FORM NO – 21
(See Rule 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: O.A. 28 OF 2010

THIS 20TH DAY OF AUGUST, 2013

CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D.Samanta, Member (Administrative)

Major Akhil Srivastava, (discharged as Captain)
Of 113, Infantry Battalion (Territorial Army) RAJPUT
Pin-934313 (Sahapur Camp, New Alipore, Kolkata)
C/o 99 APO, Son of Sri Anil Prem Srivastava,
C/o NILEX, 94, Phears Lane, 1st Floor,
Koliata-700 012 (West Bengal)

….. Applicant

Versus –

1. Union of India through its
   Under Secretary, Ministry of Defence,
   New Delhi.

2. The Commanding Officer 113 Infantry
   Battalion (Territorial Army) RAJPUT
   Pin : 934 313 (Sahapur camp, New Alipore
   Kolkata), C/o 99 APO

3. The Commander, Headquarter Territorial Army
   Group (Eastern Command) Pin 900 285
   (Fort William campus, Kolkata) C/o 99 APO

4. The Additional Director General,
   Territorial Army, Additional Directorate
   General Territorial Army, Integrated HQ,
   Ministry of Defence (Army) Block-'L'
   Church Road, New Delhi-110 001

……Respondents

For the applicant: Mr. Gopal Chandra Ghosh, Advocate

For the respondents: Mr. D.K.Mukherjee, Advocate

O R D E R

Per Hon'ble Lt. Gen. K. P. D. Samanta, Member (A) :

The applicant, who was a Major in the Territorial Army (TA), has filed this original application being aggrieved by the order dt. 26th May 2010, by which he was discharged from the said Territorial Army. He has challenged the said order as illegal, arbitrary and against the rules; thus has prayed for quashing of the same and for his reinstatement.

2. The matter was heard at length and the hearing was concluded on 1.7.13 after which the final order was reserved. However, while writing the final order in chambers, it was noticed that there was a point of maintainability in this case, which somehow was not discussed during the course of hearing nor was it raised by the respondents at any point of time. Accordingly, the matter was listed "for being spoken to" after giving notice to the parties. The point of maintainability of this application before this Tribunal was argued by both parties.

3. The issue with regard to maintainability is that as per Section 2 of the Armed Forces Tribunal Act, 2007, it is provided as under :-

> "**2. Applicability of the Act**. – (1) The provisions of this Act shall apply to all persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1050 (45 of 1950);
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> (2) This Act shall also apply to retired personnel subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1050 (45 of 1950), including their dependants, heirs and successors, in so far as it relates to their service matters. "

Now, Sec 2 (1)(e) of the Army Act, 1950 provides as under :

" **2. Persons subject to this Act**

(1) The following persons shall be subject to this Act wherever they may be, namely :-

(a) … … …

(b) … … …

© … …. …

(d) … … …

(e) **Officers of the Territorial Army, when doing duty as such officers, and enrolled persons of the said Army *when called out or embodied or attached to any regular forces,* subject to such adaptations and modifications as may be made in the application of this Act to such persons under sub-section (1) of section 9 of the Territorial Army Act, 1948 (56 of 1948)**;

… … …. …..

4. While going through facts averred in the application, we find that the applicant joined the Territorial Army on 18th December 2000 as a commissioned officer and he was disembodied on 4th October, 2006 and had remained in that state of disembodiment till he was discharged from the Territorial Army by the impugned order dt. 26th May 2010. Therefore, the undisputed fact is that the applicant remained in disembodied state with effect from 4th October 2006 till 26th May 2010 when he was discharged. Under such circumstances, it is quite evident that neither the cause of action arose nor the applicant's status could be considered to be during a period when he was in "embodied state". Therefore, the applicant would not be strictly coming under the Army Act, 1950 in any way.

