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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 2744/2015

MERCK SHARP & DOHME CORP. & ANR. Plaintiffs

Through: Ms. Tusha Malhotra with
Ms. Udit Patro, Advocates

versus

MR. MUNISH THAKUR & ANR. Defendants

Through: None.

% Date of Decision: 27th October, 2017

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

I.A. 12201/2017

1. Present application has been filed under Order VIII Rule 10 read with Section 151 CPC.

2. It is pertinent to mention that the present suit has been filed for permanent injunction, infringement of registered Patent No.209816, damages, rendition of accounts and delivery up etc. The prayer clause in the present suit is reproduced hereinbelow:-

“a. A decree of permanent injunction restraining the Defendants, its directors, employees, officers, servants, agents and all others acting for and on their

behalf from making, using, selling, distributing, advertising, exporting, offering for sale, and in any other manner, directly or indirectly, dealing in any product that infringes the claimed subject matter of the Plaintiff's Indian Patent No.209816 or any of the claims thereof, including Sitagliptin or any of its pharmaceutically acceptable salts such as Sitagliptin Phosphate Monohydrate, including the infringing Sitagliptin drug products under the brand GLIPSIT-M;

- b. An order for damages in favour of the Plaintiffs and against the Defendants as stated hereinabove;*
- c. An order requiring the Defendants to render accounts of all sums earned by the Defendants through their unlawful and infringing activities referred to in this plaint and a decree for the same in favour of the Plaintiffs and against the Defendants.*
- d. An order for delivery up of all the infringing products, if any;*
- e. An order for costs in the proceedings; and*
- f. Any order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

3. At the outset, learned counsel for plaintiffs gives up prayers (b), (c) and (d) of the prayer clause to the suit. The statement made by learned counsel for plaintiffs is accepted by this Court and plaintiffs are held bound by the same.

4. On 14th September, 2015, this Court granted an ex parte ad interim injunction in favour of the plaintiffs and against the

defendants. The relevant portion of the said order is reproduced hereinbelow:-

“5. In view of the arguments urged on behalf of the plaintiffs, the defendants are restrained, till further orders, unless varied by the Court, from in any manner using the molecule which is the subject matter of plaintiffs’ Indian Patent no.209816 with the clarification that the defendants can manufacture a drug provided it does not infringe the Indian Patent no.209816 of the plaintiffs or the defendants have statutory or other licence to use the Indian Patent of the plaintiffs.”

5. Since the defendants did not enter appearance despite service, they were proceeded ex parte vide order dated 31st August, 2017 and the ex parte injunction order was confirmed.

6. The contentions and submissions advanced by learned counsel for the plaintiffs are as under:-

- i. The plaintiff No.1 along with its various subsidiaries is amongst the world's leading Pharmaceutical companies and is dedicated to discovering, developing and providing innovative pharmaceutical products that prevent and cure diseases and address evolving medical needs of patients and society worldwide. Plaintiff No.2 is the licensee of plaintiff No.1.
- ii. The plaintiff No.1 is the registered proprietor of Indian Patent No.209816 which has been given the International Non-Proprietary name SITAGLIPTIN. The said molecule is commercially sold by the plaintiffs in India

extensively under the brand/commercial name JANUVIA.

- iii. The plaintiff No.1 manufactures another product which is a combination of SITAGLIPTIN and another drug known as METFORMIN HCl which falls under the protection afforded to Indian Patent No.209816 and the said combination is sold by plaintiff No.1 under the brand/commercial name JANUMET.
- iv. The defendant No.1 who is the proprietor of defendant No.2 is planning to launch a generic version of SITAGLIPTIN, which is the subject matter protected under the Indian Patent No.209816, under the brand name GLIPSIT-M1.
- v. The defendants have yet not commercially launched the infringing product GLIPSIT-M1 and that they have, only as a test marketing strategy, made available in a limited manner, the said infringing product at one hospital i.e. Palampur Zonal Hospital.
- vi. The sample pack of GLIPSTI-M1 as procured by the plaintiff No.1 vide an invoice clearly states that the drug is 'Sitagliptin & Metformin Hydrochloride Tablets' and that 'Each film coated tablet contains: Sitagliptin (as Phosphate) 50 mg....'
- vii. The defendants' product contains SITAGLIPTIN and therefore, blatantly infringes the plaintiff No.1's Indian Patent No.209816 wherein SITAGLIPTIN and its

pharmaceutically acceptable salts, including Phosphate are specifically claimed in Claim 19.

