

(1996) 05 DEL CK 0027

In the Delhi High Court

Case No : C.W.P. No. 1315 of 1996

Gyanendra Kumar and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 10-05-1996

Acts Referred:

Constitution of India, 1950 — Article 123, 213

Citation : AIR 1997 Delhi 58

Hon'ble Judges : M. Jagannadha Rao, C.J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : M. Chandrashekharan, Addl. Solicitor General, E.X. Joseph, A.K. Vali, Ms. Meera Bhatia and Ms. S.T. Siddiqui, for the Appellant;

Judgement

Dr. M. K. Sharma, J.—This writ petition has been filed by two Advocates practicing in Delhi challenging the actions of the respondents in re-promulgating about 10 ordinances by the President of India on March 26th and March 27th, 1996, which have come into force on 7-4-1996 on the ground that the said actions are unconstitutional and beyond the scope and power under Art. 123 of the Constitution of India. The details of the promulgation and promulgation of the aforesaid 10 Ordinances could be summarised by the following table. The table indicates in the case of each of the 10 Ordinances, the title of the Ordinance, the date of first and second promulgation and also the date of the third promulgation where it applies :--

ORDINANCE 1ST PROMULGATION 2ND 3RD

1. Industrial Disputes (Amendment) Ordinance, 1996. 11.10. 05.01.96
27.03.96

2. Employees Provident Fund and Miscellaneous Provisions Amendment Ordinance, 1996. 11.10.95 05.01.96 27.03.96

3. Building and other Construction Workers (Regulation of Employment and Conditions of Service) Ordinance, 1996. 03.10.95 05.01.96 27.03.96

4. Building and Other (Construction Workers (Welfare and Cess) Ordinance, 1996. 03.10.95 05.01.96 27.03.96
5. The repositories Ordinances, 1996. 20.09.95 07.01.96 27.03.96
6. Coal Mines Provident Fund and Misc. Provisions (Amendment) Ordinance, 1996. 05.01.96 26.03.96
7. Supreme Court and High Court Judges (Conditions of Service) Ordinance, 1996. 11-01-96 27-03-96
8. The Arbitration and Conciliation Ordinance, 1996. 16.01.96 26.03.96
9. The Constitutional and Scheduled Tribe Order (Amendment) Ordinance, 1996. 27.01.96 27.03.96
10. The Telecom Regulatory Authority of India Ordinance, 1996. 27.01.96 27.03.96

The petitioner has also set out in the writ petition the dates when the Rajya Sabha and the Lok Sabha were summoned to meet and were prorogued, which are as follows :--

HOUSE SUMMONED TO MEET PROROGUED

Rajya Sabha 11AM, 27.11.95 29.12.96

Lok Sabha - 11AM, 27.11.95 02.01.96

Rajya Sabha 11 AM, 26.02.96 14.03.96

Lok Sabha 11AM, 26.02.96 14.03.96

It is stated that the re-promulgation of 5 of the above 10 Ordinances had taken place for the second time in spite of the fact that the Parliament was in Session during the aforesaid time.

2, Learned counsel appearing for the petitioner submitted before us that the aforesaid Ordinances have now been re-promulgated immediately after the conclusion of the Parliament Session and before the lapse of any of the above Ordinances with an attempt to prevent them from lapsing in accordance with the prescriptions of the Constitution of India as provided under Art. 123 thereby subverting the mandatory procedure prescribed therein. According to him, the contents of the aforesaid 10 Ordinances which have been re-promulgated are substantially the same as were ordinarily promulgated. The petitioner further submitted that the re-promulgation of the Ordinance is in gross disregard of the mandate of the Constitution, inasmuch as, under cl. 2 of Art. 123 of the Constitution of India an Ordinance has to be laid before both Houses of Parliament and would cease to operate at the expiration of six weeks of reassembly of Parliament, which proves and establishes that the Ordinances made by the President are strictly of limited duration and are Therefore,

