

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4217 of 2015

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1. M/s Bhagwati Coke Industries Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its place of business situated at Industrial Area, Aurangabad through one of its Directors, Shyam Kishore Prasad, S/o late Deo Nandan Prasad, Resident of Urmila Villa, Mo.: Surya Mandir Road, P.O.: P.S.: Town & District- Aurangabad
2. M/s Pushpanjali Coal & Coke Pvt. Ltd., a Company incorporated under the Provisions of the Companies Act, 1956 having its place of business situated at Bhupatipur, P.S.: Sirish, District- Aurangabad through its Managing Director, Sunil Kumar Singh, S/o late Ram Naresh Singh Resident of Bhupatipur, P.S.: Sirish, District- Aurangabad

.... Petitioners

Versus

1. The Central Coalfields Ltd., a Subsidiary of Coal India Ltd., [Sales & Marketing Department], Darbhanga House, Ranchi through its Chairman-cum-Managing Director
2. The Coal India Ltd. having its Head Office situated at 10, Netaji Subhas Road, Kolkate 700 001 through its Chairman
3. The General Manager [Sales & Marketing], Central Coalfields Ltd., Darbhanga House, Ranchi

.... Respondents

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Appearance :

For the Petitioners : M/s Ajit Kumar Sinha, Sr. Advocate
Alok Kumar Agarwal,
Akshay Amritanshu, Advocates

For the Respondents : M/s K.K.Rai, Sr. Advocate
Vishwa Mohan Kumar Sinha and
Anshul Rai, Advocates

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

ORAL JUDGMENT

Date: 27-07-2016

I have heard the parties and perused the records of this case.

The petitioners initially approached this Court by filing the present writ application, *inter alia*, for grant of following reliefs:

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- i] For quashing the order communicated to the Petitioners at Aurangabad bearing No. CCL/HQ/Sales/2014/Price Noificationon/11070-184 dt. 05.11.2014, as contained in Annexure 11, by which the Respondent has intimated about charging or realization as ad-on price @ Rs. 960/- per Metric Ton as Washery Recovery charge for supply of Raw Coking Coal from the Petitioners and similarly situated units, as being wholly without jurisdiction, unauthorized and illegal;
- ii] For a Declaration that the Respondent has got no authority to change the Notified Price by indirect means in the name of recovery of Washery Charges, as the decision of issuing price notification is vested in the holding company, i.e. Coal India Ltd., and not the Subsidiary, i.e. the Respondent no. 1;
- iii] For a Declaration that the Respondent No.1 and 3 has got no authority to realize any amount, over and above the Notified Price, as it will amount to changing the Notified Price, which the Respondent does not have any jurisdiction being merely a subsidiary of Coal India Ltd.;
- iv] For a Declaration that the order issued by the Respondent No. 3 for realizing a sum of Rs. 960/- per MT on the Notified Base Price of Rs. 1740/- per MT amounts to realizing more than 50% in the name of Ad on charge is a camouflage which is hit by the principle to do something indirectly which cannot be done directly and hence it is an arbitrary exercise of power, without any authority of law;
- v] For a Declaration that the decision of the Respondent Nos. 1 & 3 to realize a sum of Rs. 960/- per MT as an Ad on price over the notified price is contrary to the

judgment of the Hon'ble Apex Court in the Case of Ashoka Smokeless Coal Industries Pvt. Ltd. & Ors. Vs. the Union of India & Ors. reported in 2007(2) SCC 640.

