

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 111 of 2014

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

1. NALCO Officers' Association, represented through its General Secretary, Sri Bijay Kumar Parida, aged about 56 years, S/o Bharat Chandra Parida, S & P Complex, NALCO Nagar-759145, Anugul, Odisha.
2. Santosh Kumar Sahu, aged about 50 years, S/o Sadananda Sahu, working as Junior Manager (Mechanical) in Smelter Plant, Nalco, Anugul.

.....Applicants

VERSUS

1. Union of India represented through Secretary of Mines, Ministry of Mines, New Delhi.
2. NALCO, represented through its Chairman-cum-Managing Director, At-NALCO Corporate Office, Nalco Bhawan, P/1, Nayapalli, Bhubaneswar – 751061, Dist.-Khurda.
3. Director (HR), NALCO Corporate Office, Nayapalli, Bhubaneswar.
4. Deputy General Manager (I.E.), NALCO Corporate Office, Nayapalli, Bhubaneswar.
5. Executive Director S&P Complex, NALCO, Nalconagar-759145, Angul.

.....Respondents.

For the applicant : Mr.S.Pattnaik, counsel

For the respondents: Mr.M.K.Mishra, counsel
Mr.D.K.Pattnaik, counsel

Heard & reserved on : 20.2.2020

Order on : 16.3.2020

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

This OA has been filed by the applicants seeking the following reliefs under section 19 of the Administrative Tribunals Act, 1985 as under:-

“a) The Hon'ble Tribunal may pleased to quash the circular bearing Ref.No. CHRD/RR/003.1/499/2014, dt. 20.02.2014 issued by the Respondent No.4 under Annexure-3 and declare the same as discriminatory and violative of Article-14 & Article-16 of the Constitution of India, 1950.

b) Any other relief(s) be deem fit and proper in favour of the applicant.”

2. The applicant No.1, the NALCO Officers' Association represented through its General Secretary and the applicant No. 2, an executive working under NALCO, are aggrieved by the decision of the respondents vide order dated 20.2.2014 (Annexure-3 of the OA) suspending the benefit of encashment of half pay leave (in short HPL) for the executives, but retaining the benefit of the encashment of leave including HPL upto 300 days at the time of

retirement/VRS/death. It is averred that the impugned order of the respondent No. 4 is prejudicial for the executives as the similar benefit has not been suspended for the non-executives. The decision is therefore alleged to be discriminatory. It is further alleged in the OA that the impugned decision has been taken without any justification for which it is liable to be quashed.

3. Counter filed by the respondents averred that the CAG has objected to such benefit being extended to the executives in the light of the OM dated 5.8.2005, 10.12.2008 and 26.10.2010 of the Department of Public Enterprises (in short DPE) and copies of the OMs are enclosed at Annexure- R/2 series of the Counter reveal that such benefits are not permissible as per these guidelines of the Government. However, the benefit of encashment of leave including HPL upto 300 days is available at the time of retirement. So far as the non-executives are concerned, it is averred that the same is governed by the wage agreement signed between the management and workers' union. The respondents have filed an Additional Counter dated 24.4.2019 stated that as per the 6th Long Term Wage settlement signed on 5.3.2019 for the non-executives, such benefit on encashment of HPL has also been withdrawn for non-executives as would be revealed from the circular dated 8.3.2019 (Annexure-R 2/4 of the Additional Counter dated 24.4.2019).

4. The respondents have also filed another Additional Counter dated 7.02.2020 in response to the pleading by the applicant's counsel to raise the issue of the Board's delegation of authority for amending the rules in question to the CMD under the provisions of the Companies Act read with the Memorandum of Association of NALCO (in short MOA). It is stated by the respondents that the point cannot be raised at hearing stage as it was not raised by the applicants in the pleadings. It is stated that under the Article 66(1) of the MOA authorizes the Board of Directors to delegate the power and the Article 66(2) of the MOA authorizes the CMD to exercise such power delegated by the Board. It is further stated that section 179 of the Companies Act, 2013 has no application to the present case since the Board in this case had delegated the power to the CMD on 25.11.1994 to modify, alter and amend the rules in question from time to time with the following resolution as under:-

“Subject to the above changes, the Board approved the amendment in the NALCO Employees Leave Rules, 1991 as proposed in the Board note including the supplementary note. The Board also authorised CMD to modify, alter, amend the Rules as may be required from time to time.”