necessarily to be placed before the Parliament during the session and would cease to operate at the expiration of six weeks from the re-assembly of Parliament and thus the President cannot by the process of re-promulgation avoid placing the Ordinances before the Parliament for consideration. The further submission of the petitioner was that the re-promulgated Ordinances do not satisfy the pre-requisites under the Constitution of India for having the force of law, inasmuch as, the Ordinances were not placed before the Parliament as is required under Art. 123(2), and accordingly the said Ordinances cannot be given the force of law. The actions of the respondents in re-promulgating the aforesaid 10 Ordinances are also challenged by the petitioner on the ground that the legislative power granted to the President under Art. 123 of the Constitution of India to issue Ordinances is in the nature of an emergency power vested in the President for taking immediate action where such action may become necessary at a time when the Parliament is not in session and Therefore, the Executive cannot, by taking resort to an emergency power exercisable by it only when the Legislature is not in session, take over the plenary powers of the Legislature as the same would clearly subvert the democratic process which is the core of the constitutional scheme;

3. On the other hand Mr. M. Chandra-shekharan, learned Additional Solicitor General appearing for the respondents supported the actions of the respondents in re-promulgating the 10 Ordinances on the ground that the Government had initially introduced the bills in the Parliament containing the same provisions in respect of the aforesaid 10 Ordinances but in view of the fact that the Parliament had other much important and urgent legislative business in the aforesaid sessions the Government, in spite of introduction of the bills in respect of the aforesaid Ordinances, could not get the said . bills taken up for consideration, or debated upon. Government could not get them passed as the time was too short and that they had a number of other emergent and important legislative and Parliamentary business in the said session. According to him, under the aforesaid circumstances the President has the power and jurisdiction legitimately to re-promulgate the aforesaid 10 Ordinances and that there is no illegality and/or irregularity in re-promulgating the aforesaid 10 Ordinances nor the same could be said to be unconstitutional.

4. The petitioner and the learned counsel for the respondents have in support of their submissions relied upon the decision of the Supreme Court in *Dr D.C. Wadhwa and Others Vs. State of Bihar and Others*, . The petitioner in support of his submissions draw our attention to the following observations of the Supreme Court in *D. C. Wadhwa's case* (supra) (at p. 589) :

"The law making function is entrusted by the Constitution to legislature consisting of the representatives of the people and if the Executive were permitted to continue the provisions of an Ordinance in force by adopting the methodology of re-promulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-

making function of the Legislature. The Executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law-making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution but by laws made by the Executive. The Government cannot bypass the legislature and without enacting the provisions of the Ordinance into an Act of the legislature, re-promulgate the Ordinance as soon as the - Legislature is prorogued."

The learned Additional Solicitor General, however, drew our attention to the following observations of the Supreme "Court from the same case (at p. 589) :--

"Of course there may be a situation where it may not be possible for the Government to introduce and push through in the legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business in a particular Session or the time at the disposal of the legislature in a particular Session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the Ordinance. Where such is the case, re-promulgation of the Ordinance may not be open to attack."

5. The issue, Therefore, which falls for our consideration is as to whether circumstances existed which rendered it necessary for the President to take immediate action by way of re-promulgation of the Ordinances. In other words, the issue is as to whether the procedure followed by the Government could be justified. as representing legitimate exercise of powers of promulgating Ordinances conferred on the President under Art. 123 of the Constitution of India. For convenience sake and for better appreciation of the submissions of the learned counsel for the parties we may quote hereunder the provisions of Art. 123 of the Constitution of India :

"123. Power of President to promulgate Ordinances during recess of Parliament.-

(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance :

(a) shall be laid before both Houses of Parliament and "shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

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

Explanation -Where the Houses of Parliament, are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

6. Article 123(1) provides that as and when both the houses of Parliament are not in session and if at the relevant time the President is satisfied that a situation has arisen to take immediate action to promulgate Ordinances he may do so and promulgate such ordinances as the circumstances may appear to him to require. The satisfaction of the President as referred to in the aforesaid provision is that of the advice of the Council of Ministers. It is settled law that it is for the petitioner to make out a prima facie case that there could not have existed any circumstance whatsoever necessitating the issuance of Ordinances before the Government could be called upon to disclose the facts which are within its knowledge. Every casual challenge to the existence of such circumstances would not be enough to shift the burden of proof to the Executive to establish those circumstances.

