

Dr. D. C. Wadhwa and Others

Vs

State of Bihar and Others

Writ Petition Nos. 412-15 of 1984

(CJI P. N. Bhagwati, E. S. Venkataramiah, V. Khalid, G. L. Oza, S. Natarajan JJ)

20.12.1986

JUDGMENT

BHAGWATI, C.J. -

1. These petitions under Article 32 of the Constitution raise a short question of great constitutional importance relating to the power of the Governor under Article 213 of the Constitution to repromulgate ordinances from time to time without getting them replaced by Acts of the legislature. The question is, can the Governor on repromulgating ordinances for an indefinite period of time and thus take over to himself the power of the legislature to legislate though that power is conferred on him under Article 213 only for the purpose of enabling him to take immediate action at a time when the legislative assembly of the State is not in session or when in a case where there is a legislative council in the State, both Houses of legislature are not in session. The facts giving rise to these writ petitions are disturbing and we may briefly state them as follows :

2. These writ petitions have been filed by four petitioners challenging the validity of the practice of the State of Bihar in promulgating and repromulgating ordinances on a massive scale and in particular they have challenged the constitutional validity of three different ordinances issued by the Governor of Bihar, namely, (i) Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983, (ii) The Bihar Intermediate Education Council Third Ordinance, 1983, and (iii) The Bihar Bricks Supply (Control) Third Ordinance, 1983. Petitioner 1 is a professor of economics in the Gokhale Institute of Politics and Economics, Pune and he has spent a number of years in studying the constitutional functioning of Indian politics. He is deeply interested in the preservation and promotion of constitutional functioning of the administration in the country. He has made a deep and profound study of the practice which is being followed in the State of Bihar of promulgating and repromulgating ordinances from time to time without enacting them into Acts of the legislature. Petitioner 2 is an occupancy raiyat of village Anigara, Kunti Police Station in the district of Ranchi. He grows forest produce in his raiyat land. Clause (5) of the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 imposes restriction on the sale of specified forest produce and it further created State monopoly for sale and purchase of such forest produce. Clause (7) of this ordinance conferred power on the State Government to fix the price at which the specified forest produce may be purchased by it or by any authorized forest officer or agent from the growers of such forest produce. The effect of these provisions in the Bihar Forest Produce (Regulation of Trade) Third Ordinance was that petitioner 2 was prevented from selling his forest produce to any purchaser other than those mentioned in the ordinance and his right to dispose of the forest produce was adversely affected by these provisions and he was therefore interested in challenging the constitutional validity of this ordinance. Petitioner 3 is a student studying in Intermediate (Science) Class in A.N. College, Patna. He was affected by the Bihar Intermediate Education Council Third

Ordinance. It is not necessary to refer to the provisions of this ordinance since it could not be seriously disputed on behalf of the respondents that the provisions of this ordinance affected, curtailed and/or regulated the rights of petitioner 3 or at least had the potential of doing so and petitioner 3 therefore challenged the constitutional validity of this ordinance. Similarly petitioner 4 was aggrieved by the Bihar Brick Supply (Control) Third Ordinance because he is the proprietor of South Bihar Agency, Patna, a brick manufacturing concern operating under a licence issued by the Mining and the Industry Department of the Government of Bihar and the provisions of this ordinance empowering the State Government to control and regulate the manufacture, distribution, transport, disposal and consumption of bricks, as also the price at which the bricks may be bought or sold affected petitioner 4 and he accordingly joined the writ petition and challenged the constitutional validity of this ordinance.

