Shabbir Vs. State

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Court : Allahabad

Decided On : Dec-06-1963

Reported in : AIR1965All97; 1965CriLJ258

Judge : Jagdish Sahai and ;Mahesh Chandra, JJ.

Acts : Constitution of India - Article 219

Appeal No. : Criminal Revn. No. 711 of 1963

Appellant : Shabbir

Respondent : State

Advocate for Def. : Adv. General and ;R.K. Shukla, Adv.

Advocate for Pet/Ap. : S.N. Misra and ;Asif Ansari, Advs.

Judgement :

Jagdish Sahai, J.

1. This criminal revision was listed for hearing before Satish Chandra, J, who along with Capoor and Tripathi, JJ., was appointed to be an Additional Judge of this Court in the beginning of October, 1963. All of the three made and subscribed to the following oath in the presence of the Chief fustice of the Court on 7-10-1963:

'I-----, having been appointed Additional Judge of the High Court of Judicature at Allahabad do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established, that I will duly and faithfully to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws.'

2. The Chief Justice purported to act under a letter of authority, dated August 25, 1963 addressed to him by the Governor of Uttar Pradesh. That letter reads as follows:

'Governor

Uttar Pradesh,

Governor's Camp.

Uttar Pradesh, Allahabad

August 25, 1963.

My dear Chief Justice,

Thnks for your letter of the 24th August In exercise of the power conferred by Article 219 of the Constitution of India, I appoint the Chief Justice, or the Acting Chief Justice, Uttar Pradesh and during his absence from Allahabad, the senior-most puisne Judge available at the moment at Allahabad as the person in whose presence every person appointed to be a Judge of the High Court of Uttar Pradesh, before he enters upon his office, makes and subscribes oath or affirmation according to the form set out for the purpose in the Third Schedule of the Constitution of India.

Yours sincerely,

Sd/- Bishwanath Das.

(Bishwanath Das).

Mr. M. C. Desai,

Chief Justice,

High Court, U.P.

Allahabad.'

3. On 18th October, 1963 it was discovered that the Constitution Sixteenth Amendment Act (hereinafter referred to as the Amending Act), 1963 had received the assent of the President on 5th October, 1963 and by means of Section 5 of that Act, the form of the oath required to be made by a person appointed to be a Judge of a High Court had been slightly amended. Consequently, the same day, in the afternoon, the three fudges mentioned above, made and subscribed oath in the presence of the Chief Justice in the following amended form:

'I----- having been appointed an Additional Judge of the High Court of Judicature at Allahabad do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour or ill-will and that I will uphold the Constitution and the laws.'

The revision application came up for hearing before Satish Chandra, J. on 23rd October, 1963, when a preliminary objection was taken that opt having taken the oath in the correct form, he could not act as a Judge and the oath that he made and subscribed on 18th October, 1963, was bad as the Chief Justice could not have acted for the Governor without there being a fresh and specific appointment of the Chief Justice by the Governor to be present and witness the oath being made and subscribed by Satish Chandra, J. Satish Chandra, J. then made a reference saying 'I refer these questions to a larger bench for decision' without framing the questions. The matter has now been placed before us.

4. The oath that the learned Judges mentioned above made on 7th October, 1963, would have been correct if the Amending Act had not been passed or bad not received the assent of the President before 7th October, 1968. Three submissions

have been made before us by Sri S. N. Misra. They are:

1. That the Amending Act having received the assent of the President on 5th October, 1963, all persons who took oath of office on that date or on subsequent dates could only do so in the amended form, and that inasmuch as Satish Chandra J. did it in the original form, he had not made and subscribed a proper oath and consequently had not entered upon his office.

2. That the oath made and subscribed on 7th October, 1963, was also ineffective on the ground that it was not made and subscribed before the Governor, and the Chief Justice before whom it was made and subscribed not having been properly appointed 'in that behalf' could not have acted for the Governor.

3. That even though on 18th October, 1963, Satish Chandra, J. had made and subscribed to the correct oath in the presence of the Chief Justice, the oath had not been properly made and subscribed because the same could only be made and subscribed before the Governor of the State or some person appointed in that behalf by him and that every time an appointment is made the Governor should decide whether he himself would be present when the oath is made and subscribed or would appoint some one else to do it; a general power such as conferred by the letter reproduced above cannot be given.

We will deal with the submissions seriatim. Article 219 of the Constitution reads:

'Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the third schedule'.