The power conferred on the President to issue Ordinances is in the nature of an emergency power which is vested in the President for taking immediate action when such action may become necessary at the time when the two Houses are not in session. Although primary power of law-making is vested in the Parliament but as and when both the Houses are not in session and it becomes necessary to take immediate action in such cases where public interest may not suffer by reason of the inability of the Parliament to make law to deal with the emergent situation, the President is vested with the power to promulgate the Ordinances. There is however, a limitation to the aforesaid power wherein it is laid down that every such Ordinance promulgated by the President must be placed before both the Houses and that it would cease to operate at the expiration of six weeks from the re-assembly of the Parliament or if before the expiration of that period a resolution disapproving it is passed by both the Houses.

7. The power to promulgate Ordinances by the Governor and the extent of the said power and limitation thereto came to be debated upon and considered by the Supreme Court in the case of *Dr D.C. Wadhwa and Others Vs. State of Bihar and Others*, . Incidentally ,it may be stated that the power of Governor in promulgating and re-promulgating Ordinances is almost similar to that of the power to promulgate and re-promulgate Ordinances by the President of India. While dealing with the power to promulgate and re-promulgate Ordinances by the Governor, the Supreme Court held that the Executive can take resort to the emergency power exercisable by it under Art. 213 of the Constitution of India only when the legislature is not in session; but by exercising power under the said provision the Executive cannot take over the law-making, function of the legislature by taking resort to an emergency power as that would be clearly subverting the democratic process which lies at the core of our constitutional scheme. The Supreme Court reminded that the Government cannot by-pass the Legislature and without enacting the provisions of the Ordinance into an Act of

the Legislature re-promulgate the Ordinances as soon as the Legislature is prorogued.

8. The aforesaid observations came to be recorded by the Supreme Court in view of the fact that an ordinance has to be replaced by a Bill which is to be introduced before the Legislature for its debate and then accepted and that without resorting to the said procedure if the Government resorts to the power of re-promulgating the Ordinances without bringing a bill in the House, that would amount to the Government taking over the law-making-power which is only vested in the Legislature and would Therefore, amount to fraud on constitutional power. In that case the Supreme Court carved out an exception when it stated that if for any reason and in a given situation it is not possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance in view of excessive legislative business pending before the Legislature in the particular session or if the time at the disposal of the Legislature in a particular session is short, in that event the Governor or President may legitimately find that it is necessary to re-promulgate the Ordinances and in such a situation the action in re-promulgating the Ordinance would not be open to attack.

9. The stand of the respondent in the present case is that in spite of the best efforts of the Government by introducing the contents of the Ordinance in the form of the Bill and to push through the same in both Houses of Parliament, however, because of the circumstances beyond control of the Government and because of heavy and other urgent and emergent work-load of the business of both the Houses in the aforesaid sessions, the aforesaid Bills could not be debated upon and/or passed and, Therefore, the circumstances compelled the Government to re-promulgate the Ordinances. Having considered the aforesaid factual position, which also is obvious and could be taken judicial notice of on the basis of the reports in the press in the national newspapers, we are of the view that the action of Government in re-promulgating the 10 Ordinances definitely falls within the ambit and scope of the exception carved by the Supreme Court and referred to above. The present is a case where the Bills introduced by the Government containing the same provisions as in the Ordinances could not be debated upon and passed in the concerned sessions as there were many other urgent and emergent businesses and the duration of the Parliament was also short and accordingly, the action of the respondents in re-promulgating the Ordinances cannot be said to be unconstitutional or illegal.

10. Accordingly, following the aforesaid observations of the Supreme Court in the case of *Dr D.C. Wadhwa and Others Vs. State of Bihar and Others*, we hold that the action of the respondents in re-promulgating the 10 Ordinances is not open to attack the Therefore, this writ petition has no merit and is accordingly dismissed, but without any order as to costs.

11. Petition dismissed.