

# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

OMPs No.1 & 7 of 2004

IN

Civil Suit No.46 of 1998

Decided on: August 28, 2006

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M/s Mohan Meakins Limited

...plaintiff.

**VERSUS**

M/s S. Somesh & Company and others

...Defendants.

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**Coram**

The Hon'ble Mr. Justice Surjit Singh, Judge.

***Whether approved for reporting?***

For the plaintiff : Mr. K.D. Sood, Advocate.

For the defendants/applicants : Mr. Vivek Thakur, Advocate.

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**Surjit Singh, Judge (Oral)**

Heard and gone through the record.

2. Present applications, under Order 9 Rule 13 CPC and Section 5 of the Limitation Act, have been filed by Mrs. Indu Kapahi and Somesh Kapahi, who were defendants No.5 and 6 in Civil Suit No.46 of 1998, and against whom, alongwith other defendants, i.e. defendants No.1 to 4 and 7, an ex-parte decree had been passed on 8.7.1999.

3. Relevant facts are that there had been some dealings between M/s Mohan Meakin Ltd., hereinafter called plaintiff, and M/s S. Somesh and Company, of which the present applicants, defendants No.5 and 7 are the partners. Defendant No.1 M/s S. Somesh and Company was in fact a partnership firm and not a

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***Whether the reporters of the local papers may be allowed to see the judgment?***

company. The dispute was referred to an Arbitrator. The Arbitrator submitted his award, dated 17.1.1998, to this Court for being made the Rule of the Court. Notices were issued to both the parties in the Arbitration proceedings. The present applicants were not served in person. Other defendants were served but they did not appear. This Court proceeded against all the defendants, including the present applicants, ex-parte and made the award the Rule of the Court.

**4.** The applicants in their application, under Order 9 Rule 13 CPC, have stated that they were not served in connection with the proceedings taken out by this Court for making the award Rule of the Court and, therefore, the ex-parte decree is liable to be set aside. Their further plea is that though they came to know about the passing of the ex-parte decree in July-August, 2002 when they received notices regarding execution from Bombay High Court to which the decree was transferred by this Court for execution, yet a lot of time was spent in procuring the copies of the relevant papers from this court, then searching for other record from their own office and consulting the Accountant to know about the exact nature of the dispute and finally the application was moved on 5.1.2004.

**5.** Decree holder M/s Mohan Meakin Ltd. has contested both the applications. It has been denied that the applicants had not been duly served. Further it is alleged that there is no explanation worth the name, leave alone a sufficient cause having been shown, for condoning the delay in filing the application for setting aside the ex-parte decree.

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**6.** This Court framed the following issues on the pleadings of the parties on 6.4.2004:

1. Whether there are sufficient grounds for the condonation of delay? **OPA**
2. Whether there are sufficient grounds for setting aside of exparte decree? **OPA**
3. Relief.

**7.** Applicants have examined three witnesses, including defendant No.6 and the attorney of defendant No.5.

**8.** I have heard the learned counsel for the parties and perused the record. My findings on the aforesaid issues are as under.

**ISSUE NO.I:**

**9.** As already stated, it is applicants' (defendants No.5 and 6) own case that they had come to know about the passing of the decree in July-August, 2002, when they received notices from Bombay High Court in connection with execution proceedings. No satisfactory explanation has been offered by them for not filing the application, under Order 9 Rule 13 CPC, within 30 days, the time limited by law. The explanation offered by them is an apology for explanation. It is stated that initially 7 to 8 months time was spent in looking for the record in the godown of the plaintiff and thereafter in January, 2003, when the record could not be searched from the godown of the plaintiff, an application was filed in this Court for procuring copies of the relevant papers to ascertain the exact nature of the claim of the plaintiff, copies were supplied in March, 2003, the

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record (copies) being voluminous, the applicants-defendants were unable to find as to what was the claim that was filed against them and so they looked for their Accountant, who had retired sometime in the year 1987, and ultimately that Accountant could be contacted in July, 2003 and then he took 3-4 months to study these papers and in the meanwhile some of the copies obtained from this Court had got misplaced and so another application was moved in November, 2003 and after procuring those copies a counsel was engaged in Shimla in December 2003 and finally the application was filed in January, 2004. Evidence led by the applicants in the form of the testimony of defendant No.6, attorney of defendant No.5 and the ex-Accountant of the defendants, is also on these lines.

**10.** Just a plain reading of the aforesaid plea/explanation of the applicants as also the testimony of three witnesses suggests that story put forward by the applicants is a cooked up one. The record shows that as a matter of fact an Advocate of Shimla was engaged by the applicants at least in August, 2003, because an application was made by that counsel in August, 2003 for inspection of the record of the main suit. Furthermore, when the defendants were aware of the arbitration proceedings, it can legitimately be presumed that they must be aware of the nature of the claim and the suit having been decreed ex-parte and if that is so where was the need for the applicants to search for the record, procuring the copies from this Court and consulting an Accountant, who had retired more than 15 years back.

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**11.** For the foregoing reasons, I find no merit in the plea for condonation of delay in filing the application, under Section 5 of the Limitation Act. This issue is answered accordingly.

**ISSUE NO.2:**

**12.** No doubt, record shows that defendant No.5 had not been served properly in the course of the proceedings in this Court, for making the award Rule of the Court, but the application for setting aside the ex-parte decree having not been filed within time and there being no justifiable explanation for condonation of delay, as already held while deciding Issue No.1, the finding that defendant No.5 had not been served properly is of no avail to the applicants.

**FINAL ORDER:** Relief

**13.** In view of my findings on issues No.1 and 2 above, both the applications are dismissed.

**August 28, 2006(sd)**

**( Surjit Singh )  
Judge.**