

**2009 (9) SCR 584
UNION OF INDIA & ANR.**

v.

**EX. MAJOR SUDERSHAN GUPTA
(Civil Appeal No.4418 of 2004)**

MAY 20, 2009

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

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:

“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.”

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 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 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, 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 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 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.

