REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5875 OF 1994

KRISHNA KUMAR SINGH & ANR. .....APPELLANTS

VERSUS

STATE OF BIHAR & ORS. ....RESPONDENTS

WITH

CIVIL APPEAL NOS. 5876-5890 OF 1994

WITH

WRIT PETITION (C) NO. 580 OF 1995

AND

CIVIL APPEAL NOS. 3533-3595 OF 1995

J U D G M E N T

Madan B. Lokur, J.

1. Having carefully read the erudite judgment prepared by brother Chandrachud, I regret my inability to agree that laying an Ordinance promulgated by the Governor of a State before the State Legislature is mandatory under Article 213(2) of the Constitution and the failure to lay an Ordinance before the State Legislature results in the Ordinance not having the force and effect as a law enacted and would be of no consequence whatsoever. In my opinion, it is not

mandatory under Article 213(2) of the Constitution to lay an Ordinance before the Legislative Assembly of the State Legislature, nor would the failure to do so result in the Ordinance not having the force and effect as an enacted law or being of no consequence whatsoever.

2. Further, in my opinion, an Ordinance cannot create an enduring or irreversible right in a citizen. Consequently and with respect, a contrary view expressed by this Court in ***State of Orissa v. Bhupendra Kumar Bose***[1] and ***T. Venkata Reddy v. State of Andhra Pradesh***[2] requires to be overruled. In overruling these decisions, I agree with brother Chandrachud though my reasons are different.

3. As far as the re-promulgation of an Ordinance is concerned, I am of opinion that the re-promulgation of an Ordinance by the Governor of a State is not *per se* a fraud on the Constitution. There could be exigencies requiring the re-promulgation of an Ordinance. However, re-promulgation of an Ordinance ought not to be a mechanical exercise and a responsibility rests on the Governor to be satisfied that "circumstances exist which render it necessary for him to take immediate action" for promulgating or re-promulgating an Ordinance.

4. Finally, I am of the view that in the absence of any challenge by the employees to the first three Ordinances promulgated by the Governor of the State of Bihar, their validity must be assumed. Consequently, even though these three

[1]1962 Supp (2) SCR 380 – Bench of 5 Judges
[2](1985) 3 SCC 198 – Bench of 5 Judges

Ordinances may have been repealed, the employees would be entitled to the benefits under them till they ceased to operate and the benefits obtained by the employees under these three Ordinances are justified. However, these three Ordinances do not confer any enduring or irreversible right or benefits on the employees. The promulgation of the fourth and subsequent Ordinances has not been adequately justified by the State of Bihar in spite of a specific challenge by the employees and therefore they were rightly struck down by the High Court. Therefore, I partly agree with brother Chandrachud on the issue of the validity of the Ordinances.

5. The facts relating to these appeals have been detailed by brother Chandrachud and it is not necessary to repeat them. All that need be said is that in terms of Article 154 of the Constitution the executive power of the State shall be vested in the Governor of the State and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. In terms of Article 168 of the Constitution every State shall have a Legislature which consists of the Governor of the State and in the case of some States, two Houses and in the other States, one House. Where there are two Houses of the Legislature, one shall be known as the Legislative Council and the other shall be known as the Legislative Assembly. We are concerned with the State of Bihar which has two Houses of the Legislature.

Promulgation of an Ordinance

6. Article 213 of the Constitution provides that when the Governor of the State is satisfied that "circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require." However, this is subject to the exception that the Governor cannot promulgate an Ordinance when both Houses of the Legislature are in session. An Ordinance is promulgated by the Governor of a State on the aid and advice of his Council of Ministers and is in exercise of his legislative power. An Ordinance has the "same force and effect as an Act of the Legislature of the State assented to by the Governor" in terms of Article 213(2) of the Constitution. Clause (a) of Article 213(2) of the Constitution provides that every such Ordinance "shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council." Clause (b) of Article 213(2) of the Constitution provides that an Ordinance may be withdrawn at any time by the Governor. There is an Explanation to Article 213(2) of the Constitution but we are not concerned with it.

7. There is no dispute in these appeals that the Governor of Bihar promulgated as many as eight Ordinances (one after another and on the same subject) in exercise of his legislative power under Article 213(1) of the Constitution. None of these Ordinances was laid before the Legislative Assembly or the Legislative Council.

8. It is important to stress, right at the threshold, that the promulgation of an Ordinance is a legislative exercise and an Ordinance is promulgated by the Governor of a State only on the aid and advice of the Executive; nevertheless, the Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action. The State Legislature has no role in promulgating an Ordinance or actions taken under an Ordinance - that is within the domain of the Executive. The State Legislature keeps a check on the exercise of power by the Executive through the Governor. This is by a Resolution disapproving an Ordinance. The State Legislature is expected to ensure that the separation of powers between the Executive and the Legislature is maintained and is also expected to ensure that the Executive does not transgress the constitutional boundary and encroach on the powers of the Legislature while requiring the Governor to promulgate an Ordinance.

9. Article 213 of the Constitution does not require the Legislature to approve an Ordinance - Article 213(2) of the Constitution refers only to a Resolution disapproving an Ordinance. If an Ordinance is disapproved by a Resolution of the

State Legislature, it ceases to operate as provided in Article 213(2)(a) of the Constitution. If an Ordinance is not disapproved, it does not lead to any conclusion that it has been approved – it only means that the Ordinance has not been disapproved by the State Legislature, nothing more and nothing less.

10. The concept of disapproval of an Ordinance by a Resolution as mentioned in Article 213(2)(a) of the Constitution may be contrasted with Article 352(4) of the Constitution where a positive act of approval of a Proclamation issued under Article 352(1) of the Constitution is necessary. Similarly, a positive act of approval of a Proclamation issued under Article 356(1) of the Constitution is necessary under Article 356(3) of the Constitution. Attention may also be drawn to a Proclamation issued under Article 360 of the Constitution which requires approval under Article 360(2) of the Constitution. There is therefore a conscious distinction made in the Constitution between disapproval of an Ordinance (for example) and approval of a Proclamation (for example) and this distinction cannot be glossed over. It is for this reason that I am of the view that only disapproval of an Ordinance is postulated by Article 213(2)(a) of the Constitution and approval of an Ordinance is not postulated by Article 213(2)(a) of the Constitution.

11. The expression of disapproval of an Ordinance could be at the instance of any one Member of the Legislative Assembly in view of Rule 140 of the Rules of

Procedure and Conduct of Business in the Bihar Vidhan Sabha.[3] If the State Legislature disapproves an Ordinance by a Resolution, it ceases to operate. One of the important issues before us is whether after an Ordinance ceases to operate, do concluded actions and transactions under that Ordinance survive.

After the promulgation of an Ordinance

12. It is in this background, after the promulgation of an Ordinance by the Governor of a State at the instance of the Executive, that the Constitution visualizes three possible scenarios.

(a) **Firstly**, despite the seemingly mandatory language of Article 213(2)(a) of the Constitution, the Executive may not lay an Ordinance before the Legislative Assembly of the State Legislature. The question is: Is it really mandatory for an Ordinance to be laid before the Legislative Assembly and what is the consequence if it is not so laid?

(b) **Secondly**, the Executive may, in view of the provisions of Article 213(2)(b) of the Constitution advise the Governor of the State to withdraw an Ordinance at any time, that is, before reassembly of the State Legislature or even after reassembly. In this scenario, is it still mandatory that the Ordinance be laid before the Legislative Assembly?

[3] 140. Discussion on Governor's Ordinance:- As soon as possible after the Governor has promulgated an Ordinance under clause (1) of Article 213 of the Constitution, printed copies of such Ordinance shall be made available by the Secretary to the members of the Assembly. Within six weeks from the re-assembly of the Assembly, any member may, after giving three clear days' notice to the Secretary, move a resolution approving the Ordinance; and if such resolution is passed, it shall be forwarded to the other House with a message asking for its concurrence.

(c) **Thirdly**, the Executive may, in accordance with Article 213(2)(a) of the Constitution lay an Ordinance before the Legislative Assembly of the State Legislature. What could happen thereafter?

I propose to deal with each possible scenario.

First scenario

13. As far as the **first scenario** is concerned, namely, the Executive not laying an Ordinance before the Legislative Assembly, brother Chandrachud has taken the view that on a textual reading of Article 213(2)(a) of the Constitution an Ordinance promulgated by the Governor shall mandatorily be laid before the State Legislature. With respect, I am unable to subscribe to this view.

14. Article 213(2)(a) of the Constitution provides that an Ordinance ceases to operate at the expiration of six weeks of reassembly of the State Legislature or if before the expiration of that period a Resolution disapproving it is passed by the State Legislature. An Ordinance ceasing to operate at the expiration of six weeks of reassembly of the State Legislature is not related or referable to laying the Ordinance before the State Legislature. Therefore, whether an Ordinance is laid before the State Legislature or not, the provisions of Article 213(2)(a) of the Constitution kick in and the Ordinance will cease to operate at the expiration of six weeks of reassembly of the State Legislature. On a textual interpretation of Article 213(2)(a) of the Constitution, not laying an Ordinance before the

Legislative Assembly has only one consequence, which is that the Ordinance will cease to operate at the expiration of six weeks of reassembly of the State Legislature. While I agree that not laying an Ordinance before the State Legislature on its reassembly would be extremely unfortunate, morally and ethically, but that does not make it mandatory for the Ordinance to be so laid.

15. In this context, does the Constitution provide for any consequence other than the Ordinance ceasing to operate? In my opinion, the answer is No. If an Ordinance is not laid before the State Legislature it does not become invalid or void. However, a view has been expressed that if an Ordinance is not at all laid before the Legislative Assembly then it cannot have the same force and effect as a law enacted and would be of no consequence whatsoever. In this view, the force and effect of an Ordinance as a law is dependent on the happening of a future uncertain event, that is, laying the Ordinance before the Legislative Assembly. I am afraid the force and effect of a law cannot depend on an uncertainty and the occurrence of a future event, unless the law itself so provides. An Ordinance, on its promulgation either has the force and effect of a law or it does not – there is no half-way house dependent upon what steps the Executive might or might not take under Article 213(2) of the Constitution.

16. Article 213(2) of the Constitution is, in a sense, disjunctive – the first part declaring that an Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the

Governor and the second part requiring laying the Ordinance before the Legislative Assembly. It is not possible for me to read the first part as being conditional or dependent on the performance of the second part, that is to say that if the Ordinance is not so laid, it will not have the force and effect of a law. There is nothing in Article 213(2) of the Constitution to suggest this construction.

17. If an Ordinance not laid before the Legislative Assembly does not have the force and effect of a law, then it must necessarily be void *ab initio* or would it be void from the date on which it is required to be laid before the Legislative Assembly, or some other date? This is not at all clear and the view that the Ordinance would be of no consequence whatsoever or void introduces yet another uncertainty – when should the Ordinance be laid before the Legislative Assembly – immediately on its reassembly or on a later date and from which date does it become void?

18. Article 213(3) of the Constitution provides for the only contingency when an Ordinance is void. This provision does not suggest that an Ordinance would be void if it is not placed before the State Legislature. The framers of our Constitution were quite conscious of and recognized the distinction between an Ordinance that is void (under Article 213(3) of the Constitution) and an Ordinance that ceases to operate (under Article 213(2) of the Constitution). If an Ordinance is void, then any action taken under a void Ordinance would also be void. But if an Ordinance ceases to operate, any action taken under the Ordinance

would be valid during the currency of the Ordinance since it has the force and effect of a law. Clearly, therefore, the distinction between Clause (2) and Clause (3) of Article 213 of the Constitution is real and recognizable as also the distinction between an Ordinance that is void and an Ordinance that ceases to operate. A contrary view blurs that distinction and effectively converts an Ordinance otherwise valid into a void Ordinance. I am afraid this is not postulated by Article 213 of the Constitution.

19. For the above reasons, both textual and otherwise, I hold that on a reading of Article 213(2) of the Constitution it is not mandatory that an Ordinance should be laid before the Legislative Assembly of the State Legislature. While concluding that the Constitution does not make it mandatory for the Executive to lay an Ordinance promulgated by the Governor of the State before the Legislative Assembly, I do share the concern what this would mean for our democracy in the long run; perhaps the State Legislatures would need to be more vigilant and proactive in keeping a check on the Executive riding roughshod over democratic requirements and exert their constitutional supremacy over the Executive.

20. What can a Member of the Legislative Assembly do if an Ordinance is not laid before the State Legislature – is he without recourse? When an Ordinance is promulgated it is printed in the Official Gazette and therefore every legislator is aware of its promulgation. As far as the State Legislature of Bihar is concerned, under Rule 140 of the Rules of Procedure and Conduct of Business in the Bihar

Vidhan Sabha a printed copy of the Ordinance is also required to be made available to all Members of the Legislative Assembly by its Secretary. Therefore, on reassembly of the Legislative Assembly, any Member may move a resolution for disapproving the Ordinance either on the basis of the Official Gazette or on the basis of a printed copy of the Ordinance made available by the Secretary of the Legislative Assembly. Consequently, even if the Executive does not lay the Ordinance before the State Legislature or if the Secretary of the Legislative Assembly does not supply a printed copy of the Ordinance, a Member of the Legislative Assembly is not helpless. Surely, his right to move a Resolution for disapproving the Ordinance cannot be taken away by this subterfuge. This right of a Member of the Legislative Assembly cannot be made dependent on the Executive laying the Ordinance before the State Legislature, nor can this right be taken away by the Executive by simply not laying the Ordinance before the Legislative Assembly.

21. Therefore, even without making the laying of an Ordinance before the State Legislature mandatory, the Constitution does provide adequate checks and balances against a possible misuse of power by the Executive.

Second scenario

22. As far as the **second scenario** is concerned, the Executive is entitled to, in view of the provisions of Article 213(2)(b) of the Constitution advise the Governor of the State to withdraw an Ordinance at any time, that is, before

reassembly of the State Legislature or after its reassembly but before it is laid before the Legislative Assembly. In either situation (particularly in the latter situation) could it be said that laying the Ordinance before the Legislative Assembly would still be mandatory? I do not think so. In such situations, no purpose would be served by laying a withdrawn Ordinance before the State Legislature except perhaps completing an empty formality. Our Constitution has not been framed for the sake of completing empty formalities. This is an additional reason for holding that there is no mandatory requirement that regardless of the circumstances, an Ordinance shall mandatorily be placed before the State Legislature.

23. The reasons for withdrawal of an Ordinance by the Governor at the instance of the Executive, whether before or after reassembly of the State Legislature are not relevant for the present discussion and it is not necessary to go into them.

Third scenario

24. The **third scenario** is where the Executive, in accordance with Article 213(2)(a) of the Constitution lays an Ordinance before the Legislative Assembly. The Ordinance could be 'ignored' and as a result no one may move a Resolution for its disapproval. In that event, the Ordinance would run its natural course and cease to operate at the expiration of six weeks of reassembly of the State Legislature.

25. However, if a Resolution is moved for disapproval of the Ordinance, the State Legislature may reject the Resolution and in that event too, the Ordinance would run its natural course and cease to operate at the expiration of six weeks of reassembly of the State Legislature.

26. But if a Resolution for disapproval of an Ordinance is accepted and the Ordinance disapproved then it would cease to operate by virtue of the provisions of Article 213(2)(a) of the Constitution on the Resolution being passed by the Legislative Assembly and the Legislative Council agreeing with it.

27. In other words, several possibilities get thrown up when an Ordinance is laid before the State Legislature. Depending on the decision of the State Legislature, an Ordinance might lapse by efflux of time and cease to operate thereafter or it might earlier cease to operate if a Resolution is passed disapproving the Ordinance or it might even be replaced by a Bill.

28. In fact, a situation of replacing an Ordinance by a Bill did arise in ***State of Orissa v. Bhupendra Kumar Bose***[4] read with ***Bhupendra Kumar Bose v. State of Orissa***.[5] In that case, the Orissa Municipal Elections Validation Ordinance, 1959 (Orissa Ordinance No.1 of 1959) was promulgated by the Governor of Orissa on 15th January, 1959. It is not clear whether the Ordinance was laid before the State Legislature or not or whether it was disapproved but in any event the government of the day sought to introduce in the Legislative Assembly on

[4] 1962 Supp (2) SCR 380 – Bench of 5 Judges
[5] OJC No.12 of 1959 decided on 20.03.10959 by the Orissa High Court [MANU/OR/0014/1960]

23rd February, 1959 a Bill entitled "Orissa Municipal Election Validating Bill, 1959". However, the Legislative Assembly refused to grant leave for its introduction by a majority of votes. This decision of the majority had no impact on the life of the Ordinance which lapsed apparently on 1st April, 1959 six weeks after reassembly of the State Legislature.

29. It is clear that when a Bill is introduced in the Legislative Assembly, it becomes the property of the Legislative Assembly and even assuming an Ordinance is laid before the State Legislature and is disapproved by a Resolution, the disapproval has no impact on the Bill. Conversely, if the introduction of a Bill is declined by the Legislative Assembly or a Bill introduced in the Legislative Assembly is defeated, it will have no impact on an Ordinance laid before the Legislative Assembly which will continue to operate till it is disapproved or it ceases to operate at the expiration of six weeks of reassembly of the Legislative Assembly. Whether to pass or not pass or enact or not enact a Bill into a law is entirely for the Legislative Assembly to decide regardless of the fate of the Ordinance, as is obvious or is even otherwise evident from ***Bhupendra Kumar Bose***. Similarly, disapproval of an Ordinance is entirely for the Legislative Assembly and the Legislative Council to decide regardless of the fate of any Bill introduced or sought to be introduced.

30. The sum and substance of this discussion is: (i) There is no mandatory requirement that an Ordinance should be laid before the Legislative Assembly on

its reassembly. (ii) The fate of an Ordinance, whether it is laid before the Legislative Assembly or not, is governed entirely by the provisions of Article 213(2)(a) of the Constitution and by the Legislative Assembly. (iii) The limited control that the Executive has over the fate of an Ordinance after it is promulgated is that of its withdrawal by the Governor of the State under Article 213(2)(b) of the Constitution - the rest of the control is with the State Legislature which is the law making body of the State.

Effect of concluded transactions under an Ordinance

31. In the above background and in view of the facts before us, the issue arising in the present appeals also relates to the effect or consequences or survival of actions and transactions concluded under an Ordinance prior to its ceasing to operate by virtue of its being disapproved by the Legislative Assembly, or its otherwise ceasing to operate or its withdrawal by the Governor of the State.

32. When an Ordinance is sought to be replaced by a Bill introduced in the State Legislature, it is entirely for the State Legislature to decide whether actions taken under the Ordinance are saved or are not saved or actions taken but not concluded will continue or will not continue. Being constitutionally transient, an Ordinance cannot, unlike a temporary Act, provide for any savings clause or contingency. Even if an Ordinance hypothetically could provide for such a savings clause, the State Legislature may not accept it, since a Bill introduced by

the government of the day is the property of the State Legislature and it is entirely for the State Legislature to decide the contents of the Act.

33. When an Ordinance ceases to operate, there is no doubt that all actions in the pipeline on the date it ceases to operate will terminate. This is simply because when the Ordinance ceases to operate, it also ceases to have the same force and effect as an Act assented to by the Governor of the State and therefore pipeline actions cannot continue without any basis in law. Quite naturally, all actions intended to be commenced on the basis of the Ordinance cannot commence after the Ordinance has ceased to operate. Do actions or transactions concluded before the Ordinance ceases to operate survive after the terminal date?

34. As far as an Act enacted by a State Legislature is concerned, there is no difficulty in appreciating the consequence of its repeal. Section 6 of the General Clauses Act, 1897 is quite explicit on the effect of the repeal of an Act passed by a Legislature.

35. In so far as a temporary Act is concerned, actions taken during its life but not concluded before it terminates (pipeline transactions) will not continue thereafter since those actions and transactions would not be supported by any existing law. However, to tide over any difficulty that might be caused in such an eventuality, a temporary Act could provide for the continuance of such actions and transactions. The reason for this is that a temporary Act is enacted by the Legislature and it certainly has the power to cater to such eventualities.

