

A CRISIS IN LEGAL PROTECTION OF INTER-STATE MIGRANT WORKERS

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Abstract

This paper seeks to examine the crisis in providing legal protection and social security to inter-state migrant workers. It identifies the shortcomings and lacunae in the existing provisions in the labour legislation relating to inter-state migrant workers which failed to provide legal protection and social security to them. The paper also examines how failure on the part of enforcement officers to enforce the relevant labour legislation led to crisis. The author argues as to why should we have a law which is only on paper. The author has asserted that laws are enacted for being adhered to and not for being flouted. The author besides highlighting the defects and shortcomings in the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act and the Unorganized Social Security Act, 2008 suggested a series of measures including amendment in relevant labour legislation to bring effective enforcement of the Act and to make them viable.

I The context of migrant labour crisis

INTER-STATE migrant workers are most neglected and exploited section of human labour. The primary reason of migration is lack of employment opportunity in their states. Thus majority of workers migrate from the State of the Jharkhand, Bihar, Uttar Pradesh, Madhya Pradesh, Rajasthan, Uttarkhand, Odisha and West Bengal to the State of Maharashtra, Gujarat, Delhi; Karnataka; Punjab, Haryana, Kerala, Karnataka, Tamil Nadu and Telengana in search of job.

The migrants are landless labourers, seasonal workers, building and other construction workers, domestic servants, hawkers, unemployed or do not have regular employment. Most of them are poor, illiterate and unskilled. But in the process of migration and during their employment they are exploited by contractors, middle men, employers and those who come in contact with them. It has also been reported that these migrant labourers become the victim of payment of low wages and inhuman working conditions.¹

A survey of migrant workers reveals that they have been working in factories, building and other construction work, hotel and restaurants, brick kilns, salt pans, stone quarries, agriculture sector. Some of them engage themselves as street vendors and taxi/auto drivers. Among them women generally take up employment as domestic servants or

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1 See Wikipedia, "Indian Migrant Workers during the COVID -19 pandemic (2020)", available at: http://en.m.wikipedia.org/wiki/covid-19_in_India (last visited on (May 20, 2020)).

street vendors. According to the 2011 Census, India has 5.6 crore inter-state migrants workers. But as per the United Nation News India dated June 4, 2020 the number of migrant workers is more than 10 crore. However no official statistics is available about the number of inter –state migrant workers. In view of this the Supreme Court² in its orders dated June 9, 2020 directed, the states and union territories to prepare a complete list of migrant workers who have reached their home states and mention the work they were engaged in prior to the lockdown.

On March 11, 2020 the World Health Organization (WHO) declared COVID-19 a pandemic. Two weeks later the Prime Minister of India declared a nationwide lockdown on March 25, 2020 limiting movement of the people as a preventive measure against the COVID-19. Like many other countries, the corona virus has had an immense impact on people and working class. Among them worst affected were inter-state migrant workers. They were denied wages due to them or were paid less wages and even they were evacuated from quarters allotted to them. Further a large number of migrant workers and their family members were in the brink of starvation and had no food to eat. In these circumstances a large number of migrant workers and their family proceeded on foot hundreds of miles to reach their native villages because no transport facilities were available due to lockdown. In this process hundreds of persons lost their lives due to hunger and accident. Even then millions of workers and their family were still stranded on the road in the hope of getting some transport facilities. But no such facilities were available till April 29, 2020, the date on which the Ministry of Home Affairs allowed states to co-ordinate individually to transport migrants using buses. Two days later on May 1, the Indian Railways resumed passenger movement for the first time after lock down with *Shramik* special trains to facilitate movement of migrants stranded to their home state. But the transport and rail facilities could hardly meet the requirements of majority of stranded migrants.

In the aforesaid circumstance a three-judge bench of the Supreme Court took on May 26, 2020 took a *suo motu* cognizance of media reports about the aforesaid state of affairs of migrant workers. After due examination of the situation the court directed the Central Government that:

- (i) As and when the state governments put in a request for trains, railways has to provide them.
- (ii) no fare for train or bus should be charged from migrant workers.

2 On June 9, 2020 the Supreme Court directed the states /union territories that the once they arrive at their destinations they should gather details of migrant workers, the nature of their skill, and place of their earlier employment at the village level, block level and district level. Further counseling centre be set up which should provide these migrants information about government schemes and avenues of employment so that this workforce can be utilised as a resource. The court also directed that a list of all such schemes, including employment has to be tendered by Centre and states to the court in two weeks

- (iii) the stranded migrant workers should be provided food and water during their railway journey.
- (iv) wherever migrant workers are found walking on the roads, they should be taken to shelter home and be provided food and all facilities.
- (v) once they arrive at their destinations, the states should gather details of migrant workers, the nature of their skill, and place of their earlier employment at the village, block and district levels.
- (vi) the counseling centres be also set up by the state government to provide information to migrant workers about government schemes and avenues of employment so that they can be utilised such a resource.
- (vii) governments to withdraw charges against migrant workers who broke lockdown measures.

The aforesaid alarming situation raises several issues. (i) Why legal protection and social security benefits were not provided to inter- state migrant worker under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (ISMW Act)? (ii) Why enforcement machinery provided under the said Act and other labour legislation did not intervene? (iii) Why the cess collected under the Building and Other Construction Workers Welfare Cess Act, 1996 was not made available to the building and other construction workers who constituted majority of inter- state migrant workers? (iv) Why Building and Other Construction Workers Welfare Board failed to provide financial assistance to the building and other construction workers and remained a silent spectator? In order to deal with the aforesaid issues it is necessary to examine the rights of inter-state migrant workers under the Constitution, Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 and the Unorganized Workers Social Security Act, 2008.

This paper seeks to examine the impact of COVID-19 and lockdown on migrant workers. The analysis focuses how the inter-state migrant workers were deprived of the rights conferred upon them under the Constitution, Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 and Unorganized Workers Social Security Act, 2008.

II Rights of inter-state migrant workers under the Constitution

Right to livelihood and right to work

Can a person (including migrant workers) live without the means of livelihood? This issue was examined in *Olga Tellis v. Bombay Municipal Corporation*.³ The court while dealing

³ AIR 1986 SC 180. See also *Delhi Development Horticulture. Delhi Administration* Delhi AIR 1992 SC 789 the Supreme court ruled that broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right to work.

with migrant workers ruled that the right to life under article 21 of the Constitution includes the right to livelihood because, no person can live without the means of livelihood. Having said so the court pointed out that workers migrate because they have no means of livelihood in the villages. The motive force behind their desertion of their hearths and homes in the villages is the struggle for survival, that is, the struggle for life. The court added that so unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live. That they can do, namely, eat, only if they have the means of livelihood. Only a handful can afford the luxury of living to eat. But it is a hard reality, as evident from media report, that during COVID-19 the migrant were deprived of such right.

Right to live with human dignity and free movement with fellow human beings

Are the workers (including migrant workers) entitled to live with human dignity? This issue was also examined in *Bandhua Mukti Morcha v. Union Of India*,⁴ where the Supreme Court held that right to live with human dignity, enshrined in article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of article 39 and articles 41 and 42 and, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum protection which must be provided to enable a person to live with human dignity. Neither the Central Government nor any state government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials.

Right to shelter

Another issue relates to right to shelter. This is necessary for inter-state migrant workers because they leave their home State to work in the other state. *Dealing with this issue a bench of three Judges of the Supreme Court in Chameli Singh v. State of U.P.*⁵ held that the right to shelter is a fundamental right available to every citizen and it was read into article 21 of the Constitution of India as encompassing within its ambit, the right to shelter to make the right to life more meaningful. Again in *Ahmedabad Municipal Nagarpalika v. Navabkhan Gulabkhan*,⁶ the Supreme Court held that article 19(1) (e) of the Constitution which guarantees all citizens fundamental rights to settle down and reside in any part of the Bharat accords is a fundamental right. Here we would like to mention that the interstate migrant workers by and large have been denied such right. This is all the more during COVID -19 and lockdown.

4 1984 SCR (2) 67.

5 (1996) 2 SCC 549.

6 (1997) 11 SCC121.

Right to health

The right to health *i.e.*, right to live in a clean, hygienic and safe environment and medical care to protect the health and vigor of a worker while in service or post retirement have been held to be a fundamental right under article 21 of the Constitution and therefore this right cannot be taken away by labour legislation.⁷ Further every state has a duty to provide at least the minimum condition ensuring human dignity. However the study reveals that migrant workers during COVID-19 were deprived of from availing this right.

