Krishna Kumar Singh & Anr vs State Of Bihar on 8 May, 1998

Author: Sujata V. Manohar

Bench: Sujata V. Manohar, D.P. Wadhwa

PETITIONER:
KRISHNA KUMAR SINGH & ANR.

Vs.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT: 08/05/1998

BENCH:
SUJATA V. MANOHAR, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

[With C.A. Nos. 3533-3595/1995, 5876-5890/1994, C.A. No. 2646 ..... /1993 (Arising out of S.L.P (C) No. 18806 of 1995) W.P. (C) No. 580/1995 with Contempt Petition Nos. 288-

296/1997 in C.A. Nos. 3535, 3539,3541,3545,3555,3560,3573,3576,3590/1995 with I.A. No. 3 in W.P.(C) No. 580/1995] J U D G M E N T Mrs. Sujata V. Manohar, J.

Leave granted.

This group of appeals arises from a judgement of the Division Bench of the Patna High Court dated 9.3.1994 in a group of writ petitions filed by the teaching and non- teaching staff of various Sanskrit Schools in the State of Bihar. These Sanskrit Schools were private schools. They were said to have been taken over by the State of Bihar under Ordinance 32 of 1989. The teachers and staff of these schools claimed that as a result, they had become Government servants. They filed before the High Court petitions for payment of salary and other emoluments on the basis that they were Government servant with effect from coming in into force of Ordinance 32 of 1989 and they continue to be so thereafter, although the last of the series of Ordinance expired by lapse of time on 30th of April,

1992.

The High Court has held that the petitioners before it would be entitled to get their salary which they were getting prior to the promulgation of the Ordinance sin question. it also held that in addition, the petitioners before it would be entitled to get their salaries as Government servants from 16.12.1989, the date of coming into force of Ordinance 32 of 1989 until 30th of April, 1992 when the last Ordinance came to an end.

Being aggrieved by the decision of the High Court which denies to them the status of Government s servants after 30th of April, 1992, a number of petitioners before the High Court have filed the present group of appeals from the High Court's judgment and order, save and except one set of appeals which have been filed by the State of Bihar, which is aggrieved by the finding that the staff of Sanskrit Schools should get salary as Government servants from the date of the first Ordinance till the date of the expiry of the last Ordinance on 30th of April, 1992. The State has also objected to the findings of the High Court in relation to "ordinance Raj" in the State of Bihar and the finding that Ordinances repromulgated by the State agains and again are illegal. All these appeals have been heard together since they raise common questions of fact and law.

Writ petition (C) No. 580 of 1995 is filed by the staff of some Sanskrit Schools claiming reliefs similar to those claimed in the original writ petitions before the High Court. The implement application, I.A.3 in writ Petition (c) No. 580 of 1995 is allowed. Since the writ petition raises contentions similar to those in the above appeals, it is also heard along with the appeals.

History of Sanskrit Schools in the State of Bihar:

> Bihar 1960 there was no legislation relating to Sanskrit education in the State of Bihar. However, all primary and secondary Sanskrit Schools, whether Government or Private, including Sanskrit Vidyalayas located in the territory of Bihar were governed by the Bihar Education code for the conduct of examinations of Prathama and Madhyama standards. The Bihar Sanskrit Association conducted the examinations.
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> After 1960, the Kameshwar Singh Darbhanga Vishwa Vidyalaya Act, 1960 came into force under which the Bihar Sanskrit Association was dissolved. The Kameshwar Singh Darbhanga Sanskrit University was given the power to hold examinations and give certificates. The power of recognition of Sanskrit Schools up to Madhyama Standard was given to the Sanskrit Shiksha parishad (The Board of Sanskrit Education) constituted under the Act. The Sanskrit Shiksha Parishad functioned as an autonomous body. This Act was replaced by the Sanskrit University Act of 1965. under the new Act, the functions of the Sanskrit Shiksha Parishad were retained in relation to Sanskrit education at the school level.
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> In 1976, the Bihar State University Act, 1976 was promulgated. It repealed Sanskrit University Act of 1965. The jurisdiction of the Bihar State University was confined to Sanskrit education at the college level. In the absence of any institution which could

hold examinations up to madhyama level (i.e school level), the University continued to conduct these examinations till 1981.

In 1981, the Bihar Sanskrit Education Board Act 1981 came into force with effect from 11th of August, 1980. it constituted an autonomous board for the development and better supervision of Sanskrit Education up to Madhyama level. The Bihar Sanskrit Education Board was, inter alia, given the power to grant recognition to Sanskrit Schools and "tools", power of preparation of text books and curriculum, holding of examinations up to Madhyama level, publication of results, award of certificates and so on.

In 1989, there were 651 Sanskrit Schools under the Bihar Sanskrit shiksha Board (Bihar Sanskrit Education Board) which were receiving grants-in-aid from the State Government. All these schools were managed by their own managing committees. However, grants-in-aid were given to these schools by the Government for meeting the expenditure on salary of teachers and staff for the number of posts prescribed or sanctioned by the Government for each school.

In addition, the Government was also giving grants for development of school buildings, furniture, equipment etc. The grant which was given to each school in accordance with the Rules laid down was given in one lumpsum to he Bihar Sanskrit Shiksha board for distribution to the Sanskrit Schools eligible for grants. The Bihar Sanskrit Shiksha Board , in turn, disbursed the grants to different individual schools in accordance with the pay-scales, D.A. rates and staffing pattern laid down by the Government for this purpose.

Ordinances:

On 16th of December, 1989, Ordinance 32 of 1989 entitled the Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance, 1989 was promulgated seeking to take over 429 out of 651 private Sanskrit Schools which were receiving grants-in-aid through the Bihar Sanskrit Shiksha Board and were recognised. Sections 3 and 4 of the Ordinance provide 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 movable or immovable including land, buildings, documents, books and register. 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.

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 employees of the taken over Secondary Schools of Bihar."

(underling ours) Clause 3(2) of the Ordinance provides for vesting of all properties and assets of private schools in the State Government free from all encumberances. It does not provide for any compensation at all being paid to the owners of these properties and assets. On the face of it, the first Ordinance appears to be wholly arbitrary and unconstitutional (vide C.B. Gautam v. Union of India & Ors. [(1993) 1 SCC 78]).

Ordinance 32 of 1989 was replaced on 28.2.1990 by Ordinance 7 of 1990 which, in turn, was replaced on 2.5.1990 by Ordinance 14 of 1990. This Ordinance was replaced on 12.8.1990 by Ordinance 21 of 1990 (hereinafter called 'the 4th Ordinance'). Each of these subsequent Ordinance contained a "repeal and Savings" clause under which the previous Ordinance was repealed. It also provided, "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 (sic) as if this Act (sic) were in force on the date on which such thing was done or action taken." With the result that all actions taken under the previous Ordinances wee deemed to be taken under the fresh Ordinance.

While Ordinances 7 of 1990 and 14 of 1990 were in substantially the same terms as Ordinance 32 of 1989, the 4th Ordinance, that is to say, Ordinance 21 of 1990 made changes in Sections 3 and 4. Sections 3 and 4 of the 4th Ordinance (21 of 1990) are as follows:

"3- Taking over of management and control of non-Government Sanskrit Schools by the State Government:

(1) With effect from the date of coming into force of this Ordinance, 429 Sanskrit schools mentioned in Schedule - I shall vest in the State Government and the State Government shall manage and control them thereafter.

But, the Sanskrit Schools mentioned in annexure-1 of this Ordinance will be investigated through concerned Collector, and it is found in the report of the Collector that such school is not in existance, 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 movable or immovable including land, buildings, documents, books and register.

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.

4. Effect of taking over the management and control - (1) The staff working in the Sanskrit Schools mentioned in annexure - 1 of the Ordinance, on integration of its management and control into the State Government as per Section 3(1), will be the employees of this school until and unless government comes to a decision regarding their services.

(2) State Government, will appointed a committee of

specialists and experienced persons to enquire about 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 post sanctioned by Governing body of the school, appointment procedure and promotion or confirmation of services.

Committees will consider the need of the institution and will submit its report after taking stock of qualification experience and other related and relevant subjects.

Committee will also determine in its report whether the directives regarding reservations for SC, ST, and O.B.C'S 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 light of their merit and demerit it will determine whether his service will be integrated with the Government or not.

Government will also determine the pay, salary allowances and other service condition for them."

(Note: This is how the two sections have been translated from Hindi to English in the Paper Book).

Thus the 4th Ordinance contained an express provisions for investigation of the Sanskrit Schools listed in annexure 1 in order to find out whether these were genuine schools or not, whether they were in existence and what were their assets and properties. Under Section 4, the State Government decided to appoint a committee of specialists to enquire about the number of employees of these schools, whether the procedure adopted for their appointment was proper, whether they possessed the requisite qualifications and merit, whether the posts they occupied were sanctioned, and other related enquires. The State Government after getting the reports had to determine, on individual basis, whether the concerned teacher would be taken in Government service or not. An individual decision was required to be taken about his pay and allowances and other service conditions. The State strongly relies upon this ordinance and subsequent Ordinances as indicating that there was no automatic take over of private Sanskrit Schools.

