

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 29TH DAY OF JANUARY 2015/9TH MAGHA, 1936

OP(C).No. 2983 of 2014 (O)

OS 389/1996 OF MUNSIF, ALAPPUZHA.
.....

PETITIONER:

**SARASWATHY, D/O.BHARATHI,
AGED 70 YEARS,
UMMAPARAMBU VELIYIL VADAKKEL MURI,
ALAPPUZHA WEST VILLAGE FROM UMMAPARAMBUVELIYIL,
PUNNAPRA MURI, PARAVOOR VILLAGE, ALAPPUZHA.**

**BY ADVS.SRI.K.S.HARIHARAPUTHRAN
SRI.GEORGE MATHEW
SRI.SUNIL KUMAR A.G**

RESPONDENT(S):

- 1. KAMALAMMA, W/O.MURALEEDHARAN,
CHEKKEKALAM VEEDU, THOTTAPPALLY P.O.,
PURAKKADU VILLAGE, AMBALAPPUZHA,
ALAPPUZHA - 688 563.**
- 2. NALINI, D/O.BHARATHI, ANCHIL CHIRAYIL,
ANAPARAMBAL NORTH THALAVADY VILLAGE,
ALAPPUZHA - 689 572.**

**R1 BY ADVS. SRI.R.LAKSHMI NARAYAN
SMT.R.RANJINI**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 16-01-2015,
THE COURT ON 29-01-2015 DELIVERED THE FOLLOWING:**

mbr/

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXT. P1 : TRUE COPY OF EP.NO.137/2013 IN OS.389/96 DATED 3-10-2013
FILED BEFORE MUNSIFF'S COURT, ALAPPUZHA.
- EXT. P2 : TRUE COPY OF EP.NO.138/2013 IN OS.NO.389/96 DATED 4-10-2013
FILED BEFORE MUNSIFF'S COURT, ALAPPUZHA.
- EXT. P3 : TRUE COPY OF EA .25/14 IN EP.137/13 IN OS.389/96
DATED 30-8-2014 KAIHEET.
- EXT. P4 : TRUE COPY OF THE APPLICATION EP.137/13 IN OS.389/96
DATED 30-8-2014(STATEMENT).
- EXT. P5 : TRUE COPY OF EP.138/13 IN OS.NO.389/96 DDATED 30-8-14(KAICHEET).
- EXT. P6 : TRUE COPY OF EP.138/13 IN OP 389/96 DATED 30-8-14(STATEMENT).
- EXT. P7 : TRUE COPY OF EA.209/14 IN EP.NO. 137/13 IN OS.389/96
DATED 16-9-14.
- EXT. P8 : TRUE COPY OF EA.NO. 210/14 IN EP.NO.138/13 IN OS.389/96
DATED 14-9-14.
- EXT. P9 : TRUE COPY OF OBJECTION IN EA.209/14 IN EP.NO.137/13 IN OS 389/96
DATED 16-10-2014.
- EXT. P10 : TRUE COPY OF OBJECTION IN EA.210/14 IN EP.138/13 IN OS.389/96
DATED 16-10-2014.
- EXT. P11 : TRUE COPY OF ORDER IN EA.NO.209/14 IN EP.137/13 IN OS.389/96
DATED 3-12-2014 OF PRL.MUNSIFF'S COURT, ALAPPUZHA.
- EXT. P12 : TRUE COPY OF ORDER IN EA.NO. 210/14 IN EP.138/13 IN OS.NO.389/96
DATED 3-12/2014 OF PRL.MUNSIFF'S COURT, ALAPPUZHA.

RESPONDENT(S)' EXHIBITS: - NIL

/TRUE COPY/

P.S. TO JUDGE

mbr/

P.BHAVADASAN, J.

O.P.(C) No. 2983 of 2014

Dated this the 29th day of January, 2015

J U D G M E N T

An interesting question with regard to the maintainability of the second application for execution by the decree holders arises for consideration in this original petition under Article 227 of the Constitution of India.

