

**The entire period in the wrong forum to be excluded under Section 14 Limitation Act;
Preparation for re-presentation in the right forum also excluded (Delhi High Court)**

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NHPC Ltd. v. BGS SGS SOMA JV

Court: High Court of Delhi | **Case Number:** OMP(COMM) 23 of 2020 | **Citation:**
MANU/DE/1247/2020 | **Judge:** Rekha Palli J | **Date:** 17 June 2020

A. Time limit to file an application for setting aside an award and Section 14 of the Limitation Act

What happens to the limitation period if someone in good faith files a case in a court that is unable to entertain it because of a defect of jurisdiction? How will limitation be counted when the case is ultimately filed in the court of competent jurisdiction? Section 14 of the Limitation Act, 1963 (“LA”) gives the answer. Under this provision, the court can exclude from limitation “the time during which the plaintiff has been prosecuting with due diligence another civil proceeding.”

The Supreme Court has decided in many cases that Section 14 LA applies to a set aside proceeding under Section 34 (3) ACA which has a specific limitation period to challenge an award.¹

But how is the period calculated? Is preparation for the case, collecting documents, consulting counsel etcetera also considered? This and two other issues arose in *NHPC*. Let us see what the court said.

B. Initially, the set aside application was filed in a Haryana court. The Supreme Court later decided that the Haryana court did not have jurisdiction. NHPC then approached the Delhi High Court

NHPC had first filed a set-aside application in a court in the State of Haryana. The court said it did not have jurisdiction and the matter came up to the Supreme Court which finally decided that only a court at Delhi had jurisdiction. After that, NHPC filed the case in Delhi.

The interested reader may note the following dates: –

- (a) 26 June 2016: An arbitral award was passed on which was subsequently rectified on 04 October 2016.
- (b) 03 January 2017: NHPC challenged it under Section 34 ACA in a court in the State of Haryana.

¹ It is three months from the date on which the party making the application had received the award. However, the Court may entertain the application within a further period of thirty days if it is satisfied that the applicant was prevented from making the application within the said period by sufficient cause.

- (c) 21 December 2017: The court said it did not have jurisdiction and returned the petition to be presented before the competent court at Delhi.
- (d) 15 February 2018: NHPC filed an appeal.
- (e) 12 September 2018: The High Court allowed the appeal and asked the Haryana court to consider the matter.
- (f) 28 September 2018: On NHPC's appeal, the Supreme Court stayed the proceedings.
- (g) 10 December 2019: The Supreme Court allowed NHPC's appeal and ruled that the court at Delhi had jurisdiction. It said that "the Section 34 petition is ordered to be presented in the Courts in New Delhi..."
- (h) 11 December 2019 to 07 January 2020: NHPC applied for a certified copy of the Supreme Court's order, applied to the Gurugram Court for a certified copy of the original petition and return of the record, and took steps to engage a counsel, a winter break also intervened from 25 December 2019 till 05 January 2020.
- (i) 08 January 2020: The petition was filed in the Delhi High Court.

C. NHPC filed an application under Section 14 LA for exclusion of time spent in the prior round and preparation to file in Delhi - three questions arose

After filing the set-aside application, NHPC filed an application under Section 14 LA.²

Given what the parties argued, four questions arose for the court's consideration³: –

- (a) Whether the set-aside application was a re-presentation of the original petition or a fresh petition? BGS said it was a fresh petition and limitation should be considered from the date of the award.
- (b) Whether NHPC was entitled to exclusion? In other words, did it satisfy the ingredients of Section 14 LA?
- (c) What is the total number of days for which the exclusion is warranted under Section 14? Should it include the time taken to preparing the application and consulting the counsel?
- (d) If the benefit of Section 14 LA is given, is the petition within limitation under Section 34 (3) ACA?

D. The court's decision

D1. Presentation or re-presentation?

BGS argued that NHPC had added additional paragraphs to the original petition and lost the right to characterize it as a re-presentation. It was, therefore, a fresh petition and subject to a *de novo* scrutiny of limitation without the benefit of Section 14 LA.

² In an application under Section 14 LA, the applicant has to satisfy the court that he had been prosecuting diligently and in good faith.

³ The court clubbed the questions into three, but for convenience, they are treated as four in this Update.

Rekha Palli J rejected the argument by noting that the argument was “neither relevant for the purpose of deciding the present application nor is it a sufficient ground to deprive the petitioner of the benefit of Section 14 LA”: –

- (a) She noted that NHPC merely brought on record the facts arising out of the original filing without taking any new ground. Also, the original petition was annexed.
- (b) But in any event, that did not matter because all re-presentations are considered fresh filings as a matter of law (referring to *Oil and Natural Gas Corporation Limited v. Modern Construction Company*, (2014) 1 SCC 648, which NHPC had cited).
- (c) She referred to the various cases relied on by NHPC⁴ and concluded that they merely reiterated the settled position that when a petition is returned by a court lacking jurisdiction and is re-presented before the competent court, it is to be treated as a fresh plaint. She noted that they do not delve into the question of exclusion of time under Section 14 LA.

D2. Was NHPC entitled to the benefit of Section 14 LA?

