driver, the passenger had to miss her flight, the customer consequently sued 'uber' for the deficiency in their service under the 'Consumer Protection act', and uber partially acknowledged its liability while holding on to its global stance when it comes to being absolved from all forms of liability. A closer reading of the 'terms and conditions' agreement that the customer/rider encounters while booking, shows us that the status of drivers who are contacted are 'independent third-party contractors and not employees of the company'. And interestingly, the only body of law that governs the nature of such employment is the terms and conditions agreement.

[3] https://www.barandbench.com/news/litigation/consumer-forum-directs-uber-pay-20000-lawyer-who-missed-flight-due-delay-cab

"Uber does not guarantee the quality, suitability, safety, or ability of third-party providers. You agree that the entire risk arising out of your use of the services, and any service or good requested in connection herewith, remains solely with you, to the maximum extent permitted under applicable law''[4].

But the forum held 'uber' liable, the court's reasoning is based on the level of control and the appointment procedure; Uber can be held liable for the actions of its agents (i.e., its drivers). In order to determine this, the forum highlighted Uber's extent of control, which is more than just a facilitator.

- The right to compute and set the fare, over which the driver has no control,
- The right to charge more than the original agreement based on the additional services provided by the driver (like additional pickups),
- The fare is not directly paid to the driver but to the platform, which then pays the driver.

Despite finding Uber accountable for the actions of the driver, the ruling makes no mention of an employer-employee relationship. Now, coming to the question of whether these platforms can be held liable for the acts of employees of this nature,

EMPLOYEE OR INDEPENDENT CONTRACTOR?

The basic question is whether the 'employer' can be held liable for the acts of the employee and whether an employer can be held liable even for offences committed by 'independent contractors/gig workers' or not. We know that the principle 'Qui facit alium per se' applies to master–agent relations, and only when the act done by the independent contractor is non–delegable then the employer can be held liable. Direct supervision and control of employers- if there is no direct control over the course of the employment and the employer merely directs the work, then there is freedom and the person is an independent contractor and the employee has no control over the contractor. It is a 'contract for service' and the contractor has the autonomy to perform his functions.

An illustration would help us understand better how the liability changes when drivers are independent contractors and when drivers are employees. 'Z' is a driver who works for a cab service provider 'X' and there is a clear employer-employee relationship, 'Z' during the course

[4] https://www.uber.com/legal/en/document (Uber Terms and Conditions agreement)

JLRJS Journal of Legal Research and Juridical Sciences

of his employment acts negligently and commits an offence, here, 'X' can be held vicariously liable for the acts of its drivers. But when 'Z' is an independent contractor working for a platform 'X' which is a mere cab aggregator and not a cab service agency, the principle cannot be applied.

The general rule is that vicarious liability doesn't apply to independent contractors and such disclaimer clauses would exempt the liability of platforms like uber from being held accountable.

In ***Erik search v. Uber Technologies, Inc***.[5] – the court propounded the 'duck theory' where 'if one quacks, walks, swims like a duck, it will be termed as a duck' the principal can be made liable for the acts of the agent if his actions and character make the third person believe that his agent acted on behalf of him. It is reasonable for a normal customer to think that drivers working for Uber are employees of the platform and not otherwise. The court made Uber pay damages, as the driver had stabbed the passenger during the course of his employment. (District Court of Colombia)

Journal of Legal Research and Juridical Sciences

In ***Uber France V. Max***[6], the court opined that drivers are not self-employed contractors or agents but employees of the company. The test applied to determine the nature of work was based on the clientele, tariff, terms, and conditions of the employment. A driver, if he is able to develop his own clientele and not depend upon a platform, fix the tariff all by himself, and make the terms and conditions then is said to be an independent or self-employed worker. In the case of Uber, all of these three are controlled by 'Uber' and the nature of the relationship is more of an 'employer-employee' one because the driver is in a subordinate position. Contrarily, uber does not consider them employees. (Court de Cassation, the highest court in French judiciary)

In the landmark judgment ***Uber B.V. and ors. V. Aslam and ors.***[7] drivers working for Uber were declared 'employees of uber and not third-party contractors as to how uber classifies them, the ratio being- the amount of control and supervision uber has over the drivers. (Supreme court of U.K.)

