

ORDINANCES AND THEIR CONSEQUENCES

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A seven judge bench of the Supreme Court recently passed a judgment in *Krishna Kumar Singh and Another v. State of Bihar and Others*, holding that actions taken under an ordinance will not necessarily survive if the ordinance lapses or ceases to operate. It has been a recent trend in various states in India as well as at a Central Government level for the government to seek to impose laws without going through the constitutionally prescribed mechanism of

having Parliament or the legislature pass the laws; the government seeks to circumvent this procedure by issuing ordinances instead. *Krishna Kumar Singh* is therefore an extremely significant judgment, because it considers whether such ordinances, applicable to all persons, companies and organisations, can create lasting rights.

The practical impact of this judgment is that the rights of persons and companies under any ordinance issued by the government may not be permanent and may only persist for the duration of the ordinance. Unless the legislature enacts a statute incorporating the same rights as are available under the ordinance, there is always a chance that the rights may abate once the ordinance lapses.

To give an example of what this means in practice, we can look at the Maharashtra Land Revenue Code (Amendment) Ordinance, 2017. This ordinance provides (among other things) that certain categories of land in Maharashtra will be deemed to be converted to different uses if dues specified in the ordinance have been paid in respect of such land. The consequence of the *Krishna Kumar Singh* judgment is that any such deemed conversion of land under the Maharashtra Land Revenue Code (Amendment) Ordinance, 2017 may not be permanent – the land may revert to its earlier status after the ordinance ceases to operate, unless the terms of the ordinance are subsequently incorporated in a statute.

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What is an ordinance?



Under the Indian Constitution, an ordinance is a special kind of executive decision (issued by a Governor or President on the advice of the State or Central Government respectively) that operates as a law. Although law-making power usually lies with the legislative branch of the government, the executive is given the power to issue ordinances in exceptional situations, with the ordinances remaining in force for a limited period of time.

The legislature can enact a law incorporating the provisions of an ordinance. However, the legislature can also pass a resolution disapproving the ordinance, in which case the ordinance will cease to operate. The legislature can also choose to do nothing, in which case the ordinance will lapse within six weeks from the beginning of the next session of Parliament or the relevant State Legislature.

What were the issues in dispute in the case?

The *Krishna Kumar Singh* case related to ordinances promulgated (issued) by the Governor of Bihar (on the advice of the Bihar State Government). Between 1989 and 1992, the Governor promulgated as many as seven ordinances allowing the State Government to take over of the management and control of Sanskrit schools in the state. As each ordinance was about to lapse, the Governor would promulgate a fresh ordinance with similar provisions (re-promulgate the ordinance), allowing the ordinance to continue in force for over two years, finally lapsing in April 1992. Although the Bihar State Legislature was in session a number of times over those years, the ordinance was never placed before them, nor was any bill incorporating the provisions of the ordinances.

On a dispute raised by the employees of the schools that were taken over, the Supreme Court was called on to decide whether the ordinances promulgated and re-promulgated were valid. The court was also asked to decide whether the employees of the schools that were taken over would remain government employees although the ordinances had lapsed (i.e., whether the rights created by the ordinances would survive the ordinances).

What did the Supreme Court decide?

The Supreme Court decided that the ordinances were invalid. The court held that legislation by ordinances is not an ordinary source of law-making. Ordinances can only be promulgated in emergent or exceptional situations, and only while the legislature is not in session. Further, the Constitution requires that ordinances must be compulsorily presented before the legislature. The repeated re-promulgation of an ordinance is evidence that the executive is trying to overstep its constitutional boundaries with the ordinance, and the court is permitted to strike down any such ordinance.

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The Supreme Court also decided that even if the ordinances had been valid, the employees of the schools would not have remained government employees once the ordinances had lapsed. The court held that “whether rights, privileges, obligations and liabilities would survive an ordinance which has ceased to operate is a matter of construction”. To decide whether or not rights will continue, courts are

required to apply a test of public interest and constitutional necessity, including considering the issue of whether the actions that have taken place under the ordinance are irreversible. Courts must adopt an interpretation which furthers the basic constitutional premise of legislative control over ordinances.

Conclusion

Whether rights or privileges acquired under an ordinance will survive the ordinance is therefore a matter for courts to consider on a case-by-case basis. In addition, an ordinance that is issued repeatedly by a State Government or the Central Government without any attempt to enact a law incorporating the terms of the ordinance is likely to be held invalid if challenged in court. While all persons are required to comply with an ordinance while it remains in force, there is no future guarantee of any rights or privileges that are granted under an ordinance; all actions taken under an ordinance should be taken with due caution and after obtaining appropriate legal advice.

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