Rekha Palli J answered for NHPC and concluded that NHPC is entitled to be granted benefit under Section 14 LA:

- (a) She noted that NHPC “would undoubtedly be entitled to the benefit of Section 14 LA, provided it satisfies this Court that it was diligently and in good faith pursuing the proceedings before the Gurugram Court, the Punjab High Court and the Supreme Court.” This assessment, she noted, “cannot be carried out in abstract and would depend on a careful and thorough analysis of the facts of each case.”
- (b) Then, she cited two paragraphs from *MP Steel Corporation v. Commissioner of Central Excise*, (2015) 7 SCC 58⁵ noting that “the principles guiding the application of Section 14 LA have been succinctly set down by the Supreme Court.”
- (c) She rejected BGS’ contention that NHPC’s action was neither bonafide nor diligent as it willfully chose to pursue proceedings in the wrong courts despite knowing that only the Courts in Delhi had the requisite jurisdiction. She relied on the fact that the Punjab and Haryana High Court, had found merit in NHPC’s plea regarding the Gurugram Court’s jurisdiction to entertain its petition. She also noted that “even while approaching the High Court by way of an appeal under Section 37 ACA, which the Supreme Court held as not being tenable, the petitioner had been guided by the decision of a Division Bench of this Court in *Antrix Corporation Ltd. v. Devas Multimedia Pvt Ltd.*, 2018 (4) ArbLR 66 (Delhi).”
- (d) She stated that these facts were material in establishing that the petitioner satisfies the twin test to qualify for the benefit of Section 14 as laid down by the Court in *Surya Chakra*.⁶

⁴ *Chandrayya v. Seethanna*, AIR 1940 Madras 689; *Amar Chand Inani v. Union of India*, (1973) 1 SCC 115; and *Ram Kishan Rai v. Ashibbad Rai*, AIR 1950 Patna 473.

⁵ *MP Steel Corporation*, para 49 (“... the expression “the time during which the plaintiff has been prosecuting with due diligence another civil proceeding” needs to be construed in a manner which advances the object sought to be achieved, thereby advancing the cause of justice”).

⁶ *Suryachakra Power Corporation Ltd. v. Electricity Department*, (2016) 16 SCC 152 (acting diligently and in good faith).

D3. What period should be excluded under Section 14 LA?

BGS had argued that “even if the entire period during which proceedings were actually pending before one court or the other is excluded, the present petition is still barred by delay.” The argument was rejected:

- (a) Palli J noted that NHPC “has prayed for the exclusion of not only the period during which proceedings are actually pending but also the period spent in preparing and filing the appeal.”
- (b) She once again referred to *MP Steel*, this time for the proposition that “the period from the cause of action till the institution of the appellate or revision proceedings from original proceedings, which may have ultimately failed for want of jurisdiction, was liable to be excluded.”
- (c) She distinguished *Simplex Infrastructure Ltd. v. Union of India*, (2019) 2 SCC 455 noting that “the Supreme Court did not have any occasion to deal with appellate proceedings arising out of the order passed by the original Court and therefore, the Supreme Court did not have to deal with the question as to whether the time spent in taking preparatory steps for filing the appeal ought to be excluded.”
- (d) She then said that “once it is found that no negligence or inaction can be attributed to the petitioner, and the benefit of Section 14 is available to it, the entire period right from the institution of the original proceedings to the termination of the appellate proceedings ought to be excluded while computing the delay, if any.”
- (e) If the period was not excluded, she said, it would “violate the spirit of Section 14 LA which endeavors to restore the petitioner to the same position as it was on the day it filed the original petition.”

D4. Is the petition within limitation under Section 34 (3) ACA?

Once the exclusion under Section 14 LA was calculated, the next question was whether the petition was still within limitation under Section 34 (3) ACA?

Palli J noted that under Section 34(3) ACA, the petitioner is entitled to file a petition challenging the award within 90 days,⁷ which was further extendable by a period of 30 days. The extended period of 30 days can only be availed after satisfying the Court of sufficient causes for delay.

Palli J found that after excluding 1088 days under Section 14 LA, the net period taken by NHPC in filing the petition was 105 days, that is, beyond the 90 days limitation period but within the 30 days additional limitation period.

NHPC had explained the 15 day-long period as the time taken to prepare the petition, collate requisite documents and establish communication with its counsel during winter break. Palli J. found this explanation sufficient and condoned the delay accordingly.

She added another reason and noted that if the time taken to prepare the petition (and appeal) is not included then, the calculation was such, that it would imply that the Supreme Court’s directions for representation came at a time when the petition was already time-barred, being beyond the statutorily

⁷ **Editor’s note:** Several decisions, including this one, have confused the maximum limitation period as 120 days. That is simply not correct. Three months plus thirty days will not always be equal to 120 days. It may be more, and it may also be less. Refer to our update on *National Highways Authority of India & another v. Subhash Bindlish & others* available at <https://www.nfral.in/limitation-for-filing-setting-aside-application/>.

permissible period of 120 days. She noted that “it was open and, rather, appropriate for the respondent to agitate this issue before the Supreme Court that any such re-presentation would time-barred per se.”