5. Moreover, the provision of the Army Act, Sec. 2(1)(e) as quoted above, when read in conjunction with Sec. 9(1) of the T.A. Act, 1948, the position would be further clear. Sec 9(1) of the TA Act reads as follows:-

"9. **Application of the Army Act 1950(XLVI of 1950)** – (1) Every officer, when doing duty as such officer, and every enrolled person when called out or embodied or attached to the Regular Army shall, subject to such adaptations and modifications as may be made therein by the Central Government

by notification in the official Gazette, be subject to the provisions of the Army Act, 1950 (XLVI of 1950) and the rules or regulations made there-under in the same manner and to same extent as if such officer or enrolled person held the same rank in the regular army as he holds for the time being in the Territorial Army.

(2) When an offence punishable under the Army Act, 1950 (XL VI 1950), has been committed by any person whilst subject to that Act under the provisions of sub section (1) such person may be taken into and kept in military custody, and tried and punished, for such offence as aforesaid in like manner as he might have been taken into and kept in military custody, tried and punished, if he had continued to be so subject.

6. It is, therefore, evident that even during the state when Army Act, 1950 is applicable in respect of TA personnel; they are still governed under the provisions of TA Act.

7. We find that in this case, the applicant was neither called out nor embodied nor attached to the Regular Army, and therefore, he could not be said to be governed under the Army Act, 1950 in any manner.

8. Even when dealing with provisions of Sec. 24 of the TA Act, 1948, which relates to the applicability of Army Act to enrolled personnel of TA during training, we find that the applicant was not also in a state of actual training or in periodic training when the cause of action arose. Therefore, even under Sec 24 Sub-sec (1) of the TA Act quoted below; the applicant would not strictly come under the provision of the Amy Act, 1950.

"**Sec. 24. Application of the Army Act, 1950, to enrolled persons** –

(1) The Army act, 1950 and the rules and regulations made there-under in their application to the enrolled persons of the Territorial Army during training shall, subject to the provisions of sub-rule (2), be modified in the manner and to the extent specified in Schedule II in the case of males and Schedule II-A in the case of females.

(2) Enrolled persons not being females who are serving on the permanent staff of a unit or are undergoing training at the National Defence academy shall be subject to the said Act and the rules and regulations made thereunder without any modifications."

9. Under the provision of the ibid Act and rules as quoted above, we could not find in any manner to justify that the applicant would be coming under the provision of Army Act. Moreover, it is very clear from the records that the applicant was disembodied from the TA with effect from 4.10.06 and thereafter discharged from TA on 26.5.10. During the above period i.e. from October 2006 to May 2010, undisputedly, the applicant was in a disembodied state of the TA and also not under any kind of training. Therefore, during this period, although he was still under the TA Act, but definitely he was not subject to the Army Act. We also find from the records that the entire process of calling the applicant for training, issuance of show cause notice and discharge from the TA Service was all carried out under the relevant provisions of TA Act and Rules and not under Army Act. That besides, the cause of action arose after the receipt of the show cause notice dated 26.8.09 that was issued under provisions of Section14 (D) of the TA Act, 1948. Therefore, no such action can justify or indicate that the applicant was governed under the Army Act during the aforesaid period.

10. While hearing the matter under the heading "for being spoken to", the ld. advocate for the applicant, Mr. G.C.Ghosh, drew our attention to regulation 93 of the TA Regulations, which is quoted below:-

> **Reg. 93.- Failure to Report for Training or for Service** -- A member of the Territorial Army, who fails to attend Recruit or annual training in accordance with TA Rules 19 and 20 and whose absence has not been satisfactorily accounted for, renders himself liable to punishment under the Army Act, 1950, or under Section 10 of the Territorial Army Act, 1948 or under Territorial Army rules 29 to 31, as the case may be. One failing to report for service when called upon to do so in accordance with Territorial Army Rule 33 will be an absentee without leave and will be liable to punishment under the Territorial Army Act, Section 10, or the Army Act, 1950."