5. No Rejoinder has been filed by the applicants in reply to the Counter/Additional Counter. We heard learned counsel for the applicants who also filed a detailed written note of submissions with the list of relevant dates.

6. Learned counsel for the applicants, while reiterating the points made in the applicants' pleadings, raised broadly three arguments. His first argument was that the benefit of encashment of HPL was allowed to the executives of NALCO by the Board and the circular dated 20.2.2014 (Annexure-3), withdrawing the said benefit, was issued without any approval of the Board, since such benefits were allowed by the Board of Directors and the CMD is not competent to reverse the decision of the Board. His second argument was that the power of the Board of Directors under the Article 67 of the MOA, including power to make employees' service rules under sub para (xvi), cannot be delegated to the CMD since the Article 67 of the MOA provides for specific power of the Board of Directors. Further, it was argued that the provisions of Article 67 were without prejudice to the general powers under the preceding Article, which meant that these specific provisions have overriding effect on the provisions under Article 66 of the MOA.

7. The third argument of learned counsel for the applicants was that the decision was discriminatory since similar benefit of encashment of HPL was being allowed to the non-executive employees of NALCO while withdrawing the same for the executives and it was argued that the impugned order, being discriminatory, is bad in law. The fourth argument advanced by learned counsel for the applicants was that after enactment of the Companies Act, 2013, the delegation made by the Board to the CMD was invalid in view of the provisions of the section 179 of the said Act. Learned counsel for the applicant, therefore, argued vehemently that the order dated 20.2.2014 (Annexure-3 of the OA) is not sustainable under law. He also filed a written note of submissions alongwith a list of relevant dates.

8. We have heard learned counsel for the respondents who opposed the arguments of the applicant's counsel. On the first argument of the applicant's counsel, it was submitted that in view of the Board's resolution dated 25.11.1994 the rules relating to the leave of NALCO employees, had also delegated the power to amend the said rules to the CMD and that delegation was valid on the date when the impugned order at Annexure-3 of the OA was issued with approval of the CMD, NALCO. He submitted that the impugned decision, therefore, did not require any prior approval of the Board of Directors. Regarding the second argument put forward by the applicant's counsel, it was submitted by learned counsel for the respondents that a reading of the provisions of the MOA will reveal that the power of the Board to delegate under the Article 66 of the MOA will also include the powers under the Article 67 of the MOA and that the power under Article 66 of the MOA is without prejudice to the general power under Article 67 of the MOA. Regarding third argument of

the applicant's counsel, it was submitted by the respondents' counsel that the section 179 of the Companies Act, 2013, referred to by the applicant's counsel, has no application to this case since the delegation of the Board, which was exercised by the CMD to issue the impugned order dated 20.2.2014, was approved prior to coming into force of the Companies Act, 2013. He also submitted that the section 179 is applicable to the affairs of the company and it has no application to the service conditions of employees.

9. Learned counsel for the respondents also submitted that the issues relating to the provisions of the MOA and applicability of the section 179 are not the points of law and hence, these should have been raised by the applicants in the pleadings. He also filed a written note of submissions enclosing copy of the judgment of Hon'ble Apex Court in the case of State of West Bengal and Another vs. West Bengal Copy Writers' Association and Another (2009) 14 SCC 132 and in the case of BALCO Employees' Union (Regd.) vs. Union of India and others, (2002) 2 SCC 333 to bolster his arguments.

10. With due consideration to the submissions as well as the pleadings on record by both the parties, we have to consider if the impugned order dated 20.2.2014 was valid in view of the grounds raised by the applicants' counsel questioning the authority of the CMD to take such a decision and validity of such delegation after 2013. The respondents have justified the decision in view of the observations of the CAG and the OMs of the DPE as enclosed at Annexure-R2/1 series to the Counter. It is seen that the paragraph 2 of the OM dated 26.10.2010 of the DPE stated as under:-

“(a) DPE OM dated 05.08.2005 provides for a maximum ceiling of Earned Leave that can be accumulated. CPSEs are not permitted to encash leave beyond 300 days at the time of retirement of an employee of CPSE. The employees are not permitted to accumulate more than 300 days as specified under DPE guidelines.”

