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(1977) 04 P&H CK 0013

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 150 of 1973

Radha Ram Badri Nath and Others — APPELLANT

Vs

Amritsar Sugar Mills Co. Ltd. and Others — RESPONDENT

Date of Decision : 08-04-1977

Acts Referred:
Companies Act, 1956 — Section 433
Industries (Development and Regulation) Act, 1951 — Section 18

Citation : AIR 1978 P&H 129 : (1978) 1 ILR (P&H) 299 : (1977) 79 PLR 387

Hon'ble Judges : R.S. Narula, C.J;Surinder Singh, J;Harbans Lal, J

Bench : Full Bench

Judgement

R.S. Narula, C.J.—The question to be answered by us in this reference by a learned Single Judge is whether the proceedings for winding up of an industrial undertaking which is a company as defined in the Companies Act, 1956(hereinafter called the Companies Act) can be commenced or continued under S. 433 of that Act without the consent of the Central Government required under cl.(c) of sub--section (1) of S. 18E of the Industries (Development and Regulation) Act (65 of 1951) as subsequently amended (hereinafter referred to as the Regulation Act) if the management of a part only of such undertaking (one of its factories) has been taken over by the Central Government under S. 18AA(1) of the Regulation Act.

2. If does not appear to be necessary for the purpose of answering the above question to go into any minute factual question to go into any minute factual details. In order to get a bird''s--eye view of the relevant circumstances in which the abovementioned question has arisen, it may, however, be stated that the Amritsar Sugar Mills Company Limited (hereinafter called the Company) is an industrial undertaking duly registered under the Companies Act with registered office at Amritsar having a sugar factory in Rohana in the State of Uttar Pradesh and a Vanaspati ghee factory in Amritsar, that on Jan. 10, 1974, the management of the sugar factory was taken over by the U. P. State Government under rule 115(2) of the Defence and Internal Security of India Rules,

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1971(hereinafter referred to as the D. I. R.), that the management of the Vanaspati ghee factory was taken over by the body of persons appointed by the Central Government under S. 18AA(1) of the Regulation Act in pursuance of the notification, dated Sept. 13, 1974, reading as below:--

"Whereas the Central Government is satisfied from the documentary evidence in its possession:-- (i) that Amritsar Oil Works, Amritsar, a factory of the industrial undertaking known as Amritsar Sugar Mills Company Limited, Amritsar, which had been engaged in the manufacture of vanaspati has been closed for a period of not less than three months, and

(ii) that such closure is prejudical to a scheduled industry, namely, the vanaspati industry, and that the financial condition of the company owning the said industrial undertaking and the condition of the plant and machinery of the said factory are such that it is possible to restart the factory and such restarting is necessary in the interest of the general public.

Now, therefore, in exercise of the power conferred by sub--section (1) of S. 18AA of the Industries (Development and Regulation) Act, 1951(65 of 1951), the Central Government hereby authorises the body of persons referred to in para 2 of this order as the Board of Management to take over the management of the said industrial undertaking in so far at it relates to the said factory subject to the following terms and conditions, namely:--

(i) The Board shall comply with all directions issued from time to time by the Central Government.

(ii) The Board shall hold office for a period of five years from the date of publication of this order in the Official Gazette.

(iii) The Central Government may terminate the appointment of the Board or of any of the persons comprising the Board earlier, if it considers it necessary to do so.

2. The Board of Management shall consist of the following, namely:--

1. Dr. N. C. B. Nath, Director (Commercial), Steel Authority of India, Chairman New Delhi.

2. Shri F. G. T. Menezes, Director (Vanaspati), Department of Food, Ministry of Agriculture, Member New Delhi.

3. Shri A. C. Chakraborti, c/o S. R. Batliboi & Company, Member Calcutta.

4. Shri B. G. Roy, General Manager, Industrial Reconstruction, Corporation of India, Member Calcutta.

5. Shri L. K. Malhotra, Chief Executive, Ganesh Flour Mills Company (Under Govt. of India Management). Member Delhi.

3. This order shall have effect for a period of five years commencing from the

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date of its publication in the Official Gazette."