- vi] For a Declaration that the Respondent No. 1 & 3 have illegally realized the amount of Rs. 960/- per MT with effect from 05.11.2014 even for the period August, 2014, September, 2014, October, 2014 onwards and as such the same being not sustainable in law is liable to be quashed and the amount illegally realized from the Petitioners is liable to be refunded back.
- vii] For a declaration that the Respondent No. 1 & 3 have realized @ Rs. 960/- per MT as an Ad on price over and above the notified price of Coal from the Petitioners for the August, 14 till November, 2014 allocation with retrospective effect, i.e. for the period prior to the date of issuance of order dt. 5.11.2014, which cannot sustain in the eyes of law by any stretch of imagination;
- viii] For a direction to the Respondents to refund the amount illegally realized from the Petitioners or adjust the same by giving credit of that amount in future supply of coal to the Petitioners,
- ix] For a direction to the Respondents to refund the amount illegally realized from the Petitioners with interest and for any other relief[s] for which the Petitioners may be found entitled to in the facts and circumstances of the present case.

Subsequently, by filing I.A. No. 4826 of 2015, the petitioners sought amendment in the relief portion of the writ



application by addition of a relief seeking quashment to the order of the respondent Central Coalfields Ltd (hereinafter referred to as “the CCL”) dated 4.6.2015, as contained in Annexure 15, which was allowed vide order dated 3.12.2015 holding that the relief mentioned in the aforesaid interlocutory application and challenge to Annexure 15 along with the averments made in that connection would form part of the writ application.

The petitioners have claimed that they are Companies incorporated under the Companies Act, 1956 and are engaged in production of smokeless fuel under the technology developed by the Central Mines, Planning & Design Institute Ltd. (CMPDI) and Central Fuel Research Institute (CFRI).

It is stated in the writ application that special smokeless manufacturing unit provides pollution free domestic fuel to the people of the State of Bihar. Since only raw material to be used for such production is raw coal, the petitioners applied to the CCL for firm assurance of supply of the coal as per the requirement of the petitioners. After joint inspection and other formalities, the petitioners were granted *ad hoc* coal linkage and the petitioners have made huge investment in their unit which fully depends upon the supply of coal on the basis of linkage granted by the CCL. It is also stated in the writ application that the CCL



revised the price of coal time to time. It is contended that suddenly a price notification was issued by the CCL, the subject matter of which indicates that an add-on price in the name of washery recovery charge was being charged from all FSA Consumers against the supply of raw coking coal @ Rs. 960/ MT. The aforesaid charging of add-on price by the CCL vide Annexure 11 has been challenged by filing this writ application on diverse grounds. During the pendency of the writ application Annexure 15 dated 4.6.2015 came to be issued by the CCL in which earlier nomenclature by changing the nomenclature of the add-on price from washery recovery charges to commitment charge @ Rs. 753/- per MT.

The earlier price notice (Annexure 11) was challenged on diverse grounds. One of the grounds is that such charging of add-on price in the name of washery recovery charge is without jurisdiction, unauthorized and illegal. Further ground of challenge is that such decision of issuing price notification could have been taken by the holding company, i.e., Coal India Limited and not its subsidiary, i.e., respondent no. 1, i.e., CCL.. Apart from above, it is claimed that it being over and above the notified price, would be in teeth of the law declared by the Courts. It is contended that, on an earlier occasion, charging of 20 % over and



above the notified price was put to challenge before Calcutta High Court in **W.P. No. 44 of 2007 (Rahul Industries & ors. V. Coal India Limited & ors.)** which was allowed vide judgment dated 25.11.2010 (Annexure 4) and the appeal preferred against that by the Coal India Limited was dismissed vide Annexure 5. Similar view was taken by a learned Single Bench of this Court vide Annexure 3 which is an order passed in **C.W.J.C. No. 6530 of 2009 (M/S MAA Mundeshwari Carbon Pvt. Ltd. Vs. The Central Coalfields Ltd. and ors.)**. In the aforesaid cases writ application were allowed and 20 % amount realized over and above the notified price was directed to be refunded back to the petitioners. It is submitted that again a decision has been taken by the CCL of charging add-on washery recovery charges and, as such, the action would be in the teeth of the aforesaid decisions rendered by a Single Bench of this Court and Single Judge and Division Bench of Calcutta High Court specially when the petitioners are being supplied raw coking coal without being washed. Similarly, Annexure 15 which was issued during the pendency of the present writ application has also been challenged on the aforesaid grounds. Thus, Mr. Ajit Kumar Sinha, learned senior counsel appearing for the petitioners has submitted that the aforesaid charge is not being any fee, tax or levy would be wholly

illegal and without jurisdiction.

