(2019) 09 CAL CK 0359

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 17024, 17287, 17288, 17289, 17386, 17388, 17389, 17403, 17405, 17407, 17409, 17513, 17625, 17626, 17627, 17670, 17813, 17832 (W) Of 2019

Writ Court By Way APPELLANT

Vs

State Of West Bengal & Ors RESPONDENT

Date of Decision : 27-09-2019

Acts Referred:

Bengal Excise Act, 1909 — Section 22, 26, 30, 37A, 38, 42
Indian Penal Code, 1860 — Section 179, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489
West Bengal (Selection Of New Sites And Grant Of License For Retail Sale Of Liquor And Certain Other Intoxicants) Rules, 2003 — Rule 4(q), 9
Constitution Of India, 1950 — Article 14, 19, 19(1)(g), 226, 301, 304

Citation : (2019) 09 CAL CK 0359

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Bikash Ranjan Bhattacharya, R. N. Chakraborty, A. De, Nabankur Paul, R. N. Chakraborty, Era Ghosh, T. Dey, A. De, Supriyo Chattopadhyay, Joydip Kar, Krishnendu Sarkar, Abhijit Mondal, Abhratosh Majumdar, Soumitra Mukherjee, Debasish Ghosh, Avra Majumdar

Final Decision : Dismissed

Judgement

Debangsu Basak, J

The Court:- 18 writ petitions are taken up for hearing analogously as they involve the same issues.

Mr. Bikash Ranjan Bhattacharya, learned senior advocate appearing on behalf of the writ petitioner in W.P. No. 17024(W) of 2019 submits that, the petitioner is a temporary liquor license holder. Such liquor license was suspended for a temporary period on the specific ground of the impending General Election of 2019 by a notification dated March 2, 2019. The Excise Commissioner did not rescind the notification dated March 2, 2019 subsequent to the General Elections of 2019 getting over. The petitioner approached the Writ Court by way of W.P. No. 11739(W) of 2019 (Partha Sarathi Saha and Ors. Vs. The State of West Bengal & Ors.). Such writ petition was disposed of by an order dated July 3, 2019 by directing the Excise Commissioner to reconsider his decision dated March 2, 2019. He submits that, the Excise Commissioner, by an order dated July 23, 2019, purportedly passed in conformity with the order dated July 3, 2019, called for reports from various authorities. He submits that, the Excise Commissioner acted in excess of jurisdiction in doing so. He submits that, the writ petitioners thereafter approached the Writ Court for the second time by way of W.P. 14644(W) of 2019 (Partha Sarathi Saha & Ors. Vs. The State of West Bengal & Ors.) complaining that the Excise Commissioner was delaying taking a decision on the subject. Such writ petition was disposed of by an order dated August 2, 2019 requiring the Excise Commissioner to take a decision within three weeks. He submits that, the Excise Commissioner by the impugned writing dated August 22, 2019 rescinded the notification dated March 2, 2019. He did not revive the liquor licenses. By the impugned order the Excise Commissioner expressed the view that, he wants to re-examine the application for continuation of temporary license subject to the conditions/restrictions contained in New Site Rules. He submits that, such an exercise is not permissible. He relies upon Rule 9 of the West Bengal Excise (New Sites and Grant of Licenses for Retail Sale of Liquor and certain other Intoxicants) Rules, 2003 and submits that, selection of site is completed prior to the issuance of the temporary license. Moreover, the authorities considers the aspect of demand and supply prior to the issuance of a temporary license. Consequently, the impugned order dated August 22, 2019 is beyond the powers vested upon the Excise Commissioner and consequently must be quashed. The petitioners invested huge capital in foraying into this type of business. The petitioners cannot be left high and dry by such whimsical and colourable exercise of powers. He, therefore, seeks a direction upon the Excise Commissioner to revive the temporary licenses existing in favour of the licensees for the reminder of the period of such temporary licenses.