[5] Civil Action No. 15-257 (JEB)
[6] Ruling n°374 – 4 march 2020 (Appeal n° 19-13.316)
[7] EWCA Civ 2748

Coming to the Indian jurisprudence, in ***Shive Kumar Yadav Vs. State of NCT of Delhi*** [8] [9], Uber was not held liable for the acts of the drivers, in the instant case the uber driver was convicted for the offence of rape against a passenger. This is because platforms argue that they are mere aggregators and not employers and they cannot be accountable, even if an offence is committed during the course of employment.

Indian courts have time and again opined that there can be no inexpugnable rule to determine the 'employer-employee' relationship and only the facts of the case can determine so. in ***Sushilaben Indravadan Gandhi and Ors. vs. The New India Assurance Company Limited and ors.***[10] the question was about differentiating between 'contract for service' and 'contract of service' to bring out the nature of work relations.

i. The presence of the right of the master to supervise and control the work done, not merely directing but also the manner in which the work has to be carried out

ii. Whether the work is integral to the employer's business, as seen in a contract of service, or if such work is just an accessory to the said business of the employer, as seen in a contract of service.

iii. Payment of wages by the employer to the worker or not

iv. Ownership of the assets, which is primary for the course of employment and who ultimately gains or incurs losses, in order to see if the business is being run for the employer or for one's own account.

v. To see if the employer has any economic control over the worker's subsistence, skill, and continued employment also known as the economic reality of control test in the American jurisprudence, a worker works for himself or for his employer can be brought out by this test.

vi. To determine whether the worker performs the work as a person in business or on his own account.

[8] CRL.A. 471/2016
[9] https://www.indiatoday.in/mail-today/story/uber-rape-case-shiv-kumar-yadav-gets-life-in-prison-271307-2015-11-03
[10] AIR 2020 SC 1977

vii. The three-tier test laid down by English judgements, deals with wage, degree of control, and other pliant tests based on circumstances.

These were the tests/criteria that were suggested by the court to find out the nature of the contract, or simply to distinguish between a 'contract of service' and a 'contract for service'. When we use these criteria, uber drivers appear to be more of 'employees' than 'independent contractors' contrary to how the liability clause exempts uber.

Laws that can hold aggregators responsible:

- "The Motor vehicle act, 1988 – the motor vehicle (Amendment) act of 2019 infused the meaning of aggregators, as defined in Section 1A of the Act, refers to a digital intermediary or marketplace for a passenger to connect with a driver for the purpose of transportation"[11]. It brings online-based cab service providers within the ambit of the motor vehicle Act, 1988.
- "The information Technology (Intermediary Guidelines and Digital Media Ethics code) Rules, 2021"[12] now governs cab aggregator platforms as 'intermediaries' and are consequently covered by the rules under which they may be held liable.
- "Consumer protection act, 2019"[13] – if taxi services provided by the cab aggregators are deficient in nature, the passengers can take to consumer forums and sue the aggregator for such services. The consumer protection act, and E-commerce rules 2020[14] would also make cab aggregators as a 'marketplace e-commerce entity' making them bound by it.

