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

+ CS(COMM) 1673/2016 & IA Nos.14790/2019 (of defendants u/S 151 CPC) & 16116/2016 (u/O XXXIX R-1&2 CPC)

MERCK KGAA

..... Plaintiff

Through: Mr. P.V. Kapur, Sr. Adv. with Ms. Shwetaree Majumder, Mr. Aditya Verma, Ms. Eva Bishwal, Ms. Pritika Kohli and Ms. Kaveri Gupta, Advs.

Versus

MERCK SHARP & DOHME CORP. & ORS. .... Defendants

Through: Mr. Sudhir Chandra Agarwal, Sr. Adv. with Mr. Pravin Anand, Ms. Vaishali Mittal, Mr. Siddhant Chamola and Mr. Souradeep Mukhopadhyay, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**ORDER**

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**12.11.2020**

**[VIA VIDEO CONFERENCING]**

1. The suit is listed before the undersigned in terms of the order dated 21<sup>st</sup> October, 2020 of Hon'ble the Judge-in-Charge, Original Side.
2. From a reading of the order dated 21<sup>st</sup> October, 2020, it transpires that during the hearing on that day a controversy arose, whether IA No.14790/2019 filed on behalf of the defendants had been formally disposed of or not, with the senior counsel for the defendants contending that the same had not been disposed of and the senior counsel for the plaintiff contending to the contrary.

3. Observing that "the record shows that there is no formal disposal of IA No.14790/2019", Hon'ble the Judge-in-Charge "to cut short the controversy", directed IA No.14790/2019 to be placed before me on 5<sup>th</sup> November, 2020.

4. On 5<sup>th</sup> November, 2020, when the matter came up before the undersigned, it appeared that order could be passed by the undersigned, merely referring to certain earlier orders. However, the senior counsel for the defendants insisted on arguing and which arguments remained inconclusive on that date and the matter adjourned to today.

5. Before referring to the contentions of the counsels, I may state that the order dated 21<sup>st</sup> October, 2020 of Hon'ble the Judge-in-Charge reminds me of the order dated 1<sup>st</sup> August, 2012 of Justice Pradeep Nandrajog of this Court, in CS(OS) No.2502/1987 titled *M/s G.S. Jain & Associates Vs. Indian Oil Corpn. Ltd. & Anr.*, when faced with a same/similar order. He said:

*"1. Once the legislature speaks while enacting a law, it loses the right of utterance; only the Court can speak on the law. Similarly, when a Court adjudicates a suit and passes a decree, it is the Executing Court alone which has the right to speak about the judgment and decree.*

*2. But, I have been bestowed the right of utterance by the Superior Lords i.e. the Division Bench, before whom EFA(OS) No.17/2010 and EFA(OS) No.18/2010 were listed in which an order dated May 17, 2010 passed by brother Rajiv Shakhder, J. as the Executing Court was challenged; and this is the reason why I dare to speak, notwithstanding the Executing Court having spoken and having interpreted my judgment, resulting in a decree being drawn which was authored by me way back on December 15, 2006.*

3. ....

4. ....

5. *Little did I realize that the crafty lawyers would set up a debate : .....*

6. ....

7. *.....the Hon'ble Judges of the Division Bench have, vide order dated July 25, 2012, required me to bestow my thought and render my opinion; by way of clarification on the last paragraph of my opinion.*

8. *I cannot pen an opinion which would amount to a review of the order passed by my learned brother Judge : Rajiv Shakhder, J. who, as the Executing Court, has interpreted my decision; and the decree.*

9. ....

10. *Hoping that my brief opinion would suffice and would be in discharge of my mandate as per the order made by the Division Bench, I sign off."*

6. I cannot express my thoughts better than as expressed in the above order.

7. The senior counsel for the plaintiff today, before the senior counsel for the defendants could continue his arguments, has drawn attention to the following orders authored by me in the suit:

(a) dated 12<sup>th</sup> April, 2019, framing issues in the suit, permitting the parties to file affidavits of their respective internet experts and recording, that as of then, need for any evidence did not appear and the question of permitting evidence will be considered, after hearing the counsels.

(b) dated 23<sup>rd</sup> July, 2019, recording that the senior counsel for the plaintiff had been heard for over an hour and that though the senior

counsel for the defendants had at the outset contended that evidence was required to be led but ordering, that the said question will be decided, after hearing the counsels.

(c) dated 9<sup>th</sup> October, 2019, in paragraph 10 whereof it was clarified that I had proceeded to hear the counsels finally in the suit as it appeared that no oral evidence is required on the issues or the controversy and the findings can be returned on the basis of admitted documents on record and that if during the hearing, either counsel satisfied the Court that on a particular issue / controversy, oral evidence was required, permission therefor will be granted.

(d) dated 22<sup>nd</sup> October, 2019, when IA No.14790/2019 of the defendants for cross-examination of the technical expert of the plaintiff and for tendering into evidence affidavit by way of examination-in-chief of the witnesses of the defendants and for hot tubbing, had come up first before the Court and in paragraph 2 whereof it was recorded that the arguments on the said application be also addressed by the defendants along with their arguments in the suit.

8. The senior counsel for the plaintiff states that the order dated 21<sup>st</sup> October, 2020 of Hon'ble the Judge-in-Charge, Original Side erroneously records that it was his contention that IA No.14790/2019 had been disposed of; attention is invited to paragraph 3.1 of the said order to contend that it correctly records his contention. He clarifies that IA No.14790/2019 has not been disposed of but the question, whether any evidence is to be recorded, would be decided, after hearing the counsels finally. He further states that he had already concluded his arguments before me and the senior counsel for

the defendants also had commenced his final arguments on 30<sup>th</sup> January, 2020, whereafter vide order dated 13<sup>th</sup> October, 2020, the suit was discharged from part heard.

9. The aforesaid stand of the senior counsel for the plaintiff appears to satisfy the senior counsel for the defendants, who has not addressed further.

10. I clarify, that on hearing the counsels at length qua Case Management including on framing of issues, on 1<sup>st</sup> April, 2019 and further on 12<sup>th</sup> April, 2019, I had formed an opinion that considering the nature of controversy, no evidence was required to be recorded in the suit and the suit could be decided on the basis of material on record. It was however observed that if on hearing, it appeared that any particular aspect required recording of evidence, recording of evidence thereon shall be permitted at that stage. I further clarify that even thereafter when IA No.14790/2019 came up before the undersigned, the opinion earlier formed remained unchanged and it was intended that the arguments on IA No.14790/2019 be also heard along with the final arguments of the senior counsel for the defendants in the suit and if during the said arguments, the senior counsel for the defendants satisfies that there is a need for recording evidence, evidence shall be taken at that time.

11. It is unfortunate that substantial hearing undertaken in this suit, got derailed, first for the reason of change of roster and thereafter owing to the prevalent pandemic; by the time IA No.9309/2020 of the plaintiff for early hearing came up before the undersigned on 13<sup>th</sup> October, 2020, more than ten months had passed since the last hearing and which resulted in the suit being released from part heard.

12. I hope that the aforesaid serves the purpose for which Hon'ble the Judge-in-Charge, Original Side listed the suit before the undersigned.

13. List before Hon'ble the Judge-in-Charge, Original Side on 27<sup>th</sup> November, 2020, for physical/virtual hearing.

**RAJIV SAHAI ENDLAW, J.**

**NOVEMBER 12, 2020**

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