The requirement of making and subscribing oath by a person appointed to be a High Court Judge has existed throughout. (See clause 3 of the Letters Patent of Her Majesty dated 17-3-1886 and Section 220 of the Government of India Act, 1935). It admits of no argument that a person appointed to be a Judge of a High Court can only enter upon his office after making and subscribing the oath required by the law. It is the performance of the oath that marks the induction into

office. It would be noticed that Article 219 of the Constitution uses the words 'every person appointed to be a judge of a High Court' and nut 'every person appointed a Judge of a High Court' which would indicate (sic) a person appointed to be a Judge becomes one only after oath has been made and subscribed by him. Before that he is what may be called a Judge designate. That Article also provides that the oath should be according to the (sic) set out for that purpose in the Third Schedule The expression 'shall before he enters upon his office make and subscribe.....' clearly shows that making and subscribing of oath is a condition precedent to the assumption of office. It is trite that the non-performance of a condition precedent cannot be treated to be a mere irregularity.

In our judgment, therefore, the provisions of Article 219 of the Constitution are mandatory at any rate so far as making and subscribing of oath is concerned We find support for our view from Sunil Kumar v. West Bengal Govt.. AIR 1950 Cal 274 (SB) and Brahmeshwar Prasad v State of Bihar. : AIR1950 Pat265 . After the Constitution of India came into force on 25th January, 1950. the President was required to take oath in the form prescribed. He, however, did not do so until 10.15 A.M on 26th January, 1950. In the cases mentioned above the Calcutta and the Patna High Courts held that the President hart not entered upon his office until he took the oath on 26th January at 10.15 A.M.

5. The question before us, however, is not that no oath was taken but whether the correct oath was taken. In view of the fact that the Amending Act having received the assent of the President had come into force on 5th October, 1963, the oath should have been taken in the amended form. The only difference between the two forms is that in the original form the words 'that I will uphold the sovereignty and the integrity of India' which find place in the new one were missing.

6. Mr. Misra's contention is that the form is of the essence, the law does not permit even the least deviation from the same and that inasmuch as admittedly the oath made and subscribed by Satish Chandra, J. did not include the words 'that I will uphold the sovereignty and the integrity of India', no valid oath was taken with the result that he did not enter upon his office. Mr. Misra makes no distinction between complete omission to take oath and oath being made but not in the exact form

prescribed. Alternatively, he submits that with the omission of the words 'I will uphold the sovereignty and integrity of India' from the oath made and subscribed by Satish Chandra, J. it cannot be said that there was even substantial compliance with the prescribed form of the oath. Learned counsel contends that those words are not of a non-essential character, and without those words the oath is not complete. The learned Advocate General, on the other hand, urges that part of Article 219 of the Constitution, which requires the oath to be taken in a particular form, is not mandatory but merely directory and, therefore, even if oath had not been taken in the new form, the matter does not go to the root nor does it vitiate the entry into office. In this connection he has made two submissions, firstly, that Article 219 only requires an oath to be made and subscribed 'according to the form' and not 'in the form' set out in the Third Schedule and the oath made and subscribed on 7-10-1963 was 'according to the form' and secondly that the provision, so far as the form of oath is concerned being directory, the negligible omission of some words from the oath is only a curable irregularity.

With regard to his first submission, he refers to the provisions of Articles 60, 69 and 159 of the Constitution i.e., those relating to the oath to be made and subscribed by the President, the Vice President of the Union and the Governor of a State. The words used there are 'in the following form' and not 'according to the form set out Under the Constitution persons who are required to make oath are the President and the Vice President of the Union, the Governors of the States, the Central Minister, the Judges of the Supreme Court, the Comptroller and Auditor General of India, the Ministers in States, the High Court Judges and the members of the Central and State Legislatures. Articles 60, 69 and 159 of the Constitution provide that the President, the Vice President of the Union and the Governors of the States shall make and subscribe 'an oath or affirmation 'in the following form...' With regard to the judges of the Supreme Court in Article 124. the Comptroller and the Auditor General in Article 148, the members of Parliament in Article 99, members of States Legislatures in Article 188 and the High Court Judges in Article 219 it has been provided that they shall make and subscribe oath according to the form set out in the Third Schedule. The Central and the State Ministers are not required to subscribe oath. In their case it is provided that before entering office, the President in the case of Union Ministers and the Governor of the State in the

case of Ministers in his state shall administer 'oaths of office and secrecy' to them.

The argument of the learned Advocate General is that there is a clear difference in the expression 'in the following form' occurring in Articles 60, 69 and 159 of the Constitution and the words 'according to the form set out for the purpose in the third Schedule' occurring in Article 219 of the Constitution. It has been strenuously contended that whereas the use of the words 'in the following form' does not permit even the least deviation from the form of the oath, the use of the words 'according to the form' require only substantial compliance with the given form and a certain amount of laxity in the words, if it does not affect the substance, is not very material.

