

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****APPEAL FROM ORDER (ST) NO. 1711 OF 2016****ALONGWITH****CIVIL APPLICATION (ST) NO. 1712 OF 2016****IN****APPEAL FROM ORDER (ST) NO. 1711 OF 2016****Mariano Fernandes & Anr.****..... Appellants****VERSUS****Asha Nagar Phase No.2 C.H.S.Ltd. & Ors.****..... Respondents**

Mr.M.V.Holamagi for the Appellants.

Mr.Y.V.Sangalika for Respondent No.1.

Ms.K.H.Mastabha for the Respondent No.2/B.M.C.

CORAM : R.D. DHANUKA, J.**DATED : 22nd FEBRUARY, 2016****P.C.**

By this appeal from order, the appellants (original plaintiffs) have impugned the order dated 23rd December, 2015 passed by the learned trial judge dismissing the notice of motion filed by the appellants inter alia praying for a mandatory order and injunction against the respondent no.1 not to obstruct the entry of the children of the school from Gate No.A and also for a direction for opening of Gate No.B.

2. The appellants are the members of the respondent no.1 society and are running a nursery school on the ground floor in one of the buildings in Phase II.

3. The learned trial judge had appointed a Court Commissioner who has submitted a report. The learned trial judge has considered the said Commissioner Report. Insofar as opening of the Gate No.A is concerned, it is observed by the

learned trial judge that there is no security guard at the said gate. At Gate No.C, there is a security guard and also there is a small gate for use of the members of the society including the appellants as ingress and outgress.

4. Learned counsel appearing for the appellants states that since the respondent no.1 society has closed Gate No.A and Gate No.B, it causes inconvenience to the students to reach their nursery school from Gate No.C.

5. A perusal of the record prima facie indicates that there is no security guard employed by the society outside Gate No.A. The society is consisting of 98 members. Learned counsel appearing for the respondent no.1 submits that for providing security to the several buildings in the society whose occupants are members of respondent no.1 society, the society has passed a resolution to open Gate No.C and not Gate No.A. The learned trial judge has considered the Commissioner's Report and has rendered a prima facie opinion that the reliefs claimed by the appellants cannot be granted at the notice of motion stage. The Gate No.C is already available to the students of the appellant nursery school. In my prima facie view, the appellants will have to challenge the decision of the society. The learned trial judge has rightly refused to grant mandatory order and injunction.

6. No case is made out for interference of the impugned order passed by the learned trial judge. The appeal is devoid of merits and is accordingly dismissed. In view of the dismissal of the appeal from order, civil application does not survive and is accordingly dismissed.

7. Considering the facts of this case, hearing of the civil suit is expedited.

[R.D. DHANUKA, J.]