

IN THE HIGH COURT OF BOMBAY AT GOA

Application nos.1,2,3 & 4 of 2015
in
Election Petition no. 1 of 2012

Caetano Rosario Silva .. Applicant/ original respondent
No.1

Vs.

Valanka Alemao .. Respondent/ original petitioner

Mr. Valmiki Menezes, Advocate for the applicant no.1.

Mr. S. S. Kantak, Senior Advocate with Mr. A. Kamat, Advocate for
the respondent/ original petitioner.

Coram : C. V. Bhadang, J.

Date : 14th August, 2015

ORDER :

These are two sets of applications, one each for amendment and production of documents. As the applications involve common and connected questions of law and fact, they are being disposed of by this common order.

2. The applicant is the first respondent in the Election Petition. Valanka Alemao, the original petitioner has filed the Election Petition, challenging the election of the applicant herein to the Seat No.32, Banaulim Assembly Constituency. The petitioner is praying for declaring the election of the applicant (respondent no.1) as void and for the consequent declaration of

the petitioner being elected to the said Assembly Constituency. The election of the applicant is challenged on the ground that applicant voluntarily got his birth registered in the Civil register of Births, Marriages and Deaths at Lisbon, Portugal and thereby had ceased to be an Indian citizen with effect from 21/07/2010. It is contended that the applicant thus, was not qualified to contest the election to the said constituency.

3. In this case, issues (Exhibit 45) were framed and thereafter, additional issues (Exhibit 50) have been framed on 01/08/2014. Thereafter, the petitioner led her evidence. When the petition was fixed for the evidence of the applicant/respondent no.1, these applications for amendment and production of documents came to be filed.

4. By application no.2/2015, it is contended that the applicant came to know of certain facts subsequent to the filing of the written statement, which are relevant and as such, required to be brought on record. The applicant seeks to incorporate paragraphs 6A and 10A as under :

“6A. This respondent states that after filling of his written statement in the present petition on 14/09/2012, he has travelled to Dubai, United Arab Emirates on 5th November 2013 from Dabolim Airport,

Goa arriving at Dubai on the same day. The endorsements to that effect are found at pages 52 and 55 of my said passport."

"10A. This respondent has recently, obtained from one Elvis Gomes of Colva, photo copies of a Certificate of Marriage of the father of the Petitioner, Mr. Churchill Ubaldo Antonio Dalton Arquimedes Alemao to Maria Fatima Fernandes, registered under No. 138 of the year 2009, in the Central office of Registrations, Lisbon (along with three birth certificates registered in the same office all under No.76841, of Valen Savio Sydney Alemao, Sara Anina Alemao, Aninha Alemao, all children of Mr. Churchill Ubaldo Antonio Dalton Arquimedes Alemao and Maria Fatima Fernandes, and siblings of the petitioner herein.) This respondent has further obtained from the same person, photocopies of a Certificate of Birth issued from the above referred office of the Central Registrations of Birth, Lisbon under No.75538, of the year 2008 of Maria Fatima Fernandes, mother of the petitioner herein."

5. By the application no.1/2015, the applicant is seeking permission to produce and rely on the documents as stated in paragraph 10A above.

6. By application no. 4/2015, the applicant is seeking to incorporate paragraph 6B in the written statement, which is as

under :

“6B. This respondent states that he held Indian Passport No.Z1814732, issued by the Passport Officer, Government of India at its embassy at Riyadh, Saudi Arabia on 7/1/2008, valid till 6/1/2018. Due to the fact that the said passport had exhausted all pages therein, due to various travel visas being issued to him, new passport bearing number Z 3234932 was issued to the respondent by the Passport Officer at Panaji, Goa on 15/6/2015 valid till 14/6/2025. The said passport did not form part of the list of documents relied upon by this respondent, since the same was recently issued on 15/6/2015 and contains visa and entry and departure endorsements of recent origin i.e. 21st July, 2015 to 26th July, 2015. This respondent states that he has travelled for the first time to Portugal on 23/7/2015 on a visit visa to that country, with an Indian passport, thereby clearly demonstrating his Indian citizenship. He travelled to the Republic of Portugal on 23/7/2015, on a tourist/ visit Entry Visa No.00396122, issued to him on 21/7/2015 as an Indian Citizen, by the Government of the Republic of Portugal, on his Indian Passport bearing number Z 3234932. The said visa was valid for visiting the Republic of Portugal from 22/7/2015 to 16/8/2015. This respondent travelled from Goa via Bombay to Lisbon on 23/7/2015 by Air India flight No.AI660 (Goa-Mumbai), and Emirates Airlines (Mumbai-Dubai, Dubai-Lisbon), arrived in Lisbon on 24/7/2015, and went on a pilgrimage to Fatima; he stayed at Don