7. Thomas v. Kelly (1888) 13 AC 506 and Banarsi Das v. Cant: Commr. U.P. : AIR 1963 SC1417 were cited. In the former case Section 9 of the Bills of Sale Act, 1878, Amendment Act, 1882 came up for consideration before the House of Lords. Section 9 required a Bill of Sale to be 'in accordance with the form'. The argument advanced before the House of Lords was that there is a difference between the expression 'in the form' and 'in accordance with the form' and that the latter words did not require verbatim et literatim compliance with the form with the result that a certain amount of elasticity and variation was and must be contemplated. In other words, the submission was that since the words used were 'in accordance with the form' the form prescribed must be taken to be only a model. Lord Halsbury, L. C., observed:

'It is, however, true that the form given is so far elastic that the statute does not make every word imperative, but provides that no form shall be permitted except one made 'in accordance with tbe form in the schedule'.

The degree of the latitude involved in these words it would be difficult perhaps impossible to define'. Lord Fitz Gerald said:

'My Lords, I do not think that the legislature intended by the words 'in accordance' a literal conformity with the statutable form of the bill of Sale. I adapt the view of Bowen, L.J. that it is sufficient if the bill of sale is substantially in accordance with, and does not depart from, the prescribed form in any malerial respect'.

Lord Macnaghlen stated in the same case as follows:

'It has been held, and I think rightly, that Section 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are 'in accordance with the form', not 'in form'. '

In : AIR 1963 SC1417 the learned Judges of the Supreme Court observed as follows.

'Now the prescription of the. law in the present case was that the cane growers and the factory must enter into an agreement in a prescribed form. That form has in fact been used, only there are certain blanks and the appellant has not signed where he was expected to do so. Reliance is placed by the appellant upon a decision of the House of Lords reported in (1888) 13 AC 506 particularly the observations of Lord Macriaghten where a distinction was made between the words 'in accordance with the form' and 'in the form'. It is argued that the Act and the rule in the present case require the agreement to be in the form prescribed and not in accordance with the form. It is submitted that a substantial compliance may be permissible when the words of the Statute are 'in accordance with the form' but that strict compliance is necessary when the words are 'in the form'.....

There are some cases of this Court in which the prescribed forms have been considered. In two cases under the Representation of the People Act, 1950 the form for making a security deposit, which was prescribed, was not strictly followed but it was held that it was merely a matter of form and is there was substantial compliance, penal consequences did not ensue. See Jagan Nath v. Jaswant Singh, : [1954]1SCR892 and Kamaraja Nadar v. Kunju Thevan, : [1959]1SCR583 . In Hari Vishnu v. Ahmad Ishaque, : [1955]1SCR1104 votes not given in the form prescribed were held to be invalid because the form prescribed was considered to be essential and an intention of the voter expressed otherwise than in tbe form prescribed was considered to be an intention not expressed at all. In Radhakisson Gopikisson v. Balmukund Ram Chandra, a by-law provided that contract between agents and their constituent shall be in the form prescribed. It was held by the Privy Council that a literal compliance with the form was not essential if the contract contained all the terms and conditions set out in the form but it was

otherwise if it did not'.

8. Undeniably, there is some difference in the expression 'in accordance with the form' or 'according to the form' and 'in the form'. We are of the opinion that whereas the former expression may admit of a slight deviation of non-substantial character, the latter expression requires strict adherence to the prescribed form. It may also be noticed that where Clause 3 of the Letters Patent provided that the Judge 'shall make and subscribe the following declaration', Section 220 of the Government of India Act, 1935, and Article 219 of the Constitution require the making and subscribing of oath 'according to the form set out' By means of the Amending Act even candidates for election to the Parliament and State Legislatures are required to make and subscribe the oath which includes the words 'I will uphold the sovereignty and integrity of India' and some substitutions have been made in order to bring in those words in the oaths or affirmations prescribed for a member of Parliament and a member of the Legislature of a State. Those words have been added to the oath of office and secrecy for the Ministers of the Unions and the Ministers in the States as also in the oaths prescribed for the Judges of the Supreme Court, the Comptroller and Auditor General of India and the judges of the High Courts. These changes apply not retrospectively but only prospectively and the Constitution as amended does not require persons already holding the offices mentioned above to take a Fresh oath in the amended or substituted form.

It would also be noticed that there is no change in the form of oath to be made and subscribed by the President and the Vice President of the Union and the Governors of Slates Whether it is the Judge of the Supreme Court or the Comptroller and Auditor General of India or the members of the Central and State legislatures of a Judge of a High Court, the same words that 'I will uphold the sovereignty and integrity of India' have been added to the oath. It is obvious that the (sic) of the various officers of the State mentioned above differ from each other and 'the sovereignly and integrity of India' cannot be upheld by all of them in the same manner. As we see it, the addition of these words does not cast upon the person required to take oath in the new Form any extra duties or additional obligations or greater responsibility than those who already held office after

making and subscribing oath in the original form nor does it confer on them any greater power.

