

(2022) 04 OHC CK 0220

In the Orissa High Court

Case No : Writ Petition Civil (OAC) No. 1067 Of 2018

Ramesh Chandra Biswal And Others

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 07-04-2022

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Administrative Tribunals Act, 1985 — Section 19

Citation : (2022) 04 OHC CK 0220

Hon'ble Judges : Sashikanta Mishra, J

Bench : Single Bench

Advocate : Upendra Kumar Samal, M.R. Mohapatra, S.P. Patra, A.K. Kar, B.R. Barick, H.K. Panigrahi

Final Decision : Disposed Of

Judgement

Sashikanta Mishra, J.

1. The petitioners in the present writ application seek to challenge the action of the Opposite Parties in taking them over to the work-charged establishment instead of regularizing their services. According to the petitioners, who claim to have been engaged as NMR/HR workers between 1980-1993, they are entitled to be regularized in service in view of the ratio laid down by the Apex Court in the case of Secretary, State of Karnataka and others vs. Umadevi and others, reported in (2006) 4 SCC 1.

2. The factual matrix of the case is as follows:

All the 23 petitioners claim to have been engaged as NMR/HR workers by the Executive Engineer P.H. Division, Cuttack (Opposite Party No.4). While petitioner No.1 was engaged as Fitter Mistry on 24.09.1980, petitioner No.15 was engaged as High Skilled worker on 01.06.1992. All the other petitioners have been engaged similarly as Fitter Mistry/Khalasi/Helper/High Skilled worker in between the aforementioned two dates. On 28.10.1994, a provisional gradation list of

NMR/HR personnel of Cuttack R.W.S.S. Division was published and circulated among 192 such workers of the Division inviting objections. The said gradation list was subsequently made final. After publication of the final gradation list, the petitioners and the other NMR employees regularly submitted representations to the authorities for regularization of their services. On 10.04.2006, a Constitution Bench of the Hon'ble Supreme Court of India rendered the judgment in Umadevi (supra) directing the Union and State Governments to take steps to regularize, as a one-time measure, the services of irregularly appointed persons, who have worked for ten years or more in duly sanctioned posts without orders of any Court or Tribunal. The petitioners submitted representation again laying their claim for regularization on the basis of the ratio of Umadevi. However, the Government of Odisha in R.D. Department instead decided to absorb the NMR personnel in different categories of Class-IV posts under work-charged establishment in the scale of pay of Rs.2550-55-2660-60-3200 with usual DA/HRA as sanctioned by Government from time to time. Basing on such letter of the R.D. Department bearing No.78991 dated 27.10.2008, the Opposite Party No.4 issued order to the petitioners to work under the work-charged establishment. It is the case of the petitioners that they were duly appointed against existing vacant posts in the regular establishment and have uninterruptedly worked for more than 10 years prior to the date of judgment passed in Umadevi, that too without any order of the Court or Tribunal and therefore, their services need to be regularized from the date they joined in service. On such facts, the petitioners pray that they may be regularized from the date of their joining along with grant of financial and retirement benefits.

3. A common counter has been filed on behalf of all the Opposite Parties wherein the claim of the petitioners for regularization of their services has been sought to be repelled on the ground that they are not entitled to such benefit. The Opposite Parties have referred to the Work-Charged Employees (Appointment and Conditions of Service) Instructions, 1974 (for short, "the Instructions 1974"), Finance Department Resolution dated 15.05.1997 and Water Resources Department Resolution dated 07.09.1995 to state that it is the policy decision of the Government as to how to regularize NMR/DLR and work-charged employees, which is reflected in the rules and circulars noted above. Accordingly, the petitioners have been brought over to the work-charged establishment and being subjected to the service conditions provided in the Instructions 1974 have accepted the same without offering any challenge since the year 2009. It is, therefore, stated that the petitioners cannot seek a relief de hors the service conditions provided in Instructions 1974. Referring to the provision of the Orissa Civil Services (Pension) Rules, 1992, it is further stated that in so far as the claim for pensionary benefits is concerned, the petitioners having been brought over to the work-charged establishment shall be governed under Rule 18(3) thereof, which provides for grant of minimum pension to a work-charged employee who has discharged service for five years or more. It is also stated that there is no provision in the Instructions 1974 to bring the work-charged employees to the