However, the respondent CCL has raised a preliminary objection in this matter stating that the present writ application would not be maintainable before Patna High Court in view of the Clause 18(4) of the agreement between the respondent CCL and the petitioner no. 1, a copy of which has been appended as Annexure R/8 to the counter affidavit. It has been urged that identical agreement has also been executed with the petitioner no. 2 which has not been disputed. It has been urged on behalf of the CCL that Clause 18(4) of the agreement lays down in clear terms that the Court of Jharkhand High Court at Ranchi shall have exclusive jurisdiction in all matters under the agreement. It has been contended that agreement having been signed by the petitioners also, now they cannot maintain a writ petition before this Court after selecting a forum for convenience being Jharkhand High Court at Ranchi. It is urged that this issue is no longer *res integra* as a Division Bench of this Court in **L.P.A. No. 786 of 2009 (The Central Coalfields Limited and ors Vs. M/s Babul Smokless Fuel (P) Ltd.** has laid down in clear terms that in view of the Clause 18(4) of the agreement, the Court of Jharkhand at Ranchi shall have exclusive jurisdiction in all matters as Clause 18(5) goes to show that this agreement shall supersede all previous



discussions and meetings held and correspondence exchanged between the seller and the purchaser in respect of this agreement and any decision arrived before coming into force of this Agreement shall have no relevance. Mr. K.K.Rai, learned senior counsel appearing for the CCL, has informed that S.L.P. No. 16777 of 2011 filed by M/S Babul Smokeless Fuel (P) Ltd. challenging the aforesaid order of the Division Bench was dismissed *in limine* by the Apex Court. Thus, it is contended that this writ application has to be dismissed on the ground of maintainability.

Mr. Rai has further placed reliance upon several decisions of the Apex Court in this regard to impress upon this Court that once the parties of the Contract choose a forum of convenience under an agreement, both of them are bound by it and, thus, the writ application would lie only before such selected forum. That apart, Mr. Rai has submitted that there has been suppression on the part of the petitioners as the complete form of sale order has not been appended as the terms and conditions printed in the back side does not form part of the copy which has been appended by the petitioners as Annexure 8. A copy of sale order was produced at the time of hearing by the respondents. It is contended that even in the sale order, Clause 3 specifically



states that Courts of Ranchi, Jharkhand shall alone have jurisdiction. Learned counsel has placed reliance upon a decision of the Apex Court rendered in **Swastik Gases Private Limited Vs. Indian Oil Corporation Limited [(2013) 9 Supreme Court Cases 32**. It is contended that the three Judges Division Bench of Apex Court has held in clear terms that, even if the words “only” “exclusive”, “alone” are missing in the Clause of the agreement and it is simply written that a particular court would have jurisdiction, that would have to be read as if the jurisdiction would lie exclusively before the chosen court, whereas, in the case in hand, it has categorically been stated in Clause 18(4) of the agreement that Jharkhand High Court at Ranchi shall have “exclusive jurisdiction” in all matters under the agreement.

Relevant passage from the aforesaid decision is extracted as under for better appreciation:

“32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement – is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the



courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.”

That apart, it has next been contended that Clause 14 of the Fuel Supply Agreement provides an in-house mechanism for settlement of disputes or difference arising out of the agreement. Thus, it is contended that such forum should first have been chosen by the petitioners for redressal of their grievance. Learned counsel for the respondents has placed reliance upon a decision of the Apex Court rendered in **Pimpri Chinchwad Municipal Corporation and others Vs. Gayatri Construction Company and another [(2008) 8 Supreme Court Cases 172]** in this regard. According to the respondents, the Apex Court has held that the High Court ought not have entertained the writ application as the agreement already provides in-house remedy for

settlement of dispute. It has been urged that in view of that also, the writ application would not be maintainable.

In view of the preliminary objection raised on behalf of the respondents, I have heard learned counsel for the petitioners on that issue also as it would be meaningless to consider and take a decision on merit of the case if it has finally to be held that the writ application is not maintainable. However, if it is decided that the petitioners can maintain this writ application then other points on merit would have to be considered and decided.

Mr. Ajit Kumar Sinha, learned senior counsel appearing for the petitioners, has vehemently opposed the submissions made on behalf of the respondents on the issue of maintainability. It has been contended that the Division Bench of this Court, without discussing the prevalent judicial pronouncements of the Apex Court on the issue, had gone to decide the issue of maintainability only by reading the Clause 18(4) of the agreement. It has not even considered the decision of the Constitution Bench of the Hon'ble Supreme Court rendered in **L.Chandra Kumar Vs. Union of India and others [(1997) 3 Supreme Court Cases 261]** holding that the jurisdiction conferred on the High Court under Articles 226 /227 and on the Supreme Court under Article 32 is a part of basic structure of the



Constitution and, thus, cannot be taken away even by any statute what to say about an agreement between the parties. Thus, in fact the Division Bench by writing the decision in **The Central Coalfields Limited Ltd.** has not laid down any law. In fact such issue was neither raised by the CCL nor by the writ petitioner at the stage of writ proceeding or even at the stage of L.P.A. However, in course of hearing the Court itself appears to have raised the issue and without considering it properly has held that the petitioner would have to avail its remedy at Jharkhand High Court. It is contended the decision rendered in the aforesaid case is *per incuriam* and cannot be treated as a binding precedent. It has further been urged that Allahabad High Court in **M/s P.R.Transport Agency v. Union of India [AIR 2006 Allahabad 23]** has held that when the parties entered into an agreement confining themselves to the jurisdiction of one of the several civil courts having territorial jurisdiction in respect of a suit, basically parties are placing restraint upon themselves from approaching the other civil courts whose jurisdiction has been excluded. As such, the jurisdiction of other civil courts get ousted subject to Section 28 of the Contract Act, however, the power of judicial review given to the High Court under Article 226 of the Constitution, being the basic structure, cannot be curtailed even by statute what



to say by any agreement made between the parties. Thus, the ouster clauses can only oust territorial jurisdiction of civil courts and not of High Court. It has been contended that since Annexure 11 and 15 have been sent to the address of the Units of the petitioners situated in the State of Bihar and, since the drafts have been prepared in the local branches of the Bank concerned and also, since whatever decision have been taken by the CCL, has affected the functioning of the Units of the petitioners situated in State of Bihar, part of cause of action lies within the territory of Patna High Court and as such the writ petition would be maintainable.

Per contra, Mr. Rai contended that the ratio laid down in **L.Chandra Kumar(supra)** would not at all be applicable in the present case as there is no issue of ouster of powers of High Court to be exercised under Article 226 of the Constitution of India rather the issue is of choosing a forum of convenience by the parties to the contract and, as such, even if part of action lies in the State of Bihar since, such forum having been chosen by the parties, the writ petition would be maintainable before Jharkhand High Court, Ranchi and it would be open to it to exercise its powers under Article 226 of the Constitution of India. Therefore, it is not the power of the High Court which is tried to



be taken away by the contract rather the parties have chosen a particular High Court for their convenience. It is also contended that the decision of the Division Bench rendered in **The Central Coalfields Limited Ltd.** is not *per incuriam* as it is based upon the express clause of the agreement. So far cause of action is concerned it is contended that not even part of the cause of action lies even in State of Bihar as the agreement was signed at Ranchi, Jharkhand, the impugned notifications dated 5.11.2014 as well dated 4.6.2015 have been issued from Ranchi, the registered Head Officer of the respondent CCL is at Ranchi and the delivery point of the coal is also in the State of Jharkhand.

It has been submitted on behalf of the writ petitioners that the demand draft may have been prepared in the State of Bihar but, in fact, that would not be relevant rather relevant would be the fact that the demand drafts / banker cheques were issued in favour of the respondent CCL payable at Ranchi. It is urged that as per Clause 10.1 of the agreement payment has to be made in favour of the seller / respondent on any Nationalised / Scheduled Bank at Ranchi. It is submitted that the bald statement that the impugned action has affected the Unit would not be enough as the writ petitioners have not been able to explain as to how it is changing the Units. It has to be kept in mind that

increase or decrease of price may always happen as per the policy. Increase of price of raw material cannot create part of cause of action as the *lis* is regarding correctness or otherwise of the price notification issued by the respondents from their registered office at Ranchi.

The agreement between the parties which has been brought on record is not in dispute. Clause 18.4 of the agreement reads as follows:

“18.4 Governing Law: This Agreement, and the rights and obligations hereunder shall be interpreted construed and governed by the laws of India. The court of Jharkhand High Court at Ranchi shall have exclusive jurisdiction in all matters under this Agreement. ”

It would be manifest from the aforesaid that both the parties to the contract have chosen their forum convenience.

The Division Bench of this Court in **The Central Coalfields Limited Ltd.** has held in clear terms that such being the admitted clause under the agreement, the Jharkhand High Court at Ranchi had got exclusive jurisdiction. Special Leave Petition filed against the order has been dismissed *in limine*. The Division Bench decision rendered in the aforesaid case is binding upon this Court. However, since ground has been raised by the petitioners stating that the judgment is *per incuriam* as the



decision rendered by the Constitution Bench of the Apex Court rendered in **L.Chandra Kumar(supra)** as well as other decisions laying down the law in this regard have not been considered, that issue requires to be addressed. Before proceeding to discuss the above I must express that once a view has been taken by a Division Bench of this Court that has to be followed by a Single Judge Bench. In case it suffers from any glaring error then the judicial propriety and decorum requires the Single Judge hearing such matter to refer it to a larger Bench to examine the question.

The issue is whether such question exists in the present case at all? In my considered opinion, answer has to be in negative. In **Hakam Singh Vs. M/S. Gammon (Indai) Ltd. [1971(1) Supreme Court Cases 286]**, the Apex Court struck down an argument that when two courts have jurisdiction to entertain a dispute, a choice to forum clause would amount to restraint of to legal proceedings, or violate public policy, under Sections 28 and 23 of the Indian Contract Act, 1872. In **ABC Laminart (P) Ltd. v. A.P.Agencies, (1989) 2 Supreme Court Cases 163]** also a view was taken by the Apex Court that even if the words such as “only”, “alone” and “exclusive” are absent from the contract the maxim “*expressio unius est exclusion alterius*” i.e., expression of one is exclusion of the other may be applied,



however, at the same time it was also observed that the implied exclusion of the other jurisdiction would have to be inferred from the facts and circumstances of the case as there would not be an automatic exclusion. That had created an impression that if there is some ambiguity in such clause of the agreement, unless it can be inferred from the facts and circumstances of the case, the jurisdiction of the other court in which part of cause of action also falls cannot be ousted. However, in **Swastik Gases Private Limited (supra)**, the Three Judges Division Bench of the Apex Court has put the matter at rest by holding that even if the words “alone”, “only” and “exclusive”, are absent in such clause of agreement, it has to be read that the parties have agreed for exclusive jurisdiction of that particular court and such exclusive clause would neither be hit by section 23 nor would offend section 28 of the Contract Act, 1872.

Learned counsel for the petitioners has placed reliance upon the decision of the Constitution Bench of the Apex Court rendered in **L.Chandra Kumar(supra)** but in my view the issues involved in that case were entirely different. The ratio decided in the aforesaid is that even by bringing any statute, the constitutional power of the High Court under Article 226 cannot be taken away as the jurisdiction conferred upon the High Court

under Article 226 and on the Supreme Court under Article 32 is part of the basic structure of the Constitution.

In the case in hand, the issue is, even assuming that two courts have territorial jurisdiction, however, by the contract the parties have chosen forum convenience. The exercise of power under Article 226 is not being taken away by the parties rather issue is as to which High Court they would approach for resolution of their dispute arising out of the agreement.

That apart, I do not find any force in the further submission made on behalf of the petitioners also that part of cause of action falls within the territorial jurisdiction of Patna High Court. Admittedly, the agreement was inked at Ranchi, Jharkhand, impugned price notifications dated 5.11.2014 as well dated 4.6.2015 were issued from Ranchi, the registered Head Office of the respondent CCL is at Ranchi and the delivery point of the coal is also in the State of Jharkhand. Clause 1(j) of the agreement has defined the delivery point as meaning the colliery sidings or colliery loading points, as the case may be, in the designated coal mine of the seller or the locations or ports identified by the sellers which, in the present case is admittedly in the State of Jharkhand. Clause 5 provides that any complaint with respect to the quality of the coal shall be made at the colliery site / delivery point. Most



importantly Clause 8 declares that the title and risk of coal will pass from the Seller to the purchaser at the delivery point itself where the coal is loaded into wagons / containers of the purchaser. The seller shall have no liability as regards any loss, whatsoever, thereafter. Clause 10(1) envisages that the demand draft / bankers' cheque shall be drawn in favour of seller by the purchaser payable on any Nationalised / Scheduled Bank at Ranchi. Thus, in my view, simply for the reason that the concerned letters though are addressed to the petitioners at Aurangabad would not mean that part of cause of action has fallen within the territorial jurisdiction of this Court. Even if the claim of the petitioners is accepted that the seller has a right to examine whether the coal supplied by it is converted into the end product or not at the Unit situated in the State of Bihar, that issue having no nexus with the present *lis*, would be of no relevance. Other factors also do not have a nexus with the *lis* between the parties. A reference in this regard is made to a decision of the Hon'ble Supreme Court rendered in **National Textile Corpn. Ltd. and others Vs. Haribox Swalram and others [(2004) 9 Supreme Court Cases 786]**. Their Lordships have observed that each and every fact pleaded in the writ petition does not *ipso facto* lead to the conclusion that those facts give rise to a cause of action within the court's territorial

jurisdiction unless those facts pleaded are such which have nexus or relevance with the *lis* or dispute involved in the case. Facts which does not have bearing with the *lis* or dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned.

That apart even if it is assumed for the time being that small part of cause of action has fallen within the jurisdiction of this Court also in view of the express agreement between the parties, that would be of no help to the petitioners. A reference in this regard is made to the decision of the Apex Court rendered in **Kusum Ingots & Alloys Ltd. Vs. Union of India and another [(2004) 6 Supreme Court Cases 254]** the Hon'ble Supreme Court has held in para 30 as under :

“30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

In view of the above discussion, I am of the considered opinion that this writ application has to fail on the ground of maintainability, firstly, in view of the decision of the

Division Bench rendered in **The Central Coalfields Limited Ltd.**, secondly, since the parties to the contract have chosen forum convenience, thirdly, as per the discussion made above, the cause of action does not fall within the territorial jurisdiction of this Court, fourthly, even if it is assumed that small part of cause of action falls within the territorial jurisdiction of this Court, in view of the forum having been chosen by the parties, this Court would refuse to exercise its discretionary jurisdiction in view of the doctrine of forum convenience.

Thus, in my considered opinion, in the present matter Jharkhand High Court at Ranchi would have the exclusive jurisdiction for consideration of the *lis* between the parties.

As a result this writ application fails and is, accordingly, dismissed.

(Dr. Ravi Ranjan, J)

Spd/-

AFR/NAFR	AFR
CAV DATE	NA
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