Mr. Joydip Kar, learned senior advocate appearing in support of the writ petitioner in W.P. 17287(W) of 2019 submits that, the licenses in question in the present batch of writ petitions are under Rule 4 (q) of the West Bengal (Selection of New Sites and Grant of License for Retail Sale of Liquor and certain other Intoxicants) Rules, 2003. Rule 4(q) was inserted by a notification bearing no. 1437-F.T. dated October 3, 2018. He submits that, Rule 9 of the Rules of 2003, which lays down the procedure for selection of grant of license is not attracted since, the notification dated October 3, 2018 which introduced Rule 4(q) into the Rules of 2003, did not amend Rule 9 of the Rules of 2003. He submits that, Section 26 of the Bengal Excise Act, 1909, allows the authorities to close shop temporarily after grant of license. It also grants power to cancel or suspend license under Section 42 of the Act of 1909. He submits that, the license granted under Rule 4(q) of the Rules of 2003 was suspended for a specific reason. In the affidavit-in-opposition, the State did not specify any law and order problem obtaining at any locality where the licenses are operating. He relies upon a notification dated February 20, 2019 issued by the Finance Department and submits that, the authorities standardised and rationalised the process relating to application for grant of 'No Objection Certificate' by different police commissionarates in the State of West Bengal in connection with grant of excise licenses under the Act of 1909. He submits that, the order dated February 20, 2019 specifies that, no clearances from police commissionarate are required for renewing existing and regular excise licenses every licensing year. Consequently, according to him, the Excise Commissioner cannot ask for any further report from any police commissionarate in view of the notification dated February 20, 2019 for the purpose of considering whether to lift the suspension of the license under Rule 4(q) of the Rules of 2003 or not. He submits that, the petitioner should be allowed to act in terms of their licenses for the reminder of the period.

Learned Additional Advocate General appearing for the State relies upon Sections 30, 37A and 38 of the Act of 1909. He submits that, the period of settlement is defined. According to him, the authorities selects a person to whom licenses may be granted, in terms of Section 37A of the Act of 1909. A selected person is required to pay requisite fees in terms of Section 38 of the Act of 1909. He relies upon the West Bengal Excise (Payment of Fees for Grant of License for Retail Sale of Certain intoxicants) Rules, 2005 and submits that, a person is required to pay the prescribed fees thereunder. He submits that, a person who is selected, is required to have the requisite infrastructure. Therefore, a person being granted a temporary license initially or license under Rules 4(q) of the Rules of 2003 cannot claim any promissory estoppel on the ground that he made any investment with regard to the business. He submits that, the provisions of the Act read with the Rules are such that, a person venturing into this kind of business is required to make an investment. He has to have requisite infrastructure. Making an investment for this purpose to become qualified to apply for license, does not mean that the State is required to grant or extend a license. He submits that, having obtained a license, such a person does not have a vested right to carry on business. The license is merely a privilege. It does not give rise to a right. He refers to the Rules of 2005 and various Supreme Court authorities in support of his contentions that, the petitioners does not have a fundamental right or any right to carry on business of the nature as the petitioner is carrying on. The license is merely a privilege. It does not give any justitiable right. In support of such contentions, he relies upon (2013) 6 SCC 573 (State of Kerala v. Kandath Distilleries), (2004) 11 SCC 26 (State of Punjab v. Devans Modern Breweries Ltd.), (2005) 1 SCC 1 (Sompal Singh v. Sunil Rathi and Anr.), (1999) 5 SCC 740 (Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of Andhra Pradesh), (2017) 6 SCC 715 (State of Tamil Nadu v. K. Balu), (1986) 4 SCC 566 (State of Madhya Pradesh v. V. Nandlal Jaiswal) and (2016) 4 SCC 631 (Sayyed Ratanbhai Sayeed v. Shirdhi Nagar Panchayat).

