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Sr. No.	Date	Orders
		% 11.11.2003
		Present: Mr.Harish Malhotra for the Appellant. Mr.H.K. Pathak for the Respondent.
		+ <u>FAO No.26/2002</u> *
		<p>The plaintiff had filed suit for possession and mandatory and permanent injunction on the allegations as contained in the plaint. Issues in the case were framed on 15.7.1999 and thereafter despite repeated opportunities and costs imposed upon the plaintiff, evidence was not led. On 12.8.2000, when the matter was listed for evidence of the plaintiff no body appeared despite the case having been called twice and the same was, accordingly, dismissed in default at 2.50PM.</p> <p>The plaintiff moved an application under Order 9 Rule 9 CPC for restoration of the suit on the allegations that two of his witnesses alongwith the plaintiff were present in Court on 21.8.2000 but as they were looking for their advocate, they did not appear when the matter was called and consequently the same was dismissed in default. It is also stated in the application that counsel for the plaintiff had also reached the Court firstly at 10.30AM but the matter had not yet been called and again intermittently but every time the case was kept in waiting. It is stated that the counsel again reached the Court at 2.00PM but the case was not called and when he had gone out to attend other cases, the matter was dismissed in default in his absence. The application is supported by the affidavit of one Mr.Sanjay Jain who is stated to be one of the witnesses and is the Manager of the plaintiff company.</p> <p>Reply to the application was filed by the respondent and it was stated that the conduct of the plaintiffs was such that the same did not call for any equitable relief in their favour. It is submitted that despite costs of Rs.3500/- having been</p>

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By: AMULYA

SHRI SHYAM SALES 02-03

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		<p>imposed upon the plaintiffs, they did not produce any evidence and as no one appeared in the Court till 2.50PM on 21.8.2000, the Court had no option but to dismiss the suit in default. On these pleas being taken by the parties the Trial Court by the impugned order dismissed the application of the appellant under Order 9 Rule 9 CPC. It was held by the Trial Court that it was unbelievable that the counsel was present in Court till about 2.45PM and was absent for only about 15 minutes during which the case was called and was dismissed because of non-appearance of any one on behalf of the plaintiff. According to the Court, nothing prevented the plaintiff to appear before the Court and request the Court to wait for the counsel but as even the plaintiff had not appeared, he was unable to believe that they were prevented by any reason from appearing when the matter was called for hearing. Aggrieved by this order, the appellant has filed the present appeal.</p> <p>When notice of appeal was issued to the respondent it was observed by the Court that it was not very much satisfied by the conduct of the appellant yet in order to do substantial justice between the parties and in view of the undertaking given by learned counsel for the appellant that he would examine his witnesses on a date to be fixed by the Court and would not seek any further adjournment the Court subject to the appellant depositing a sum of Rs.5000/- as costs directed notice to be issued to the respondent. The contention of learned counsel for the respondent is that it is the case ^{of} the plaintiff deliberately avoiding the Court only with a view to harass and blackmail the respondent and the absence of the plaintiff was not due to any bonafide error or due to the counsel being busy in other Court. It is submitted that a deliberate attempt has been made by the appellant to delay the proceedings so as to harass the respondent.</p> <p>I have carefully considered the arguments of learned counsel for the parties and have also gone through the Trial Court record. As observed by the Court</p>

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		<p>on 2.1.2002, the conduct of the plaintiffs before the Trial Court is not very satisfactory and repeated adjournments have been taken by them for producing evidence. However, I am of the view that rights of the parties should not be decided on technicalities but an endeavour should be made to decide the same on merits. In order to do substantial justice between the parties, sometimes it become necessary to grant adjournments to a party and not dismiss the matter on a technical ground of the evidence being not present. In my opinion, the respondents can be compensatory by the delay in disposal of the case and it is not that any irreparable injury would be caused in case an opportunity is given to the plaintiff to produce evidence. Moreover, before rejecting the plea of the appellants that the witnesses were present in Court on 21.8.2000, and they did not appear in Court when the matter was called for hearing, as they were looking for their counsel, in my opinion, the Trial Court should have given an opportunity to the plaintiffs to lead evidence. Be that as it may, in order to do substantial justice between the parties, I am of the view that one more opportunity can be granted to the appellant to produce its entire evidence on a date to be fixed by the Court.</p> <p>I, accordingly, allow this appeal, set aside the impugned order and restore the suit to its original number subject, however, to the payment of Rs.5000/- as costs and direct the Trial Court to give one opportunity to the plaintiffs to produce its entire evidence on a date to be fixed by the Court. It is made clear that in case either the entire costs are not paid to the respondent on the next date of hearing or the entire evidence of the appellant is not present on the date to be fixed by the Trial Court, the Trial Court would be at liberty to close the evidence of the appellant without any further reference. With these observations, this appeal stands disposed of.</p> <p>The parties are directed to appear before the Trial Court on 15.12.2003 when it will fix a date for recording the evidence of the appellants. The appellants</p>

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		<p>can withdraw the amount of Rs.5000/- lying in this Court and pay entire costs to the respondent on the next date of hearing.</p> <p>The Trial Court record be sent back immediately.</p> <p>November 11, 2003 'ns'</p> <p><i>S.K. MAHAJAN</i> (S.K. MAHAJAN) JUDGE</p> <p>— Fresh am 9:30/03 O/S 151 CFC</p> <p>— Main case disposed of on 11-11-03. Pl. see order dt 11-11-03</p>