Therefore, if there is a permissive provision to the contrary, a pipeline transaction could survive the life of a temporary Act. Such an eventuality specifically came up for consideration before a Constitution Bench of this Court in ***S. Krishnan v. State of Madras***.[6] In that case, the Preventive Detention Act, 1950 (a temporary Act that would cease to have effect on 1st April, 1951 except as regards things done or omitted to be done before that date) was amended by the Preventive Detention (Amendment) Act, 1951. The period of preventive detention of detenus (such as the petitioners therein who were already under detention) was extended from one year to two years by extending the life of the Preventive Detention Act, 1950 till 1st April, 1952.

36. One of the questions that arose for the consideration of this Court in that case was whether the preventive detention of a person, detained for example on 21st February, 1951 (as in the case of some petitioners) could continue beyond 31st March, 1951 (or 1st April, 1951) by virtue of the Amendment Act when the temporary Act under which they were detained would have, but for the Amendment Act, ceased to operate on 1st April, 1951. This involved the interpretation and constitutional validity of Section 12 of the Amendment Act which reads as follows:

> "For the avoidance of doubt it is hereby declared —
>
> (*a*) every detention order in force at the commencement of the Preventive Detention (Amendment) Act, 1951, shall continue in force and shall have

[6] (1951) SCR 621 – Bench of 5 Judges

effect as if it had been made under this Act as amended by the Preventive Detention (Amendment) Act, 1951; and

(*b*) nothing contained in sub-section (3) of Section 1, or sub-section (1) of Section 12 of this Act as originally enacted shall be deemed to affect the validity or duration of any such order."

37. Answering the question in the affirmative, Justice Patanjali Sastri (with Chief Justice Harilal Kania concurring) took the view that because of the Amendment Act the period for continuing the preventive detention could be extended and the continued preventive detention beyond 31st March, 1951 was valid. It was said:

"…… although the new Act does not in express terms prescribe in a separate provision any maximum period as such for which any person may in any class or classes of cases be detained, it fixes, by extending the duration of the old Act till the 1st April, 1952, an overall time limit beyond which preventive detention under the Act cannot be continued. **The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against the person under it will *ipso facto* terminate as soon as the statute expires** (Craies on Statutes, 4th Edition, p. 347). **Preventive detention which would, but for the Act authorizing it, be a continuing wrong, cannot, therefore, be continued beyond the expiry of the Act itself**. The new Act thus in substance prescribes a maximum period of detention under it by providing that it shall cease to have effect on a specified date." [Emphasis supplied].

38. Justice Mahajan (with Justice S.R. Das concurring) also took a definitive view that nothing further could be done under a temporary Act after it expires. It was held as follows:

"It may be pointed out that Parliament may well have thought that it was unnecessary to fix any maximum period of detention in the new statute which was of a temporary nature and whose own tenure of life was

limited to one year. **Such temporary statutes cease to have any effect after they expire, they automatically come to an end at the expiry of the period for which they have been enacted and nothing further can be done under them.** The detention of the petitioners therefore is bound to come to an end automatically with the life of the statute and in these circumstances Parliament may well have thought that it would be wholly unnecessary to legislate and provide a maximum period of detention for those detained under this law." [Emphasis supplied].

39. Thereafter, it was held that since the Amendment Act was valid, the petitioners were not entitled to release merely on the ground that the period of one year mentioned in the Preventive Detention Act, 1950 had expired.

40. Justice Vivian Bose disagreed with the majority view and held that the expiry of the temporary Act would not result in the preventive detentions coming to an end. The learned Judge held:

> "…. I cannot agree that these detentions would come to an end with the expiry of the Act. The rule in the case of temporary Acts is that –
>
> > "*as a general rule, and unless it contains some special provision to the contrary*, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect. Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires." (Craies on Statute Law, 4th edition, p. 347).
>
> But transactions which are concluded and completed before the Act expires continue in being despite the expiry. See Craies on Statute Law, page 348, and 31 Halsbury's Laws of England (Hailsham Edition), page 513. I take this to mean that if a man is tried for an offence created by a temporary Act and is found guilty and sentenced to, say, five years' imprisonment, he would have to serve his term even if the Act were to expire the next day. In my opinion, the position is the same in the case of detentions. **A man, who is arrested under a temporary detention Act and validly ordered to be detained for a particular period, would not be entitled to claim release before his time just because the Act expired earlier**." [Emphasis supplied].

41. It is, therefore, evident that the view of a majority of this Court was that nothing done would survive the termination of the temporary Act, unless there is a provision or savings clause to the contrary or unless the life of the temporary Act is statutorily extended. Does this conclusion apply to an Ordinance as well? It must be remembered that an Ordinance has "the same force and effect as an Act of the Legislature of the State assented to by the Governor" [Art. 213(2) of the Constitution] but is not an Act of the Legislature – it is not even a temporary Act of the Legislature.

42. This question came up for consideration in ***Bhupendra Kumar Bose*** and while deciding the issue, this Court referred to three English decisions - ***Warren v. Windle***[7], ***Steavenson v. Oliver***[8] and ***Wicks v. Director of Public Prosecutions***[9].

43. In ***Warren*** the decision of the Court was that where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the Legislature to that effect is expressed. In that context, it was stated by Lord Ellenborough, C.J. that "a law, though temporary in some of its provisions, may have a permanent operation in other respects. The stat. 26 Geo. 3, c. 108, professes to repeal the

[7] (1803) 3 East 205; 102 E.R. (KB) 578
[8] 151 E.R. 1024
[9] [1947] AC 362

statute of 19 Geo. 2, c. 35, absolutely, though its own provisions, which it substituted in place of it, were to be only temporary."

44. In ***Steavenson*** the temporary statute expired on 1st August, 1826 but in the meantime a person was given a right to practice as an apothecary. The temporary statute did not contain any savings provision and it was contended that the expiration of the temporary statute would bring to an end all the rights and liabilities created by it. On these broad facts, it was observed by one of the learned judges (Parke, B.) that the construction of the statute would be the determining factor. It was held:

> "Then comes the question, whether the privilege of practising given by that stat. 6 Geo.4, referred to in the replication, is one which continues notwithstanding the expiration of that statute. **That depends on the construction of the temporary enactment.** There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction. **We must therefore look at this act, and see whether the restriction in the 11th clause, that the provisions of the statute were only to last for a limited time, is applicable to this privilege.** It seems to me that the meaning of the legislature was, that all assistant-surgeons, who were such before the 1st of August, 1826, should be entitled to the same privileges of practicing as apothecaries, & c., as if they had been in actual practice as such on the 1st of August, 1815, and that their privilege as such was of an executory nature, capable of being carried into effect after the 1st of August, 1826. " [Emphasis supplied].

45. In ***Wicks*** the question framed was: Is a man entitled to be acquitted when he is proved to have broken a Defence Regulation at a time when that regulation was in operation, because his trial and conviction take place after the regulation

has expired? While answering this question, it was observed that the question is a pure question of the interpretation of sub-section 3 of Section 11 of the Emergency Powers (Defence) Act, 1939. It was then held that:

> "Section 11 begins with the words "Subject to the provisions of this section," and those introductory words are enough to warn anybody that the provision following immediately is not absolute, but is going to be qualified in some way by what follows**. It is therefore not the case that, at the date chosen, the Act expires in every sense; there is a qualification.** Without discussing whether the intermediate words are qualifications, sub-s. 3, in my opinion, is quite plainly a qualification. It begins with the phrase "The expiry of this Act" – a noun which corresponds with the verb "expire" **-"The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done."**
>
> Learned counsel for the appellants have therefore been driven to argue ingeniously, but admit candidly, that the contention they are putting forward is, that the phrase "things previously done" does not cover offences previously committed. I think that view cannot be correct. It is clear that **Parliament did not intend sub-s. 3 to expire with the rest of the Act**, and that its presence in the statute is a provision which preserves the right to prosecute after the date of expiry." [Emphasis supplied].

46. In all three cases, on a construction of the temporary statute, it was held that its provisions would not come to an end on its expiry. This Court, on a consideration of the matter acknowledged that proposition and accepted the view taken by Patanjali Sastri J that on the expiry of a temporary Act, all actions and transactions terminate unless the temporary Act provides otherwise. This is clear from the following passage in ***Bhupendra Kumar Bose***:

> "It is true that the provisions of Section 6 of the General Clauses Act in relation to the effect of repeal do not apply to a temporary Act. As observed by Patanjali Sastri, J., as he then was, in ***S. Krishnan v. State of Madras*** the general rule in regard to a temporary statute is that in the

> absence of special provision to the contrary, proceedings which are being taken against a person under it will *ipso facto* terminate as soon as the statute expires. **That is why the Legislature can and often does, avoid such an anomalous consequence by enacting in the temporary statute a saving provision, the effect of which is in some respects similar to that of S.6 of the General Clauses Act.** Incidentally, we ought to add that it may not be open to the Ordinance making authority to adopt such a course because of the obvious limitation imposed on the said authority by Art. 213(2)(a)." [Emphasis supplied]

47. However, this Court unfortunately overlooked the qualitative distinction between a temporary Act (enacted by a Legislature) and an Ordinance (promulgated by the Executive without the Legislature coming into the picture at all) and equated them. By making that equation, this Court with respect, made a fundamental and qualitative error and also, with respect, erroneously relied upon the English decisions which relate to temporary statutes whose interpretation depended upon their construction. As a result of this erroneous equation, this Court concluded as follows:

> "Therefore, in considering the effect of the expiration of a temporary statute, it would be unsafe to lay down any inflexible rule. **If the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and had been imposed upon a person, the imposition of the penalty would survive the expiration of the statute.** That appears to be the true legal position in the matter." [Emphasis supplied].

48. The English decisions concerned themselves with the construction of temporary statutes and nothing else. ***Bhupendra Kumar Bose*** adopted for

Ordinances the construction of temporary statutes given by the English decisions and introduced an 'enduring rights' theory into our jurisprudence.

49. But, what is more significant for the present purposes is that though this Court accepted the view of Patanjali Sastri J, an observation was made at the end of the above quoted passage, that is, "*Incidentally, we ought to add that it may not be open to the Ordinance making authority to adopt such a course* [of enacting a savings provision as in a temporary statute] *because of the obvious limitation imposed on the said authority by Article 213(2)(a)* [of the Constitution]." In view of the above, I see some difficulty in incorporating the 'enduring rights' theory into Ordinances.

50. This observation is significant for two reasons: Firstly, it recognizes the obvious distinction between a temporary Act and an Ordinance. Secondly it recognizes that while there may be life after the expiry of a temporary Act if a savings provision is incorporated therein, Article 213(2)(a) of the Constitution perhaps prohibits the incorporation of a provision having an enduring effect in an Ordinance, by necessary implication, with the result that there may not be any life in an Ordinance after it ceases to operate. In other words, neither any pending action or transaction nor any concluded action or transaction can survive beyond the date of expiry of an Ordinance. I accept this proposition because of the historical background relating to Ordinances.

Historical background

51. Section 88 of the Government of India Act, 1935 gave power to the Governor of a Province to promulgate an Ordinance during the recess of the Legislature, if he is satisfied that circumstances exist which render it necessary to take immediate action.

52. Section 90 of the Government India Act, 1935 gave an extraordinary power to the Governor to enact a Governor's Act containing such provisions as he considers necessary. Sub-section (3) of Section 90 of the Government of India Act, 1935 provides that a Governor's Act shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor. In other words, the Governor had the power to promulgate an Ordinance (Section 88) and also enact an Act (Section 90) in exercise of his legislative powers.

53. The significance of having two separate provisions, Section 88 and Section 90 of the Government of India Act, 1935 is that this Act also accepted a distinction between an Ordinance (having a limited life) and an Act (having a 'permanent' life until repeal). An Ordinance would have a limited shelf life in terms of Section 88 of the Government of India Act, 1935 and it would cease to have any force and effect as an Act of the Provincial Legislature assented to by the Governor after the expiry of its shelf life. If the effect of an Ordinance promulgated by the Governor were to survive after the expiry of its shelf life for an indefinite period, there would have been no occasion for enacting Section 90

of the Government of India Act, 1935 empowering the Governor to enact a Governor's Act, since an appropriately drafted savings clause in an Ordinance would serve the same purpose.

54. Appreciating this distinction, the Constituent Assembly did away with the extraordinary power of enacting an Act conferred on the Governor under Section 90 of the Government of India Act, 1935. However, it retained the impermanence of an Ordinance as is clear from a reading of Article 213 of the Constitution. The retention of impermanence is also clear from a reading of Article 213 of the Constitution in juxtaposition with some other provisions of the Constitution. For example, Article 357(2) of the Constitution (as originally framed) provided that Parliament or the President or any other authority may exercise the power of a State Legislature in making a law during a Proclamation of an emergency issued under Article 356 of the Constitution. However, that law shall cease to have effect on the expiration of one year after the Proclamation has ceased to operate "except as respects things done or omitted to be done before the expiration of the said period ……" By the Constitution (Forty-second Amendment) Act, 1976 the period of one year was deleted and such law shall continue in force until altered or repealed or amended by a competent Legislature or other authority even after the Proclamation issued under Article 356 of the Constitution has ceased to operate.

55. Similar provisions excepting things done or omitted to be done (for a limited period of six months) are found in Article 249 and Article 250 of the Constitution notwithstanding that a Resolution passed under Article 249 of the Constitution has ceased to be in force (in the case of Article 249 of the Constitution) or a Proclamation issued under Article 356 of the Constitution has ceased to operate (in the case of Article 250 of the Constitution).

56. Although Article 359(1-A) of the Constitution was not a part of the Constitution as originally framed, it too provides for saving things done or omitted to be done before the law ceases to have effect. Brother Chandrachud has sufficiently dealt with these and other similar provisions of the Constitution and it not necessary to repeat the views expressed in this regard.

57. It is clear, therefore, that in the absence of a savings clause Article 213 the Constitution does not attach any degree of permanence to actions or transactions pending or concluded during the currency of an Ordinance. It is apparently for this reason that it was observed in ***Bhupendra Kumar Bose*** that in view of Article 213(2)(a) of the Constitution an Ordinance cannot have a savings clause which extends the life of actions concluded during the currency of the Ordinance.

58. Therefore, there is a recognizable distinction between a temporary Act which can provide for giving permanence to actions concluded under the temporary Act and an Ordinance which cannot constitutionally make such a provision. The reason for this obviously is that a temporary Act is enacted by a

Legislature while an Ordinance is legislative action taken by the Executive. If this distinction is not appreciated, the difference between a temporary Act and an Ordinance will get blurred. With respect, it appears to me that this Court overlooked this distinction in ***Bhupendra Kumar Bose***.

59. Assuming there is no real distinction between a temporary Act and an Ordinance, I would then fall back on and respectfully agree with the view taken in ***S. Krishnan*** that for actions concluded under an Ordinance to continue after its shelf life is over, a savings clause is necessary. However, as observed in ***Bhupendra Kumar Bose*** (and with which observation I have no reason to disagree) an Ordinance cannot provide for a savings clause that will operate beyond the life of the Ordinance in view of the provisions of Article 213(2)(a) of the Constitution. Therefore, such an assumption would really be of no consequence. In other words, whichever way the issue is considered, it is clear from the Constitution that concluded actions and transactions under an Ordinance do not continue beyond the life of the Ordinance.

60. However, it must be made clear that there is obviously no constitutional restraint on the State Legislature in enacting a law in terms of an Ordinance and thereby giving permanence to it.

Decision in Venkata Reddy extending Bhupendra Kumar Bose

61. In ***Venkata Reddy*** this Court went a step further than ***Bhupendra Kumar Bose*** and introduced the concept of irreversibility of a completed transaction as against the enduring character of a right or liability laid down in ***Bhupendra Kumar Bose***. The decision in ***Venkata Reddy*** dealt with the validity of the Andhra Pradesh Abolition of Posts of Part-time Village Officers Ordinance, 1984 (Ordinance 1 of 1984) promulgated by the Governor of Andhra Pradesh. As the title of the Ordinance suggests, it abolished the posts of part-time village officers in the State of Andhra Pradesh and provision was made for the appointment of village assistants. One of the contentions raised in the writ petitions challenging the validity of the Ordinance was: "The Ordinance having lapsed as the Legislature did not pass an Act in its place, the posts which were abolished should be deemed to have revived and the issue of successive ordinances the subsequent one replacing the earlier one did not serve any purpose."

62. Rejecting this contention, this Court observed that if the requirements of Article 213(2)(a) of the Constitution were not met, then an Ordinance "shall cease to operate" which "only means that it should be treated as being effective till it ceases to operate on the happening of the events mentioned in clause (2) of Article 213." In other words, since an Ordinance shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, it would be operate as a law from the date of its promulgation till the date it ceases to operate. This is quite obvious from a reading of Article 213(2) of the

Constitution which makes it abundantly clear that an Ordinance has the 'same force and effect' as an Act of the State Legislature assented to by the Governor. Consequently, merely because an Ordinance ceases to operate by efflux of time or is disapproved under Article 213(2)(a) of the Constitution does not void or efface the actions and transactions concluded under it. They are valid as long as the Ordinance survives and "treated as being effective till it ceases to operate".

63. ***Venkata Reddy*** however introduced an entirely new dimension to the 'force and effect' of an Ordinance by extending the 'enduring nature' theory of ***Bhupendra Kumar Bose*** and introducing the 'irreversible effect' theory. This was propounded in the following words:

> "Even if the Ordinance is assumed to have ceased to operate from a subsequent date by reason of clause (2) of Article 213, the effect of Section 3 of the Ordinance was irreversible except by express legislation."

This Court took the view that the abolition of the posts of part-time village officers in the State of Andhra Pradesh was a completed event and therefore irreversible. Consequently there was no question of the revival of these posts or the petitioners continuing to hold these posts any longer. Yet this Court held that the State Legislature was not powerless to restore the *status quo ante* by passing an express law operating retrospectively to the said effect, subject to constitutional limitations.

64. I am afraid it is difficult to accept this view. As it is, in view of Article 213(2) of the Constitution an Ordinance cannot, on its own terms, create a right or a liability of an enduring or irreversible nature otherwise an extraordinary power would be conferred in the hands of the Executive and the Governor of the State which is surely not intended by our Constitution. If such a power were intended to be conferred upon the Executive and the Governor of the State, it would be bringing in Section 90 of the Government of India Act, 1935 into our Constitution through the back door.

65. It seems to me that if a situation is irreversible, then it is irreversible. If a situation could be reversed through the enactment of a retrospective law, then surely the *status quo ante* can be restored on the lapsing of an Ordinance by efflux of time or its disapproval by the Legislative Assembly. The same can be said of an action or transaction of an enduring nature. Undoubtedly, there are a few physical facts that are of an enduring nature or irreversible. For example, if an Ordinance were to provide for the imposition of the death penalty for a particular offence and a person is tried and convicted and executed during the currency of the Ordinance, then obviously an irreversible situation is created and even if the Ordinance lapses by efflux of time or is void, the *status quo ante* cannot be restored. So also in a case of demolition of an ancient or heritage monument by an Ordinance. Such physically irreversible actions are few and far between and are clearly distinguishable from 'legally irreversible' actions.

66. There is a distinction between actions that are 'irreversible' and actions that are reversible but a burden to implement. The situations that arose in ***Bhupendra Kumar Bose*** and ***Venkata Reddy*** were not physically irreversible though reversing them may have been burdensome. If elections are set aside or posts are abolished, surely fresh elections can be held and posts revived. In this context, it is worth recalling that should the need arise, as in ***Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly***[10] this Court can always restore the *status quo ante*. ***Bhupendra Kumar Bose*** and ***Venkata Reddy*** did not present any insurmountable situation.

67. Therefore, I am not in a position to incorporate the 'enduring nature' or 'irreversible effect' theory in an Ordinance or even the public interest or constitutional necessity theory. In a given situation, the State Legislature is competent to pass an appropriate legislation keeping the interests of its constituents in mind. To this extent, both ***Bhupendra Kumar Bose*** and ***Venkata Reddy*** are overruled.