regular establishment. The claim of the petitioners is described as misconceived on the ground that they have made a backdoor entry into Government service without being sponsored by the employment exchange or undergoing any recruitment process. It is finally stated that as per Finance Department resolution dated 15.05.1997, which is an existing scheme for absorption in regular establishment in supersession of all previous resolutions, a work-charged employee cannot claim the benefit of a regular employee. Therefore, there is no scope of regularization of such employees particularly, after the judgment of the Apex Court in Umadevi.

4. Heard Mr. Upendra Kumar Samal, learned counsel for the petitioners and Mr. H.K. Panigrahi, learned Additional Standing Counsel for the State at length.

5. Mr. Samal would argue at the outset that all controversy relating to regularization of services of all types of casual employees including NMR/DLR/Job contract workers has been set at rest by the Apex Court in its judgment rendered in the case of Umadevi. It is submitted that the petitioners fully fulfill the criteria laid down in Umadevi inasmuch as their initial appointments being against vacant sanctioned posts may be irregular but not illegal and they have admittedly worked for more than 10 years without intervention of any Court or Tribunal prior to the said judgment. Mr. Samal has also referred to the decision of the Apex Court in the case of State of Karnataka and others vs. M.L. Kesari and others, reported in (2010) 9 SCC 247 to support his contention that the petitioners have fulfilled the criteria much prior to the cut-off date, i.e., 10.04.2006. On the basis of the above judgments, Mr. Samal contends that the only course open to the Opposite Parties-Authorities after Umadevi was to regularize the services of the petitioners but instead of doing so, the petitioners were brought over to the work-charged establishment which is not akin to regular service. This, according to Mr. Samal is in complete violation of the ratio of Umadevi as well as M.L. Kesari (supra). It is also submitted that though being work-charged employees the petitioners are entitled to the minimum pay scale of regular employees along with admissible allowances and gratuity etc. but are deprived of pensionary benefits, despite having put in decades of uninterrupted and unblemished service to the State.

6. Per contra, Mr H.K. Panigrahi has relied upon the decision of the Odisha Administrative Tribunal in the case of Hurusikesh Singh vs. State of Orissa and others in O.A. No.447 of 2006, as confirmed by this Court as well as the Apex Court. It is argued by Mr. Panigrahi that in the aforementioned case, the Tribunal after relying upon the provisions of Instructions 1974 held that the applicant therein who was a work-charged employee is not entitled to the benefit of regularization of his services. Mr. Panigrahi has also referred to two judgments of this Court, i.e., the case of State of Orissa and others vs. Dhaneswar Sahu and another in OJC No.14196 of 1999 and the case of Pravaranjan Kumar Panda vs. Water Resources Department in WPC (OA) No. 157 of 2010. Mr. Panigrahi has, in particular, referred to the observation of the Division Bench in the case of

Dhaneswar Sahu (*supra*) to the effect that without availability of posts in the regular establishment, a work-charged employee, even if he has completed five years of service, cannot become a regular employee. Referring to the case of Pravarajan Kumar Panda (*supra*) Mr. Panigrahi has contended that the decision rendered in Hrusikesh Singh (*supra*) has been affirmed and the prayer for regularization of the applicant therein was rejected. It is further argued by Mr. Panigrahi that the ratio of Umadevi does not lay down an inflexible rule that all temporary/casual employees shall have to be regularized in service, rather regularization has to be on the basis of a scheme. In this regard Mr. Panigrahi has referred to a decision of the Apex Court in the case of State of Tamil Nadu vs. A. Singamuthu, reported in (2017) 4 SCC 113. The sum and substance of the argument advanced by Mr. Panigrahi is that a scheme for regularization of services of such employees having already been framed by the Government in the form of FD resolution dated 15.05.1997 and the petitioners having already been brought over to the work-charged establishment being governed under Instructions 1974, are not entitled to be regularized in service.

7. As is evident from the above narration, both parties have relied upon Umadevi (*supra*) besides other cases in support of their respective stands. It would therefore be profitable to first know the purport of the ratio of Umadevi before delving into the facts of the case. The Apex Court has held under paragraph-53 of the judgment as under:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (*supra*), R.N. Nanjundappa (*supra*), and B.N. Nagarajan (*supra*), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

8. The decision of Umadevi (*supra*) was further explained in the case of M.L. Kesari (*supra*) under paragraphs-8, 9 10 and 11 as follows:

"8. Umadevi (3) casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi (3)¹, directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.4.2006).

9 . The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi (3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their services."

(Emphasis supplied)

10. At the end of six months from the date of decision in Umadevi (3), cases of several daily-wage/ad-hoc/casual employees were still pending before Courts. Consequently, several departments and instrumentalities did not commence the one-time regularization process. On the other hand, some Government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such

circumstances, the employees who were entitled to be considered in terms of Para 53 of the decision in Umadevi, will not lose their right to be considered for regularization, merely because the one-time exercise was completed without considering their cases, or because the six month period mentioned in para 53 of Umadevi has expired. The one-time exercise should consider all daily-wage/adhoc/those employees who had put in 10 years of continuous service as on 10.4.2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi, but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi, the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one time exercise will be concluded only when all the employees who are entitled to be considered in terms of Para 53 of Umadevi, are so considered.

11. The object behind the said direction in para 53 of Umadevi is two- fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decision in Umadevi was rendered, are considered for regularization in view of their long service.

Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad-hoc/casual for long periods

and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 (the date of decision in Umadevi) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Umadevi(3) or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in Umadevi(3) as a one-time measure.

9. A careful reading of the observations made by the Apex Court in the aforementioned cases would make it abundantly clear that the benefits of regularization in service is not available to all irregularly engaged employees, but only to those who fulfill the criteria laid down therein, i.e., their appointments must be irregular but not illegal and they must have continued in work for more than 10 years uninterruptedly without protection of the order of any Court or Tribunal prior to 10.04.2006. Further, a corresponding duty has been cast upon the Government to undertake a one-time exercise and prepare a list of such employees to make necessary verification of their services and if found to be eligible, to regularize their services.

10. Coming to the case of A. Singamuthu (supra) relied upon by Mr. Panigrahi, it is seen that in the said case also the Apex Court emphasized as a matter of caution under paragraph -8.

"8. Part-time or casual employment is meant to serve the exigencies of administration. It is a settled principle of law that continuance in service for long period on part-time or temporary basis confers no right to seek regularization in service. The person who is engaged on temporary or casual basis is well aware of the nature of his employment and he consciously accepted the same at the time of seeking employment. Generally, while directing that temporary or part-time appointments be regularized or made permanent, the courts are swayed by the long period of service rendered by the employees. However, this may not be always a correct approach to adopt especially when the scheme of regularization is missing from the rule book and regularization casts huge financial implications on public exchequer."

Further, the Apex Court also referred to the observation made in Paragrah-48 of Umadevi, which is as under:

" 48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries

for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

The Apex Court also referred to a decision of *State of Rajasthan vs. Dayalal*, reported in (2011) 2 SCC 429 wherein the well settled principles relating to regularization and parity in pay were laid down under paragraph-8 as follows:

"8. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be 'litigious employment'. Even temporary, ad hoc or daily- wage service for a long number of years, let alone service for one or two years, will not entitle such

employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

(See : Secretary, State of Karnataka vs. Uma Devi - 2006 (4) SCC 1, M. Raja vs. CEERI Educational Society, Pilani - 2006 (12) SCC 636, S.C. Chandra vs. State of Jharkhand - 2007 (8) SCC 279, Kurukshetra Central Co-operative Bank Ltd vs. Mehar Chand - 2007 (15) SCC 680, and Official Liquidator vs. Dayanand - 2008 (10 SCC 1)."

11. On a conjoint reading of the case laws referred to in the preceding paragraphs, it becomes evident that while Umadevi and M.L. Kesari enjoin upon the Central/State Governments to formulate a scheme for regularization of eligible employees, A Singamuthu inter alia, emphasizes the need to adhere to the scheme, if any, for such purpose.

12. Keeping the above principles of law in the background, the facts of the present case may now be examined.

Undisputedly, all the 23 petitioners have been engaged as NMR/HR workers under the administrative control of Opposite Party No.4 in between 1980 to 1993. As already stated, the Opposite Parties have referred to the FD resolution dated 15.05.1997 as being relevant to the case. Undoubtedly, the said resolution holds the field as it was issued in supersession of all previous orders/resolution/notification etc. issued by various departments of Government for regularization of NMR/DLR/Job contract and other such category of workers as mentioned in paragraph-13 thereof. According to the Opposite Parties, this is the existing scheme of the Government for absorption of such category of workers under the regular establishment prior to the judgment in Umadevi. Several pre-conditions

have been laid down in the said resolution including the condition that the workers should have worked under the administrative control of the department concerned directly for a minimum period of 10 years and they should have been engaged prior to 12.04.1993.

13. Having examined the aforesaid resolution, this Court finds that nowhere it mandates that the NMR/DLR/Job Contract workers are to be first brought over to the work-charged establishment before regularization of their services. Such being the position, it is not understood nor adequately clarified by the opposite parties as to on what basis the petitioners were brought over to the work-charged establishment in the year 2009, which is after the judgment passed in Umadevi, even though they had put in nearly three decades of uninterrupted service and were, therefore, otherwise eligible to be considered for absorption in the regular establishment as per the ratio of Umadevi and even as per the resolution dated 15.05.1997. Reference has been made to the Resolution No.21828 dated 07.09.1995 of the Government in Water Resources Department, enclosed as Annexure-C to the counter, which provides for regularization of services of NMR and work-charged employees but then, after coming into force of the FD resolution dated 15.05.1997, the same stood automatically superseded. Therefore, reliance placed on the said resolution to justify the action of the authorities in bringing over the petitioners to the work-charged establishment in the year 2009 is entirely fallacious and untenable.

14. The Opposite Parties have also referred to the Instructions 1974 to contend that the petitioners having accepted and acquiesced to being brought over to the work-charged establishment without any challenge to their service conditions as provided in the said instruction, cannot now seek a relief de hors the provisions in Instructions 1974. This is a fallacious argument inasmuch as when the Constitution Bench of the highest Court of the land has placed a definite obligation on the Government (in Umadevi) to act in a particular manner in respect of such category of employees and it has not done so, how can it turn around to question the so-called conduct of the employees by raising the plea of acceptance and acquiescence? To reiterate, the Apex Court in Umadevi as explained in M.L. Keshari, mandated that every department of the Government should undertake a one-time exercise of verification of such employees to consider if they are eligible to be regularized, and if so, to regularize them. This being the law of the land has to be followed in letter and spirit by all concerned. The concerned department in the instant case has however, acted as per its own decision overlooking the mandate of the Apex Court to simply bring the petitioners (and similarly placed other employees) to the work-charged establishment instead of undertaking the exercise as mandated in Umadevi. The stand of the opposite parties is therefore, untenable.

