
(1989) 03 DEL CK 0086

In the Delhi High Court

Case No : Criminal Writ Petition No"s. 543, 545, 555, 576 and 577 of 1988

Ved Pal Anand

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-03-1989

Acts Referred:

Customs Act, 1962 — Section 2(39)

Citation : (1989) ILR Delhi 264

Hon'ble Judges : M. Sharief-ud-din, J;Charanjit Talwar, J

Bench : Division Bench

Advocate : Kapil Sibal, K. Jaiswal, A.K. Nigam, Rajender Dutt and Kamini Lao, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) (RULE D.B.)-This judgment deposes of five Criminal Writ Petitions.

(2) CR. Writ Petition No. 543 of 1988 has been filed by Ved Pal Anand. His son Ashok Anand, who has also been detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short the Cofeposa Act) has challenged the legality of the detention order in Cr. Writ Petition No. 545 of 1988.

(3) In Cr. Writ Petition No. 577 of 1988, Ved Pal Anand has unaligned the declaration issued u/s 9(1) of the Cofeposa Act. In Cr. Writ Petition No. 576 of 1988, Ashok Anand also seeks quashing of a similar declaration. They aver that the declarations dated the 2nd November, 1988 were served on them after they had filed the earlier writ petitions.

(4) The fifth writ petition (Cr. Writ Petition No. 555 of 1988) has been filed by Smt. Shashi Anand on be naif of her husband Madan Lal Anand, who has also been detained under the detention order passed by the Joint. Secretary to the Government of India, specially empowered u/s 3(1) of the Cofeposa Act. Madan Lal Anand is the brother of Ved Pal Anand and uncle of Ashok Anand. The three

impugned orders of detention were passed on 30th September, 1988 with a view to preventing the detainees from abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods. The grounds of detention dated 30th. September, 1988, in all the three cases are almost the same. Those may be summarised as under.

(5) Information was received by the authorities that huge quantities of Polyester fibre and Polyester filament yarn imported in the names of two firms of Delhi viz., M/s. Jasmine, B-3/7 Vasant Vihar, New Delhi and M/s. Expo International, C-224, Defense Colony, New Delhi under the Duty Exemption Entitlement Certificate Scheme (DEEC Scheme), were being disposed of in the local market illegally.

(6) M/S. Jasmine having its office at B-3/7, Vasant Vihar, New Delhi had obtained five "Actual User" Advance licenses in the financial year 1984-85 from the Joint Chief Controller Of Imports and Exports, New Delhi for the import of Polyester Filament Yarn and Polyester Fibre free of Customs Duty under the Duly Exemption Entitlement Certificate Scheme. One of the conditions imposed on M/s. Jasmine under this Scheme was that the importer would manufacture readymade garments out of the imported polyester filament yarn and polyester fibre and export the resultant products abroad within a period of six months from the date of first clearance of the imported consignments in terms of the conditions of the advance licenses and the conditions of the Notification No. 117/78-Customs, dated the 9th June, 1978.

(7) M/S. Expo International, C-224, defense Colony, New Delhi, another export house, had also obtained five Actual User Advance licenses in the financial year 1984-85 from the Joint Chief Controller of Imports & Exports (CLA), New Delhi for the import of polyester filament varn and polyester fibre free of Customs Duty under the Deec Scheme. 1 his firm was also required to manufacture the resultant products out of the imported polyester filament yarn and polyester fibre and to export out of India the resultant products within a period of six months from the date of clearance of the first consignment of raw material in terms of conditions of the advance licenses and the provisions of the said Notification dated the 9th June, 1978.

(8) Investigations conducted by the Customs and Central Excise staff revealed that neither M/s. Jasmine nor M/s. Expo International had established any factory to manufacture the resultant products from the imported polyester filament. yam and polyester fibre. It was revealed that the factory addresses given in the applications by these two firms were bogus. It was. farther found out that M/s. Jasmine was declared to be a partnership firm with Shri Naresh Chadha and Shri Krishna Lal Chawla as its two partners. The other firm, M/s. Expo International was found to be a proprietary firm with Shri Naresh Chadha (one of the partners of M/s. Jasmine) as its proprietor. It further came to light on investigations that these two persons. were actually employees of Ved Pal Anand ana working completely under his instructions.

(9) As noticed above, M/s. Jasmine had obtained five actual user advance licenses in the financial year 1984-85. Those licenses were:

1. License No. P/L/3078150/C/XX/92/D/84, dated 19th July, 1984.
2. license No. P/L/3078643/C/XX./92/D/84, dated: 11th September, 1984.
3. license No. P/L/3078628/C/XX/92/D/84, dated 29th August, 1984.
4. license No. P/L/3042845/C/XX/94/D/84, dated 25th January, 1985.
5. license No. P/L/3042846/C/XX/92/D/84, dated 9th January, 1985.

(10) Against the first advance license dated the 19th July, 1984, M/s. Jasmine imported about 50 tonnes of polyester filament yarn involving Customs import duty amounting to Rs. 86.80 lakhs and got the goods cleared from Bombay Customs in January/March/August, 1985 against eleven bills of entry. In respect of this imported material, the export obligation was to be fulfilled by 30th June, 1985. M/s. Jasmine did not manufacture any resultant product and thus could not and in any case did not export any quantity of the resultant products. This firm further imported and got cleared about 27 tonnes of polyester filament yarn against the second advance license dated the 11th September, 1984 without payment of customs duty amounting to Rs 50 lakhs approximately. However, the- balance of 1483 cartons of polyester filament yarn imported under the said license dated the 11th September, 1984 involving customs import duty amounting to Rs. 87 lakhs were not released by the Bombay Customs due to non-production of related documents and non-fulfilment of export obligation in respect of earlier duty free imports.

