Delhi High Court Vinod Khanna And Ors. vs Bakshi Sachdev on 20 April, 1995 Equivalent citations: AIR 1996 Delhi 32, 59 (1995) DLT 89, 1995 RLR 431 Author: M Sharma Bench: D Wadhwa, M Sharma JUDGMENT M.K. Sharma, J. (1) The present appeal by defendants 1,2 & 3 is directed against the judgment and decree dated 29.5.1993 passed by the learned Single Judge in Suit No. 723 /1989 filed by plaintiff/respondent No. 2 and the predecessor- in-interest of respondents No. 1 (a) & 1 (b) for recovery of possession, mesne profits, damages and injunction relating to property No. 5, Golf Links, New Delhi. (2) The case of the plaintiff as pleaded in the plaint, in brief, is that the property was let out to M/s. Dynamic Sales Service International Pvt. Ltd. w.e.f. 19.6.1974 on a monthly rent of Rs. 6,000.00 . The written lease agreement in this connection is dated 21.6.1974 but the same was not registered. It is pleaded that after a few months the lease was transferred in favor of defendant No. 1 - namely M/s. Concord International Pvt. Ltd. in pursuance of which the defendant No. 1 became the sole tenant on the same terms and conditions. The defendant No. 2 Along with his family members practically own all the shares of defendant No. 1, and accordingly for all practical purposes the defendant No. 1 is a company belonging to defendant No. 2 and his family, who are also the persons residing in the said house right from the beginning. (3) The plaintiff originally imploded M/s. Dynamic Sales Service International Pvt. Ltd. as defendant No. 4 and Shri Vipin Khanna as defendant No. 5. However, subsequently on the basis of the representation on behalf of defendants Nos. 4 & 5 that they do not claim any interest in the suit property the said defendants were given up by the plaintiff. It may also be mentioned herein that the defendant No. 2 and Shri Vipin Khanna who was originally imploded as defendant No. 5 are real brothers. It is also to be mentioned that earlier the defendant No. 2 was also involved with M/s. Dynamic Sales Service International Pvt. Ltd. and he had in fact executed the lease agreement on behalf of the said company with the plaintiff. (4) By notice dated 12.12.1988 the plaintiffs terminated the tenancy w.e.f. the last date of the month of tenancy and it is the case of the plaintiffs that inspite of service of notice of termination of tenancy the defendant failed to vacate the premises and hand over vacant, peaceful possession thereof to the plaintiffs. The plaintiffs in this suit also have claimed compensation for the demands made by the Government on various accounts of breaches of the terms of the lease committed by the defendants and the plaintiffs have also demanded mesne profits at Rs. 10,000.00 per month w.e.f. 19.1.1989 i.e. after termination of the tenancy. The plaintiff has also claimed pendente lite interest @ 10% per annum till realisation. (5) The suit was filed on 10.3.1989 through the predecessor-in-interest of the respondents Nos. 1 (a) & (b) and plaintiff No. 2/ respondent No. 2. The respondents 1 (a) & 1 (b) being the legal representatives of plaintiff No. 1 were brought on record by order dated 25.1.1990. (6) The defendants Nos. 4 & 5 filed a joint written statement in March, 1990 in which they stated that the tenancy had been transferred in the name of defendant No.1 and they had no interest in the property in suit. (7) Defendants Nos. 1 to 3 who are the present appellants, filed a joint written statement on 6.9.1990 i.e. after about 18 months of the institution of the suit. In fact on 17.8.1990

their defense was struck off on account of non-filing of the written statement. However, on an appeal filed against the said order the written statement was filed by the aforesaid defendants during the pendency of the aforesaid appeals. The said written statement was allowed to be taken on record. The case of the defendants Nos. 1 to 3/ the present appellants as disclosed from the written statement is that the suit is not maintainable in view of the fact that the notice was invalid in the eyes of law. It was further pleaded that the defendant No.1, defendant No. 2 and their associate companies had also been given independent tenancy rights and therefore, without service of notice on the said companies in accordance with the provisions of Section 106 of the Transfer of Property Act no decree could be passed in favor of the plaintiffs in the present form. (8) It appears that the Court directed that statement of Principal Officer of defendant No. 1 be recorded before framing of the issues in order to settle the matters in controversy in the suit. Accordingly, on 30.11.1990 the statement of Shri E.S. Pawar, a Director of defendant No. 1 was recorded. During the course of his examination it appears that said Shri E.S. Pawar stated that the defendant No. 1 was the tenant in