Learned Additional Advocate General draws the attention of the Court to the impugned notification dated August 22, 2019. He submits that, the Excise

Commissioner took into consideration the two previous orders of the High Court. The Excise Commissioner finding that, the initial notification dated March 3, 2019 being founded upon the then impending General Elections of 2019 and the fact that, such General Elections are over, rescinded the same. The Excise Commissioner thereafter took into consideration that, in most of the cases, the period of temporary licenses have already expired and that, the persons concerned could not utilise the full period of license due to the continuance of the order dated March 2, 2019. He submits that, the Excise Directorate is in active consideration as to whether, to allow such temporary licenses to operate for the rest of the period on the basis of assessment of the demand and supply and factors like law and order etc. He submits that, the Excise Directorate took into consideration, competing interest of economy to reexamine all applications for the continuation of temporary licenses subject to the conditions/restrictions contained in New Site Rules. He submits that, the impugned order records that the exercise would be completed within ten weeks from August 22, 2019. According to him, the time to complete such exercise is yet to expire. He submits on instructions that, the authorities received approximately 45 applications under Rule 4(q) of the Rules of 2003 prior to January 1, 2019 and that, the authorities received approximately 750 applications subsequent to January 1, 2019. The authorities have treated January 1, 2019 as a cut off date. The authorities are dealing with licenses granted under Rule 4(q) of the Rules of 2003, subsequent to and on and from January 1, 2019. He submits on instructions that, all licenses granted on and from January 1, 2019 will be treated on the same parameters. None of the licensees receiving license on and from January 1, 2019 will be discriminated against. He submits that, since none of the petitioners have any right, which is justiciable and enforceable in a Court of Law, a Writ of Mandamus cannot be issued. Moreover, in Excise Laws, the authorities are granted a larger latitude than normally allowed. In the facts of the present case, therefore, the Court should not intervene.

In reply, Mr. Joydip Kar learned advocate appearing for the writ petitioner in W.P. 17287(W) of 2019 submits that, the action taken by the Excise Directorate must conform with Article 14 of the Constitution of India. Although, a liquor license cannot be treated as a fundamental right or any other thing than a privilege, then also in the event, the petitioners are able to substantiate that the Excise Authorities have acted arbitrarily or whimsically or malafide then, such actions can be set aside by the Constitutional Court.

An order dated August 22, 2019 issued by the Excise Commissioner is under challenge at the behest of the petitioners. The impugned order dated August 22, 2019 notes that, licences of liquor shops under Category 4(q) were granted and that, in view of the then, impending general election 2019, by an order dated March 2, 2019, such licences granted on and from January 1, 2019 were suspended and that, since, the general election 2019 are now over, and the instructions of the election commission of India are not in force the suspension of operation of the liquor shops granted by the order dated March 2, 2019 is rescinded.

The impugned order proceeds to notice that, in most of the cases where liquor licences were issued under Rule 4(q) on and from January 1, 2019, the period of temporary licence has expired. It also notes that, the shops could not utilize the full period of licence due to the continuance of the order dated March 2, 2019. It proceeds to state that, the scenario is under consideration of the Excise Directorate. The Excise Directorate is considering whether or not they should allow such temporary licence to operate for the rest of the period on the basis of assessment of demand and supply and factors like law and order. It takes into consideration the two orders passed by the High Court on the subject. It records that, the Excise Directorate was acting in due deference to the law and spirit of the orders of the High Court. It stipulates that, the Excise Directorate will reexamine the applications for temporary licence for their continuation, keeping in mind, competing interests of the economy and public at large as also the conditions/restrictions contained in New Site Rules. Ultimately, the impugned order records that, the exercise would be completed within a period of ten weeks from the date of the order.

The time period to complete the exercise in terms of the impugned order dated August 22, 2019 is yet to expire.

Nandlal Jaiswal & Ors. (supra) is of the view that, there is no fundamental right in a citizen to carry on trade or business in liquor. It relies upon a previous decision of the Supreme Court reported at (1975) 1 SCC 737 (Har Shankar v. Deputy Excise and Taxation Commissioner). It is of the view that, no one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. It goes on to note that, when the State decides to grant such right or privilege to others, then, the State cannot escape the rigour of Article 14. It cannot act arbitrarily, whimsically or mala fide. However, it cautions that, the Court should be slow to interfere with the policies laid down by the State Government for grant of licences for manufacture and sale of liquor. It is of the view that, since, the commodity involved is inherently pernicious, the Court should allow a large measure of latitude to the State Government in determining its policy of regulating manufacture and trade in liquor. It goes on to say that, since the grant of licences for manufacture and sale of liquor is essentially a matter of economic policy, the Court should hesitate to intervene and strike down what the State has done, unless it appears to be plainly arbitrary, irrational or mala fide.

Yasar Shafi & Ors. (supra) takes into consideration the view expressed by the Supreme Court in (1990) 1 SCC 109 (Synthetics and Chemicals Ltd. v. State of U.P.). It is of the view that, in the context of excise enactments, the expression 'privilege' really means the licence or permit granted by the State. The State is entitled to prohibit the trade in intoxicating liquors altogether; it can impose a total ban. It is of the view that no citizen can claim any fundamental right to manufacture or to trade in these liquors.

Devans Modern Breweries Ltd. (supra) considers the nature of trade or business in intoxicating liquors in light of Article 19 of the Constitution of India. It is of the view that, permissive privilege to deal in liquor is not a right at all. Dealing in liquor is neither a right nor is the levy a tax or a fee. Articles 301 to 304 of the Constitution of India are rendered inapplicable at the threshold of the activity in liquor. Maharashtra Distilleries Ltd. & Ors. (supra) is similar view that, permissive privilege to deal in liquor is not at all a right.

Kandath Distilleries (supra) considered the limits of issuance of a writ of mandamus under Article 226 of the Constitution of India in relation to a distillery licence. It is of the view that, a citizen does not have a fundamental right to trade or do business in liquor as a beverage and the activities which are res extra commercium cannot be carried on by any citizen. The State can prohibit completely trade or business in potable liquor. The State can also create a monopoly in itself for trade or business of such liquor. The State can impose restrictions and limitations on trade or business in liquor as a beverage.

Kandath Distilleries (supra) considers whether a Court should interfere with a liquor policy of a State. It is of the view that, a Court of law is not expected to propel into the unchartered waters of the State policy. It recognizes that, the State has the power to frame and reframe, change and rechange, adjust and readjust liquor policy, which cannot be declared as illegal or arbitrary on the ground that, the earlier policy was better and suited to the prevailing situations.

Sayyed Ratanbhai Sayeed (supra) is a Supreme Court decision on proceedings under the Maharashtra Regional and Town Planning Act, 1966. In the context of that case, it considers a situation where private interest is pitted against public interest. It is of the following view.

"58. The emerging situation is one where private interest is pitted against public interest. The notion of public interest synonymises collective welfare of the people and public institutions and is generally informed with the dictates of public trust doctrine - res communis i.e. by everyone in common. Perceptionally health, law and order, peace, security and a clean enviornment are some of the areas of public and collective good where private rights being in conflict therewith has to take a back seat. In the words of Cicero "the good of the people is the chief law".

59. The Latin maxim salus populi supreme lex connotes that health, safety and welfare of the public is the supreme in law. Herbert broom, in his celebrated publication, A Selection of Legal Maxims has elaborated the essence thereof as hereunder:

"This phrase is based on the implied agreement of every member of the society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good."

K. Balu & Anr. (supra) is a decision subsequent to the one rendered by the Supreme Court on liquor vending on National and State Highways reported in (2017) 2 SCC 281. In K. Balu & Anr. (supra), the Supreme Court is of the view that, no individual has a vested right to obtain a licence. There is no fundamental right to carry on business in liquor since as a matter of constitutional doctrine Article 19(1)(g) does not extend to trade in liquor which is consistently regarded as res extra commercium. It recognizes that, the State has a discretion on whether a licence should be granted under its enabling powers. It is of the view that, no individual can assert a right to the grant of a licence. According to it, trading in liquor is a privilege conferred by the State.

The authorities noticed above are of the consistent view that, there is no fundamental right in a citizen to carry on trade or business in liquor. A licence to trade in liquor is a permissive privilege. The expression 'privilege' means the licence or permit granted by the State. Such a permissive privilege to deal in liquor is not a right at all. Trade or business in liquor is res extra commercium. The State can prohibit trade or business in liquor. State has the power to frame and reframe change and rechange, adjust and readjust liquor policy. Courts should be slow in interfering with the liquor policy of the State. No justiciable right accrues to a liquor licence holder to approach Court to enforce any of the terms of the licence. Ipso facto, a liquor licence holder cannot ask the Court to allow him to carry on business for the remainder period of the licence. In the affidavit-in-reply, the writ petitioners in W.P. No.17024 (W) of 2019 admits that, they do not have a fundamental right to carry on business in liquor and that, the licence granted in their favour is a privilege.

Notwithstanding, the licences granted in favour of the petitioners being a privilege with no right accruing thereon, the actions of the State taken with regard to such licences are to be tested on the touchstone of Article 14 of the Constitution of India. If, the action taken by the State fails such test, then, such action can be struck down.

In the facts of the present case, the petitioners obtained temporary licences under Rule 4(q) of the Rules of 2003 on and from January 1, 2019. Subsequent to such licences, the General Election of 2019 intervened. By an order dated March 2, 2019, the Excise Commissioner suspended the operation of such licences granted on and from January 1, 2019 under category 4(q) of the Rules of 2003 until further orders. The reason stated in the order dated March 2, 2019 for suspending such licences was the instructions issued by the Election Commission of India restricting the distribution and storage of liquor and containing the availability of it during the process of conducting the General Election of 2019. The General Election of 2019 being over, the Excise Commissioner, did not suspend or rescind the order dated March 2, 2019.

Suspension imposed by the order dated March 2, 2019 was for an unlimited period of time. An order is necessary to lift the suspension. The suspension was rescinded by the impugned order dated August 22, 2019. However, such impugned order did not revive the licences under Rule 4(q) granted on and after January 1, 2019.

Since inception the Excise Directorate classified 4(q) licence holder on and from January 1, 2019 as a category. Such classification on the face of it cannot be said to be unreasonable, perverse or arbitrary. The justification of classifying such licensees as advanced on behalf of the Excise Directorate is that, the Excise Directorate received substantial number of applications on and from January 1, 2019 and that, they amounted to about 750. Prior thereto, the Excise Directorate granted licences under Rule 4(q) for about 45 persons. The sheer number of such licences is a plausible reason for the classification. Therefore, there subsists same justification in the classification undertaken by the Excise Directorate in classifying licensees under Rule 4(q) of the Rules of 2003 on and from January 1, 2019 and treating them separately.

Some of the licensees under Rule 4(q) of the Rules of 2003 approached the Writ Court when, orders of similar nature as that of the order dated July 3, 2019 passed in W.P. No.11739 (W) of 2019 were passed. By the order dated March 3, 2019, the Court directed the Excise Commissioner to reconsider its decision dated March 2, 2019 since the General elections of 2019 were over. The Excise Commissioner was directed to inform his decision to the petitioners within a period of fortnight from the date of communication of the order. The Excise Commissioner undertook the exercise in terms of the order dated July 3, 2019 and passed an order dated July 23, 2019. By such order, it expressed the view that, in order to reconsider the order dated March 3, 2019, status reports regarding the subject licences are necessary. It proceeded to issue necessary directions to the authorities for status report. Some petitioners approached the Court by way of another writ petition. Second bunch of writ petitions were disposed of in the month of August 2019, by passing similar orders as the order dated August 2, 2019 passed in W.P. No. 14644(W) of 2019. By such order the Excise Commissioner was required to take a decision within three weeks.

The Excise Commissioner by the impugned order dated August 22, 2019 took the decision of undertaking the exercise of evaluating individual licences and taking a decision thereon.

It is the contention of the petitioners that, given the provisions of the Act of 1909 read with the relevant rules, the Excise Commissioner is not to undertake such an exercise.

The Act of 1909 allows closure of shop temporarily. Such power can be found in Section 26 of the Act of 1909. The authority granting the licence can cancel or suspend the same in terms of Section 42 of the Act of 1909.

Sections 26 and 42 of the Act of 1909 are as follows: -

"26.(1) The District Magistrate or a Subdivisional Magistrate, or (in [Kolkata]) [the Chief Metropolitan Magistrate] or the Commissioner of Police, may, by notice in writing to the licensee require that any shop in which any [intoxicant] is sold shall be closed at such times or for such period as such Magistrate of Commissioner of police may think necessary for the preservation of the public peace.

(2) If any riot or unlawful assembly is apprehended or occurs in the vicinity of any shop in which any [intoxicant] is sold, any Magistrate, or any Police Officer above the rank of constable, who is present, may require such shop be kept closed for such period as he may think necessary.