(11) M/S. Jasmine also imported and got cleared about 25 tonnes of polyester filament yarn valued at Rs. 9,65,651 during December, 1987 to March, 1988 against advance license dated the 29th August, 1984 without payment of customs duty amounting to Rs. 46.14 lakhs. The imported goods under this license were cleared under three bills of entry. This firm also imported 482 bales of polyester fibre in April, 1985 involving customs import duty amounting to Rs. 89.54 lakhs against the fourth license dated the 25th January, 1985 but did not get the delivery from Bombay Customs due to non-production of related documents and non-fulfilment of export obligation in respect of earlier licenses. This firm, however, did not import any goods against the fifth advance license dated the 9th January, 1985. In the grounds of detention, the details of the imported goods such as the numbers of the bills of entry, numbers of bales/cartons, weight in Kgs, the value of the goods and the duty involved, have been mentioned for each of the five advance licenses granted to M/s. Jasmine.

(12) M/S. Expo International of New Delhi, which has been described as another export house, had also obtained five actual user advance licenses in the financial year 1984-85 from the Joint Chief Controller of Imports and Exports, New Delhi for the import of polyester filament yarn and polyester fibre free of customs duty under the said Deec Scheme. This firm was also required to manufacture

resultant products out of the imported goods and to export out of India those resultant products within a period of six months from the date of clearance of the first consignment of raw material in terms of conditions of the advance licenses and the provisions of Notification No. 117/78-Customs. dated the 9th June, 1978. The numbers of those licenses as mentioned in the grounds of detention are :

- 1.license No. P/L/3025495/C/XX/91/D/84, dated the 29th May, 1984.
- 2.license No. P/L/3078321/d/XX/92/D/84, dated the 3rd August, 1984.
- 3.license-No. P/L/3078644/C/XX/92/D/84, dated the 11th September, 1984.
- 4.license No.P/L/3041034/C/XX/92/T/84, dated the 21st December, 1984.
- 5.license No. P/L/3042826/C/XX/92/D/84, dated the 7th January, 1985.

(13) M/S. Expo International did not import any goods against licenses Nos. 4 & 5 above. They did import 2109 cartons of polyester filament yarn involving customs import duty amounting to Rs. 1.17 crores under the said Deal Scheme against licenses Nos. 2& 3 but did not get those goods released due to non-availability of Deec books and advance licenses from the Joint Chief Controller of Imports and Exports, New Delhi. The goods imported under the first license dated the 29th May, 1984, i.e., 886 cartons of polyester filament yarn were, however, got cleared by it against six bills of entry on 6th December, 1984 without payment of customs export duty amounting to Rs. 49.29 lakhs.

(14) M/S. Expo International had been issued notice, by the Special Investigation and Intelligence Branch, New Customs House, Bombay for confiscation of the goods imported under licenses Nos. 2 & 3 above.

(15) The detailing authority has further noticed that the investigations conducted by the Customs and Central Excise Staff, Chandigarh have revealed that both the said firms, i.e.. M/s. Jasmine and M/s. Expo International have not at all fulfilled their export obligations in terms of the advance licenses granted to them and in terms of the provisions of the said Notification No. 117/78-Customs, dated the 9th June, 1978. The firms have instead sold the imported/cleared polyester filament yarn in contravention of the provisions of the above referred Notification and the conditions.

(16) It was found that Ved Pal Anand (petitioner in Cr. Writ Petition No. 543/88) was the Chief Executive of M/s. Jasmine, New Delhi in terms of the power of attorney dated the 14th November, 1984 which was executed in his favor by the partners of M/s. Jasmine. As per the grounds of detention, he was empowered :

"To enter into any bargain or exchange -with any person or persons in respect of business transactions in the name of firm M/s. Jasmins and to do all things and deals and assurances to receive, accept any consideration whether any money, bank draft, cheque or other movable goods or property, to negotiate, endorse, accept, discount or otherwise assign any promissory note and cheque, bill of

exchanges ,hundi, draft and other negotiable instruments and to represent before revenue, central excise, customs, import and export department of Government of India and other Government departments and agencies as lawful representative on behalf of till firm M/s. Jasmine."

(17) Ved Pal Anand had received a sum of Rs. 20,000 vide cheque dated the 31st March, 1986 drawn by M/s. Jasmine showing thereby his active involvement in the affairs of the firm.

(18) The investigations revealed that the petitioner Ved Pal. Anand had actually floated the other firm, M/s. Expo International also. He introduced both the firms to the banks to enable them to open bank accounts. Infact he assured one Shri R. N. Marda, partner of M/s. Maheshwari International, New Delhi that he owned both the firms and had floated them in the name of others to avoid taxation. He persuaded Shri Marda to stand grantee for his two firms to enable them to open letters of credit.

(19) The inquiries further brought to light that Ashok Anand (petitioner in Cr. Writ Petition No. 545 of 1989) and Madam Lal Anand (detenu in Cr. Writ Petition No. 555 of 1988) were actively involved in import clearance and sale of polyester filament yarn imported by the two firms against the said advance licenses. This has been stated so in paragraph 16 of the grounds of detention passed against each of these detenus.