The 4th Ordinance was replaced on 8.3.1991 by Ordinance No. 10 of 1991. This Ordinance, in turn, was replaced on 8.8.1991 by Ordinance 31 of 1991. The latter was, in turn, replaced on 21.1.1992 by Ordinance 2 of 1992 which was the last Ordinance. It expired on 30th of April, 1992. These three Ordinances promulgated subsequent to the 4th Ordinance 21 of 1990, were similar in terms to Ordinance 21 of 1990. Status of the Staff:

> It is the contention of the State that despite the wording of 1st three ordinances, by virtue of the 4th Ordinance there was no automatic take-over of the 429 Sanskrit Schools listed in these Ordinances. The State contends that by virtue of the 4th Ordinance and subsequent Ordinances and investigation was required to the made by the Collector to decide first, whether the school was in existence or not. Because, according to the State of Bihar, there were a large number of non-existing schools which were there only on paper. It is also the contention of the State that the service of the teaching and non-teaching staff of the 429 Sanskrit Schools was not automatically transformed into Government service. A committee constituted by the State Government was required to examine whether the concerned teacher was occupying a post which was validly sanctioned, whether the procedure for his appointment was regular, whether he possessed the qualifications and experience prescribed for the post and other similar factors. Each of the persons so approved had to be absorbed on an individual basis in Government service. His pay and allowances and other service benefits would be determined by the State at the time of his absorption.
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> The State contends that these enquiries and reports were not complete at time when the last Ordinance expired on 30th of April, 1992. No decision and/or steps had been taken by the State Government to absorb any person employed in these Sanskrit Schools in Government service. Therefore, the teachers of Sanskrit Schools as well as the non-teaching staff did not have, at any time, the status of a Government servant.
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> The teachers who are appellants before us, however, contend that only the first Ordinance No. 32 of 19896 should be looked at in order to decide their status. Since no inquiry is contemplated under the first Ordinance, they have automatically

become Government Ordinances are illegal/invalid and must be ignored. Validity of Ordinances:

One has, therefore, to consider whether 1st Ordinance is valid, or whether all are valid or whether all are unconstitutional. To decide this, it is necessary to consider under the constitutional framework, the nature of the power conferred on the Governor under Article 213 of the Constitution to promulgate an Ordinance. Can a series of Ordinances be issued validly under Article 213 over a number of years without placing any of the ordinances before the State Legislature? Under the basic scheme of the Constitution, the legislative powers of the State are distributed between Parliament and State legislatures in accordance with Articles 245 and 246 of the Constitution. The Legislature of a State is given the power to make laws for the whole or any part of the State in respect of matters as set out in Article 246 read with the Seventh Schedule.

Article 213, however, makes a departure from this scheme and gives to the Governor who acts on the aid and advice of the Executive, the legislative power to promulgate an Ordinance when the Governor is satisfied that immediate action is required at a time when both the Houses of the State legislature, and when there is only one House of a State Legislature, the Legislative Assembly of the State, is not in session.

Article 213(2) provides as follows: "213(2): An Ordinance promulgated under this article shall have the same force and effect as an Act of Legislature of the Stat 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 re-assembly of the legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislature, or if before the 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 clauses."

Since the Governor acts with the aid and advice of the Council of Ministers, the Ordinance-making power is given to the executive to promulgate a law when urgency of the situation so demands provided the legislature is not in session. Since this is an exception to the normal rule that laws must be enacted by the Legislature, Clause (2) of Article 213 provides certain safeguards. An Ordinance so

promulgated must be laid before the Legislative Assembly of the State or when there is a Legislative Council in the State, before both the Houses when they reassemble. It shall cease to operate at the expiration of si weeks from the re- assembly of the Legislature. but even before the expiration of six weeks if a resolution disapproving the ordinance is passed by the Legislature, it will cease to operated. This provision has to be read with Article 174 which enjoins that not more than six months shall intervene between the last session of the Legislature and the next session. Thus, an Ordinance is necessarily of a limited duration, not extending beyond 7-1/2 months.

That this power is a departure from the normal scheme of the Constitution was made clear during the Constituent Assembly Debates (Vol. 8 pages 208, 214,215) when Professor K.T. Shah expressed concern at six weeks' time being allowed to lapse after the reconvening of the Legislature before the Ordinance would cease to have effect. He expressed distrust of the Ordinance-making power vested in the Chief Executive. Answering his apprehensions, Dr. Ambedkar assured him that an Ordinance would have very limited duration since there was a provision that not more than six months shall elapse between two sessions of Parliament. He justified the provision on the ground that limited power may be conferred on the Chief Executive to deal with urgent matters when the Legislature was not in session.

In R.K. Garg etc. etc. V. Union of India & Ors. etc. (1982 (1) SCR 947 at page 964), referring to the similar power of the president to promulgate Ordinances under Article 123, a Constitution Bench of this Court said "At first blush it might appear rather unusual that the power to make laws should have been entrusted by founding fathers of the Constitution to the executive because according to the traditional outfit of a democratic political structure the legislative power must belong exclusively to the elected representatives of the people and vesting it in the executive though responsible to the Legislature would be undemocratic as it might enable the executive to abuse this power by securing the passage of an ordinary bill without risking a debate in the Legislature ..... It may be and this was pointed out forcibly by Dr. Ambedkar while replying to the Criticism against the introduction of Article 123 in the Constituent Assembly - that the legislative power conferred on the President under this Article is not a parallel power of legislation. It is power exercisable only when both Houses of Parliament are not in session and it has been conferred ex-necessite in order to enable the executive to meet an emergent situation. Moreover, the law made by the President by issuing an Ordinance is of strictly limited duration."

There are similar observations made by this Court in the case of T.Venkata Reddy etc. etc. v. State of Andhra Pradesh (1985 (3) SCR 509 at page 524) and Dr. D.C. Wadhwa & Ors. V. State of Bihar & Ors. (1987 (1) SCC 378 at 392).

Clearly, the power to promulgate an Ordinance is not a substitute for regular legislation passed by the Legislature of a State. It is a power conferred on the Executive in order to deal with any urgent situation while the Legislature is not in session. It is also of a limited duration. Article 213 does not contemplate that one Ordinance should be succeeded by several subsequent Ordinance should be succeeded by several subsequent Ordinances without, at any stage, placing the Ordinances before the Legislature. It was this kind of practice which was condemned by the Constitution Bench of this Court in Dr. D.C. Wadhwa's case (supra). This Court observed in that case that the Government of

Bihar made it a settled practice to deliberately go on re-promulgating the Ordinances from time to time on a massive scale in a routine manner. Immediately at the conclusion of each session of the State Legislature, a Circular Letter used to be set by the Special Secretary in the Department of Parliamentary Affairs to all the Commissioners, Secretaries etc. intimating to them that the session of the Legislature had been got prorogued and that under Article 213(2) (a) all the Ordinances would cease to be in force six weeks after date of re-assembly of the Legislature. They should, therefore, get in touch with the Law Department and take immediate action to get all the concerned Ordinances re-promulgated before their date of expiry. The Court observed that the startling facts showed that the Executive in Bihar had almost taken over the role of legislature in Making laws not for a limited period but for years together in disregard of the constitutional limitations. This was clearly contrary to the constitutional scheme and was improper and invalid. Accordingly, the court Struck down the Ordinance which was before it. The manner in which a series of Ordinances have been promulgated in the present case by the state of Bihar also clearly shows misuse by the Executive of Article 213. It is a fraud on the Constitution. The State of Bihar had not even averred that any immediate action was required when the 1st ordinance was promulgate. It has not stated when the Legislative assembly was convened after the first Ordinance or an 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 the unconstitutional and invalid particularly when there is no basis shown for that exercise of power under Article 213. There is also no explanation offered for promulgation 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 first Ordinance is valid, even though all others may be invalid. The same course of conduct has continued from the first to the last Ordinance. I, therefore, do not agree with brother Wadhwa, J's conclusion that the 1st Ordinance is valid but the subsequent Ordinances are invalid. In my view all are invalid.

Also, neither the 1st Ordinance nor the subsequent Ordinances provide for any compensation being paid for taking over the properties and assets of private schools. Also each of the Ordinances provides that these private properties and assets are taken over by the State free from all encumberances. This is a totally arbitrary exercise of power violative of Article 14 (Vide C.B. Gautam v. Union of India & Ors. (Supra)]. Since the other provisions in all the Ordinances dealing with teachers in these private schools becoming Government servants, are consequential, flowing from the private schools vesting in the State along with their properties and assets, the Ordinances are unconstitutional in their entirety. No rights can flow from any of them.

Ordinance 32 of 1989:

> Even if one accepts, for the sake of argument, the contention of the teachers that only the first Ordinance is valid and the subsequent Ordinances are illegal or invalid, the first Ordinance, by itself, would cease to operate six weeks after the re-assembly of the Legislature. In the present case the 1st Ordinance was promulgated on

> 16.12.1989. The State Legislature had re-assembled some time prior to 28.2.1990 (the date of the 2nd Ordinance), thus "necessitating" a fresh Ordinance. since the Legislative Assembly must have been prorogued prior to 28.2.1990, the 1st Ordinance, in the present case, would have ceased to operate latest by 15th April, 1990 if not earlier, if it had stood by itself. Any effect which it had would come to an end when it ceases, unless the effect is permanent. Now, ordinarily, when a temporary law ceases to operate or expires, Section 6 of the General Clauses Act, 1897 has no application because Section 6 is, in terms, limited to repeals (vide G.P. Singh, Principles of Statutory Interpretation, 16th Edition, Page 388). However, if any action taken during the subsistence of such a law or Ordinance has a "permanent" effect, that "permanent" effect may not be wiped out when the Ordinance or temporary law ceases to operate.