3. It was contended on behalf of the respondents that the petitioners had no locus standi to maintain this writ petition since out of the three ordinances challenged on behalf of the petitioners, two of them, namely, Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 and the Bihar Bricks Supply (Control) Third Ordinance, 1983 had already lapsed and their provisions were enacted into Acts of the legislature and so far as the third ordinance, namely, the Bihar Intermediate Education Council Third Ordinance was concerned, a legislative proposal was already introduced for enacting its provisions into an Act. The respondents also contended that the petitioners are not entitled to challenge the practice prevalent in the State of Bihar of repromulgating ordinances from time to time since they were merely outsiders who had no legal interest to challenge the validity of this practice. We do not think this preliminary objection raised on behalf of the respondents is well founded. It is undoubtedly true that the provisions of two out of the three ordinances challenged in these writ petitions were enacted into Acts of the legislature but that happened only during the pendency of these writ petitions and at the date when these writ petitions were filed, these two ordinances were very much in operation and affected the interest of petitioners 2 and 4 respectively. Moreover, the third ordinance, namely, the Bihar Intermediate Education Council Third Ordinance is still in operation though a bill incorporating the provisions of this ordinance is pending consideration before the State legislature and it has been referred to a Select Committee and the right of petitioner 3 to pursue particular course of study is vitally affected by the provisions contained in that ordinance. Besides petitioner 1 is a Professor of Political Science and is deeply interested in ensuring proper implementation of the constitutional provisions. He has sufficient interest to maintain a petition under Article 32 even as a member of the public because it is a right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions. Of course, if any particular ordinance was being challenged by petitioner 1 he may not have the locus standi to challenge it simply as a member of the public unless some legal right or interest of his is violated or threatened by such ordinance, but here what petitioner 1 as a member of the public is complaining of is a practice which is being followed by the State of Bihar of repromulgating the ordinances from time to time without their provisions being enacted into Acts of the legislature. It is clearly for vindication of public interest that petitioner 1 has filed these writ petitions and he must therefore be held to be entitled to maintain his writ petition. In *S. P. Gupta v. Union of India* ((1982) 2 SCR 365 : 1981 Supp 87 : AIR 1982 SC 149), one of us (Bhagwati, J. as he then was) observed : (SCC p. 218, para 23)

.... [A]ny member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.



Ordinance	Date	on which	Life of the Ordinance first promulgated
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(i) The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1968 (Ordinance No. 3 of 1968)	3-11-1968		13 11 19
(ii) The Bihar Panchayat Raj 1970 (Ordinance No. 3 of 1970)	14-8-1970		11 4 18
(iii) The Bihar Hindu Religious Trusts (Amendment) Ordinance, 1970 (Ordinance No. 5 of 1970)	5-9-1970		11 3 26
(iv) The State Aid to Industries (Amendment) Ordinance, 1970 (Ordinance No. 8 of 1970)	10-9-1970		11 3 21
(v) The Bihar Khadi and Village Industries (Amendment) Ordinance, 1970 (Ordinance No. 9 of 1970)	17-9-1970		11 3 14
(vi) The Bihar Soil and Water Conservation and Land Development Ordinance, 1971 (Ordinance No. 16 of 1971)	10-2-1971		10 10 19
(vii) The Bihar Panchayati Raj 1971 (Ordinance No. 54 of 1971)	15-5-1971		10 7 17
(viii) The Bihar Municipal Amendment Ordinance, 1971 (Ordinance No. 57 of 1971)	20-5-1971		10 7 12
(ix) The Patna Municipal Corporation (Amendment) Ordinance, 1971 (Ordinance No. 58 of 1971)	22-5-1971		10 7 10
(x) The Bihar State Housing Board Ordinance, 1971 (Ordinance No. 101 of 1971)	14-9-1971		10 3 17
(xi) The Bihar Co-operative Societies (Second Amendment) Ordinance, 1971 (Ordinance No. 103 of 1971)	7-10-1971		19 2 25
(xii) The Bihar Agricultural Produce Markets (Amendment) Ordinance, 1972 (Ordinance No. 6 of 1972)	14-12-1972		9 10 16
(xiii) The Bihar Medical Educational Institutions (Regulation and Control) Ordinance, 1972 (Ordinance No. 69 of 1972)	14-5-1972		9 7 18
(xiv) The Rajendra Agricultural University (Amendment) Ordinance, 1973 (Ordinance No. 2 of 1973)	15-1-1973		8 11 17
(xv) The Bihar Panchayati Raj (Validating) Ordinance, 1973 (Ordinance No. 5 of 1973)	22-2-1973		8 10 7
(xvi) The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Ordinance, 1973 (Ordinance No. 6 of 1973)	22-2-1973		8 10 7
(xvii) The Bihar Khadi and Village Industries (Amendment) Ordinance, 1973 (Ordinance No. 122 of 1973)	1-10-1973		8 3 0
(xviii) The Motor Vehicles (Bihar Amendment) Ordinance, 1971 (Ordinance No. 56 of 1971)	20-5-1971		7 8 17
(xix) The Bihar State Aid to Industries (Second Amendment) Ordinance, 1974 (Ordinance, No. 56 of 1974)	27-4-1974		7 8 4
(xx) The Bihar Irrigation Laws and Control (Amendment) Ordinance, 1974 (Ordinance No. 169 of 1974)	27-8-1974		7 4 3
(xxi) The Bihar Irrigation Channel (Amendment) Ordinance, 1974 (Ordinance No. 170 of 1974)	29-8-1974		7 4 3
(xxii) The Bihar Soil and Water Conservation and Land Development (Amendment) Ordinance, 1974 (Ordinance No. 174 of 1974)	16-9-1974		7 3 15
(xxiii) The Bihar Gramdan (Amendment) Ordinance, 1972 (Ordinance No. 12 of 1972)	26-2-1972		6 5 27
(xxiv) The Bihar Primary Education (Amendment) Ordinance, 1970 (Ordinance No. 6 of 1970)	5-9-1970		6 3 26
(xxv) The Bihar Regional Development Authority Ordinance, 1974 (Ordinance No. 175 of 1974)	19-9-1974		6 3 12
(xxvi) The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Fifth Amendment) Ordinance, 1975 (Ordinance No. 197 of 1975)	29-10-1974		6 2 3
(xxvii) The Bihar Motor Vehicles Taxation (Fifth Amendment) Ordinance, 1975 (Ordinance No. 207 of 1975)	29-11-1975		6 1 2
(xxviii) The Bihar Cess (Amendment) Ordinance, 1975 (Ordinance No. 209 of 1975)	2-12-1975		6 1 0
(xxix) The Bihar Public Land Encroachment (Amendment) Ordinance, 1975 (Ordinance No. 210 of 1975)	5-12-1975		6 0 27
(xxx) The Bihar Motor Vehicles Taxation (Sixth Amendment) Ordinance, 1975 (Ordinance No. 212 of 1975)	5-12-1975		6 0 27
(xxxi) The Bihar Motor Vehicles Taxation (Seventh Amendment) Ordinance, 1975 (Ordinance No. 214 of 1975)	5-12-1975		6 0 27