2. In a suit for partition, preliminary decree was passed followed by final decree of which the decree holders sought execution of the decree who are the second and the first plaintiffs against the first and second defendants. The decree holders took out execution by E.A.Nos. 137/2013 and 138/2013 as per Ext.P1 and Ext.P2 execution petitions. An Amin was deputed for delivery of the property who filed Ext.P3 report dated 30.08.2014 which reads as follows:

“Report: ഉത്തരവനുസരിച്ച് 2014-ാം മാണ്ട് ഓഗസ്റ്റ് മാസം 30 തീയതി ഉദ്ദേശം ഉച്ചക്ക് ശേഷം 3 pm മണിയോടു വാദി, മുരശുകാരൻ, സർവ്വതർ, പോലീസ്

എന്നിവരോട് പട്ടിക വസ്തുവിൽ ഹാജരായി സർവ്വതർ അളന്നുതിരിച്ച് തിട്ടപ്പെടുത്തി എന്നെ ബോധ്യപ്പെടുത്തി തന്ന ഡിക്രിപട്ടിക വസ്തു [MQRFGHIJKLM] ഭാഗം അളന്ന് തിട്ടപ്പെടുത്തിത്തന്നത് ഞാൻ ബോധ്യപ്പെട്ട ശേഷം ഉത്തരവും ഡിക്രിപ്തകർപ്പും മുരശിപ്പിച്ച് പ്രസിദ്ധം ചെയ്ത് അപ്പോൾ അവിടെ കൂടിയ തടസ്സരുടെ സാന്നിധ്യത്തിൽ പട്ടിക വസ്തു ഒന്നാം പ്രതിക്ക് തിരിച്ച $\frac{1}{4}$ ഭാഗം 0,05,500 പ്രതികളുടെ കൈവശത്തുനിന്നും നിരുപാധികം വിടർത്തി വിട്ടൊഴിപ്പിച്ച് അതിന്റെ എഥാർത്ഥ അവകാശിയായ വാദിക്ക് വേണ്ടി ഏറ്റുവാങ്ങി സർവ്വസാതന്ത്രമായി പട്ടികവസ്തുവിൽ പ്രവേശിപ്പിച്ച് കൈവശപ്പെടുത്തിയിട്ടുള്ളതാകുന്നു. ”

3. The kychit executed by the decree holders in E.P.No.137/2013 is produced as Ext.P4 which reads as follows:

“മേൽനമ്പർ കേസ് കോടതിനിയുക്തനായ ആമിൻ പോലീസ് സഹായത്തോടെ ഡിക്രി പട്ടിക വസ്തുവിൽ ഹാജരായി പ്ലാനിൽ വിവരിക്കും പ്രകാരമുള്ള [MQRFGHIKLM] പ്രകാരമുള്ള പട്ടികവസ്തു എനിക്കവകാശപ്പെട്ടതു കോടതി നിയുക്തനായ സർവ്വതർ അളന്ന് തിരിച്ച് അതിരുകൾ അളന്നുതിട്ടപ്പെടുത്തി വിധിക്കക്കാരിൽ നിന്ന് വിടർത്തി വേർപ്പെടുത്തി

വിധിയുടമസ്ഥനായ ഞാൻ ഇന്നേ ദിവസം (30/8/2014)
സർവ്വസ്വാതന്ത്ര്യത്തോടെ പ്രവേശിച്ചു അവകാശം
സ്ഥാപിച്ചു ഇതിനാൽ സമ്മതിച്ചു ബോധിപ്പിച്ചു
കൊള്ളുന്നു.”

4. That is with respect to E.P.No. 137/2013. As
regards E.P.No. 138/2013, the Amin report reads as follows:

“ഉത്തരവിൻ പ്രകാരം 2014 ആഗസ്റ്റ് മാസം
29-ാം തീയതി പകൽ ഉദ്ദേശം 2 മണിയോടു കൂടി
സർവ്വേയർ, പോലീസ്, മുരശുകാരൻ, വിധി ഉടമസ്ഥ,
എന്നിവരോടൊപ്പം ഡിക്രി പട്ടിക വസ്തുവിൽ
ഹാജരായി തടസ്സരുടെയും സമീപസ്ഥരുടെയും
സാന്നിധ്യത്തിൽ സർവ്വേയർ അളന്നു തിരിച്ച്
തിട്ടപ്പെടുത്തിയ ശേഷം എലുകകൾ കണ്ട്
ബോധ്യപ്പെട്ടു കൊണ്ട് മുരശുകാരനെ കൊണ്ട്
മുരശടിപ്പിച്ച് ഉത്തരവും പട്ടികയും പ്രസിദ്ധീകരിച്ച്
തുടർന്ന് ഡിക്രി പട്ടികയോടൊപ്പം തന്നിരിക്കുന്ന
പ്ലാനിൽ വിവരിക്കും പ്രകാരം “A.B.C.S.P.A.” എന്ന്
രേഖപ്പെടുത്തി കാണിച്ചിട്ടുള്ള ഭാഗം വസ്തു
വിധിക്കടക്കാരിൽ നിന്നും വിടർത്തി വേർപെടുത്തി
ഏറ്റെടുത്ത് ഉത്തരവിൽ വിവരിക്കുന്ന പേരുകാരിയായ
വിധി ഉടമസ്ഥയ്ക്ക് സർവ്വ സ്വാതന്ത്ര്യത്തോടെ
പ്രവേശിച്ച് അവകാശം സ്ഥാപിച്ച് അനുഭവിക്കാൻ വിട്ടു
കൊടുത്ത വിവരം ഇതിനാൽ ബോധിപ്പിച്ചു

കൊള്ളുന്നു.”

5. The kychit executed by the decree holders in E.P.No.138/2013 is produced as Ext.P5 which reads as follows:

“മേൽനമ്പർ കേസിൽ കോടതിനിയുക്തനായ ആമിൻ പോലീസ് സഹായത്തോടെ ഡിക്രി പട്ടിക വസ്തുവിൽ ഹാജരായി പ്ലാനിൽ വിവരിക്കും പ്രകാരമുള്ള [ABCSPA] ഇപ്രകാരമുള്ള പട്ടികവസ്തു എനിക്കവകാശപ്പെട്ടതു കോടതി നിയുക്തനായ സർവ്വേയർ അളന്ന് തിരിച്ച് അതിരുകൾ അളന്നുതിട്ടപ്പെടുത്തി വിധിക്കടക്കാരിൽ നിന്ന് വിടർത്തി വേർപ്പെടുത്തി വിധിയുടമസ്ഥനായ ഞാൻ ഇന്നേ ദിവസം (29/8/2014) സർവ്വസാതന്ത്ര്യത്തോടെ പ്രവേശിച്ചു അവകാശം സ്ഥാപിച്ചു ഇതിനാൽ സമ്മതിച്ചു ബോധിപ്പിച്ചു കൊള്ളുന്നു. ”

6. Subsequently, the decree holders filed E.A.No.209/2014 in E.P.No. 137/2013 and E.A.No. 210/2014 in E.P.No. 138/2013 by pointing out that there was deficiency in the earlier delivery and that the building which was situated in the property wherein the judgment debtors remained, was not delivered by the Amin for the reason

that there was no order from the court to remove the judgment debtors forcibly and evict them from the premises concerned.

7. The judgment debtors resisted the petitions by pointing out that the second execution petition is not maintainable. The contention taken was that having permitted the judgment debtors to remain in the premises and having executed a kychit accepting that the entire property of which delivery was sought for has been delivered, it cannot now be said that there was deficiency in delivery and therefore the second execution application is not maintainable. If at all the decree holders are aggrieved, they have to file a separate suit.

8. The executing court considered the rival contentions and came to the conclusion that there is no merit in the contentions taken by the judgment debtors and ordered delivery of the property which was sought for in the respective E.A.s.

9. The said order is under challenge.

10. Sri. K.S. Hariharaputhran, the learned counsel appearing for the petitioner contended that the court below was not justified in law in ordering delivery once again in the light of the fact that in the earlier execution application, as per the kychit executed by the decree holders, they had obtained delivery of the entire property as sought for in the execution petitions and they had endorsed that the decree was satisfied. If that be so, even assuming that the judgment debtors remained in possession of the property thereafter, a second application is not maintainable and the only remedy available to the decree holders is to file a separate suit. For the above proposition, the learned counsel relied on the decision reported in **Varghese v. Chacko** [1964 KLT 226] and **Upper Ganges Sugar Mills Ltd. v. Khalil-ul-Rahman and Others** [AIR 1961 SC 143]. On the basis of those decisions, it was contended that in those cases, the facts indicate that symbolic delivery was

taken and the judgment debtors were allowed to continue in possession of the property. Later, when actual delivery was sought for, the court held that the second execution petition for relief of actual delivery is not maintainable and the only remedy available to the decree holders is to file a separate suit. According to the learned counsel, the principle laid down in the above decisions applies with all force to the case on hand. The court below is therefore not justified in allowing the application filed for delivery by the decree holders.

11. The learned counsel appearing for the respondents on the other hand contended that it is not a case of obtaining symbolic delivery in the first instance, but it is a case of deficient delivery. Even though the delivery of the entire property was sought for in the first execution petitions, after removing the judgment debtors who are found to be in possession of the property. The Amin, under the pretext that there was no order from the court directing

forcible eviction of the judgment debtors from the premises, had only delivered the rest of the property excluding the portion occupied by the building in possession of the judgment debtors. Referring to the decree, it was pointed out that the judgment debtors were given the option to remove the shed on eviction and if they failed to do so, the decree holders were allowed to pull down the same. It is also significant to notice according to the learned counsel that even after the first so called delivery of the property, the execution petitions were not closed as endorsing that the decree has been satisfied. But it was kept pending which shows that there was no complete delivery of the property. When there is no complete and full satisfaction of the decree recorded and a part of which remains dissatisfied, the second petition for delivery would be maintainable. The learned counsel relied on the decisions reported in **K. Ramalingam and others v. K.N. Krishna Reddi and another** [AIR 1974 Madras 325], **Mst. Mumtaz**

Jehan v. Mst. Insha Allah and Others [AIR 1983 Delhi 65] and **Jit Singh v. Bhago** [AIR 2002 P & H 340]. The learned counsel went on to point out that the decisions relied on by the learned counsel for the petitioner in those decisions, there was a permission granted by the decree holders to the judgment debtors to remain in possession and that is conspicuously absent in the case on hand. It was in that context that the courts had occasion to hold that the second execution petition is not maintainable.

12. After having heard the learned counsel on both sides and after having perused the records, there seems to be considerable force in the submissions made by the learned counsel for the respondents.

13. The suit was one for partition in which the decree holders were granted shares. They were given a decree of their share and also they were given the right to have the portion of the structure in their respective shares removed or on failure of the judgment debtors to remove the same,

they were allowed to pull it down. It is true that in E.P.No. 137/2013 and E.P.No. 138/2013 filed by the respective decree holders, they have sought for the following reliefs:

“XXXXXXXXXXXXXXXXXXXX

2) ആയതിനാൽ ടി ഭാഗം വസ്തുവും, അതിൽ വരുന്ന പുരയുടെ ഭാഗവും (വേണ്ടിവന്നാൽ പുരഭാഗം പൊളിച്ചുമാറ്റി) 1-ാം വിധിക്കടക്കാരിയെ വിട്ടൊഴിപ്പിച്ച് കോടതിയിൽ നിന്നും ആമീനേയും മറ്റും നിയമിച്ചു വിധിഉടമസ്ഥയായ 2-ാം വാദിക്കു നടത്തിക്കൈവശപ്പെടുത്തി തരുന്നതിനു അനുവദിക്കണം.

XXXXXXXXXXXXXXXXXXXX”

Similar is the prayer in the other execution petition also.

14. It is true that the Amin's endorsement is to the effect which has already been referred to above and so also the endorsements in the kychit executed by the respective decree holders. However, it is significant to notice that there is no endorsement by the Amin nor was any acceptance by the decree holders that structure in the property had been removed even though the decree holders accepted that the property has been delivered to them.

15. The question is whether the endorsement by the

decree holders that the property has been delivered in a situation whereby the judgment debtors who were in occupation of the shed and who were in occupation of the property will also deemed to have been removed from possession.

16. One fact needs to be noticed. There is no case for the judgment debtors that the decree holders permitted them to remain in the property.

17. In the decision reported in **Varghese v. Chacko** [1964 KLT 226] the facts indicate that what was sought for is symbolic delivery and the decree holders were satisfied with the same. If they were not satisfied with symbolic delivery, they could have obtained actual delivery of the property. It was thereafter that they filed second execution application for actual delivery purporting to be under Section 47 of the C.P.C. It was in that context, it was held that after having permitted the judgment debtors to remain in possession of the property and after having endorsed that

they were satisfied with the symbolic delivery, the second execution petition cannot lie. In the decision reported in **Shew Bux Mohata v. Bengal Breweries Ltd.** [AIR 1961 SC 137], the decree holders had accepted the delivery of possession without actual removal of the portion in possession of the judgment debtors. It is seen that permission was granted to the judgment debtors to remain in possession and the decree holders let the execution petitions be closed on that basis. It was thereafter that they had moved the second application for execution wherein the Apex Court had occasion to observe as follows:

“22. It is true that the Nazir's return showed that defendant No. 4 had not been bodily removed. But the same return also shows that it had not been so removed because of certain arrangement arrived at between it and the decree-holders and as the decree-holders had not required the removal of defendant No. 4 from the premises. Now under O. 21, R. 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the

possession he is entitled to and asks for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. This is what happened in this case. The decree-holders in the present case, of their own accepted delivery of possession with defendant No. 4 remaining on the premises with their permission. They granted a receipt acknowledging full delivery of possession. They permitted the execution case to be dismissed on September 8, 1949, on the basis that full possession had been delivered to them by defendant No. 4. The fact that they put their guards on the premises as mentioned in the Nazir's return would also show that they had obtained full possession. It was open to the decree-holders to accept such possession. Having once done so, they are bound to the position that the decree has been fully executed, from which it follows, that it cannot be executed anymore. In the case of Jagadish Nath Roy v. Nafar Chandra Parmanik, 35 Cal

WN 12: (AIR 1931 Cal 427), an exactly similar thing had happened and it was held that the decree was not capable of further execution. It was there said a. p. 15 (of Cal WN): (at p. 429 of AIR).

"The case, therefore, seems to me to be one of those cases in which a decree-holder having armed himself with a decree for khas possession executes that decree in the first instance by obtaining symbolical possession only with some ulterior object of his own, and thereafter subsequently and as a second instalment asks for khas possession. The question is whether such a course is permissible under the law. I am of opinion that it is not."

We entirely agree with the view that was there expressed."

18. Order XX1 Rule 35 of the C.P.C. deals with delivery of the property which reads as follows:

"35. Decree for immovable property:-

(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has

been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession."

19. It is well settled that the delivery can be either symbolic or actual delivery. When some person other than the judgment debtor is in possession of the property, usually

symbolic delivery is resorted to.

20. In the case on hand, actual delivery was sought for. It may be remembered in the context that the decree was to the effect that decree holders are entitled to get their respective shares and if any structure is found to be in the occupation of the judgment debtors, those structures were either to be removed by the judgment debtors or if they failed to do so, it could be pulled down.

21. The second application for execution was laid on the ground that there was deficiency in the execution that the Amin did not evict the judgment debtors from the possession of the property wherein the shed was situated under the pretext that there was no order from the court below to do so. It is true that going by the endorsements, the decree holders have endorsed that they have obtained whatever is delivered to them. But there is nothing to show that there was any attempt to remove the judgment debtors from the shed or there was any attempt to pull down the

shed and to give vacant possession of the land occupied by the shed. In the above context, the decision reported in **K. Ramalingam and others v. K.N. Krishna Reddi and another** [AIR 1974 Madras 325] may be of some relevance. After considering the facts, the Madras High Court had occasion to observe as follows:

“15. From the above stated Supreme Court decision it is clear that if the decree-holder is satisfied with alleged delivery of possession, whether physical or symbolical, he cannot on a subsequent date ask for actual possession by filing a second execution petition; subsequent execution petition can be entertained only in cases where there was no legal, complete and effective delivery of possession on the earlier occasion.

17. Thus it is clear from the aforesaid decision that whatever may be the conflict between some decisions regarding filing an execution petition for a second time after the decree for possession has been satisfied, one thing is certain that if on the previous occasion there was no legal, complete or effective delivery, a second execution petition was not a bar. As far as the present case is concerned,

the judgment-debtors (appellants) themselves accept the fact that there was no actual physical delivery given to the decree-holder. They have come forward with a specific case that the alleged handing over of the actual possession is not true and that as a matter of fact they are in possession of the property. The only persons who could object to a second execution petition if filed, on the basis that the decree has already been satisfied, themselves state that there was no legal, complete or effective delivery of the property. In these circumstances, there is absolutely no substance in the argument that a subsequent execution petition will be objected to as a bar as if it will be a second execution petition filed after the decree has been satisfied.”

22. It could not be said that in all cases where if there is an earlier delivery, the second execution petition will not lie. The case of the decree holders is that even in spite of the earlier delivery, there has not been complete and full satisfaction of the decree and a portion of the decree remains dissatisfied, the second application for execution will certainly lie. Even in the decision relied on by the

learned counsel for the petitioner, such a possibility was not excluded. The two decisions relied on by the learned counsel for the petitioner are cases where the decree holders consciously accepted the symbolic delivery when the judgment debtors were in actual possession of the property and permitted the judgment debtors to remain in the property. It was in that context that it is observed that the second execution application is not maintainable.

23. In the case on hand, there is nothing to show that either explicitly or impliedly the judgment debtors were permitted by the decree holders to remain in possession of the property. Their grievance was that even though there was an order for delivery of the property by the court, the Amin under the pretext that there was no specific order directing forcible eviction of the judgment debtors and also to pull down the structures, did not deliver that portion of the property wherein the shed stood and which was occupied by the judgment debtors.

24. The second application will have to be viewed in the above context. There was no case for the judgment debtors that they were allowed to remain in possession on permission given by the decree holders. In their counter claim, they only said that the decree holders having accepted delivery cannot now turn down and say that delivery has not been effected and the second application is not maintainable. There is nothing to indicate that the decree holders had accepted the delivery on the first occasion permitting the judgment debtors to remain in possession and occupation and that the judgment debtors remained in occupation on the basis of such a concession made by the decree holders. Even though it may appear that the two endorsements made by the decree holders would indicate that the property has been delivered, it can only be taken as the property excluding the portion where the shed stood and that was delivered to the decree holders. There is no mention in the two delivery reports

made by the Amin and that kychits executed by the decree holders that there was removal of the judgment debtors from the premises and removal of the shed from the premises in question.

25. It is also significant to notice that after the first delivery note made by the Amin and also the so called kychits said to have been executed by the decree holders, the execution petitions were not closed and it remained alive for the decree holders to move for further execution of the decree on the ground that an earlier execution of delivery was deficient.

26. Had it been a case where the decree holders were satisfied with the first delivery, that would have automatically resulted in closing of the execution petition which was not done in the case on hand. That would show that the decree holders had objection at least were dissatisfied by the delivery initially. Viewed from that angle, the court below was justified in entertaining the second

application for delivery.

27. This petition is without merits and it is accordingly dismissed.

28. After pronouncement of the judgment, the learned counsel appearing for the petitioner requested for some time to be granted to him to take further steps if so advised and also to vacate the premises.

Considering the totality of the circumstances, it is felt that a months time can be granted to the petitioner to vacate the premises. The petitioner shall file an affidavit before the court below undertaking to vacate the premise on or before **28.02.2015** unconditionally within three weeks from today. If the affidavit is not filed within two weeks, the execution court may proceed in accordance with law.

**P.BHAVADASAN
JUDGE**

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