Once a Judge has sworn to uphold the Constitution and tbe laws, as he had to do even if he took oath in the old form, he has undertaken to uphold those laws also which may be passed in future in order to prevent the sovereignty and integrity of India being impaired. The very fact that the sitting Judges were not again required to take oath in the new form clearly shows that it was taken for granted that they had already made and subscribed oaths comprehensive enough to enable them to successfully discharge the functions of their office even after the Sixteenth Amendment Act had come into Force. Judicial functions are confined to administer the laws of the land and to decide disputes between citizen and citizen and citizen and the State. A Judge can uphold the sovereignty and integrity of India only by administering laws validly made by the State for preventing the integrity and sovereignty of India being impaired and for that purpose the oath in the old form is sufficiently comprehensive. The Preamble of the Constitution of India reads:

'We, the People of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic.....'

Article 1(3) of the Constitution provides:

'The territory of India shall comprise:

(a) the territories of the States;

(b) the Union territories specified in the First Schedule; and

(c) such other territories as may bo acquired.'

These provisions and several others which need not be enumerated here would show that conceptions of sovereignty and integrity of India in the Constitution are not new and have not been introduced therein for the first time by the Amending Act. By virtue of Section 2 of the Amending Act, the State can make laws in the interest of the sovereignty and the integrity of India even in disregard of Article 19(1)(a), (b) or (c) of the Constitution. Consequently, when a Judge swears to

uphold the Constitution and the laws, he by necessary implication also swears to uphold the sovereignty and integrity of India. The same is true of the oaths in the old form of the Judges of the Supreme Courts the Comptroller and Auditor General of India and the members of the Central and State Legislatures. In their case also by he addition of the words 'I will uphold the sovereignty and integrity of India' there has not been any change of addition of Duty In fact it is elementary that any change or addition of duty can only be brought in by the enacting clauses of the Constitution or a statute and not by the mere change in the phraseology of oath. It is trite that oath does not confer any powers.

9. Sections 2, 3 and 4 of the Amending Act read as follows:

'2. In Article 19 of the Constitution,

(a) in Clause (2), after the words 'in the interasts of', the words 'the sovereignty and integrity of India', shall be inserted;

(b) in Clauses (3) and (4), after the words 'in the interests of', the words 'the sovereignty and integrity of India or' shall be inserted.

3. In Article 84 of the Constitution, for Clause (a), the following clause shall be substituted, namely:

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule. 4. In Article 173 of the Constitution, for Clause (a), the following clause shall be substituted, namely.

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;' Section 5 of the Amending Act is to the effect that in the Third Schedule to the Constitution the form of oath shall be substituted or amended so as to include the words 'that I will uphold the sovereignty and integrity of India'.

10. The effect of Section 2 of the Sixteenth Amendment is to permit the States to make laws imposing reasonable restrictions on the right of freedom of speech and expression, of assembling peacefully without arms and of forming associations and unions in the interest of sovereignty and integrity of India. The effect of Sections 3 and 4 is to require candidates for election to Parliament or the State Legislatures to make and subscribe oath or affirmation before some person authorised by the Election Commission--a requirement which did not exist in the Constitution before the Sixteenth Amendment. The effect of Section 5 is to add words 'that I will uphold the sovereignty and integrity of India' in the forms of oath given in the Third Schedule. There cannot be any manner of doubt that the whole object of the Sixteenth Amendment was to make secure the sovereignty and integrity of India. Even though we have held that the addition of tho.se words in the forms of oath does not affect the actual discharge of the functions by the persons required to make and subscribe oath, the change cannot but be treated to be of utmost significance. A constitutional amendment is not made in vain nor is it to be treated for a mere emphasis. We are unable to agree with the learned Advocate General that the sole object of the Sixteenth Amendment in the Forms of oath was to make express what was already implied. As we see it the addition of the words 'I will uphold the sovereignty and integrity of India' in the various Forms of oath given in the Third Schedule of the Constitution was made with a view to make it obligatory on persons who were to hold high offices under the State to acknowledge publicly in a solemn and deliberate manner their faith that India is sovereign and indivisible and that they will conduct themselves accordingly. In other words the idea was to shut out from holding these high offices persons who would not publicly swear to uphold the sovereignty and integrity of India. It is well known that the Sixteenth Amendment was passed because it was felt that some persons in this country claimed a right for a geographical unit to secede from the rest of India and some others drew inspirations of their political faith and actions from some of the foreign countries. The idea was to curb all fissiparous tendencies and rule out action tending to secession and extra national allegiance.

11. As the provisions of Sections 2, 3, and 4 of the Sixteenth Amendment would show the Sixteenth Amendment has not brought about only a change in the forms of oath, but has widened the law making powers of the state and it has also made

it obligatory for candidates seeking election to the Parliament or the local legislature to take oath which they were not required to do before and to declare that they will uphold the sovereignty and integrity of India.

12. The learned Advocate General has contended, relying upon Dattatraya v. State of Bombay : 1952 CriLJ955 ; State of U. P. v. Manbodhan Lal, : (1958)IILLJ273SC and Bhikraj Jaipuria v. Union of India : [1962]2SCR880 that Article 219 so far as it requires oath being made and subscribed in the form prescribed is not mandatory but only directory. In our judgment none of these three cases support the contention of the learned Advocate General.

13. In : 1952 CriLJ955 the question before the Supreme Court was whether an executive decision not in the form mentioned in Article 166 is illegal merely on that ground. The Supreme Court observed as follows:

'It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to the persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice of the Court to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.'

In the present case if the Article 219 so far as it requires oath to be taken according to the particular form is to be taken to be directory, the main object of providing for oath would be lost. In the case mentioned above S. R. Das, J. clearly pointed out that the rule of public inconvenience was subject. to the main object of the legislature not being frustrated.

14. In : (1958)IILLJ273SC (supra) the question was whether the provisions of Article 320(3)(c) were mandatory or not. The (sic) Court held that provision did not confer on a public servant any right with the result that absence of consultation or any irregularity in consultation could not give the public servant a cause of action in a court of law or entitled him to a relief under Article 226 or Article 32 of the

Constitution. The ground on which the Supreme Court came to that confusion was that the protection that bad been granted to a public servant In the Constitution was embodied in Article 311 of the Constitution and that Article 320(3)(c) was not to the nature of a rider or proviso to Article 311. In other words what the Supreme Court hold was that since the public servant could not claim it as a matter of right that the appropriate Public Service Commission should be consulted before action is taken against him, the action taken by the Government without consulting the Public Service Commission cannot be said to be illegal or void and for that reason Article 320(3)(c) must be considered to be directory in nature. These considerations do not exist in the case before us.

15. In : [1962]2SCR880 the Supreme Court held that the provisions of Section 175(3) of the Government of India Act were mandatory and it is difficult to see how this decision can be pressed into service to support the submission of the learned Advocate General.

16. Reliance was also placed (sic) the following passage in Craies on Statute Law, fifth edition, p. 60:

'It has been held In Ireland that Statutes are to be construed as mandatory and imperative when they prescribe acts to be done by private parties, but are only directory when they require public officers to do the acts, in which case the default or mistake of the officers will not destroy the rights of the parties.'

When Satish Chandra J. took the oath on 7-10-1963 he had not already become a Judge. It was the performance of that oath which marked his induction into office. Consequently, at the time of taking oath it was not an act done by him in discharge of his official duties or as public officer. Besides, the following passage from the same book on the same page just preceding the quotation given above would show that the making and subscribing of oath cannot be treated to be merely directory:

'When a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called

imperative or absolute; but those which are not essential, and may be disregarded without invalidating the thing to be done, are called directory.' In the same book at the same page Young v. Mayor etc. of Leemiggton has been mentioned. There it was in dispute whether Section 174(1) of the Public Health Act, 1875, enacting that contracts made by an urban sanitary authority, whereof the value exceeded 50, should be in writing and sealed with the common seal of the authority, was imperative or directory. The Court of Appeal and the House of Lords decided that it was imperative, and that a contract not so sealed was void although executed, and that, although the sanitary authority had obtained the benefit of it, they were free from the usually correlative obligation of payment'.

17. Reliance was next placed upon the following passage occurring on page 369 under the heading 'Performance of Public Duty' in the Maxwell on Interpretation of Statutes XI edition:

'On the other hand, where the prescription of a statute relate to the performance of a public duty, and whew the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, yet not promote the essential aims of the legislature, such prescripts seem to generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words as directory only.'

What we have said above with regard to a similar passage from Craies holds good for this passage also. Apart from it all canons of interpretation are subordinate to the cardinal principle that the provisions of the whole Act must be seen in order to gamer whether a particular provision is intended to be mandatory or directory.

18. In Liverpool Boroug Bank v. Turner, (1860) 30 LJ Ch 379 it was stated:

'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.'

This decision was approved of by ovur Supreme Court in : [1962]2SCR880 (supra). We have already held earlier that the taking of oath in the prescribed form is a condition precedent to the assumption of office. Consequently, the passages from Craies and Maxwell reproduced above ha no applicability to the case before us.

19. The learned Advocate General relied upon the following passage from Corpus Juris Secundum Volume 67, at pages ^-8:

'In the absence of constitutional or statutory provision prescribing form or mode of administering oath described infra Subdivision of this section, a person may and should be sworn in a form and mode which he regards as binding on his conscience; but when this requirement is satisfied the form of the oath, as is also the fact that the person sworn may regard another form of oath as more binding on his conscience and to upholding the validity and binding effect of an oath taken the courts have accorded weight to the fact that the person sworn took the oath without objection to its form.'