Right to minimum wage

Are the migrant workers entitled to minimum wage? This issue was examined in a number of decided cases by the Supreme Court. The Supreme Court in *Crown Aluminum Works v. Their Workmen*⁸ and in *Express Newspapers Pvt. Ltd v. Union of India*,⁹ ruled that “(n)o industry has a right to exist unless it is able to pay its workmen at least a bare minimum wage.”

In *People’s Union for Democratic Republic v. Union of India*¹⁰ the Supreme Court ruled that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words ‘forced labour’ under article 23 of the Constitution. Such a person would be entitled to come to the court for enforcement of his fundamental right under article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be ‘forced labour’ and the breach of article 23. Thus payment of less than the minimum wage for labour or service provided by a person falls within the scope and ambit of the words ‘forced labour’ under article 23 of the Constitution.

A survey of the aforesaid decisions reveals that inter-state migrant workers like other citizen have a fundamental right of livelihood, right to work, right to shelter, right to health and right to get minimum wage. They are entitled to approach the Supreme Court or high court for enforcement of their fundamental right. However a survey of decided cases and studies conducted by various organization reveal that most of inter–state migrant workers are either not aware or they do not want to fight for their rights because of poverty or other family problems and responsibilities.

7 *Occupational Health and Safety Association v. Union of India* (2014) 3 SCC 547.

8 ([1958] S.C.R. 651.

9 (1961)2 LLJ 339.

10 (1982) 2 LLJ 454.

III Rights of inter-state migrant workers under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

In order to understand the rights of inter-state migrant workers under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (ISMW Act) it is necessary to know (i) where the Act is applicable (ii) Who is a interstate migrant workman?

Applicability of the Act

The Act applies:

- (i) in every establishment¹¹ in which five or more inter-state migrant workmen (whether or not in addition to other workmen) are employed or who were employed on any day of the preceding twelve months;
- (ii) Every contractor¹² who employs or who employed five or more inter-state migrant workmen (whether or not in addition to other workmen) on any day of the preceding twelve months.

In July 2019 the Code on Occupational Safety, Health and Working Conditions Bill (OSH Code) was introduced in the Lok Sabha. The Code subsume ISMW Act but unlike the ISMW Act the Code seeks to apply to (i) every establishment in which twenty or more contract labour are employed or were employed on any day of the preceding twelve months through contractor; (ii) every manpower supply contractor who has employed on any day of the preceding twelve months twenty or more contract labour.¹³ However section 45 of the Code provides that it shall not apply to sections 59 to 62 of the Code which relates to facilities, displacement allowance, journey allowance and past liabilities respectively.

Who is interstate migrant worker

Section 2(e) defines “inter-state migrant workman” to mean: “any person who is recruited by or through a contractor in one State under an agreement or other

11 S. 2(d) defines “establishment” to mean (i) any office or department of the government or a local authority; or (ii) any place where any industry, trade, business, manufacture or occupation is carried on.

12 S. 2 (b) defines “contractor”, in relation to an establishment to mean a person who undertakes (whether as an independent contractor, agent, employee or otherwise) to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, by the employment of workmen or to supply workmen to the establishment. It includes a sub-contractor, *Khatadar*, *Sardar*, agent or any other person, by whatever name called, who recruits or employs workmen.

13 The OSH Code was introduced in the Lok Sabha in July, 2019 but it was referred to Parliamentary Standing Committee which has submitted its report in 2020.

The Code incorporates the essential features of the 13 enactments including the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979.

arrangement for employment in an establishment in another State, whether with or without the knowledge of the principal employer in relation to such establishment”. From the above it is evident that a person cannot be said to be “inter-State migrant workman” if he is recruited or engaged from one state to another state for employment in his establishment not by or through contractor but directly by the employer. Thus the definition excludes millions of migrant workers out of the purview of the Act. In order to meet the aforesaid shortcoming the Occupational Safety, Health and Working Conditions Code Bill, 2019 OSH Code¹⁴ has widened the scope of inter-state migrant workers to include therein the workers recruited or engaged by an employer directly, from one state to another state for employment in his establishment.¹⁵ There is yet another aspect which needs to be highlighted. Unlike the OSH Code, section 2 (g) the Code on Wages 2019¹⁶ defines “contract labour” to mean a worker who shall be deemed to be employed in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer *and includes inter-state migrant worker... (emphasis added)*

A perusal of the aforesaid definition reveals that contract labour includes inter-state migrant worker employed by or through a contractor. Thus a worker is entitled not only wages but also bonus and other benefits. However, the approach to deal with migrant labour under the aforesaid two Codes are at variance.