Validity of the Ordinances

68. All the Ordinances have ceased to operate and nothing done under them now survives after they have ceased to operate. The validity of the first three Ordinances was not challenged by the employees. There is no material before us, one way or the other, to hold that the promulgation of the first Ordinance and

[10] (2016) 8 SCC 1 – Bench of 5 Judges

its re-promulgation by the second and third Ordinances is invalid. Therefore, one can only assume that the first three Ordinances are valid and the employees are entitled to the benefits under them till the date these Ordinances ceased to operate and not beyond, since these Ordinances were not replaced by an Act of the State Legislature. I may mention, *en passant*, that it is not every re-promulgation of an Ordinance that is prohibited by ***D.C. Wadhwa v. State of Bihar***.[11] There is no universal or blanket prohibition against re-promulgation of an Ordinance, but it should not be a mechanical re-promulgation and should be a very rare occurrence. Additionally, a responsibility is cast on the Governor of a State by the Constitution to promulgate or re-promulgate an Ordinance only if he is satisfied of the existence of circumstances rendering immediate action necessary. There could be situations, though very rare, when re-promulgation is necessary, but it is not necessary for me to delve into this issue insofar as the first three Ordinances are concerned.

69. Only the fourth and subsequent Ordinances were challenged by the employees. As far as the fourth and subsequent Ordinances are concerned, their promulgation and re-promulgation was not adequately justified by the State of Bihar despite a specific challenge. There was no immediate action required to be taken necessitating the promulgation of the fourth Ordinance and its re-promulgation by subsequent Ordinances. I agree that the fourth Ordinance and subsequent Ordinances should be struck down.

[11] (1987) 1 SCC 378 – Bench of 5 Judges

Relief

70. In the absence of any challenge to the first three Ordinances and since I have assumed that these three Ordinances are valid, the benefit given to the employees (such as salary and perks) by these Ordinances till they ceased to operate are justified. However, these three Ordinances did not and could not grant any enduring or irreversible right or benefits to the employees and the employees did not acquire any enduring or irreversible right or benefits under these three Ordinances. Any right or benefits acquired by them terminated when the Ordinances ceased to operate.

71. Despite a specific challenge made to the fourth and subsequent Ordinances, the State of Bihar has not justified their promulgation. They are therefore struck down.

72. The directions given by the High Court for payment of salary (if not already paid) and interest thereon need not be disturbed. The reference is answered accordingly.

……..J
(Madan B. Lokur)

New Delhi;
January 2, 2017

R E P O R T A B L E

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5875 OF 1994

KRISHNA KUMAR SINGH & ANR. ...PETITIONERS

VERSUS

STATE OF BIHAR & ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NOS.5876-5890 OF 1994

WRIT PETITION (C) NO.580 OF 1995

CIVIL APPEAL NOS.3533-3595 OF 1995

O R D E R

T.S. THAKUR, CJI.

1. I have had the advantage of reading the order proposed by my esteemed brother Dr. D.Y. Chandrachud, J. and the discordant note struck by Madan B. Lokur, J. to the same. The genesis of the controversy giving rise to this reference to a larger bench has been elaborately set out in the order proposed by

Chandrachud, J. to which I can make no useful addition especially when the narrative is both lucid and factually accurate. All that I need mention is that the seminal question that arises for our consideration is whether seven successive repromulgations of The Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance, 1989 suffer from any illegality or constitutional impropriety. The High Court of Patna has while dismissing the writ petition filed by the appellants seeking relief on the basis of the said ordinances held that the repeated repromulgation of the ordinances was unconstitutional. Relying upon the Constitution Bench decision of this Court in *D.C. Wadhwa and Ors. v. State of Bihar and Ors.* (1987) 1 SCC 378, the High Court has dismissed the writ petition but protected the appellants against any recovery of salaries already paid to them.

2. The present appeal filed to assail the view taken by the High Court was initially heard by a Two-Judge Bench of this Court comprising Sujata V. Manohar and D.P. Wadhwa, JJ. who differed in their opinions resulting in a reference of the appeal to a bench of

Three-Judges who in-turn referred the same to a bench of Five Judges. Since, however, doubts were raised about the correctness of the view expressed by this Court in two earlier Constitution Bench decisions in *State of Orissa v. Bhupendra Kumar Bose* (1962) Supp. 2 SCR 380 and *T. Venkata Reddy v. State of Andhra Pradesh* (1985) 3 SCC 198, the matter was referred to a bench of Seven-Judges for an authoritative pronouncement.

3. In the order proposed by Chandrachud, J., his Lordship has dealt with, at great length, several aspects that arise directly or incidentally for our adjudication and *inter alia* concluded that seven successive repromulgations of the first ordinance issued in 1989 was aUntitled 2 fraud on the Constitution especially when none of the ordinances were ever tabled before the Bihar Legislative Assembly as required under Article 213(2) of the Constitution. I am in complete agreement with the view expressed by my esteemed brother Dr. Chandrachud, J. that repeated repromulgation of the ordinances was a fraud on the Constitution especially when the Government of the

time appears to have persistently avoided the placement of the ordinances before the legislature. In light of the pronouncement of this Court in D.C. Wadhwa's case (*supra*), such repeated repromulgations were legally impermissible which have been rightly declared to be so by the High Court. Even Lokur, J. has, in the order proposed by His Lordship, found repromulgated ordinances to be unconstitutional except for the first three ordinances which, according to His Lordship, survive not because they were unaffected by the vice of unconstitutionality but because they were not challenged by the petitioners. The need for such a challenge did not in my opinion arise. I say so with respect because the first, second and third ordinances stood repealed by the subsequent ordinances issued by the Government. At any rate, since the process of issuing the ordinances and repromulgation thereof was in the nature of a single transaction and a part of a single series on the same subject the vice of invalidity attached to any such exercise of power would not spare the first, second and the third ordinances which would like the subsequent ordinances

be unconstitutional on the same principle. These ordinances provided the foundation for the edifice of the subsequent repromulgations. If the edifice was affected, there is no way the foundation could remain unaffected by the vice of unconstitutionality. I would in that view agree with the conclusion drawn by Chandrachud, J. that the ordinances in question starting with Ordinance 32 of 1989 and ending with Ordinance 2 of 1992 were all constitutionally invalid, the fact that none of them was ever placed before the State legislature as required under Article 213 (2) of the Constitution of India, lending support to that conclusion.

4. The next question then is whether ordinances issued by the Government in exercise of its powers under Article 213 or for that matter 123 can create enduring rights in favour of individuals affected thereby. I agree with the concurring views expressed by Lokur and Chandrachud, JJ. that the nature of power invoked for issuing ordinances does not admit of creation of enduring rights in favour of those affected by such ordinances. I also agree with the

view that the Constitution Bench decision in *Bhupendra Kumar Bose* and *T. Venkata Reddy* (supra) to the extent the same extended the theory of *"creation of enduring rights"* to legislation by ordinances have not been correctly decided and should stand overruled. It follows that the ordinances issued in the instant case could not have created any enduring rights in favour of Sanskrit school teachers particularly when the ordinances themselves were a fraud on the Constitution. The High Court and so also the views expressed by my esteemed brothers Madan B. Lokur and Chandrachud, JJ. on this aspect are in my opinion legally unexceptionable.

5. That brings me to the question whether the benefit of salaries drawn by Sanskrit school teachers covered by the ordinances can be reversed and the amount so received by them, recovered by the State Government. Lokur, J. has taken the view that since the first three ordinances are valid, anything received by them during the currency of the said ordinance cannot be recovered. Chandrachud, J. has also in conclusion directed that no recovery of salaries which have been

paid shall be made from any of the employees. I concur with that direction, for in my opinion teachers who were paid their salaries under the ordinances and who organised their lives and affairs on the assumption and in the belief that the amount paid to them was legitimately due and payable cannot at this distant point of time be asked to cough up the amount disbursed to them. Payments already made shall not accordingly be recoverable from those who have received the same.

6. The order proposed by Chandrachud, J. also deals with several other aspects including the question whether the obligation to place an ordinance before the legislature in terms of Article 213 and 123 is mandatory and whether non-placement of ordinances before the Parliament and the State legislature as the case may be would itself constitute a fraud on the Constitution. While Chandrachud, J. has taken the view that placing of the ordinances is an unavoidable Constitutional obligation and the breach whereof affects the efficacy of the ordinances, Lokur, J. has taken a different view. In my opinion, the question

whether placing the ordinance before the legislature is mandatory need not be authoritatively decided as this appeal and the Writ Petitions out of which the same arises can be disposed of without addressing that question. Regardless whether the requirement of placing the ordinance is mandatory as held by Chandrachud, J. or directory as declared by Lokur J., the repeated repromulgation of the ordinances were in the light of the pronouncement of this Court in D.C Wadhwa's case constitutionally impermissible and a fraud on the powers vested in the executive. If that be so, as appears to be the case, the question whether the placement of the ordinances will per se render it unconstitutional, need not be gone into. There may indeed be situations in which a repromulgation may be necessary without the ordinances having been placed before the legislature. Equally plausible is the argument that the constitution provides for the life of ordinances to end six weeks from the date of re-assembly of the legislature, regardless whether the ordinances has or has not been placed before the house. The three scenarios which Lokur, J. has

referred to in his order are real life possibilities and ought to be addressed without giving rise to any anomalies. This may require a deeper deliberation which can be undertaken in an appropriate case. Non-presentation of the ordinances before the State Legislature was, at any rate, only a circumstance to show that the executive had invoked the power vested in it without complying with the concomitant obligation of placing the ordinances before the legislature even when it had the opportunity to do so. The High Court was therefore right in holding that no relief on that basis could be granted to the writ petitioners. I would, in that view, leave the question of interpretation of Articles 123 (2) and 213(2) in so far as the obligation of the Government to place the ordinance before the Parliament/legislature open. With these few lines the reference shall stand answered in terms of what is proposed by brother Chandrachud, J.

.....CJI.
(T.S.THAKUR)

NEW DELHI;
JANUARY 2, 2017.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 5875 OF 1994

KRISHNA KUMAR SINGH & ANR **.....APPELLANTS**

Versus

STATE OF BIHAR & ORS **.....RESPONDENTS**

WITH

CIVIL APPEAL Nos. 5876-5890 of 1994

WITH

W.P.(C) No. 580 OF 1995

WITH

CIVIL APPEAL Nos. 3533-3595 OF 1995

J U D G M E N T

Dr D Y CHANDRACHUD, J

A Re-promulgation of Ordinances : the background to the reference

A professor of economics who was pursuing his research on land tenures in Bihar stumbled upon a startling practice. Ordinances were promulgated and

re-promulgated by the Governor of Bihar – two hundred fifty six of them between 1967 and 1981. These Ordinances were kept alive for long periods, going upto fourteen years. This academic research into the re-promulgation of Ordinances became the subject of a book[12] and a petition under Article 32 of the Constitution. The book provided the backdrop of a judgment of a Constitution Bench of this Court in **D C Wadhwa** v. **State of Bihar**.[13] The Constitution Bench held that the practice which had been followed in the State of Bihar was in disregard of constitutional limitations. An exceptional power given to the Governor to make Ordinances in extra-ordinary situations had, in the manner of its exercise, taken over the primary law making function of the legislature in the state. The Constitution Bench deprecated the rule by Ordinances: the 'Ordinance-raj'[14].

2 The judgment of the Constitution Bench was delivered on 20 December 1986. Barely three years after the decision, the Governor of Bihar promulgated the first of the Ordinances which is in issue in this case, providing for the taking over of four hundred and twenty nine Sanskrit schools in the state. The services of teachers and other employees of the school were to stand transferred to the state government subject to certain conditions (which would be elaborated upon later in this judgment). The first Ordinance was followed by a succession of Ordinances. None of the Ordinances, which were issued in exercise of the power of the Governor under Article 213 of the Constitution, were placed before

[12]Re-promulgation of Ordinance: A fraud on the Constitution of India
[13] (1987) 1 SCC 378
[14][Id. at paragraph 8, page 395]

the state legislature as mandated. The state legislature did not enact a law in terms of the Ordinances. The last of them was allowed to lapse.

3 Writ proceedings were initiated before the Patna High Court by the staff of the Sanskrit schools for the payment of salaries. Those proceedings resulted in a judgment of the Patna High Court. When the appeal against the decision of the High Court came up before a Bench of two judges of this Court in **Krishna Kumar Singh** v. **State of Bihar**[15], both the judges – Justice Sujata Manohar and Justice D P Wadhwa - agreed in holding that all the Ordinances, commencing with the second, were invalid since their promulgation was contrary to the constitutional position established in the judgment of the Constitution Bench. Justice Sujata Manohar held that the first Ordinance was also invalid being a part of the chain of Ordinances. Justice Wadhwa, however, held that the first Ordinance is valid and that its effect would endure until it is reversed by specific legislation. The difference of opinion between the two judges was in their assessment of the constitutional validity of the first Ordinance; one of them holding that it is invalid while the other held it to be constitutional.

4 When the case came up before a Bench of three judges[16], it was referred to a Bench of five judges on the ground that it raised substantial questions relating to the Constitution.[17] The proceedings before the Constitution Bench on 23 November 2004 have resulted in a reference to a larger Bench of seven

[15](1998) 5 SCC 643
[16]Justices SP Bharucha, GB Pattanaik and S RajendraBabu
[17]Order dated 6 November 1999 in CA 5875 of 1994

Judges. The basis of the reference is best understood from the order of reference which reads thus :

> "During the course of hearing, Mr. P.P. Rao, learned senior counsel for the appellants placed reliance on the decisions of this Court in State of Orissa vs. Bhupendra Kumar Bose, 1962 (Supp.2) SCR 380 and T.Venkata Reddy and Ors. vs. State of Andhra Pradesh, 1985 (3) SCC 198. The learned Solicitor General brought to the notice of this Court the decision in State of Punjab vs. Sat Pal Dang & Ors., 1969 (1) SCR 478. All these decisions are Constitution Bench decisions. Mr.Rakesh Dwivedi, learned senior counsel for the respondent-State of Bihar, however, relied on a 9-Judge Bench decision of this Court in S R Bommai and Ors. vs. Union of India and Anr., 1994 (3) SCC 1 and in particular paragraphs 283 to 290 thereof.
>
> We are of the opinion that these matters call for hearing by a 7-Judge Bench of this Court. Be listed accordingly."

As the above extract indicates, the three decisions of Constitution Benches which have been noticed are those in **Bhupendra Kumar Bose**, **T Venkata Reddy** and **Satpal Dang**. The nine judge Bench decision in **Bommai** was relied upon, on the other hand by counsel for the State. **Bommai**, it has been urged, warrants a reconsideration of the earlier decisions. That has given rise to the reference.

B The Ordinances

5 The first Ordinance, called The Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance, 1989 – was promulgated

by the Governor of Bihar on 18 December 1989[18]. The Ordinance contains a recital of the satisfaction of the Governor that :

> "44….circumstances exist which render it necessary for him to take immediate action for the taking over of non-government Sanskrit schools for management and control by the State Government for improvement, better organization and development of Sanskrit education in the State of Bihar." (Id at pg.665)

Clause 3 of the Ordinance provided for the taking over of the management and control of four hundred and twenty nine Sanskrit schools (named in Schedule 1) by the state government. Clause 3 was as follows :

> "3. Taking over of management and control of non-government Sanskrit schools by State Government – (1) With effect from the date of enforcement of this Ordinance 429, Sanskrit schools mentioned in Schedule 1 shall vest in the State Government and the State Government shall manage and control thereafter.
>
> (2) All the assets and properties of all the Sanskrit schools mentioned in sub-section (1) and of the governing bodies, managing committees incidental thereto whether moveable or immovable including land, buildings, documents, books and registers, cash-balance, reserve fund, capital investment, furniture and fixtures and other things shall, on the date of taking over, stand transferred to and vest in the State Government free from all encumbrances."

Clause 4 made a provision for the transfer to the state government of those teaching and non-teaching employees of the schools who were appointed

[18]Ordinance 32 of 1989

permanently or temporarily against sanctioned posts in accordance with the prescribed standard and staffing pattern prescribed by the state government prior to the Ordinance. Staff in excess of the sanctioned strength and those not possessing the required qualifications or fitness were to stand automatically terminated. Clause 4 was in the following terms :

> "4 Effect of taking over the management and control-(1) With effect from the date of vesting of Sanskrit schools mentioned in Schedule 1 under Section 3(1) in the State Government, the services of all those teaching and non-teaching employees of the schools mentioned in Schedule 1, who have been appointed permanently/temporarily against sanctioned posts in accordance with the prescribed standard, staffing pattern as prescribed by the State Government prior to this Ordinance shall stand transferred to the State Government. He shall be employee of the State Government with whatsoever designation he holds:
>
> Provided, that the services of those teaching or non-teaching employees who are in excess of the sanctioned strength or do not possess necessary fitness/ qualification shall automatically stand terminated.
>
> (2) Teachers of the Sanskrit schools taken over by the Government shall be entitled to the same pay, allowances and pension etc. as are admissible to teaching and non-teaching employee of the taken-over secondary schools of Bihar".

Under clause 5, management and control of the schools taken over by the state government was to remain with the Director of Education of the Government, incharge of Sanskrit Education. The Ordinance made provisions for, among other things, the constitution of managing committees (clause 6), powers and

functions of managing committees (clause 7), functions of the Headmasters (clause 8), accounts and audit of the Sanskrit schools taken over by the State Government (clause 9), constitution of a Sanskrit Education Committee relating to development of Sanskrit education in the State (clause 10), offences and penalties for contravention of the provisions of the Ordinance (clause 11), cognizance of offences (clause 12), protection of action taken in good faith (clause 13), power to make rules (clause 14) and power to remove difficulties (clause 15).The schedule to the Ordinance listed out four hundred and twenty nine Sanskrit schools situated in several districts of the state. Along side each school was the strength of standard teaching and non-teaching staff.

6 Ordinance 32 of 1989 was promulgated on 16 December 1989 and was published in the Bihar Gazette Extra ordinary on 18 December 1989. The life of the first Ordinance[19] was for a period of two months and two weeks since by virtue of the provisions of Article 213(2)(a) it ceased to operate at the expiration of six weeks from the reassembling of the legislature. The session of the Vidhan Sabha concluded on 25 January 1990. On 28 January 1990 the second in the succession of Ordinances was promulgated. The next session of the Vidhan Sabha was held between 16 March 1990 and 30 March 1990. On 2 May 1990 the third in the succession of Ordinances[20] was promulgated. The next session of the Vidhan Sabha took place between 22 June 1990 and 9 August 1990, as a

[19]The Vidhan Sabha was convened for its 11th session which lasted from 29 June 1989 to 3 August 1989 after the Ordinance was promulgated, the 12th Session of the Vidhan Sabha commenced on 18 January 1990.
[20]Ordinance 14 of 1990.

result of which the life of the Ordinance was about three months. The first, second and third Ordinances were in similar terms.

7 On 13 August 1990 the Governor promulgated a fresh Ordinance.[21] This Ordinance contained in clauses 3 and 4, provisions which were materially different from those of the first three Ordinances. Clauses 3 and 4 provided as follows :-

> "3 Taking over of management and control of non-government Sanskrit schools by State Government.—(1) With effect from the date of enforcement of this Ordinance, 429 Sanskrit schools mentioned in Schedule 1 shall vest in the State Government and the State Government shall manage and control thereafter….
>
> But the Sanskrit schools mentioned in Annexure 1 of this Ordinance will be investigated through the Collector concerned and if it will be found in the report of the Collector that such school is not in existence, in this case State Government will remove the name of that school from Annexure 1 of the Ordinance through notification in State Gazette.
>
> (2) All the assets and properties of all the Sanskrit schools, mentioned in sub-section (1) and of the governing bodies, managing committees, incidental thereto whether moveable or immovable including lands, buildings, documents, books and registers, cash-balance, reserve fund, capital investment, furniture and fixture and other things, shall on the date of taking over, stand transferred to and vest in the State Government free from all encumbrances.
>
> 4. *Effect of taking over the management and control*.—(1) The staff working in the Sanskrit schools mentioned in Annexure 1 of the Ordinance related to integration of its management and control into the State Government as per Schedule

[21] Ordinance 21 of 1990

3(1), will not be the employees of this school until and unless the Government comes to a decision regarding their services.