All that is contained to this passage is that in the absence 'of constitutional or statutory provision prescribing the form or mode of administering oath' the person required to swear in adopt any form acceptable to himself. Inasmuch as the Constitution prescribes the form and mode of oath, it is useless to rely upon this passage. It may be another thing to urge that there has been a substantial compliance -itb the form and take advantage of the words 'according to the form' occurring in Article 219. This submission we have already dealt with earlier.

20. The learned Advocate General then placed the following passage from Willoughby on the Constitution of United States, Vol 3, page 1473:

'The making of this oath or affirmation marks the induction into office. The requirement that it shall be taken is undoubtedly dictated by the belief that thus an additional moral obligation will be placed upon the one talcing it That it adds no new legal obligation would follow from the fact that beyond doubt, were the oath or affirmation not required the President like all, other public officers would he equally liable for any misfeasance or non-feasance of duly. It would seem equally true that

the taking of his oath or affirmation, In pursuance of a constitutional requirement, confers no powers upon the President. Jefferson and Jackson, indeed, referred to this oath as supporting them in their contention that with reference to the purpose of their constitutional duties they, as being sworn to support the Constitution, might interpret finally for themselves the meaning of its provision; but their position was unquestionably an incorrect one'.

It is contended that the passage reproduced above is an authority for the proposition that the taking of oath is not of the essence. We an; unable to agree with this submission and have no doubt that the effect of the passage is in the reverse. It clearly mentions that the making of the oath marks the induction into office. We have ourselves said earlier that the oath confers no new obligations. The obligations to discharge the Functions of office diligently, conscientiously and according to law are not dependent upon the taking or non-taking of oath. They are inherent in the acceptance of office. But merely because the taking of oath easts no new obligations would not justify the inference that the oath or its form is dispensable.

21. The following passage from Halsbury's Laws of England, Simonds Edition, page 343, may be reproduced with profit:

'The oath of allegiance and official oath must be tendered to and taken by certain executive officers, and the oath of allegiance and judicial oath by certain members of the judiciary, in the form and manner prescribed, as soon as may be after their acceptance of office, and failure to take the oaths when tendered, or the solemn affirmation or declaration permitted in place of the oaths, entails vacation of the office, if already entered upon, or disqualification from holding the same, if not already entered upon, but no person may be compelled, in respect of the same to the same office, to take the oaths, affirmations or declarations more than once.'

This passage, in our opinion, wholly militates against what the learned Advocate General has contended and supports our view that making and subscribing of oath according to the prescribed form is a condition precedent to entry ugon office and the failure to perform the same results in the vacation of the office, if assumed. For the reasons mentioned above we are clearly of the opinion that the provisions of

Article 219 of the Constitution even in respect of the oath being taken according to the form prescribed are mandatory and not merely directory.

22. The question, however, that requires consideration is whether this mandatory provision has been complied with. On 23-10-1963 when the Criminal Revision came up for hearing before Satish Chandra, J. he had already on 18th October, 1963, taken oath in the amended form. It is clear and is also a matter of admission that the oath that he had made and subscribed on the 18th October, 1963, was the one required by the law. There can, therefore, be no difficulty in holding that on the date when the revision application came up before (sic) for hearing he had already taken the proper oath. The learned Advocate General has, however, based his submission about the proper constitution of the Court on the oath made and subscribed by Satish Chandra, J. on 7th October, 1963. We have already said earlier in this judgment that the oath made and subscribed by Satish Chandra, J. on 7th October, 1963, was complete so far as discharge of his functions as a Judge was concerned though some important and material words were missing from it. In fact it was a verbatim et literatim compliance of the old form.

We have also held above that the addition of the words 'I will uphold the sovereignty and integrity of India' in the various forms of oath given in the Third Schedule of the Constitution though very material in some respects did not affect the actual discharge of the official functions by the persons who were required to take the oath. As said earlier by the inclusion of those words it was intended to make the persons concerned acknowledge solemnly and deliberately their faith in the sovereignty and integrity of India. In view of the fact that the oath made and subscribed by Satish Chandra, J. was complete, so far as the discharge of his duties was concerned, it cannot be said that he had not entered upon his office. So far as the declaration of the particular faith and his undertaking to conduct himself accordingly is concerned it was not fatal to his assumption of office if the same was professed on 18th October, 1963, when oath was taken in the new form, At no stage there was reluctance on the part of Satish Chandra, J. to proclaim his faith regarding the sovereignty and integrity of India and he was ever willing to swear to uphold it. He could not do so on the 7th of October, 1963, because it was not known whether the President had given his assent to the

Sixteenth Amendment. For these reasons we are of the opinion that the omission of the words 'I will uphold the sovereignty and integrity of India' from the oath made and subscribed by Satish Chandra, J. on 7th October, 1963, though unfortunate and irregular was not fatal and did not vitiate his entry upon the office of a Judge of this Court.