respect of the premises and that the rate of rent of the said premises is Rs. 6,000.00 per month. He further stated in the course of his aforesaid deposition that he was not aware of any document or writing or lease agreement executed by plaintiffs with any of the firms or companies mentioned in the written statement. He further stated that the premises were being used for residential purposes on the ground floor and for office of the defendant No.1 on the first and second floors. (9) On the pleadings of the parties the learned Judge framed the following issues for determination:- (1) Whether the tenancy of the first defendant in respect of property in suit being House No.5, Golf Links, New Delhi, was properly terminated? (2) Whether the provisions of the Delhi Rent Control Act (as amended) which make the provisions of Delhi Rent Control Act in-applicable to the premises are violative of Article 14 of the Constitution? And, if so, to what effect? (3) Whether defendant No.1 is not the sole tenant of the suit premises in question? (4) Whether the suit is not maintainable in view of the preliminary objection No. 7 raised by the defendants ? (5) Whether the plaintiffs are entitled to claim damages mesne profits at the rate of Rs.50,000.00 per month with effect from 19th January, 1989 and whether the defendants are jointly and severally liable to make this payment? (6) What is the effect of the defendants using the tenanted premises for commercial purposes as weli? (7) If the above issue is held against the defendants, are they not liable to pay charges as levied by the Land and Development Officer on account of misuser of the tenanted premises? And, if so, to what effect? (8) If the above issues are held in favor of the plaintiffs, are they not entitled to a decree for possession and also to perpetual injunction restraining the defendants from using the said property for any nonresidential purposes? (9) Relief. (10) The plaintiff examined Shri D.K. Garg, Advocate on their behalf on the issue of issuance and service of the notice of termination of tenancy on the defendants which were subsequently admitted to evidence as Ex.P-1. Various opportunities were granted by the learned Judge to the defendants for the purpose of examining their witnesses and the defendant No. 2 in pursuance of the said opportunities was examined

on commission. Thereafter the case was fixed for recording the evidence of the remaining witnesses on behalf of the defendants and rebuttal evidence of the plaintiffs on several occasions. However, it appears on record that the defendants did not lead any evidence and ultimately the evidence was closed by the learned Judge, as a result of which the Counsel for the plaintiff chose not to lead any evidence in rebuttal. After closing of the evidence of the defendants the learned Single Judge decided to proceed on with the case and finally by his Judgment and decree dated 29.5.1993 the suit in favor of the plaintiffs and against the defendants for possession of the property in suit and also for damages / mesne profits at Rs. 10,000.00 per month w.e.f. 19.1.1989 till handing over the vacant possession of the premises by the defendants to plaintiffs, and also for payment of compensation by the defendants of all lawful charges payable to the Land and Development Officer on account of misuser of the premises and for purpose of regularisation of the breaches of conditions of lease. (11) On the question of termination of the tenancy the learned Judge held that the tenancy of the first defendant in respect of the property in suit was properly terminated. On the issue with regard to the constitutional validity of the amendment to Delhi Rent Control Act in the year 1988, the learned Judge held that the said issue was already concluded by the Division Bench Judgment of this Court in Civil Writ Petition No. 410/1989 titled D.C. Bhatia v. Union of India decided on 11.2.1991 and accordingly the said issue was also decided against the defendants. It may be mentioned herein that the constitutional validity of the said amendment of Delhi Rent Control Act in the year 1988 has since been upheld by the Apex Court in D.C. Bhatia v. Union of India Jt 1994 (7) 114. So far as the issue as to who is the tenant in respect of the suit property the learned Trial Court held that there was no other tenant in the suit premises except defendant No. 1 and he was the sole tenant in the premises at a monthly rent of Rs. 6,000.00 . The learned Trial Court has further held that a sum of Rs. 10,000.00 per month is a fair amount towards damages mesne profits to be awarded in favor of the plaintiffs w.e.f. 19.1.1989 till the date of handing over of vacant possession of the premises, and further held that the defendants are liable to pay the charges as levied by the Land and Development Officer on account of