(2) State Government will appoint a Committee of specialists and experienced persons to enquire about the number of employees, procedure of appointment as well as to enquire about the character of the staff individually and will come on a decision about validity of posts sanctioned by governing body of the school, appointment procedure and affairs of promotions or confirmation of services. Committee will consider the need of institution and will submit its report after taking stock of the views regarding qualification, experience and other related and relevant subjects. Committee will also determine in its report whether the directives regarding reservation for SC, ST and OBCs has been followed or not.

(3) State Government, after getting the report, will determine the number of staff as well as procedure of appointments and will go into the affair of appointment of teaching and other staff on individual basis and in the light of their merit and demerit will determine whether his service will be integrated with the Government or not. Government will also determine the place, salary, allowances and other service conditions for them".

Clause 16 provided for repeals and savings in the following terms:

"16. Repeal and savings.—(1) The Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance, 1990 (Bihar Ordinance 14, 1990) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken in exercise of the powers conferred by or under the said Ordinance shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act as if this Act were in force on the date on which such thing was done or action taken."

Since the next session of the Vidhan Sabha commenced on 22 November 1990 the life of the Ordinance was about four months and two weeks. The fifth in the series of Ordinances[22] was promulgated on 8 March 1991. The session of the Vidhan Sabha took place between 21 June 1991 and 2 August 1991. Soon after the conclusion of the session the sixth in the series of Ordinances was promulgated on 8 August 1991.[23] The next session of the Vidhan Sabha took place from 1 December 1991 to 18 December 1991. Upon the conclusion of the session, the seventh of the Ordinances was promulgated on 21 January 1992.[24] The session of the Vidhan Sabha took place between 20 March 1992 and 27 March 1992. The Ordinance lapsed on 30 April 1992.

8 The Ordinances promulgated by the Governor followed a consistent pattern. None of the Ordinances was laid before the legislature. Each one of the Ordinances lapsed by efflux of time, six weeks after the convening of the session of the legislative assembly. When the previous Ordinance ceased to operate, a fresh Ordinance was issued when the legislative assembly was not in session. The legislative assembly had no occasion to consider whether any of the Ordinances should be approved or disapproved. No legislation to enact a law along the lines of the Ordinances was moved by the government in the legislative assembly. The last of the Ordinances, like its predecessors, cease to operate as a result of the constitutional limitation contained in Article 213 (2)(a).

[22]Ordinance 10 of 1991
[23]Ordinance 31 of 1991
[24]Ordinance 2 of 1992

The subject was entirely governed by successive Ordinances; yet another illustration of what was described by this Court as an Ordinance raj barely three years prior to the promulgation of the first in this chain of Ordinances.

C Proceedings before the High Court

9 The High Court framed the following issues for consideration :

(i) Whether the Sanskrit schools stood denationalised upon the expiry of the Ordinances;
(ii) Whether as a result of clause 4 of the fourth Ordinance[25] the employees had ceased to be government servants which they have become in terms of the first Ordinance[26] promulgated on 18 December 1989;
(iii) Whether the fourth Ordinance was *ultra vires* Article 14 of the Constitution;
(iv) Whether the services of the teachers must be regularised and they ought to be treated as government servants; and
(v) Whether, in any event the petitioners were entitled to their salaries and emoluments.

10 The High Court held that there was no permanent vesting of the schools in the State of Bihar, notwithstanding the expiry of the Ordinances. In the view of the High Court, the power to promulgate Ordinances is not a rule but an exception and is conferred upon the Governor to deal with emergent situations. The High Court held that in the present case there was a promulgation of successive Ordinances contrary to the decision of the Constitution Bench in **D C Wadhwa**. Moreover, none of the Ordinances has been laid before the

[25]Ordinance 21 of 1990
[26]Ordinance 32 of 1989

legislature. As a result, the legislature was deprived of its authority to consider whether the Ordinances should or should not be approved. The High Court held that the failure to comply with the constitutional obligation to place the Ordinances before the legislature would have consequences: the Ordinances which were re-promulgated repeatedly were *ultra vires* and the petitioners had derived no legal right to continue in the service of the state. The High Court noted that the fourth Ordinance made a departure from the earlier Ordinances since the state government had found that many teachers who did not fulfil the requisite criteria would have become government servants. It was, in the view of the High Court, permissible for the state to modify a provision which had been made in an earlier Ordinance and only those who passed the rigours of the provisions made in the fourth Ordinance were to become government servants. This finding was subject to the basic conclusion that all the Ordinances were unconstitutional. On the aspect of whether directions for the payment of salary were warranted, the High Court noted that upon inquiry three hundred and five schools were found to be genuine, while at least one hundred and one did not fulfil the criterion for being taken over. The High Court held that the petitioners were entitled to salary as government servants until 30 April 1992, the last date of the validity of the Ordinances, for the period during which the Ordinances had subsisted. The High Court finally held that in terms of its findings the management of the schools would be governed in the same manner that prevailed prior to the promulgation of the first Ordinance.

D The two differing judgments

11 Before the Bench of two judges of this Court[27], there was an agreement in the two separate judgments delivered by Justice Sujata V Manohar and Justice D P Wadhwa that commencing with the second ordinance, the re-promulgated Ordinances were *ultra vires*. Justice Sujata Manohar held that the manner in which a series of Ordinances was promulgated by the State of Bihar constituted a fraud on the Constitution. In the view of the learned judge :

> "24. ... The State of Bihar has not even averred that any immediate action was required when the 1st Ordinance was promulgated. It has not stated when the Legislative Assembly was convened after the first Ordinance or any of the subsequent Ordinances, how long it was in session, whether the Ordinance in force was placed before it or why for a period of two years and four months proper legislation could not be passed. The constitutional scheme does not permit this kind of Ordinance Raj. In my view, all the Ordinances form a part of a chain of executive acts designed to nullify the scheme of Article 213. They take colour from one another and perpetuate one another, some departures in the scheme of the 4th and subsequent Ordinances notwithstanding. All are unconstitutional and invalid particularly when there is no basis shown for the exercise of power under Article 213. There is also no explanation offered for promulgating one Ordinance after another. If the entire exercise is a fraud on the power conferred by Article 213, with no intention of placing any Ordinance before the legislature, it is difficult to hold that the first Ordinance is valid, even though all the others may be invalid". (Id at pg.658)

[27]The Referring judgment is reported in (1998) 5 SCC 643: See paragraph 24 at page 161

Alternatively, on the hypothesis that the first Ordinance was valid, Justice Sujata Manohar held that it would have ceased to operate upon the lapse of a period of six weeks of the reassembling of the state legislature. Any effect that the Ordinance had would come to an end when it ceased, unless it is permanent. Addressing the issue of what is meant by a permanent effect or a right of an enduring nature which subsists beyond the life of an Ordinance, the learned Judge held thus :

> "30... Every completed event is not necessarily permanent. What is done can often be undone. For example, what is constructed can be demolished. A benefit which is conferred can be taken away. One should not readily assume that an Ordinance has a permanent effect, since by its very nature it is an exercise of a limited and temporary power given to the executive. Such a power is not expected to be exercised to bring about permanent changes unless the exigencies of the situation so demand. Basically, an effect of an Ordinance can be considered as permanent when that effect is irreversible or possibly, when it would be highly impractical or against public interest to reverse it, e.g., an election which is validated should not again become invalid. In this sense, we consider as permanent or enduring that which is irreversible. What is reversible is not permanent." (Id at pg.660)

In this view, when the Ordinance taking over private schools lapsed, the status quo ante would revive. The first Ordinance was held not to have any permanent effect. Hence, even if the first Ordinance were to be valid (which in the view of the learned judge it was not), the teachers could be considered as government servants only for its duration. Moreover, it was held that nothing was done under the first Ordinance; the inquiry for the purpose of take over under the

fourth Ordinance could not be completed as a result of an interim stay and since all the Ordinances had ceased to operate and none of them could be considered as permanent in effect, no directions could be given for enforcing them.

12 Justice D P Wadhwa, on the other hand differed with the view of Justice Sujata Manohar in regard to the validity of the first Ordinance. The learned Judge formulated his reasons in the following propositions :

> "59....(*1*) It is fairly established that Ordinance is the "law" and should be approached on that basis.
>
> (*2*) An Ordinance which has expired has the same effect as a temporary Act of the legislature.
>
> (*3*) When the Constitution says that Ordinance-making power is a legislative power and an Ordinance shall have the same force as an Act, an Ordinance should be clothed with all the attributes of an Act of the legislature carrying with it all its incidents, immunities and limitations under the Constitution and it cannot be treated as an executive action or an administrative decision.
>
> (*4*) Regard being had to the object of the Ordinance and the right created by it, it cannot be said that as soon as the Ordinance expired the validity of an action under the Ordinance came to an end and invalidity of that action revived.
>
> (*5*) What effect of expiration of a temporary Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon their character whether the said right and liability are enduring or not.
>
> (*6*) If the right created by the temporary statute or Ordinance is of enduring character and is vested in

the person, that right cannot be taken away because the statute by which it was created has expired.

(*7*) A person who has been conferred a certain right or status under temporary enactment cannot be deprived of that right or status in consequence of the temporary enactment expiring.

(*8*) An Ordinance is effective till it ceases to operate on the happening of the events mentioned in clause (2) of Article 213. Even if it ceased to operate, the effect of the Ordinance is irreversible except by express legislation.

(*9*) A mere disapproval by the legislature of an Ordinance cannot revive closed or completed transactions.

(*10*) State Legislature is not powerless to bring into existence the same state of affairs as they existed before an Ordinance was passed even though they may be completed and closed matters under the Ordinance. An express law can be passed operating retrospectively to that effect subject to other constitutional limitations." (id at pgs.677-678)

In the view of the learned Judge :

"67..... The effect of the first Ordinance has been of enduring nature. Whatever the Ordinance ordained was accomplished. Its effect was irreversible. The Ordinance was promulgated to achieve a particular object of taking over the Sanskrit schools in the State including their assets and staff and this having been done and there being no legislation to undo the same which power the legislature did possess, the effect of the Ordinance was of permanent nature. The Ordinance is like a temporary law enacted by the legislature and if the law lapses, whatever has been achieved there under could not be undone, viz., if under a temporary law land was acquired and building constructed thereon, it could not be said that after the temporary law lapsed the building would be

> pulled down and land reverted back to the original owner". (Id at pg.683)

In this view, rights which had been vested could not be taken away unless the legislature was to enact a law taking them away and re-vesting the property in the managing committee. The rights which had vested in the employees were held to be of an enduring character which, it was held, could not be taken away merely because the Ordinance, like a temporary statute ceased to operate. Justice Wadhwa thus approached the matter in dispute from two perspectives. Firstly, the Ordinance was placed on the same footing as a temporary statute and was held to have created rights of an enduring character that would survive the Ordinance upon its ceasing to operate. Secondly, vested rights created under the Ordinance could, in this view, be reversed only by a fresh legislation enacted by the legislature. The essential difference between the perspectives of the two judges was precisely this: while Justice Sujata Manohar held that all the Ordinances were part of a chain of promulgation and re-promulgation and constituted a fraud on the Constitution, Justice Wadhwa held that it was only the re-promulgation after the first Ordinance that was *ultra vires*. The first Ordinance was in his view a valid exercise of constitutional power and had created enduring rights which would continue even after the Ordinance ceased to operate. This enduring consequence could only be reversed by legislation.

13 Now it is in this background that it would be necessary to advert to the evolution and scope of the Ordinance making power.

E Historical evolution

E.1 England

14 In the United Kingdom, the prerogative of the Monarch to legislate domestically was set at rest about four hundred years ago by Sir Edward Coke by his opinion in The Case of Proclamations.[28]. The opinion ruled that :

> "The King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm".

The Law of England, it held, is divided into three parts : common law, statute law and custom. The King's proclamation was held to be none of the above. The King, it was ruled, had no prerogative but that which the law of the land allowed him. The vestiges of the power of the King to legislate upon British citizens were wiped out by the Bill of Rights in 1689 or in any event, by 1714. In his judgment in **Pankina** v **Secretary of State for the Home Department**,[29] Lord Justice Sedley speaking for the Court of Appeal observed :

> "The exercise of the Monarch's prerogative has passed since 1689 – or perhaps more precisely, as Anson's Law and Custom of the Constitution suggests, since 1714 – to ministers of the Crown. It is they who are now constitutionally forbidden to make law except with the express authority of Parliament: hence their need for statutory power to make delegated legislation. As Lord Parker of Waddington said in The Zamora [1916] 2 AC 77, 90:
>
> > **"The ideas that the King in Council, or indeed any branch of the executive, has power to**

[28](1611) 12 Co Rep 74
[29][2010] 3 WLR 1526

> **prescribe or alter the law to be administered by the courts of law in this country is out of harmony with the principles of our Constitution".**" (emphasis supplied)

15 Tracing the evolution of the King's power to make proclamations in England following the opinion of Sir Edward Coke, Shubhankar Dam in a recently published work on the subject[30] observes:

> "Although the decision brought conceptual clarity, regal practice varied. Monarchs continued making Ordinances (of the unlawful kind) and enforced them too. Only with the establishment of parliamentary supremacy towards the end of the seventeenth century did the law and practice of Ordinances finally become consistent; from then on, it would always be a subordinate legislative power...By the close of the seventeenth century, statutes represented parliament's ultimate authority to enact legislation whereas Ordinances, generally speaking, came to represent the executive's more limited authority to make narrow and specific regulations".

E.2 British India

16 The dilution of the power of the Monarch in England to rule by proclamations was in sharp contrast to the position which prevailed in the British colonies. The Governor Generals as representatives of the Crown were vested with extensive authority to issue Ordinances. The Indian Councils Act, 1861 empowered the Governor General to issue directions which had the force of law. A power was conferred upon the Governor General to issue ordinances

[30]Shubhankar Dam – "Presidential Legislation in India The Law and Practice of Ordinances [Cambridge University Press – page 144 at pages 37, 38]

by Section 23, subject to two conditions : (i) the power could be exercised in cases of emergency; and (ii) an Ordinance would remain in force for a period of not more than six months from its promulgation. Under the Government of India Act, 1915, the power to issue Ordinances was retained. In the Government of India Act, 1935, Section 42 empowered the Governor General to promulgate ordinances when the Federal Legislature was not in session provided that he was satisfied that circumstances existed which made it necessary that such a law be passed without awaiting reassembly of the legislature. Section 42(2) provided that an Ordinance promulgated under that provision would have the same force and effect as an Act of the Federal Legislature but was required to be laid before the legislature. The Ordinance would cease to operate upon the expiration of six weeks from the reassembly of the legislature or if before that period, resolutions disapproving it were passed by the legislature. The Governor General was in certain cases required to exercise his individual judgment for the promulgation of an Ordinance while in others, he was to act on the instructions of His Majesty. Section 43 enabled the Governor General to issue Ordinances valid for a period of six months and extendable by a further period of six months if he was satisfied that circumstances existed rendering it necessary for him to take immediate action to enable him to satisfactorily discharge such functions in respect of which he was to act in his discretion or individual judgment. Under Section 44, the Governor General was vested with power to enact in the form of a Governor General's Act, a law containing such provisions and to attach to his message to the chambers of the

legislature a draft bill which he considered necessary. Similar powers were vested in the provincial Governors. Wide powers were hence conferred upon the Governor General by Sections 42, 43 and 44.

F Constituent Assembly

17 The Union Constitution Committee was appointed by the Constituent Assembly on 30 April 1947 to report on the 'main principles of the Constitution'. The memorandum which was prepared by B N Rau, the constitutional advisor envisaged a constitutional power for making ordinances. The memorandum contemplated that the President may promulgate an ordinance when Parliament is not in session, upon satisfaction that circumstances exist requiring immediate action. The ordinance would have the same force and effect as an Act of Parliament but would remain in force for a period not more than six weeks from the reassembly of Parliament [see in this context **B Shiva Rao: The Framing of India's Constitution**[31]]. B N Rau acknowledged that ordinances were the subject of great criticism under colonial rule but sought to allay the apprehensions which were expressed on the ground that the President would normally act on the aid and advice of ministers responsible to Parliament and was not likely to abuse the ordinance making power.

18 After the report of the Union Constitution Committee was submitted to the Constituent Assembly, the ordinance making power came up for discussion on 23 May 1949. Professor K T Shah observed that however justified such a power

[31]Universal Law Publishing New Delhi (2006) Vol.II page 485

may appear to be it was "a negation of the rule of law". He therefore suggested that the power should be so structured as to retain an extraordinary character to deal with emergent situations :

> "…Of course in extraordinary circumstances, as in the case of an emergency, the use of extraordinary powers would be both necessary and justified. I think that it is important, therefore to make it clear, in the heading itself that this is an avowedly extraordinary power which may take the form of the legislation without our calling its legislative power. Legislative power the executive head should not have. Or it may even take the form of an executive decree or whatever form seems appropriate in the circumstances. The point that I wish to stress is that we must not, by any mention here imply or convey or suggest that the law making powers of the President are any but extraordinary powers. I think this is sufficiently clear, and will be acceptable to the House."

Another member of the Constituent Assembly, B Pocker Sahib, moved an amendment for the inclusion of a proviso in draft Article 102(1) in the following terms :

> "Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law."

This amendment was moved with a view to securing the fundamental right of the citizen to be tried by a court of law.

19 H V Kamath moved an amendment that would ensure that an ordinance upon promulgation shall be laid before both Houses of Parliament within four

weeks of its promulgation. This, he observed, was necessary to restrict the ordinance making power "as far as we can" and to provide "a constitutional safeguard against the misuse of this article". This objection was responded to by observing that since Parliament had to be convened atleast twice every year and not more than six months would intervene between the last sitting and the date appointed for the next session, an ordinance could not continue for a period of more than seven and a half months.

20 Pandit H N Kunzru moved an amendment to the effect that the tenure of an ordinance should not exceed thirty days from its promulgation (instead of six weeks from the reassembly of Parliament). He observed that there were several countries in which the executive did not possess an ordinance making power and there was no justification "in the new circumstances" for arming the executive with wide powers of the nature that were conferred by the Government of India Act, 1935. He opined that the duration of seven and a half months was too long for the operation of an ordinance. Kunzru observed :

> "…..I think therefore that the period should be long enough to enable the legislature to meet and consider the extraordinary situation requiring the promulgation of an Ordinance, at any rate an Ordinance made necessary by factors affecting the peace or security of the country."
>
> "But when the ordinance relates to the peace or security of the country, or to similar circumstances, requiring extraordinary action to be taken by the executive under an Ordinance, then I think, we have to see that the period during which the Ordinance remains in force is as short as possible, and that any legislation that may be required

should be passed by Parliament after a due consideration of all the circumstances."

"It is therefore necessary that the legislature should be given an opportunity, not merely of considering the situation requiring the passing of an Ordinance, but also the terms of the Ordinance."

21 Professor K T Shah expressed the view that even if an ordinance was issued to meet extraordinary circumstances, it must be laid immediately upon the assembling of Parliament and must cease to operate forthwith unless it was approved by a specific resolution. He supported the restriction which he proposed on the following grounds :

"Most of us, I am sure, view with a certain degree of dislike or distrust the ordinance-making power vested in the Chief Executive. However, we may clothe it, however it may necessary, however much it may be justified, it is a negation of the rule of law. That is to say, it is not legislation passed by the normal Legislature, and yet would have the force of law which is undesirable. Even if it may be unavoidable, and more than that, even if it may be justifiable in the hour of the emergency, the very fact that it is an extraordinary or emergency power, that it is a decree or order of the Executive passed without deliberation by the Legislature, should make it clear that it cannot be allowed, and it must not be allowed, to last a minute longer than such extraordinary circumstances would require."