23. It was contended by Mr. Asif Ansari relying upon Hira Singh v. Jai Singh : AIR1937 All588 that inasmuch as on the date when the President signed the appointment orders of Kapoor, Satish Chandra and Tripathi, JJ. the Sixteenth Amendment not having been enforced the old form of oath was still valid and inasmuch as oath was made and subscribed in that form the provisions of Article 219 were fully complied with. In Hira Singh's case : AIR1937 All588 what had happened was that Bajpai, J. who was already an Additional Judge of the Court and who had already at the time of taking over as Additional Judge made and subscribed oath as prescribed in Clause 3 of the Letters Patent, had been appointed a permanent Judge on 17th March, 1937, with effect from 1st April, 1937. He did not take a fresh oath as required by Section 220 of the Government of India Act which came in force from 1st April, 1937. The question was whether he could function as a Judge of this Court and hear the case on 13th May, 1937. It was held by Thom and Allsop JJ, that Bajpai, J. had already entered upon his office as a Judge of this Court when he took over as an Additional Judge and neither on 9th March, 1937, when his appointment was approved, nor on 17th March, 1037, when the royal warrant was signed, Section 220 of the Government of India Act, 1935, was in force with the result that a fresh oath was not necessary.

This decision cannot be applicable to the facts before us for the simple reason that the ground on which the learned Judges decided the case was that 'the mere fact that an Additional Judge has been made a permanent Judge does not mean that that he 'enters upon his office' as Judge of the High Court afresh, necessitating a fresh oath. In the present case none of the three gentlemen mentioned above were sitting Judges of the Court whether additional or permanent and clearly they had nqt already entered upon their office. This is the basic distinction between Hira Singh's case AIR 1837 All 588 and the one before us.

24. We are not impressed with the submission of Mr. S. N. Misra that the use of the word 'subscribed' in Article 219 of the Constitution makes even the dropping of one word in the form of oath fatal. In the Concise Oxford Dictionary the following meanings, amongst others, have been given to the word 'subscribe' :

'Write one's name or rarely other inscription at foot of document etc. Write one's name at foot of, sign (document, picture etc.); 2. express one's adhesion to an information or resolution.'

The use of the word 'subscribed' would show that the oath repeated orally should be reduced to writing and be signed by the person taking it in token of his adhesion to what is written. The word 'subscribed' is not correlated with the particular form but with what is said in the oath and what is reproduced in writing. Even if a wrong oath is taken and its reproduction is signed by the person making it, it would still be an act of subscribing though not a correct oath. Consequently, in our judgment, this submission of the learned counsel is unfounded.

25. We will now consider the second and the third submissions of the learned counsel. A study of the various provisions in the Constitution dealing with the making of oath reveals that the founding fathers were jealous that the oath should be made and subscribed in the presence of the head of the State and for that purpose made imperative provisions. The Vice President, the Judges of the Supreme Court, the members of Parliament and the Comptroller and Auditor General of India have to make and subscribe oath before the President. The Judges of the High Courts and the members of the State legislatures have to make and subscribe oath before the Governor concerned. The Central Ministers and the Ministers in States have to make oath before the President and the Governor concerned respectively. The President of the Union and the Governors of the States have to make and subscribe oaths before the Chief Justiee of India and the Chief Justice of the State concerned respectively.

It is clear from the relevant provisions of the Constitution that it has been deliberately provided that oath should be made and subscribed before the Head of the State except in the case of Heads themselves who obviously cannot make and subscribe oath before themselves. There is good reason behind this rule. The oath

or a solemn affirmation creates a moral obligation and consciousness in the mind of one who takes It of the solemn and serious duties he is called upon to discharge and of his undertaking that he would do so conscientiously, diligently and according to the Constitution and the laws. The original of the oath can be traced to a religious source. The idea was to invoke God so that its breach may be visited with divine wrath. It has also a secular aspect, the same being impeachment or dismissal in the case of high dignitaries and punishment for perjury according to the laws of the land in the case of witnesses for its infringement. The gravity and solemnity of the oath is enhanced if it is made and subscribed before the highest officer of the State. Its value is reduced if the person before whom it is made does not enjoy that highest status. It is admitted on all hands that much depends upon the impressive manner in which an oath is made for its subjective potency. Therefore the presence of the President or the Governor as the case may be at the time of making and subscribing oath is not a mere formality but has much deeper significance.

26. It cannot be denied that to be present and witness the making and subscribing of oath by a Judge of a High Court is one of the constitutional duties of the Governor concerned. He cannot relieve himself of that duty except in accordance with the provisions of the Constitution. Article 219 of the Constitution uses the expression 'before the Governor of the State or some person appointed in that behalf by him'. The use of the words 'in that behalf' in our opinion means 'for that specific purpose' or 'on that particular occasion'. In Section 220(4) of the Government of India Act, 1935, the words were 'before the Governor or some person appointed by him'. This provision is almost the same as Article 219 of the Constitution except for the omission of the words 'in that behalf' after the word 'appointed'. The expression 'in that behalf' cannot be divorced of specificity. Consequently, the rule enshrined in Article 219 of the Constitution is that normally oath should be made and subscribed before the Governor but the Governor can also appoint some one else for that purpose.

