Shephali

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# TESTAMENTARY AND INTESTATE JURISDICTION
# INTERIM APPLICATION (L) NO. 1582 OF 2021
# IN
# TESTAMENTARY SUIT NO. 61 OF 2019
# IN
# TESTAMENTARY PETITION NO. 2611 OF 2017

Pearl Fernandes Navin & Anr …Applicants
*In the matter between*
Monica Fernandes …Plaintiff
*Versus*
Pierre Fernandes ...Defendant

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**Mr Karl Tamboly**, *with Ms Shoma Maitra and Mr Nikhil Apte, i/b Wadia Ghandy & Co, for the Applicants in IAL/1582/2021.*
**Mr BG Saraf**, *for the Defendant.*

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**CORAM: G.S. PATEL, J.**
**DATED: 27th January 2021**



**PC:-**

**1.** There have been several rounds of discussions towards a settlement of this matter. On one side, are the two daughters of the deceased parents. Their names are Pearl and Petal. Opposing them is their brother Pierre. There is a property in South Mumbai, Cuffe Parade, in a building known as Lovely Home. There is another property in Goa. These are the principal properties in dispute.

**2.** After several rounds of discussions, and several hearings during which both sides sought my interventions and assistance, the siblings have arrived at Consent Terms in Court. Indeed, the parties signed the Consent Terms before me in Court.

**3.** Before I proceed to accept Consent Terms and make an order on them, I must note that I have personally explained to all the parties not just what these Consent Terms contain, but the precise choices available to the parties. I have not merely left it to the respective Counsels to explain this to their respective clients. I have done so myself, and have done so more than once to leave absolutely no room for controversy. In particular, I have explained this to the Defendant, Pierre. What I have said is this. First, I noted that there was an earlier understanding between the parties that Pierre's percentage share in the Mumbai property in the range of between 25% and 33.33% would be left to the discretion of the Court. This meant that I would not fix a percentage higher than 33.33% or lower than 25%. I also told Pierre that I would fix neither 33.33% nor 25% but, in the interests of a balanced compromise, some percentage in between. Once that was done, the property would be valued. Pierre would have to share in the costs of that valuation. Then the property would be put to sale under the supervision of the court. Bids would be invited by advertisement both in print and online. There would be costs to this too. A reserve price — yet unknown — would be fixed. Bids would be evaluated. If above the reserve price (again unknown and uncertain at this stage), bidders would be asked in open court to improve their bids. The price at which the Mumbai property would be finally knocked down in favour of a bidder is today unknown and uncertain, as is the date on which the complete payment would be made. Then there would be taxes, duties, levies and costs in which all three would have to share. Operationally and procedurally, there is no difficulty with following this line of action. It has been done before. But it is fraught with uncertainty. Indeed, the only thing that is certain in any of this is that all three will face ongoing costs both in terms of court appearances and, too, the costs associated with the long-drawn sale process. This meant that after the sale was completed, Pierre would get his court-defined percentage. The actual rupee value of that percentage was and is today unknown and uncertain. It depends on many unpredictable factors.

**4.** As opposed to this was the two sisters' offer to pay Pierre a fixed sum of Rs.82.50 lakhs almost immediately with no percentage needing to be fixed and no additional costs to Pierre, in consideration of his relinquishing his share — whatever be the percentage — in favour of his sisters. He would receive the funds in two tranches, an initial payment and then the final payment a few weeks later. If the final payment did not come and the sisters defaulted, the initial payment would be forfeit to Pierre and his to keep; and the parties would be reverted to the position today. If both tranches were paid as agreed, Pierre would have no continuing interest in the Mumbai property, but would also incur no further costs whatsoever. The offer was of a known sum payable in the immediate future and had the advantage of certainty. The public auction process, on the other hand, might conceivably result in Pierre getting a larger amount than offered. But it came with the risk of Pierre getting a significantly lower amount as well, and to that Pierre would then have no opportunity to object or cavil, having made his election.

**5.** The Goa property would stand outside all of this.

**6.** Mr Tamboly for the sisters made it clear that his offer of payment was a one-time offer. Should Pierre not accept it, and should the parties proceed to a share-fixation and then an auction sale, this offer would not be renewed and would be unavailable.

**7.** I personally explained all this to Pierre myself and I did so twice in open court to allay any doubts or confusion. I invited him to make his choice on this basis but cautioned him that the choice was his and his alone to make. He could choose either option without adverse consequences, but in making that decision, it was necessary that he take an *informed* decision, cognizant of the various repercussions: a certain amount payable almost immediately as opposed to the vagaries of an auction sale process and the risk of receiving an amount lower than now offered, there being no guarantee or assurance that in a auction sale Pierre would certainly receive a higher amount than the sisters now offered. Pierre considered this and consulted with Mr Saraf who also independently explained these choices, leaving it to Pierre to decide on which course of action he prefers and believes to be in his best future interest. Indeed, this is not the first time the offer of immediate payment is made; but it is the first time that it has been fully fleshed out, the default provision insisted as a condition to be imposed on the sisters (at my instance and on my insistence as a matter of equity and fairness).

**8.** On considering all this and having reflected on it, by day's end, Pierre personally confirmed that he is agreeable to the provisions of these Consent Terms. He has understood them as explained to him and he has no misgivings. His doubts have been clarified, his concerns allayed. He confirms that his decision is a fully informed one, taken after considering, evaluating and weighing for himself all factors in both options. In short, he has confirmed his election for the risk-free option.

**9.** It is in these circumstances that I take the Consent Terms on record and marked them "C1" for identification with today's date. The Consent Terms are signed by all three parties and their Advocates, as noted above. The Testamentary Suit and the Testamentary Petition will stand disposed of in accordance with these Consent Terms. The undertakings in the Consent Terms are accepted as undertakings to the Court.

**10.** It is clarified that these Consent Terms are limited to the Mumbai immovable property i.e., Lovely Home. They do not extend to the Goa property. Any issues between these parties regarding the Goa properties will be dealt with in accordance with the applicable law in a Court of competent jurisdiction. The Consent Terms provide for this in any case.

**11.** The Consent Terms are actually in the nature of a Family Arrangement. All authorities are directed to regard them as such irrespective of the title that may have been attributed to them for the purposes of Court proceedings. The provisions of the Consent Terms make it clear that they are indeed in the nature of a Family Arrangement, intended, as the Supreme Court has said, to broker peace and to bring an end to family disputes. Thus, if these terms as a Family Arrangement are required to be registered or assessed to stamp duty they will be regarded as a Family Arrangement for that purpose.

**12.** It is also agreed between the parties that for the completion of formalities, should any further document be required, all three will cooperate in effecting that. All stamp duty or other charges and costs on any such further document will be borne by the Petitioners alone and are not to be demanded of the Defendant, Pierre.

**13.** A soft copy of the Consent Terms will be uploaded as the second order in the matter. The Registry is to ensure that the hard copy of the signed Consent Terms is permanently retained on file as part of the record and is not sent for destruction in the ordinary course.

**14.** The Lovely Home Cooperative Housing Society Limited will act on production of an authenticated copy of the order to make the necessary changes in its records and transfers when required upon completion of the execution of these conditions.

**15.** With these observations the Testamentary Suit, Testamentary Petition and the Interim Application are all disposed of. There will of course be no order as to costs.

**16.** This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

**(G. S. PATEL, J)**