Before the taking over of the management of the Sugar Mill by the U. P. Government and the vanaspati mill by the Central Government, the petitioners had on April 30, 1973, filed this petition for the winding up of the Company, which petition had subsequently been published under the Companies (Court) Rules by the order of the Court, dated July 27, 1973. It is the common case of both sides that the taking over of the Sugar Mill by the U. P. State Government under the D. I. R. has no effect on the petition for winding up of the Company and does not attract either the provision of S. 18E(1)(c) or any other such provision. Proceedings for winding up against the Company appear to be ex parte. The State Bank of India (one of the secured creditors of the Company) has intervened with the leave of the Court and is contesting the petition. Consequent upon the taking over of the vanaspati mill by the Central Government, notice was issued to it under order of the learned Single Judge, dated Sept. 27, 1974. The Central Government did not put in appearance in response to the notice.

3. Mr. I. N. Shroff, the learned counsel for the State Bank of India, contended before the learned Single Judge that once an undertaking is taken over either in whole or in part under S. 18AA(1) of the Regulation Act, S. 18E(1)(c) of that Act would be attracted and the winding up proceedings cannot be either initiated or continued against such an undertaking except with the consent of the Central Government. He, therefore, submitted that the petitioners may be directed to apply for and obtain the requisite consent falling which the petition cannot proceed any further. The learned counsel for the creditor--petitioners on the other hand contended that S. 18E would apply only to those undertakings which are taken over under S. 18AA as a whole and not where only a part of the undertaking is taken over. Gujral, J.(now M. S. Gujral, C. J. of the Sikkim High Court) noticed the rival contentions of the counsel on the above point, and observed in his order, dated Sept. 12, 1975, that the controversy is not free from considerable doubt and it would, therefore, be proper that the matter is decided by larger Bench. It is in consequence of the said order of the learned Single Judge that the matter has been placed before us virtually for purposes of answering the question posed by me in the opening sentence of this judgment.

4. The principal Regulation Act was enacted in 1951. S. 18A series were introduced into the principal Act by the Industries (Development and Regulation) Amendment Act (26 of 1953) by adding Chapter III--A and Chapter III--B between the previously existing Chapter III and Chapter IV. I need not take notice of the various other intervening amending Acts but have to refer to the Industries (Development & Regulation) Amendment Act (72 of 1971) whereby S. 18AA was added to Chapter 3A and Chapters IIIAA, IIIAB and IIIAC were brought in after the existing Chapter IIIA and before Chapter IIIB. In order to appreciate the scheme of these provisions is may also be noticed that S. 10A authorising the revocation and registration of a company in certain cases, S. 11A, the provision for prescribing a licence for production or manufacture of any

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new articles, and S. 15A, empowering the Central government to investigate into the affairs of a company in liquidation had also been added to the principal Regulation Act by the 1953 Amending Act, S. 18A(1) and the explanation to that section may be quoted at this stage:--

"18A(1) If the Central Government is of opinion that-- a) an industrial undertaking to which directions have been issued in pursuance of S. 16 has failed to comply with such directions, or

b) an industrial undertaking in respect of which an investigation has been made under S. 16 (whether or not any directions have been issued to the undertaking in pursuance of S. 16), is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest,

the Central Government may, by notified order, authorise any person or body of persons to take over the management of the whole or any part of the undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order.

(2).....

Provided.....

Explanation:--The power to authorise a body of persons under this section to take over the management of an industrial undertaking which is a company includes also a power to appoint any individual, firm or company to be the managing agent of the industrial undertaking on such terms and conditions as the Central Government may think fit."

"Industrial undertaking" is defined in S. 3(d) as below:--

"Industrial undertaking'' means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government."

