

A UNION OF INDIA & ANR.
v.
EX. MAJOR SUDERSHAN GUPTA
(Civil Appeal No.4418 of 2004)

B MAY 20, 2009
[DR. MUKUNDAKAM SHARMA AND DR. B.S.
CHAUHAN, JJ.]

C *Armed Forces – Court martial – Order of convening the
General Court Martial – Legality/validity of – Held: Records
of the Convening Authority were not available, and as such it
could not be decided whether the competent Authority applied
its mind while passing the convening order – Army Authorities
destroyed the records pursuant to the prevailing Rule that
D records of all court martial proceedings should be retained
only for a period of seven years – However, writ petition was
filed before expiry of seven years and since matter was sub-
E judice, Army Authorities were required to preserve the records
to make them available to decide the issue – Thus, order of
High Court setting aside the order of convening the General
Court Martial, upheld.*

*Union of India and Ors. vs. Harish Chandra Goswami AIR
1999 SC 1940, referred to.*

F Case Law Reference:

AIR 1999 SC 1940 Referred to. Para 1

CIVIL APPELLATE JURISDICTION : Civil Appeal No.
4418 of 2004.

G From the Judgment & Order dated 10.3.2003 of the High
Court of Delhi in C.W.P. 486 of 1991.

S.K. Dubey, Gaurav Aggarwal, Ajay Sharma, B.K. Prasad

and Sushma Suri for the Appellants.

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Sushil Kumar Jain and Pratibha Jain for the Respondent

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. This appeal is directed against the judgment and order dated 10.03.2003, passed by the Division Bench of the Delhi High Court setting aside quashing the order of convening the General Court Martial. While doing so and coming to the conclusions leading to the said order the High Court applied the ratio of the decision of this Court in *Union of India & Ors. vs. Harish Chandra Goswami*, reported in AIR 1999 SC 1940. While allowing the aforesaid writ petition, the High Court has observed in paragraph 4, in the following manner:

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“We have given ample opportunities to the respondents to produce the records as to whether the convening order passed by Maj. Mehta was passed after the same was endorsed by the Major General concerned, so that it could have been observed whether the competent authority under the law has applied its mind before convening the General Court Martial or not. In spite of various opportunities granted to the Respondents, the respondents have not been in a position to produce the records before us.”

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2. When the present appeal is taken up for final hearing and on our query, it is pointed out that the records of the Convening Authority are not available as the same has been destroyed by the Army Authorities. We are informed that the same has been done pursuant to the prevailing Rule that records of all Court Martial proceedings should be retained only for a period of 7 years. However, the records disclose that the writ petition was filed in the Delhi High Court by the respondent before the expiry of 7 years period and since the matter was sub-judice before the Court, the Army Authorities were required to preserve the records so as to make the same available to

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- A the Court to effectively decide the issue with regard to the
legality or validity of the order of Convening the General Court
Martial. It would not be possible to decide the issue raised, as
has been rightly held by the High Court, namely, as to whether
or not there was proper application of mind by the competent
B authority while passing the Convening Order.

3. Learned counsel appearing for the respondent has
stated that adverse inference should be drawn against the
inability of the Department to produce the records. However,
C in view of non-availability of records, we find no reasonable
ground to interfere with the order of the Division Bench of the
High Court. In our considered opinion legality and the validity
of the order of Convening the General Court Martial cannot now
be decided in the absence of the records which the appellant
is required to produce before us. We, therefore, find no merit
D in this appeal which is accordingly dismissed leaving the
parties to bear their own costs.

4. At this stage, learned counsel for the respondent states
that in view of the order passed today the respondent shall have
E to be paid all the consequential benefits. We grant three
months time to the appellant to comply with the order and to
give all consequential benefits.

N.J.

Appeal dismissed.