22 Sardar Hukam Singh moved an amendment which provided for the need for consulting the Council of Ministers :

"It may be said that conventions would grow automatically and the President shall have to take the advice of his Ministers. My submission is that here conventions have yet to grow. We are making our President the constitutional head and we are investing him with powers which appear

> dictatorial. Conventions would grow slowly and as this constitution is written and every detail is being considered, why should we leave this fact to caprice or whim of any individual, however high he may be? If we clearly put down that he is to act on the advice of his Ministers, it is not derogatory to his position."

23 The amendments which were proposed were opposed by P S Deshmukh and Dr B R Ambedkar. P S Deshmukh observed that the draft article had a provision that if and so far as an ordinance made any provision which Parliament would not under the Constitution be competent to enact, it shall be void. Dr Ambedkar, opposing the amendments, observed that while the Governor General under Section 43 of the Government of India Act, 1935 was a parallel legislative authority with an independent power of legislation even when Parliament was in session draft Article 102 conferred an ordinance making power upon the President only when the legislature was not in session. Justifying the conferment of the power Dr Ambedkar observed thus :

> "My submission to the House is that it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise. What is the executive to do? The executive has got a new situation arisen, which it must deal with ex hypothesi it has not got the power to deal with that in the existing code of law. The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because, again ex hyhpothesi, the legislature is not in session."

24 Dr Ambedkar rejected the suggestion that an ordinance should automatically come to an e-nd upon the expiry of thirty days from its promulgation. The objections expressed by H N Kunzru to the duration of an

ordinance were not accepted on the ground that Parliament had to be convened at intervals not exceeding six months. Moreover, he also clarified that the President was to act on the aid and advice of the Council of Ministers. Draft Article 102 was accordingly approved.

G The Ordinance making power

25 Chapter IV of the Constitution contains a single constitutional provision: Article 213. The title to Chapter IV is descriptive of the nature of the power. The power is described as the "Legislative power of the Governor". The marginal note to Article 213 describes it as a "power of Governor to promulgate Ordinances during recess of legislature".

26 The Constitution has followed the same pattern while enunciating the Ordinance making power of the President. Chapter III contains a sole Article, Article 123 which specifies the "legislative power" of the President to promulgate Ordinances when Parliament is not in session.

Article 213 provides as follows :

> "**213**. **Power of Governor to promulgate Ordinances during recess of Legislature**.—(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

Explanation.—Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

> Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him."

27 The authority which is conferred upon the Governor to promulgate Ordinances is conditioned by two requirements. The first is that an Ordinance can be promulgated only when the state legislature is not in session. When the legislature is in session, a law can only be enacted by it and not by the Governor issuing an Ordinance. The second requirement is that the Governor, before issuing an Ordinance has to be satisfied of the existence of circumstances rendering it necessary to take immediate action. The existence of circumstances is an objective fact. The Governor is required to form a satisfaction of the existence of circumstances which makes it necessary to take immediate action. Necessity is distinguished from a mere desirability. The expression "necessity" coupled with "immediate action" conveys the sense that it is imperative due to an emergent situation to promulgate an Ordinance during the period when the legislature is not in session. The Governor may then promulgate an Ordinance "as the circumstances appear to him to require". Both these requirements indicate a constitutional intent to confine the power of the Governor to frame Ordinances within clearly mandated limits. The first limit describes the point in time when an Ordinance may be promulgated : no

Ordinance can be issued when the legislature is in session. The second requirement conditions the Ordinance making power upon the prior satisfaction of the Governor of the existence of circumstances necessitating immediate action. The power conferred upon the Governor is not in the nature of and does not make the Governor a parallel law making authority. The legislature is the constitutional repository of the power to enact law. The legislative power of the Governor is intended by the Constitution not to be a substitute for the law making authority of duly elected legislatures. The same position would hold in relation to the Ordinance making power of the President. Article 213(1) also specifies the circumstances in which the Governor cannot promulgate an Ordinance without the instructions of the President. The three situations where the instructions of the President are required are:

(i) Where a Bill containing the same provisions requires the previous sanction of the President, for its introduction into the legislature;

(ii) Where a Bill containing the same provisions would be deemed necessary by the Governor for being reserved for consideration of the President; and

(iii) Where a law enacted by the state legislature containing the same provisions would require the assent of the President, failing which it would be invalid.

28 The first of the above conditions arises in a situation such as the proviso to Article 304(b) of the Constitution. Under Article 304(b), the legislature of a state is permitted to impose reasonable restrictions in the public interest on the freedom of trade, commerce or intercourse with or within that state (notwithstanding anything in Articles 301 or 303). The proviso requires the

previous sanction of the President before a Bill or amendment for the purposes of clause (b) can be introduced in the state legislature. An illustration of the second requirement ((ii) above) is provided by Article 200 of the Constitution under which the Governor is required to reserve for consideration of the President any Bill which in his opinion would, if it were to become a law, derogate from the powers of the High Court so as to endanger the position which it is designed to fill by the Constitution. Situations where the assent of the President is required ((iii) above) are illustrated by Article 254 where a law made by the state legislature on a matter enumerated in the Concurrent List (of the VIIth Schedule) is repugnant to a law made by Parliament. The state law will prevail only if and to the extent to which it has received the assent of the President. These three situations make it abundantly clear that while exercising the power to promulgate an Ordinance, the Governor is not liberated from the limitations to which the law making power of the state legislature is subject.

29 An Ordinance which is promulgated by the Governor has (as clause 2 of Article 213 provides) the same force and effect as an Act of the legislature of the state assented to by the Governor. However - and this is a matter of crucial importance – clause 2 goes on to stipulate in the same vein significant constitutional conditions. These conditions have to be fulfilled before the 'force and effect' fiction comes into being. These conditions are prefaced by the expression "but every such Ordinance" which means that the constitutional fiction is subject to what is stipulated in sub-clauses (a) and (b). Sub-clause (a) provides that the Ordinance "shall be laid before the legislative assembly of the

state" or before both the Houses in the case of a bi-cameral legislature. Is the requirement of laying an Ordinance before the state legislature mandatory? There can be no manner of doubt that it is. The expression "shall be laid" is a positive mandate which brooks no exceptions. That the word 'shall' in sub-clause (a) of clause 2 of Article 213 is mandatory, emerges from reading the provision in its entirety. As we have noted earlier, an Ordinance can be promulgated only when the legislature is not in session. Upon the completion of six weeks of the reassembling of the legislature, an Ordinance "shall cease to operate". In other words, when the session of the legislature reconvenes, the Ordinance promulgated has a shelf life which expires six weeks after the legislature has assembled. Thereupon, it ceases to operate. In the case of a bi-cameral legislature where both the Houses are summoned to reassemble on different dates the period of six weeks is reckoned with reference to the later of those dates. Article 174 stipulates a requirement that the state legislature has to be convened no later than six months of the completion of its last sitting. Consequently, the constitutional position is that the life of an Ordinance cannot extend beyond a period six months and six weeks of the reassembling of the legislature. The importance which the Constitution ascribes to the reassembling of the legislature is because firstly, that date determines the commencement of the period of six weeks upon which the Ordinance shall cease to operate. But there is a more fundamental significance as well, which bears upon the mandate of an Ordinance being laid before the state legislature. An Ordinance will cease to operate within the period of six weeks of the reassembling of the

legislature if a resolution disapproving it is passed by the legislature. An Ordinance may also be withdrawn by the Governor at any time. The tenure of an Ordinance is hence brought to an end :

(i) By the Ordinance ceasing to operate upon the expiry of a period of six weeks of the reassembly of the legislature; or
(ii) If the Ordinance is disapproved by a resolution of the state legislature in which event it ceases to operate on the resolution disapproving it being passed; or
(iii) In the event of the Ordinance being withdrawn by the Governor.

30 The laying of an Ordinance before the legislature is mandatory. Textually, the sense that this is a mandatory requirement is conveyed by the expression "but every such Ordinance shall be laid before the legislative assembly". Though the Constitution contemplates that an Ordinance shall have the same force and effect as a law enacted by the state legislature, this is subject to the Ordinance being laid before the state legislature and coming to an end in the manner stipulated in sub-clauses (a) and (b).

31 Laying of an Ordinance before the state legislature subserves the purpose of legislative control over the Ordinance making power. Legislation by Ordinances is not an ordinary source of law making but is intended to meet extra-ordinary situations of an emergent nature, during the recess of the legislature. The Governor while promulgating an Ordinance does not constitute an independent legislature, but acts on the aid and advice of the Council of Ministers under Article 163. The Council of Ministers is collectively responsible to the elected legislative body to whom the government is accountable. The

Constitution reposes the power of enacting law in Parliament and the state legislatures under Articles 245 and 246, between whom fields of legislation are distributed in the Seventh Schedule. Constitutional control of Parliament and the state legislatures over the Ordinance making power of the President (under Article 123) and the Governors (under Article 213) is a necessary concomitant to the supremacy of a democratically elected legislature. The reassembling of the legislature defines the outer limit for the validity of the Ordinance promulgated during its absence in session. Within that period, a legislature has authority to disapprove the Ordinance. The requirement of laying an Ordinance before the legislative body subserves the constitutional purpose of ensuring that the provisions of the Ordinance are debated upon and discussed in the legislature. The legislature has before it a full panoply of legislative powers and as an incident of those powers, the express constitutional authority to disapprove an Ordinance. If an Ordinance has to continue beyond the tenure which is prescribed by Article 213(2)(a), a law has to be enacted by the legislature incorporating its provisions. Significantly, our Constitution does not provide that an Ordinance shall assume the character of a law enacted by the state legislature merely upon the passing of a resolution approving it. In order to assume the character of enacted law beyond the tenure prescribed by Article 213(2)(a), a law has to be enacted. The placement of an Ordinance before the legislature is a constitutional necessity; the underlying object and rationale being to enable the legislature to determine (i) the need for and expediency of

an ordinance; (ii) whether a law should be enacted; or (iii) whether the Ordinance should be disapproved.

32 The failure to lay an Ordinance before the state legislature constitutes a serious infraction of the constitutional obligation imposed by Article 213(2). It is upon an Ordinance being laid before the House that it is formally brought to the notice of the legislature. Failure to lay the Ordinance is a serious infraction because it may impact upon the ability of the legislature to deal with the Ordinance. We are not for a moment suggesting that the legislature cannot deal with a situation where the government of the day has breached its constitutional obligation to lay the Ordinance before the legislature. The legislature can undoubtedly even in that situation exercise its powers under Article 213(2)(a). However, the requirement of laying an Ordinance before the state legislature is a mandatory obligation and is not merely of a directory nature. We shall see how in the present case a pattern was followed by the Governor of Bihar of promulgating and re-promulgating Ordinances, none of which was laid before the state legislature. Such a course of conduct would amount to a colourable exercise of power and an abuse of constitutional authority. Now it is in this background, and having thus far interpreted the provisions of Article 213, that it becomes necessary to refer to the precedents on the subject and to the nuances in the interpretation of the constitutional provisions.

H Precedent

H.1 Nature of the power

33 The headings of both Chapters III and IV indicate that while promulgating Ordinances, the President under Article 123 and the Governor under Article 213 exercise legislative powers. That an Ordinance "shall have the same force and effect" as a law enacted by the state legislature indicates that in terms of its operation and consequence, the Ordinance making power is placed on the same basis as law making power. While enacting legislation the law making body – whether it be Parliament or the state legislatures – are subject to constitutional limitations originating in (i) fundamental rights contained in Part III; (ii) distribution of legislative powers between the Union and the States; and (iii) express constitutional limitations. Ordinances made by the President under Article 123 and by the Governors under Article 213 are subject to the same constitutional inhibitions. An Ordinance is susceptible of a challenge based on a violation of a guaranteed fundamental right and would be void to the extent of an infraction of a fundamental right guaranteed by Part III. Ordinances can be made by the President in areas which lie within the legislative competence of Parliament and by the Governors, in areas where the state legislatures are competent to enact law. Article 13 provides that a law shall be void to the extent of its inconsistency with Part III and for that purpose, the expression 'law' is defined in clause (3)(a) to include an Ordinance. Article 367(2) of the Constitution provides that :

> "**367 Interpretation**
>
> "**(2)** Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance

made by the President or, to an Ordinance made by a Governor, as the case may be."

Interpreting these provisions, a Constitution Bench of this Court in **R.K. Garg** v. **Union of India**[32] rejected the submission that while promulgating an Ordinance under Article 123 the President had no power to amend or alter tax laws. Dealing with the submission that the legislative power must exclusively belong to elected representatives and vesting such a power in the executive is undemocratic as it may enable the executive to abuse its power by securing the passage of an ordinary Bill without risking a debate in the legislature, the Constitution Bench emphasised the constitutional limitations on the exercise of the ordinance making powers. Adverting to the speech made by Dr Ambedkar in the Constituent Assembly the Court noted "that the legislative power conferred on the President under this Article is not a parallel power of legislation[33]". Among the provisions that the Court emphasised are limitations on when the power can be exercised and the duration of an Ordinance. The Constitution Bench carefully emphasised the element of legislative control in the following observations:

> "...The conferment of such power may appear to be undemocratic but it is not so, because the executive is clearly answerable to the legislature and if the President, on the aid and advice of the executive, promulgates an Ordinance in misuse or abuse of this power, the legislature can not only pass a resolution disapproving the Ordinance but can also pass a vote of no confidence in the executive. There is in the theory of constitutional

[32](1981) 4 SCC 675
[33] (Id at pg.687)

> law complete control of the legislature over the executive, because if the executive misbehaves or forfeits the confidence of the legislature, it can be thrown out by the legislature". (id at paragraph 4, page 688)

34 In the view of the Constitution Bench, "there is no qualitative difference between an Ordinance issued by the President and an Act passed by Parliament". The same approach was adopted by another Constitution Bench of this Court in **AK Roy** v. **Union of India**[34] where this Court spoke about "the exact equation, for all practical purposes, between a law made by the Parliament and an ordinance issued by the President"[35]. The submission before the Court in a challenge to the validity of the National Security Ordinance was that an Ordinance is an exercise of executive and not legislative power. While rejecting that submission, the Constitution Bench held that :

> "14...the Constitution makes no distinction in principle between a law made by the legislature and an ordinance issued by the President. Both, equally, are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power". (id at page 291)

Both the decisions of the Constitution Bench in **RK Garg** and in **AK Roy** repelled the submission that the Ordinance making power is not legislative in nature and character. Undoubtedly, the power to promulgate an Ordinance is a legislative power which has been conferred upon the President or, as the case may be, the Governors. It is, however, necessary to emphasise that when the

[34](1982) 1 SCC 271
[35] (id at para 14 page 290)

decision in **RK Garg** speaks of there being "no qualitative difference" between an Ordinance issued by the President and an Act of Parliament and the decision in **AK Roy** speaks of the "exact equation for all practical purposes" between the two, these observations are in the context of the principle that an Ordinance promulgated under Article 123 or Article 213 of the Constitution is subject to the same constitutional inhibitions which govern an enactment of the legislature. Both the decisions of the Constitution Benches have, however, placed significant emphasis on the safeguards introduced by the Constitution to ensure against an abuse of power by the executive in exercising a legislative power while framing an Ordinance. The decision in **RK Garg** emphasised the element of legislative control over an Ordinance made by the executive. The Constitution Bench in **AK Roy**, while noting that the Constituent Assembly conferred an Ordinance making power on the heads of the executive in the Union and the States as a "necessary evil"[36], held thus :

> "16...That power was to be used to meet extraordinary situations and not perverted to serve political ends. The Constituent Assembly held forth, as it were, an assurance to the people that an extraordinary power shall not be used in order to perpetuate a fraud on the Constitution which is conceived with so much faith and vision. That assurance must in all events be made good and the balance struck by the founding fathers between the powers of the government and the liberties of the people not disturbed or destroyed". (id at pages 292-293)

35 While the Constitution stipulates that an Ordinance shall have the same force and effect as a law enacted by the legislature, it is necessary to

[36][Id at para 16 page 292]

emphasise that the fiction which is created by Article 213(2) is subject to its provisions which are : firstly, the duration of an Ordinance is limited until the expiration of a period of six weeks from the reassembly of the legislature; secondly, the duration of an Ordinance can be curtailed to a period even less than six weeks after the legislature has re-assembled, upon the passing of a resolution disapproving the Ordinance; and thirdly, the constitutional requirement that an Ordinance shall be laid before the legislature. Legislative control upon Ordinances made by the President or by the Governors is central to the scheme of Articles 213 and 123 and the constitutional fiction which ascribes to an Ordinance the same force and effect as a law enacted by the legislature is subject to sub-clauses (a) and (b) of clause 2 of Article 213. The expression "but" which precedes the formulation contained in sub-clauses (a) and (b) indicates that the constitutional fiction is subject to the conditions that are prescribed in the constitutional provision.

I Presidential satisfaction

36 The constitutional power which has been conferred upon the President under Article 123 and upon the Governors under Article 213 to promulgate ordinances is conditional. Apart from the condition that the power can be exercised only when the legislature is not in session, the power is subject to the satisfaction of the President (under Article 123) or the Governor (under Article 213) "that circumstances exist which render it necessary for him to take immediate action."

37 In **R C Cooper** v. **Union of India**[37], a Bench of eleven Judges of this Court held that the presidential power to promulgate an ordinance is exercisable in extraordinary situations demanding immediate promulgation of law. This Court held that the determination by the President was not declared to be final. Justice J C Shah speaking for the court observed thus :

> "23. Power to promulgate such Ordinance as the circumstances appear to the President to require is exercised--(a) when both Houses of Parliament are not in session; (b) the provision intended to be made is within the competence of the Parliament to enact; and (c) the President is satisfied that circumstances exist which render it necessary for him to take immediate action. **Exercise of the power is strictly conditioned. The clause relating to the satisfaction is composite: the satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final."**(emphasis supplied)

However, the issue had been rendered academic because the ordinance had been replaced by a legislative enactment. The justiciability of the satisfaction was not conclusively decided.

38 The Constitution (Thirty Eighth Amendment) Act, 1975 was brought into force on 1 August 1975 during the period of the internal emergency. The amendment introduced, among other things, two crucial provisions into Articles 123 and 213 by which the satisfaction of the President or, as the case may be

[37](1970) 1 SCC 248

of the Governor, was declared to be final and conclusive and to be immune from being questioned "in any court on any ground". Clause 4 of Article 123 provided as follows :

> "24….Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground." (Id at p. 295)

By a similar amendment, clause 4 was introduced into Article 213. The effect of the amendment was to grant an immunity from the satisfaction of the President or the Governor being subjected to scrutiny by any court. This amendment was expressly deleted by Section 16 of the Forty-fourth amendment.