In the case of State of Orissa v. Bhupendra Kumar Bose (1962 Suppl. (2) SCR 380) this Court considered the effect of an Ordinance which had lapsed. This Court had to examine the effect of lapsing of an Ordinance which had validated electoral rolls improperly prepared and the elections held on the basis of such electoral rolls. The Court said that on the expiry of the validating Ordinance the invalidity did not revive. The Ordinance had successfully cured the invalidity of the electoral roll and of the elections. In the course of its judgment this Court referred to the observations of Patanjali Sastri, J. in the case of S. Krishnan & Ors. v. The State of Madras (1951 SCR 621) with approval. It said that the general rule in regard to a temporary statute is that in the absence of special provisions to the contrary, proceedings which are taken against a person under a temporary statute will ipso facto terminate as soon as the statute expires. Because the provisions of Section 6 of the General Clauses Act in relation to the effect of repeal do not apply to a temporary Act. 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 Section 6 of the General Clauses Act. This Court, however, said, "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 Article 213(2)(a)." (underlining ours) After drawing this distinction between the greater limitation imposed on the executive promulgating an ordinance as against a temporary statute of a Legislature, this Court added, (p.398) that it would not be reasonable to hold that the general rule about the effect of the expiration of a temporary Act is inflexible and admits of no exception. It said, " 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 had enduring effect or not". The Court made a reference to the English case of Stevenson v. Oliver ([1841] 151 E.R. 1024) where the court considered a temporary statute which provided that every person who held a Commission or Warrant as a Surgeon or Assistant Surgeon in His Majesty's Navy or Army should be entitled to practise as an Apothecary without having passed the usual examination. The temporary Statute expired. The Court held that the person who had acquired a right to practice without having passed the usual examination by virtue of the temporary Act could not be deprived of this right after its expiration.

In the case of T. Venkata Reddy (supra) this Court considered a case where the Governor had issued an Ordinance abolishing the posts of part-time village officers. The Ordinance lapsed and was not replaced by an Act of the Legislature. The Court said that the posts which had been abolished by the Ordinance did not revive. The abolishing of posts and the declaration that the incumbents of those posts would cease to be the holders of those posts, being completed events, they could not be revived without express legislation.

These two cases are an exception to the general rule that an Ordinance ceases to have effect when it lapses or comes to an end. A "permanent" effect of the Ordinance may continue. What then is a permanent effect? Or, what is a right of an enduring character which subsists beyond the life of an ordinance? Both these terms are somewhat ambiguous. Since an Ordinance by its very nature, is limited in duration and is promulgated by the Executive in view of the urgency of the situation, we must examine the rights which are created by an Ordinance carefully before we decide whether they are permanent. Every completed event is not necessarily permanent. What is done can often be undone. For example, what is construction 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 irreversibly 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.

In this context, there has been considerable change in judicial thinking since 1962. In the case of S.R.Bommai & Ors. v. Union of India & Ors. (1994 (3) SCC page 1, at page

226), the majority of the judges have taken the view that when a proclamation of the President's Rule ceases to be in operation, the necessary consequences is that the status quo ante revives. This Court by a majority, also said (at page

123) that the constitutional check on the president's power would become meaningless if the president takes irreversible decisions. A Legislative Assembly which is dissolved can revive if the proclamation comes to an end. Similarly when an ordinance taking over private Schools lapses, the status quo ante revives. It would be startling if for example, an Ordinance nationalising private banks or industries lapsed or parliament declined to ratify it, and yet it would continue to operate under the guise of "permanent effect"

> contrary to legislative mandate. A "take over' Ordinance may be required if there is urgency. But any enduring consequences beyond the life of the ordinance can only be brought about by legislation. The first take over Ordinance in the present case does not have any permanent effect. In this regard I do not agree with the view taken by brother Wadhwa for reasons I have already set out.

Our attention was drawn to other similar temporary provisions in some other Articles of the Constitution in order to show that when on the cessation of a temporary "situation", if the measure taken is to be continued, an express provision is mad e to this effect in the Article. e.g., Article 352 deals with a proclamation of emergency. Clause (4) of Articles 352 provides that "every proclamation issued under this article shall be laid before each House of Parliament and shall ..... cease to operate at the expiration of one month unless before the expiration of that period it has been approved by resolution of both House of Parliament". Article 356 deals with president's Rule in a State if there is failure of constitutional machinery in the State . Clauses (3) and (4) of Article 356 provide for the proclamation ceasing to operate as stated therein. Article 358 which deals with suspension of provisions of Article 19 during emergency, Article 359(1A) , Article 360 and Article 369 also contain somewhat similar provisions. In the case of exercise of legislative powers during the President's Rule under Article 356, however, Article 357(2) provides that any law made in the exercise of the power of the Legislature of the State by Parliament or the President during the subsistence of the proclamation shall, after the proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority. This is an express Constitutional provision which extends the life of laws enacted during the proclamation of President's Rule beyond the period during which the proclamation was in force. There is not such provision relating to the Ordinance promulgated under Article 213. The effect of an Ordinance cannot, therefore, last beyond its life-time. The only possible situation when this can happen is when any action already completed during the life of the ordinance has a permanent effect and is broadly speaking, irreversible in the sense set out earlier.

In the present case, it is contended by the teachers that the first Ordinance has conferred on them the status of Government Servants. And because a status has been conferred on them, the effect of the Ordinance is irreversible and, therefore, permanent. But conferment of a status is not per se an irreversible act. It depends on the kind of status conferred. Status may be of different kinds. A person may acquire a certain status by reason of his birth. He may be the son of his father and mother, he may be the brother of his siblings, he may acquire by birth other family relationships. These are unchangeable. However, not all family relationships are unchangeable. The marital status of a person is not, in this sense, permanent because husband and wife can take a divorce or have their marriage annulled. In the economic field, an industry may be taken over by the state or be nationalised. However, since the changes brought about are far ranging they are brought about by legislation. If an Ordinance is issued nationalising an industry, it is almost always followed up by proper legislation. but the process is not irreversible Similarly, the employees of such an industry, on its being taken over by the State, may become Government servants but when the industry is de- nationalised they may cease to be Government servants. There is nothing immutable about this kind of a status. Moreover no status can be conferred by a take over which is arbitrary and unconstitutional.

> The protection of Article 311(2) does not extend to such situations. This Court has held, in S.S. Dhanoa v. Union of India & Ors. (AIR 1991 SC 1745) , that creation and abolition of posts is the exclusive concern of the executive. Even in the case of a permanent post if it is abolished, Article 311(2) is not attracted. There is no question here of punishment for misconduct. The same view has been reiterated in M.L. Kamra v. Chairman-cum-Managing Director, New India Assurance Co. Ltd. & Anr. (1992 (2) SCC
>
> 36). When such "creation of posts" is under a temporary statute in the form of an Ordinance promulgated by the Government and is not subsequently followed up by Legislation by the Legislature, the posts cease to exist when the Ordinance ceases to operate. The executive is not expected to take irreversible decisions in the form of Ordinances unless the decisions are followed up by a law enacted by the Legislature. Otherwise the constitutional check on the executive's power to promulgate Ordinance will become meaningless.

Moreover, in the present case nothing was done to give effect to the 1st Ordinance. The schools were not in fact taken over, and the teachers were not actually made Government servants or paid the salary of a Government Servant by the time the ordinance would have ordinarily expired. It is difficult to see how effect cab be given to an ordinance after it has expired, or to consider its "effect" as permanent.

Therefore, in the present case, assuming that the first Ordinance conferred the status of a Government servant on the appellants, the status would depart with the Ordinance. The contention of the appellants-teachers that although the Ordinances have lapsed, they continue to be Government servants has, therefore, in my view, been rightly rejected by the High Court. Even if the 1st Ordinance is valid (which it is not), the teachers can be considered as Government servants only for its duration.

Learned counsel for the State pointed out that in fact, none of the teachers or staff members were absorbed as Government servants under any of these Ordinances nor was anyone given the scale of pay of a Government servant. Even so, there was no justification for not paying them any salary even as teachers of private Sanskrit Schools. We are told that when the matter was before the High Court, even the salaries of the teachers on the basis prevailing prior to the first Ordinance 32 of 1989, had not been paid. We are informed by learned counsel for the State that the salary of the entire staff of these schools has not been paid up to date on the Bihar Sanskrit Shiksha Board) Prior to the promulgation of the first Ordinance 32 of 1989. if such salary has not been paid in any case, the same must be paid forthwith. The teachers shall continue to receive their salary as before regularly henceforth.

In case of State of Bihar & Ors. v. Chandradip Rai & Ors. (1982 (2) SCC 272), this Court examined Bihar Non- Government Elementary Schools (Taking over of Control) Act, 1976. Section 3 provided for take over of elementary schools by the State Government by publication of a notification. Section 4 sub-section (2) provided that every officer, teacher or other employee holding any office or post in

the school taken over by the State Government shall be deemed to have been transferred to and become an officiate teacher or employee of the State Government. This Court observed that in fact the schools had not been taken over by the State Government. Therefore, the High Court was not justified in issuing a writ of mandamus directing the State Government to take steps for the management of the school or for payment of salary to the respondents. In the light of these observations of this Court, the writ petition filed in the High Court was withdrawn. In the present case also, nothing was done under the 1st Ordinance. The examination of schools for the purpose of take over under the 4th and subsequent Ordinance, was not complete when the last Ordinance lapsed. Because of an interim stay on the operation of Clause 4 of the fourth Ordinance 21 of 1990, the enquiry into the qualifications etc. of teachers and staff of these schools also could not be completed. Since all Ordinances have ceased to operate and none of them can be considered as permanent in effect, no directions can be given for enforcing any of them. Therefore, in any view of the matter, the petitioners before the High Court could not have succeeded in the writ petitions.

The petitioners are undoubtedly entitled to their salary and allowances in accordance with the position that prevailed prior to the promulgation of Ordinance 32 of 1989. They cannot be deprived of their salary during the period of the Ordinances. The directions given by the High Court for the payment of salary to the staff of Sanskrit schools on the basis of the Position prevailing prior to the promulgation of the first Ordinance, therefore, must be upheld. The High Court, however, was not right, in my view, in granting to the petitioners before it salary and allowances on the basis of their being Government servants from 16th December, 1989 upto 30th of April, 1992 since the Ordinances are a fraud on the constitution and no rights can flow from all or any of them. The appeals and writ petition filed by staff of the Sanskrit Schools are dismissed and the appeal of the State succeeds, but for reasons very different from the once canvassed. Looking to the conduct of the State of Bihar, it must pay to the original petitioners the costs of this litigation throughout.

Contempt Petition Nos. 288-296 of 1977 in civil appeals concerned also do not now service since salaries on the basis of the staff's entitlement prior to the first Ordinance have already been paid. Contempt petitions are accordingly disposed if , [With Civil Appeal No. 3533-3595/1995, 5876-5890/1994, Civil Appeal No. 2646/19998 (@ S.L.P. (c) No. 18806/1995) Writ Petition No. 580/1995 with Contempt Petition Nos. 288- 296/1997 in CA No. 3535,3539, 3541, 3545, 3555, 3560, 3573, 3576, 3590/1995 with IA Nos. 3 in Writ petition (C) No. 580/1995] D.P. Wadhwa, J.

I regret I am unable to agree with the view taken by my most learned and noble sister Sujata V. Manohar, J. I, therefore, deliver my separate judgment.

These are cross appeals are arise out of the judgment dated March 3,1994 of the Division Bench of Patna High Court. In one set of these appeals, the appellants, who belong to teaching and non-teaching staff of Sanskrit schools in the State of Bihar, filed writ petitions in the High Court claiming their status as Government servants under Ordinance No. 32 of 1989, which was promulgated by the Governor of Bihar exercising powers conferred on him by Article 213 of the Constitution of India. The Ordinance was published the Bihar Gazette (Extra-ordinary) dated December 18, 1989. There were successive Ordinances promulgated after Ordinance No. 32 of 1989 lapsed, the last Ordinance lapsing on April 30, 1992. The Ordinance did not take the shape of Act of

the Legislature. The High Court in its judgment did not grant relief to the petitioners that they be paid salaries as Government servants from the date of the first Ordinance 32/1989 till April 30, 1992 when the last Ordinance lapsed and also directed payment of salaries for the earlier period at the rate to which the petitioners were entitled to. The State has also filed appeal against this judgment. it is aggrieved by the direction of the High Court for payment of salaries to the petitioners as Government servants for the limited period. The State also felt aggrieved by the findings of the High Court that Ordinance re-promulgated again and agains were illegal and that there was "Ordinance Raj" in the State of Bihar.

It is not necessary for me to give history of Sanskrit schools in the State of Bihar which were being run privately but had been recognised by the State and were being given grant-in-aid. The grant was being distributed to the teaching and non-teaching staff and for meeting other expenses of the schools through the Bihar Sanskrit Shiksha Board. The grants were disbursed to different schools in accordance with the pay-scales, D.A. rates and staff pattern laid down by the State Government for this purpose. In the year 1981, there were 651 Sanskrit Schools under the Bihar Sanskrit Shiksha Board which were receiving grants-in-aid from the State Government.

On December 16, 1989 Ordinance 32/1989 was promulgated and as noted above was published in the Bihar Gazette (Extra-ordinary) on December 18, 1989. Since a great deal depends on the purpose and effect of this Ordinance it would be appropriate to reproduce the somewhat detail:-

> (Bihar Ordinance no. 32, 1989) THE BIHAR NON-GOVERNMENT SANSKRIT SCHOOLS (TAKING OVER OF MANAGEMENT AND CONTROL) ORDINANCE, 1989.
>
> AN ORDINANCE To provide for the taking over of Non-Government Sanskrit Schools for Management and Control by the State Government for improvement, better organisation and development of Sanskrit Education in the State of Bihar.
>
> ```
> Preamble.    -     WHEREAS,     the
> legislature of  the State  of Bihar
> is not in session;
>      AND WHEREAS,  the Governor  of
> Bihar     is     satisfied     that
> ```
>
> circumstances exist which render it necessary for him to take immediate action of the taking over of Non-
>
> Government Sanskrit Schools for Management and Control by the State Government for improvement better organisation and development of Sanskrit Education in the State of Bihar;
>
> NOW, THEREFORE, in exercise of the power conferred by clauses (1) of Article 213 of the Constitution of India the Governor is pleased to promulgate the following Ordinance:-

CHAPTER 1 PRELIMINARY

1. Short title, extent and commencement.- (1) This Ordinance may be called the Bihar Non-Government Sanskrit Schools (Taking over of Management and Control) Ordinance, 1989.

(2) It shall extend to the whole of the State of Bihar.

(3) It shall come into force at once.

2. Definitions. In this Ordinance, unless there is anything repugnant in the subject or context-

(i) "Non-Government Sanskrit Schools" means a Sanskrit School with the prior approval of the State Government recognised by dissolved Bihar Sanskrit Shiksha Parishad, Kameshwar Singh Darbhanga Sanskrit University, Darbhanga and Sanskrit Education Board constituted under Bihar Sanskrit Education Board Act, 1981.

(ii) "Head-Master" means the Head of the teaching staff of Sanskrit School taken over by the Government whatsoever the designation may be.

(iii) "Teacher" means a teacher of the Sanskrit Schools taken over by the Government.

(iv) "Non-Teaching Staff" means full time employees other than the teaching staff of the Sanskrit School taken over by the Government.

(v) "Director" means Director of Education of the State Government Incharge Sanskrit Education.

(vi) "Prescribed" means prescribed by this Ordinance of rules made thereunder.

(vii) "Rules" means Rules made under Section 14 of this Ordinance.

CHAPTER 2 TAKING OVER OF MANAGEMENT AND CONTROL

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 movable or immovable including land, buildings, documents, books and register, cash-balance, reserve fund, capital

investment, furniture and fixtures and other things shall, on the date of taking of taking over, stand transferred to the vest in the State Government free from all encumbrances.

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.

CHAPTER 3 MANAGEMENT OF SCHOOLS

5. Management and Control. - The Management and Control of the Sanskrit Schools taken over by the state Government shall remain under the Director and Officers working under him in the manner prescribed by the State Government. The State Government shall determine the powers and functions of the Director and officers of all ranks working under him and shall issue necessary direction in this behalf to the Director from time to time.

There are other clauses of the Ordinance dealing with constitution of managing committee (Clause -6) , powers and functions of managing committee (clause-7), main functions of the Head Masters (clause -8) accounts and audit of the Sanskrit Schools taken over the State Government (clause-9) ; constitution of Sanskrit Education Committee relating to development of Sanskrit education in the State (clause - 10) ; offences and penalties for contravention of the provisions of the Ordinances (Clause -11) , cognizance of offence (clause- 12), protection of action taken in good faith (clause-13) power to make rules (Clause- 14) and power to remove difficulties (Clause -15).

Schedule of the Ordinance gives list of non-Government Sanskrit Schools to be taken over by the Ordinance. It give the names of 429 such schools in each of the districts in the State of Bihar which separate columns giving strength of standard teaching staff (including Head Masters) and non-teaching staff.

After this Ordinance 32/1989 lapsed successive Ordinances Nos. 7 of 1990 dated February 28,1990 and 14 of 1990 dated may 2,1990 were repromulgated on the same terms. After that, fourth

Ordinance No. 21 of 1990 dated August 12, 1990 was promulgated which struck a different note. Clauses (3) and (4) of this Ordinance 21/1990 are reproduced as under:-

> "TAKING OVER OF MANAGEMENT AND CONTROL
>
> 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 concerned Collector and if it will be found in the report of Collector that such school is not in existence, in this case State government will remove the name of that school 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 movable 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 encumberances.

4. Effect of taking over the management and control (1) The staffs working in the Sanskrit Schools mentioned annexure -1 of the Ordinance related to integration of its management and control into the State Government as per the Schedule 3(1) , they will be not until and unless Government comes to a decision regarding their services.