These circulars of the DPE do not provide for encashment of HPL except at the time of retirement/ VRS / death of an employee and the maximum extent of leave which can be encashed or accumulated was fixed at 300 days as per the OM dated 26.10.2010 and the encashment was not permissible when an employee is in service. The applicability of these OMs at Annexure-R2/1 series of the Counter to the service conditions of the applicants have not been disputed by the applicants nor these OMs have been challenged by the applicants in this OA. Further, the applicants have not contradicted the contentions of the respondents at paragraph 5 of the Counter filed on 20.7.2015. Clearly, the benefit of encashment of HPL being allowed to the employees of NALCO as per the NALCO Employees Leave Rules dated

10.10.1991 (Annexure-1 of the OA) is not permissible after issue of the OM dated 26.10.2010 (Annexure-R2/1 series of the Counter) and hence, the order dated 20.2.2014 (Annexure-3 of the OA) is in accordance with the DPE OMAs as per the respondents' contentions in the Counter.

11. Regarding the point raised by learned counsel for the applicants about the validity of the order at Annexure-3 on the ground that there was no decision of the Board to that effect, the respondents have referred to the decision of the Board on 25.11.1994 in which the Board has delegated the power to modify or amend the NALCO Leave Rules has been delegated to the CMD as averred in the Additional Counter dated 7.02.2020, filed in pursuance to the order dated 20.1.2010 of this Tribunal directing the respondents to file authority for delegation of power to CMD. The applicants have not denied the averments, although they have raised the issue of validity of such delegation after enactment of the Companies Act, 2013 in the light of the section 179 of the said Act. Hence, it is clear that the CMD had authority to issue the order dated 20.2.2014 (Annexure-3) provided the delegation made by the Board to CMD in this regard on 25.11.1994 remains valid after enactment of the Companies Act, 2013 and provided such delegation can be done under the provisions of the Articles 66 and 67 of the MOA.

12. With above factual background, the crucial questions to be decided in this case are as under:-

- (i) Can the Board of Directors delegate its power under the Article 67(xvi) of the MOA? and
- (ii) Will the delegation of the Board of Directors on 25.11.1994 to the CMD to amend the NALCO Leave Rules, 1991 from time to time remain valid after enactment of the Companies Act, 2013?

13. Regarding the question at paragraph 12(i), it is seen that although the delegation of power to amend the NALCO Employees Leave Rules, 1991 was made on 25.11.1994, no challenge has been made to such delegation on the ground that it is not permissible under the Articles 66 and 67 of the MOA and the said delegation was acceptable to the applicants since 25.11.1994 till issue of the impugned order dated 20.2.2014. Hence, the applicants' challenge of the delegation made by the Board to CMD on 25.11.1994 to amend and modify the said Leave Rules on the ground that such delegation was not as per the provisions of the MOA, is badly delayed and barred by limitation under the provisions of the Administrative Tribunals Act, 1985. On merit also, we are unable to agree with the contentions of learned counsel for the applicants after perusal of the MOA. The Article 67 of the MOA states as under:-

“67. Subject to the provisions of the Act and without prejudice to the general powers conferred by the last preceding Article and other powers conferred by these Articles, the Board of Directors shall have the following powers,.....

.....

(xxiv) Subject to Section 292 of the Act, to sub-delegate all or any of the powers, authorities and discretion for the time being vested in them with or without power or authority to such delegate also sub-delegate any or all of the powers, authorities and discretions vested in him provided that all such sub-delegations shall, however, be subject to the ultimate control and authority being retained by the Board of Directors of the Company.”