39 The effect of this deletion (of clause 4) was urged before a Constitution Bench of this Court in **A K Roy** v. **Union of India**[38], as a positive indicator that the satisfaction of the authority issuing an ordinance on the existence of circumstances necessitating immediate action was no longer final and conclusive and that it should be open to judicial scrutiny. In support, reliance was placed on the following observations of Justice Shah and Justice Hegde in **Madhav Rao** v. **Union of India**[39]**.** Justice Shah observed thus :

> "25….Constitutional mechanism in a democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be tested for their validity before the lawfully constituted courts." (Id at p.296)

[38](1982) 1 SCC 271
[39](1971) 3 SCR 9

Justice Hegde observed thus :

> "25….There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens." (id at p. 296)

In A K Roy, Chandrachud, CJ speaking for the Constitution Bench held that the issue as to whether the conditions for the exercise of the power under Article 213 had been fulfilled could not be regarded as a political question:

> "26.We see the force of the contention that the question whether the pre-conditions of the exercise of the power conferred by Article 123 are satisfied cannot be regarded as a purely political question. The doctrine of the political question was evolved in the United States of America on the basis of its Constitution which has adopted the system of a rigid separation of power, unlike ours." (Id at p. 296)

The Constitution Bench held that the earlier case, **State of Rajasthan** v. **Union of India**[40] was decided at a time when the presidential satisfaction under clause 1 of Article 123 had been made final by the thirty-eighth amendment. This Court held that it is arguable that after the forty-fourth amendment, judicial review of the President's satisfaction is not totally excluded. The observations of Chandrachud, CJ, speaking for the Constitution Bench are thus :

> **"**27**.** The *Rajasthan case* [*State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592 : (1978) 1 SCR 1] is often cited as an authority for the proposition that the courts ought not to enter

[40](1978) 1 SCR 1

> the "political thicket". It has to be borne in mind that at the time when that case was decided, Article 356 contained clause (5) which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any court on any ground. Clause (5) has been deleted by the 44th Amendment and, therefore, any observations made in the *Rajasthan case* [*State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592 : (1978) 1 SCR 1] on the basis of that clause cannot any longer hold good. **It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President satisfaction.**(Id at p. 297) (emphasis supplied)

However, in the ultimate analysis, the court declined to go into the question as regards the justiciability of the President's satisfaction under Article 123(1) since, on the material placed before it, it was not possible for the court to arrive at a conclusion one way or the other.

The impact of the forty-fourth amendment was noticed by Justice Jeevan Reddy in the nine judge bench decision In **S R Bommai** v. **Union of India** [41] :

> "379…We, however, agree that the deletion of this clause is certainly significant in the sense that the express bar created in the way of judicial review has since been removed consciously and deliberately in exercise of the constituent power of Parliament. (See *A.K. Roy* v. *Union of India* [(1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272]). The cloud cast by the clause on the power of judicial review has been lifted." (Id at p. 270)

[41](1994) 3 SCC 1

As the above extract indicates, the observations in **A K Roy** found a specific reference, in **Bommai.** The court while construing the provisions of Article 356 noted that clause 5 which expressly barred the jurisdiction of the courts to examine the validity of a proclamation had been deleted by the forty-fourth amendment to the Constitution. Elucidating the approach of the court, when a proclamation under Article 356 is questioned, Justice Jeevan Reddy held that :

> **"**373. Whenever a Proclamation under Article 356 is questioned, the court will no doubt start with the presumption that it was validly issued but it will not and it should not hesitate to interfere if the invalidity or unconstitutionality of the Proclamation is clearly made out. Refusal to interfere in such a case would amount to abdication of the duty cast upon the court — Supreme Court and High Courts — by the Constitution." (Id at p.266-267)

The standard of judicial review was formulated in the following observations :

> "374…..the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of mala fides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power, or what is sometimes called fraud on power — cases where this power is invoked for achieving oblique ends." (Id at p. 268)

40 Applying the principles which emerge from the judgment of Justice Jeevan Reddy in **Bommai,** there is reason to hold that the satisfaction of the President under Article 123(1) or of the Governor under Article 213(1) is not immune from

judicial review. The power of promulgating ordinances is not an absolute entrustment but conditional upon a satisfaction that circumstances exist rendering it necessary to take immediate action. Undoubtedly, as this Court held in **Indra Sawhney** v. **Union of India**[42] the extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions involved and such factors. Since the duty to arrive at the satisfaction rests in the President and the Governors (though it is exercisable on the aid and advice of the Council of Ministers), the Court must act with circumspection when the satisfaction under Article 123 or Article 213 is challenged. The court will not enquire into the adequacy, or sufficiency of the material before the President or the Governor. The court will not interfere if there is some material which is relevant to his satisfaction. The interference of the court can arise in a case involving a fraud on power or an abuse of power. This essentially involves a situation where the power has been exercised to secure an oblique purpose. In exercising the power of judicial review, the court must be mindful both of its inherent limitations as well as of the entrustment of the power to the head of the executive who acts on the aid and advice of the Council of Ministers owing collective responsibility to the elected legislature. In other words, it is only where the court finds that the exercise of power is based on extraneous grounds and amounts to no satisfaction at all that the interference of the court may be warranted in a rare case. However, absolute immunity from judicial review cannot be supported as a matter of first principle or on the basis of constitutional history.

[42] (1992) Supp. (3) SCC 217

J Re-promulgation

41 The judgment in **D C Wadhwa** adopted as its rationale, the title and theme of the work from which the case arose. In this section, we address the basis for holding that an act of a constitutional functionary is construed to be a fraud on the Constitution. Why does the repetition of an act which is permissible initially, become a transgression of constitutional limits? The judgment in **D C Wadhwa** aside, we consider the issue of re-promulgation on first principle in the first section. In the second section, we analyse the decision of the Constitution Bench and explore its logic and limitations.

J.1 The constitutional principles

42 The rationale for the conferment of a power to promulgate ordinances upon the President and the Governors is that the law, particularly a compact of governance, would not accept a state of constitutional vacuum. The legislature is not always in session. Convening it requires time. In the meantime, unforeseen events may arise which need legislative redressal. An ordinance can be promulgated only when the legislature is not in session. But the legislature has to be convened at an interval of no later than six months. The life of an ordinance is restricted in time: six weeks after the reassembly of the legislature, it ceases to operate. Even within this period, a resolution can be passed by the legislature disapproving of the ordinance promulgated in its absence. In such an event, an ordinance made by the Governor on the aid and advice of the Cabinet ceases to operate. The constitutional conferment of a

power to frame ordinances is in deviation of the normal mode of legislation which takes place through the elected bodies comprising of Parliament and the state legislatures. Such a deviation is permitted by the Constitution to enable the President and Governors to enact ordinances which have the force and effect of law simply because of the existence of circumstances which can brook no delay in the formulation of legislation. In a parliamentary democracy, the government is responsible collectively to the elected legislature. The subsistence of a government depends on the continued confidence of the legislature. The ordinance making power is subject to the control of the legislature over the executive. The accountability of the executive to the legislature is symbolised by the manner in which the Constitution has subjected the ordinance making power to legislative authority. This, the Constitution achieves by the requirements of Article 213. The first requirement defines the condition subject to which an ordinance can be made. The second set of requirements makes it mandatory that an ordinance has to be placed before the House of the legislature. The third requirement specifies the tenure of an ordinance and empowers the legislature to shorten the duration on the formulation of a legislative disapproval. Once the legislature has reconvened after the promulgation of an ordinance, the Constitution presupposes that it is for the legislative body in exercise of its power to enact law, to determine the need for the provisions which the ordinance incorporates and the expediency of enacting them into legislation. Once the legislature has convened in session, the need for an ordinance is necessarily brought to an end since it is then for

the legislative body to decide in its collective wisdom as to whether an ordinance should have been made and if so, whether a law should be enacted.

43 A reasonable period is envisaged by the Constitution for the continuation of an ordinance, after the reassembling of the legislature in order to enable it to discuss, debate and determine on the need to enact a law. Re-promulgation of an ordinance, that is to say the promulgation of an ordinance again after the life of an earlier ordinance has ended, is fundamentally at odds with the scheme of Articles 123 and 213. Re-promulgation postulates that despite the intervening session of the legislature, a fresh exercise of the power to promulgate an ordinance is being resorted to despite the fact that the legislature which was in *seisin* of a previously promulgated ordinance has not converted its provisions into a regularly enacted law. What if there is an exceptional situation in which the House of the legislature was unable to enact a legislation along the lines of an ordinance because of the pressure of legislative work or due to reasons? Would the satisfaction of the Governor on the need for immediate action be arrived at for an act of re-promulgation, after a legislative session has intervened?

44 Re-promulgation of ordinances is constitutionally impermissible since it represents an effort to overreach the legislative body which is a primary source of law making authority in a parliamentary democracy. Re-promulgation defeats the constitutional scheme under which a limited power to frame ordinances has been conferred upon the President and the Governors. The danger of

re-promulgation lies in the threat which it poses to the sovereignty of Parliament and the state legislatures which have been constituted as primary law givers under the Constitution. Open legislative debate and discussion provides sunshine which separates secrecy of ordinance making from transparent and accountable governance through law making.

J.2 D C Wadhwa

45 The judgment of the Constitution Bench in **D C Wadhwa** v. **State of Bihar**[43] held that the re-promulgation of ordinances by the State of Bihar constituted a fraud on the Constitution. Adverting to the scheme of the Constitution, the Constitution Bench observed thus :

> "6….The primary law making authority under the Constitution is the legislature and not the executive but it is possible that when the legislature is not in session circumstances may arise which render it is necessary, to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate ordinances. But every ordinance promulgated by the Governor must be placed before the legislature and it would cease to operate at the expiration of six weeks from the reassembly of the legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any. The object of this provision is that since the power conferred on the Governor to issue ordinances is an emergent power exercisable when the legislature is not in session, an ordinance promulgated by the Governor to deal with a

[43](1987) 1 SCC 378

situation which requires immediate action and which cannot wait until the legislature reassembles, must necessarily have a limited life. …"

"The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be "perverted to serve political ends". It is contrary to all democratic norms that the executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided that the ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the legislature. The Constitution-makers expected that if the provisions of the ordinance are to be continued in force, this time should be sufficient for the legislature to pass the necessary Act. But if within this time the legislature does not pass such an Act, the ordinance must come to an end. The executive cannot continue the provisions of the ordinance in force without going to the legislature. The law-making function is entrusted by the Constitution to the legislature consisting of the representatives of the people and if the executive were permitted to continue the provisions of an ordinance in force by adopting the methodology of repromulgation without submitting to the voice of the legislature, it would be nothing short of Susurpation by the executive of the law-making function of the legislature. The executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law-making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution but by laws made by the executive." (Id at p. 392)

The re-promulgation of ordinances was held to be a colourable exercise of power. The Constitution Bench held that the executive in the State of Bihar had almost taken over the role of the legislature in making laws, not for a limited period but for years together in disregard of constitutional limitations. This Court warned that there must not be an ordinance raj in the country :

> "6……When the constitutional provision stipulates that an ordinance promulgated by the Governor to meet an emergent situation shall cease to be in operation at the expiration of six weeks from the reassembly of the legislature and the government if it wishes the provisions of the ordinance to be continued in force beyond the period of six weeks has to go before the legislature which is the constitutional authority entrusted with the law-making function, it would most certainly be a colourable exercise of power for the government to ignore the legislature and to repromulgate the ordinance and thus to continue to regulate the life and liberty of the citizens through ordinance made by the executive." (Id at p. 394)

The limitation of the decision in **D C Wadhwa** is that having spelt out constitutional doctrine, the Constitution Bench ended only with a 'hope and trust' that law making through re-promulgated ordinances would not become the norm. That trust has been belied by the succession of re-promulgated ordinances in this case. The ultimate direction was to set aside one ordinance on intermediate education, which still held the field. **D C Wadhwa** did not address itself to the legal status of action taken under an ordinance which has lapsed on the expiry of its tenure or on being disapproved. Does action initiated

under an ordinance survive the end of an ordinance which has not been adopted into an act of the legislature? That is the issue to which we turn now.

K Life beyond death : the conundrum of enduring effects

46 Article 213(2)(a) postulates that an ordinance would cease to operate upon the expiry of a period of six weeks of the reassembly of the legislature. The **Oxford English dictionary** defines the expression "cease" as[44] : "to stop, give over, discontinue, desist; to come to the end."**P Ramanatha Aiyar's**, **The Major Law Lexicon**[45] defines the expression "cease" to mean "discontinue or put an end to". **Justice C K Thakker's Encyclopaedic Law Lexicon**[46] defines the word "cease" as meaning: "to put an end to; to stop, to terminate or to discontinue". The expression has been defined in similar terms in **Black's Law Dictionary**[47].

47 In a judgment of a Division Bench of the Andhra Pradesh High Court in **Mahanat Narayan Dessjivaru** v. **State of Andhra**[48], it was held that once a scheme and a sanad were no longer operative, the rights, if any, accruing there from were extinguished. There was no scope for importing any notion of suspension into that expression. A discontinuation took effect "once for all[49]".

[44] The Oxford English Dictionary (II Edition) : Clarendon Press, pg. 1014
[45]The Major Law Lexicon (IV Edn. Pg. 1053)
[46]Ashoka Law House, New Delhi (india) pg. 879
[47]XthEdn. Pg. 268
[48]AIR (1959) AP 471
[49]Id at para 28, pg. 474

48 The expression “cease to operate” in Article 213(2)(a) is attracted in two situations. The first is where a period of six weeks has expired since the reassembling of the legislature. The second situation is where a resolution has been passed by the legislature disapproving of an ordinance. Apart from these two situations that are contemplated by sub-clause (a), sub-clause (b) contemplates that an ordinance may be withdrawn at any time by the Governor. Upon its withdrawal the ordinance would cease to operate as well.

49 The expression “disapproval” is defined in **P Ramanatha Aiyar’s Law Lexicon** (supra) as being sometimes used in the sense of formally refusing a sanction or annulling in consequence of the feeling of disapprobation. **Black’s Law Dictionary**[50] defines disapproval as “a negative decision or attitude towards someone or something.”

50 The issue before the court is of the consequence of an ordinance terminating on the expiry of a period of six weeks or, within that period, on a disapproval by the legislature. The constitutional provision states that in both situations the ordinance ceases to operate. Where an ordinance has ceased to operate, would it result *ipso jure* in a revival of the state of affairs which existed before the ordinance was promulgated? Would the legal effects created by the ordinance stand obliterated as a matter of law upon the lapsing of an ordinance or passing of a resolution of disapproval? There are two constructions which need to be analysed. Each of them lies at two opposing ends. At one end of the

---

50 10th Edn. Pg. 268

spectrum is the view that once the legislature has expressed its disapproval by a resolution, the state of affairs which the ordinance brought about stands dissolved and that which existed on the eve of the ordinance stands revived. In this view, disapproval amounts to an obliteration of the effect of all that had transpired in the meantime. At the other end of the spectrum is the view that an ordinance upon being promulgated has the force and effect of a law enacted by the legislature. Hence, the lapsing of its term (on the expiry of six weeks or the passing of a resolution of disapproval)means that the ordinance ceases to operate from that date. Until the ordinance ceases to operate, it continues to have the force of law with the result that the enduring effects of an ordinance or consequences which have a permanent character may subsist beyond the life of 'the' ordinance. Alternatively, where a situation has been altered irreversibly in pursuance of the legal authority created by the ordinance, the clock cannot be set back to revive the state of affairs as it existed prior to the promulgation of the ordinance.

51 Before the position is examined as a matter of first principle, it would be appropriate to examine the precedent emanating from this Court. In **State of Punjab** v. **Mohar Singh**,[51] an ordinance was promulgated by the Governor of East Punjab under Section 88 of the Government of India Act, 1935, for the registration of land claims of refugees from East Punjab. The respondent purporting to be a refugee from West Pakistan filed a claim under the ordinance. The ordinance was repealed and an Act was passed by the East

[51]AIR (1955) SC 84

Punjab legislature re-enacting all the provisions of the repealed ordinance. The respondent was prosecuted under the Act on the ground that his claim had been found to be false and no land in fact belonged to him in West Pakistan. The respondent was convicted of an offence under the Act and sentenced to imprisonment. The District Magistrate considering the sentence to be inadequate, referred the case to the High Court. The respondent raised a preliminary objection on the ground that the offence had been committed against the ordinance before the Act had come in to being and the prosecution was commenced long after the ordinance had come to an end. This contention was accepted by a Division Bench of the High Court which set aside the conviction and sentence. The High Court held that Section 6 of the General Clauses Act is attracted only when an Act is repealed simpliciter but not when a repeal is followed by a re-enactment. The repealing act, it was held, did not provide that an offence which was committed when the ordinance was in force could be punished after its repeal. In appeal, this Court noted in a decision of three Judges that the prosecution was initiated against the respondent not under the ordinance but under the provisions of the Act. The offence was committed when the Act was not in force. The court held that no person could be prosecuted or punished under a law which came into existence subsequent to the commission of an offence. But the issue which still survived was whether the respondent could be prosecuted and punished under the ordinance after it was repealed. This Court observed that :

> "8…..Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation."

The offence committed by the respondent consisted in filing false claim under the provisions of the ordinance. The claim was filed under the ordinance and any false information in regard to such a claim was a punishable offence under the ordinance. Under the proviso to Section 4 of the Act, a claim filed under the ordinance would be treated as one filed under the Act, with all consequences attached to it. A refugee who had previously submitted a claim under the ordinance was not required to submit another claim in respect of the same land. Such a claim would be registered as a claim under the Act. Hence, it was held that the incidents attached to the filing of a claim, as laid down in the Act must necessarily follow. If the information given by the claimant was false, he could be punished under the provisions of the Act. This Court held :

> "9…..If we are to hold that the penal provisions contained in the Act cannot be attracted in case of a claim filed under the Ordinance, the results will be anomalous and even if on the strength of a

> false claim a refugee has succeeded in getting an allotment in his favour, such allotment could not be cancelled under Section 8 of the Act. We think that the provisions of Sections 47 and 8 make it apparent that it was not the intention of the Legislature that the rights and liabilities in respect of claims filed under the Ordinance shall be extinguished on the passing of the Act, and this is sufficient for holding that the present case would attract the operation of Section 6 of the General Clauses Act."

The conviction and sentence were restored and the judgment of the High Court was set aside (enhancement was also refused). The decision in **Mohar Singh** involved a case where an ordinance (under which a false claim had been filed) was repealed by an Act of the legislature. The Act was interpreted to mean that the claim which was filed under the ordinance would be reckoned as a claim under the Act. Once this was so, rights and liabilities in respect of claims filed under the ordinance were held not to be extinguished despite repeal.

52 The judgment in **Mohar Singh** drew sustenance from the provisions of Section 6 of the General Clauses Act. This Court held that when an enactment is repealed, the consequences envisaged in Section 6 of the General Clauses Act will follow unless a contrary intention appears. This principle is not inapplicable merely because a repeal is followed by a fresh enactment. The court found as a matter of statutory construction that the rights and liabilities under an ordinance which had been repealed did not stand extinguished on the enactment of a fresh legislation.

53 Section 6 of the General Clauses Act provides as follows :

> "Section 6. Where this Act or any Central Act or regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—
>
> * * *
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
>
> (*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> (*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid".

54 Section 6 in its terms applies only to a repeal. An ordinance ceases to have effect six weeks from the date on which the legislature reassembles (or upon the passing of a legislative resolution disapproving it). An ordinance which lapses upon the expiry of its tenure of six weeks from the reassembly of the legislature is not repealed as such. Repeal of a legislation results from a positive or affirmative act of the legislative body based on its determination that the law is no longer required. Repeal takes place through legislation. An ordinance lapses ('ceases to operate') when it has failed to obtain legislative approval by being converted into a duly enacted legislation. Section 6 of the General Clauses Act protects rights, privileges and obligations and continues liabilities in cases of repeal of an enactment. The issue as to whether rights, privileges, obligations and liabilities which have arisen under an ordinance which has ceased to operate would endure is not answered by Section 6 of the

General Clauses Act. What then is the touch-stone on which this question should be resolved?

55 In **State of Orissa** v**. Bhupendra Kumar Bose**[52]**,** elections to a municipality were set aside by the High Court on a defect in the publication of the electoral roll. The Governor of Orissa promulgated an ordinance by which the elections were validated together with the electoral rolls. A Bill was moved in the state legislature for enacting a law in terms of the provisions of the ordinance but was defeated by a majority of votes. The State of Orissa filed an appeal before this Court against the decision of the High Court striking down material provisions of the ordinance. Before this Court, it was urged on behalf of the respondent that the ordinance was in the nature of a temporary statute which was bound to lapse after the expiration of the prescribed period. It was urged that after the ordinance had lapsed, the invalidity of the elections which it had cured stood revived. It was in the above background that this Court addressed itself to the question as to whether a lapse of the ordinance affected the validation of the elections under it. Justice Gajendragadkar, writing the opinion of a Constitution Bench held that the general rule in regard to a temporary statute is that in the absence of a special provision to the contrary, proceedings taken against a person under it will terminate when the statute expires. That is why the legislature adopts a savings provision similar to Section 6 of the General Clauses Act. But in the view of the court, it would not to be open to the ordinance making authority to adopt such a course because of the

[52] (1962) Supp. (2) SCR 380

limitation imposed by Article 213(2)(a). The Constitution Bench relied upon three English judgments: **Wicks** v. **Director of Public Prosecutions**[53] ; **Warren** v. **Windle**[54]; and **Steavenson** v. **Oliver**[55].