misuser of the premises. (12) Mr. L.R. Gupta, the learned Senior Advocate appearing for the appellants addressed us on almost all the issues decided by the learned Judge against the defendants/appellants. He did not, however, seriously challenge the findings of the learned Judge that Rs. 10,000.00 per month could be the fair market rent for the suit premises and also in respect of the finding with regard to issue regarding constitutional validity which was issue No. 2 before the learned Judge and urged before us that the impugned judgment and decree are not legally sustainable and are liable to be set aside. (13) Elaborating his arguments the learned Counsel for the appellants submitted that the findings of the learned Single Judge to the effect that there was no other tenant in the suit premises except defendant No.1 are illegal and contrary to the records of the case. According to the learned Counsel the tenancy rights were created in favor of appellant No. 2 and associate companies were paying the rent 93 through the medium of M/s. Concord International Pvt. Ltd. and were doing the same

with the knowledge and consent of Late Bakshi Sachdev, the original plaintiff No. 1. According to him the learned Judge failed to appreciate that even as per the lease deed dated June, 1974 the tenant was described as M/s. Dss Industries Pvt. Ltd. and Associates which necessarily implied that the tenancy devolved not only on appellant No. 2 namely - M/s. Concord International Pvt. Ltd. but also on its associate companies and as such the findings of the learned Judge cannot be sustained. (14) Shri Arun Mohan, learned Senior Advocate appearing for the respondents while countering the submissions of the learned Counsel for the appellants took us through the evidence on record both oral and documentary and submitted that the findings of the learned Judge on the aforesaid issue are legal and justified on the face of the record. According to learned Counsel the defendant No.1 was the sole tenant and the defendants Nos. 2 & 3 who were controlling these family companies and were residing therein were liable to be evicted, which the learned Judge has rightly done (in the basis of the evidence on record. (15) The learned Counsel for the parties drew our attention to the lease deed marked Ex.D-1. It is admitted that the said lease deed is not registered and therefore, the question of the admissibility of the said document in evidence does arise for our consideration. It is by now a settled law that an unregistered lease deed could be looked into only for the collateral purposes and not for the terms as has been held in the case of Bajaj Auto Limited v. Behari Lal Kohli; , and subsequently reiterated in the case of Rai Chand Jain v. M/s. Chandra Kanta Khosla; In the case of Bajaj Auto Limited (supra) the lease had given rights to the tenants to assign/part with possession to their associate concerns. In the said case the Apex Court refused to look into the lease on account of non-registration holding that the 'right to assign to the associate' was a term of the transaction incorporation in the documents and could not be dissociated from the lease and considered in isolation. In the said decision the Apex Court had further held that the term 'associate concern' was too general so as to constitute specific permission. It is admitted by the parties to the suit that the initial tenant to the suit property was M/s. Dynamic Sales International Pvt. Ltd. and subsequently the said tenancy was transferred to M/s. Concord International Pvt. Ltd. On the aforesaid question also there appears to be no dispute between the parties. The only dispute which arises for our consideration is that apart from the defendant No.1 some other companies also came to be/ continued to be the tenants of the suit property or not. On consideration of both documentary as well as oral evidence on record, the lea mod Trial Court came to the definite finding that there was no material on record from which it could be said that there was any other tenant in the premises except defendant No.1 and that defendant No. I was the sole tenant in the premises at a monthly rent of Rs. 6,000.00 . On perusal of the evidence on record we find that the associates who are claimed to be also the tenants in respect of the suit property as urged by the counsel for the appellants are none other than companies/firms etc. claimed to be owned/ controlled by Shri Vipin Khanna, who is the appellant No. I in the present appeal. In the written statement it was categorically stated that the intention between the parties was that all the associate companies headed, controlled and managed by defendant

No. 2, would have independent legal tenancy rights in relation to the suit premises. In his evidence also particularly in the cross-examination he stated that he was associated with the said companies in various capacities such as Director, Joint Managing Director, Managing Director, partner etc. It is thus, apparent that the said associates which are alleged to be co-tenants in respect of the suit property are the owned companies/firms of the appellant No. 1. The original lease deed which was exhibited as Ex. D-1 does not name any of the associates. Subsequently, when the tenancy was transferred in favor of defendant No. 1, it appears that rent was paid through cheques by the defendant No. 1 as would appear from the contents of Annexure P-12 dated 29.6.1976 which is a latter of M/s. Concord International Pvt. Ltd. which stated "please find enclosed herewith our cheque No. 913132 dated 29.6.1976 drawn on State Bank of India for Rs. 18,000.00 towards rent w.e.f. 18.6.1976 to 17.9.1976 in respect of 5, Golf Links, New Delhi, leased out to our company. (16) In this connection we may also refer to a certificate of M/s. Concord International Pvt. Ltd., defendant No. dated 25.2.1985 which was exhibited as Ex.P- 14 which stated as follows:"ever since the house has been in our occupation as tenant." Besides Mr. E.S. Pawar, one of the Directors of M/s. Concord International Pvt. Ltd., in his statement stated that the defendant No. I became the tenant of the whole of the suit premises on rent of Rs. 6,000.00 per month. As against the aforesaid evidence we find from the perusal of the evidence of Shri Vinod Khanna as DW-1 in respect of the said issue that his answers were evasive. In view of the aforesaid oral as well as documentary evidence on record and also in-view of the fact that the term 'associate' on which the appellants have put much stress 'or their submissions is not specific and too general the only view that we could reach is that only a single tenancy in favor of the appellants/defendants was created for the entire suit premises and there were not several tenancies and that there was no intention of the parties to create co-tenancies in respect of the suit property. In view of the aforesaid findings we have no hesitation in our mind in holding that defendant No. 1 was the sole tenant in respect of the suit premises which were being occupied by the defendants Nos. 2 & 3 with their children and therefore, the findings of the learned trial court in respect of the aforesaid issue are legal and justified and do not call for any interference at our hands. (17) The next submission of the learned Counsel for the appellant is with regard to the validity of the notice issued by the plaintiffs under Section 106 of the Transfer of Property Act. We find from the judgment and order of the learned Trial Court that the appellants as the defendants tried to plead before the learned Trial Court that the tenancy was for manufacturing purposes and not for residential purposes and therefore, the notice issued under the provisions of Section 106 of the Transfer of Property Act was illegal and void as the said notice did not comply with six months period as is envisaged under the said provision. The learned Trial Court however, came to a definite finding on the evidence on record that the lease was not for manufacturing purposes but for residential purposes and therefore, the notice issued and served on the defendants was legal and valid and that there is no defect in the same. (18) The learned Counsel for the appellants however, did not agitate before us the issue

with regard to the tenancy being created for manufacturing purposes and in our view rightly. We, are therefore, not called upon to examine and to decide as to whether the tenancy was created for the purpose of manufacturing purposes or for residential purposes and as to whether a notice as envisaged under Section 106 of the Transfer of Property Act should have been issued for terminating a tenancy for manufacturing purposes. As agreed to by the Counsel for the parties we propose to deal with the question of notice in the instant case holding the tenancy to have been created for the residential purposes as is even otherwise concluded by the evidence on record and also not disputed by the appellants. Exhibit P-1 is the notice dated 12.12.1988 terminating the tenancy and the same was dispatched under 7 registered covers and 3 postal certificates whereby the tenancy was sought to be terminated. The issue with regard to legality of the notice was framed by the learned Trial Court as to whether the tenancy of the first defendant in respect of the suit property was properly terminated or not. Therefore, according to the learned Counsel for the respondents the plea is not with regard to the receipt of the notice but of improper service and improper because the tenancy claimed was for manufacturing purpose and the notice was only for 15 days and not 6 months expiring with the tenancy month. According to the learned Counsel for the respondents otherwise there was no need to add the words "in accordance with law" or "no legal service". (19) Be that as it may, since the learned Counsel for the appellants raised the plea that a proper and valid notice was not issued and served on the defendants, we propose to deal with the said question to examine and to come to a decision as to whether a proper and legal notice as envisaged under Section 106 of the Transfer of Property Act for terminating the tenancy of residential purpose was served or not on the defendants/tenants. (20) The plaintiffs examined PW-1 who proved notice Ex.P-1 and 8 postal receipts and some returned envelops and Ad cards. Mr.E.S.Pawar, who had given a statement on oath under Order 10 Rule 2 Cpc, stated in his statement that a postal A.D. card marked Ex.P-8 (which is a notice sent to him under Section 106 of Transfer of Property Act terminating the tenancy) bears his signatures and he did receive the letter covered by the A.D. card (Ex.P-8). From Ex. P-1 to P-11 it is proved and established that the aforesaid notices dated 12.12.1988 (Ex.P-1) terminating the tenancy was dispatched to defendant No. 2 at its registered office and also to the appellantNos.l&3at their addresses at 5, Golf Links, where they were admittedly residing, as is disclosed from the evidence of DW1 /appellant No. 1. In view of the dispatch of the said notices to the appellants/defendants individually at their proper addresses now the question arises as to whether a presumption of service of notice could be drawn in favor of the plaintiff or not. The basic law of presumption of service of notice is permitted under the provisions of Section 27 of the General Clauses Act and also under the provisions of Section 114 of the Evidence Act. The earliest case on the issue of drawing of presumption of service under such circumstances is probably the case of Hari Har Bannerjee v. Ram Shashi Roy, reported in Air 1918 Privy Council 102, wherein it was held that if a letter properly directed, containing a notice to quit, is proved to have been put in the post office, it is presumed that the letter reached its destination at the

proper time according to the regular course of business of the post office and was received by the person to whom it was addressed and that presumption would apply with still greater force to letters which the sender had taken the precaution to register. In the case of M/s. Madan v. Wazir J.V. Chand the Apex Court has held that all that a landlord can do is to comply with the provision is to post a pre-paid registered letter (acknowledgement due or otherwise) containing the tenant's correct address and that once the same is done and a letter is delivered to the post office, he has no control over it and that it can then be presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. The above being the settled law and in the present case it having been proved by the plaintiffs that a notice as envisaged under Section 106 of the Transfer of Property Act having been issued by the plaintiffs to the concerned defendants at their residential address in accordance with law, it can well be presumed under the aforesaid provisions - statutory as well as case laws that the said notices have been duly served on the said defendants and therefore, in that view of the matter we do not find any infirmity to interfere with the findings of the learned Trial Court that the notice terminating the tenancy was duly, properly and validly served on the defendants. (21) The learned Counsel for the appellants also urged before us that the learned Trial Court was not justified in taking a judicial notice of the fact of increase of rents like the suit property and also in providing Rs.10,000.00 per month as fair amount towards damages mesne profits in favor of the plaintiffs. It is true that no substantial evidence has been led by the plaintiffs in respect of the increase of rent in the properties like that of the suit property. However, it is a well known fact that the amount of rent for various properties in and around Delhi has been rising staggeringly and we cannot see why such judicial notice could not be taken of the fact about such increase of rents in the premises in and around Delhi which is a city of growing importance being the capital of the country which is a matter of public history. At this stage we may appropriately refer to the Court taking judicial notice of the increase of price of land rapidly in the urban areas in connection with the land acquisition matters. Even the Apex Court has taken judicial notice of the fact of universal escalation of rent and even raised rent of disputed premises by taking such judicial in case of D.C. Oswal v. V.K. Subbiah; . (22) In that view of the matter we have no hesitation in our mind in holding that the Trial Court