5. The definition of "factory" is given in clause (c) of S. 3 in the following words:--

"'Factory'' means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on-- "(i) with the aid of power, provided that fifty or more workers are working or were working thereon on any day of the preceding twelve months; or

(ii) without the aid of power, provided that one hundred or more workers are working or were working thereon on any day of the preceding twelve months and provided further that in no part of such premises any manufacturing process is being carried on with the aid of power." Cl.(j) of S. 3 states that the words and expressions used in the Regulation Act, but not defined therein and defined in the Companies Act have the meanings respectively assigned to them in that act.

6. A perusal of S. 18A shows that the power of the Central Government to direct a body of persons to take over the management of the whole or any part of an

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undertaking was confined by the 1953 Amendment Act to cases in which either an undertaking had failed to comply with the directions given to it under of an investigation under S. 16 (on completion of an investigation under S. 15) or the undertaking in respect of which an investigation had been made under that provision (S. 15) was being managed in a manner highly detrimental to the scheduled industry concerned or to public interest. It is not in dispute that sugar industry as well as the vanaspati industry is a scheduled industry within the meaning of the Regulation Act, the result was that unless the Central Government was of the opinion under S. 15 that-

"(a) in respect of any scheduled industry or industrial undertaking or undertakings-

(i) there has been or is likely to be, a substantial fall in the volume of production in respect of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be; for which, having regard to the economic conditions prevailing, there is no justification; or

(ii) there has been, or is likely to be, a marked deterioration in the quality of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, which could have been or can be avoided; or

(iii) There has been or is likely to be a rise in the price of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which there is no justification; or

(iv) it is necessary to take any such action as is provided in this Chapter for the purpose of conserving any resources of national importance which are utilised in the industry or the industrial undertaking or undertakings, as the case may be; or

(b) any industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest."

The Central Government could not make or cause to be made any investigation into the circumstances of the case under S. 15 of the Act, and unless such an investigation had been made, neither any direction could issue under S. 16 on the violation of which cl.(a) or S. 18A(1) could come into force, nor any direction or order could be passed under cl.(b) of S. 18A(1). Consequently a long time had to elapse between the forming of the opinion by the Central Government referred to in S. 15 and the actual taking over of the industry under S. 18AA(1), reproduced below, authorised the Central Government to take over the management of an industrial undertaking or a part thereof on the prescribed satisfaction derived from documentary or other evidence it is possession without undertaking any investigation:--

"Without prejudice to any other provision of this Act, if, from the documentary or

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other evidence in its possession the Central Government is satisfied, in relation to an industrial undertaking, that-- (a) the persons in charge of such industrial undertaking have, by reckless investments or creation of incumbrances on the assets of the industrial undertaking, or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured or produced in the industrial undertaking, and that immediate action is necessary to prevent such a situation; or

(b) it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the company owning the industrial undertaking or for any other reason) and such closure is prejudical to the concerned scheduled industry and that the financial condition of the company owning the industrial undertaking and the condition of the plant and machinery of such undertaking are such that it is possible to restart the undertaking and such re--starting is necessary in the interests of the general public,

it may, by a notified order, authorise any person or body of persons (hereafter referred to as the ''authorised person'') to take over the management of the whole or any part of the industrial undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order."

The provisions of sub--section (2) of S. 18A have been made applicable to a notified order made under sub--s. (1) of S. 18AA so far as may be.

7. Having armed itself with the power to take over the management of a sick undertaking either after investigation under S. 15 by virtue of powers under S. 18A(1) or without any investigation in exercise of the power under S. 18AA(1) the Central Government still statutorily abstained from interfering with an undertaking which was being wound up by or under the supervision of the Court. This exception was carved out by sub--section (3) of S. 18AA in the following words:--

"Nothing contained in sub--section (1) and sub--section (2) shall apply to an industrial undertaking owned by a company which is being wound up by or under the supervision of the Court."