Having adverted to these English decisions, the Constitution Bench held thus :

> "21…..In our opinion, what the effect of the expiration of a temporary Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon their character whether the said right and liability are enduring or not."

The 'enduring rights' theory which had been applied in English decisions to temporary statutes - was thus brought in while construing the effect of an ordinance which has ceased to operate. In the view of the Constitution Bench :

> "21….Therefore, in considering the effect of the expiration of a temporary statute, it would be unsafe to lay down any inflexible rule. If the right created by the statute is of an enduring character and has vested in the person that right cannot be taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and had been imposed upon a person, the imposition of the penalty would survive the expiration of the statute. That appears to be the true legal position in the matter."

The court held that the validation of the municipal elections was not intended to be temporary in character which would last only during the lifetime of the ordinance. The rights created by it were held to endure and last even after the

[53](1947) A.C. 362
[54](1803) 3 East 205, 211-212 : 102 E.R. (K.B.) 578
[55]151 E.R. 1024, 1026-1027

expiry of the ordinance. Consequently, the lapsing of the ordinance would not result in the revival of the invalidity of the election which the ordinance had validated.

56 This reasoning was followed by a Constitution Bench in **T Venkata Reddy** v. **State of Andhra Pradesh**[56]**.** In that case, an ordinance was promulgated by the Governor of Andhra Pradesh to abolish posts of a part-time village officer. The ordinance was not replaced by an Act but was succeeded by four other ordinances. The submission before the High Court was that upon the lapsing of the ordinances (the legislature not having passed an Act in its place) the posts which were abolished would stand revived. The Constitution Bench held that :

> "14……An Ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing. When the Constitution says that the Ordinance-making power is legislative power and an Ordinance shall have the same force as an Act, an Ordinance should be clothed with all the attributes of an Act of Legislature carrying with it all its incidents, immunities and limitations under the Constitution." (Id at p. 211)

This Court held that an ordinance is not rendered void at its commencement merely because it has been disapproved by the legislature :

> "19…..It is seen that Article 213 of the Constitution does not say that the Ordinance shall be void from the commencement on the State Legislature disapproving it. It says that it *shall cease to operate*. It only means that it should be treated as being effective till it ceases to operate on the

[56](1985) 3 SCC 198

> happening of the events mentioned in clause (2) of Article 213." (Id at p. 214)

The abolition of the posts of part-time village officer was held to be an established fact. If the legislature intended to bring back the post as it existed before the promulgation of the ordinance, the court held that a law would have to be enacted by the state legislature :

> "20. We do not, however, mean to say here that Parliament or the State Legislature is powerless to bring into existence the same state of affairs as they existed before an Ordinance was passed even though they may be completed and closed matters under the Ordinance. That can be achieved by passing an express law operating retrospectively to the said effect, of course, subject to the other constitutional limitations. A mere disapproval by Parliament or the State Legislature of an Ordinance cannot, however, revive closed or completed transactions." (Id at p. 216)

57 The basic premise of the decision in **Bhupendra Kumar Bose** is that the effects of an ordinance can be assessed on the basis of the same yardstick that applies to a temporary enactment. There is a fundamental fallacy in equating an ordinance with a temporary enactment. A temporary Act is a law which is enacted by the legislature – Parliament or the state legislature – in exercise of its plenary powers. While enacting a law, the legislature is entitled to define the period during which the law is intended to operate. The legislature decides whether the law will be for a limited duration or is to be permanent. Hence, it lies perfectly within the realm and competence of the legislature which enacts a temporary law to provide that the rights or the liabilities which are created

during the tenure of the law will subsist beyond the expiry of its term. The legislature which has the competence to enact a law unrestricted by tenure is equally competent to enact a temporary legislation in which it can convey a legislative intent that the rights or obligations which will be created will continue to subsist even upon its expiry. An ordinance is not in the nature of a temporary enactment. An ordinance is conditioned by specific requirements. The authority to promulgate an ordinance arises only when the legislature is not in session and when circumstances requiring emergent action exist. The Constitution prescribes that an ordinance shall remain valid for a period of not more than six weeks after the legislature reassembles and even within that period, it will cease to operate if it is disapproved. Hence, the considerations which govern law making by a competent legislature which has plenary powers to enact a law cannot be equated with a temporary enactment. The basic error, if we may say so with respect, in the judgment in **Bhupendra Kumar Bose** lies in its placing an ordinance on the same pedestal as a temporary enactment. The judgement in **T Venkata Reddy** follows the rationale of **Bhupendra Kumar Bose.** Having done that, the Constitution Bench proceeded to hold that if Parliament or the state legislatures intend to revive the state of affairs which existed before the ordinance was promulgated, it would have to bring a law which has retrospective effect. A disapproval by the legislature, it was held cannot revive completed transactions. The effect of the judgment in **T Venkata Reddy** is to place ordinances in a privileged position and to disregard the supremacy of Parliament. By way of an illustration, take a situation where an ordinance has

overridden rights created by a duly enacted legislation. If the ordinance lapses, the decision in **T Venkata Reddy** would posit that the consequences which have ensued under the ordinance can only be reversed by a retrospective legislation enacted by Parliament which restores *status quo ante.* In a hierarchical sense, this virtually subordinates the position of legislation in relation to ordinance making powers. The basis and foundation of the two Constitution Bench decisions cannot be accepted as reflecting the true constitutional position.

58 What then is the effect upon rights, privileges, obligations or liabilities which arise under an ordinance which ceases to operate? There are two critical expressions in Article 213(2) which bear a close analysis. The first is that an ordinance "shall have the same force and effect" as an act of the legislature while the second is that it "shall cease to operate" on the period of six weeks of the reassembling of the legislature or upon a resolution of disapproval. The expression "shall have the same force and effect" is prefaced by the words "an ordinance promulgated under this article". In referring to an ordinance which is promulgated under Article 213, the Constitution evidently conveys the meaning that in order to have the same force and effect as a legislative enactment, the ordinance must satisfy the requirements of Article 213. Moreover the expression "shall have the same force and effect" is succeeded by the expression "but every such ordinance.." shall be subject to what is stated in sub-clauses(a) and (b). The **pre-conditions** for a valid exercise of the power to promulgate as well as the **conditions subsequent** to promulgation are both

part of a composite scheme. Both sets of conditions have to be fulfilled for an ordinance to have the protection of the 'same force and effect' clause. Once the deeming fiction operates, its consequence is that during its tenure, an ordinance shall operate in the same manner as an act of the legislature. What is the consequence of an ordinance ceasing to operate by virtue of the provisions of Article 213(2)(a)? There are two competing constructions which fall for consideration. The expression "shall cease to operate" can on the one hand to be construed to mean that with effect from the date on which six weeks have expired after the reassembling of the legislature or upon the disapproval of the ordinance, it would cease to operate from that date. 'Cease' to operate in this sense would mean that with effect from that date, the ordinance would prospectively have no operation. The ordinance is not void at its inception. The second meaning which can be considered for interpretation is that the expression "shall cease to operate" will mean that all legal consequences that arose during the tenure of the ordinance would stand obliterated. According to the second construction, which is wider than the first, the consequence of an ordinance having ceased to operate would relate back to the validity of an ordinance.

59 Now, one of the considerations that must be borne in mind is that Article 213 has not made a specific provision for the saving of rights, privileges, obligations or liabilities that have arisen under an ordinance which has since ceased to operate either upon the expiry of its term or upon a resolution of disapproval. Significantly, there are other provisions of the Constitution where,

when it so intended, the Constitution has made express provisions for the saving of rights or liabilities which arise under a law. Under Article 352(4) every resolution for the proclamation of an emergency has to be laid before each House of Parliament and will "cease to operate" on the expiration of one month unless it has been approved during that period by resolutions of both Houses of Parliament. Under clause 5 of Article 352, a proclamation thus approved shall, unless it is revoked, "cease to operate" on the expiration of a period of six months. When a proclamation of emergency is in operation Parliament is conferred with the power to make laws even with respect to matters in the state list. Article 358(1) provides that when a proclamation of emergency is in force, nothing in Article 19 shall restrict the power of the state as defined in Part III to make any law which the state but for the provisions of Part III would be competent to make. However any law so made shall to the extent of its incompetency cease to have effect as soon as the proclamation ceases to operate "except as respects things done or omitted to be done before the law so ceases to have effect". Similarly Article 359(1) provides that during the operation of a proclamation of emergency the President may declare that the right to move a court for the enforcement of rights conferred by Part III (except Articles 20 and 21) shall remain suspended. However, Article 359(1A) provides that any law made shall to the extent of the incompetency with Part III cease to have effect as soon as the order aforesaid ceases to operate "except as respects things done or omitted to be done before the law so ceases to have effect".

60 The nature of the power of the President and the structure of the emergency provisions is undoubtedly different from the ordinance making powers under Articles 123 and 213. However, it is significant to note that while making a provision that a parliamentary law would cease to operate after a proclamation of emergency is revoked, the Constitution Bench has provided for an express saving clause in Articles 358(1) and 359(1)(A). Such a provision was necessary because the effect of the proclamation of emergency is to enable Parliament to enact legislation without the restraint of Article 19. But for it, a law which offends Article 19 would be void under Article 13. Once the proclamation ceases to operate, the law made ceases to have effect. Hence, a specific savings provision has been made as respects things done or omitted to be done when the law was in operation.

61 Similarly, a presidential proclamation under Article 356(1)(b) may declare that the powers of the legislature of the state shall be exercisable by or under the authority of Parliament. Every such proclamation is required to be laid before each House of Parliament and will cease to operate on the expiration of two months, unless it has been approved by resolutions of both Houses of Parliament. Under Article 357, any law made by Parliament in exercise of the power of the state legislature, which it would not have been competent to make but for a proclamation under Article 356 shall continue in force even after the cessation of the proclamation until it is altered or repealed or amended by a competent legislature. This is a situation where the Constitution has provided for the continuation of a law even after the cessation of a proclamation.

62 Article 249 enables Parliament to legislate on matters enumerated in the state list if the Council of States has declared by a resolution supported by not less than two thirds of its members present and voting that it is necessary or expedient in the national interest that Parliament should make laws on a subject in the state list. Similarly, under Article 250, Parliament is empowered, while a proclamation of emergency is in operation, to make laws with respect to any matter in the state list. Article 249(3) and Article 250(2) however stipulate that the law enacted by Parliament shall cease to have effect on the expiration of six months of the resolution. However, both Article 249(3) and Article 250(2) contain a savings clause as respects things done or omitted to be done before the expiration of the period. Such a saving has been rendered necessary because Parliament has, in pursuance of a resolution under Article 249, or under Article 250 during a proclamation of emergency, enacted a law on a matter in the State List (which Parliament is not otherwise competent to enact). Once the law ceases to have effect, the framers considered it necessary to introduce a saving as respects things done under it. This was necessary because a law lacking in legislative competence would be void, but for Articles 249 and 250.

63 In **S R Bommai** v. **Union of India**[57], Justice B P Jeevan Reddy delivering a judgment on behalf of himself and Justice S C Agrawal observed that the requirement of laying a proclamation under Article 356 before both Houses of Parliament and the provision for its cessation unless approved by a resolution

[57](1994) 3 SCC 1

passed by both Houses before the expiry of two months "is conceived both as a check upon the power and as a vindication of the principle of Parliamentary supremacy over the executive". In the earlier decision in **State of Rajasthan** v. **Union of India**[58]**,** a view was expressed that even after Parliament disapproves or declines to approve of a proclamation within two months, the proclamation would be valid for two months. Moreover, it was held that even if both the Houses do not approve or disapprove of the proclamation, the Government which has been dismissed or the assembly which may have been dissolved do not revive. This view was disapproved in the judgment of Justice Jeeven Reddy in **S R Bommai** with the following observations :

> "290…..With utmost respect to the learned Judges, we find ourselves unable to agree with the said view insofar as it says that even where both Houses of Parliament disapprove or do not approve the Proclamation, the Government which has been dismissed does not revive. (The *State of Rajasthan* [(1977) 3 SCC 592 : AIR 1977 SC 1361 : (1978) 1 SCR 1] also holds that such disapproval or non-approval does not revive the Legislative Assembly which may have been dissolved but we need not deal with this aspect since according to the view expressed by us hereinabove, no such dissolution is permissible before the approval of both the Houses). Clause (3), it may be emphasised, uses the words "approved by resolutions of both Houses of Parliament". The word "approval" means affirmation of the action by a higher or superior authority. In other words, the action of the President has to be approved by Parliament. The expression "approval" has an intrinsic meaning which cannot be ignored. Disapproval or non-approval means that the Houses of Parliament are saying that the President's action was not justified or warranted and that it shall no longer

[58](1977) 3 SCC 592

> continue. In such a case, the Proclamation lapses, i.e., ceases to be in operation at the end of two months — the necessary consequence of which is the status quo ante revives. To say that notwithstanding the disapproval or non-approval, the status quo ante does not revive is to rob the concept of approval of its content and meaning. Such a view renders the check provided by clause (3) ineffective and of no significance whatsoever. The Executive would be telling Parliament : "I have dismissed the Government. Now, whether you approve or disapprove is of no consequence because the Government in no event can be revived. The deed is done. You better approve it because you have practically no choice." We do not think that such a course is consistent with the principle of parliamentary supremacy and parliamentary control over the Executive, the basic premise of parliamentary supremacy. It would indeed mean supremacy of the Executive over Parliament. The dismissal of a Government under sub-clause (*a*) of clause (1) cannot also be equated to the physical death of a living being. There is no irrevocability about it. It is capable of being revived and it revives. Legislative Assembly which may have been kept in suspended animation also springs back to life. So far as the validity of the acts done, orders passed and laws, if any, made during the period of operation of the Proclamation is concerned, they would remain unaffected inasmuch as the disapproval or non-approval does not render the Proclamation invalid with retrospective effect."(Id at p.226)

Justice P B Sawant speaking on behalf of himself and Justice Kuldip Singh held that :

> "There is no reason why the Council of Ministers and the Legislative Assembly should not stand restored as a consequence of the invalidation of the Proclamation, the same being the normal legal effect of the invalid action." (Id at p. 122)

In this view, if a proclamation is held to be invalid then even though it is approved by both Houses of Parliament, the court would have the power to restore the *status quo ante* prior to the issuance of the proclamation and to restore the legislative assembly and the ministry. However, while doing so, it would be open to the court to suitably mould the relief and declare as valid, actions of the President till that date. Moreover, it would be open to Parliament and the state legislature to validate the actions of the President. This statement of law was concurred in by Justice S R Pandian. Justice K Ramaswamy, however, agreed with the view in **State of Rajasthan**, holding that there was no express provision in the Constitution to revive an assembly which has been dissolved or to re-induct a Government which has been removed. Justice A M Ahmadi was generally in agreement with the view of Justice K Ramaswamy though he has not specifically expressed an opinion on this aspect. Justices J S Verma and Yogeshwar Dayal rested their decision upon the non-justiciability of the proclamation and relied on the decision in **State of Rajasthan**.

64 The view which was adopted by this Court in **State of Rajasthan** was reflected in the majority decision of Justices Y V Chandrachud, Untwalia and Fazl Ali. That view posited that a proclamation has a life of two months and the only effect of its non-placement before Parliament is that it ceases after the expiry of two months. Hence, it was held that disapproval of the proclamation by Parliament would not result in a revival of the *status quo ante*. This view in **State of Rajasthan** was overruled in **S R Bommai**. However, at this stage, it may also be of significant to note that in the course of the judgment Justice

Chandrachud observed that there is a distinction between Articles 356 and 123. In the case of the ordinance making power of the President under Article 123, it was observed that an ordinance could be disapproved by a resolution of Parliament and would cease to operate even before the prescribed period. However, under Article 356, a proclamation had an assured life of two months. This was also noted in the judgment of Justice Bhagwati. Be that as it may, the significance of the nine Judge Bench decision in **S R Bommai** lies in its elucidation of the consequences of a disapproval or non-approval of a proclamation by Parliament. In such an event, it was held that disapproval or non-approval amounts to its negation by Parliament; a statement, that the action of the President was not justified or warranted and that it shall no longer continue. The necessary consequence is that the *status quo ante* would revive. The contrary view in **State of Rajasthan,** would deprive Parliament of its control and supremacy. The rationale of the decision of the majority on this aspect is that if the *status quo ante* was not to revive despite the disapproval or non-approval of a proclamation by Parliament, parliamentary supremacy would give way to the supremacy of the executive.

65 The Constitution has in its provisions used different phrases including "repeal", "void", "cease to have effect" and "cease to operate". In **Keshavan Madhava Menon** v. **State of Bombay**[59], Justice Fazl Ali in the course of his dissenting opinion noticed the use of these phrases in the following observations :

[59](1951) SCR 228

> "25. A reference to the Constitution will show that the framers thereof have used the word "repeal" wherever necessary (see Articles 252, 254, 357, 372 and 395). They have also used such words as "invalid" (see Articles 245, 255 and 276), "cease to have effect" (see Articles 358 and 372), "shall be inoperative", etc. They have used the word "void" only in two articles, these being Article 13(1) and Article 154, and both these articles deal with cases where a certain law is repugnant to another law to which greater sanctity is attached. It further appears that where they wanted to save things done or omitted to be done under the existing law, they have used apt language for the purpose; see for example Articles 249, 250,357, 358 and 369. The thoroughness and precision which the framers of the Constitution have observed in the matters to which reference has been made, disinclines me to read into Article 13(1) a saving provision of the kind which we are asked to read into it."

These phrases have different connotations: each cannot be equated with the other. Consequently, the court should be careful to not attribute to the expression "cease to operate" the same meaning as the expression "void". This is of particular significance because clause 3 of Article 213 uses the expression "void" in relation to an ordinance which makes a provision which would not be valid if enacted in an act of the legislature of the state assented to by the Governor. Such a provision contained in an ordinance is declared to be void by clause 3 of Article 213. Evidently, when the framers wished to indicate that a provision of an ordinance would be void in a certain eventuality, the Constitution has expressly used that phrase. This would militate against equating the expression "cease to operate" with the expression "void". Both have distinct connotations. Particularly, where the same constitutional article has used both

phrases – ‘cease to operate’ (in clause 2) and ‘void’ in (clause 3) one cannot be read to have the same meaning as the other.

66 An ordinance which has ceased to operate is not void. As an instrument, it is not still–born. During the tenure of the ordinance, it has the same force and effect as a law enacted by the legislature.

67 Significantly, the expression “cease to operate” in Article 213(2)(a) applies both to an ordinance whose tenure expires after the prescribed period as well as in relation to an ordinance which is disapproved by the legislature. The content of the expression cannot hence mean two separate things in relation to the two situations. The issue which needs elaboration is whether an ordinance which by its very nature has a limited life can bring about consequences for the future (in terms of the creation of rights, privileges, liabilities and obligations) which will enure beyond the life of the ordinance. In deciding this issue, the court must adopt an interpretation which furthers the basic constitutional premise of legislative control over ordinances. The preservation of this constitutional value is necessary for parliamentary democracy to survive on the sure foundation of the rule of law and collective responsibility of the executive to the legislature. The silences of the Constitution must be imbued with substantive content by infusing them with a meaning which enhances the rule of law. To attribute to the executive as an incident of the power to frame ordinances, an unrestricted ability to create binding effects for posterity would set a dangerous precedent in a parliamentary democracy.