did not commit any illegality in taking judicial notice of the fact of increase of rents and determining the compensation in respect of the suit premises at Rs. 10,000.00 per month w.e.f. 19.1.1989, in view of the fact that the rent fixed for the said premises was at Rs. 6,000.00 per month as far back as in the year 1974. We may, however, note here that the learned Counsel for the appellants did not seriously challenge the findings of the learned Judge that Rs. 10,000.00 per month would be the fair market rent of the suit premises. Accordingly, in view of the aforesaid findings arrived at by us the submissions of the learned Counsel for the appellants in our view have no substance at all. (23) The learned Counsel for the appellants further argued before us that the learned Judge was not justified to answer the issues Nos. 6 and 7 in affirmative in favor of the plaintiffs with regard to liability to

pay charges of L & Do by the defendants to the plaintiff. We have been taken through the findings of the learned judge in that respect and also through the evidence on record. On perusal of the pleadings of the parties and evidence on record we find that it is admitted in the replication that no such demand has been raised for any non-residential use. In that view of the matter, although we hold that the defendants are liable to pay to the plaintiffs such charges levied by L & Do in respect of the suit premises as and when such demand is made by the L & Do, we cannot sustain the findings of the learned Trial Court in respect of issues Nos. 6 & 7 in absence of any specific demand in that respect at present and we set aside the said findings given by the learned Judge on the aforesaid two issues. (24) With the aforesaid conclusions and findings the only question that is left to be determined by us is whether the learned Trial Court was justified in closing the evidence of the defendants and proceedings with the hearing of the suit as was done by him on 17.5.1993. On perusal of the order sheet of the learned Trial Court we find that issues in the suit were framed on 30.11.1990 and list of witnesses was filed by the parties in the month of January, 1991. The responsibility of summoning of witnesses had been placed on the parties as early as in January, 1991 and the trial was fixed for 28th, 29th and 30th of October, 1991. It appears from the record that no witness was summoned by the defendants/appellant and on 28th and 29th October, 1991 no witness was present on behalf of the defendants/appellants. Again on 4.11.1991 once again the Court directed that the trial of the case shall take place on 20.2.1992. on a day to day basis and also recuired the parties to ensure service of the witnesses. It appears from the records that again no witness was summoned by the defendants when the case came upon 20. 2.1992. No witness was present on behalf of the defendants on that date. However on that day a prayer for examination of defendant No. 2 on commission was made and order was passed. But the fact remains that the defendants took no steps to summon any witness on that date. On 12.3.1992 evidence of the plaintiff was recorded and also concluded hut the defendants were not ready for their further evidence nor had they summoned any witness for that date. Accordingly, or their prayer time was granted and the case was adjourned to 4th and 5th of May 1992. It appears from record that on 4th and 5th May, 1992 again no witness "as summoned by the defendants. Similarly, we find that on subsequent dates al- the defendants did not summon any witnesses and subsequently on 15.2.1993 it was ordered by the learned Trial Court that the defendants would also beat liberty to summon witnesses, if any. It was made clear in the said order that service of witnesses would be the sole responsibility of the defendants and if they failed to serve any witness that would be no ground for seeking adjournment of the case. Thus it appears, that the Court by the aforesaid order fixed responsibility on the defendants to produce their witnesses positively on the next date and summon their witnesses prior to the date fixed for the trial. The said trial was fixed for 29th and 30th April, 1993. It appears from the record that defendants got the summons issued but peculiarly enough not for 29.4.1993 but for 30.4.1993. On 29.4.1993 neither the defendants nor their Counsel nor any witness was present and on the next date i.e. 30.4.1993 the learned Judge being on leave the case