Sub--section (5) of S. 18AA has made the provision of Ss. 18A to 18E (both inclusive) also applicable to the industrial undertaking in respect of which a notified order has been made under sub--section (1) of S. 18AA. We are concerned in the present proceedings with sub--clause (c) of S. 18E(1) directly and with sub--section (2) of that section for purposes of interpretation. Both these are, therefore, quoted below:--

"18E (1) Where the management of an industrial undertaking, being a company as defined in the Indian Companies Act, 1913, is taken over by the Central Government, then, notwithstanding anything contained in the said Act or in the memorandum of articles of association of such undertaking--

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(a).....

(b).....

(c) no proceeding for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any court except with the consent of the Central Government.

(2) Subject to the provisions contained in sub--section (1), and to the other provisions contained in this Act and subject to such other exceptions, restrictions and limitations, if any, as the Central Government may, by notification in the Official Gazette, specify in this behalf, the Indian Companies Act, 1913, shall continue to apply to such undertaking in the same manner as it applied thereto before the issue of the notified order under S. 18A."

It may admit of a little repetition to take pointed notice of the admitted facts that the Company is an industrial undertaking within the meaning of the Regulation Act, that the sugar factory in U.P. is a part of that undertaking, that the vanaspati factory at Amritsar is another part of that undertaking, that the undertaking is a company as defined in the Companies Act, and that an order under S. 18AA(1) has been passed by the Central Government during the pendency of the winding up proceedings in pursuance of which the body of persons appointed by the Central Government has taken over the actual management and control of that part of the undertaking which is situated at Amritsar. It has been rightly conceded by the counsel for the petitioners that the mere fact that liquidation proceedings had been initiated before the order under S. 18AA(1) was passed would not by itself make any difference to the application of S. 18E(1)(c) as the expression "no proceeding shall lie" used in that clause includes the initiating as well as the continuing of the relevant proceedings. The argument advanced by Mr. Bhagirath Dass, the learned counsel for the petitioners, before us was that his petition is for the winding up of the Company as a whole and not for winding up of the undertaking which has been taken over by the Central Government. In other words he submitted that he has not applied for liquidation of the vanaspati factory which alone has been taken over by the Central government and his clients would have no objection if that unit of the Company is completely left out of the winding up proceedings. It is on these premises that he has argued that his clients need not apply to the Central Government for its consent under S. 18E(1)(c) particularly when it (the Central Government) has neither responded to the notice issued to it by this Court, nor put in appearance to support the objection raised by Mr. Shroff.

8. I have already noticed above the scheme of the Regulation Act up to the stage of the introduction of S. 18AA(3). The obvious purpose of the introduction of chapter IIIAA containing S. 18FA is to provide for the management and control of an industrial undertaking owned by companies in liquidation which were otherwise saved from interference by the Central Government by virtue of the exception contained in S. 18AA(3). Similarly the power to provide relief to certain

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industrial undertakings (a subject with which we are not concerned) was brought in by the introduction of Chapter IIIAB, and provisions for regulation or reconstruction of companies were made in S. 18FC or S. 18FH contained in Chapter IIIAC and amendment to the power to control, supply, distribution, price, etc. of certain articles was made by the introduction of S. 18G as contained in Chapter IIIB of the Regulation Act. It is in this manner that machinery has been provided for extension of the scope of interference with an industrial undertaking even when it is under liquidation or has been ordered to be wound up. The scheme of the Act, therefore, provides that the Central government may order and hold investigation under S. 15 in respect of a company, for winding up (of) which no petition has been presented, but it must seek leave of the Court for investigation into the affairs of a company which is being wound up, though such leave cannot be refused because of the language of sub-section (2) of that section. The whole of S. 15A is quoted below for facility of reference:--

"(1) Where a company, owing an industrial undertaking is being wound up by or under the supervision of the High Court, and the business of such company is not being continued, the Central Government may, if it is of opinion that it is necessary, in the interests of the general public and, in particular, in the interests of production, supply or distribution of articles or class of articles relatable to the concerned scheduled industry, to investigate into the possibility of running or re--starting the industrial undertaking, make an application to the High court praying for permission to make, or cause to be made, an investigation into such possibility by such person or body of persons as that Government may appoint for the purpose.