Though Article 219 of the Constitution does not say so expressly it is obvious that departure from the normal rule of the Governor himself being present can be made only for good reasons. Any general order for an indefinite period or a routine

practice requiring oath being made and subscribed before some one else and not the Governor can only result in defeating the provisions of the Constitution. Consequently, every lime that an appointment is announced and the question of making and subscribing of oath arises the Governor has to apply his mind and decide whether he would like the oath to be made and subscribed before himself or would appoint some one else to do so. He is the best judge to decide which course he would adopt but the matter should receive his attention on every occasion. We have already said above that the expression 'in that behalf' in the context in which it is used means 'for that sake' or for the purpose of witnessing the oath being made and subscribed by the particular person who is appointed to he a judge For these reasons we are of the opinion that the Governor should not have made a general authorisation as he did by means of the letter addressed to the Chief Justice dated 25th August, 1963.

27. Mr S. N. Misra cited Gour Chandra v. Public Prosecutor, Cuttack, : AIR 1963 SC1198 . That was a case where a sanction had been granted under Section 198-B Cr. P. C. for the prosecution of the editor and publisher of 'Matrubhumi', a journal in circulation in Orissa, by the Home Secretary, Orissa Government. The Home Secretary had relied upon an authorisation made by the then Governor some time in 1956. The notification relating to that authorisation is dated 18th July, 1956 and reads:

'No. 1607-C. In exercise of the powers conferred by Clause (a) of Sub-section (3) of Section 198-B of the Cr P.C. 1898, (V of 1898) the Governor hereby authorises the Secretary to the Government of Orissa in the Home Department, to accord previous sanction to the making of complaints, under Subsection (1) of the said section, in cases, where such complaints are made of an offence alleged to have been committed against the Governor.

By Order of the Governor,

Sd A.K. Barren.

Secretary to Governor.'

It was contended that the sanction was not valid because there can be no general authorisation in such a matter. The Orissa High Court repelled the submission invoking the provisions of Section 14 of the General Clauses Act. The Supreme Court reversed the Orissa High Court and observed as follows:

'The High Court relied upon Section 14 of the General Clauses Act in support or its conclusion that a general authorisation would meet the requirements of Clause (a) of Sub-section (3) of Section 198-B, Cr P. C. That section deals with the exercise of a power successively and has no relevance to the question whether the power claimed can at all be conferred We may further point out that Clause (a) contemplates authorisation by the Governor defamed and, therefore, an authorisation of the type which we have here made by some one else in 1956 can be of no avail. Indeed, considering the nature of the offence it is difficult to appreciate how an authorisation in advance to sanction the making of a complaint of defamation can at all be given.'

28. The case, in our judgment, is distinguish-able firstly on the ground that want of proper santion would render the court trying a case without jurisdiction and, secondly, as was pointed out bv the Supreme Court, the Governor has to decide after knowing the nature of the allegations whether or not the particular person should be prosecuted and then only make up his mind whether he would authorise some one to sanction the filing of a complaint. In the present case it cannot be said that the Governor had no jurisdiction to authorise the Chief Justice to have the three learned Judges concerned make and subscribe oath in his presence. The detect is in the manner in which that jurisdiction was exercised by the Governor True, the Governor could not have given such a general authority thus relieving himself for an indefinite period of his constitutional duty to consider in each case whether he would himself like to be present to see a person appointed to be a judge of the High Court making and subscribing oath or he would for that purpose appoint some one else, but it is only an irregularity in the exercise of the jurisdiction. This irregularity, in our judgment, does not vitiate the making and subscribing of oath by the threelearned Judges and their entry into office.

In any case when the Governor sent the letter dated 25th August, 1963, he knew that the threegentlemen mentioned above were being appointedJudges of this Court. He also knew that he wouldbe called upon to swear them as provided by Article 219 of the Constitution. When in the knowledge of that fact he signed the letter mentionedabove, it is clear that on this particular occasion andin the case of these three learned Judges, at anyrate, he has authorised the Chief Justice to act onhis behalf. In that view of the matter also, we areof the opinion that even though it was irregular tohave given a general authority as the letter dated25th August, 1963 purports to do and the authorityso given may not survive for future use on theground that an irregular act, If performed bona fide,though curable, is not correct in law and cannot berepeated from time to time, the making and subscribing of oath by the three learned Judges concernedis not vitiated. For this reason we reject the secondand the third submissions of Mr. Misra also.

29. The result is that in our opinion SatishChandra, J. was competent to hear the criminal revision. We direct that the case shall be sentback to him for decision on merits.