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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(COMM) 107/2017 & IA No.1860/2017 (u/O XXXIX R-1&2 CPC)
BAYER INTELLECTUAL PROPERTY GMBH Plaintiff
Through: Mr. Pravin Anand, Mr. Aditya Gupta
& Mr. Utkarsh Srivastava, Advs.

Versus

BDR PHARMACEUTICALS INTERNATIONAL
PVT. LTD & ANR Defendants
Through: Ms. Pratibha M. Singh, Sr. Adv. with Ms.
Rajeshwari H. & Mr. Tahir A.J., Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **14.02.2017**

1. The senior counsel for the defendants has contended i) that this Court has no territorial jurisdiction; neither of the defendants has any presence at Delhi and the Delhi address given is not of the defendants; and, ii) that the defendants have not been marketing the subject drug in India but since the year 2012 have been exporting, mostly for regulatory purposes or to countries where there is no patent. Reliance is placed on order dated 4th January, 2017 in CS(COMM) No.1648/2016 titled *Bayer Intellectual Property GMBH Vs. Ajanta Pharma Ltd.* and it is argued that the Coordinate Bench therein relying on *Franz Xaver Huemer Vs. New Yash Engineers* AIR 1997 Delhi 79 has suspended the interim injunction subject to the defendant therein filing accounts and which the defendants herein also are willing to submit.

2. From the aforesaid, it appears that there is no dispute that what is being exported is in infringement of the patent.

3. As far as reference to *Franz Xaver Huemer* supra is concerned, a Division Bench of this Court therein declined interim relief finding that the plaintiff therein was not using the patent in India and holding that the plaintiff was thus not entitled to restrain the defendant from producing the infringing product for use in Indian market or industries.

4. I have enquired from the senior counsel for the defendants as to how the aforesaid ratio can be applied to a case of exports; it is not as if the manufacture by the defendants of the infringing product is for the benefit of public of India.

5. The senior counsel for the defendants has contended that exports by the defendants are also in public interest as they earn foreign exchange for India and encourage economic activity in India.

6. However, in my *prima facie* opinion, if such parameters are to be adopted, then in each case of a non-working of patent, infringement of the patent would be allowed. It is also not as if it is a life saving drug.

7. As far as the reference to the order dated 4th January, 2017 is concerned, the same is but an ad-interim order and does not contain any discussion on this aspect and in my humble opinion, cannot qualify as a precedent.

8. It is also the contention of the senior counsel for the defendants that the defendants have been exporting to Egypt where the plaintiff does not have a patent.

9. That also in my view would be irrelevant inasmuch as once the infringing product is manufactured in India and exported from India, it

would be an infringement within the meaning of Section 48 of the Patents Act, 1970.

10. It has been suggested that the defendants pay royalty to the plaintiff for the exports effected in future.

11. The counsel for the plaintiff seeks time to take instructions in this regard.

12. List on 16th February, 2017.

RAJIV SAHAI ENDLAW, J

FEBRUARY 14, 2017

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