14. It is clear from the above provisions in Article 67 of the MOA, that subject to section 292 of the Companies Act, 1956, all the powers listed under the Article 67 of the MOA can be delegated by the Board of Directors. This implies that the powers listed in section 292 of the 1956 Act can be delegated as provided in that section. The corresponding Section for Section 292 of 1956 Act in the Companies Act, 2013 is in the section 179 of the 2013 Act, which will be discussed subsequently. From the perusal of the provisions under the Article 67 of the MOA and specifically the Article 67(xxiv) of the MOA, we have no hesitation to hold that the Board of Directors have the authority to delegate all the powers listed under the Article 67 of the MOA subject to the section 179 of the Companies Act, 2013 Act (section 292 of Companies Act, 1956). In the circumstances, the question at paragraph 12(i) has to be answered in affirmative, contrary to the submissions made on behalf of the applicants in this regard.

15. Regarding the question at paragraph 12(ii) of this order, we take note of the provisions of the section 179 of the Companies Act, 2013 as under:-

“179. Powers of Board

(1) The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting:

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.

(2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

(3) The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—

- (a) to make calls on shareholders in respect of money unpaid on their shares;
- (b) to authorise buy-back of securities under section 68;

- (c) to issue securities, including debentures, whether in or outside India;
- (d) to borrow monies;
- (e) to invest the funds of the company;
- (f) to grant loans or give guarantee or provide security in respect of loans;
- (g) to approve financial statement and the Board's report;
- (h) to diversify the business of the company;
- (i) to approve amalgamation, merger or reconstruction;
- (j) to take over a company or acquire a controlling or substantial stake in another company;
- (k) any other matter which may be prescribed:

Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify:

....."

16. From above provisions it is clear that the Board cannot delegate the powers listed in the section 179(3) except for the powers specified in clauses (d) to (f). It has not been demonstrated by the applicants that the service conditions of the employees of the Company is one of the functions included under section 179 which cannot be delegated by the Board to the CMD. None of the powers specified in the section 179(3) except the clause (k) include the service conditions of the employees of a company. Nothing has been furnished by the applicants' counsel to show that the service conditions of the employees is one of the function prescribed by the Government under the section 179(3)(k) of the Companies Act, 2013. Hence, we are unable to agree with the submissions made on behalf of the applicants that the delegation made by the Board on 25.11.1994 to the CMD, NALCO to modify or amend the NALCO Employees Leave Rules, 1991 is invalid after enactment of the Companies Act, 2013 and the question at paragraph 12(ii) of this order is answered in affirmative, against the stand taken by learned counsel for the applicants.

17. Learned counsel for the applicants has raised the issue of discrimination since similar benefit of encashment of HPL was being allowed to the non-executive employees. It is explained by the respondents that the service conditions of non-executives are governed by the wage settlement agreement and since the existing wage agreement which was in force, contained the provision for encashment of HPL, it could not have been withdrawn without amending the said agreement. It is also stated in the Additional Counter dated 24.4.2019 of the respondents that as per the new wage agreement as per the circular dated 8.3.2019 (Annexure-R2/4 to the Additional Counter dated 24.4.2019), the benefit of encashment of sick leave during service will be discontinued for non-executive employees has been discontinued vide para 11.2 of the said circular. In order to claim discrimination vis-a-vis non-executives, it was necessary on the part of the applicants to show that the executive and non-executive employees are similarly placed as far the benefits

of encashment of leave are concerned. No such averment is advanced as to how both the groups of employees are to be treated on similar footing for this purpose. The settled position of law is that if a reasonable classification of employees can be made in objective manners, they can be treated differently and parity in service benefits cannot be claimed as a matter of right. In this case, the service conditions of the non-executive employees are governed by the agreement between the labour unions and management, which were not applicable to the executives of NALCO. No rules, guidelines or policy documents have been furnished by the applicants to show that both the executives and non-executives are entitled to the same leave encashment benefits. In the circumstances, the argument that the impugned order dated 20.2.2014 (Annexure-3 of the OA) is discriminatory as similar benefit was allowed for non-executives, is not tenable.

18. In the facts and circumstances as discussed above, we do not find any ground to justify any interference in the matter as prayed for in the OA. The OA is accordingly dismissed. However, there will be no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath