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Builders Supply Corporation Vs. Union of India and Others.

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Court : Kolkata

Decided On : Jun-21-1955

Reported in : [1955]28ITR797(Cal)

Appeal No. : Civil Revision Case No. 231 of 1954

Appellant : Builders Supply Corporation

Respondent : Union of India and Others.

Judgement :

CHAKRAVARTTI, C. J. - At the earlier stages of the argument on this rule, it appeared as if a broad question of fundamental importance would have to be decided, but a closer examination of the record revealed that the point actually calling for decision was a far narrower one.

The facts are these. Messrs. R. K. Das & Co., who are opposite party No. 2 to this rule, obtained a building contract from Government in connection with the construction of the Mint and had to make a deposit of Rs. 50,000 as security for due execution of the contract. In connection with that undertaking, Messrs. R. K. Das & Co. obtained a supply of building materials from the petitioners, Messrs. Builders Supply Corporation. The petitioners appear to have been unable to obtain payment for the goods supplied and they brought a suit for the recovery of their dues. In that suit, they obtained an order for an attachment before judgment of Rs. 5,000 out of the security deposit of Rs. 50,000 made by Messrs. R. K. Das. & Co., and lying in the hands of the Superintending Engineer, Calcutta Central Circle No. 1. The order for attachment was made on the 18th April, 1949, and the attachment was in due course made. Subsequently, on the 16th June, 1950, the petitioners suit was decreed by the 5th Additional Subordinate Judge, 24-Parganas, for a sum of Rs. 12,275-9-0. On the 14th February, 1952, the decree was put into execution in the Court of the 7th Subordinate Judge and Money Execution Case No. 9 of 1952 was started. On the 18th February following, the Subordinate Judge issued an order for the attachment of a further sum of Rs. 7,275-9-0 out of the amount of the security deposit and while communicating that order to the Superintending Engineer, asked him to transmit to the Court the sum of Rs. 5,000 already attached before judgment. On receipt of that communication, the Superintending Engineer placed a further sum of Rs. 7,275-9-0 under attachment, but did not send to the Court the sum of Rs. 5,000, as requested. On the 30th April, 1952, the executing Court wrote to the Superintending Engineer, asking him to transmit the whole amount of Rs. 12,275-9-0, attached under the two orders, but the request was not complied with till the 9th March, 1953. In the meantime, the Certificate Officer of 24-Parganas had, on the 23rd July, 1952, addressed a letter to the Subordinate Judge whereby he made a request that if the Superintending Engineer had transmitted any money to the Court, payment thereof

to the petitioners before us might be withheld in order that 'a claim under Order 21, rule 52, of the Civil Procedure Code' might be preferred on behalf of Government. Along with that letter, the Certificate Officer sent a copy of another letter which he had addressed to the Superintending Engineer, asking him to make no payment of any money out of the deposit in his hands, but to retain the whole amount after deducting the departmental dues. It was said that arrears of income-tax due from Messrs. R. K. Das & Co., exceeded Rs. 50,000 and therefore the whole of the security deposit, less departmental dues, was liable to be applied to the satisfaction of the tax-debt in respect of which Government had a priority over all unsecured creditors. It appears that there was a prior attachment order, issued by the Certificate Officer on the 24th September, 1951. In spite, however, of the letter from the Certificate Officer, the Superintending Engineer sent, as I have already stated, the whole amount attached by the petitioners to the executing Court and the same, paid in one sum and by a single cheque, was received on the 9th March, 1953. Thereafter on the 21st March, 1953, the executing Court addressed a letter to the Certificate Officer apparently in consequence of the letter received from him earlier, requesting him to state why the money which had been brought to Court at the instance of the petitioners should not be paid out to them and adding that in the absence of any step taken by the 10th April, 1953, the money would be paid out. Then followed a succession of adjournments, always at the instance of the Union of India represented by the Commissioner of Income-tax, who went on asking for time and yet more time for showing cause against payment of the money to the petitioners. The case was in that position when, on the 17th June, 1953, the Certificate Officer addressed a letter to the executing Court under rule 22 of Schedule II to the Public Demands Recovery Act and asked the Court to hold the amount, subject to further intimation from him. That letter was received by the executing Court on the 24th June, 1953, and an order withholding payment until further orders was made. Previously, the case had been adjourned to the 8th July and when that date came, there was again an application by the Union of India for a weeks time. The application was granted. The case was then adjourned to the 15th July, and on the 15th July the Union of India, as represented by the Commissioner of Income-tax, made an application by which they claimed to be entitled to receive the whole amount of Rs. 12,275-9-0 towards satisfaction of the income-tax dues of R. K. Das & Co., and in their right of priority in respect of a tax-debt. A further and a fuller application to the same effect was filed on the 11th September, 1953, in which the details of the income-tax demand against R. K. Das & Co., were given. It was stated that the demand was for a sum of Rs. 81,537-8-0 and it was on account of the assessment years 1946-47 and 1947-48. In both the applications it was stated that a certificate under section 46(2) of the Indian Income-tax Act had been duly forwarded to the Collector of 24-Parganas and proceedings under the Public Demands Recovery Act had been started.

The learned Judge of the executing Court heard the parties at great length and by an order made on the 19th December, 1953, directed a sum of Rs. 12,275-9-0 lying in his custody to be paid out to the Union of India. It is against that order that the present rule is directed.

The two applications made by the Union of India on the 15th July, and the 11th September, 1953, respectively, did not purport to be made under any particular provision of law. It appears, however, that the advocate for the Union of India invited the Court to treat the applications as applications made under section 151 of the Civil Procedure Code. The learned Judge held that the applications were maintainable as applications under section 151, but he seems also to have held that the Union of India

were equally entitled to succeed on the foot of the attachment made by the Collector through the Certificate Officer.

In support of the rule two objections against the learned Judges orders were urged before us, one of which questioned the right to which he had given effect and the other questioned the procedure he had adopted in doing so.

I may dispose of the second objection first. A great deal of time was taken up before us by insisting that the order made by the learned Judge must be taken to have been made unders section 151 of the Code, since no specific provision applied and then contending that he could not in law make an order under that section for paying out to a third party intervener a sum of money which had been attached by a decree-holder and brought into Court under such attachment. It was said that the Certificate Officers letter to the executing Court had been written before the money had been received and therefore neither Order 21, rule 52 of the Civil Procedure Code, nor rule 22 of Schedule II to the Public Demands Recovery Act would apply. It would, however, appear from the sequence of facts which I have already set out that quite apart from the letter of the 23rd July, 1952, on which the learned advocate for the petitioners was relying, there was another letter dated the 17th June, 1953, which was written after the receipt of the amount. That letter referred specifically to rule 22 and its contents followed literally the language of the rule. In those circumstances, there was clearly an attachment of the amount by the Certificate Officer and whether the matter be regarded as governed by Order 21, rule 52 of the Civil Procedure Code or rule 22 of the Rules framed under the Public Demands Recovery Act, the learned Judge, in whose custody the amount was, was by law required to determine the question of priority raised before him. It is therefore not necessary at all to complicate matters by importing section 151 of the Code.

I must say, however, that the responsibility for introducing section 151 of the Code lies on the Union of India whose lawyers invoked the section before the learned Judge and gave cause to the petitioners to raise the procedural point before us. Why anybodys thoughts should have turned to section 151 at all it is difficult to say, but, perhaps, upon discovering the case of Manickam Chettiar v. Income-tax Officer, Madura South where in similar circumstances a bare application under section 151 succeeded, the lawyers thought that the Government had a short and simple remedy under that section. Had it been necessary to decide whether after a decree-holder had attached some money belonging to his judgment-debtor and caused it to be brought to Court, the State might obtain it for the satisfaction of a public debt by a simple application under section 151, I would have required strong reasons to agree with the view taken in the Madras case. But it is not necessary to consider the soundness of that extreme view here, because there is in the present case the added fact of an attachment by the Certificate Officer in connection with the income-tax demand, which was absent in the Madras case. The same difference in the facts distinguishes the decision of this Court in the case of Gayanada Bala Dassee v. Butto Kristo Bairagee, but I may point out further that although there was no attachment in that case, Government were trying to realise the court-fees decreed to them in a pauper suit in respect of which they were in the position of decree-holders. The present case is a far simpler one and a stronger one for the Union of India. Apart from the attachment by the petitioners, there was also an attachment by the Certificate Officer at the instance of the Union of India who were seeking to realise their income-tax demand. But even so, if the applications before the learned Judge had really to be treated as applications under section 151, I would have to consider

whether the Union of India, acting through the Collector, could attach the money in the custody of the executing Court under the Public Demands Recovery Act and at the same time, acting through the Commissioner of Income-tax, apply to the same Court under section 151 for the payment of the money to them. I do not, however, find any reason to ascribe such duality to the Union of India on the facts of this case. The Union of India, acting through the Commissioner of Income-tax and an officer of his, had issued a certificate under section 46(2) of the Income-tax Act and the Certificate Officer had attached the money in the hands of the executing Court in execution of the certificate and in the manner prescribed by rule 22 of the Rules framed under the Public Demands Recovery Act. The proviso to the rule says that where the property attached thereunder is in the custody of a Court, any question of title or priority arising between the certificate-holder and any other person, not being a certificate debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court. The language of the proviso is the same as that of the proviso to rule 52 of Order 21 of the Code and indeed the whole of rule 22 is a reproduction of rule 52 with the necessary substitution of the Certificate Officer in the place of the Court as the authority issuing the notice of attachment. Under the proviso contained in both these provisions, the question of priority has got to be decided by the custody Court. What the Union of India did by the two applications filed on the 15th July, and the 11th September, 1953, was that they appeared before the executing Court through the Commissioner of Income-tax, raised the question of their priority and prayed that it might be determined in their favour. I may leave aside rule 52 of Order 21, because the attachment for the realisation of the tax-debt was not made under the Code, nor through the Court of the learned 5th Subordinate Judge or any other Court, though I do not decide that those facts would exclude the operation of the rule. I exclude rule 52, because the attachment was actually made under rule 22 of the Rules framed under the Public Demands Recovery Act and that rule itself warrants the applications made by the Union of India, so far at least as they raised the question of priority. Since rule 22 suffices, it is not necessary to import section 151 which, I may recall, was not mentioned in the applications. If section 151 may be left out of account and if under the proviso to rule 22, the learned Judge was required to decide the question of priority, it cannot be said that in deciding it on the applications made to him, he committed any error of procedure.

The next and the more important question is whether the Union of India could claim any priority at all in respect of the tax-debt. It was contended that they could not, because in respect of debts due to the State, there was no priority in India now, nor had there been any such priority at any other time. In support of that extreme proposition, a broad reason was given and it was said that had there been any such priority, it would not have been necessary to provide in various Acts that various kinds of liabilities due to the State would be first charges on the debtors property. A specific reference was made to the Public Demands Recovery Act and it was contended that the provisions of that Act were clear proof that in respect of movable property of the debtor, the State had no prior claim or right; further that income-tax having been made realisation under the Public Demands Recovery Act, the State was limited to the provisions of that Act and could not proceed under any supposed prerogative of priority which, in respect of income-tax demands, no longer existed. Lastly it was faintly contended that even assuming that Crown debts enjoyed a priority before the commencement of the Constitution, under the Constitution, such priority had not survived.

I do not think that the extreme contention urged on behalf of the petitioners required any serious consideration. The broad reason given in its support could not bear a moments scrutiny, because the right to preferential payment which Crown debts enjoy is a right only against unsecured creditors and therefore if precedence over secured creditors as well was to be a achieved, a statutory declaration of first charge was necessary. It was also necessary, because even against unsecured creditors, Crown claims could prevail over private claims only if they met at the same point of time. Taken as a question of fact, the question whether priority in respect of Crown debts has or has not been a part of the law of India admits of only one answer. There was a fairly exhaustive citation of authority before us from which it clearly appeared that the principle of the priority of Crown debts had been accepted and given effect to by the Courts whenever it has been invoked and that instances without number could be found among the decisions of the Calcutta, Bombay, Madras, Allahabad, and Rangoon High Courts. I do not consider it necessary to burden this judgment by setting out those citations. Mr. Das Gupta who appeared for the petitioners relied on a single decision of the Madras High Court in the case of Ramachandra v. Pitchaikanni where also all that the learned Judges said was that they would hesitate to import into places outside the presidency towns the doctrine of the common law of England relating to Crown debts. But it was not necessary to decide the matter in the case before them, inasmuch as even if the doctrine applied in the mofussil areas of India, the facts of the case excluded the priority of the Crowns claim. The decision therefore decided nothing and even to the extent that it expressed a doubt by means of an obiter dictum as to the applicability of the doctrine of priority in the mofussil areas of India it has since been dissented from in other decisions of the Madras High Court, for example, in Bell v. The Municipal Commissioners for the City of Madras. In my view, it is futile to contend that the law of India has never recognised the principle of the priority of Crown claims.

The second attempt of the petitioners was to spell out of the provisions of the Public Demands Recovery Act the meaning that no priority could be claimed in respect of income-tax dues and that, in any event, as to the recovery of such dues, the State was limited to the provisions of the Act. I confess I had some difficulty in comprehending what the learned advocate for the petitioners meant. He referred to the recent decision of P. B. Mukharji, J., in the case of Murli Tahilram v. T. Asoomal & Co., and contended that section 8 of the Act would show that the State had been given only a limited priority in respect of public demands such as income-tax dues and that beyond such priority, which was limited to the realisation of the dues out of the immovable property of the debtor, there was no priority in the Act and there could be none under any prerogative right. I confess I was, and still am, unable to follow the reasoning. It was said that the Act required the Certificate Officer to issue a notice under section 7 after a certificate had been filed and that the only effect of such a notice as laid down in section 8 was that subsequent transfers of the debtors immovable property situated in the district in which the certificate was filed would be void, if voluntarily made, against claims enforceable in execution of a certificate and that the amount due in respect of the certificate would be a first charge upon the immoveable property of the certificate debtor, wherever situated, to which every other charge created subsequently would be postponed. That provision, it was said, had two implications. A notice under section 7 operated only on immovable property and the first charge created thereon, which was only another name for priority, was limited to such property and did not extend to the movables of the debtor. In respect of the movables of the debtor, therefore, the section intended the State to be in the same position as other creditors. The second implication of the section, it was said,

was that apart from the statute-made priority, the State had no other, because, if it had, the provision freezing the immovable property and creating a first charge thereon would be redundant. In my view the first branch of the argument proceeds on a total misconception of what priority means. There is nothing like priority as between different kinds of property owned by the debtor; the priority contemplated by the principle of the priority of Crown claims is a priority vis-a-vis and over claims of other creditors, though only unsecured creditors. I find it impossible to see how any indication of any kind as to the existence or non-existence of the Crowns or of the States right to priority can be found in the provisions of section 8 of the Public Demands Recovery Act. The first paragraph of the section virtually reproduces section 64 of the Civil Procedure Code, except that it is limited to immovable property situated in the district where the certificate is filed and the second paragraph adds a provision for the creation of a charge on all immovable property of the debtor, which certainly goes beyond the Code. I am unable to see how it can be said that such provision excludes the States right to priority as against other unsecured creditors, or how any provision regarding such priority can be said to be implied in the section. The second branch of the petitioners argument on section 8 is even less tenable. It overlooks the fact that the Public Demands Recovery Act is not limited to the recovery of debts due to the State. The long definition of 'public demand', given in Schedule I of the Act and containing as many as fourteen clauses, would how that debts due to local authorities, co-operative societies and in certain cases even private individuals are public demands and can be recovered through the certificate procedure. Debts due to such authorities or individuals enjoy no priority at common law and therefore if the publication of a notice under section 7 was to be given the effect of making subsequent voluntary transfers of certain immovable properties void and creating a charge on all immovable properties of the debtor, a statutory provision in that behalf was needed. The same consideration would answer a further argument advanced by the petitioners which was that if the State had a priority in common law, there could not possibly be any question or priority to be decided, as provided for in the proviso to rule 22. In the first place debts other than public debts have no common law priority and therefore any claim of priority on any other ground, if raised, would have to be determined. Even in the case of debts due to the State; the State would have to make out before the custody Court that the debt is of that character, before such Court could be expected to give preference to such a debt. It has also to be borne in mind that the State is preferred to a private creditor only when the rights of the two meet at one and the same time and therefore whenever a claim of priority is made by the State, it will have to be proved to the custody Court that this requirement of the rule is satisfied. How the Public Demands Recovery Act, which is only a machinery Act for the realisation of debts of various kinds due to various kinds of creditors, can have any bearing on the existence or otherwise of the States right of priority in respect of debts due to it, I find it impossible to see.

