AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

ARBA No. 3 of 2021

- D.B. Power Limited, C-31, Naman Corporate Link, 3rd Floor, G - Block, Opposite Dena Bank, Bandra Kurla Complex, Bandra East, Mumbai (M.H.) Through Its Authorised Representative Shri Shailendra Bajpai S/o Shri D.P. Bajpai, Legal Manager, D.B. Power, Village Bandardarha District Janjgir Champa Chhattisgarh

---- Appellant

Versus

- South Eastern Coalfields Ltd. Through Director, Headquarters S E C L, Seepat Road, Bilaspur, Chhattisgarh

---- Respondent

For Appellant	:	Shri Deepak Khurana, Advocate along with Shri Parth Shrivastava, Advocate
For Respondent	:	Shri Prafull N. Bharat, Sr. Adv. Along with Shri Anumeh Shrivastava, Advocate

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Hon'ble Shri Justice Goutam Bhaduri &

Hon'ble Smt. Justice Rajani Dubey

Judgment on Board

Per Goutam Bhaduri, J

27/06/2024

Heard.

1. The present appeal has been filed against the order dated 18/11/2020 passed by the Commercial Court, Raipur in ARB. M.J.C. No.05/2019, whereby the appeal preferred by the present appellant against the arbitral award dated 24/12/2018 was dismissed.

2. The brief facts of the case are that a power plant was set up by the appellant, wherein for production of the energy the appellant entered into a fuel supply agreement on 29/08/2013 with the respondent. Since the supply was with respect to the coal, as such, the quality of coal was required to be tested to evaluate the price. Accordingly in the agreement specific clause 5.7 was provided to deal with the dispute regarding quality of coal. For sake of brevity clause 5.7 of the agreement is reproduced hereinbelow:-

> 5.7 "Third Party" sampling facility as is being currently in vogue for the FSA consumers with the Power Producers (IPP/SEB) shall be available to successful bidders under the special e auction, if requested in writing to the supplying coal company. Debit/Credit notes shall be issued in case of grade slippage/improvement.
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> "5.7.1 Sample Collection: (i) Samples of Coal shall be collected jointly by the Third Parties of the Seller and the Purchaser either manually or through any suitable mechanical sampling / arrangement including Augur Sampling method if physically operationable at each of the Deliver Points for determining the quality of Coal in presence of representatives of Seller and Purchaser.
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> 5.7.2 Detailed modalities for collection, handling, storage and preparation of samples by Third Parties shall be as per Schedule V to this Agreement.
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> 5.7.3 Sample preparation & analysis :
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> (i) Total Moisture: Sample for determination of Total Moisture shall be segregated from the sample collected at the Delivery Point by the ***Third Parties jointly***, and prepared and analyzed, as per procedure given in Schedule V.
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> (ii) Daily Gross Sample: a) The Gross Sample collected as per clause 5.7.1(i) for determination of moisture, ash & GCV on equilibrated basis shall be reduced into laboratory sample on the date immediately following the date of collection. The final laboratory samples will be divided into ***three parts*** viz. Set-I, Set-II and Set-III as follows:

Set-I shall be taken by the Purchaser for analysis at their ends to determine the ash, moisture and GCV.

Set-II shall be analyzed by the Seller to determine the ash, moisture and GCV.

Set.III shall be kept under joint seal of the Seller, Purchaser and the Third Parties as referee sample in the joint custody at the loading end for a period of fourteen (14) days or until the analysis results of Set-I and Set-II are accepted without dispute, whichever is earlier.

b) The sample in ***Set-I and Set-II*** shall be analyzed for ash, moisture and GCV content on equilibrated basis {wherever required in accordance with IS: 1350 (Part-I)-1984 and IS: 1350 (Part-II)-1970.

c) ***Set-I and Set-ll*** of the laboratory samples as prepared shall be analyzed by the Third ***Parties of the Seller and Purchaser in their respective laboratories*** as per relevant part of IS: 1350 (Part-I)-1984 and IS: 1350 (Part-II)-1970 within three-four (3-4) days from the date of preparation and distribution of laboratory sample for analysis of ash, moisture and GCV.

d) In the event of any dispute (which shall be raised not later than forty-eight (48) hours after analysis), at the time of Third Party analysis of ***Set-I and Set-II*** the referee sample as in ***Set-III*** shall be referred for analysis within seventy two (72) hours of the dispute but not later than eight (8) days of the collection of samples at any mutually agreed ***NABL Accredited/Government laboratory***.

