

**(2025) 04 DEL CK 1050**

**In the Delhi High Court**

**Case No : Arbitration Petition 2075 Of 2024**

Railtel Corporation Of India Limited

APPELLANT

Vs

Primatel Fibcom Limited

RESPONDENT

**Date of Decision : 22-04-2025**

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11, 12(2), 19, 21, 37, 37(2)(a)

**Citation : (2025) 04 DEL CK 1050**

**Hon'ble Judges : Subramonium Prasad, J**

**Bench : Single Bench**

**Advocate : Alok Singh, B.R. Menon, Jaivardhan Jeph, Rohit Gandhi, Adhish Srivastava, Hargun Singh Kalra, Akshita Nigam**

**Final Decision : Disposed Of**

## **Judgement**

Subramonium Prasad, J

1. The present Petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") has been filed by the Petitioner seeking appointment of an independent Sole Arbitrator to adjudicate upon the disputes arising under a Definitive Agreement dated 27.02.2018.

2. Facts leading to the filing of the present petition are as follows:-

a. The Petitioner is a Public Sector Undertaking (PSU) engaged in providing broadband and network infrastructure services. The Petitioner seeks appointment of an independent Sole Arbitrator to adjudicate its claims against the Respondent herein, a private limited company with whom the Petitioner had entered into a contractual relationship in connection with the RajNET Project implemented by M/s RajCOMP Info Services Limited (hereinafter referred to as "RISL").

b. On 4th July 2017, RISL issued a Request for Proposal (RFP) for the "Supply, Installation and Maintenance of RF Links and Outdoor Wi-Fi Access Points across Rajasthan on a rate contract basis," under the RajNET Project. The Petitioner

participated in the said tender process and, upon being declared the lowest bidder, was awarded the contract by RISL. The RFP, which the Petitioner refers to as the "Mother Contract", formed the foundational basis for subsequent downstream agreements executed for the performance of the project.

c. Pursuant thereto, the Petitioner entered into a Definitive Agreement dated 27.02.2018 with the Respondent by way of which the Respondent was designated as the system integrator and implementation partner. The Agreement provided for a back-to-back payment structure, whereby payments to the Respondent were contingent upon the Petitioner receiving payment from RISL. The Respondent's scope of work included supply, installation, commissioning, and maintenance of the relevant equipment and infrastructure, in accordance with the RFP issued by RISL.

d. The Definitive Agreement acknowledged the importance of the RFP and the project's objectives, and expressly stated that the Respondent would ensure the smooth implementation and integration of its assigned scope of work as defined therein. Clause 18.2 of the Agreement contained an arbitration clause providing for dispute resolution through arbitration under the aegis of the Delhi International Arbitration Centre (DIAC).

e. According to the Petitioner, RISL raised concerns regarding alleged deficiencies and delays in the execution of work, caused by the Respondent's performance. The Petitioner states that these issues led to non-payment of certain invoices by RISL, resulting in financial losses. The Petitioner further avers that it eventually engaged M/s Netsoft Consulting (P) Ltd. to complete the unfinished portions of the project.

f. The Petitioner refers to a meeting held on 06.11.2021, allegedly attended by the parties and representatives of RISL, during which the Respondent was, according to the Petitioner, made aware of the performance-related concerns. The Petitioner further submits that the Respondent was required, under Clause 5(a) of Exhibit-A of the Definitive Agreement, to prepare and submit detailed User Acceptance Test (UAT) schedules to RISL, and that the equipment would be deemed commissioned only upon RISL's acceptance of UAT. The Petitioner states that the UAT requirement, further elaborated in Clause 7 of the agreement, was not fulfilled by the Respondent.

g. Disputes having arisen between the parties, the Respondent invoked the arbitration clause. In ARB. P. No. 364/2024, this Court, vide Order dated 14.03.2024 (as corrected on 05.04.2024), appointed a Sole Arbitrator under the aegis of DIAC, to adjudicate the disputes between the parties.

h. The arbitral proceedings commenced with the learned Arbitrator issuing Procedural Order No. 1 on 13.05.2024, prescribing timelines for submission of the Statement of Claim, Statement of Defence/Counter Claim, and Rejoinder. Subsequently, by Procedural Order No. 2 dated 30.07.2024, the Statement of Claim filed by the Respondent was taken on record, and the Petitioner was

granted three weeks' time to file its Statement of Defence, followed by three weeks for the Respondent to file a Rejoinder. The matter was adjourned for final hearing between 26.09.2024 and 03.10.2024. No formal order framing issues or finalising the procedure for leading evidence was passed at that stage.

i. It is further stated that the Respondent filed its Statement of Claim after the lapse of the prescribed time, and without filing any application seeking condonation of delay. The Statement of Claim was transmitted via email. The Petitioner, however, filed its Statement of Defence within the prescribed period. Subsequently, the Respondent at the relevant time issued a notice to the Petitioner seeking production of documents relating to the arbitration between the Petitioner and RISL. The Petitioner declined to furnish the said documents by email dated 09.09.2024.