(20) The inquiries further revealed that it was Ved Pal Anand, who had been contacting the shipping agents from December 1985 onwards for clearance of the imported polyester filament yarn. He disclosed to one Shri Prabhu Das v. Thakkar, employee of M/s Gokaldas Hansraj Shipping Pvt. Ltd.. Bombay that he was the real owner of the imported polyester filament yarn in question and Shri Naresh Chadha was only a front man. Ved Pal Anand produced the bank guarantees, Deec book and advance licenses for clearance of the imported polyester filament yarn which was not cleared till March-April, 1986. It seems that it was in the preset ice of the said thakkar that Naresh chadha had signed the documents as partner of M/s Jasmine and proprietor of M/s Expo International but he (Thakkar) was categorically informed that the real owner was Ved Pal Anand. Prabhu Dass V. Thakkar in his further statement dated 12th August. 1988 stated that Ved Pal Anand had met him on many occasions at Bombay in connection with the clearance of the imposed polyester filament yarn and polyester fibre of the said two firms. He further stated that one consignment of polyester filament yarn of M/s. Jasmine was got cleared in January, 1988 and delivery was taken by Ved Pal Anand, who was accompanied by Naresh Chadha.

(21) Similarly while seeking the services of one Bharat M. Shah, partner of M/s Amrit Lal Vasanji and Co. Bombay for clearance of the imported goods, Ved Pal Anand informed him that the two complies who were to import the goods duty free under the Deec scheme, were owned by him. The declaration about the firms being owned by Ved Pal Anand, was made by him to very many people at

Bombay apart from the persons mentioned above; others were Sim J. Basu, Customs House Agent; Shri Dejappa Babu Poojari, Clerk in Imports and Experts Department of M/s Jotendera Steels and Tubes Ltd. In some of the meetings with those persons, Ved Pal Anand was accompanied by Madan Lal Anand and in some other by Ashok Anand. Naresh Chadha, when ever present, was introduced as an employee.

(22) Ved Pal Anand in his statement dated 7th June, 1988 admitted that the said two firms had not fulfilled their export obligations so far. The goods cleared it was found out according to the grounds of detention, were sold during March-May, 1988 on consignment basis to some parties at Ludhiana through one Ramesh Ramgopal Aggarwal. According to Aggarwal, he received an amount of Rs. 37,800 towards his brokerage. Prior to the selling of the duty free imported goods in Ludhiana market, strenuous efforts were made by Ved Pal Anand to sell those goods through Bombay brokers. About six tonnes of polyester filament yarn was sold by Madan Lal Anand as a representative of M/s Jesmine to one Shri V. L. Modi. who was informed that the firm's export obligations had already been fulfilled and, Therefore, he (Madan Lal Anand) was entitled to sell the, polyester filament yarn. In his statement made on 21st June, 1988, Madan Lal Anand admitted that 45 tonnes of polyester filament yarn were got cleared by M/s. Jasmine after getting orders from. the High Court of Punjab and Haryana, Chandigarh for the release of 50 per cent of the imported goods. Out of the 45 tonnes of polyester filament yam, 35 m. tonnes were sold to one Shri Shiv Kumar Daga and six tonnes to Shri V. L. Modi. Madan Lal Anand further admitted that he had accompanied Ved Pal An and to Bombay when 45 tonnes of polyester filament yarn was got cleared in February 1988. Shri Daga. however, stated that he had broken off the negotiations which he had with Ved Pal Anand and his son Ashok Anand, who were acting as owners of the said two firms when he (Daga) came to know that the goods imported were duty free. goods under the Deec Scheme but he confirmed that the negotiations were carried out with Ved Pal Anand and Ashok Anand during January and February-March, 1988 when the father and the son were staying in Hotel Sahil, Bombay Central where the talks took place.

(23) Ashok Anand and Ved Pal Anand had told Shiv Kumar Daga that some quantities of polyester filament yarn imported by them in the names of the said two firms were about to be cleared from Bombay Customs House which they intended to sell. According to Daga, it was in his next meeting with both of them in February/March 1988 that he broke off the negotiations regarding purchase of the duty free imported yarn offered" to him earlier. According to him he came to know later that the said yarn was ultimately sold in the Ludhiana market.

(24) Likewise one Raj Kumar Seth of Bombay also slated that when he met Ved Pal Anand at Bombay in connection with the clearance of the polyester filament yarn in the names of the said two firms, Ashok Anand told him that he (Ashok Anand) was an expert in Deec Scheme and proficient in making documents

relating to that Scheme. Ashok Anand further told him that all the export obligations required under the Deec Scheme in relation to the imported yarn had already been fulfilled and; Therefore, he suggested that Seth could purchase that material.

(25) From the above facts which have been noticed in detail in each of the grounds of detention, the detaining authority was satisfied that although the three detenus viz., Ved Pal Anand, Ashok Anand and Madan Lal Anand were neither the partners nor the proprietors of the two firms. M/s. Jasmine and M/s. Expo International, yet it was apparent that Ved Pal Anand was the actual owner and his brother and son were actively associated with him in the import of the duty free goods obtained on advance licenses as actual users and in illegal disposal of the same.

(26) The detaining authority after noticing the definition of smuggling as given in Section 2(39) of the Customs Act, has held that in the present cases, the goods imported by the said two firms were liable to be termed as smuggled. It is stated in one of the paragraphs of the grounds (which is common in all the three cases) in this respect as follows:

"42.M/s. Jasmine and M/s. Expo International had obtained advance licenses and had imported polyester filament yarn and polyester fibre duly free under Deec Scheme on the explicit and specific condition that the duty free polyester filament yarn and fibre would be used in the resultant products i.e. readymade garments and polyester spun yarn which will be exported out of India. M/s. Jasmine and M/s. Expo International New Delhi imported polyester filament yarn and polyester fibre duly free but instead of manufacturing and consequently exporting the resultant products the polyester filament yarn was sold to various people in the local market in India without fulfilling the export obligations at all and thereby contravened the provisions of Notification No. 117/78 Cus dated 9-6-78 as amended under which the duty free import of polyester filament yarn/fibre was allowed and consequently made the polyester filament yarn/fiber imported duty free liable to confiscation in terms of clause (o) of Section 111 of the Customs Act, 1962. The manner in which the polyester filament yarn/fiber was decaled duty free and its sale into India without fulfilling the export obligations in violation of the conditions or notification No. 117/78 Cus dated 9-6-78 as amended amounted to smuggling as per provisions of law".