of more than five years.

6. The Government of Bihar, it seems, made it a settled practice to go on repromulgating the ordinances from time to time and this was done methodological and with a sense of deliberateness. Immediately at the conclusion of each session of the State legislature, a circular letter used to be sent by the Special Secretary in the Department of Parliamentary Affairs to all the Commissioners, Secretaries, Special Secretaries, Additional Secretaries and all Heads of Departments intimating to them that the session of the legislature had been got prorogued and that under Article 213 clause (2)(a) of the Constitution all the ordinances would cease to be in force after six weeks of the date of reassembly of the legislature and that they should therefore get in touch with the Law Department and immediate action should be initiated to get "all the concerned ordinances repromulgated", so that all those ordinances are positively repromulgated before the date of their expiry. This circular letter also used to advise the officers that if the old ordinances were repromulgated in their original form without any amendment, the approval of the Council of Ministers would not be necessary. The petitioners placed before the court a copy of one such circular letter dated July 29, 1981 and it described the subject of the communication as "regarding repromulgation of ordinances". It would be profitable to reproduce this circular letter dated July 29, 1981 as it indicates the routine manner in which the ordinances were repromulgated by the Governor of Bihar :

# Letter No. P. A/Misc. 1040/80-872 Government of Bihar Department of Parliamentary Affairs  
From : Basant Kumar Dubey Special Secretary to the Govt.  
To : All Commissioners and Secretaries, All Special Secretaries, All Additional Secretaries, All Heads of Departments. Patna 15 - dt. July 29, 1981  
Subject : Regarding repromulgation of Ordinances  
Sir,##

I am directed to say that the budget Session of the legislature (June-July 1981) has been got prorogued after the completion of the business of both the house on July 28, 1981.

Under the provisions of Article 213(2)(a) of the Constitution all the ordinances cease to be in force after six weeks of the date of the reassembly of the legislature. This time the session of the Legislative Assembly has began on June 29, 1981 and that of the Legislative Council on July 1, 1981. Therefore from July 1, 1981, six weeks, that is, 42 days would be completed on August 11, 1981 and if they are not repromulgated before the aforesaid date, then all the ordinances will cease to be in force after August 11, 1981.

It is, therefore, requested that the Law Department may be contacted and immediate action be initiated to get all the concerned ordinances repromulgated so that they are definitely repromulgated before August 11, 1981.

If the old ordinances are repromulgated in their original form without any amendment, then the approval of the Council of Ministers is not necessary.

This should be given the topmost priority and necessary action should be taken immediately.

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Yours faithfully,

Sd/- Basant Kumar

Dubey Special Secretary to Bihar Government

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This circular letter clearly shows beyond doubt that the repromulgation of the ordinances was done on a massive scale in a routine manner without even caring to get the ordinances replaced by Acts of the legislature or considering whether the circumstances existed which rendered it necessary for the Governor to take immediate action by way of repromulgation of the ordinances. The government seemed to proceed on the basis that it was not necessary to introduce any legislation in the legislature but that the law could be continued to be made by the government by having the ordinances repromulgated by the Governor from time to time. The question is whether this practice followed by the Government of Bihar could be justified as representing legitimate exercise power of promulgating ordinances conferred on the Governor under Article 213 of the Constitution.

7. The determination of this question depends on the true interpretation of Article 213 which confers power on the Governor of a State to promulgate ordinances. This article insofar as material, reads as follows :

213. (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 :

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(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 Council; and

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

Explanation. - Where the Houses of legislature of a State having a Legislative Council are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the later of those dated for the purposes of this clause.

The power conferred on the Governor to issue ordinances is in the nature of an emergency power which is vested in the Governor for taking immediate action where such action may become necessary at a time when the legislature is not in session. 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 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 situation which requires immediate action and which cannot wait until the legislature reassembles, must necessarily have a limited life. Since Article 174 enjoins that the legislature shall meet at least twice in a year but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session and an ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the legislature, it is obvious that the maximum life of an ordinance cannot exceed seven and a half months unless it is replaced by an Act of the legislature or disapproved by the resolution of the legislature before the expiry of that period. 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 usurpation by the executive of the law-making function of the legislature. The executive cannot be 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. The government cannot by-pass the legislature and without enacting the provisions of the ordinance into an Act of the legislature, repromulgate the ordinance as soon as the legislature is prorogued. Of course, there may be a situation where it may not be possible for the government to introduce and push through in the legislature a Bill containing the same provisions as in the ordinance, because the legislature may have too much legislative business in a particular session or the time at the disposal of the legislature in a particular Session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the ordinance. Where such is the case, repromulgation of the ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the executive to continue an ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation. It is settled law that a constitutional authority cannot do indirectly what is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision. This is precisely what was pointed out by Mukherjea, J. speaking for the Court in *K. C. Gajapati Narayan Deo v. State of Orissa* (1954 SCR 1, 12 : AIR 1953 SC 375) :

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. So also in *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras* ((1965) 1 SCR 614 : AIR 1965 SC 1017) a Constitution Bench of this Court observed that when it is said that legislation is a colourable one, what it means is that the legislature has transgressed its legislative power in a covert or indirect manner, if it adopts a device to outstep the limits of its power. 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. Such a strategem would be repugnant to the constitutional scheme, as it would enable the executive to transgress its constitutional limitation in the matter of law-making in an emergent situation and to covertly and indirectly arrogate to itself the law-making function of the legislature.

8. Shri Lal Narain Sinha, appearing on behalf of the State of Bihar urged that the court is not entitled to examine whether the conditions precedent for the exercise of the power of the Governor under Article 213 existed or not, for the purpose of determining the validity of an ordinance and in support of this proposition, he strongly relied upon the decisions reported in *Bhagat Singh v. Empire*, (AIR 1913 PC 111 : 131 IC 415 : 58 IA 169) *Raja Bahadur Kamakshya Narain Singh v. CIT* (AIR 1943 PC 153 : (1943) 2 MLJ 410 : 70 IA 180), *Lakshmidhar Misra v. Rangalal* (AIR 1950 PC 56 : (1950) 1 MLJ 100 : 76 IA 271) and *R. C. Cooper v. Union of India*. ((1970) 3 SCR 530 : (1970) 1 SCC 248 : AIR 1970 SC 564). We do not see how these decisions could possibly help in the present case. They do not at all deal with the question which we are called upon to decide here. It is true that, according to the decisions of the Privy Council and this Court, the court cannot examine the question of satisfaction of the Governor in issuing an ordinance, but the question in the present case does not raise any controversy in regard to the satisfaction of the Governor. The only question is whether the Governor has power to repromulgate the same ordinance successively without bringing it before the legislature. That clearly the Governor cannot do. He cannot assume legislative function in excess of the strictly defined limits set out in the Constitution because otherwise he would be usurping a function which does not belong to him. It is significant to note that so far as the President of India is concerned, though he has the same power of issuing an ordinance under Article 123 as the Governor has under Article 213, there is not a single instance in which the President has, since 1950 till today, repromulgated any ordinance after its expiry. The startling facts which we have narrated above clearly show that the executive in Bihar has almost taken over the role of the legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid. 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 assembling 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.

9. We must accordingly strike down the Bihar Intermediate Education Council Ordinance, 1985 which is still in operation as unconstitutional and void. Petitioner 1 has done enormous research and brought this reprehensible practice of the Government of Bihar to the notice of the court and we would therefore direct that the State of Bihar shall pay to petitioner 1 a sum of Rs. 10,000 (rupees ten thousand only) as and by way of cost of the writ petitions.

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