7. The learned counsel for the plaintiffs in support of her contentions has relied upon the following documents:

- i. The patent certificate dated 5th July, 2002 granted by the Patent Office and the ownership documents pertaining to Indian Patent No.209816.
- ii. The suit patent specification and the Claims pertaining to Indian Patent No.209816.
- iii. The regulatory approvals granted in India to the Indian Patent No.209816.
- iv. The certificate of validity of Indian Patent No.209816 granted by this Court vide order dated 07th September, 2016 passed in CS(OS) 586/2013.
- v. The WHO International Nonproprietary List as well as the chemical structure of the Indian Patent No.209816.
- vi. The photographs of the plaintiffs' products JANUVIA and JANUMET.
- vii. The photographs of the defendants' website as well as the infringing product GLIPSIT-M1.

8. This Court while dealing with similar applications under Order VIII Rule 10 CPC in ***CS(OS) 873/2015 Samsung Electronics Company Limited & Anr. Vs. Mohammed Zaheer Trading As M/s. Gujarat Mobiles & Ors.*** has culled out the relevant law as under:-

“10. The Supreme Court in C.N. Ramappa Gowda Vs. C.C. Chandregowda, (2012) 5 SCC 265 has interpreted the Order VIII Rule 10 CPC as under:-

"25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect [Ed.: It would seem that it is the purpose of the procedure contemplated under Order 8 Rule 10 CPC upon non-filing of the written statement to expedite the trial and not penalise the defendant.] of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment

although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial."

11. A Coordinate Bench of this Court in *Nirog Pharma Pvt. Ltd. Vs. Umesh Gupta and Ors.*, 235 (2016) DLT 354 has held as under:-

"11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to prove its contents.

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28. The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to linger on. Accordingly, if the defendant fails to pursue his case or does so in a lackadaisical manner by not filing his written statement, the courts should invoke the provisions of Order VIII Rule 10 to decree such cases."

12. Another Coordinate Bench of this Court in *Satya Infrastructure Ltd. and Ors. Vs. Satya Infra & Estates Pvt. Ltd.*, 2013 III AD (Delhi) 176 has held as under:-

"4. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record....."

9. This Court is of the view that the plaintiffs are entitled to a decree under Order XIII-A of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 as the said provision empowers this Court to pass a summary judgment, without recording evidence, if it appears that the defendant has no real prospect of defending the claim.

10. In the opinion of this Court, the product of defendants i.e. GLIPSIT-M1 constitutes infringement of the suit patent as the same contains SITAGLIPTIN and/or any of its salts including various stereoisomeric forms. The acts of the defendants are prohibited under Section 48 of the Patents Act, 1970 and are incomplete contravention and disregard of the plaintiff No.1's existing and valid Indian Patent No.209816.

11. This Court is also of the view that since a Coordinate Bench of this Court has already issued a certificate of validity to the suit patent through its order dated 07th September, 2016 passed in CS(OS)

586/2013, there is no plausible explanation for the defendants in using SITAGLIPTIN and its pharmaceutically acceptable salts for its impugned product GLIPSIT-M1.

12. This Court is further of the view that though the infringing product GLIPSIT-M1 is not yet being commercially sold by the defendants, there exists a reasonable apprehension that the defendants may launch their infringing product at a commercial scale in the future and flood the markets which would cause irreparable harm to the plaintiffs.

13. In any event, as the averments in the plaint have not been rebutted by the defendants nor did they bother to put forth their stand in spite of ample opportunities given by this Court, they are deemed to have been admitted.

14. Accordingly, the present application is allowed and the suit is decreed against the defendant in accordance with prayers 'a' and 'e' of the plaint along with actual cost. The plaintiffs are given liberty to file on record the exact cost incurred by them in adjudication of the present suit. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

OCTOBER 27, 2017

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