

**(2009) 10 DEL CK 0155**  
**In the Delhi High Court**  
**Case No : OMP No. 457 of 2008**

A.K. Sinha

APPELLANT

Vs

Mahanagar Telephone Nigam Ltd. and Others

RESPONDENT

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**Date of Decision :** 30-10-2009

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 34  
Contract Act, 1872 — Section 73

**Citation :** (2009) 10 DEL CK 0155

**Hon'ble Judges :** Valmiki J Mehta, J

**Bench :** Single Bench

**Advocate :** Kamalakshi Singh, for the Appellant; Dinesh Agnani, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Valmiki J Mehta, J.—This OMP u/s 34 of the Arbitration and Conciliation Act, 1996 contains the objections to the impugned award dated 16.5.2008 passed by the sole arbitrator. The only issue in this case pertains to the claim made by the present petitioner for the loss of profits in not awarding the complete volume of work as envisaged under the contract. The contract in question was entered into through a letter of award dated 21.2.2002 of the respondent and six agreements dated 1.3.2002, were entered into between the parties for laying by the petitioner of telephone cables by using the trenching method. The case of the applicant/petitioner was that whereas the petitioner was contracted to do 600 Km of work, but only 40 Km (42 as per the respondent) of work was awarded against the original contracted length of 6 00 Km. Before the arbitrator, the claimant claimed the profit margin of 10% on the balance portion of the work not allowed to be taken up viz of 560 km The claimant claimed a sum of Rs. 2,43,36,000/- as loss of profit under this head.

2. It was very ably argued by the counsel for the petitioner before this Court that once the respondent is held guilty of breach of contract, and which has been

done in this case, the finding arrived at by the arbitrator, that the petitioner was not entitled to the balance amount of work for laying of 560 km of cables is clearly incorrect and that the petitioner ought to be granted profit margin of 10% of the contract. The counsel in this behalf has relied upon various judgments including of Supreme Court and which are Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh, , A.T. Brij Paul Singh and Others Vs. State of Gujarat, and Ayub Ali Vs. Union of India and Others, . On the strength of these judgments, the counsel has strenuously contended that it is not necessary to prove the loss of profits and there can be honest guess work in allowing the loss of profits.

3. A reference to the aforesaid judgments no doubt shows that in awarding loss of profits as damages, there is involved an element of honest guess work, however, I do not find of anything in these judgments where it is stated that no evidence at all need be led and yet loss of profits can be awarded. In the case of Mohd. Salamatullah, there is a specific line in paragraph 2 of the Judgment which states that evidence was led as to the loss of profits per gun and there was no cross examination on this point. Thus, there was some evidence on the basis of which further honest guesswork could be made.

4. The arbitrator in this behalf has held as under:

1. Claim No. 1

As to the deprivation of profit on an amount of Rs. 2,43,36,000/-(contract not allotted), the onus is on the claimant to render evidence in support of it. Except for oral assertion no material has been placed on record to show that the claimant would have earned profit on the said amount and that too at 10%. Accordingly, the claim at Rs. 24,36,000/-remains unapproved, hence not allowable. As the initial claim at Rs. 24,36,000/- is not allowable further profit at 10% on the said amount of Rs. 24,36,000/- upto 28.2.2004 and further interest upto 31.5.2004 working at Rs. 57,570/- is not allowable. In fact the roll on profit at Rs. 33,30,924 on the initial profit of Rs. 24,36,000/- and interest thereon is not allowable, hence, claim is rejected.

(Emphasis added)

In any case, I find that this issue would not have much bearing on the facts of this case as I am more concerned with the two aspects which have been raised by the respondent before the Arbitrator and one of which shows that no loss of profits was caused to the petitioner. The first aspect is that the respondent has stated before the arbitrator by filing its affidavit by way of evidence that the same petitioner instead of doing the work in question was awarded work of cable laying by trenchless technology and if the value of both the works is taken i.e. the work performed in the contract in question and the new work of cable laying by trenchless technology, then the value of the work so done by the petitioner for which it would have earned profit is much more, than the value of the balance of the work not performed. I may note that the total value of the work under the

subject contract is Rs. 2,40,00,000/-. The evidence has been filed on behalf of the respondent before the Arbitrator that the present petitioner has in fact done work of the value of Rs. 8,28,85,648/-. The relevant paragraph 10 of the affidavit by way of evidence dated 6.11.2007 of one Sh.S.K. Kapadia reads as under:

10. I say that in the tender for open trench method he was awarded cable laying work for 600 kms cables length for a total value of Rs. 24000000/-. I say that out of this, the claimant executed cable laying and other allied works work for a value of Rs. 56,75,128/-. I further say that in the tender for trench less method the claimant was awarded cable laying work for 57.25 kms cable length for a total value of Rs. 25565560/-. I say that the claimant was given additional wok and thus executed cable laying work by trenchless method for 178.689 kms cable length for a value of Rs. 7,72,10,520/-. I say that in terms of value combined in both methods of work, the claimant was entitled to work of value of Rs. 49565560/- only whereas work of value of Rs. 8,28,85,648/- was given to the claimant, which is much more than the entitlement of the claimant under both the tenders.

5. At this stage, it is necessary to refer to Section 73 of the Contract Act and which reads as under:

73. Compensation for loss or damage caused by breach of contract-When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused t him thereby, which naturally arose in the usual course to things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract-When an obligation resembling those created by contract has been incurred and has not been discharged , any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

6. The explanation to Section 73 is relevant and as per which merely because there is a breach of contract the aggrieved party is not entitled to damages unless it actually suffers loss. In the present case, it is clear that the petitioner was awarded work of much more value than the balance work which was not performed under the original contracts dated 1.3.2002. That being the position,

the petitioner would have earned profit for the portion of the work done under the contracts dated 1.3.2002 and also for the new cable laying by trenchless technology. If that be so profits would have been in fact earned by the petitioner disentitling it to claim any compensation as loss of profits. I may note that of course, the petitioner could have led evidence before the Arbitrator to say that it could have performed both the contracts simultaneously and it had the necessary wherewithal in the form of labour and material etc. but it is not disputed by the counsel for the petitioner that no such evidence has been led before the Arbitrator to this effect.

7. The second aspect is that the counsel for the respondent has relied upon para 13 of Section III of the contract and also para 1.4 of the Instruction to the Bidders portion of the contract and both of which clauses clearly specify that though the work awarded is of a particular length for cable laying, however, it was always open to the respondent whereby it could require a particular work not to be performed and in fact the respondent had the right to make alteration, addition and subtraction of any item of work at any stage of the contract and it is specifically mentioned in the aforementioned para 13 and Clause 1.4 of the instructions to bidders that the contractor shall not have any claim/compensation on account of alteration of the contract. In terms of these clauses on showing of reasons and facts necessitating the alteration amendments can be done and which would be a reasonable interpretation of the clauses inasmuch as reasonableness in action will have to be read into such clauses. The counsel for respondent has contended that this clause was inserted in the contract because there were taking place fast changes in technology of cable laying and which became evident in this case itself when the trenchless technology replaced the trenching technology of cable laying being a valid and reasonable reason for amendment in the contract. That being so, on both the grounds, whether the petitioner has at all suffered a loss and has failed to prove the same before the Arbitrator or that there was no obligation on the respondent to necessarily award the entire volume of work under the contracts, cannot be held in favour of the petitioner/claimant.

8. Accordingly, I do not find that the award in question calls for any interference by this Court because it does not violate either any law or any contractual provisions or can be said to be perverse in any manner whatsoever and I do not find any merit in this objection petition. Ordinarily, I would have imposed costs because this Court has been consistently following the practice of awarding actual costs to the successful party, however, Mr. Dinesh Agnani ,Advocate appearing for the respondent, has at this stage, very fairly waived costs.

9. With these observations, the present petition is dismissed.