

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****APPEAL FROM ORDER NO. 544 OF 2015****ALONGWITH****CIVIL APPLICATION NO. 684 OF 2015****IN****APPEAL FROM ORDER NO. 544 OF 2015****Mark J.Gomes****..... Appellant****VERSUS****Eric D'Aguiar****..... Respondent**

Mr.Jayesh Bhatt for the Appellant.

Mr.Clive D'Souza for the Respondent.

CORAM : R.D. DHANUKA, J.**DATED : 30th NOVEMBER, 2015****P.C.**

By this appeal from order, the appellant has impugned the order passed by the learned trial judge on 23rd February,2015 granting injunction in respect of the prayer clause (a) in favour of the respondent herein in the notice of motion in a suit for partition. According to the original plaintiff, the plaintiff and the defendant are the co-owners in respect of the suit property.

2. However it is the case of the appellant herein that the appellant is an exclusive owner of the suit property and claims the right under the alleged deed of conveyance from Mr.Edward and deceased brother Cyril's widow Jane who got 1/3 share each in the properties left by Alban and the remaining 1/3 was got by Alban's widow Mrs.Clementine Gomes. It is the case of the appellant that appellant has been staying in the property and has been collecting the rent for more than 40

years and has been maintaining the property.

3. Even if the party from whom appellant is claiming right in the property had any share in the part of that property, in my prima facie view the entire property could not have been transferred by the predecessor in the title of the appellant herein. However since even according to the respondent herein the appellant has 12 and ½ % share in the suit property, in my view at this stage, the appellant can be permitted to collect the rent on the condition that the appellant maintains the accounts in respect of the suit property and maintain the suit property out of such rent recovered by the appellant. The appellant shall furnish a copy of the account to the original plaintiff every six months. It is ordered accordingly. I am not inclined to modify the other part of the impugned order dated 23rd February, 2015.

4. Learned counsel appearing for the appellant submits that the learned trial Judge be directed to dispose of the separate notice of motion filed by the appellant for return of the plaint or for dismissal of the suit. The original plaintiff is directed to file affidavit in reply to the said notice of motion within two weeks from today and a copy thereof shall be served upon the defendant's advocate simultaneously. The learned trial judge shall dispose of the said Notice of Motion bearing No. 1107 of 2014 expeditiously.

5. It is made clear that the order passed today is without prejudice to the rights and contentions of both the parties. The learned trial judge shall dispose of the notice of motion filed by the original defendant for disposal of the suit on its own merits. In view of the disposal of the appeal from order, civil application does not survive and is accordingly disposed of.

[R.D. DHANUKA, J.]