(2) State Government will appoint a committee of specialists and experienced persons to enquire about number of employees, procedure of appointment as well as to enquire about the character of the staffs individually and will come on a decision about validity of posts sanctioned by Governing body of the School, appointment procedure and affairs of promotions of confirmation of services.

Committee will consider the need of institution and will submit its report after taking stock of 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 OBC's has been followed or not.

(3) State Government, after getting the report will determine the number of staffs as well as procedure of appointments and will go into the affair of appointment of teaching and other staff on individual basis and in 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 others service conditions for them."

XXX XXX XXX "(16) Repeal and savings (1) The Bihar non-Government Sanskrit School (taking over of management and control Ordinance, 1990) (Bihar Ordinance No. 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."

This fourth Ordinance now contemplates enquiry and investigation which was not there in the first Ordinance.

Again successive Ordinance Nos. 10 of 1991 dated march 8, 1991, 31 of 1991 dated August 8, 1991 and 2 of 1992 dated January 21, 1992, on the same terms as Ordinance 21/1990, were issued till the last Ordinance lapsed without State Legislature's passing any Act in substitution of the Ordinance.

While the stand of the teaching and non-teaching staff in the writ petitions was that by virtue of the first Ordinance 32/1989 Sanskrit Schools mentioned in the Schedule were taken over and they had become Government Servants, the State Government took entirely an opposite stand that schools were never taken over and nor the teaching and non- teaching staff conferred the status of Government servants as even the first Ordinance required certain criteria to be laid and fulfilled and that not having been done the writ petitions were devoid of merit.

To understand the rival contentions I think I may first refer to the relevant provisions of Article 213 of the Constitution and various judgements of this Court laying down the scope and effect of an Ordinance in the circumstances as in the present case. Article 213 confers power on the Governor of the State to promulgate Ordinance during recess of the legislature of the State. Said Article in relevant part is as under:-

> " 213. Power of Governor to promulgate Ordinance 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 circumstance exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstance appear to him to require :
>
> (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 re-assembly of the Legislature, or 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 Legislature of a State having a Legislative Council are summoned to re-assembly on different dates, the period of six weeks shall be reckoned from the latter of those dates for the purposes of this clause.

(3)....."

In writ petition under Article 32 of the Constitution in D.C. Wadhwa vs. State of Bihar (1987 (1) SCC 378) the question before this Court was: Can the Governor go on repromulgating the Ordinance 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 petitioners therein had challenged the validity of the practice of the State of Bihar in promulgating and re-promulgating Ordinances on a massive scale and in particular they challenged the constitutional validity of three different Ordinances. At the time of filing the writ petitions the Ordinances were in force and during the pendency of the writ petitions only on of the ordinances which had been repromulgated was still in force, it was contended before the Court that the question raised before it was academic in nature and need not be adjudicated upon. Since one ordinance was still in force and the question raised in the writ petitions was of highest constitutional importance this Court said that it must decide the issue on merit in order to afford guidance to the governor in exercise of his power to repromulgate ordinances from time to time. After examining numerous ordinances issued by the State of Bihar the Court was of the view that it seemed that the Government of Bihar made it a settled practice to go on repromulgating the ordinances from time to time and this was done methodologically and with a sense of deliberateness. The Court found that 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 re-assembly 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. The Court also noticed that 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. This Court reproduced such a letter in its judgment. The Court quashed the Ordinance which was in force at the time of the judgment. The Court then observed that the only question before it was that whether the Governor had power to repromulgate the same Ordinance successively without bringing it before the legislature. It said:-

" 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 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.

It will be seen that this Court in strongest possible words disapproved the practice adopted by the State in successively repromulgating the Ordinances. The judgment was delivered in this case on December 20, 1986. It seems that it had no effect on the State of Bihar as the present case shows that the practice of repromulgating the same Ordinances successively is continuing with impunity by the State of Bihar. The hope which this Court expressed has been belied. This court will certainly look sternly and come down with heavy hand on any action of the State in violation of the constitutional provisions.

In State of Orissa vs. Bhupendra Kumar Bose (1962 Supp.(2) SCR 380) the High Court set aside the elections held for Cuttack Municipality on the ground that electoral rolls had not been prepared in accordance with the provisions of the Orissa Municipalities Act, 1950. The State took the view that the judgment affected not merely the Cuttack Municipality but other municipalities as well as accordingly the Governor promulgated an Ordinance validating the elections and the electoral rolls so prepared. The Ordinance was promulgated on January 15,1959 and it lapsed on April 1, 1959. Another writ petition was filed questioning the continuance of the elected councilors in office by virtue of the Ordinance, which had lapsed without it being passed into an Act of the State legislature. The High Court allowed the writ petition. Aggrieved State of Orissa came to this Court in appeal. It was submitted by the respondents that since the Ordinance having lapsed on April 1, 1959, the appeal itself had become infructuous and further the Ordinance was a temporary statute which was bound to lapse after the expiration of the prescribed period and so, as soon as it lapsed, the invalidity in the Cuttack Municipal elections which had been cured by it revived and so there is no point in the appellants challenging the correctness of the High Court's decision. The question before this Courts was that if it was the true legal

position that after the expiration of the Ordinance the validation of the elections effected by it comes to an end. This Court noticed the observations of Patanjali Sastri, J., (as he then was) in S. Krishnan vs. The State of Madras (1951 SCR 621) that 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 section 6 of the General Clauses Act. The Court observed that 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 and added that it cannot be open to the ordinance making authority to adopt such a course because of the obvious limitation imposed on the said authority by Article 213 of the Constitution. The Court then observed as under:-

"Mr. Chetty contends that there is and can be, no corresponding saving provision made by the Ordinance in question and so, the invalidity of the Cuttack Municipal Elections would revive as soon as the Ordinance expired by lapse of time. This contention is based on the general rule thus stated by Craise: "that unless a temporary Act 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. That is why offences committed against temporary Acts must be prosecuted and punished before the Act expires, and as soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate.

In our opinion, it would not be reasonable to hold that the general expiration of a temporary Act on which Mr. Chetty relies is inflexible and admits of no that offences committed against temporary acts must be prosecuted and punished before the Act expires. If a prosecution has not ended before that day, as a result of the termination of the Act, it will ipso facto terminate. But is that an inflexible and universal rule? 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."

and then:-

" 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. Finally, the Court held as under:- " Now, turning to the

facts in this present case, the Ordinance purported to validate the elections to the Cuttack Municipality which had been declared to be invalid by the High Court by its earlier judgment so that as a result of the Ordinance, the elections to the Cuttack Municipality must be held to have been valid. Can it be said that the validation was intended to be temporary in character and was to last only during the life-time of the Ordinance? In our opinion, having regard to the object of the Ordinance want to the rights created by the validating provisions, it would be difficult to accept the contention that as soon as the Ordinance expired the validity of the elections came to an end and their invalidity was revived. The rights created by this Ordinance are, in our opinion, very similar to the rights created by this Ordinance are, in our opinion, very similar to the rights with which the court was dealing in the case of Stevenson and they must be held to endure and last even after the expiry of the Ordinance. The Ordinance has in terms provided that the Order of Court declaring the elections to the Cuttack Municipality to be invalid shall be deemed to be and always to have been of no legal effect whatever and that the said elections are thereby validated. That being so, the said elections must be deemed to have been validly held under the Act and the life of the newly elected Municipality would be governed by the relevant provision of the Act and would not come to an end as soon as the Ordinance expires. Therefore, we do not think that the preliminary objections raised by Mr. Chetty against the competence of the appeals can be upheld."

In T. Venkata Reddy vs. State of Andhra Pradesh (1985 (3) SCR 509) the post of various part-time village officers were abolished by the Andhra Pradesh Abolition of posts of Part-time Village Officers Ordinance, 1984 (Ordinance No. 1 of 1984) promulgated the Governor of Andhra Pradesh on January 6, 1984 in exercise of his powers under Article 213 of the constitution. The Ordinance lapsed without it being replaced by an Act passed by the legislature though it was succeeded by four Ordinances, namely, Ordinance 7/84, 13/84, 18/84 and 31/84. One of the questions raised before this court was that the Ordinance having lapsed as the legislature did not pass an Act in its place, the posts which were abolished be deemed to have revived and the issue of successive Ordinances the subsequent. One replacing the earlier one did not serve any purpose. The Court noticed that Article 213 corresponds to Article 123 of the Constitution conferring similar powers on the President in relation to matters on which parliament can make laws. Of course, there is slight difference between the two Articles, but that is not relevant for our purposes. This Court observed:-

" Under Article 123 of the constitution the President can promulgate an Ordinance on the advice of the Council of Ministers to meet the requirements of a situation when either House of Parliament is not in session.