The court's interpretation of the power to frame ordinances, which originates in the executive arm of government, cannot be oblivious to the basic notion that the primary form of law making power is through the legislature. Hence, the interpretation which the court places on the ordinance making power must be carefully structured to ensure that the power remains what the framers of our Constitution intended it to be: an exceptional power to meet a constitutional necessity.

68 We have already expressed our reasons for coming to the conclusion that the basic foundation upon which the decision of the Constitution Bench in **Bhupendra Kumar Bose** rested is erroneous. The Constitution Bench equated an ordinance with a temporary act enacted by the competent legislature. This approach, with respect, fails to notice the critical distinction between an enactment of a competent legislature and an ordinance. The constitutional power of promulgating ordinances is carefully conditioned by the requirements spelt out in Articles 123 and 213. The power is subject to limitations both of a durational and supervisory character. The intent of the framers of the Constitution, as reflected in the text of Article 123 and Article 213, is to subject to the ordinance making power to Parliamentary control. The enduring rights theory which was accepted in the judgment in **Bhupendra Kumar Bose** was extrapolated from the consequences emanating from the expiry of a temporary act. That theory cannot be applied to the power to frame ordinances. Acceptance of the doctrine of enduring rights in the context of an ordinance would lead to a situation where the exercise of power by the Governor would

survive in terms of the creation of rights and privileges, obligations and liabilities on the hypothesis that these are of an enduring character. The legislature may not have had an opportunity to even discuss or debate the ordinance (where, as in the present case, none of the ordinances was laid before the legislature); an ordinance may have been specifically disapproved or may have ceased to operate upon the expiry of the prescribed period. The enduring rights theory attributes a degree of permanence to the power to promulgate ordinances in derogation of parliamentary control and supremacy. Any such assumption in regard to the conferment of power would run contrary to the principles which have been laid down in **S R Bommai**. The judgment in **T Venkata Reddy** essentially follows the same logic but goes on to hold that if Parliament intends to reverse matters which have been completed under an ordinance, it would have to enact a specific law with retrospective effect. This, in our view, reverses the constitutional ordering in the regard to the exercise of legislative power.

69 The issue which confronts itself before the court is whether upon an ordinance ceasing to operate, either as a result of its disapproval by the legislature or upon its expiry after the prescribed period of six months of the assembling of the legislature, all consequences that have ensued would necessarily stand effaced and obliterated. The judgment of **Justice Sujata Manohar** in the referring order in the present case adverted to the ambiguity inherent in the expression “permanent effect” and “rights of an enduring character”. The Bench consisting of Justice Sujata Manohar and Justice D P Wadhwa, being a bench of two learned judges, was confronted with the binding

effect of the decisions of the two Constitution Benches in **Bhupendra Kumar Bose** and **T Venkata Reddy.** Within the framework provided by the two binding precedents, **Justice Sujata Manohar** held that the effect of an ordinance can be considered as permanent when it is irreversible or when it would be "highly impractical or against public interest to reverse it". A three-fold test has been laid down : the first is of the irreversibility of effect; the second, the impracticality of reversing a consequence which has ensued under the ordinance and the third, is the test of public interest. The principle which we will lay down is not constrained by the two Constitution Bench decisions which propounded the enduring rights theory, once we have held that the theory has been incorrectly lifted from the context of a temporary law and applied to the ordinance making power.

70 The judgment of **Justice Sujata Manohar** does indicate (as one commentator on the subject states), that the learned judge "is willing to engage in some form of heightened scrutiny"[60]. Yet, the three-fold test of irreversibility, impracticality or public interest may, if broadly applied, cover almost every situation where an ordinance has ceased to operate. A demolition may have been effected. An order of conviction may have been passed upon a trial. An acquisition of an industrial undertaking may be made. Large-scale regularisation of contractual or casual employees may be effected. Legalisation of unauthorised structures may be made. A myriad different situation can be contemplated. Must every action under an ordinance produce binding rights,

[60]Shubhankar Dam (Supra) (Id at page 151)

obligations and liabilities which will survive its demise? In our view, in determining the issue the over-arching consideration must be the element of public interest or constitutional necessity. Ultimately, it is this element of public interest which would have guided the court in **Bhupendra Kumar Bose** in holding that the validation of an election by an ordinance should not be set at naught (though the logic adopted by the court was flawed). **Bhupendra Kumar Bose** also raises troubling aspects independently on its facts because in that case a Bill which was moved before the state legislature to incorporate provisions similar to those of the ordinance was defeated. Be that as it may, in deciding to mould the relief the effort of the court would be to determine whether undoing what has been done under the ordinance would manifestly be contrary to public interest. Impracticality and irreversibility in that sense are aspects which are subsumed in the considerations which weigh in the balance while deciding where public interest lies. Impracticality cannot by itself be raised to an independent status because it would then be simple enough for the executive to assert the supposed complexities in undoing the effects of an ordinance. Since the basic constitutional value which is at issue is of parliamentary supremacy and control, the moulding of relief can be justified in cases involving grave elements of public interest or constitutional necessity demonstrated by clear and cogent material.

L Laying of ordinances before the legislature

71 Article 213(2)(a) requires an ordinance to be laid before the state legislature. A similar requirement is contained in Article 123(2)(a). Neither Article

123 nor Article 213 specifically provide for when an ordinance should be laid before the legislature upon its reassembling. The position in relation to Parliament is set out by **Subhash C Kashyap,** in his work titled "Parliamentary Procedure – the law, privileges, practice and precedents[61]." Rule 71 which the author extracts is as follows :

> "Rule71. Statement regarding Ordinances – (1) Whenever a Bill seeking to replace an Ordinance with or without modification is introduced in the House, there shall be placed before the House along with the Bill a statement explaining the circumstances which had necessitated immediate legislation by Ordinance.
>
> (2) Whenever an Ordinance, which embodies wholly or partly or with modification the provisions of a Bill pending before the House is promulgated a statement explaining the circumstances which had necessitated immediate legislation by Ordinance shall be laid on the Table at the commencement of the session following the promulgation of the Ordinance". (emphasis supplied)

The procedure of Parliament (see Kashyap supra) is that where on the first day of the session, the House is to adjourn after obituary references ordinances are laid on the table on the following day's sitting. Normally, ordinances promulgated by the President are laid on the table on the first sitting of the House after the promulgation.

72 The Rules of Procedure and Conduct of Business in the Bihar Vidhan Sabha[62] contain a provision in Rule 140 which indicates that copies of the

[61]Universal Law Publishing Co. Pvt. Ltd (Id at page 16,17)
[62]10th Edition Bihar Vidhan Sabha Patna

ordinance have to be made available to members of the legislative assembly "as soon as possible" after the Governor has promulgated an ordinance. Within a period of six weeks of the legislature reassembling (that being the period during which the ordinance will continue to operate) any member may move a resolution approving the ordinance with a notice of three days.

73 The importance of tabling an ordinance before the legislature is that it enables the legislature to act in furtherance of its constitutional power of supervision and control. The legislature is entitled to determine whether an ordinance should be disapproved. The need for and expediency of issuing an ordinance can be discussed and debated by the legislature. The Government which is accountable to and bears collective responsibility towards the legislature may bring a Bill along the lines of the ordinance (or with such modifications as are considered appropriate) before the legislature in which event, the Bill can be debated upon and discussed before a vote is taken. The ordinance making power is not a parallel source of legislation. Promulgated at a time when the legislature is not in session, the constitutional process involved postulates an intersection between the exercise of the ordinance making power with the constitutional authority of the legislature over an ordinance which has been promulgated by the President or the Governor.

74 The failure to place an ordinance before the legislature constitutes a serious infraction of a constitutional obligation which the executive has to discharge by placing the ordinance before the legislature. The laying of an

ordinance facilitates the constitutional process by which the legislature is enabled to exercise its control. Failure to lay an ordinance before the legislature amounts to an abuse of the constitutional process and is a serious dereliction of the constitutional obligation. In the case of delegated legislation, Parliamentary or state enactments may provide a requirement of laying subordinate legislation before the legislature. It is well-settled that a requirement of merely laying subordinate legislation before the House of the legislature is directory. But where a disapproval of subordinate legislation is contemplated, such a requirement is mandatory. In **Quarry Owners' Association** v. **State of Bihar**[63] this Court held :

> "45…..Laying before the Houses of Parliament is done in three different ways. Laying of any rule may be subject to any negative resolution within a specified period or may be subject to its confirmation. This is spoken of as negative and positive resolution respectively. Third may be mere laying before the House. In the present case, we are not concerned with either the affirmative or negative procedure but consequence of mere laying before the legislature…..
>
> 48…..Even if submission for the appellants is accepted that mere placement before a House is only for information, even then such information, inherently in it makes the legislature to play an important role as aforesaid for keeping a check on the activity of the State Government. Such placement cannot be construed to be non est. No act of Parliament should be construed to be of having no purpose. As we have said, mere discussion and questioning the Ministry concerned or authority in the House in respect of such laying would keep such authority on guard to act with circumspection which is a check on such authority,

[63](2000) 8 SCC 655

> especially when such authority is even otherwise answerable to such legislature." (Id at p. 689)

75 The requirement of an ordinance being laid before the legislature cannot be equated with the laying of subordinate legislation. An ordinance is made in the exercise of the legislative power of the Governor which is subordinate to and not a stream which runs parallel to the power of law making which vests in the state legislatures and Parliament. Any breach of the constitutional requirement of laying an ordinance before the legislature has to be looked upon with grave constitutional disfavour. The Constitution uses the express "cease to operate" in the context of a culmination of a duration of six weeks of the reassembling of the legislature or as a result of a resolution of disapproval. The framers introduced a mandatory requirement of an ordinance being laid before the legislature upon which it would have the same force and effect as a law enacted by the legislature, subject the condition that it would cease to operate upon the expiry of a period of six weeks of the reassembling of the legislature or earlier, if a resolution of disapproval were to be passed. The 'cease to operate' provision is hence founded on the fundamental requirement of an ordinance being placed before the legislature. If the executive has failed to comply with its unconditional obligation to place the ordinance before the legislature, the deeming fiction attributing to the ordinance the same force and effect as a law enacted by the legislature would not come into existence. An ordinance which has not been placed before the legislature at all cannot have

the same force and effect as a law enacted and would be of no consequence whatsoever.

The Constitution has not made a specific provision with regard to a situation where an ordinance is not placed before a legislature at all. Such an eventuality cannot be equated to a situation where an ordinance lapses after the prescribed period or is disapproved. The mandate that the ordinance will cease to operate applies to those two situations. Not placing an ordinance at all before the legislature is an abuse of constitutional process, a failure to comply with a constitutional obligation. A government which has failed to comply with its constitutional duty and overreached the legislature cannot legitimately assert that the ordinance which it has failed to place at all is valid till it ceases to operate. An edifice of rights and obligations cannot be built in a constitutional order on acts which amount to a fraud on power. This will be destructive of the rule of law. Once an ordinance has been placed before the legislature, the constitutional fiction by which it has the same force and effect as a law enacted would come into being and relate back to the promulgation of the ordinance. In the absence of compliance with the mandatory constitutional requirement of laying before the legislature, the constitutional fiction would not come into existence. In the present case, none of the ordinances promulgated by the Governor of Bihar were placed before the state legislature. This constituted a fraud on the constitutional power. Constitutionally, none of the ordinances had any force and effect. The noticeable pattern was to avoid the legislature and to

obviate legislative control. This is a serious abuse of the constitutional process. It will not give rise to any legally binding consequences.

M Re-promulgation in the present case

76 The judgment of the Constitution Bench in **D C Wadhwa** was delivered on 20 December 1986. The Constitution Bench made it clear, as a matter of constitutional principle, that the executive cannot subvert the democratic process by resorting to a subterfuge of re-promulgating ordinances. The Constitution Bench held that it would be a colorable exercise of power for government to ignore the legislature and to re-promulgate ordinances. Perhaps there is justification in the critique of the judgment that the Constitution Bench ultimately left the matter (having invalidated one of the Bihar ordinances which still held the field) to an expression of hope which read thus :

> " we hope and trust that such practice shall not be continued in the future and that whenever an ordinance is made and the government wishes to continue the provisions of the ordinance in force after the reassembling of the legislature, a Bill will be brought before the legislature for enacting those provisions into an act. There must not be Ordinance-Raj in the country."

77 The Constitution Bench carved out an exception where an ordinance may have to be re-promulgated by the Governor where it has not been possible for Government to introduce and push through in the legislature a Bill containing the same provisions as an ordinance because of an excess of legislative business for a particular session. This exception has been criticized on the

ground that however pressing is the existing legislative business, it lies in the discretion of the government to seek an extension of the legislative session for converting an ordinance into an enactment of the legislature. Moreover, it has been questioned as to whether a re-promoulgated ordinance would meet the basic constitutional requirement of the existence of circumstances bearing upon the satisfaction of the Governor on the need to take immediate action. Be that as it may, it is not the case of the State of Bihar in the present case that there was any reason or justification to continue with a chain of ordinances nor is there any material before the court to indicate exceptional circumstances involving a constitutional necessity.

78 The two learned judges (Justice Sujata Manohar and Justice Wadhwa) agreed in coming to the conclusion that the ordinances which were issued after the first would amount to a fraud on constitutional power. They however differed in regard to the validity of the first ordinance. Justice Sujata Manohar held that all the ordinances formed a part of a chain of acts designed to nullify the scheme of Article 213. In this view, each of the ordinances took colour from one another, notwithstanding some departures in the scheme of the fourth and subsequent ordinances. The entire exercise was held to be a fraud on the power conferred by Article 213 since the executive had no intention of placing any of the ordinances before the legislature. Justice Wadhwa on the other hand took the view that the effect of the first ordinance was of an enduring nature and held that what the first ordinance ordained was accomplished and its effect was irreversible. In this view, the ordinance was like a temporary law which had

accomplished its purpose. Justice Wadhwa held that once the property has vested in the state there had to be an express legislation taking away vested rights. The conferment of rights on the employees was held to be of an enduring character which could not be taken away merely because the ordinance, like a temporary statute ceased to operate.

79 We have already adduced reasons earlier for overruling the enduring rights theory based on the analogy of a temporary statute. Moreover as we have indicated, it would not be correct to assert that these enduring rights could be set at naught only by an act of the legislature enacted with retrospective effect. The basic infirmity is that none of the ordinances, including the first, was laid before the legislature. There was a fundamental breach of a mandatory constitutional requirement. All the ordinances formed a part of one composite scheme by which the Governor of Bihar promulgated and re-promulgated ordinances. That chain or link commenced from the promulgation of the first ordinance. Hence, in the very nature of things it would not be possible to segregate the first ordinance since it forms an intrinsic part of a chain or link of ordinances each of which and which together constitute a fraud on constitutional power.

N Conclusion

80 In summation, the conclusions in this Judgment are as follows :

(i) The power which has been conferred upon the President under Article 123 and the Governor under Article 213 is legislative in character. The power is

conditional in nature: it can be exercised only when the legislature is not in session and subject to the satisfaction of the President or, as the case may be, of the Governor that circumstances exist which render it necessary to take immediate action;

(ii) An Ordinance which is promulgated under Article 123 or Article 213 has the same force and effect as a law enacted by the legislature but it must (i) be laid before the legislature; and (ii) it will cease to operate six weeks after the legislature has reassembled or, even earlier if a resolution disapproving it is passed. Moreover, an Ordinance may also be withdrawn;

(iii) The constitutional fiction, attributing to an Ordinance the same force and effect as a law enacted by the legislature comes into being if the Ordinance has been validly promulgated and complies with the requirements of Articles 123 and 213;

(iv) The Ordinance making power does not constitute the President or the Governor into a parallel source of law making or an independent legislative authority;

(v) Consistent with the principle of legislative supremacy, the power to promulgate ordinances is subject to legislative control. The President or, as the case may be, the Governor acts on the aid and advice of the Council of Ministers which owes collective responsibility to the legislature;

(vi) The requirement of laying an Ordinance before Parliament or the state legislature is a mandatory constitutional obligation cast upon the government. Laying of the ordinance before the legislature is mandatory because the

legislature has to determine: (a) The need for, validity of and expediency to promulgate an ordinance; (b) Whether the Ordinance ought to be approved or disapproved; (c) Whether an Act incorporating the provisions of the ordinance should be enacted (with or without amendments);

(vii) The failure to comply with the requirement of laying an ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process;

(viii) Re-promulgation of ordinances is a fraud on the Constitution and a sub-version of democratic legislative processes, as laid down in the judgment of the Constitution Bench in **D C Wadhwa**;

(ix) Article 213(2)(a) provides that an ordinance promulgated under that article shall "**cease to operate**" six weeks after the reassembling of the legislature or even earlier, if a resolution disapproving it is passed in the legislature. The Constitution has used different expressions such as "repeal" (Articles 252, 254, 357, 372 and 395); "void" (Articles 13, 245, 255 and 276); "cease to have effect" (Articles 358 and 372); and "cease to operate" (Articles 123, 213 and 352). Each of these expressions has a distinct connotation. The expression "cease to operate" in Articles 123 and 213 does not mean that upon the expiry of a period of six weeks of the reassembling of the legislature or upon a resolution of disapproval being passed, the ordinance is rendered *void ab initio*. Both Articles 123 and 213 contain a distinct provision setting out the circumstances in which an ordinance shall be void. An ordinance is void in a situation where it makes a provision which Parliament would not be competent

to enact (Article 123(3)) or which makes a provision which would not be a valid if enacted in an act of the legislature of the state assented to by the Governor (Article 213(3)). The framers having used the expressions “cease to operate” and “void” separately in the same provision, they cannot convey the same meaning;

(x) The theory of enduring rights which has been laid down in the judgment in **Bhupendra Kumar Bose** and followed in T **Venkata Reddy** by the Constitution Bench is based on the analogy of a temporary enactment. There is a basic difference between an ordinance and a temporary enactment. These decisions of the Constitution Bench which have accepted the notion of enduring rights which will survive an ordinance which has ceased to operate do not lay down the correct position. The judgments are also no longer good law in view of the decision in **S R Bommai**;

(xi) No express provision has been made in Article 123 and Article 213 for saving of rights, privileges, obligations and liabilities which have arisen under an ordinance which has ceased to operate. Such provisions are however specifically contained in other articles of the Constitution such as Articles 249(3), 250(2), 357(2), 358 and 359(1A). This is, however, not conclusive and the issue is essentially one of construction; of giving content to the ‘force and effect’ clause while prescribing legislative supremacy and the rule of law;

(xii) The question as to whether rights, privileges, obligations and liabilities would survive an Ordinance which has ceased to operate must be determined as a matter of construction. The appropriate test to be applied is the test of

public interest and constitutional necessity. This would include the issue as to whether the consequences which have taken place under the Ordinance have assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief; and

(xiii) The satisfaction of the President under Article 123 and of the Governor under Article 213 is not immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinise whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all.

81 We hold and declare that every one of the ordinances at issue commencing with Ordinance 32 of 1989 and ending with the last of the ordinances, Ordinance 2 of 1992 constituted a fraud on constitutional power. These ordinances which were never placed before the state legislature and were re-promulgated in violation of the binding judgment of this Court in **D C Wadhwa** are bereft of any legal effects and consequences. The ordinances do not create any rights or confer the status of government employees. However, it would be necessary for us to mould the relief (which we do) by declaring that no recoveries shall be made from any of the employees of the salaries which have

been paid during the tenure of the ordinances in pursuance of the directions contained in the judgment of the High Court.

82 The reference is answered in these terms.

83 We acknowledge and value the able assistance rendered by learned counsel who appeared before the court :

Shri Salman Khurshid, Shri Rakesh Dwivedi, Shri Amarendra Saran, Shri Mukesh Giri, Shri C U Singh, senior advocates and Shri Ranjit Kumar, Solicitor General. Their industry and research have provided us valuable inputs.

..... J
[S.A. BOBDE]

..... J
[ADARSH KUMAR GOEL]

..... J
[UDAY UMESH LALIT]

..... J
[DR D Y CHANDRACHUD]

..... J
[L. NAGESWARA RAO]

New Delhi
January 02, 2017