was not taken up and the same was directed to be re-notified on 3.5.1993. (25) However, on 3.5.1993 also no witness on behalf of the defendants was present and the case was refixed by the learned Trial Court for 17.5.1993, granting another opportunity to the defendants to lead their evidence. On 17.5.1993 the learned Trial Court recorded that when the case was called I out for the purpose of recording evidence of the defendants, there was no appearance on behalf of the defendants and that neither the Counsel nor any representative of the defendants were present and also that no witness appeared to be present on behalf of the defendants. Accordingly, the Court directed that the case be called again after lunch. It appears that an affidavit was filed by Shri Sandeep Khanna S/o Shri Vinod Khanna on 17.5.1993 with an affidavit thereto sworn before the Oath Commissioner on 17.5.1993 itself praying for an adjournment. It appears that when the case was called out again after lunch. Counsel for the defendants was present but the defendants themselves were absent nor any witness on their behalf was present in the Court. The Counsel for the defendants stated before the Court that he was unable to summon the witnesses and that he had filed an application in the Registry on that very date for an adjournment. The Trial Court appears to have recorded an order on that date in the following manner:-"Counsel for the defendants further admits that no steps have been taken for summoning of any witnesses for today. He also admits that no witness on behalf of the defendants is present in the Court today. Learned Counsel for the plaintiffs has taken me through the record of proceedings in the suit. The record shows that there has been a constant attempt on the part of the defendants to delay and obstruct the proceedings in the suit ... ... In view of these facts, I am not inclined to grant any further adjournment. (26) It thus is apparent from the aforesaid facts appearing from the records of the case that number of adjournments and opportunities were given to the defendants to examine their witnesses inspite of which further witnesses on their behalf were not produced and thereby dilly-dallying the entire process of hearing of the suit. On 17.5.1993 the defendants were absent from the Court and no witness on their behalf was also present in the Court, and only the Counsel for defendants was present in Court. The Counsel, it appears, had only the instructions to apply for an adjournment and he had no instructions to examine any witness on behalf of the defendants. Under such circumstances, in our opinion there was no other option open for the learned Trial Court but to proceed n accordance with the provisions of Order Xvii Civil Procedure Code provided he did not consier it to be a fit case to grant further adjournment to the defendants by pardoning their lapses. Explanation added to Rule 2 of Order 17 specifically lays down the where the evidence or a substantial portion of the evidence of any party has milady been recorded and such party fails to appear on any date to which the hearing of the suit is adjourned, the Court may in its discretion proceed with the case as if such party was present. In our view there is no appearance on behalf of a party merely because a pleader who has instructions only to apply for adjournment and not to conduct the suit, applies for adjournment on his behalf, as has been held in the case of Rama Rao v. Shanti Bai; . (27) In our considered opinion the provisions of Order 17 Rule 2 read with Rule 3

did not in anyway debar the learned trial Judge to take recourse to the action that he had taken in proceeding with the suit and we are of definite view that learned trial judge was so permitted under the provisions of Order 17 Rule 2 read with the explanation thereto. Even assuming that the said provisions have no application in view of the facts and circumstances of the present case, we see no reason why the learned Judge could not have proceeded with the suit as has been done in the present case,inexerciseofhispowersvested under section 151 of the Code of Civil Procedure, so as to stall the dilatory tactics adopted by the defendants in the process of hearing of the suit and in order to do real and substantial justice to the parties to the suit. In our opinion, provisions of Section 151 of the Code of Civil Procedure are squarely applicable in a case like this. Accordingly, we find no illegality and/or irregularity in the action of the learned trial Judge in proceeding with the suit, as has been done in the instant case, and no interference is called for at our hands for such proceeding with the suit by the learned trial Judge. (28) In view of the aforesaid findings we do not find any infirmity and/or illegality in the findings recorded by the learned Judge in the impugned judgment and decree save and except in findings on Issues Nos. 6 & 7, which we hereby set aside and we accordingly, uphold the said findings and ihe judgment and decree passed by the learned Judge court except for the finding, recorded in issues Nos. 6 & 7, which is set aside. (29) In the result, this appeal fails and is accordingly dismissed with costs.