Similarly under Article 213 of the Constitution the Governor may issue an Ordinance on the advice of his Council of Ministers when the legislative Assembly or where there are two Houses of Legislature in a State either of them is not in session. Since under Article 85 of the Constitution it is not permissible to allow a period of six months to intervene in the case of each House of Parliament between its last sitting in one session and the date appointed for its first meeting in the next session and since

> under clause (2) of Article 123 of the Constitution an Ordinance has to be laid before both Houses of Parliament and would cease to operate at the expiration of six weeks from the re-assembly of parliament, it cannot be said that either Houses can be avoided by President beyond seven and a half months after the passing of an Ordinance. It is open to Parliament if it chooses to approve it or not.
>
> Having regard to the conditions prevailing in India the Constitution makers thought that the ordinance making power should be given to the President to deal unforeseen or urgent matters. The position under Article 213 of the constitution is also the same."
>
> Then the Court considered its judgements in R.K. Garg vs. Union of India (1982 (1) SCR 947) and A.K. Roy vs. Union of India (1982 (2) SCR 272) and said that both these decisions fairly established that the Ordinance is a "Law"

and should be approached on that basis. It said that the language of clause 92) of Article 123 and clause (2) of Article 213 of the Constitution leaves no room for doubt. The Ordinance promulgated under either of these two articles has the same force and effect as an Act of Parliament or an Act of the State Legislature, as the case may be. The Court observed that 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 and that it cannot be treated as an executive action or an administrative decision. Then considering the question whether the posts of part-time village officers revive as the Ordinance is not replaced by an Act of the legislature of the State, the Court observed:-

" This contention of the petitioners is based on clause (2) of Articles 213 of the constitution. It is argued on their behalf that on the failure of the State Legislature to pass an Act in terms of the Ordinance it should be assumed that the Ordinance had never become effective and that it was void ab initio. This contention overlooked two important factors namely the language of clause (2) of Article 213 of the Constitution and the nature of the provisions contained in the Ordinance. Clause (2) of Article 213 says that an Ordinance promulgated under that 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 re-assembly of the Legislature or if before the expiration of that period a 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. 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 happening of the events mentioned in clause (2) of Article

213. Secondly the Ordinance deals with two separate matters. By section 3 of the Ordinance it abolishes the post of part-time village officers on the commencement of the Ordinance and it further declares that every person who held the post of a part-

time village officer would cease to hold that post with effect from that date. By section 4 and other allied provisions as Ordinance has provided regarding the creation of posts of village Assistants and appointment and conditions of service of Village Assistants who are full-time employees of the Government. There is no doubt that separated, provision is made in section 5 of the ordinance of for payment of some amount to the ex-

part-time village officers. Now by virtue of section 3 of the Ordinance all the posts of part-

time village officers stood abolished on January 6, 1984 and the petitioners ceased to be employees of the State Government.

These two matters became accomplished facts on January 6, 1984, irrespective of whether the holders of these posts were paid any amount under section 5 or whether the new post of village Assistants were filled up or not.

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."

The Court also referred to its earlier decision in State of Orissa vs. Bhupendra Kumar Bose (1962 Supp. (2) SCR 380). The Court finally held as under:-

> " 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 constitutionals limitations. A mere disapproval by Parliament or the State legislature of an Ordinance cannot , however, revive closed or completed transactions.
>
> In the petitions before us also the position is the same as in the decision referred to above. The abolition of the posts and the declaration that the incumbents of those posts would cease to be holders of those posts under section 3 of the Ordinance being completed events, there is not question of their revival or the petitioners continuing to hold those posts any longer. The above contention has, therefore, to be rejected in the circumstances of this case."

In S.R. Bommai and ors. vs. Union of India (1994 (3) SCC 1), the question with fell for consideration before this Court was whether the president has unfettered powers to issue proclamation under Article 356(1) off the Constitution. Sawant, J., who delivered judgment for himself and Kuldip

Singh, J. and with whom Pandian, J. concurred and so also Jeevan Reddy, J. and S.C. Agrawal, J. by separate judgements, said that the answer to the question depended upon the answers tot he following questions:-

> (a) Is the proclamation amenable to judicial review ?
>
> (b) If yes, what is the scope of the judicial review in this respect? and
>
> (c) What is the meaning of the expression "a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution" used in Article 356(1)?

For our purposes it is not necessary to go into various aspects which were considered by this Court except to know the following observations in the judgment of Sawant, J.:

> " Our conclusion, therefore, firstly, is that the President has no power to dissolve the Legislative Assembly of the State by using his power under sub-clause
>
> (a) of clause (1) of Article 356 till the Proclamation is approved by both the Houses of Parliament under Clause (3) of the said article. He may have power only to suspend the Legislative Assembly under sub-clause (c) of clause (1) of the said article. Secondly, the court may invalidate the proclamation whether it is approved by Parliament or not. The necessary consequence of the invalidation of the Proclamation could be to restore the status quo ante and, therefore, to restore the Council of Ministers and the legislative Assembly as they stood on the date of the issuance of the proclamation. The actions taken including the laws made during the interregnum may or may not be validated either by the court or by parliament or by the State Legislature. it may, however, be made clear that it is for the Court to mould the relief to meet the requirements of the situation it is not bound in all cases to grant the relief of restoration of the legislative Assembly and the Ministry. The question of relief to be granted in t a particular case pertains to the discretionary jurisdiction of the Court."

And in the judgment of justice Jeevan Reddy who delivered judgment for himself and justice Agrawal:-

> "Clause (3) of Article 356 is conceived as a check on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the proclamation, the proclamation lapses at the end of the two-month period. In such a case, Government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation gets reactivated. Since the proclamation lapses-- and is not retrospectively invalidated -- the acts done, orders made and laws passed during the period of two months do not become illegal or void. They are, however, illegal or void. they are, however, subject

> to review, repeal or modification by the Government/Legislative Assembly or other competent authority."

xxxxxxxxxxxxxxx xxxxxxxxx " If the court strikes down the proclamation, it has the power to resource the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the court has the power to declare that acts done, orders passed and laws made during the period the proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/ legislative Assembly or other competent authority to review, repeal or modify such acts, orders and laws."

The case of Stevenson vs. Oliver [1841) 151 ER 1024] which has been relied upon by this Court, has been discussed in "Craies on Statute Law " (7th edition page 409) while considering the effect and expiration of a temporary statute. I reproduce:-

> " 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 nay further effect. Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires, and as soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate, In Spencer v. Hooton [(1920) 37 T.L.R 280] Roche J. held he had no jurisdiction to hear appeals from Munitions Tribunals in proceedings taken under the Wages (Temporary Regulation) Acts 1918, 1919, by reason of the act giving him jurisdiction having expired (on September 20, 1920) before the appeals came on for hearing.
>
> The difference between the effect of the expiration f a temporary Act and the repeal of a perpetual Act is pointed out by Parke B. in Stevenson V. Oliver ;
>
> "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." The case related to 6 Geo. 4, c. 133, S.4 (Apothecaries), which enacted that every person who held a commission as surgeon in the army should be entitled to practice as an apothecary without having passed the usual examination. This Act was temporary, expiring on August 1, 1826; an it was contended that a person who under the Act entitled to practice as apothecary would lose his right after August 1, 1826. But the court held that such a person would not be so deprived of his right, and Lord Abinger C.B. , in giving judgment, said: " It is by no means a consequence of an Act of Parliament expiring that rights acquired under it should likewise expire. The Act provides that person who hold such commissions should be entitled to practice as apothecaries, and we cannot engraft on the statute & new qualification limiting that enactment."

Following propositions emerge from the aforesaid decisions of the Supreme court, relevant to the present case;

(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 the 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 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 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 its 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 mattes under the Ordinance. An express law can be passed operating retrospectively to that effect subject to other constitutional limitations.

It was submitted by Mr. Dwivedi, learned counsel for the State of Bihar, that Preamble to the Ordinance 32/1989 purported to "provide for taking over the school" and that with respect to every school contained in the Schedule it had to be scrutinized whether such school was in existence duly recognised by Sanskrit Shiksha Board with the prior approval of the Government. This he said with reference to the definition of non-Government Sanskrit schools appearing in Clause 2(1) of the Ordinance. His further submission was that Clause (4) dealt with the services of the staff of the schools and it sought to confer Government status only on such teachers and employees as had been appointed against the sanctioned posts and as per the staffing pattern which was subject to fitness and qualification being possessed by the concerned staff member. The Ordinance did not provide for an automatic conferment of Government status on the staff. Further, the school which is the object

of acquisition under the Ordinance must be in existence. Mr. Dwivedi, therefore, said that it was implicit in the Ordinance that if the school was found to be not in existence there would be no taking over and only that school which had come into existence as per prescribed norms of recognition and possessed necessary infrastructure would be covered by the Ordinance. He said it was necessarily implicit in the Ordinance that there should be an enquiry with respect to these matters. It was then submitted that the fourth ordinance 21/1990 dated August 12, 1992 specifically contemplated enquiry by a committee with respect to the matters mentioned in clauses (3) and (4) of the Ordinance. This Ordinance made explicit what was implicit in the Ordinance 32/1989 with a substantial difference that Ordinance 21/1990 provided for a committee to conduct the enquiry and submit report and thereby provided a machinery. According to the state under none of the Ordinance the teachers and employees would get automatic status of Government servants and even taking over of the schools was not automotive and was subject to completion and result of enquiry and as an enquiry had not been completed when various Ordinances lapsed and no decision taken on the enquiry report, therefore, niter the acquisition of the school was complete not the employees could get Government Status. An argument was also raised that each subsequent Ordinance contained a specific provision in the form of clause (16) which repealed previous Ordinance and provided that any thing contained or any action taken under the previous ordinance shall be "deemed to have been done or taken in exercise of the powers conferred by or under the new Ordinance as if the new Ordinance was in force on that day". Thus the effect of clause (16) was to make Ordinance 21/1990 retrospective and it involved a fiction which fiction should be allowed full flow and taken to its logical sequiter. Ordinance 21/1990 was of clarificatory nature and such an ordinance had always to be understood as retrospective in operation. Alternatively, it was submitted that in view of clause (16) even if one assumed that in law the first Ordinance made a complete acquisition and purported to confer status of Government servants on the employees still the said level position would have to be contemplated in terms of Ordinance 21/1990 which Ordinance is deemed to be enforced on the date of the first Ordinance. Mr. Dwivedi was of the view that the decisions of this Court in State of Orissa vs. B.K. Bose (1962 Supp. (2) SCR 380) and T. Venkatareddy vs. State of Andhra Pradesh (1985 (3) SCR 509) required fresh look as the issues involved in the present case were not fully considered in those two cases and principles of law laid therein would not be applicable in the present case. He also referred to various other Articles in the Constitution where the expression "cease to operate" has been used. reference was then made by him to the case of S.R. Bommai and ors. vs. Union of India (1994 (3) SCC 1) which as noted about was under Article 356 of the Constitution. Finally, it was submitted that perhaps this matter could be referred to a larger bench in view of latest decision of this Court in S.R. Bommai's case.