(2) Where an application is made by the Central Government under sub--section (1), the High Court shall, notwithstanding anything contained in the Companies Act, 1956, or in any other law for the time being in force, grant the permission prayed for."

9. The object of the provisions of the Regulation Act to which reference has been made by me above is to override the normal Company Law routine in respect of any industrial undertaking which is manufacturing or producing any of the articles referred to in the schedule to the Act by taking over, the whole or limited control of its factory if:--

(i) such undertaking unjustifiably reduces its production beyond the requirements of the prevailing economic conditions; or

(ii) there has been an avoidable deterioration to a marked extent in the quality of the articles produced by it; or

(iii) the undertaking has unjustifiably raised the price of its products; or

(iv) it is necessary to do so in order to conserve any specified resources of national importance; or

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(v) it is being managed in a manner highly detrimental to the scheduled industry; or

(vi) if the persons in charge of the undertaking have by reckless investment or reckless encumbering its assets or by diversion of its funds brought about a situation likely to affect its production; or

(vii) if the undertaking has been closed for three months or more and such closure is prejudical to the industry though there is no lack of machinery or funds to restart the factory in the public interest.

10. All impediments in the way of achieving the above objects have been removed by the different provisions in the Regulation Act. Care has at the same time been taken to disturb the ordinary law of the land to the minimum possible extent for achieving the above mentioned objectives. This effort accounts for provisions like those for taking over the control of only part of an undertaking, for obtaining permission of the High Court in certain contingencies, for fixing the maximum period for which the control can be taken over and the like. The requirement of the consent of the Central government requisite under S. 18E(1)(c) has to be read in the same light. This requirement being in the nature of a restriction on the right of a creditor or shareholder conferred on him by S. 433 of the Companies Act has to be strictly construed. The result of strict construction of the restriction would be that if it is possible to construe the provision in both ways, that is for S. 18E being attracted only if the whole undertaking is taken over and also if a part of it is taken over then by the process of interpretation, its application would be excluded from a case where only a part of the undertaking is taken over provided such construction of the provision can be harmonious with the various other provisions of the Regulation Act and the Companies Act. S. 18E(1)(c) has already been quoted by me. It is significant to notice that in the opening part of sub--section (1) of the section, the applicability of the provision is made dependent upon the industrial undertaking having been taken over by the Central Government and not on any part of the industrial undertaking having been so taken over. Wherever the legislature so intended, it has referred to the taking over of the whole or part of the undertaking, for example, in sub--section (1) of S. 18A, sub--section (1) of S. 18AA, etc. If the Legislature intended that no proceedings for winding up of an undertaking shall lie, without up of an undertaking shall lie, without the consent of the Central Government even if one factory of the undertaking or a part of the undertaking had been taken over under the control of the Central Government, it would surely have said so. Mr. Shroff has argued that in the very nature of things, consent would be necessary even if a part of the undertaking has been taken over by the Government to avoid duality of management as the authorised person appointed under S. 18AA(1) would have control of one part of the undertaking and the Official Liquidator of the remaining undertaking in the case of the passing of a winding up order. It was further argued that similarly if the Court were to appoint a receiver of the undertaking, he would not be able to take over the factory which

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is under the control of the authorised person appointed by the Central Government and the Court would not be able to exclude from the purview of the authority of the receiver or the Liquidator that part of the company which is under the control of the authorised person. This argument does not hold any water in view of the express provisions contained in Chapter IIIAA. Under S. 18FA(2), the High Court can make an order in the case of a company in liquidation empowering the Central Government to authorise any person to take over the management of the undertaking or to exercise functions of control in relation to the whole or any part of the undertaking for the relevant period. Under the proviso to that sub--section, the High Court can permit such authorised person to continue to manage the undertaking or its part even after the Central Government gives up the control by giving such permission or authority for a period up to two years at a time, but not exceeding twelve years in all. Sub--section (3) of S. 18FA reads as follows:--

"(3) Where an order has been made by the High Court under sub--section (2), the High Court shall direct the Official Liquidator or any other person having, for the time being, charge of the management or control of the industrial undertaking, whether by or under the orders of any court, or any contract or instrument or otherwise, to make over the management of such undertaking or the concerned part, as the case may be, to the authorised person and thereupon the authorised person shall be deemed to be the Official Liquidator in respect of the industrial undertaking or the concerned part, as the case may be."