(27) It has further been held that in view of the active and major role played by each one of the detenus in obtaining the said advance licenses for importing the polyester filament yarn and polyester fibre, getting the polyester filament yarn cleared from Bombay Customs and selling it in the local market each one of the detenus has been dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping the smuggled goods.

(28) Thus the detenus have been detained with a view to preventing them from:

(1)abetting the smuggling of good; and

(2) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods.

(29) MR: Sibbal, learned counsel for the petitioners (Ved Pal Anand and Ashok Anand) submitted that the subjective satisfaction of the detaining authority is vitiated as very many documents which would have weighed either way with him, were not placed before him. Further the impugned orders were liable to be set aside for non-application of mind by that authority. At any rate the orders were punitive in nature. Another argument is that the counter-affidavit, which has not been sworn by the detaining authority cannot be considered to be a good return. It is also pleaded that the detaining authority could not have proceeded to exercise its jurisdiction as the import of the goods which have not yet been declared as smuggled by the Customs authorities, continues to be lawful. Mr. Rawal on behalf of the detenu Madan Lal Anand (in Cr. W. 555/88) while adopting the arguments of Mr. Sibbal has urged that the statements recorded u/s 108 of the Customs Act could not be given effect to because of the various orders passed by the Punjab & Haryana High Court, Chandigarh. He has further submitted that the detention order is liable to be set aside because admittedly some documents which have been relied upon by the detaining authority, were not supplied to the detenus.

(30) We would now discuss the contentions urged by Mr. Sibbal. Contention No. 1 in re : Documents not placed before the detaining authority The submission is that a number of orders by the office of the Chief Controller of Imports & Exports in respect of the said two firms and show cause notices issued by the licensing authority to them which documents were material and bound to effect the subjective satisfaction of the detaining authority one way or the other, were not placed before it and, Therefore, the impugned detention orders are liable to be set aside. Those orders are :

(1) Abeyance Order No. 120/84-85/H, dated the 27th March, 1985 issued by the Dy. Chief Controller of Imports & Exports to M/s. Expo International under Clause 8D of the Imports Control Order, 1955 as amended, placing the firm under abeyance for a period of six months w.e.f. the date of the issue of the order (Annexure E to Cr. Writ 545/ S8).

(2) Order dated the 29th March, 1985 issued by the Office of the Chief Controller of Imports & Exports, New Delhi to M/s. Expo International suspending the operation of the said five advance import licenses granted to them (Annexure "C" to Cr. Writ. 545/ 88). "

(3) Show cause notice dated the 26th December, 1985 issued by the office of the Chief Controller of Imports & Exports to M/s. Expo International u/s 4-L for action u/s 4-1 of the Imports and Exports (Control) Act, 1947 as amended, and under Clause 8 of the Imports (Control) Order, 1955 (as amended) (Annexure H to Cr. Writ 545/ 88).

(4) Show cause notice dated the 27th March, 1985 issued by the office of the

Chief Controller of Imports & Exports to M/s. Expo International under Clause 10 for action under Clause 9(l)(a) & (d) of the Imports (Control) Order, 1955 as amended as to why the five import licenses should not be cancelled and rendered ineffective (Annexure F to Cr. Writ 545/88).

(31) The further submission is that the operation of the said abeyance order, the suspension order and the two show cause notices having been stayed by the Punjab and Haryana High Court, Chandigarh, it was essential for the sponsoring authority to have placed these facts before the detaining authority.

(32) To appreciate this contention, some more facts may be noticed. M/s. Expo international had filed a Civil Revision Petition No. 306 of 1986 before the Hon"ble Punjab and Haryana High Court, Chandigarh, challenging some of the orders passed against it by the licencing authority. That Court stayed the operation of the impugned show cause notices and the other orders. M/s. Jasmine had filed another Civil Revision Petition No. 3694 of 1985 before that Court seeking directions to the respondents not to obstruct the clearance of the validly imported goods by it. On that petition, the Court directed the release of the imported polyester filament yam and polyester fibre by its order of the 17th February, 1985, permitting the release of the 50% of the goods; the remaining 50% Constituting the guarantee.

(33) The petitioners" case is that the two main petitions which were vital, were not placed before the detaining authority. To highlight the stand of the respondents on this point, Mr. Sibbal has drawn our attention to the affidavit in opposition filed by them. The averments contained in paragraph Is of the writ petition (Cr.Writ 545/88) about the. passing of the abeyance order, the suspension order and the show cause notices is neither admitted nor denied by Shri S. K. Chaudhary, Under Secretary to the Government of India in the return. It is stated by him that the said paragraph pertains to the action taken by the Dy. Chief Controller of Imports and Exports and that it :

"Has no concern either with the answering respondent or with the grounds of detention."

(34) Mr. Sibbal says that from the reply it is apparent that the said four documents were not placed before the detaining authority. The argument is that as. those documents do not even find mention in the grounds of detention, it must be presumed that they were not placed and, Therefore, not relied upon.