Pedro Hotels in Lisbon on the 24th and 25th of July, 2015, and returned on flight Emirates Airlines from Lisbon to Mumbai via Dubai on 25/26th July and to Goa by Indigo Airlines on 26th July. The respondent has in his possession boarding pass he has for all the above referred flights, his travel insurance issued by Bajaj Allianz, and his hotel receipt at Lisbon. The endorsements supporting his travel to Lisbon and back, with Schengen visa and entry and departure stamps are found at pages 58, 59 and 5 of his passport bearing No.Z 3234932.”

7. While by application no.3/2015, the applicant is seeking permission to produce the documents in support of his travel to Lisbon, Portugal, namely the boarding passes, travel insurance issued by Bajaj Allianz and the Hotel receipt at Lisbon as also, the endorsements on the visitor/ tourist visa made on his passport.

8. It is contended that subsequent to the filing of the written statement, the applicant has travelled to Dubai as well to Portugal on an Indian passport, which would show that the applicant is an Indian citizen and has not given up Indian citizenship at any time. In so far as paragraph 10A to be introduced is concerned, it is contended that the applicant has obtained from one Elvis Gomes of Colva, the photocopies of

Certificate of the Marriage of the parents of the petitioner, namely Mr. Churchill Ubaldo Antonio Dalton Arquimedes Alemao and Maria Fatima Fernandes, registered under No.138 of the year 2009 by the Central office of Registrar, Lisbon along with three birth certificates of the sisters of the petitioner. It is also contended that the applicant has obtained photocopies of certificate of birth issued by the Central Registration of Births, Lisbon of Maria Fatima Fernandes, the mother of the petitioner. It is thus, contended that the birth of mother of the petitioner as well as the marriage of the parents of the petitioner are registered in Portugal. The births of three sisters of the petitioner are also registered in Portugal. It is contended that thus, the petitioner is not an Indian citizen. It is submitted that the contents of the petition that the petitioner is an Indian citizen has been specifically denied vide paragraph 10A of the written statement. It is therefore, necessary to incorporate the amendment and to permit the applicant to produce the documents.

9. The petitioner has not filed a formal reply to these applications. However, during the course of arguments, the same are opposed.

10. I have heard Shri Menezes, the learned Counsel for the

applicant and Shri Kantak, the learned Senior Counsel for the non-applicant (original petitioner).

11. It is submitted by Shri Menezes, the learned Counsel for the applicant that the amendments are necessitated on account of the events as well as information received subsequent to the filing of the written statement. It is submitted that the proposed amendments and production of the documents, is necessary in order to decide the real controversy in dispute and has thus, to be allowed. It is submitted that no prejudice whatsoever would be caused to the petitioner, if the amendment/ production of the documents is allowed, in as much as no new case/ defence is being introduced. It is submitted that a copy of the passport of the applicant is already on record. The copy of the passport, which is now sought to be produced is only a continuation of passport entries, which are already on record and has thus, to be allowed. It is submitted that the issue whether the petitioner is an Indian citizen is also relevant for the purpose of determining whether the petitioner has locus to challenge the election of the applicant as also whether she is entitled to be declared as elected. He, therefore, submitted that the applications be allowed.

12. On the contrary, it is submitted by Shri Kantak, the

learned Senior Counsel for the non-applicant that the applications are not bonafide and filed only with a view to prolong the litigation and gain time. The learned Senior Counsel has placed reliance on Section 87 of the Representation of Peoples Act, in order to submit that the provisions of the Code of Civil Procedure are applicable to the conduct of the election petition before this Court. It is submitted that under proviso to Rule 17 of Order VI of C.P.C., it has to be shown that in spite of due diligence, the party was precluded from seeking amendment, before commencement of the trial. It is submitted that the applicant had allegedly travelled to Dubai on 05/11/2013 and the amendment is sought much thereafter. It is submitted that the said amendment is clearly belated. It is submitted that the applicant may travel to various countries and in respect of each of such travel, no cause can arise for amendment. It is submitted that the challenge in the Election Petition is essentially based on the fact that the applicant on account of his act of getting his birth voluntarily registered at Lisbon, Portugal, has ceased to be an Indian citizen. It is submitted that thus, the amendment based on the travel of the applicant to Dubai and Portugal are inconsequential and cannot be said to be necessary for deciding the real controversy in dispute.

13. In so far as the amendment by introduction of

paragraph 10A is concerned, it is submitted that the proposed amendment as to the registration of birth of the mother and the siblings of the petitioner as also the marriage of the parents of the petitioner in Portugal, is not relevant. The learned Senior Counsel has pointed out that a question as to whether the birth of any of four sisters of the petitioner being registered in Portugal, was specifically disallowed by this Court, during the course of cross-examination of the petitioner. It is submitted that thus, now the applicant cannot seek amendment on this aspect. He, therefore, submitted that the applications be dismissed.

14. I have considered the rival circumstances and the submissions made.

15. Section 87 of the Representation of Peoples Act reads thus :

“87. Procedure before the High Court.—(1)
Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of

the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1872), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.]”

It can, thus, be seen that in terms of Section 87 of the said Act, every election petition shall be tried, “as nearly as may be” in accordance with procedure applicable under the Code of Civil Procedure (C.P.C.) to the trial of suits. Order VI, Rule 7 of C.P.C., which is relevant for the purpose, reads as under :

“17. Amendment of Pleadings.- *the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

16. Thus, the normal rule is that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. All such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. These general principles are subject to the rider as provided in the proviso, which states that no application for amendment shall be allowed after the trial has commenced, if the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

17. Coming to the present case, the amendments sought are essential on the following counts :

- (a) The applicant's travel to Dubai on 05/11/2013.
- (b) The applicant's travel to Portugal on 23/07/2015 (on either occasions on an Indian passport.)
- (c) The pleading about the registration of birth of the mother of the petitioner as also the marriage of the parents of the petitioner in Portugal.

18. As noticed earlier, the basic challenge to the election of the applicant is that on account of his voluntarily getting his

birth registered in Portugal, the applicant ceases to be an Indian citizen in terms of decree law and the Organic law of 2006. The amendments at clause nos.(a) and (b) above are sought to be introduced on the ground that the applicant has travelled on Indian passport which would indicate that he is an Indian citizen. It would be significant to note that the written statement in this case is filed by the applicant on 14/09/2012 and additional written statement is filed on 13/06/2014. The applicant has travelled to Dubai prior to filing of the additional written statement although has travelled to Portugal recently. However, the basic ground that the applicant travelled on an Indian passport can be said to have been available to the applicant when he travelled to Dubai on 05/11/2013 itself. It is inconceivable that every time the applicant travels to a foreign country on an Indian passport, it will afford a cause of action for filing an application for amendment. Such an interpretation would lead to absurd and startling results. Thus, the ground that the applicant had travelled on an Indian passport if at all relevant, was available to the applicant when he travelled to Dubai on 05/11/2013, which plea is not taken in the additional written statement filed on 13/06/2014 and is tried to be introduced for the first time in August, 2015, after the evidence of the petitioner is concluded. At the cost of repetition, it needs to be stated that the travel to Portugal on 23/07/2015 cannot be a fresh

cause to file the amendment as the very purpose and object is to show that the applicant had travelled on an Indian passport, which was available in November, 2013 itself. It cannot be said that in spite of due diligence, the applicant could not have raised the matter before the commencement of trial. As noticed earlier, the basic issue is whether on account of the alleged act of the applicant in getting his birth voluntarily registered in Portugal, he has ceased to be an Indian citizen or not. Thus, on either counts, namely on relevance as also delay and laches, which would import considerations as required by the proviso to Rule 17 of Order VI of C.P.C., I find that the amendment as per paragraphs 6A and 6B cannot be allowed. Consequently, the applications, seeking production of the documents in support of such travel also cannot be allowed.

19. This takes me to amendments as per clause (c) above. It is argued on behalf of the applicant that the applicant has specifically denied that the petitioner is an Indian citizen (paragraph 10 of the written statement). It is submitted that the applicant has recently obtained photocopies of certificate of marriage of the parents of the petitioner in Central office of Registration, Lisbon along with five birth certificates, registered in the same office. It is submitted that according to the petitioner's

own claim and interpretation as pleaded by her in paragraph I to N of the petition, she would be a Portuguese citizen. It is submitted that therefore, it is necessary to allow the said amendment and production of documents.

20. It would be significant to note that in paragraph 10 of the written statement, the applicant has stated thus:

“10. The contents of Para 1 of the Election Petition are specifically and singularly denied except whatever is specifically admitted in this written statement. The identity of the said Valanka Alemao referred to in the petition is seriously disputed for reason that a Certificate of Birth issued by the Sub Registrar of Births and Deaths, Margao Municipal Council discloses that a person with a similar First Name was born to Maria and Churchil Alemao on 8.1.1980 having a full name as “Valanca Natasha Sherry Alemao”. It is denied that the petitioner is a citizen of India or a law graduate from ILS Law College Pune University. It is further denied that the petitioner is actively engaged in social service and empowerment of women.”

It can, thus, be seen that the citizenship of the petitioner has been denied. Although there is no specific issue on that count, issue no.10 is whether the petitioner has no cause of action to file the present petition. It may not be out of place to

mention that the petition not only seeks a declaration that the election of the applicant (first respondent) is void, but also a declaration that the petitioner is elected. If that be so, the proposed amendment questioning the citizenship of the petitioner on the ground of registration of the birth of the mother and the marriage of the parents of the petitioner being registered in Portugal, would be relevant. Although it was contended on behalf of the petitioner that a question during the course of cross-examination on this aspect was disallowed, the relevant cross-examination reads as under :

“Between 01.01.2012 till today, I have never gone to Portugal. I voluntarily state that I last visited Portugal in the year 2009. Savio Valen Sydney Alemao is my brother. My mother's name is Maria Fatima Alemao. I have four sisters namely, Sara, Anna, Sharon and Wanda. I am not aware and as such I cannot say anything to the question whether the full name of my father is Churchill Ubaldo Antonio Delton Archemedis Alemao. I am not aware whether the birth of my mother is registered in Portugal. I am also not aware whether the marriage of my mother with my father is registered in Portugal.

Question: Whether the birth of any of your four sisters is registered in Portugal ?

Ans: “Question disallowed” as not relevant.”

21. It can, thus, be seen that the petitioner was cross-examined on the point of registration of birth of her mother as also the marriage of her parents in Portugal, in respect of which, the petitioner had stated that she is not aware. It is only the question in respect of the registration of the birth of four sisters of the petitioner in Portugal, which was disallowed, as not relevant. In my considered view, the amendment, which seeks introduction of paragraph 10A of the application, except bracketed and underlined portion in paragraph 10A, which is reproduced above, will have to be allowed, subject to costs of Rs.25,000/-, to be paid to the petitioner, within one week. Consequently, the application seeking production of documents pertaining to the registration of birth of the mother of the petitioner and the marriage of the parents of the petitioner is allowed. The production of birth certificates of the siblings of the petitioner stands disallowed. Hence, the following order is passed :

ORDER

- (i) Application No.2/2015 is partly allowed. The amendment as per paragraph 6A is rejected. The amendment as per paragraph 10A is allowed, except bracketed and underlined portion in paragraph 10A,

which is reproduced above, subject to costs of Rs.25,000/- to be paid to the petitioner, within one week. Amendment to be carried out in one week, on payment/ deposit of costs.

(ii) Application No.1/2015 is partly allowed. The Birth Certificate of the mother of petitioner and the Marriage Certificate of the parents of the petitioner are allowed to be produced on record.

(iii) Application No.4/2015 is rejected.

(iv) Application No.3/2015 is rejected.

C. V. BHADANG, J.

SMA