When and how interstate migrant workman be employed

The ISMW Act provides that establishment proposing to employ inter-state migrant workmen will be required to be registered with registering officers. Further every contractor who proposes to recruit or employ inter-state migrant workmen will be required to obtain a license from the specified authority both of the state to which the workman belongs (home state) and the state in which he is proposed to be employed

14 *Ibid.*

15 OSH Code, s. 2(zd) defines “inter-state migrant worker” means any person who is recruited by—

(i) an employer in one state for employment in his establishment situated in another state; or

(ii) through a contractor in one state for employment in an establishment in another state,

under an agreement or other arrangement for such employment and draws wages not exceeding the amount notified by the Central Government from time to time.

16 The Code having been passed by both the houses of the Parliament received the assent of the President of India on Aug. 8, 2019 . However till date it has not come into force. The Code on Wages seeks to consolidate four the then labour legislation relating to wages, namely, (i) the Minimum Wages Act, 1948; (ii) the Payment of Wages Act, 1936; (iii) the Payment of Bonus Act, 1965; and (iv) the Equal Remuneration Act, 1976 and the matters connected there with or incidental thereto into one Code.

(host state). Thus ISMW Act only provides for registration of establishment and license by contractor. The Act, however does not provide for registration of interstate migrant workers. In the absence of such a provision no data on the number of migrant workers in each state is available and, therefore, the inter-state migrant workers are not able to avail the benefits under various welfare scheme issued by the government available to other employees. In order to protect the interest of workers it is necessary that each of the interstate migrant workers be identified as directed by the Supreme Court. Further database must be collected regarding interstate migrant workmen and they be provided with a smart card for their identity so that benefits could reach them whenever and wherever they may be working. For this purpose there is a need to put in place and strengthen the registration machinery, both for the registration of establishments as well as registration of inter-state migrant workers. Further like registration of establishment and licensing of contractor the registration of migrant workers be also made compulsory.

What are the responsibilities, duties and liabilities of contractor and principal employer towards inter-state migrant workers

A contractor shall be responsible for payment of wages to each inter-state migrant workman employed by him and such wages shall be paid before the expiry of the prescribed period.¹⁷ Further he must ensure that disbursement of wages be made in the presence of the authorised representative of the principal employer.¹⁸ On the other hand it is the duty of every principal employer to nominate a representative to be present at the time of disbursement of wages by the contractor and such representative should certify that the wages were paid in prescribed manner. But if the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of the wages in full or the unpaid balance due, as the case may be, to the inter-state migrant worker employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. Likewise if displacement allowance, journey allowance or any other allowances¹⁹ or facilities is not provided by the contractor to

17 *Supra* note 15, s.17(1).

18 *Id.*, s. 17(3).

19 It shall be the duty of every contractor employing inter-state migrant workmen in connection with the work of an establishment to which this Act applies,—(a) to ensure regular payment of wages to such workmen;(b) to ensure equal pay for equal work irrespective of sex;(c) to ensure suitable conditions of work to such workmen having regard to the fact that they are required to work in a state different from their own state;(d) to provide and maintain suitable residential accommodation to such workmen during the period of their employment;(e) to provide the prescribed medical facilities to the workmen, free of charge;(f) to provide such protective clothing to the workmen as may be prescribed; and (g) in case of fatal accident or serious bodily injury to any such workman, to report to the specified authorities of both the states and also the next of kin of the workman.(s. 16)

benefit of such workman, such allowance shall be paid, and such facility shall be provided by the principal employer within the prescribed period and may recover amount spent from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. The Act²⁰ among other duties also imposes an obligation upon the contractor, in case of fatal accident or serious bodily injury to any such workman, to report to the specified authorities of both the states and also the next of kin of the workman. Further every contractor and every principal employer must ensure that any loan given by them to any inter-state migrant workman does not remain outstanding after the completion of the period of employment of such workman under the said contractor or, as the case may be, in the establishment of such principal employer. If any such amount remain unsatisfied before the completion of such period it would be deemed to have been extinguished and no suit or other proceeding shall lie in any court or before any authority for the recovery of such debt or any part thereof.²¹ Every principal employer and every contractor are required to maintain the registers and records wherein particulars of the inter-state migrant workmen employed, the nature of work performed by such workmen, the rates of wages paid to the workmen and such other particulars must be mentioned.²² The ISMW Act also prescribes penalties for violation of any provisions of the Act.

Out of the aforesaid duties the duty to report to the specified authorities of both the states and also the next of kin of the workman in case of fatal accident or serious bodily injury of any such workman requires a careful scrutiny. Here it may be mentioned that the ISMW Act does not refer to the applicability of the provisions of the Employees' Compensation Act, 1923 in case of accident arising out of and in the course of employment. It is therefore suggested that such a provision must be specifically included in the ISMW Act. It is also suggested that the provisions of Employees' State Insurance Act, 1948 be made available to establishments employing 10 or more interstate migrant workmen on payment of nominal contribution. Further migrant workers particularly building and construction workers who constitute majority of migrant workers be brought under the Employees' Provident Funds and Miscellaneous Act, 1952 and the necessary contribution be paid out of the cess collected under the Building and other construction workers and building and Other Construction Workers Welfare Cess Act, 1996.

What are the rights of inter-state migrant workmen

The ISMW Act confers following rights upon the inter-state migrant workmen:

20 *Supra* note 15, s. 16(g).

21 *Id.*, s. 19.

22 *Id.*, s. 23.

Displacement allowance

Every inter-state migrant workman is entitled to receive at the time of recruitment, a displacement allowance equal to 50 per cent of the monthly wages payable to him or 75 rupees, whichever is higher. Such allowance is non refundable and shall be in addition to the wages or other amounts payable to him.²³

Journey allowance

Every inter-state migrant workman is entitled to receive journey allowance of a sum not less than the fare from the place of residence of the inter-state migrant workman in his state to the place of work in the other state/ This amount shall be paid by the contractor to the workman both for the outward and return journeys and such workman shall be entitled to payment of wages during the period of such journeys as if he were on duty.²⁴ However it has been reported that in many cases inter-state migrant workman has not been paid fare for return journey.

Right to receive residential accommodation, medical facilities and protective clothing

Every inter-state migrant workman is entitled to receive (i) suitable residential accommodation during the period of their employment (ii) prescribed medical facilities to the workmen, free of charge and (iii) such protective clothing to the workmen as may be prescribed. The contractor is also required to provide and maintain the facilities and in case of fatal accident or serious bodily injury to any such workman report to the specified authorities of both the states and also the next of kin of the workman.²⁵ However it has been reported that in many cases inter-state migrant workman has not been provided suitable residential accommodation during the period of their employment.

Right to raise industrial dispute

The inter-state migrant workman is entitled to raise an industrial dispute in the state where he is employed but if he has returned to the state wherein the recruitment was made then he can also make an application to the state wherein the recruitment but such dispute must be made before the expiry of six months from the date of his return.²⁶ However in practice such right was rarely exercised.

Rights to get wages

The inter-state migrant workman are entitled to the same wage rates which is paid for same or similar kind of work by any other workman in that establishment.²⁷ In other

23 *Id.*, s. 14.

24 *Id.*, s. 15.

25 *Id.*, s. 16.

26 *Id.*, s. 22.

27 *Id.*, s.13(1) (a).

cases they will get wages prescribed by the appropriate government but such wages shall not be less than the wages fixed under the Minimum Wages Act, 1948.²⁸ Further such wages shall be paid in cash. Entitlement of holidays, hours of work and other conditions of service the inter-state migrant workman are entitled to the same number of holidays, hours of work and other conditions of service which are applicable to such other workman in such establishment.²⁹

IV Enforcement of the ISMW Act and problems involved therein

Having discussed the rights of inter-state migrant workers it is necessary to examine as to how these rights are protected and what are the problems involved therein. The ISMW Act³⁰ provides for inspection machinery for enforcement of the Act. It also authorises the state/Union Territory of originating states of migrant labour in India to order its officers to hold appropriate inquiries within the limits of the recipient states regarding enforcement of the ISMW Act. However no such order shall be issued without the concurrence of the government of the state in which such workmen are employed or where the establishment falls under central sphere, without the concurrence of the Central Government. But the Supreme Court in *Damodar Panda v. State of Orissa*,³¹ held that no recipient (host) state shall place any embargo or hindrance in such process because the it is necessary for effective implementation of the Act. But it is unfortunate that no such order was made by originating state of migrant workers to inquire about migrant labour or to find out whether the ISMW Act is being implemented during lockdown. Moreover it is also doubtful whether either home state or host state even thought of applying the provisions of the Act during and after lockdown. It is a hard reality that inter-state migrant workmen were even aware of the legal protection provided under the ISMW Act. Indeed the Act only remains on paper. In this connection it may be mentioned that while dealing with the inter-state migrant workers the Supreme Court in *Bandhua Mukti Morcha v. Union of India*³² observed that the central legislation of Inter State Migrant Workmen Act, 1979 is being most flagrantly violated.

Several reasons may be accounted for non-enforcement:

- (i) Under the ISMW Act only those persons are inter-state migrant workman who is recruited by or through a contractor in one state for employment in an establishment in another state. Thus the persons who is recruited by employer from another state would not be covered under the Act because they are not inter-state migrant workman.

28 *Id.*, s.13(1) (b).

29 *Id.*, s.13(1) (a).

30 *Id.*, s. 22(3) of ISMW Act.

31 (1990) 4 SCC 11.

32 AIR 1984 SC 802; 1984 SCR (2) 67.

- (ii) The contractors who recruits persons in one state for employment in an establishment generally do not possess a valid license. This is evident from the report of the Parliamentary Standing Committee on the ISMW Act which while considering the amendment bill on ISMW Act in 2011 mentioned that when the Ministry of Labour and Employment was asked about the number of reported cases where the principal employers/ contractors hire migrant labour without the licences /approval of the appropriate Government and the action taken against them, the Ministry informed that there were 25 principal employers and 83 contractors and action against them was initiated by way of filing complaints against the erring employers in the appropriate court.
- (iii) While the contract labour who are generally employed in organized sector migrant labour are generally employed in unorganized sector.
- (iv) A large number of migrant workers are self employed such as street vendors, domestic servant, taxi or auto drivers.
- (v) Most of the migrant labour are illiterate and are not aware of their legal rights.
- (vi) A good number of inter-state migrant workers are employed in agriculture during harvesting season or at the time of cutting of crops and leave thereafter. The agriculture sector is not covered under establishment and therefore the Act is not applicable.
- (vii) Women who constitute a large proportion of migrant worker are self employed as they work as domestic servant which is not covered under any labour legislation.
- (viii) Majority of workers work in building and other construction work are engaged and brought by his fellow skilled workers or middleman from outside the state and therefore they are not covered under the Act.
- (ix) The inspection machinery are overburdened as they are required to enforce a number of labour legislation in organized sector and therefore they are least concerned about the enforcement of the ISMW Act.

V Effect of non-observance of the provisions of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

The Supreme Court in *People's Union for Democratic Republic v. Union of India*,³³ ruled that that non-observance of the provisions of the ISMW Act, 1979 is violative of article 21 of the Constitution. We now turn to examine whether inter-state migrant workmen are entitled to any social security under the existing legislation or schemes launched by the government.

33 (1982) 2 LLJ 454.

VI Right to social security of inter -state migrant workman under the Unorganized Workers' Social Security Act, 2008

The Unorganized Workers' Social Security Act, 2008, which came into force with effect from May 16, 2009, seeks to provide social security and welfare to the unorganized workers and provides for other matters connected therewith or incidental thereto. The term 'unorganised worker' has been defined under the Unorganised Workers' Social Security Act, 2008 (UWSS Act) as 'a home based-worker, self employed worker or a wage worker in the unorganised sector and includes a worker in the organised sector who is not covered by any of the Acts mentioned in scheduled II of its Act'. The wage worker³⁴ includes a migrant worker. Thus migrant workers are entitled to social security benefits under the said Act.

Social security benefits under the Act

The UWSS Act empowers the Central Government to formulate and notify, from time to time, suitable welfare schemes for unorganized workers on matters relating to (a) Life and disability cover; (b) health and maternity benefits; (c) old age protection; and (d) any other benefit as may be determined by the Central Government. Further section 3(4) provides for formulation of welfare schemes relating to (i) provident fund, (ii) employment injury benefit, (iii) housing, (iv) educational schemes for children (v) skill up gradation of workers, (vi) funeral assistance and (vii) old age homes.³⁵

Social security schemes

The Act also included ten schemes, namely, (i) Indira Gandhi National Old Age Pension Scheme (ii) National Family Benefit Scheme (iii) Janani Suraksha Yojana (iv) Handloom Weavers' Comprehensive Welfare Scheme (v) Handicraft Artisans' Comprehensive Welfare Scheme (vi) Pension to Master Craft persons (vii) National Scheme for Welfare of Fishermen and Training and Extension (viii) Janshree Bima Yojana (ix) Aam Admi Bima Yojana and Rashtriya Swasthya Bima Yojana (RSBY).³⁶ These schemes mentioned in Schedule I shall be deemed to be the welfare schemes.

A perusal of the aforesaid schemes reveals that all the above schemes were available prior the commencement of the Act. Further the scheme mentioned under aforesaid item numbers 4 to 7 are meant for special categories. Further none of the aforesaid schemes are meant exclusively for unorganized workers. The above schemes are generally

34 Unorganized Workers Social Act, 2008 (n) defines wage worker to mean a person employed for remuneration in the unorganized sector, directly by an employer or through any contractor, irrespective of place of work, whether exclusively for one employer or for one or more employers, whether in cash or in kind, whether as a home-based worker, or as a temporary or casual worker, or as a migrant worker, or worker employed by households including domestic worker, with a monthly wage of an amount as may be notified by the Central Government

35 S. 3 (1).

36 S. 3(2).

applicable to persons below poverty line. However the RSBY is more close to unorganized workers and, therefore requires elucidation. It was the national health insurance scheme. It provided for cashless health insurance including maternity benefit cover of Rs. 30,000/- to below poverty line (BPL) families (a unit of five) in the unorganized sector per annum on family floater basis. Later RSBY Scheme, *inter alia*, was extended to building and other construction workers, street vendors, beedi workers and domestic workers. Even though migrant workers were not specifically mentioned in extended category but all the aforesaid workers fell under migrant workers.

On September 23, 2018 the *Ayushman Bharat Yojana/ Pradhan Mantri Jan Arogya Yojana* (PM-JAY) was introduced which seeks to provide a health cover of Rs. 5 lakhs per family per year for secondary and tertiary care hospitalization. It subsumed the then RSBY which was launched in 2008. The coverage under PM-JAY includes families that were covered in RSBY but are not present in the SECC 2011 database. PM-JAY is fully funded by the government and cost of implementation is shared between the Central and state governments. But unlike RSBY there is no cap on family size or age of members. Further pre-existing diseases are covered from the very first day. Since RSBY scheme has been subsumed in this scheme would also cover to building and other construction workers, street vendors, bedi workers, domestic workers who are mostly interstate migrants.

In 2019 the Government of India brought a pension scheme known as the *Pradhan Mantri Shram Yogi Maandhan, 2019* (PM-SYM). This scheme is meant for unorganized worker under the Unorganised Workers' Social Security Act, 2008 (UWSS Act). It is a voluntary and contributory pension scheme on 50:50 basis. Under this scheme each subscriber shall receive minimum assured pension of Rs 3000/- per month after attaining the age of 60 years and family pension. This scheme came into force on the February 15, 2019. The scheme, *inter alia* covers those unorganized workers who are working or engaged as home based workers, street vendors, mid-day meal workers, head loaders, brick kiln workers, cobblers, rag pickers, domestic workers, washer men, rickshaw pullers, landless labourers, agricultural workers and , among others construction workers. However, those unorganized workers who are covered under the National Pension Scheme, the Employees' State Insurance Scheme or Employees' Provident Fund Scheme would not be eligible under this scheme. Further workers who are income-tax payee are also not eligible. Under the scheme the unorganized worker who wishes to join the scheme shall not be less than 18 years of age but not exceeding 40 years. In order to avail the benefit the worker should also have a savings bank account in his/her name and an Aadhaar number.

Registration of workers and issuance of smart card

The UWSS Act imposes an obligation upon the district administration to register every unorganized worker and issue an identity card / smart card carrying a unique

identification number which shall be portable. Further the state government may set up such workers' facilitation centres to disseminate information on available social security schemes, facilitate and assist in registration and assist unorganized workers to avail the benefits of social security schemes.

Administration of the Unorganised Workers Social Security Act, 2008

In order to administer the provisions of the aforesaid Act the Central Government is empowered to constitute the National Social Security Board to be chaired by Union Minister for Labor and Employment. The Commission is required to (a) recommend to the Central Government suitable schemes for different sections of unorganized workers; (b) advise the Central Government on such matters arising out of the administration of this Act; (c) monitor social welfare schemes for unorganized workers administered by the Central Government; (d) review the progress of registration and issue of identity cards to the unorganized workers; (e) review the record keeping functions performed at the State level and (f) review the expenditure from the funds under various schemes.

At the state level, the state government is empowered to constitute state social security board for the purpose of implementation of the Act. The composition and functions of state social security board are similar to that of the National Social Security Board.

Problems involved in implementation of the Unorganised Workers' Social Security Act, 2008.³⁷

Even though the provisions of the above Act is applicable to interstate migrant workman it is unfortunate that most of the unorganized workers have been registered under the Act. Further the Act suffers from a number of infirmities such as (i) the Act confers upon the National Social Security Board a limited power to recommend, advise and monitor the social welfare scheme. Thus (i) the board has no power to implement, or enforce social security (ii) there is no machinery for redressal of grievances of unorganized workers (iii) The Act only provides the skeleton and does to provide effective machinery for enforcement of the Act (iv) all the schemes mentioned in the Act are applicable to persons below poverty line or to certain specified trades but not specifically to unorganized workers (v) all the ten schemes (except PM-SYM) provided under the Act are implemented by various agencies specified therein. Further each scheme prescribe different criteria.

How to make Unorganized Social Security Act, 2008 viable

Coming to the administration of the Act it may be mentioned that the National Social Security Board was set up on August 18, 2009. But only some States like Karnataka,

³⁷ For details See, S.C. Srivastava, *Legal Protection and Social Security in Unorganized Sector* (The book Line (2017).

West Bengal, Chhastisgarh and Assam have constituted State Social Security Board and framed Rules under the Unorganized Workers' Social Security Act, 2008. It is also felt that those state government and Union Territories who have not constituted social security board under the said Act must constitute the same. Indeed there is a need to strengthen the machinery provided under the Act. Further the board must meet at least once in a quarter. Quite apart from this the board should lay greater emphasis to review the progress of registration and issuance of smart card to unorganized workers and in particular to inter- state migrant workers. Further the state governments and Union Territories must issue direction to the district administration to register migrant workers and issue the identity card./smart card carrying a unique identification number which shall be portable. It is equally important that the beneficiaries of the Building and Other Construction Workers Act, namely, "construction workers who are primarily inter –state migrant workers and most, if not all of them, are indigent and extremely poor be not exploited and be not deprived of the benefit provided under the law. This leads to break down of the aforesaid labour legislation

VII Conclusion

The rights of interstate migrant workers is a tale for search of a labour legislation which may be successfully implemented and its failure. Even though the ISMW Act, 1979 seeks to regulate the employment and conditions of service of inter-state migrant workmen but even after 41 years it failed to protect the interest of inter-state migrant workmen. Indeed it remained only on paper particularly during lockdown after March 25, 2020. Same is the fate of UWSS Act which was enacted in 2008. May be this is not only due to defects and shortcoming in the aforesaid legislation but shows a complete failure of the enforcement machinery. Whatever may be the explanation there is undoubtedly a mood of frustration about the aforesaid legislation. This even raises a question as to why do we have such a law. This is, however, unfortunate because one cannot altogether do without law. As observed by the Supreme Court that laws are enacted for being adhered to and not for being flouted. Indeed it is a well settled principle that the rule of law that it must be respected and the human rights and dignity of the inter-state migrant workers must be implemented. Indeed violation of the ISMWAct, as mentioned earlier involves violations of article 21 of the Constitution which guarantees fundamental rights. It is also felt that an employer who cannot meet the requirement of minimum standards of employment and social security has no right to carry on business. It is, therefore necessary to evolve a national policy on inter-state migrant workers.