The above--quoted sub--section clearly provides for an eventually where the Official Liquidator and the authorised person in charge of the Government managed part of the undertaking can work together in respect of their different spheres of assignment. For purposes of the Companies Act, the authorised person is deemed to be the Official Liquidator in respect of the concerned part of the undertaking. This completely answers the question raised by Mr. Shroff and dispels the doubt created by his argument.

11. It has also been pointed out by Mr. Bhagirath Dass that the Legislature has consciously used two different expressions in different provisions of the Regulation Act so as to bring about clearly the distinction between the company which is the body corporate on the one hand, and the industrial undertaking which is an enterprise of the company on the other. In Ss. 15A. 18AA(1)(b), 18AA(3) and 18FE the expression used is "a company owing an industrial undertaking." On the other hand the expression used in Ss. 18A, 18B(1)(e) and 18E(1) is "an industrial undertaking which is a company" or "an industrial undertaking, being a company as defined in the Indian Companies Act." From a mere perusal of those provisions it is clear that the Regulation Act has kept in view the fact that what is to be wound up is the company which may own an industrial undertaking, and not the industrial undertaking. That is why the expression used in S. 15A(1) is "where a company, owning an industrial undertaking is being wound up....." Reference may also be had to

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clause (b) of sub--section (1) of S. 18AA which refers to "the financial condition of the company owning the industrial undertaking" Similarly in sub--section (3) of S. 18AA application of the provisions of sub--section (1) and (2) of that section has been excluded in respect of an industrial undertaking " owned by a company which is being wound up." Reference to "the company owning the industrial undertaking" is also made in cl.(a) of sub--section (1) of S. 18 FD, and in S. 18FE(1). On the other hand the expression "industrial undertaking which is a company" is used in the explanation to S. 18A, S. 18B(1)(e) and S. 18E(1). Wherever the reference is to an industrial undertaking "being a company" or an industrial undertaking "being a company" or an industrial undertaking "which is a company", the expressions are intended to refer to the whole of the company unless a part thereof is clearly referred to. Where on the other hand reference is to an undertaking owned by a company, it is intended to cover the undertaking or part thereof in respect of which some order has been passed and not necessarily the entire undertaking of the company.

12. Last but not the least is the language of the notification itself. In its opening part it clearly says that the Central Government is satisfied from the documentary evidence in its possession that the Amritsar Oil Works, Amritsar, "a factory of the industrial undertaking known as..." In the operative part of the notification again the Central Government has authorised a body of persons appointed by it to take over the management of the said industrial undertaking "insofar as it relates to the said factory" " subject to the conditions specified in the notification. All this clearly indicates that the management of the industrial undertaking which is the company (being a company as defined in the Indian Companies Act) has not been taken over by the Central Government, and, therefore, sub--section (1) of S. 18E of the Regulation Act has no application to the case. It is only a part of the undertaking, that is only one of the factories belonging to the Company, that has been taken over.

13. For the foregoing reasons we have no hesitation in holding that the provisions of cl.(c) of sub--section (1) of S. 18E are not attracted in this case and the winding up proceedings can continue without obtaining the consent of the Central Government required under the provision. The winding up petition will now go back to the learned Company Judge for being dealt with further and decided on merits in accordance with law.

Harbans Lal, J.

14. I agree.

Surinder Singh, J.

15. So do I.

16. Reference answered accordingly.

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