Mr. Shanti Bhushan, who appeared for some of the teachers and addressed main arguments, submitted that the employees of Sanskrit Schools mentioned in Schedule to the ordinance 32/89 became government servants on December 16, 1989 when it was promulgated and they were never divested of that position by any express legislation. Services of the teachers and other employees of these schools were taken over by the State and under sub-clause 2 of Clause 4 of the ordinance they were to be paid salaries on the same pay- scales as admissible to the government employees. He said all the teachers who were petitioners in the writ petitions in the High Court were on the sanctioned strength of the schools and possessed requisite qualifications. Mr. Bhushan submitted that the fourth ordinance 24/90 which sought to change the status of the teachers and non-teachers who had

become government servants by the first Ordinance could not do so. It was not that posts in the schools had been abolished and when there were schools and there were posts, the changing of the status of the employees of the schools taken over under the first Ordinance 32/89 would be unconstitutional Vested rights were created by the Ordinance 32/89 and it was unnecessary to issue subsequent Ordinances which would have no effect. He argued if the fourth Ordinance was to be acted upon, the results would be startling. Under the first Ordinance, properties of the Schools had vested in the State free from all encumbrances and it could not be said that under the fourth Ordinance the State Government shall be divested of those properties and even assuming that to be so in whose favour properties now vested the fourth Ordinance was silent. When under the first Ordinance 32/89 property was vested, in the State and there was no denationalisation, anything could have happened to property at that time. During that period the property could have been leased out, sold or otherwise disposed of who will account for all these transactions?, Mr. Shanti Bhushan queried. He strongly relied on the two decisions of this Court in Bhupender Kumar Bose and T. Venkata Reddy's cases. it was only the first Ordinance 32/89 that mattered and the forth Ordinance 32/89 that mattered and the fourth Ordinance 24/90 had no meaning. Mr. shanti Bhushan said that the High Court was wrong in coming to the conclusion that after the Ordinances lapsed, the schools did not remain vested in the State and teachers and other employees were not government servants when even though the High Court held that successive Ordinances were illegal and void. He said that in the case of T. Venkata Reddy posts abolished under Ordinance could not be revived after the Ordinance lapsed and on that very analogy it could also not be said that after the lapse of the first Ordinance 32/89 the vested rights could be taken away. Law did not become invalid when it ceased to operate. Mr. Shanti Bhushan also referred to another decision of this Court in State of Mysore vs. H. Papanna Gowda & Anr. Etc. , (1971 (2) SCR 831) to contend that when the employees of the Sanskrit Schools under the first Ordinance 32/89 had become government servants, they could not be made to become private servants as that would amount to removing them from civil posts which would be illegal. In the case of H. Papanna Gowda, the government employees were sought to be transferred to the University, which order was set aside by this Court. The Court held that the notification which resulted in the extinction of the status of the petitioners as a civil servant by his compulsory transfer to the University was void. Referring to a decision of this Court in Prabodh Verma and others etc. vs. State of Uttar Pradesh and others etc., 1985 (1) SCR 216 at Mr. Shanti Bhushan said that even those employees who were not parties to these appeals may also get the advantage of the judgement of this Court irrespective of the fact if all the employees of the schools had joined in writ petitions or not in the High Court. Lastly, Mr. Shanti Bhushan submitted that S.R. Bommai's case was on Article 356 of the Constitution and that this Court would be bound by its earlier two Constitution Bench decisions in Bhupender Kumar Bose and T. Venkata Reddy's cases which were under Article 213 of the Constitution.

Many other counsel, who appeared in other appeals of teachers and Head Masters, adopted the arguments of Mr. Shanti Bhushan. They also submitted that on merits of individual cases as well under the fourth Ordinance enquiries had been made and schools and staff both teaching and non-teaching had been identified. However, the view which I have taken of the applicability of the first ordinance it is not necessary for me to go into all these questions raised.

Undoubtedly the ordinance making the power of the President and the Governor is rather unusual as it is legislative's function to make laws. The Executive is to implement those laws. The Executive is to implement those laws. At the time of consideration of draft Constitution a fear was expressed and the very wisdom of giving such powers to the president and to the Governors was subject to criticism. However, in justification of the Ordinance making power Dr. B.R. Ambedkar, Chairman, Drafting Committee, said:-

> My submission to the House is that it is 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? Th executive has got a new situation which it must deal with ex hypothesis. 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 the 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 hypothesis, the legislature is not in session. Therefore, it seems to me that fundamentally there is no objection to the provisions contained in Article 123."
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> The very opening words of Article 213 are pointer to the fact that such power of promulgating ordinance is to be exercised when the Governor is satisfied that circumstances exist which rendered it necessary for him to take immediate action. The Ordinance so promulgated has the same force and effect as an Act of Legislature of the State assented to by the Governor. It is only to meet an emergent situation when existing law is either deficient or no law exists to meet that situation that an Ordinance is promulgated by the Executive. Legislature cannot foresee every situation which may develop suddenly requiring immediate action. It has been held that it is within the subjective satisfaction of the Governor to come to the conclusion if any situation has developed suddenly requiring immediate action on his part and then resorting to issuance of an Ordinance invoking his powers under Article 213 of the Constitution.
>
> If we examine the first Ordinance 32/89 it was issued to provide for the taking over of non-Government Sanskrit Schools for the Management and control of the State Government for improvement, better organisation and development of Sanskrit education in the State of Bihar. Preamble of the Ordinance shows that the Governor was satisfied that circumstances exist which render it necessary for him to take immediate action for taking over of the schools. The Ordinance came into force at once. Under clause (3) of the Ordinance 429 Sanskrit schools mentioned in Schedule vest in the state Government with immediate effect and the State Government shall manage and control these schools thereafter. Not only that all the assets and properties of these schools, both movable and immovable and of any nature whatsoever including that of their governing bodies, managing committees, stood

> transferred to and vest in the State Government free from all encumbrances. under clause (4) of the Ordinance services of those teaching and non-teaching staff of the schools, mentioned in the Schedule, who had been appointed permanently/temporarily against sanctioned posts in accordance with the prescribed standard, staffing patterns prescribed by the State Government, stood transferred to the State Government. They shall thereafter be employees of the State Government with whatsoever designation they hold. The proviso to this clause which shows that services of those teaching and non-teaching employees who were in excess of the sanctioned strength or did not possess the necessary qualification shall automatically stand terminate. On these two clauses, which to my mind are explicit and leave no doubt whatsoever argument was sought to be raised by Mr. Twined that the schools mentioned in schedule were yet to be identified and it had yet to be found that if the employees working there possessed requisite qualifications and fell within the prescribed staffing patten and the sanctioned strength of the school. I think such a specious argument has just stated to be rejected. It is the fourth Ordinance which talks of all these conditions and on that basis it was stated that under clause 16 of the fourth ordinance there would be retrospective operation covering the period from the date first Ordinance came into force . This type of argument would appear to be more in desperation than to meet the situation which was sought to be created by promulgating the first Ordinance.

Moreover, if the purpose of first Ordinance was merely of a preparatory nature to identify the schools and the staff that could have been done by administrative orders and it was not necessary to invoke extra-ordinary powers under Article 213 of the constitution. The Ordinance was promulgated to take over the schools mentioned in Schedule to the Ordinance and their staff with immediate effect. We have only to see what further consequence followed from that. It is the Legislative power which the Governor has exercised and issued the first Ordinance and full effect has, therefore, to be given to it as per the law. If we accept the arguments of the State that all these seven ordinances successively issued serve no purpose and achieve nothing then one can easily say that these were useless documents not worth the papers on which these were printed. I am confident that this could not be the stand of the state Government. It cannot be said that for some inexplicable reasons these Ordinances were promulgated time and again. Nothing has been said as to why any of these Ordinances could not be placed before the State Legislature to be replaced by an Act of Legislature. It is not that an ordinance can never be repromulgated if there are certain valid circumstances satisfying the constitutional mandate.

We have seen above from the pronouncements of this Court that an Ordinance may cease to operate but whatever had been done earlier under the Ordinance it does not vanish altogether. The effect of the first Ordinance has been of enduring nature. Whatever the Ordinance ordained was accomplished. Its effect was irreversible. 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 under the same which power the legislature did possess, the effect of the Ordinance was of permanent nature. Ordinance is like a temporary law enacted by the Legislature and if the law lapses whatever has been achieved thereunder 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. The only consideration to examine the Ordinance is to see if the effect is of an enduring nature and if the Ordinance has accomplished what it intended to do. I have no doubt in my mind that by the Ordinance 32/89 the State no only took over the management and control of the Sanskrit Schools but all the properties of the schools of whatsoever nature vested in the State free from all encumbrances. Under clause (11) of the Ordinance, it is an offence if a person wrongfully with-holds such property from the State. Let me set out clause 11(2) of the Ordinance to appreciate the impact of vesting of properties of the Schools in the State:

> " 11(2) If any person -
>
> (a) having in his possession, custody or control any property forming part of the assets of the institution/Governing body or Board of Control wrongfully withholds such property from the State Government; or
>
> (b) wrongfully obtains possession of any property forming part of the assets of the institution/governing body or Board of Control; or
>
> (c) wilfully withholds or fails to produce or hand over to any person authorised by the State Government any register, record or other document which may be in his possession, custody or control; or
>
> (d) fails without any reasonable cause to submit any accounts, books or other documents when required to do so, he shall be deemed to have committed an offence and shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to one thousand and five hundred rupees or with both.

Once a property vests in the State, it can be divested only by an express provision of law or under its plenary powers satisfying the requirement of Article 14 of the Constitution.

It is nobody's case that the Ordinance was promulgated as colourable exercise of power. As to what are the effects of repromulgation of the Ordinances, law had been settled by this Court in D.C. Wadhwa and ors. vs. State of Bihar and ors. (1987 (1) SCC 378). This Court has held that this Court would invalidate the Ordinances repromulgated time and again without being brought before the Parliament or the Legislature as required by Article 123(2) or before the State legislature under Article 213(2) of the Constitution. I am not saying that an Ordinance cannot be repromulgated at all if circumstances so exit but when Executive is usurping the power of Legislature time and again it has to be shown as to why the Ordinance could not be placed before the Legislature under Article 213(2) of the Constitution. State cannot go on governing by Ordinances without going to the Legislature. It is the later Ordinance which has to be struck down after the first Ordinance 32/89 achieved its purpose and was of enduring effect. Subsequent Ordinances have no meaning and are void. Law is well settled that an Ordinance can be issued by the President under Article 123 and by the Governor under Article 213 of the Constitution and the effect of an Ordinance is like an Act

passed by the Parliament or by the Legislature. It is repromulgation which can be struck down. The Court may not go into the question whether circumstances existed for exercise of power under the provision of the Constitution and as to what was the urgency or emergency to promulgate an ordinance. We are concerned here with the consequence and effect of an Ordinance which lapses and not when an Ordinance is disapproved by the Legislature. but the rights which had been vested rights. Moreover, when the property vested in the State by virtue of the Ordinance, there has to be an express legislation to revest the property in the schools or the governing bodies and managing committees. When in the case of Venkata Reddy posts which were abolished could not be revived after the Ordinance lapsed it is difficult to hold that in the present case when the first Ordinance lapsed vested rights could be taken away. If what is correct in Venkata Reddy's case the converse in the present case would also be true. As a matter of fact what the first Ordinance accomplished, i.e., vesting of schools and grant of States in the present case is more than what the Ordinance in the case of Venkata Reddy did, i.e., abolition of posts, process which the first Ordinance set into motion is irreversible except by express legislation which is not there. In Steavenson vs. Oliver which was relied upon by this Court in its earlier decisions, a certain status was conferred on some persons by a statute which was temporary. It was held that person would not be deprived of the status after the expiration of the statute. The status was to practice apothecary without having passed the usual examination. The status of being validly elected representatives which the Ordinance in B.K. Bose conferred on them though elected on illegal electoral rolls was held to be of enduring nature even though the Ordinance lapsed without its being brought before the Legislature. The present case before us is on much stronger footing. The right is vested in the employees of the School which is of enduring character which cannot be taken away merely because the Ordinance like a temporary statute ceases to operate. The High Court was not correct when it thought that the object of the Ordinance was to grant status of Government servants on the teachers etc. and acquisition of school properties merely for the period during which the Ordinance was in force. Its effect continued after it lapsed.

An Ordinance promulgated under Article 213 has the same force and effect as the Act of the Legislature of the State assented to by the Governor, but then it is the mandate of the Constitution that every such Ordinance shall be laid before the Legislature of the State. The Ordinance ceases to operate at the expiration of six weeks from the reassembly of the Legislature and even before expiry of this period of six weeks if the ordinance is disapproved by the Legislature or withdrawn by the Governor. When read with Article 174 which enjoins that not more than six months shall intervene between the last session of the Legislature and the next sessions, the Ordinance at the most can operate for a period up to 7-1/2 months. Considering that power has been conferred on the Executive to make law by promulgating an Ordinance when an emergent situation arises and the legislature does not put its stamp of approval and it ceases to operate after expiry of a certain period or otherwise one can perhaps assume that the operation of the Ordinance is of limited duration and cannot be of enduring nature. But then this Court has held that an Ordinance can be of enduring nature in certain circumstances when it confers vested rights and those rights could not be taken away when the Ordinance lapses. In the present case, successive Ordinances which have been promulgated by the Governor would go to show that the State itself wanted the first Ordinance to be of enduring character. It is correct that successive Ordinance have been issued in violation of the Constitutional provisions without the Executive having to go to the Legislature and, indeed, it may

even amount to breach of privilege of the Legislature, the Governor can certainly promulgate second or subsequent Ordinance, if circumstances so exist like when the Legislature has been dissolved or it had been adjourned sine die without transacting any business. It will be for the State to explain as to why the Ordinance could not be placed before the Legislature. It is also for the Legislature to guard itself against the mechanisation of the Executive in brining an Ordinance which would be of enduring nature and yet it is not brought before the Legislature. In the present case, it is quite paradoxical that the Executive, while issuing successive Ordinances and thus making it to believe that first ordinance would be of enduring nature, is now claiming that it was of no effect.

State of Bihar has a grievance that the High Court in its impugned judgment has stated that there was Ordinance Raj in the State. I think this criticism is rather mild particularly when this Court did not approve the action of the State Government in promulgating successive ordinances the case of D.C. Wadhwa and ors. vs. State of Bihar and ors. (1987 (1) SCC 378). It is rather unfortunate that after the decision of this Court in D. C. Wadhwa's case which was delivered on December 20,1986 state of Bihar continued to indulge its illegal practice of repromulgating the Ordinances successively without having to fact the Legislature and acted in an unconstitutional manner. I face no difficulty in striking down all the Ordinance repromulgated after the first Ordinance 32/1989. The nature of the rights created by the first Ordinance and obligations arising out of its provisions and the character unmistakably conferred status of Government servants on the employees of the Sanskrit schools taken over under the Ordinance and entitled to all the pay and other benefits admissible to Government servants of the same rank, with property of the schools and of all their governing bodies/managing committees vested in the State Government free from all encumbrances. It cannot be said that the State Government was not having all the details of the Sanskrit Schools which had been recognised and the posts which the employees occupied against sanctioned strength and their qualification to occupy those posts. In 1981, there were 651 recognised Sanskrit Schools receiving grant-in-aid from the State. Ordinance 32/89 took over 429 such recognised schools. Even after the promulgation of the Ordinance if it comes to the notice of the State Government that name of any particular school or the staff of any school appearing in the Schedule was shown there by mistake, it can always rectify the same but that would not mean that the Ordinance would not have its full play. Rights created by the Ordinance 32/89 are very similar to the rights which the English Court was dealing in the case of Steavenson vs. Oliver (151 ER 1024) which has been followed by two constitution Benches of this Court and those rights must be held to endure and last even after the expiry of the Ordinance.

In the circumstances I would hold that the Ordinance 32/1989 has conferred status of Government servants on the Head masters, teachers and other non-teaching staff of the schools mentioned to in the Schedule to the Ordinance and they are all entitled to same pay-scales as any Government servant holding equivalent posts. The properties of the school, their governing bodies/managing committees vest in the State Government free from all incumbrances. These consequence flowing from the Ordinance are of enduring nature unless reversed by the State Legislature.

According, I will dismiss the appeals filed by the State of Bihar and allow all the other appeals with costs. The impugned judgment of the High Court stands modified to the extend aforesaid.

O R D E R While we are both agreed that the ordinances from the 2nd Ordinance onwards are invalid, one of us (Sujata Manohar, J.) is further of the view that the 1st ordinance is also invalid and cannot be delinked from the chain. Further, even if the 1st ordinance is valid, its effect cannot last beyond its life-time. Wadhwa, J. is of the view that the 1st Ordinance is valid and its effect is enduring till it is reversed by express legislation.

In view of the difference of opinion between ourselves on the constitutional validity of the first ordinance, and on the effect of it on the status of the concerned teachers, the matters may be placed before the Hon'ble the Chief justice of India for constituting a larger bench.