This Court is also unable to agree with the other contention raised by the opposite parties that the petitioners being governed by the Instructions 1974 cannot seek any relief de hors such instructions. This is for the reason that

undoubtedly Instructions 1974 are applicable to all work-charged employees but the same does not speak of regularization of such employees, but lays down their various service conditions. As already stated, even apart from Umadevi, the FD Resolution dated 15.05.1997 holds the field in the matter of regularization of not only NMF/DLR/Job Contract employees but also the work-charged employees. Significantly, the opposite parties have themselves stated so in their counter affidavit under paragraph-9, the relevant portion of which is extracted herein below:-

"9. xxx xxx xxx xxx

Moreover, it is humbly submitted that the Finance Department in a subsequent resolution dated 15.5.1997 on the scheme for absorption of NMR/DLR/Job Contract Workers under Regular establishment vide Annexure-B have in supersession to all the orders/resolution/notification etc. issued by various department of Government for regularization of such category of workers issued norms and conditions for absorption in regular establishment. The Para-8 of the said resolution clearly states that while filling the regular vacant posts preference shall be given to work charged employees first. Where no suitable work charged employees are available to man the post, preference shall be given in the following order, i.e., NMR/DLR/Job Contract Workers. Thus, there is existing scheme for absorption in regular establishment as Finance Department Resolution dated 15.5.1997 vide Annexure-B which supersedes all previous resolutions including Finance Department Resolution dated 22.1.1965 dated 6.3.1990 issued in the subject matter of absorption.

xxx xxx xxx xxx xxx xxx."

However, the provisions of the Resolution were never applied in case of the petitioners.

15. It is also seen that the claim of regularization of the petitioners is sought to be repelled by the opposite parties by contending that they have made a backdoor entry into Government service without being sponsored by the employment exchange or undergoing any recruitment procedure. In this context, it is significant to refer to the averments made under paragraph-6.10 of the writ petition to the effect that the petitioners were duly appointed against existing vacant posts in the regular establishment. Such averment has not been controverted in any manner in the counter affidavit. Even assuming for a moment that the petitioners were not validly engaged, the question is, how could they be retained for such an inordinately long period of time and secondly, how could a gradation list of such employees be prepared and finalized and thirdly, how could they be taken over to the work-charged establishment? Of course, this court is conscious of the proposition that mere continuance for a long period per se does not confer any right on the person concerned to claim regular appointment de hors the Constitutional requirement, but then the observations of the Constitution Bench in Umadevi under paragraph-53 thereof as referred to

hereinbefore, cannot also be overlooked. The long and short of the issue at hand is, the petitioners claim to have fulfilled the criteria laid down in Umadevi and therefore, should at least have been considered for regularization of their services within six months of the passing of judgment in Umadevi.

16. From the facts narrated hereinbefore, it is apparent that the petitioners, despite having put in merely three decades of continuous service to the State have been left in the lurch. Some of them have also retired in the meantime. The fact that the petitioners have continued for so long proves that there was work for them. If such be the case then, taking work from them for such a long period of time, but depriving them from the wages and other benefits payable/being paid to their counter-parts in the regular establishment is nothing, but exploitation of the labour force by the Government, which is not expected from it, as it is supposed to be a model employer. The direction of the Constitution Bench in Umadevi, as amplified in M.L. Kesari is clear and unambiguous and places an obligation on the Government to regularize as one-time measure, all eligible casual employees who fulfill the criteria laid down therein within a period of six months. Alas, sixteen long years have passed since the date of judgment in Umadevi and yet there are no materials to suggest that the case of the petitioners was considered in pursuance of the ratio of Umadevi. It would therefore, be in the fitness of things to remit the matter to the opposite parties to first take a decision with regard to regularization of the services of the petitioners with due regard to all relevant factors like availability of posts, seniority etc.

17. For the foregoing reasons therefore, the writ petition is disposed of with a direction to the opposite parties to consider the case of all the petitioners for regularization of their services in due deference to the ratio of Umadevi (supra) and if found eligible, to regularize their services in accordance with law. The above exercise shall be taken up and concluded within a period of three months from the date of the receipt of a copy of this order or on production of certified copy thereof by the petitioners..

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