

(2023) 06 DEL CK 0049

In the Delhi High Court

Case No : Letter Patent Appeal No. 548 Of 2022, CAV No. 300 Of 2022, Civil Miscellaneous Application No. 42077, 42078 Of 2022

VEE Excel Drugs And Pharmaceuticals Pvt Ltd

APPELLANT

Vs

HAB Pharmaceuticals And Research Limited

RESPONDENT

Date of Decision : 01-06-2023

Acts Referred:

Constitution of India, 1950 — Section 226, 227

Citation : (2023) 06 DEL CK 0049

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : S.K. Bansal, Ajay Amitabh Suman, Archana Sahadeva, Anjun Saxena

Final Decision : Dismissed

Judgement

Amit Mahajan, J

1. The present intra-court appeal has been filed challenging the judgment dated 18.08.2022 (hereafter 'the impugned judgment') passed by the learned Single Judge, in W.P.(C)-IPD No. 101/2021 captioned M/s VEE Excel Drugs & Pharmaceuticals (P) Ltd. v. Union of India &Ors., whereby the appellant's challenge to the order dated 31.07.2013 passed by the then Intellectual Property Appellate Board (hereafter 'IPAB'), was rejected.

Brief facts

2. The appellant applied for registration of the trademark 'VEGA ASIA' on 08.02.2002 on a 'proposed to be used basis'. The mark was registered in its favour on 31.03.2005.

3. The respondent applied for registration of the trademark 'VEGAH TABLETS' on 24.04.2002, claiming user since 01.04.2002. The mark was registered in its favour on 19.12.2003. Both marks that is 'VEGA ASIA' and 'VEGAH TABLETS', were registered in Class 5 in respect of pharmaceuticals and medicinal

preparations.

4. Both the petitioner and the respondent filed applications for rectification of the respective trademarks before the learned IPAB. In addition to the applications for rectification, both the petitioner and the respondent also filed suits against each other, which are pending adjudication before this Court and Bombay High Court respectively.

5. The respondent filed an application for rectification of the trademark 'VEGA ASIA', claiming to be the proprietor of trademarks, 'VEGA 50', 'VEGAH TABLETS', 'VEGA 100', etc.. It claimed to be the prior user and adopter of the said trademarks, having adopted the same in the year 2001.

6. The learned IPAB, by a common order dated 31.07.2013, allowed both applications and directed the Registrar to remove both the trademarks, 'VEGA ASIA' and 'VEGAH TABLETS' from the register.

7. The learned IPAB held as under:

"38. We shall first deal with the trademark VEGA ASIA registered under No.1079405 in class 5 by Vee Excel. The application has been filed on 08/02/2002 as proposing to use the mark. The respondents have obtained drug license on 12/09/2002. So the goods ie. the drugs could have been sold after 12/09/2002 only. The bills produced of the year 2000 therefore shall not be considered for deciding the issue of use as the goods could have been sold only after the issuance of the drug license.

39. The other trade mark is VEGA H TABLETS under No.1098288 in class 5 by HAB Pharmaceuticals & Research Limited. The application has been filed on 24/04/2002 claiming user since 01/04/2002. HAB has been using the trade mark VEGA, VEGA 50 etc. since 2001 whereas this mark namely VEGA H TABLET is being used since 2002.

40. The issue as to whether HAB and Vee Excel are aggrieved and have the locus standi to file the rectification application has to be decided. The applicants and the respondents ie. HAB and Vee Excel have filed cross suits against each other based on the impugned registration granted. The impugned trade marks are VEGA ASIA and VEGA H TABLET. Both HAB and Vee Excel are aggrieved and therefore have the locus standi to file the rectification application.

41. HAB's main argument was that they are prior user of the trade mark. On perusal of the documents it is seen that the trade mark VEGA is alone used and not VEGA H the impugned trade mark. There is no dispute as regards the date of user as of the year 2001 by the HAB for the trade mark VEGA. In respect of this HAB is prior in use. But here, we are concerned with the trade mark VEGA H TABLETS impugned herein for which there is no user proved.

42. For this reasons, we are of the view that the trade mark VEGA H TABLET shall not continue on the register.

43. The trade mark VEGA ASIA as on the date of application ie. on 08/02/2002 was proposed to be used. The first invoice is of the date 04/10/2002. The drug license is dated 12/09/2002. The registered proprietor could have manufactured and sold only after the drug license was granted.

44. The Vee Excel have admitted user since the year 2002 whereas HAB has been using it since 2001. It's also an admitted case of Vee Excel that the marks are deceptively similar and is likely to cause confusion and deception. In such a case the prior user has the better right. The mark which is in subsequent use shall not remain on the register.

45. Accordingly, ORA/59/2005 and ORA/155/2009 are allowed with a direction to the Registrar to remove the trade marks from the register."

8. The respondent challenged the order dated 31.07.2013 in so far as it relates to the removal of the trademark, 'VEGAH TABLETS' from the register before the High Court of Bombay. The said petition is stated to be pending consideration.

9. The appellant challenged the order passed by the learned IPAB by filing a writ petition being W.P.(C)-IPD No. 101/2021 before this Court. The learned Single Judge of this Court dismissed the said petition by the impugned judgment dated 18.08.2022, which led to the filing of the present appeal.

Submissions of the appellant

10. Learned counsel for the appellant, has assailed the impugned judgment and the learned IPAB's order on several grounds.

11. Learned counsel for the appellant contended that the Hon'ble Single Judge erred in observing that the subject matter trademark registration of 'VEGA ASIA' was filed on 08.02.2002 as proposed to be used; hence, any claim prior to that cannot be accepted. He submitted that by virtue of the agreement dated 21.07.2009, M/s Ma Gayatri transferred all rights in its trademark ('VEGA') in favour of the appellant, and therefore, the use of the mark by the appellant was prior to the respondent's use of the mark.

12. Learned counsel submitted that the Hon'ble Single Judge erred in its finding in so far as it mentions that the only stray document relied upon by the appellant is the NOC issued by DCGI on 23.07.2001 and did not consider the various invoices pertaining to the user of trademark 'VEGA' by M/s Ma Gayatri.

13. Further, he submitted that the learned Single Judge and the learned IPAB could not have relied upon the additional representation of the respondent's trademark application 'VEGA 50' without appreciating the fact that all the invoices for the sale of its products were un-signed, and did not reflect user of the impugned trademark at all.

14. Learned counsel submitted that the Hon'ble Single Judge erred in relying upon the bill dated 01.10.2001 issued by one Mr. Kishore Mathkar as it was fabricated. This was apparent as the telephone number on the said invoice is an

8-digit telephone number, i.e., 2365734; however, 8-digit telephone numbers were not in use in Mumbai in the year 2001. In support of the argument, learned counsel placed reliance on *Gandhi Scientific Co v. Gulshan Kumar* : 2009 SCC OnLine Del 820 and *Khushi Ram Behari Lal v. Jaswant Singh Balwant Singh* : 2019 SCC OnLine Del 6702.

15. Learned counsel submitted that the Hon'ble Single Judge was wrong in not appreciating the fact that admittedly, in accordance with the deed of cross-licensing dated 07.11.2007, the respondent was merely a licensee of one M/s Aurochem for the trademark 'VEGA' and could not have been elevated to the status of the proprietor of impugned trademark 'VEGA'.

16. Learned counsel submitted that the trademark 'VEGA' was cancelled by the learned IPAB vide its order dated 08.08.2011 passed in the cancellation petition. Hence the respondent cannot be held to be the prior user of the impugned trademark 'VEGA' by any stretch of the imagination. Learned counsel placed reliance on *Cinni foundation v. Raj Kumar Sah & Sons & Anr.* : 2009 SCC OnLine Del 2856 and *Harmohan Singh v. Gurbax Singh* : 2001 SCC OnLine Del 641 in support of his contentions.

17. Learned counsel submitted that the Hon'ble Single Judge further erred in not appreciating that, as per the respondent's averments, it was allegedly using the impugned trademark 'VEGA' along with the device of a 'Minar.' However, intending to trade upon the appellant's trademark/label, the respondent adopted and started to use the impugned trademark 'VEGA' with the device of 'Rocket' only to come closer to said trademark/label of the appellant.

18. Learned counsel placed reliance on *Pioneer Nuts and Bolts Pvt. Ltd. v. M/s Goodwill Enterprises* : 2009 SCC OnLine Del 2851 and *Kirorimal Kashiram Marketing and Agencies Pvt. Ltd. v. Shree Sita Chawal Udyog Mill* : 2010 (44) PTC 293 (Del) in support of his contention that to set up a case of prior use against registered trademark, the user must be substantial, credible, and reliable.

Submissions of the Respondent

19. Learned counsel for the Respondent submitted that the respondent is the prior adopter and user of the mark 'VEGA', having adopted the mark in the year 2000 and further used the same continuously and uninterruptedly, in the course of trade, since the year 2001. He further stated that it is a settled principle of law that the rights of a prior adopter are superior, even to that of a registered proprietor [Ref: *S. Syed Mohideen v. P. Sulochana Bai* : (2016) 2 SCC 683].

20. In support of her arguments learned counsel referred to the following documents:

- a. The permission to export Sildenafil Citrate tablets under the mark 'VEGA' dated 12.08.2001;
- b. Additional representation of respondent's trademark application for the mark

VEGA 50, claiming use since the year 2001;

c. Illustrative copies of invoices raised in the year 2001 by the respondent towards the sale of its products under the mark VEGA;

d. An application dated 11.10.2001 for the removal of Excisable goods - Form AREI submitted to the Superintendent of Central Excise;

e. The letter issued by the FDA on a complaint filed by the appellant against the respondent, in which the FDA has categorically held that since the respondent has adopted the mark 'VEGA' prior in point in time (in 2001), no action could be taken on the complaint filed by the appellant; and

f. Bill issued by one Mr. Kishore Mathkar in the year 2001, who designed the artistic work for the mark 'VEGA' for the respondent.

21. Learned counsel submitted that the appellant is admittedly the subsequent adopter of the impugned mark 'VEGA ASIA', having adopted the same in 2002. The application for registration was filed on a 'proposed to be used' basis and, therefore, there is absolutely no explanation for adopting an identical mark as that of the respondent, for identical goods. [Ref.: *Innovolt Inc v. Kevin Power Solutions Ltd.* : 2015 SCC OnLine Del 13730]

22. Learned counsel submitted that the claim of the Appellant on the basis of purported assignment deed entered with M/s Ma Gayatri on 21.07.2009 is misconceived since the said agreement is merely a license agreement wherein the appellant is the licensor and M/s Ma Gayatri is the licensee; there is no element of consideration for the purported assignment; the purported agreement fails to not only identify the marks/rights, which are purportedly assigned but also fails to specify whether the alleged assignment is with or without goodwill. Further, the purported agreement is, in fact, a non-exclusive and a non-transferable license to use the marks by M/s Ma Gayatri within the defined territory.

23. Lastly, learned counsel submitted that the appellant's assertion that it has acquired the rights from M/s Ma Gayatri by virtue of the agreement dated 21.07.2009 is false and misleading, and the said document has not been placed on record by the appellant either before the learned IPAB or before the learned Single Judge. Therefore, the appellant cannot rely upon the said document to claim itself to be a prior user of the mark VEGA.

Conclusion

24. It is not in dispute that the subject trademark is similar to the mark used by the respondent and both marks if used together are likely to deceive the public and cause confusion. It has been consistently held that in the field of medicinal products, it is particularly important that great care be taken to prevent any possibility of confusion in the use of trademarks [Ref. : *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd.* : (2001) 5 SCC 73]

25. It is well-settled that the rights of a prior adopter are superior to that of a registered proprietor of a trademark [Ref : S. Syed Mohideen v. P. Sulochana Bai: (2016) 2 SCC 683]. The respondent, in the present case, had claimed that they are prior user of the mark 'VEGA' and, therefore, the registration in favour of the appellant for the identical mark requires to be rectified.

26. The issue which, therefore, was considered by the learned IPAB and the learned Single Judge was whether the respondent is a prior user of the mark 'VEGA' that would make the appellant's mark liable for being struck off from the register. The respondent in order to substantiate its claim of being a prior user, had produced documentary evidence before the learned IPAB which included :

- a) Permission to export Sildenafil Citrate tablets under the mark VEGA dated 12.08.2001
- b) Additional Representation of Respondent no.2's trade mark application for the mark VEGA 50, claiming use since the year 2001
- c) Illustrative copies of invoices raised (in 2001) by Respondent no. 2 towards sale of its products under the mark VEGA
- d) Application dated 11.10.2001 for removal of Excisable goods - Form AREI submitted to the Superintendent of Central Excise
- e) Letter issued by the FDA on a complaint filed by the Petitioner herein against Respondent no. 2, in which the FDA has categorically held that since Respondent no. 2 has adopted the mark VEGA prior in point of time (in 2001), no action could be taken on the complaint filed by the Petitioner herein
- f) Bill issued by one Mr. Kishore Mathkar in the year 2001 who designed the artistic work for the mark VEGA for Respondent no. 2.

27. Considering the evidence as produced, the learned IPAB held that the respondent was able to show its user since the year 2001, whereas the appellant on the other hand has admitted using the said mark from the year 2002.

28. The appellant, however, contended before the learned Single Judge that the said mark was also used by M/s Ma Gayatri, which had claimed its user since the year 1996. The appellant claimed that M/s Ma Gayatri by a Licence Agreement dated 21.07.2009 had assigned its right in the trademark / label 'VEGA' to the appellant, thereby making the appellant the prior user of the mark.

29. The learned Single Judge has considered the said argument and after perusing the said agreement did not agree with the contentions raised by the appellant. The said Licence Agreement was produced for the first time before the learned Single Judge. The relevant paras of the agreement are stated as under:

"LICENSE AGREEMENT

I. VEE EXCEL DRUGS & PHARMACEUTICALS (P) LTD

703, Devika Tower, Chander Nagar, NCR-201011, UP, India

Tel/Fax:-091-120-3019191, 3019190

Reg. Off Address: - G-16, Preet Vihar, 3rd Floor, Vikas Marg, Delhi India.

Represented by :- Mr. VIPIN BANSAL (Director)

Hereinafter referred to as "Licensor"

&

II. M/s. Magayatri

Basement of City Work shop, Gali no. 2, Opp L Pocket Market Sarita Vihar, N. Delhi-110076, India

Ph:-011-29942571

Represented by : Mr. U.S. Elawadhi (Proprietor)

Hereinafter referred to as "Licensee".

WITNESSETH

Whereas, Licensor or its affiliate Companies are owners of certain inventions and formulations relating to pharmaceutical products and possess a valuable Know – How hereinafter defined, which is useful in the manufacture of pharmaceutical product(s) as hereinafter defined:

Whereas, Licensor or its affiliate Companies are the owners of valuable Trademarks, as hereinafter defined, which are useful in promoting, marketing, using and selling the pharmaceuticals products.

Whereas, Licensee is desirous of securing from Licensor and Licensor is willing to grant Licensee, a licensee to utilize the Know-How and the Trademark to register and make use and sell the pharmaceutical products in the "Territory", as hereafter defined.

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1.07:

The term "Trademark (s)" shall mean the (not readable) Trademarks and /or Trade name(s) in words and / or design indicated in 'Appendix (2) to this Agreement as well as any other Trademark which may be (not readable) By mutual agreement of the Parties hereto.

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Article 2:

GRANTS OF RIGHTS:

2.01:

Licensor hereby grants to Licensee and Licensee hereby accepts from Licensor, subject to the terms herein contained a non-transferable exclusive right (without right to sub-license others) to sell the Product(s) in the Territory.

2.02: Licensor hereby grants to Licensee and Licensee hereby accepts from Licensor, subject to the terms herein contained, a non exclusive license and non-transferable right (without right to sub0license others) to use the Trademarks in distribution and sale of the Products in the Territory.

2.03:

Except the provisions of Items 2.01 and 2.02 respectively Licensee is granted no express or implied right or license to :

(a) Use the Know – How and / or Trademark (S) in whatsoever manner and / or whichever purpose beyond the scope of this Agreement.

(b) Use Licensor's Licensor name or any Licensor's name other than those provided herein.

(c) ***** ****

10.03 That the licensee shall not claim any proprietary rights in the trademarks belonging to licensor. Licensee will never challenge validity of any trademark of the licensor. Licensee rights in the marks which existed before the execution of this agreement shall now stands relinquished in favour of the licensor who will now have exclusive rights for the said trademarks.

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C. Approval of Representations: All presentations of Licensor's Trademarks that Representative intends to use shall first be submitted to Licensor for approval (which shall not be unreasonable withheld) of design, color, and other details or shall be exact copies of those used by Licensor.

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Appendix – 1

1

VEGA ASIA- 50

Sildenafil Citrate Tablets

Each film coated tablet contains:

Sildenafil Citrate

eq, to Sildenafil 50 mg

Colours: Indigo Carmine & Titanium Dioxide

2

Sildenafil Citrate Tablets

VEGA ASIA – 100

Each film coated tablet contains:

Sildenafil Citrate

eq, to Sildenafil 100 mg

Colours: Indigo Carmine & Titanium Dioxide

3

Sildenafil Citrate Tablets

VEGA - SUPER

Each film coated tablet contains:

Sildenafil Citrate

eq, to Sildenafil 120 mg

Colours: Indigo Carmine & Titanium Dioxide

Any other products or-Brand of Vee Excel that licensee may like to market in future”.

30. The learned Single Judge considered the arguments advanced by the parties and, in our opinion, rightly concluded that the order passed by the learned IPAB does not merit any interference.

31. The right, which is sought to be established by the appellant that is the user of the mark even before the date of application in the year 2002 stems from the alleged License Agreement between the appellant and M/s Ma Gayatri. The said Agreement from its bare perusal clearly describes the appellant as a Licensor and M/s Ma Gayatri as Licensee.

32. From the perusal of the Agreement, it appears that it is the appellant who licensed the use of its marks to M/s Ma Gayatri. Further, the marks which are sought to be licensed were referred to in Appendix II which has not been placed on record. The learned Single Judge in that regard held as under:

“26. As far as the petitioner's reliance on the Licence Agreement with M/s Ma Gayatri is concerned, the said agreement describes the petitioner as a Licensor and M/s Ma Gayatri as a Licensee. By this Agreement, it is the petitioner who licenced the use of its marks to M/s Ma Gayatri and not the other way around. The learned counsel for the respondent no. 2 is correct in her submission that what those marks were can only be ascertained from Appendix II to the said agreement, which has not seen the light of the day so far. An adverse inference therefore, should be drawn against the petitioner in this regard.

33. We find no reason to interfere with the view taken by the learned Single Judge. It is also significant to note that the proprietary rights of M/s Ma Gayatri in the mark 'VEGA' are even otherwise not established. The appellant relies upon a document being the NOC issued by DCGI on 23.07.2001. Even the said document does not bear reference to any trademark. The learned Single Judge in that regard held as under:

"28. Though the above clause states that the rights of M/s Ma Gayatri in the mark shall stand relinquished in favour of the licensor, it does not state which are those marks. Further, the petitioner has been unable to show the proprietary rights of M/s Ma Gayatri in the mark 'VEGA'. The only stray document relied upon by the learned counsel for the petitioner in this regard is the NOC issued by the DCGI on 23.07.2001. The said document does not bear any reference to a trade mark. The learned counsel claims that the said NOC was granted on an application filed by M/s Swiss Pharma Pvt. Ltd., which in turn depicts the mark 'VEGA-100'. However, the connection between the two documents cannot be established. Even otherwise, as rightly contended by the learned counsel for the petitioner, these documents do not show the user of the mark on the actual product. The judgement in M/s Kisan Industries (supra), therefore, cannot come to the aid of the petitioner, as in the present case, there is neither an assignment of the mark by M/s Ma Gayatri in favour of the petitioner, nor the prior use of the mark 'VEGA' by M/s Ma Gayatri has been established by the petitioner. In fact, the judgment of Pioneer Nuts and Bolts Pvt. Ltd. (supra), cited by the learned counsel for the petitioner, works against the petitioner itself, as the petitioner has not placed any credible evidence of proof of the use of the mark by M/s Ma Gayatri."

34. We agree with the view taken by the learned Single Judge. It is an admitted fact that the subject matter Trademark Registration was filed by the appellant on 08.02.2002 on a 'proposed to be used basis'. It is significant that the appellant has not disputed that the respondent has been using the identical mark 'VEGA' since the year 2001. The argument advanced in order to show that the use of the identical mark by the appellant pre-dated the use by the respondent was on account of the alleged use of the mark by M/s Ma Gayatri since the year 1996.

35. Learned Counsel for the appellant has relied upon the judgment passed by this Court in Jabbar Ahmed & Anr. v. Prince Industries: 2003 SCC Online Del 455, in order to contend that in a rectification application, the onus lies upon the party seeking rectification. The appellant also relies upon the judgment passed by the Division Bench of this Court in the case of Pioneer Nuts and Bolts Pvt. Ltd. v. Goodwill Enterprises (supra) and Kirorimal Kashiram Marketing and Agencies Pvt. Ltd. v. Shree Sita Chawal Udyog Mill (supra) in support of the arguments that in order to set up a case of prior user against a registered trademark, the applicant has to show its user on the basis of a substantial, credible and reliable material. There is no cavil with the law laid down in the afore-stated judgments. In the present case, the learned IPAB has reached a conclusion that the respondent is a

prior user of the mark 'VEGA' on the basis of evidence produced before it. The said evidence cannot be said to be not substantial or credible. The IPAB has passed an order after appreciating the material on record, which cannot be said to be erroneous. Once it is established on the basis of material on record that the respondent adopted and used the mark prior to the same mark being adopted by the appellant, the conclusion reached by the learned IPAB, cannot be held to be erroneous.

36. During the course of arguments, it was also contended by the learned Counsel for the appellant that the respondent has abandoned the trademark 'VEGA' in the year 2014. The same, in our opinion, is not relevant for the purpose of deciding the present appeal since the application for rectification has been decided by the learned IPAB, while considering whether the respondent is a prior adopter and user of the mark from the date of application for its registration by the appellant.

37. Similarly, the contention that the trademark 'VEGA', which was also registered in favour of M/s Aurochem, and licensed to the respondent was cancelled at the behest of the appellant in the year 2011, is also not a relevant factor. Once the respondent has been able to establish, on the basis of material produced before the learned IPAB that it was using the mark prior to the application filed by the appellant, the order passed by the learned IPAB cannot be faulted. Bald averments have been made to contend that the invoices raised by Mr. Kishore Mathkar are fabricated. It is submitted that the telephone no. mentioned in the bill dated 01.10.2001 is a 8-digit telephone no., whereas 8-digit telephone nos. were not in use in Bombay in the year 2001. Further, no material has been placed on record in order to substantiate the said argument, therefore, in our opinion, the same is not required to be considered at this belated stage.

38. It is also significant to note that the appellant has filed a petition under Article 226 read with Article 227 of the Constitution of India challenging the order passed by the erstwhile IPAB. The High Court exercising power under Article 226 of the Constitution of India issues a writ of certiorari for correcting the gross errors of jurisdiction when the Subordinate Court or the Tribunal is found to have acted without jurisdiction; in excess of its jurisdiction; acted in flagrant regard of law or rules of procedure and acting in violation of principles of natural justice.

39. The High Court while exercising supervisory jurisdiction does not act as an Appellate Court and is, therefore, not to review the findings or the facts reached by a Court or Tribunal even if they are erroneous. The High Court while exercising powers under Article 226 of the Constitution of India ought to interfere if the error is of such nature, which is self-evident and can be demonstrated without involving any lengthy or long-drawn appreciation of evidence. However, where two inferences or reasonably possible views are possible, the High Court while exercising the supervisory jurisdiction ought not to interfere. The jurisdiction is held to be exercised sparingly and only in appropriate cases, which

demonstrate gross failure of justice. The High Court is not to convert itself into a Court of Appeal in order to re-appreciate or re-evaluate the evidence that forms the basis of the order passed by the jurisdictional Tribunal or Court, especially when the same are of technical nature.

40. In the present case, it cannot be said that the impugned order passed by the learned IPAB was without jurisdiction or was passed in excess of its jurisdiction. At the same time, it also cannot be said that the learned IPAB acted in disregard of the law and in violation of the principles of natural justice. It is apparent that the order was passed after appreciating the evidence placed on record by both the parties. The Tribunal has taken a plausible view of the matter, which cannot be held to be patently erroneous so as to make it justiciable in the exercise of power under Article 226 and Article 227 of the Constitution of India.

41. We find no reason to interfere with the judgment passed by the learned Single Judge.

42. In view of the above, the appeal is dismissed.

43. Pending applications are also disposed of.