(35) We may, however, note that in these petitions, the petitioners have not made out any grievance that these documents were not placed before the authority concerned. The passing of the orders and the show cause notices have been pleaded merely as a sequence of events. But it is correct that specifically there is no mention in the grounds of detention to any one of the said four documents. Mr. Sibbal, however, admits that those four documents were annexed with Civil Revision Petition No. 306 of 1986 filed in the Punjab and Haryana High Court, Chandigarh by M/s. Expo International. That revision Petition does find

mention in the grounds of detention but for another purpose. While narrating the fact that M/s. Expo International had earlier taken on rent a shed measuring approximately 150 sq. ft. in Khasra No. 474, Village Jonapur, New Delhi for the period from 1-4-1985 to 31-3-1986 @ Rs. 200 per month in which shed no fabrication of readymade garments was, actually carried out, the detaining authority has mentioned that that firm later on shifted its factory premises somewhere in Mohali near Chandigarh. This information about the .change of factory premises from Delhi to Chandigarh was gathered from the Revision Petition No. 306; 86 filed by the firm. This is so stated in paragraph 28 of the grounds of detention (Cr. Writ 545/88). We quote the relevant portion :

"As per Civil Revision No. 306/86 filed in the Punjab and Haryana High Court at Chandigarh, the factory premises were shifted somewhere in Mohali, but specific address of the factory was not declared either to the Joint Chief Controller of Imports & Exports (CLA) New Delhi or to any other department."

(36) This statement clearly shows that tile petition had been placed before the detaining authority although he has not relied upon it The original record produced before us also shows that the said four documents were annexed to the revision petition and the petition was placed before the detaining authority. What is important to note is that M/s Expo International had never informed any authority about the change of factory premises. It seems that it was only in the revision petition that they had mentioned it. The subjective satisfaction is based on the fact that the firm was neither carrying on any fabrication or manufacturing process in its so called factory at Delhi or after the change of premises at Mohali. This has been clearly mentioned in the grounds. Non-production of the resultant products either at Delhi or at Chandigarh has been made a ground for detention. The change of the factory premises could only have been found out by the detaining authority if it had gone through the revision petition. The said four documents which were a part of the revision petition were thus before the detaining authority. It was open to him not to rely an those documents.

(37) Mr. Sibbal has also made a grievance that a Panchnama showing "Nil" recovery from the residence of Ved Pal Anand was not placed before the detaining authority and. Therefore, the satisfaction of the detaining authority is vitiated. This averment is contained in paragraph 21 of Cr. Writ No. 543/88 and in paragraph 17 of Cr. Writ No. 545/88. In reply ,the respondents admit that the residence of Ved Pal Anand was searched on 30th May, 1988 as a result of which search nothing incriminating was seized and a Panchnama showing nil recovery was drawn. Their averment is that :

" HOWEVER, as the said panchnama was not relied upon in the grounds of detention, the same was not placed before the detaining authority. The petitioner cannot take the benefit of the said panchnama when it has been proved from the various statements as discussed in paragraph 9 above that he was directly and actively involved in the import, clearance and sale of the duty free imported

polyester filament yarn fibre."

(38) In our view it cannot be held that non-placing of the panchnama showing nil recovery in the facts of the present cases, vitiates the satisfaction of the detaining authority. The prejudicial activities of the detenus are discernible from the rounds of derention. The subjective satisfaction of the detaining authority is based on the narration of facts contained therein.

(39) Another grievances made by Mr. Sibbal during arguments is that the main petition filed by M/s Jasmine (Civil Revision No. 3694/85) was not placed before the detaining authority. From the grounds of detention it is apparent that a number of orders on miscellaneous applications made in the said petition (Civil Revision 3694/85) have been relied upon. Those applications and the orders passed thereon have been mentioned in the grounds of detention in each case. We may note that there is no averment in the writ petitions that the said civil revision petition Was not placed before the detaining authority although in paragraph 26 of the petition (Cr. Writ 543/88). the fact of the filing of the petition has been averred by way of narration of facts. The respondents in reply also admit the averment but submit that the grounds of detention are entirely different from the subject matter of that petition. There is no merit in this contention and it is rejected. Contention No. 2 in re : Non-application of mind.

(40) The submission is that the licenses issued to the said two firms were valid for 18 months only and those licenses having elapsed, they have been rendered ineffective snd cannot, Therefore be acted upon. It is urged that the detenus could not have got released any imported goods under those licenses and, Therefore, there was no likelihood of their repeating the prejudicial activity.

(41) Reliance of the learned counsel is on a judgment of this Court in Achia Kakkar v. Administrator, Union Territory of Delhi reported in 1988 Cr. Law Journal 189

(42) It was found as a matter of fact that the detenu did not hold any other advance license under which he could import any consignment of polyester fabric or zip fasteners. Except for the consignment in question which was lying under seizure there had never been any previous import or export of any consignment under the Deec Scheme. The grounds of detention did not reve that the detenu had at any time engaged himself in any other smuggling, activity. In fact he could not do so unless and until the various licencing authorities granted him future advance licenses under the Deec Scheme, which appeared to be a rare possibility. The authorities could take recourse to black listing the detenu and thereby permanently debar him effectively from undertaking any import and/or export activities. It was further found by the learned Single Judge that the advance licenses in question had already been exhausted.

(43) Mr. Sibbal submits that on facts, the present cases are similar to the facts in Achia Kakkar"s case (supra).

(44) Learned counsel for the respondents submit that the ratio of the said case is not applicable in the present cases. They submit that unlike the detenu in Achia Kakkar's case, the detenus in this case had put up "front men" in the said two firms viz.. M/s Jasmine and M/s Expo International. The whole affair was clandestine as far as the authorities were concerned. They emphasise that the effort of the detenus from the very beginning was to sell in the market duty free polyester filament yarn and polyester fibre. The firms had no factory nor had they any administrative office. In spite of the show cause notices and the 281 orders, the detenus through their front men were successful in getting the goods cleared without payment of import duty of almost a crore of rupees and selling the same in the market in contravention of the conditions of the advance licenses. The respondent's case is that the detenus have been detained with a view to preventing them from carrying on their prejudicial activities in future as mentioned in the grounds of detention.

(45) Their case is that they are not being detained merely because they would have been able to get any goods cleared on the advance licenses in question but to prevent them from abetting the smuggling of goods and also to prevent them from dealing in smuggled goods. Mr. Dutt, learned counsel for the respondents in reply to the argument of Mr. Sibbal has emphasised that the detenus have been detained on the subjective satisfaction that they would be able to that the smuggling of polyester filament yarn and also that the smuggling of goods generally, and further to prevent them from dealing in such smuggled goods. He submits that the detenus were not license holders and. Therefore, debarring them from holding future licenses and taking recourse to blacklisting them from undertaking any import and/or export activities [as could have been done in Achia Kakkar's case (supra)] would not serve the purpose. The argument is that with their specialised knowledge of obtaining the advance licenses and with their vast links at Bombay and other places for disposing of the smuggled goods, it was essential to detain them. It is urged that the illicit business which they were carrying on and were likely to carry on had to be put a stop to. The further argument of Mr. Misra, learned counsel for the respondents in Cr. writ 555 of 1988 on this very contention is that the two grounds of detention are severable, i.e. the ground of abetting the smuggling of goods can be severed from the ground of dealing in smuggled goods. He relies on Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, ..

(46) In the facts and circumstances of the cases we are unable to hold that the orders of detention are based only on the activities committed earlier by the detenus. In these cases as noticed earlier, the petitioners have been detained with a view to preventing them from not only abetting the smuggling of goods but from dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping the smuggled goods. It is not clear from the reported judgment in Achia Kakkar's case (supra) whether this was the position in that case also. The respondents here do not base their case only on the 282 ground that the detenus have other advance licenses in their names or that they are

going to utilise in any way the earlier licenses granted in the names of the said two firms. The facts in Achia Kakkar's case (supra) appear to be different. The detenu in that case was himself the Managing Director of a limited company. There was no allegation that he was otherwise dealing in smuggled goods. One of the grounds of detention in these cases that the detenus are being prevented from dealing in smuggled goods, is severable. The judgment cited by Mr. Misra is applicable to the facts of these cases. There is no merit in this submission. Contention No. 3 in re : Import of the goods being lawful the detention jurisdiction has not commenced

(47) According to Mr. Sibbal, the detaining authority had no jurisdiction to hold that the goods in question were smuggled and Therefore, liable to confiscation. He urges that unless a prima facie opinion of the statutory authority under the Customs Act is given by issuance of a show cause notice in this respect, the detaining authority cannot pre-judge this issue. The argument is that as yet no show cause notice by the Customs authorities had been issued for confiscation of goods for alleged violation u/s 111(0) of the Customs Act and that those goods not having been seized on the belief that the same were "liable for confiscation", Therefore, the subjective satisfaction that the goods were "smuggled" is vitiated.

(48) We have quoted at page 13, paragraph 42 of the grounds (in Cr. Writ 545/88). The detaining authority has also noticed the definition of smuggling as given in Section 2(39) of the Customs Act. That definition reads :

"(39)"smuggling" in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113;"

The narration of facts in the grounds of detention clearly shows that the petitioners have disposed of the goods imported duty free in the market. The import duty amounted to more than a crore of rupees. The polyester filament yam and the polyester fibre imported duty free could only have been used for manufacturing readymade garments. The resultant products were consequently to be exported. Those goods were sold without fulfilling the export obligations. A mere reading of paragraph 42 of the grounds shows that the goods in question fall within the purview of the definition of smuggling. The argument that the goods were got cleared after obtaining orders of the Punjab and Haryana High Court, Chandigarh in the petition filed by M/s. Jasmine, is of no help to the petitioners. The Court did not permit the firms to dispose of the duty free imported goods in the open market. The goods so got cleared were, thereafter to be exported as per the conditions of the advance licenses granted. Obviously that has not been done. Therefore, the goods were liable to be confiscated. Mr. Sibbal is correct only to the extent that without issuance of a show cause notice and advertisement proceedings under the Customs Act, no prosecution could have been launched under the Act. But that fact by itself cannot prevent the detaining authority to hold, as has been done in the present cases that the goods were "smuggled". There is no merit in this contention also and it is, Therefore, rejected. Contention No. 4 in re : Detention is punitive in nature.

(49) This submission is in two parts; one that the detention order has been made for past activities only of the detenus and thus is punitive in nature. The other part of the submission relates only to Ved Pal Anand and Ashok Anand, who are residents of Chandigarh. It is urged that they could have only been defamed at that place, transporting these detenus from Chandigarh to Central Jail, Tihar, New Delhi amounts to punishment.

(50) In support of the contention, Mr. Sibbal submits that it is the respondents case also that the detenus have been detained only for their past activities. He relies on the averment made in paragraph 22 of the counter affidavit (Cr. Writ 545/88). the last sentence of which paragraph reads :

"The grounds of detention against the petitioners have been passed On the basis that they sold the imported material got released duty free and did not fulfill the export obligations and, Therefore mis-utilised the Desc Scheme."

(51) While dismissing contention No. 2, we have held that the impugned detention orders have been passed to prevent the detenus from indulging in prejudicial activities in future. There is no merit in this contention.

(52) In support of the second limb of the argument, Mr. Sibbal relies on A.K. Roy and Others Vs. Union of India (UOI) and Others, , In paragraph 74 of the said reported decision while analysing Section 5 of the National Security Ordinance, 1980, which provision is similar to Section 5 of the present Act, and lays down power to regulate place and conditions of detention, it was observed that :

"Laws of preventive detention cannot, by the back door introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered; but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in "such place" as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. If a person ordinarily resides in Delhi to keep him in detention in a far off place like Madras or Calcutta is a punitive measure by itself, which in matters of preventive detention at any rate, is not to be encouraged".

(53) Mr. Sibbal submits that on the respondents own showing, these two detenus are residents of Chandigarh as the detention orders were addressed to them at their Chandigarh address. In view of the clear enunciation of law by the Supreme Court on this subject, the argument is that the detention being punitive, must be quashed.

(54) From the grounds of detention, which have been summarised above, it is clear that the two firms in question floated by Ved Pal Anand were carrying on their illicit business at Delhi. Most of the prejudicial activities were carried out by Ved Pal Anand at Delhi. "The factory premises of M/s. Expo International were at Delhi which were subsequently shifted to 52, Mohali, near Chandigarh. It cannot

be said that Ved Pal Anand or his son Ashok Anand are outsiders in Delhi. The other detenu Madan Lal Anand at any rate is a resident of Delhi. The present is not a case where the father and the son are being kept in detention at a far off place like Trivendrum or Guwahati. Delhi certainly is not a far off place from Chandigarh.

(55) We may note that the representations challenging the detention which were made by the detenus during the pendency of the writ petitions, have not been brought on record. We do not know if such a complain about being detained in Delhi, had been made by these two detenus in those representations. In the present cases we are unable to hold that lodging of these two detenus in Central Jail Tihar was punitive or smacks of punishment. The case cited is not applicable. But as a grievance has been made during arguments, we are of the view that these two detenus be shifted to Chandigarh, their ordinary place of residence. Contention No. 5 in re : Counter-affidavit not sworn by the detaining authority.

(56) Mr. Sibbal submits that the affidavits in opposition had been sworn by Shri S. K. Choudhary, Under Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi, who was not the detaining authority. The deponent, it is urged, is not competent to depose in the matter and there is no Explanation by him as to why the detaining authority himself did not swear the counter-affidavits. A preliminary objection regarding his competency to file the counter affidavits has been raised in the rejoinder affidavits but it is argued that the respondents have not even bothered to file a reply. The submission is that the counter-affidavits be not treated as a valid return and on that ground alone, the Rule be made absolute. In support of his contention, Mr. Sibbal relies On Biru Mahato Vs. District Magistrate Dhanbad, . In this case the subjective satisfaction of the District Magistrate, Dhanbad. Shri D. Nand Kumar, was in issue. The counter-affidavit was filed by one Mr. Brara, who was the District Magistrate at the time of filing of the return. He had described himself as the detaining authority of the petitioner in that case. It was found that Mr. Brara, who was merely an occupant of office, could not substitute his subjective satisfaction for that of Mr. Nand Kumar and, Therefore, his affidavit was ignored from consideration by the Supreme Court.

(57) Mr. Misra in reply submits that the present cases can not be considered to be a case of no return even for the sake of arguments as the respondents had produced the complete record which was before the detaining authority, for the perusal of the Court. His argument which has appealed to us is that in cases of Habeas Corpus, the counter-affidavits are required to be filed at a very short notice and in the event of the specially empowered officer (detaining authority) having been transferred or being on leave, the return can be filed by any other competent officer who had dealt with the case and not necessarily by a senior to the detaining authority. He submits that even if that is not possible, the records produced before the Court have to be treated as a good return.

(58) In the present cases it appears that Shri K. L. Verma (the specially

empowered officer) had by then been transferred from the Cofeposa Section of the Department of Revenue and hence affidavits in opposition were filed by Shri S. K. Choudhary, who has diary that he was conversant with the facts of the cases. Mr. Misra agrees that it would have been better if Shri Choudhary had disclosed the fact of Shri Verma transfer in the counter-affidavits. He, however, invited us to go through the record from which this fact was clear. As we have noticed above, we did see the record to assure ourselves whether civil revision petition filed by M/s. Expo International in the Punjab & Haryana High Court had been placed before the detaining authority. The submission in regard to the transfer of Shri K. L. Verma from this particular-assignment is also made out from the record. It also appears that Shri S K. Choudhary, the deponent had dealt with the file when the case for detention of the detenus was being considered. In Biru Mahato's case (supra) it was found that the averment that the deponent Mr. Brara was the detaining authority was incorrect. In fact it was Mr. Nand Kumar who as District Magistrate of Dhanbad had passed the order. In the present cases, it is not the assertion of Shri S. K. Choudhary that he was the detaining authority. What is more, the subjective satisfaction of Shri K. L. Verma is made out from the grounds of detention. In these cases we are not persuaded to go behind it.

(59) We note that the records produced before us by the respondents, independently support the contention that the detaining authority was subjectively satisfied. We did not go through the record to fish out any point in favor or against the respondents. It was only to see whether the averments contained in the affidavits are borne out. It is true that the detaining authority should personally affirm on Oath the stand of the respondents but as has been held in the State of Gujarat Vs. Sunil Fulchand Shah and Another, , it cannot be held as an inflexible rule. The original file having been produced before us, the fact that the affidavits are not sworn by the detaining authority personally, is not much of importance. This contention has also no merit and is rejected. Contention No. 6 in re : Declaration u/s 9 of the Cofeposa Act is bad in law.

(60) This contention is based on the assumption that (1) the detention orders have been made for past activities of the detenus only and (2) that as no live licenses were in the hands of the petitioners, there could not have been any likelihood of prejudicial activity in a highly vulnerable area. Thus it is urged that the declarations being bad, the detention orders are likely to be set aside.

(61) For the reasons noticed above, this contention has also no force. We have held earlier, that the impugned detention orders have not been made for past activities only. Those were made, as is clear from the grounds, for the detenus propensity to indulge in prejudicial activities.

(62) Now we proceed to deal with the two submissions made by Mr. Rawal, learned counsel for the petitioner in Cr. Writ 555 of 1988.

(63) His main contention is that the authorities ought not to have taken into

consideration the statements made by the detenus u/s 108 of the Customs Act to arrive at the subjective satisfaction to detain them. He relies on an order passed by the Punjab & Haryana High Court in Civil Revision No. 3694 of 1985. That petition was moved by Naresh Chadha on behalf of M/s. Jasmine. That order dated the 5th October, 1988 (Annexure P. 10 to Cr. Writ No. 555 of 1988) was passed on a miscellaneous application.

(64) The impugned orders passed in the present cases are dated the 30th September, 1988. The Order being relied upon was passed five days thereafter. We asked Mr. Rawal as to how the detaining authority could possibly divine that such an order was going to be passed. Mr. Rawal then submitted that atleast the specially empowered officer who made the declaration u/s 9 of the Act should have kept that in view. At any rate, he urged that at the time of confirming the detention order, the Central Government ought to have kept that in view.

(65) We may note here that as per, paragraph 41 of the grounds of contention (in.cr. Writ 555/88), the, detaining authority was aware of the fact: that the powers of Customs Officer to summon u/s 108 of the Customs Act, 1962 had been challenged by the petitioner in Civil Revision Petition No. 3694 of 1985 and an order had been passed on an interlocutory application in that petition on 21st July, 1988, whereby further action on summons dated the 27th May, 1988 by the Customs authorities had been stayed. Paragraph 41 of the grounds makes this clear. It reads :

"41.On initiation of investigations by the Department against M/s, Jasmine and: M/s.Expo international, New Delhi, M/s. Jasmine filed CM. application No. 3199-C-II of 1988 in C.R. No.,; 3694 of 1985 on 19-7-88- in the Punjab & Haryana High Court challenging the powers of Customs Officers to summon persons u/s 108 of the Customs Act, 1962 and got stayed further action on summons dated 27-5-83 in terms of orders dated 21-7-88 of the Hon"ble High Court, Chandigarh which were ordered to be continued till further orders as per Order dated 2-8-88 of the Hon"ble High Court."

(66) The submission of Mr. Rawal that the detaining authority on passing of the order dated 5th October, 1988 ought to have revoked the detention orders suo moto, seems to us to be mis-conceived. By that order further proceedings before the Customs authorities had been stayed- The statements already recorded u/s 108 of the Customs Act were not directed to be expunged or to no affect. The further argument that the authority making the declaration u/s 9 of the Act ought to have kept the said order of 5th October, 1988 in view, is also untenable. At that stage, the empowered Officer had only to see whether provisions of Section 9 of the Act were applicable. It cannot be held as is being sought, that because of the stay of the proceedings before the Customs authorities, there was no jurisdiction vested in that authority or the Central Government to pass the declaration or to confirm the detention order.

(67) Mr. Rawal had: also laid great stress on the fact that certain vital documents

had been concealed from the detaining authority. His submissions were complementary in that respect to the submissions of Mr. Sibbal. The argument regarding the counter-affidavit not being filed by Shri K. L. Verma, the detaining authority was the same as of Mr. Sibbal. We have negated those contentions already.

(68) Mr. Rawal further urged that there could not have been any apprehension of the prejudicial activities being repeated by the detenus as the licenses in question were only for a period of 18 months and that those had already expired. This contention has also no force. The prejudicial activities which the detenus are likely to indulge in have been discussed above.

(69) As far as documents are concerned, Mr. Rawal submitted that his client Madan Lal Anand had retracted from his earlier statement made u/s 108 of the Customs Act. The retraction statement dated the 20th June, 1988 according to him, was not placed before the detaining authority. He further submitted that a letter dated the 2nd July, 1988 by one Mr. G. L. Aggarwal, which he wrote to the Superintendent (Preventive), Chandigarh with reference to the summons received by him u/s 108 of the Customs Act, was also not placed before the detaining authority.

(70) Mr. G. L. Aggarwal in the letter dated the 2nd July, 1988 (Annexure P. 9 to Cr. Writ 555 of 1988) had informed the said Superintendent that because of bad health he was unable to travel to Chandigarh. He had therefore, requested that his earlier statement which he had made to Shri A. K. Malhotra, Dy. Superintendent of Police in connection with the same matter under investigation, be summoned. Mr. Rawal submits that in that statement made by Mr. Aggarwal to Shri A. K. Malhotra, he had completely exonerated the detenus. According to him if the letter of 2nd July, 1988 had been placed before the detaining authority, he would have sent for the statement referred to in that letter and it was bound to effect his (detaining authority's) mind.

(71) We have gone through that letter of 2nd July, 1988 written by Shri G.L. Aggarwal to the Superintendent (Preventive) Chandigarh. The Superintendent (Preventive) was holding proceedings under the Customs Act, which proceedings were admittedly not concluded by the time the detention order was passed. That document was neither material nor vital.

(72) Mr. Misra in reply submits that in the present cases the subjective satisfaction has not been reached only on the basis of the statement of Madan Lal Anand but also on other material which warranted the detention. His reliance on *Prakash Chanaei Mehta v. Commissioner and Secretary, Government of Kerala* 1986 Sc 687(6) in support of his argument is well founded.

(73) There is no merit in any one of the petitioners and hence they are dismissed. However, as we have noticed above, the detenus Ved Pal Anand and Ashok Anand have made a grievance of being lodged in Central Jail Tihar, New Delhi. We direct that they be moved to Chandigarh and lodged in a prison there. We

make it clear that by passing this direction, we are not holding that under the impugned detention orders, they were lodged in Central Jail Tihar, New Delhi by way of punishment