(3) When any Magistrate or Police Officer makes a direction under sub-section (1) or sub-section (2), he shall forthwith inform the Collector of his action and his reason therefor.

"42. Power to cancel or suspend license, permit or pass.-(1) Subject to such restrictions as the State Government may prescribe, by rule made section 85, sub- 20 section (2), clause (i) the authority who granted any license, permit or pass under this Act may cancel or suspend it- (a) if it is transferred or sublet by the holder thereof without the permission of the said authority : or (b) if any duty, tax or fee payable by the holder thereof be not duly paid ; or (c) in the event of any breach by the holder thereof or by any of his servants, or by any one acting on his behalf with his express or implied permission, of any of the terms or conditions thereof; or (d) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence or of any offence punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985, or under the Trade and Merchandise Marks Act, 1958 (43 of 1958) or under any of the sections 479 to 489 of the Indian Penal Code (45 of 1860), or under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955) ; or 3 [(e) if the holder thereof is subjected to any penalty under Chapter XIV of the Customs Act, 1962 ; or] (f) where a license, permit or pass has been granted on the application of the holder of an exclusive privilege under section 22 on the requisition in writing of such holder ; or (g) if the conditions of the license, permit or pass provide for such cancellation or suspension at will. (2) When a license, permit or pass held by any person is cancelled under clause (a), clause (b), clause (c), clause (d) or clause (e) of sub-section (1), the authority aforesaid may cancel any other licence, permit or pass granted to such person by, or by the authority of the State Government under this Act, or under any other law for the time being in force relating to excise or under the Narcotic Drugs and Psychotropic Substances Act, 1985. (3) The holder of a license, permit or pass shall not be entitled to any compensation for its cancellation or suspension under this section, or to the refund of any fee paid or deposit made in respect thereof."

The licences under Rule 4(q) of the Rules of 2003 are subject to the rigours of the Act of 1909. In view of the provisions of Sections 26 and 42 of the Act of 1909, it cannot be said that, the Excise Commissioner cannot revisit the licences already granted. He has the power to cancel or suspend a licence if a just ground exists for the same.

It is the contention of the petitioners that, none of the grounds for cancellation or suspension of the licence as are recognised under Section 42 of the Act of 1909 exists in the facts of the present case. In the impugned order, the Excise Commissioner notes that, in most cases, the period of temporary stand expired by efflux of time. It also notes that, the licences could not utilise the full period of the licence. The Excise Commissioner proceeds to say that, the Excise Directorate is considering allowing the temporary licences to operate for the remainder of the period and for such purpose it is taking into consideration various factors. It is essentially reexamining the licences. As on date, the Excise Commissioner is yet to complete his exercise of evaluating whether or not to permit the licence holders under Rule 4(q) of the Rules of 2003 to continue with their business or not. The authorities cited at the bar require the Court to be slow in interfering in such circumstances and to allow the authorities greater latitude than is normally available. The impugned order dated August 22, 2019 contains reasons. It cannot be said that the reasons appearing on the face of the order dated August 22, 2019 are whimsical or arbitrary or mala fide. The impugned order dated August 22, 2019 cannot be quashed on the touchstone of Article 14 of the Constitution of India.

In such circumstances, I find no merit in the present writ petition.

W.P. No. 17024(W) of 2019, W.P. No. 17670(W) of 2019, W.P. No. 17627(W) of 2019, W.P. No. 17626(W) of 2019, W.P. No. 17625(W) of 2019, W.P. No. 17813(W) of 2019, W.P. No. 17386(W) of 2019, W.P. No. 17389(W) of 2019, W.P. No. 17388(W) of 2019, W.P. No. 17513(W) of 2019, W.P. No. 17832(W) of 2019, W.P. No. 17407(W) of 2019, W.P. No. 17409(W) of 2019, W.P. No. 17405(W) of 2019, W.P. No. 17403(W) of 2019, W.P. No. 17287(W) of 2019, W.P. No. 17289(W) of 2019 and W.P. No. 17288(W) of 2019 are dismissed without any order as to costs.

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