5.7.7 In the event the ***Third Party appointed*** by the Purchaser fails/declines to participate in the process of sampling and analysis as mentioned inclause 5.7.1(i), such failure/refusal shall not beconsidered as ground for disputing the result submitted by the Third party of the seller which will be binding on both the Parties."

3. Learned counsel for the appellant would submit that in order to evaluate the quality of coal at the time of loading the sample Set-I was to be taken by the purchaser i.e. the appellant; Set-II was to be preserved by the seller i.e. the respondent to determine the ash, moisture and GCV; and Set-III was to be kept under the joint seal of the seller, purchaser and third party as referee sample in the joint custody at the loading end

for a period of 14 days or until the analysis results of Set-I and Set-II are accepted without dispute. The submission further is made that in the event of any dispute clause (d) would be applicable wherein a time limit has been fixed for 48 hours after analysis of Set-I and Set-II. The referee sample as in Set-III was required to be referred for analysis within 72 hours of the dispute but not later than 8 days. It has been submitted that at para 56 of the award before the Tribunal, it was deliberated that after Set-I was decided, no response was received, the appellant lodged his claim in respect of grade slippage in coal supplied by the respondent on different dates.

4. It is further submitted that the seller did not dispute the Set-I analysis which was in the hold of the appellant. Consequently, there was no occasion to refer the sample for analysis to any mutually agreed independent laboratory. The submission is made that the learned arbitrator agreed to this fact that the question of referring of sample referee to third party would only arise if the dispute is raised, however, it is submitted that in the instant case in hand the said dispute was never raised by the SECL in respect of their quality of Set-II. Consequently, the reference could not have been made. It is further submitted that the further interpretation of the said clause d again has been turned down by the Arbitrator by referring to the corresponding facts thereby the award nullifies the said terms of agreement and it would amount to re-writing the agreement. Further submission is made that though the agreement purports that in case of grade slippage if the dispute is not raised within the stipulated time, the laboratory test conducted by the

appellant would prevail and having not furnished the laboratory test of Set-II, which was in the hold of the respondent, *ipso facto*, the analysis of Set-I would be deemed to be accepted as per the contract.

5. Learned counsel for the appellant would further submit that in the return before the arbitrator, the respondent stated that after the purchase dated 26/12/2015 the claimant has only sought analysis report of third party appointed by the respondent in respect of each consignment and accordingly respondent supplied the reports which was filed as Annexure R/7. Referring to Annexure R/7 the submission is made that it was not an analysis report and it is only of 11 days, whereas in the rejoinder to the reply, the appellant case was specific that day to day samples of coal were being collected by the claimant and on the basis of third party agency reports the dispute of grade slippage in the coal were being regularly raised with the respondent, but it was not referred to the referee sample for analysis nor the results were provided. Further the attention was invited to para 13 of the rejoinder and it is stated that a specific denial was made that the respondent knowing fully well that the dispute has arisen with respect to quality/grade of coal failed to provide its result of third party analysis of the laboratory sample and confirm with the claimant's third party analysis report within the prescribed time as per the agreement. The attention was also invited to the cross-examination of Jayanta De on behalf of the respondent and the attention was also invited to question No. 29 with respect to Annexure R-7, wherein it was stated that Annexure R-7 does not mention the date of analysis of the samples and Annexure R-7 is only a month-wise

summary and not the analysis report. It is submitted that therefore the finding of the arbitrator at para 58 that in view of the divergent analysis reports furnished by the third parties of the claimant and the respondent analysis report of the referee sample by a mutually agreed NABL accredited/government laboratory becomes highly significant for deciding the dispute. The submission is, therefore, made that this finding is completely contrary and out of record.