The third argument which was also based upon the Public Demands Recovery Act is equally untenable. It was said that the effect of the Act was to limit the State to its provisions as respects the recovery of public demands and necessarily recovery of income-tax and the reason given for the contention was that if, for what could previously have been done under a prerogative right, a legislative provision was subsequently made, the prerogative right could no longer survive. Strong reliance for that proposition was placed on the well-known case of Attorney-General v. D. Keysers Royal Hotel Limited. I am unable to see what application the decision cited has in the present case and how it can be said that the whole or any part of the prerogative right, previously enjoyed, had now been codified in the provisions of the Public

Demands Recovery Act. The case cited dealt with the Kings power to acquire the property of a subject in times of emergency and the question was whether a particular acquisition had been made under the Defence of the Realm Consolidation Act, 1914, in which case compensation would have to be paid, or whether it had been made in exercise of the royal prerogative, in which case the Crown would not be bound to pay compensation. It was held by the House of Lords that if the whole ground of something which could be done by the prerogative was covered by a statute, it was the statute which would rule and upon a construction of the Defence of the Realm Consolidation Act, 1914, it was held to cover the whole ground of emergency acquisition of property in exercise of the prerogative right. The principle laid down in the decision is well-settled, but I am entirely unable to find any analogy between the defence of the Realm Consolidation Act of England and our Public Demands Recovery Act. The reason why a statute is held in an appropriate case to have replaced the prerogative right to the whole or a part of its extent is that the Crown is an assenting party to a statute and where a statute does provide that the Crown is an assenting party to a statute and where a statute does provide that the Crown can only do a particular thing under and in accordance with its provisions, the Crown is necessarily taken to have agreed to a curtailment or abolition of its prerogative power. But the statute must be such that its terms do limit the Crown to its provisions and thereby exclude the prerogative or hold it in suspension, as in the case of temporary statute. I find it impossible to read the Income-tax Act, and with it the Public Demands Recovery Act, as limiting the State to the provisions of the latter as respects recovery of income-tax. If the Crowns assent to a statute is the basis for thinking that the statute overrides the prerogative, it is necessary to see to what the Crown has assented. Section 230(1) of the Indian Companies Act is an instance where the Crowns priority as respects revenue and other debts due to it has been expressly limited by a statute, enacted with the assent of the Crown. But section 46(2) of the Income-tax Act merely says that the Income-tax Officer may forward to the collector a certificate, specifying the amount of arrears due from an assessee and the Collector shall thereupon proceed to recover the amount specified therein as if it were an arrear of and revenue. The section is only permissive. It does not limit the Income-tax Officer to the provision of the Public Demands Recovery Act nor, as I have already pointed out, is the Public Demands Recovery Act limited to the recovery of State debts. I cannot therefore agree that the principles of D. Keysers Hotels case, invoked by the petitioners have any application. I cannot see that either the Income-tax Act or the Public Demands Recovery Act takes over and makes exclusive provision for the Crowns or the States right to recover income-tax which could previously be recovered in exercise of some prerogative right. Indeed, as I have endeavoured to point out, the Public Demands Recovery Act only deals with the particular method of recovering, among other dues, income-tax, if the Income-tax Officer be minded to resort to section 46(2) of the Income-tax Act, but it does not bear upon the priority attaching to tax-claim dues which is quite independent of the method of their recovery. In my opinion, the third ground urged by the petitioners must also fail.

It was lastly contended, rather half-heartedly, that whatever might have been the position before the commencement of the present Constitution of India, the principle of priority attaching to debts due to the State was no longer a part of the law of India and had not been adopted as such by the Constitution. The only argument advanced in support of that contention was that article 372(1) of the Constitution was the only article by which 'all the law in force in the territory of India immediately before the commencement of this Constitution' had been kept alive, but the definition of 'law in force' as given in Explanation 1 to the article, or the definition of 'existing law' in

article 366(10), did not include any such principle. It is true that neither of the definitions covers a doctrine or principle of law which is not an enactment by any authority, but it ought not to be overlooked that the definitions are not exhaustive. All that they say is that the expression 'law in force' in one case and 'existing law' in the other shall include certain matters. The main provision of article 372(1), however, draws in all the law in force in India immediately before the commencement of the Constitution and quite obviously it covers all the laws in force in fact. I have already shown that the principle of priority of debts due to the State had been a part of the law uniformly current in India before the commencement of the Constitution and I am therefore of opinion that the language of article 372(1) must be construed as having brought it over to the India under the Constitution. It can hardly be said that the Crowns prerogative was a right personal to the monarch who held the Crown and since the form of the present Government of India is not monarchical but republican there cannot possibly be any prerogative right, consistently with a Constitution which has an elected President at its head. This argument may plausibly be advanced under the provision contained in article 372(1) that the law previously in force shall continue to be so, subject to other provisions of this Constitution, and it may be said that the other provisions of the Constitution and indeed, the whole concept underlying it, militates against a theory of the head of the State enjoying prerogative rights. Such an argument would, in my view, be fallacious, because although the Crowns prerogative in England might have been a personal right in ancient theory and may historically have arisen out of the feudal character of the State organisation, there can be no doubt that it has since come to be equated with the rights enjoyed by the Government of the day as representing the State. The old explanation of the Crowns priority, given in coke on Littleton, is that it attaches to certain debts, because they are debts due to flow into the public treasury. The justification of the priority, therefore, is that the debts to which it attaches feed the public funds and the reason why they are preferred to debts owned to private individuals is that the needs of the State are supreme and the necessity of keeping the State functioning is the first necessity of any organised society. This conception of the priority of State debts is equally valid in the case of States which are republican in form, because they also require funds to maintain themselves and to perform the high functions which are among the responsibilities of any State. I do not therefore think that the principle of the priority of State debts can be said to be repugnant to the provisions of our Constitution. The principle must therefore be held to have crossed over the dividing line between Crown-ruled and Republican India and become a part of the law of the latter.

On behalf of the Union of India, Mr. Meyer contended that besides that article 372(1) imported into the present-day India all the law previously in force in general terms, there was a direct and specific provision in article 294 by which all the rights previously enjoyed by the Dominion of India, including the right of priority in regard to Crown debts, had devolved upon the Indian Republic. As at present advised, I find myself unable to assent to that proposition. Article 294 appears to me to be addressed to quite a different matter. It undoubtedly deals with all the property and assets previously vested in the Crown for the purposes of the Dominion of India and of the Provinces, as also all rights, liabilities and obligations of the Dominion and the Provinces existing before the Constitution, but the object of the article appears to be to provide for an adjustment of the properties, rights and liabilities as between the Centre and the Provinces and not to enact a provision for their continuance. It is true that the continuance is referred to necessarily and incidentally, but I do not read the article as primarily or directly concerned with the maintenance or continuance of the

pre-Constitution rights and liabilities.

This exhausts all the arguments advanced on behalf of the parties. In my view, there was no procedural error in the manner in which the question was raised before the learned Judge, nor was any error committed by him in holding that the Union of Indias claim to priority was to be upheld. The debt to the Union of India is a tax-debt. The earlier attachment by the petitioners did not create any charge or right in their favour; nor had any order for payment to them been made, as was the fact in the case before P. B. Mukharji, J., before the attachment by the Certificate Officer. All the contentions urged on behalf of the petitioners must therefore be negatived.

I desire, however, to add that no question was raised before us as to the form in which the order ought to have been made. The order made by the learned Judge is an order for payment to the Union of India. Whether or not he should have limited himself to determining the question of priority and holding the money for disposal in such manner as the Certificate Officer might intimate, as required by rule 22 of the Rules framed under the Public Demands Recovery Act was not discussed before us; nor were any of the vexed questions raised as to what the duties of a custody Court were when it was merely a custody Court and when it was both such Court and the executing Court, or such Court and the attaching Court; nor were we asked to consider when, in the circumstances of this case, the money sent by the Superintending Engineer could be said to have been received and whether any crediting to the petitioners suit was required for completing reception. No question was raised either on the earlier attachment of the money in the hands of the Superintending Engineer which appears to have been made in 1951.

Our decision must be regarded as limited to the two points urged before us.

For the reasons given above, this rule is discharged, but in the circumstances of the case no order for costs is made.

LAHIRI, J. - I agree.

Rule discharged.

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