j. On 26.09.2024, when the matter was scheduled for final arguments, the learned Arbitrator adjourned the proceedings to 16.10.2024 and directed the Petitioner to respond to the document production request. Both parties were directed to prepare written submissions. Thereafter, on 16.10.2024, the matter was adjourned to 18.11.2024, 19.11.2024, and 20.11.2024 for final hearing, without a formal decision on the procedure for evidence or framing of issues.

k. On 11.11.2024, the Petitioner filed its Counter Claim, along with an application seeking condonation of delay and another application under Section 19 of the Act, seeking finalisation of the procedure to be followed in the proceedings. The Petitioner also addressed a letter to the learned Arbitrator requesting that the applications be listed and heard prior to the scheduled dates of final hearing. No response was received to the said request.

l. Vide Order dated 18.11.2024, the learned Arbitrator dismissed the Petitioner's counter claim and the accompanying applications, observing that the application seeking condonation of delay was filed belatedly. The Petitioner states that the dismissal was done without hearing and thus contrary to the principles of natural justice.

m. The learned Single Judge has disposed of the appeal by observing as under:-

"11. Therefore, this Court is of the opinion that the Appellant herein is at liberty to initiate proceedings for appointment of an independent Arbitrator in accordance with law for adjudication of its Counter-Claim. "

3. The Petitioner now seeks appointment of an independent Sole Arbitrator under Section 11 of the Act, submitting that the arbitral proceedings conducted thus far stand vitiated due to procedural irregularities and denial of opportunity. Reliance has also been placed on a judgment dated 09.12.2024 passed by this Court, wherein liberty was granted to the Petitioner to initiate independent proceedings for appointment of an Arbitrator and the Respondent is stated to have conceded to such liberty being available.

4. The Petitioner claims to have suffered financial losses in excess of  
□ 81,94,07,586.74.

Submissions on behalf of the Petitioner:

5. The Petitioner has submitted that the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed in light of the dismissal of its counter claim by the learned Sole Arbitrator, appointed earlier under Section 11 of the Act in ARB. P. 364/2024. The Petitioner states that its counter claim was dismissed without adjudication on merits, on the ground of delay, and without affording an opportunity of hearing.

6. The Petitioner further states that it had challenged the said dismissal by filing an appeal under Section 37(2)(a) of the Act, which came to be dismissed by this Court vide order dated 09.12.2024. However, in para 11 of the said judgment, this Court granted liberty to the Petitioner to initiate independent proceedings for appointment of an Arbitrator in accordance with law. The Petitioner also relies on Para 10.3 of the same judgment, wherein it is recorded that the Respondent had conceded that the Petitioner may initiate independent proceedings for such appointment.

7. The Petitioner contends that the requirement of notice under Section 21 of the Act stands fulfilled through various steps already undertaken, including issuance of a notice dated 26.09.2024 by the Respondent itself, the prior arbitral proceedings, and the liberty granted by this Court. It is further submitted that the purpose of Section 21 of the Act is to notify the existence of a dispute to the other party, which has already occurred in this case. In view of the Respondent's recorded concession and the liberty granted by this Court, the Petitioner argues that no further notice is required.

8. It is the Petitioner's case that it is left with no other remedy and that denial of relief at this stage would effectively bar its substantive right to have its claims adjudicated on merits. The Petitioner, relying on Clause 18.2 of the Definitive Agreement, prays for appointment of an independent Sole Arbitrator.

Submissions on behalf of the Respondent:

9. The Respondent has opposed the petition, primarily on the ground that the Petitioner has failed to issue a mandatory notice under Section 21 of the Act, which, according to the Respondent, is a condition precedent to the commencement of arbitral proceedings. It is contended that this failure renders the present petition under Section 11 of the Act non-maintainable.

10. The Respondent further argues that the claims sought to be referred to arbitration by the Petitioner do not arise from the agreement between the parties, but rather from the Petitioner's agreement with RISL. The Respondent submits that for the said claims against RISL, the Petitioner has already invoked arbitration and the High Court of Rajasthan has appointed an arbitrator.

11. It is further contended that the Petitioner's claims cannot be raised against the Respondent under the guise of a back-to-back contractual arrangement. The Respondent submits that the counter claim before the previously appointed arbitrator was filed belatedly and only after the Petitioner's Special Leave Petition (SLP) was dismissed by the Supreme Court. The Arbitrator, in rejecting the counter claim, is said to have acted in accordance with procedural orders and the statutory framework under the Act.

12. The Respondent denies having accorded consent to the appointment of a new Arbitrator for adjudication of the Petitioner's claims and contends that any such appointment must be preceded by compliance with the mandate under Section 21 of the Act. The Respondent relies on various judgments including *Alpuro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*, 2017 SCC OnLine Del 7228; *Florentine Estates of India Ltd. v. Lokesh Dahiya*, *BSNL v. Nortel Networks India Pvt. Ltd.*, 2022 SCC OnLine Del 3689; and *Arif Azim Co. Ltd. v. Aptech Ltd.*, 2024 SCC OnLine SC 215, to support its submission that issuance of notice under Section 21 of the Arbitration & Conciliation Act is mandatory.

#### Findings and Analysis

13. The principal issue for determination is whether the present petition seeking appointment of an independent Arbitrator for adjudication of the Petitioner's claims is maintainable in light of the alleged non-issuance of a separate notice under Section 21 of the Act.

14. There is no dispute that an Arbitrator was earlier appointed by this Court pursuant to a petition filed by the Respondent under Section 11 of the Act. In the said proceedings, the Petitioner filed a Statement of Defence but did not initially file a counter claim. A counter claim was filed belatedly along with an application seeking condonation of delay, which was dismissed by the learned arbitrator without adjudication on merits.

15. The Petitioner challenged the said order by filing an appeal under Section 37(2)(a) of the Act. This Court, vide judgment dated 09.12.2024, dismissed the appeal as being not maintainable but explicitly granted liberty to the Petitioner to initiate independent proceedings under Section 11 of the Act for appointment of an Arbitrator. Notably, the contention of the Respondent is recorded in Para 10.3 of the judgment to have conceded that the Petitioner may initiate such proceedings.

16. In view of the above, the Court is of the opinion that the issue of compliance with Section 21 of the Act must be examined in the context of the facts of the present case, including the proceedings already undertaken and the judicial record.

17. Section 21 of the Act states that arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent, unless otherwise

agreed. The object of this provision is to ensure that the Respondent is aware of the disputes sought to be referred to arbitration and is afforded an opportunity to respond.

18. In the present case, the disputes between the parties were already the subject matter of an earlier arbitral reference. The Petitioner attempted to raise its claims therein as counter claims. The record discloses that the Respondent was not only aware of these claims but also participated in arbitral proceedings where the Petitioner attempted to assert them. There is no denial of existence of disputes. Indeed, the Respondent's own concession recorded in the judgment dated 09.12.2024 affirms the right of the Petitioner to initiate separate arbitral proceedings.

19. In view of the above, and particularly the liberty granted by this Court in the judgment dated 09.12.2024, the requirement of separate invocation under Section 21 of the Act must be deemed to have been satisfied or rendered unnecessary by judicial determination. A hyper-technical view cannot be adopted to defeat the Petitioner's right to seek adjudication of its claims, especially when such adjudication has not taken place on merits.

20. As regards the Respondent's contention that the claims arise out of the agreement between the Petitioner and RISL, it is to be noted that the Petitioner relies on a back-to-back contractual arrangement. The exact nature of liability and whether the Respondent can be made liable for the losses claimed would fall within the domain of the arbitral tribunal and cannot be decided at this stage. This Court, at this stage, is only required to examine the existence of a valid arbitration agreement and whether disputes have arisen.

21. The arbitration clause at Clause 18.2 of the Definitive Agreement is not disputed. The Petitioner has asserted claims allegedly arising under the said agreement. There is no apparent bar to adjudication of those claims under the said arbitration clause.

## Conclusion

22. The judgment relied upon by the Petitioner that the notice under Section 21 of the Arbitration and Conciliation Act, 1996 is a sine qua non of the arbitration proceedings and could apply to the facts of this case as it deals with the reasons of counter-claim. Valid arbitration proceedings have been initiated by one party seeking for reference for the arbitration proceedings under Section 21 of the Arbitration and Conciliation Act, 1996 for adjudication of disputes. A separate notice under Section 21 of the Arbitration and Conciliation Act, 1996 would not be necessary only for the purposes of counter-claim which is not the mandate of the Arbitration and Conciliation Act, 1996. A Coordinate Bench of this Court, in proceedings under Section 37 of the Arbitration and Conciliation Act, 1996 has set aside the order of the Arbitral Tribunal rejecting the counter-claim only on the ground of limitation. In view of the order of the Coordinate Bench, the counter-claims as raised by the Petitioner is being looked into as a fresh reference, but

since the dispute arises under the same agreement and the arbitration has already been initiated, for which a separate notice under Section 21 of the Act would not be necessary and the instant petition need not be dismissed only on the ground that further notice for the purpose of counter-claim has not been given. This Court is not making any observation regarding the merits or the maintainability of the counter claim and as to whether the counter claim is barred by limitation or not.

23. In order to avoid the conflicting orders arisen under the very same Arbitration Agreement which is being adjudicated upon by Dr. Justice Satish Chandra (Retd.), this Court directs Dr. Justice Satish Chandra (Retd.) to adjudicate upon the counter-claims as well which is the spirit behind the judgment passed by the learned Single Judge allowing the appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996.

24. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned Arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

25. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the Arbitration & Conciliation Act within a week of entering on reference.

26. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

27. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

28. The present petition stands disposed of in the above terms along with pending application(s), if any.