11. He drew our attention to the point that the applicant was called for training while he was in a state of disembodiment but he could not report for such training for reasons that have been agitated in the OA. As per the ibid regulation, as submitted by the ld. adv. for the applicant, the applicant could be punished under the Army Act for not reporting for training under the Army Act. Therefore, to assume that he would not be under the Army Act would actually violate the provision of regulation 93 of the TA Act.

12. We have analyzed the issue and we notice that in regulation 93, it has been very clearly mentioned that failure to report for training or service by a member of the TA when such absence has not been accounted for, renders himself liable to *punishment under the Army Ac, 1950 or under Section 10 of the Territorial Army Act, 1948 or under the Territorial Army Rules 29 to 31, as the case may be.* Nowhere is it specifically stated that such absentee would come only under the Army Act. In fact, a detailed reading of the ibid Regulations would reveal that the applicant, though not under Army Act, had continued to remain under the TA Act even during the state of disembodiment.

13. Mr. Ghosh in support of his contention has also placed reliance on two unreported decisions of AFT, Principal Bench in the case of **Ex Lt. Rajib Phukan –vs- UOI & Ors** (TA 320 of 2009) decided on 9.11.11 and **Major S.D.Singh (Retd.) & Anr –vs- UOI & Ors** (OA 165 of 2010) decided on 19.10.12.

14. We have gone through the decisions referred to by the ld. adv. We find that the facts are totally different in both the cases. When in the former case, the applicant sought for withdrawal of his application seeking disembodiment in the later case, the issue was with regard to grant of pensionary benefits to TA personnel at par with army personnel. The question of jurisdiction of the Tribunal was not at all agitated nor considered in those

two cases and hence they are of no use for our purpose. Similarly, in another decision in TA 15 o 2012 decided by the present Bench of AFT, Kolkata on 5.2.13, as relied on by the ld. adv. for the applicant, the subject matter was also on different aspect i.e. shortfall of required minimum qualifying service for grant of pension. The issue of jurisdiction was also not considered in that case. Therefore, this case is also not applicable to the case in hand.

15. Mr. Ghosh also drew our attention to the fact that the applicant was called for annual medical examination, which was carried out on 3.4.10 at the Command Hospital, Kolkata. In this connection he submits that the applicant was called by 113 Infantry Battalion of TA vide their letter dt. 30th March 2010(copy produced before us) showing that he would be required to undergo annual/periodic medical examination every year and it is in accordance with such instruction that the applicant submitted himself for such medical examination. Moreover, he clarified that as per policy, annual medical examination is only required to be done for an officer once he is embodied or is under training. Drawing a conclusion from the instruction to appear for annual medical examination, the ld. adv. for the applicant submits that the applicant may be treated as if he was embodied in TA since he was asked to undergo annual medical training.

16. We have carefully considered the connected correspondences as produced before us and the submission made by the ld. adv. for the applicant. We are, however, of the view that this medical examination can at best be treated as pre-requisite before proceeding for embodiment or training. That by itself does not place an officer in a state of embodiment.

17. Under the circumstances discussed above, we are of the considered opinion that under the present provisions of TA Act and Rules/Regulations and the Army Act, Sec. 2(1) (e), the applicant cannot be considered to be under Army Act during the period the cause of action arose. Therefore, he cannot claim any relief from the Armed Forces Tribunal under the provision of Sec. 2 of the AFT Act, 2007 quoted above.

18. In view of the above, we hold that this application cannot be adjudicated by this Tribunal being beyond our jurisdiction. Accordingly, the application stands dismissed for lack of jurisdiction. However, the applicant will be at liberty to approach appropriate forum for redressal of his grievance, if so advised. Be it noted that we have not gone into the merit of the case and all points are kept open.

19. Let a plain copy of the order, duly countersigned by the Tribunal Officer be furnished to both sides, on observance of due formalities.

(LT. GEN. K.P.D.SAMANTA)
MEMBE (ADMINISTRATIVE)

(JUSTICE RAGHUNATH RAY)
MEMBER(JUDICIAL)