6. Learned counsel would further refer to the grounds in appeal under Section 34 of the Arbitration and Conciliation Act, 1996 before the Commercial Court, Raipur. Referring to the grounds, the counsel would submit that specific ground was raised that the SOP clearly provides that the analysis of Set-III referee sample will be required only if a dispute is raised. Once the appellant has conveyed Set-I analysis result to the Respondent and the Respondent was informed of the grade slippage, it was open for the Respondent to raise a dispute by conveying the analysis result of Set-II sample. Ground was raised that the analysis report of Set-II was never supplied and specific averments were made pointing out to the question No.29 which says admission of interpretation of Annexure R-7 to say that it does not mention the date of analysis of the samples and Annexure R-7 was only month-wise summary but in the order the learned commercial court completely ignored the same to adjudicate and simply on the principle as has been laid down in Section 34 of the Arbitration and Conciliation Act did not enter into the issue. Further submission is made that in para 56 & 58 of the Commercial Court order, the Court misdirected itself and recorded

that the sole arbitrator has considered all the relevant clauses of agreement and the interference could not be made because of the fact that only second view is possible. It is submitted that in the cross-examination and the document Annexure R-7 which is a clear admission of the fact that no analysis report of Set-II was conducted a finding has been avoided to be given on this and the order of the arbitrator also shows that it is prima facie contradictory to each other.

7. Referring to the law laid down by the Supreme Court in the matter of ***Associate Builders Vs. Delhi Development Authority {(2015) 3 SCC 49}*** learned counsel would submit that when the decision has been made in contravention of the Arbitration Act itself, it would be a patent illegality if an arbitrator gives no reasons for an award it would also be an illegal. The reference is also made to the dictum laid down by the Supreme Court in the matter of ***South East Asia Marine Engineering and Constructions Limited (Seamec Limited) Versus Oil India Limited {(2020) 5 SCC 164}*** to submit that as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory and the Tribunal has completely ignored this view to hold otherwise. It is further submitted that when this issue was raised before the Commercial Court and objections were raised particularly with respect to the document Annexure R/7 on which the respondent relied upon but their witness says that it is not an analysis report of Set-II then that cannot be converted to interpret otherwise and the Commercial Court has completely ignored this fact.

8. Learned counsel for the appellant further placed reliance on the ratio laid down by the High Court of Madhya Pradesh in the matter of ***State of M.P. Vs. SMEC International Pvt. Ltd. {(2023) 1 MP LJ 136}*** to submit that learned Commercial Court has simply reproduced the factual backdrop of the matter, rival contentions of the parties and also reproduced the citation and governing statutory provisions and as to why the admission has been ignored which is very vital to the case in hand. He also placed his reliance in the law laid down by the Rajasthan High Court in the matter of ***Union of India Vs. M/s. Madan Mohan Jain & Sons & Anr. {2019 (1) RLW 360 (Raj.)}*** and would submit that the language of this judgment has been reproduced in the order of the Commercial Court and no reasons actually have been assigned as to why the award passed by the arbitrator is correct. Therefore, the judgment of the Commercial Court, prima facie, do not satisfy the statutory requirement and therefore, is required to be set aside.

9. Per contra, learned senior counsel appearing on behalf of the respondent would submit that the scope of interference in the arbitral award is very limited. Reference is made to the judgment rendered by the Supreme Court in the matter of ***National Highways Authority of India Vs. ITD Cementation India Limited {(2015) 14 SCC 21}*** wherein the Supreme Court has reiterated the law laid down by it in the matter of ***McDermott International Inc. V. Burn Standard Co. Ltd. {(2006) 11 SCC 181}*** and held that in order to construe a contract, relevant correspondence can be seen by the arbitrator and if it has been interpreted in a certain manner, the same cannot be subject of appeal merely for the reason that

there is a different view possible over interpretation even if such interpretation give rise to some question of law. In ***National Highways Authority of India*** (supra) further reference is also made in a judgment rendered by it in the matter of ***Associate Builders Vs. Delhi Development Authority {(2015) 3 SCC 49}*** wherein the Supreme Court while discussing the public policy of India held that a contravention of the substantive law of India would also be against the public policy coupled with the fact that the arbitrator give no reasons but when the reasons have been assigned, the law emphasizes that an Arbitral Tribunal must decide in accordance with the terms of the contract but when the arbitrator construes a term of the contract in a reasonable manner, it would not mean that award can be set aside on this ground and the construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

10. Learned senior counsel would further refer to the law laid down by the Supreme Court in the matter of ***K. Sugumar and Another Vs. Hindustan Petroleum Corporation Limited and Another {(2020) 12 SCC 539}*** to submit that the jurisdiction of the High Court would be limited to interfere and referring to the judgment rendered by the Supreme Court in the matter of ***Sutlej Construction Limited Vs. Union Territory of Chandigarh {(2018) 1 SCC 718}*** he would submit that this Court or the Commercial Court cannot re-appreciate the evidence and the reasoning that has already been given and there cannot be

substitution of the opinion by the Court to set aside the award.

11. We have heard learned counsel for the parties at length and perused the documents.

12. The Supreme Court in the matter of ***National Highways Authority of India Vs. ITD Cementation India Limited {(2015) 14 SCC 21}*** has held thus in para 24 which is reproduced hereinbelow:-

> **24.** In a recent decision in *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] while discussing "the public policy of India" contained in Section 34(2)(*b*)(*ii*) of the Arbitration Act, 1996 this Court dealt with each of the heads contained in *Saw Pipes* [*ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705] judgment in the light of three distinct and fundamental juristic principles added in *ONGC Ltd.* v. *Western Geco International Ltd.* [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] "Patent illegality" which is one of the heads contained in *Saw Pipes* [*ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705] judgment was then elaborated and we quote paras 42 to 42.3: (*Associate Builders case* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , SCC p. 81)
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> "*42*. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub-heads:
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> *42.1*. (*a*) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(*a*) of the Act, which reads as under:
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> '**28.*Rules applicable to substance of dispute***.—(1) *Where the place of arbitration is situated in India—*
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> (*a*) *in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India*;'

> *42.2*. (*b*) A contravention of the Arbitration Act itself would be regarded as a patent illegality—for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.
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> *42.3*. (*c*) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:
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> '**28.*Rules applicable to substance of dispute***.—(1)-(2) ***
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> (3) *In all case, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction*.'
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> This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

13. There is no dispute about the interpretation that the Court cannot substitute its own interpretation and it is for the arbitrator to construe a contract unless it is said to be something that no fair minded or reasonable person could do, however, at the same time as has been laid down by the Supreme Court in the matter of ***South East Asia Marine Engineering and Constructions Limited (Seamec Limited) Versus Oil India Limited {(2020) 5 SCC 164}*** the principle which is laid down that wide interpretation that the contract cannot be accepted. As the thumb rule of the interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. Though in the grounds of appeal before the learned Commercial Court those grounds of interpretation was raised, but the

order do not answer the lis i.e. grounds so raised.

14. When the contract is seen, simplicitor it shows that in order to determine the quality of the coal, three samples were required to be procured. One is by the purchaser i.e. the appellant; one by the seller i.e. the SECL and one by any third party and the nomenclature is given as Set-I, Set-II and Set-III. The contract further purports that the time limit has been provided that in case of any dispute about the report within 48 hours of the analysis of Set-I and Set-II, meaning thereby when the analysis report do not stand on the same platform Set-III sample which is kept under joint seal of the seller and purchaser the report would come to fore that too there has been some time limit has been prescribed for reference within 72 hours but not later than 8 days.

15. The case of the appellant was that they had conducted the analysis of Set-I which was in their hold but in order to raise the dispute to question the same the report of Set-II should have been surfaced or exchanged. The respondent SECL in their return heavily relied upon the document Annexure R-7 and stated that answering respondent after purchase dated 26/12/2015 has only sought analysis report of third party appointed by the respondent in respect of each consignment and accordingly respondent supplied the reports of the third party declaring the grade of coal supplied.

16. Annexure R-7 is on record dated 22/01/2016 of different date of loading of sample. The nature of document further was interpreted in the cross-examination in the evidence of Jayanta De wherein he admits that it is

correct to say that Annexure R-7 does not mention the date of analysis of the samples. He further admits that it is correct that the Annexure R-7 is only a month-wise summary and not the analysis report.

17. This admission of the respondent have been completely ignored by the arbitrator and on challenge no finding have been arrived at by the Commercial Court touching upon it. The rejoinder filed by the claimant they have categorically denied at para 13 that Respondent despite knowing fully well the dispute has arisen with respect to quality/grade of Coal supplied failed to provide result of third party analysis of the laboratory sample or confirm the claimant's third party analysis report within prescribed time. This rejoinder submission has been admitted by the respondent witness when he was confronted with the document Annexure R-7. However, we do not find any discussion of the same when this issue and point was under challenge before the Commercial Court. The memo of appeal before the Commercial Court a categorical ground was raised at ground 'N' the appellant has conveyed the Set-I analysis result to the respondent of grade slippage but no dispute was raised to confront it with the result analysis of Set-II. Consequently, the dispute could not be referred with respect to Set-III, therefore, not referring the Set-III analysis was contrary to SoP. Reference of Annexure R-7 was also made at ground 'O' and admission was pointed out in the memo of appeal but when we revert back to the order of the Commercial Court it is completely silent on this.

18. When such specific ground which has a germane to issue, when raised but not decided by the Commercial Court came up for consideration, the likewise situation arose before the High Court of M.P. in the matter of ***State of M.P. Vs. SMEC International Pvt. Ltd. {(2023) 1 MP LJ 136}***, the Court observed that when the objection raised by the appellant before the Commercial Court when not been averted while passing the order, the order cannot be sustained. It further observed that it is well settled law that the reason is the heart and soul of the order. The Court further observed that no doubt the order of arbitrator can be called in question on limited grounds mentioned in various clause of Section 34 of the Act but when the grounds have been taken under Section 34 specifically highlighting the admission made where from the admission made by the respondent touching upon the analysis report of Set-II, the Commercial Court was expected to deliberate upon it. Whether the evidence constitute an admission or not cannot be ignored as it is the settled proposition that an admission made during the course of trial is the best evidence.

19. The learned Commercial Court simply reproduced the facts, grounds and case law and has passed the order. No reasoning has been assigned as to why the order of the Arbitrator can stand the test shelving the admission, if any. Likewise the judgment passed in the case of ***South East Asia Marine Engineering and Constructions Limited (Seamec Limited) Versus Oil India Limited {(2020) 5 SCC 164}*** and has held thus in paras 28 to 31 which are reproduced hereinbelow:-

28. In this context, the interpretation of Clause 23 of the contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.

29. The contract was entered into between the parties in furtherance of a tender issued by the respondent herein. After considering the tender bids, the appellant issued a letter of intent. In furtherance of the letter of intent, the contract (Contract No. CCO/FC/0040/95) was for drilling oil wells and auxiliary operations. It is important to note that the contract price was payable to the "contractor" for full and proper performance of its contractual obligations. Further, Clauses 14.7 and 14.11 of the contract state that the rates, terms and conditions were to be in force until the completion or abandonment of the last well being drilled.

30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.

31. The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same.

20. Likewise in the similar proposition the Delhi High Court in the matter of ***Indian Oil Corporation Ltd. Vs. Ms. Meenakshi Arora Vs. Aneja Transporters {2017 SCC OnLine Del 9318}*** and Rajasthan High Court

in the matter of ***Union of India Vs. M/s Madan Mohan Jain & Sons & Anr. {2019 (1) RLW 360 (Raj.)}*** has laid down the principle when the objections have been made, they are required to be decided in absence of such decision it would be an apology for the expression of judgment. It held that it is correct that the Court shall not ordinarily not substitute its interpretation for that the Arbitrator but when the judicial review has been sought for of the award under Section 34 of the Act, the Court was required to objectively examine and shed the ground by reasons in the order.

21. In view of the aforesaid discussion, we are of the view that the appeal is liable to be and is hereby allowed. Accordingly, the order of the Commercial Court dated 18/11/2020 is set aside. The case is remanded back to the Commercial Court for adjudication afresh by a reasoned order on the ground raised in the memo of appeal.

(Goutam Bhaduri)
Judge

(Rajani Dubey)
Judge

ASHU

Headnote

Court shall not ordinarily substitute its interpretation over the interpretation adopted by arbitrator but when the judicial review has been sought for of the award under Section 34 of the Arbitration and Conciliation Act, 1996 the Court is required to objectively examine and shed the ground by reason in the order.

मध्यस्थ द्वारा किये गये निर्वचन को सामान्यतः न्यायालय अपने निर्वचन से प्रतिस्थापित नहीं सकता किन्तु जब माध्यस्थम् और सुलह अधिनियम 1996 की धारा 34 के अंतर्गत अवार्ड का न्यायिक पुनर्विलोकन चाहा गया हो तो न्यायालय को यह चाहिये कि वह निष्पक्ष परीक्षण कर आधार का सकारण उल्लेख अपने आदेश में करें।