JLRJS Journal of Legal Research and Juridical Sciences

Although the context is about cab aggregators, in the case of ***Amazon sellers V. Vishwa Jit Tapia***[15], even for manufacturing defects, amazon (an intermediary) was held liable by the Punjab consumer disputes redressal commission by interpreting that amazon cannot be construed as a 'mere intermediary' because '' it optimizes, promotes and offers for sale and is not neutral or passive in its functions'', regardless of no proper vicarious liability, such intermediaries are being held accountable. The same logic can be extended to cab aggregators,

[11] The Motor Vehicles (amendment) act, 2019
[12] F. No. 16(4)/2020-CLES
[13] The consumer Protection act, 2019
[14] E-Commerce) Rules, 2020
[15] FA No544/2019 (Amazon sellers V. Vishwa Jit Tapia)

who act more than being an 'intermediary' and spend so much on promotions, marketing, and other activities.

Moving on, to the question of whether employers can be made liable for the acts of the independent contractors/gig – workers or whether they are 'employees' or 'gig workers' in the first place, there is another pertinent reason as to why platforms or aggregators don't want to classify drivers as their employees. If they are employees, then the employer is liable legally to provide social security and other benefits as evolved by both domestic as well as international labour laws.

When it comes to providing social security for gig workers, it is a relatively new concept and countries are just starting to recognize such schemes, so the employer is technically not bound to provide benefits or adhere to labour laws if they are grouped as 'independent contractors or simply gig workers.

In the U.K, the supreme court in the case of ***Uber BV and ors. vs. Aslam and ors.***[16], apart from classifying uber drivers as workers and not independent contractors, widened the scope for social security and other benefits to be conferred upon gig workers. Even self-employed workers are entitled to certain benefits by law and are construed as 'workers' for such reasons, to bring them under limb (b) of section 230 (3) of the U.K. Employment Rights Act, 1996[17].

As per the International Labour Organizations report on 'Ramifications of the said Judgement'[18], there have been developments in many countries in regards to providing benefits and labour protection laws being extended to platform workers as well

New Zealand and Australia have already widened the scope of statutes to extend occupational safety and health coverage to all workers. In Brazil, a judgement has confirmed the same objectives, i.e., to bring health and safety standards to platform workers. In France, accident insurance costs of self-employed workers are taken care of by the platforms that employ them. In Malaysia and Indonesia, injury and death benefits to workers of platforms have been initiated.

[16] EWCA Civ 2748
[17] U.K. Employment Rights Act, 1996
[18] 2021-III-LLJ (ILO) – ILO REPORT ON UBER B.V VS ASLAM CASE

In India, In 2020, a writ petition was filed by the Indian Federation of App-Based Transport Workers (IFAT)[19] before the supreme court by petitioners that the agreements between the aggregators and gig workers violate fundamental rights (articles 14, 21, 23) of the gig workers, enshrined in the constitution of India. The IFAT is basically the trade union formed to represent workers not just belonging to Ola and Uber but all service aggregators such as Swiggy, and Zomato as well. The arguments put forth by them are pertinent, although it is not settled law. It helps us understand how the landscape of Indian laws governing gig workers can be put to change if the courts favour the petitioners. Some of the reliefs/arguments put forth are:

- Several ministries of the central government including the Ministry of Commerce and Industry, Ministry for labour and employment, and Ministry of Road transport and highways are violating Article 23 because they do not recognize gig workers as 'workers' under social security laws.
- Direction to the government, to widen the scope of "section 2 (m) of the Unorganised workers' social welfare security Act, 2008" and include gig workers also (this will be replaced by the new code on social security,2020)
- Direct the government to include registration of gig workers on the E- SHRAM portal (all the social security benefits of unorganized workers will be delivered through this eSHRAM portal, accident insurance coverages, assistance during situations like national pandemics so by providing access to this portal, even gig workers can be brought into the fold of Ministry of Labour and employment)
- 'PM Garib Kalyan Ann Yojana' can be extended to gig workers also, so as to provide them with food grains.
- All financial institutions complying with the RBI, providing relaxations on loan repayments should extend the same to gig workers and their vehicles should not be seized due to failure of repayment because it is crucial for their survival
- Service aggregators should deposit a portion of their annual turnover, along with government contribution as cess for the functioning of social security schemes.

