

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.04.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.Nos.793 & 794 of 2009

1.Vimaladeviammal

...first appellant in SA
793/2009 and
Appellant in SA No.794/2009

2.Mayilvaganam

3.Easaivaanan

4.Udayavaanan

5.Madhivaanan

6.Simmavani

7.Bujavani

... Appellants 2 to 7 in SA.No.793
of 2009

Vs.

V.Gunasekaran

.... Respondent/Petitioner in both SAs.

Prayer:- These Memorandum of Second Appeals are filed under
Section 100 of Civil Procedure Code :

(i) against the Judgment and decree dated 31.01.2008 and
made in A.S.No.95 of 2006 on the file of the Fast Track Court
No.2, Ranipet, reversing the judgment and decree dated
30.11.2004 and made in O.S.No.61 of 2004 on the file of the
District Munsif Court at Ranipet(S.A.No.793 of 2009).

(i) against the Judgment and decree dated 31.01.2008 and
made in A.S.No.96 of 2006 on the file of the Fast Track Court
No.2, Ranipet, reversing the judgment and decree dated
30.11.2004 and made in O.S.No.201 of 2004 on the file of the
District Munsif Court at Ranipet(S.A.No.794 of 2009).

For Appellants
(in both SAs)

For Respondent
(in both SAs)

Mr.K.V.Ananthakrishnan

: Mr.R.Margabandhu

C O M M O N J U D G M E N T

The common judgment and decree dated 31.01.2008 and made in
the appeals in A.S.Nos.95 & 96 of 2006 on the file of the
learned Additional District Judge(FTC.2) Ranipet, Vellore

District, reversing the common judgment and decree dated 30.11.2004 on the file of the learned District Munsif, Ranipet, Vellore District, are under challenge in these Second Appeals.

2. The appellants in S.A.No.793 of 2009 are the plaintiffs in the suit in O.S.No.61 of 2004 on the file of the learned District Munsif, Ranipet, whereas, the appellant in S.A.No.794 of 2009 is the plaintiff in the suit in O.S.No.201 of 2004 on the file of the learned District Munsif, Ranipet.

3. With the common issue involved in both the appeals is one and the same and the parties to the appeals are also one and the same, these two appeals have been consolidated together, heard jointly and disposed of in this common judgment.

4. Originally, the respondent in both the appeals Mr.V.Gunasekaran had filed the suit in O.S.No.66 of 97 as against the appellants in S.A.No.793 of 2009 seeking the relief of specific performance of contract of sale.

5. At the same time, the first appellant Mrs.Vimaladevi Ammal had filed another suit in O.S.No.28 of 97 on the file of the learned District Munsif, Ranipet as against the respondent. In pursuant to the order passed by the District Court, Vellore District dated 26.06.2000 in O.P.No.19 of 99, the suit filed by the first appellant Mrs.Vimaladevi Ammal in O.S.No.28 of 97 was transferred to the file of the Sub Court, Ranipet and renumbered as 167 of 2002. That suit was dismissed for non prosecution on 21.03.2003. Under this circumstance, the suit filed by the respondent in O.S.No.66 of 97 was transferred to the file of learned District Munsif, Ranipet, in view of the Act 1 of 2004 and renumbered as O.S.No.61 of 2004. The first appellant Mrs.Vimaladevi Ammal had also filed the suit in O.S.No.201 of 2004 on the file of the learned District Munsif, Ranipet as against the respondent seeking the relief of permanent injunction. Both the suits were contested by the respective parties and ultimately, the trial Court in a common judgment dated 30.11.2004 had proceeded to dismiss the suit in O.S.No.61 of 2004 filed by the respondent as against the appellants in S.A.No.793 of 2004 rejecting the relief of specific performance of contract of sale and decree the suit in O.S.No.201 of 2004 filed by Mrs.Vimaladevi Ammal, who is the appellant in S.A.No.794 of 2009 granting the relief of permanent injunction.

6. Questioning the correctness of the judgment and decree of the trial Court, the respondent in both the appeals had preferred two appeals in A.S.Nos.95 & 96 of 2006 on the file of the learned Additional District Judge(FTC.2) Ranipet. The first Appellate Court in the common judgment dated 31.01.2008 had proceeded to allow both the appeals reversing the judgment

and decree passed by the Trial Court directing the appellants in S.A.No.793 of 2009, to execute a Sale Deed in respect of the suit property, after receiving the balance of sale consideration of Rs.300/-. The respondent was also directed to deposit the above said amount within a period of two months.

7. Having been aggrieved by the judgment and decree of the first Appellate Court dated 31.01.2008, the appellants stand before this Court with these second appeals.

8. Heard Mr.K.V.Ananthakrishnan, learned counsel appearing for the appellants and Mr.R.Margabandhu, learned counsel appearing for the sole respondent.

9. The first appellant Mrs.Vimaladevi Ammal in S.A.No.793 of 2009, is the wife of one late. Punniyakotti. The appellants 2 to 5 are their sons and the appellants 6 and 7 are their daughters. Admittedly, Punniyakotti was the original owner of the schedule mentioned property. What the respondent Mr.V.Gunasekaran would contend is that on 20.02.1995, the said Punniyakotti and the respondent/plaintiff had entered into a Sale Agreement and thereby the said Punniyakotti had agreed to sell his property in favour of the respondent/plaintiff for a total sale consideration of Rs.72,300/-. At the first instance, at the time of execution of the sale agreement Punniyakotti had received a sum of Rs.35,000/- from the respondent/plaintiff towards the advance and subsequently, on various occasions he had received the remaining balance of sale consideration excepting Rs.300/-. On the date of the said Sale Agreement i.e., on 20.02.1995, the possession of the suit property was also handed over to the respondent/plaintiff towards the part performance of the contract and he had also delivered the entire original documents relating to the said property. Since then, the respondent/plaintiff had/has been in possession and enjoyment of the property.

10. That on 02.11.1996, Punniyakotti had died intestate leaving behind all the appellants/defendants as his legal representatives. The said Sale Agreement, according to the respondent/plaintiff was very well known to the appellants/defendants. When the respondent/plaintiff had demanded the appellants to execute the sale deed, after receiving the balance of Rs.300/-, they had refused to execute the Sale Deed and therefore, the respondent/plaintiff was constrained to file the above said suit seeking the relief of specific performance of the contract of sale, directing the appellants/defendants to execute and register a Sale Deed in terms of the Agreement of Sale dated 20.02.1995.

11. On the other hand, the appellants/defendants while denying the averments of the plaint, including the execution of the Sale Agreement in question dated 20.02.1995 would contend that there was no need or necessity to sell the properties which would fetch nearly Rs.3 lakhs. It is their specific case that it is not the exclusive property of late.Punniyakotti to be dealt with independently, but it is the joint family property, in which the appellants/defendants 2 to 5 have equal share and therefore, the alleged Sale agreement dated 20.02.1995 would not bind upon the rights of the appellants 2 to 5. After the death of late. Punniyakotti, his 1/5th share devolved on all the appellants/defendants, who could not be personally liable even if the family arrangement is not accepted.

12. They have also contended that late. Punniyakotti being the husband of the first appellant and father of the remaining appellants had never entered into any Sale Agreement with the respondent/plaintiff as there was no necessity for the family to sell the suit property. They have described the suit Sale Agreement as a forged one which could have been concocted by the respondent/plaintiff, to grab the suit property.

13. They have also specifically contended that there were corrections and inter lineation in the suit sale agreement with regard to the receipt of balance of sale consideration. They have also denied the passing of consideration on the disputed Sale Agreement. Since the signature of late.Punniyakotti and the endorsements were forged one, the appellants/defendants were not liable to execute the sale deed in favour of the respondent/plaintiff.

14. They would further contended that the first appellant's husband viz., late.Punniyakotti had no right to enter into any Sale Agreement as the property was allotted to the share of the first appellant/defendant as per the family arrangement effected prior to the death of the said Punniyakotti and though she had been in possession and enjoyment of the suit property, neither the first appellant/defendant nor the other appellants/defendants are bound by the disputed Sale Agreement. They have maintained that the suit sale agreement is unenforceable in law, invalid and not binding upon the appellants/defendants.

15. Based on the pleadings of the parties to the suit in O.S.No.61 of 2004, the trial Court had formulated as nearly as six issues. Insofar as the suit in O.S.No.201 of 2004 is concerned, as stated in the foregoing paragraphs, the first appellant in S.A.No.793 of 2009 is the plaintiff. She has filed the suit as against the respondent seeking the relief of permanent injunction. She has contended in this suit that originally the suit property was allotted to her husband

(Punniyakotti) by the Government India, while he was engaged in a National War and as such he had been in possession and enjoyment of the property by raising crops.

16. After the death of her husband, she became the absolute owner thereof and she had been in possession and enjoyment of the property. According to the first appellant/defendant in O.S.No.201 of 2004, the respondent is a adjoining Stall owner of the schedule mentioned property and insofar as the suit property is concerned he is an utter stranger and he has no right, title and interest over the suit property. Taking advantage of the loneliness of the first appellant/plaintiff, the respondent had threatened and intimidated her alongwith his henchmen and he has also admitted the trespass made to the schedule mentioned property.

17. In fact, on 09.06.2006, he alongwith his henchmen was attempting to trespass into the suit property and on account of this reason, the first appellant(plaintiff in O.S.No.201 of 2004) had lodged a complaint with the concerned Police Officials. Hence, she was constrained to file a suit in O.S.No.201 of 2004 as against the respondent seeking the relief of permanent injunction. Both the suits were consolidated together as the subject matter involved therein is one and the same.

18. On appreciation of the evidences both oral and documentary, the trial Court had proceeded to dismiss the suit filed by the respondent(O.S.No.61 of 2004) for specific performance of contract of sale, rejecting the prayer of specific performance and allowed the suit in O.S.No.201 of 2004 filed by the first appellant granting the relief of permanent injunction. But the first Appellate Court in A.S.Nos.95 & 96 of 2006, had reversed the judgment and decree of the trial Court by dismissing the suit. Hence, the appellants, who are the defendants in the suit in O.S.No.61 of 2004 and the first appellant, who is the plaintiff in the suit in O.S.No.201 of 2004 stand before this Court with these second appeals.

19. On perusal of the grounds of memorandum of appeals(both appeals), the following common substantial questions of law have been identified by the learned counsel Mr.K.V.Ananthakrishnan, appearing for the appellants.

(i)Whether the appellant has been in possession of the suit property as the same was assigned by the Government in favour of the first appellant's husband Late.Punniyakotti for having rendered his service during Second World War.

(ii) Whether the first Appellate Court is not correct in coming to the conclusion that the respondent was put in possession of the suit property under Section 53(A) of the Transfer of Property Act by way of part performance of the contract of sale?

(iii) Whether the lower Appellate Court was not right in holding that the possession of the suit property was handed over to the respondent towards the part performance of the contract of sale agreement in the absence of any recital in the sale agreement dated 09.02.1995 with reference to handing over of possession ?

(iv) Whether the lower Appellate Court was not right in coming into the conclusion that the respondent was in possession of the suit property merely on the basis of his holding of patta pass book which is not a document of title?

The entire case hinges around the pivot of Ex.A2, Agreement of Sale dated 20.02.1995.

20. Mr.K.V.Ananthakrishnan, learned counsel appearing for the appellants while advancing his arguments has invited the attention of this Court to Ex.A2, Agreement of Sale dated 20.02.1995. He has seriously attacked and challenged the very genesis of this document, Ex.A2. The learned counsel has contended that this Agreement of Sale dated 20.02.1995 was a fabricated and concocted document, after forging the signature of the deceased Punniyakotti, who is none other than the husband of the first appellant and father of the remaining appellants. He has also demonstrated as to how this Sale Agreement ought had been forged.

21. The Ex.A2, Agreement of Sale is said to have been executed by the first appellant's husband Late.Punniyakotti in favour of the respondent, agreeing to sell the suit property, after receiving the entire sale consideration, excepting a sum of Rs.300/- and in- part performance thereof, he had also handed over the possession of the suit property in favour of the respondent.

22. The appellants have totally challenged the alleged execution of the Sale Agreement by the said late.Punniyakotti as well as the alleged endorsements said to have been made on the reverse of the disputed Sale Agreement of late.Punniyakotti. It is the specific case of the appellants that the said property was allotted to Punniyakotti by the Government of India for his service rendered in the second World War and that the Agreement of Sale, which is a disputed document was a rank forged one

and created only for the purpose of this suit and in fact the possession of the suit property is only with the appellants.

23. The first appellant had also filed a suit in O.S.No.204 of 2004, seeking the relief of permanent injunction restraining the respondents from interfering with their possession. In this connection, Mr.K.V.Anantha Krishnan, learned counsel has vehemently contended that, on careful perusal of the document, Ex.A2, it would establish that all the disputed signatures which are said to have been signed by Punniyakotti were different and varied with each other and that this document was executed in two stamp papers with a white paper sandwiched in between them and this would go to show that this document was not a genuine one.

24. This Court has examined the document under Ex.A2, i.e., the Sale Agreement in question dated 20.02.1995. The signatures find a place beneath the contents of page Nos.1, 2 & 3 varied with each other. On scrutinization of this Sale Agreement a white paper is found, sandwiched between two stamp papers. It is also apparent and explicit that these two stamp papers have been purchased from different stamp vendors and also appears to have been written by different persons. The signatures find place in the endorsements dated 07.04.1995, 15.11.1995, 20.02.1996 and 17.08.1996 also varied from each other. Apart from this, in the first page, it is stated in the fifth line from bottom as hp!p!;jh; fhyj;jpy; and in the second page i.e., in the white sheet in the fifth line from bottom, it is stated as hp\$!;lh; bra;J''. Therefore, Mr.K.V.Ananthakrishnan, learned counsel has contended that Ex.A2, Sale Agreement should have been written by different persons. The trial Court in its judgment has observed that Ex.B2, Patta stands in the name of the first appellant Mrs.Vimaladevi Ammal. It was issued in her favour on 22.11.2002 and Ex.B3, Tax Receipt dated 9.03.2003 was also issued in her name.

25. The trial Court has also observed that the respondent/plaintiff had miserably failed to substantiate his case that Ex.A2, was executed by late.Punniyakotti and since, the respondent was able to obtain the patta, which stands in the name of the first appellant, it could not be concluded that the respondent/plaintiff was in possession of the property. The trial Court has also observed that since the disputed signatures said to have been put up by late.Punniyakotti were differ with each other, it could not be concluded that the said document was executed by late.Punniyakotti in favour of the respondent/plaintiff and equally, the respondent had also not substantiated his case with acceptable legal and documentary evidences. Before, the first Appellate Court, the respondent/plaintiff had filed an application in I.A.No.71 of

2006 under Order 26, Rule 10(a) read with Section 151 of the Code of Civil Procedure, to appoint an Advocate Commissioner to take the document under Ex.A2, to hand writing expert to compare the signatures find a place in the Sale Agreement as well as in the endorsements and to find out as to whether those signatures were put by the same person or different persons.

26. An application was filed on behalf of the respondent before the first Appellate Court saying that the first appellant's husband Punniyakotti was an Ex-Serviceman, working as a Mechanic and therefore, if the documents such as pension papers and other related documents pertaining to his job were produced, it would be easier to find out the genuineness of the signatures find a place in Ex.A2. For this application, the appellants had filed their objection saying that such documents were not available with them and submitted that the said late. Punniyakotti was not a pension holder and that he was serving in the Military during the Second World War period. They had also contended that the documents relating to more than 62 years were not available with them.

27. After hearing both sides, while disposing of the appeal, the first Appellate Court had observed that since no documents containing the accepted signatures were produced by the appellants and even if the disputed signatures find a place in Ex.A2, were sent to Forensic Laboratory, no useful result could be obtained. Therefore, that petition was dismissed.

28. With reference to the above, Mr.K.V.Ananthakrishnan, learned counsel has raised a question as to 'whether the non production of the admitted signatures would give adverse inference?'. He has also pointed out that on seeing the signature hand writing and the stamp papers with bare eye, we can infer that Ex.A2 was not a genuine one.

29. It appears from Ex.A2, the disputed Sale Agreement that it was attested by two witnesses viz., one K.P. Govindaraju Gounder and V. Vasudevan. Admittedly, both of them had passed away. Mr.Margabandu, learned counsel appearing for the respondent has mainly relied upon the evidence adduced by PW1 to 3. PW2 and 3 are the attesting witnesses in respect of the endorsements for having paid the remaining balance of sale consideration.

30. On perusal of the evidences of PW 2 & 3, they have categorically spoken to, that they did not know the appellants. However, they have stated that the amounts were paid by the plaintiff, but their evidences are not sufficient to hold that Ex.A2, Sale Agreement was executed by late. Punniyakotti. Mr.Margabandhu, learned counsel has submitted that despite the petition under Order 26, Rule 10(a) was filed before the first

Appellate Court to send the disputed signatures find place in Ex.A2, Sale Agreement alongwith the admitted signatures for being compared by the hand writing experts attached to Forensic Sciences Laboratory, the appellants were not able to produce the admitted signatures of the deceased Punniyakotti. He has submitted that the admitted signatures of the said Punniyakotti might have been in possession of the appellants but wantonly they had not chosen to produce the same for being compared with the disputed signatures. The non production of the admitted signatures of late.Punniyakotti by the appellants would lead the Court to take adverse inference as against the appellants under Section 114(G) of the Indian Evidence Act. Mr.Margabandhu, learned counsel has also placed reliance upon the following three decisions:

(i) State(Delhi Administration) Vs. Pali Ram, AIR 1979 Supreme Court 14(1)

(ii) Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif and Others, AIR 1968 Supreme Court 1418.

(iii) Ramdas Oil Mills Vs. Union of India(Military Dept.) (1977) 1 Supreme Court Cases 592.

State(Delhi Administration) Vs. Pali Ram, AIR 1979 Supreme Court 14(1), wherein it is held as follows:

'A sample writing taken by the Court under the second paragraph of Section 73, is, in substance and reality, the same thing as 'admitted writing' within the purview of the first paragraph of Section 73, also. The first paragraph of the section provides for comparison of signature, writing, etc., purporting to have been written by a person with others admitted or proved to the satisfaction of the Court to have been written by the same person. But it does not specifically say by whom such comparison may be made. Construed in the light of English Law on the subject, which is the legislative source of this provision, it is clear that such comparison may be made by a handwriting expert(Sec.45) or by one familiar with the handwriting of the person concerned (Sec.47) or by the Court. The two paragraphs of the section are not mutually exclusive. They are complementary to each other. Section 73 is therefore to be read as a whole in the light of Section.45.

It is also held that '' In addition to Section 73, there are two other provisions resting on the same principle, namely, Section 165, Evidence Act and Section 540 Cr.P.C., 1898, which between them invest the Court with a wide discretion to call and examine any one as a witness, if it is bonafide of the opinion that his examination is necessary for a just decision of the case.''

Besides this the Apex Court has also observed that the matter can be viewed from another angle, also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other, and the prudent course is to obtain the opinion and assistance of an expert.

Remaining two other decisions are with reference to Section 114(G) of the Indian Evidence Act, with regard to the taking of adverse inference.

31. Countering his argument Mr.K.V.Ananthakrishnan, learned counsel has submitted that unless, the plaintiff prove his case he shall not be ordered to get the relief. He has also submitted that no notice was issued to the appellants calling upon them to produce the document in question. Mr.K.V.Ananthakrishnan, has also made reference to the counter statement filed by the first appellant in application in I.A.No.71 of 2006, wherein, the respondent had requested the Court to send the disputed signatures find a place in Ex.A2, alongwith the admitted signatures. They may not be produced by the appellants. In her counter statement, the first appellant had stated that she was not in possession of any records with the signature of her husband and therefore, she was not able to produce the same.

32. In this regard, Mr.K.V.Ananthakrishnan, learned counsel has made reference to the decision of the Allahabad High Court in Bhaggu Vs. Manni Prasad Pandey (AIR) 1965 ALLAHABAD 202. In this case, the learned Single Judge of the Allahabad High Court has observed as follows:

"It may be a rule of caution and prudence that where the Court considers that the opinion of a Handwriting Expert would be of assistance to it in coming to a decision it may call for the evidence of an expert. But there is no rule or law that the Court is precluded from coming to its own conclusions in cases where it is fully familiar with the language and script of the document which is the subject matter of scrutiny before it and where it has the assistance in such scrutiny of the counsel of the parties. If on the face of it the Court is able to come to a conclusion that a particular document contains alterations and interpolations it is not bound to seek the assistance of Handwriting Experts. It cannot, therefore, be said that simply because a Handwriting Expert is not called to give evidence the Court is not empowered to come to a conclusion whether a particular pronote and a receipt have been subjected to alterations or interpolations.

"it is also held that it may be a rule of caution and prudence that where the Court considers that the opinion of a Handwriting Expert would be of assistance to it in coming to a decision it may call for the evidence of an expert. But there is no rule of law that the Court is precluded from coming to its own conclusions. In cases where it is fully familiar with the language and script of the document which is the subject matter of scrutiny before it and where it has the assistance in such scrutiny of the counsel of the parties. If on the face of it the Court is able to come to a conclusion that a particular document contains alterations and interpolations it is not bound to seek the assistance of Handwriting Experts. It could not, therefore, be said that simply because a Handwriting Expert was not called to give evidence the Court is not empowered to come to

a conclusion whether the pronote and the receipt in question have been subjected to alterations or interpolations.

33. In an another decision in the State of Gujarat Vs. