

# Dispute Resolution Hotline

August 29, 2023

## CAN AN ARBITRAL AWARD BE SET ASIDE PARTIALLY? DELHI HIGH COURT CLARIFIES

An arbitral award can be set aside partially under grounds prescribed by Section 34 of the Arbitration and Conciliation Act, 1996 ("**the Act**"), basis the Proviso to Section 34(2)(a)(iv).

Separate claims within an award may be treated as distinct awards if they are not interdependent, affirming the principle of severability and partial set aside of awards under Section 34 of the Act.

The Delhi High Court distinguishes modification from partially setting aside an award, thereby clarifying that *NHAI vs. Hakeem & Anr.* is not an authority on partial set aside.

The scope and purpose of Section 34(4) clarified: it addresses curable defects in the award without revisiting past findings, ensuring a limited avenue for rectification while maintaining the award's integrity.

The Delhi High Court, in its recent judgement of *NHAI vs. Trichy Thanjavur Expressway Ltd.*<sup>1</sup>, has added depth to the ongoing discourse on the extent of the court's power to set aside arbitral awards under Section 34 of the Arbitration and Conciliation Act, 1996 ("**the Act**").

The case finds its roots in the legal principle established by *NHAI vs. Hakeem & Anr.*<sup>2</sup>, where the Supreme Court ruled that the power to set aside an arbitral award does not encompass the power to modify or vary the award rendered by the Arbitral Tribunal. In *Hakeem*, the focus was on the District and Sessions Judge's decision to increase compensation, examined within a Section 34 application. The Supreme Court emphasized that if deficiencies/ grounds under Section 34 were identified, setting aside the award was the only available course and that the courts lacked the power to modify the terms of an award. This precedent was largely based on the absence of a provision under the Act, allowing modification of an award, which was otherwise provided under the provisions of the erstwhile Arbitration Act of 1940, specifically Sections 15 and 16. This poses a critical question: Does *Hakeem* extend to prohibit partial setting aside of awards?

The genesis of the concept of partial setting aside an Award arises from the Proviso to Section 34 (2)(a)(iv), which provides that if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains a decision on matters not submitted to arbitration, may be set aside.

It is in this background that the Delhi High Court, in its recent decision, has cleared the air over the following issues which has vexed litigators in the recent past:

The High Court considered the question as to whether the power of Courts while deciding an application under Section 34 of the Act, 1996 is restricted to only setting aside a part of the award, under Section 34(2)(a)(iv) [in view of the placement of the proviso to Section 34 (2)(a)(iv)], or could a court also set aside a part of an award on merits specified in the other sub-sections to Section 34(2), such as the award is in conflict with the public policy of India<sup>3</sup>, non- arbitrability of dispute<sup>4</sup>, incapacity of parties<sup>5</sup> etc.

The second aspect which was canvassed for the consideration of the Court related to the scope and intent of Section 34(4) which contemplates the Court adjourning proceedings on the request made by one of the parties in order to enable the Arbitral Tribunal to resume arbitral proceedings and take such further action as in its opinion would eliminate the grounds for setting aside the Arbitral Award itself.

Key takeaways from the Delhi High Court's analysis are as follows-

### No Prohibition on Partial Setting Aside of an Arbitral Award

In analysing whether an Arbitral Award may be set aside partially, the Court divided the grounds prescribed under Section 34 in two parts:

- Grounds pertaining to fundamental invalidity, i.e., those that would render the arbitration proceedings ab initio<sup>6</sup> and
- Grounds pertaining to the merits of the challenge<sup>7</sup>.

The Court held that the placement of the proviso to Section 34(2)(a)(iv) does not restrict its applicability to it and therefore can be validly imported and applied to sub-sections (i)-(iii) and (v) of Section 34(2)(a) and Section 34(2)(b) of the Act. In holding this, the court explains that Section 34(2)(a)(iv) falls within the same genre of fundamental invalidity akin to the other sub-sections of Section 34(2)(a). Therefore, the proviso to this sub-section, dealing with severance of the Arbitral Award, intended to ensure that the award would not be set aside in toto, should be equally

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applicable to sub-sections (i)-(iii) and (v) of Section 34(2)(a). In so far as the applicability of the Proviso to the grounds prescribed by Section 34(2)(b) is concerned, the Court opined that the absence of the Proviso in Section 34(2)(b) does not mean partial annulment cannot be considered as an option when courts assess challenges based on the grounds stated in Section 34(2)(b), i.e., non-arbitrability and public policy. The Proviso itself counters such assumptions as it not only recognizes the validity of partial annulment but also acknowledges separable components within an award. The Proviso envisions divisible components of an award, their separability and isolation. It is concrete proof of both the option to partially annul an award and the existence of distinct components/ elements of the award.

Further the Court held that there is no point lending credence to Article 34 of the UNCITRAL Model Law, ultimately failing to allude to the power to partially set aside an Award, even though it was expressly provisioned for in the draft Article 29, 30, 40 and 41 of the UNCITRAL Model Law. Since there is no clarity from the Working Group Reports to which reference was made to by the counsels' submissions, that suggests a conscious deletion of power, any further deliberation on the same would amount to conjecture.

### Severability of Award Components

The Court held that an award involves decisions made in relation to multiple claims. If a claim isn't subservient, meaning it's not "*entwined or interdependent upon another*", the decision made by the Arbitral Tribunal on that claim is its own separate award. While the final award might cover numerous claims, each decision on an individual claim shall be treated as a distinct award. The Court acknowledged that this understanding stems from the Arbitral Tribunal's authority to issue not only a final award but also interim awards for different claims during the arbitration. Therefore, when an award is perceived as made up of separate components, each with its own independent significance, the Court held that there shouldn't be any obstacle to applying the principle of separability to partially annul or set aside an award. This authority to "set aside" an award in part thus qualifies as a valid use of jurisdiction under Section 34 of the Act.

Severability of the award into different components has also been previously discussed in *JG Engineers v Union of India*<sup>8</sup>, where the Supreme Court affirms the courts authority to segregate different parts of the award that are independent and identifiable which do not suffer from any legal infirmity under the grounds set out in Section 34(2) of the Act. This position has been upheld by *Saptarishi Hotels Pvt. Ltd. and Anr. v. National Institute of Tourism & Hospitality Management*<sup>9</sup>, holding that where parts of an award are found to be unsustainable and severable, setting aside those parts would clearly not amount to a modification.

### Partial Setting Aside Does Not Amount to Modification of an Award.

This brings us to the question of whether adopting such an approach would be contrary to *Hakeem*. In *Hakeem*, the Supreme Court interpreted that the power to set aside an Arbitral Award under Section 34 of the Act does not include the authority to modify the award. The Delhi High Court clarified that the term "modify" refers to altering the ultimate relief granted by an Arbitral Tribunal, establishing a clear difference between modifying an award and partially setting aside specific parts of it. Following *J.G Engineers and Saptarishi*, the Court held that partial setting aside involves annulling a particular problematic portion of the award, as long as it is independent and does not impact other findings. The ability to partially set aside an award rests on whether the claim can stand alone without causing a cascading impact, and therefore the position in *Hakeem* would not be applicable in this case.

### Intent and Scope of Section 34(4)

The court recognized that the scope and intent of Section 34(4) have been previously examined in various Supreme Court decisions. *Kinnari Mullick v. Ghanshyam Das Damani*<sup>10</sup>, clarified that Section 34(4) can only be used while the Arbitral Award is valid, not after annulment, to remand parties back to the Arbitral Tribunal. Subsequently in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*<sup>11</sup> reiterated that Section 34(4) primarily addresses curable defects. *I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd*<sup>12</sup>. emphasized that the provision is applicable only when there is a pre-existing finding or conclusion. It cannot be employed in situations without any established findings, as this could potentially result in an award being set aside due to the absence of substantial reasoning.

Following the above decisions, the Court held that when a Section 34(4) application is made, the Court's initial assessment must be whether the award bears a remediable defect, aligning with the provision's purpose of preserving the award from being wholly set aside. This evaluation stems from the provision's phrase "*the Court may where it is appropriate....*" as elucidated in *I-Pay Clearing Services* and *Dyna Technologies*.

Section 34(4) does not grant the authority to review or reconsider past findings or conclusions. This limitation was established by *I-Pay Clearing Services*, which emphasized the provision's role in rectifying manifest defects without altering the fundamental basis of the award or engaging in comprehensive re-evaluation. However, Section 34(4) may be evoked to necessitate additional reasons or fill in gaps in the reasoning presented in the award. This recourse is contingent upon the availability of material within the record of the Arbitral Tribunal, and the court's role is to ensure that the reasoning provided aligns with the existing record.

It was further held that Section 34(4), being curial in nature operates separately from Section 34(2), which outlines grounds for setting aside awards. *Hakeem* reinforced that these provisions remain distinct, preventing the criteria from Section 34(2) being applied to Section 34(4). Therefore, if an award is found to be afflicted by any of the irregularities specified in Section 34(2) (a) or (b), then invoking Section 34(4) to rescue it would be beyond the permissible scope of curial correction. Section 34(4) would however extend to curative measures similar to those in Section 33. Nevertheless, its application does not permit the Arbitral Tribunal to comprehensively review or alter the award.

Where the Arbitral Tribunal overlooks a claim, the issuance of an additional award on the omitted claim is a viable ground to invoke Section 34(4), consistent with the language and intent of Section 32(3), which mandates court involvement in framing directions under Section 34(4) for closing proceedings. The power under Section 34(4), though effective post-award, can be harnessed to address situations where the Arbitral Tribunal inadvertently omitted to rule on a claim, thus sparing the need for outright annulment.

In conclusion, *NHAI v. Trichy* reiterates and affirms the limited application to remedying defects and avoidance of substantial changes to awards, thereby reinforcing the legislative balance between annulment and curial correction of an award.

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You can direct your queries or comments to the authors.

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<sup>1</sup>O.M.P. (COMM) 95/2023, I.A. 4057/2023 (Stay), I.A. 5361/2023 and O.M.P. (COMM) 106/2023, dated 21 August 2023

<sup>2</sup>(2021) 9 SCC 1

<sup>3</sup>The Arbitration and Conciliation Act, 1996, s.34(2)(b)(ii).

<sup>4</sup>The Arbitration and Conciliation Act, 1996, s.34(2)(b)(i).

<sup>5</sup>The Arbitration and Conciliation Act, 1996, s.34(2)(a)(i).

<sup>6</sup>The Arbitration and Conciliation Act, 1996, s.34(2)(a).

<sup>7</sup>The Arbitration and Conciliation Act, 1996, s.34(2)(b).

<sup>8</sup>(2011) 5 SCC 758

<sup>9</sup>2019 SCC OnLine TS 1765

<sup>10</sup>(2018) 11 SCC 328

<sup>11</sup>(2019) 20 SCC 1

<sup>12</sup>(2022) 3 SCC 121

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