Journal of Legal Research and Juridical Sciences

[19] https://www.scobserver.in/reports/gig-workers-access-to-social-security-the-indian-federation-of-app-based-transport-workers-ifat-v-union-of-india-writ-petition-summary/

- Service aggregators should comply with labour laws governing insurance, minimum wages, working hours, and redressal mechanisms. And specifically, the Motor vehicle Aggregator Guidelines, 2020.

Since this case was filed during the covid -19 Pandemic situation, the reliefs sought were of such nature. The gig- economy, and gig – workers were the most hit by the extended lockdown periods In India and across the globe. The service aggregators have control and supervision over the gig workers to a greater extent, indicative of an employer-employee relationship, there are some pertinent cases that were cited by the petitioners to further their arguments,

Dhrangadhara Chemical works Ltd. V. state of Saurashtra[20], a "control over the execution of work indicates employer-employee relationship". ***Olga Tellis v. Bombay Municipal Corporation***[21], the right to livelihood was recognized as part of the right to life under article 21 and it is inclusive of providing decent conditions to work. It is because of the assumption that gig workers are not workers, employers are depriving them of social security, a fair working environment.

The petitioners also put forth the argument that the aggregators are exploitative in nature by imposing minimum hours of work and there is an inability to negotiate the terms of the contract, gig workers are not allowed to place their demands and are forced to comply with industry standards, which in turn amounts to forced labour.

JLRJS Journal of Legal Research and Juridical Sciences

CODE ON SOCIAL SECURITY, 2020

The government introduced the new 'code on Social security in 2020'[22] , which has now recognized gig workers as 'platform workers and defines [23] them as " persons engaged in or undertaking platform work, 'platform work' in turn means a work arrangement outside of a traditional employer-employee relationship in which organisations use online platforms to access other organisations or individuals to solve specific services or any such activities in exchange for payment", it is essential to note that there is no need to grant the gig workers the status of 'employees' in order to make them avail benefits, the statute is clear that gig workers are directly entitled so.

[20] AIR 1957 SC 264: (1957) 1 LLJ 477 (SC)
[21] 1985 SCC (3) 545
[22] CG-DL-E-29092020-222111
[23] Section 2(35), Code on Social Security 2020

Chapter IX contains the social security for unorganised workers, gig workers, and platform workers explicitly and the code deals with matters of life and disability coverage, health and maternity benefits, old age protection, accident insurance, and creche. The code also provides funds for gig workers, the employers, (gig aggregators) have to contribute 1 – 2 percent of the annual turnover and it is limited to 5 percent of the amount paid by an aggregator to the workers.

National Social Security Board is the body that governs the implementation of the code, and it is vested with the function of monitoring and regulating the same. The board has adequate representation from all parties to an 'employment' including the platform workers. five representatives from the aggregators and five from the gig/platform workers will be part of the board apart from five representatives from the government and the director general of ESIC (employees state Insurance corporation). This code makes the registration compulsory for both gig workers and platform workers to avail of the benefits.

NITI AAYOG

NITI Aayog's report[24] on 27th, June 2022 released a report on India's Booming Gig and platform economy, which in turn cites the current reports by international forums on India's gig economy. "The economic survey 2020-21 has noted that India has already emerged as one of the world's largest countries for Flexi-staffing (gig and platform work) the ILO's 2021 World Employment and Social Outlook report states that the number of digital labour platforms has grown fivefold over the last decade".

It was estimated that "7.7 million workers were engaged in the gig economy, (2020-21) they constituted to around 1.5% of the total workforce in India, and it is expected to ride up to 23.5 million workers by 2029-30, 4.1 % of total livelihood in India" by then.

Chapter 6 of the report specifically deals in great detail, with the social security policies that can be adapted to the gig workers and presents global examples where countries such as the US, UK, Singapore, South Africa, and Hong Kong have already made laws to confer such benefits.

[24] https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf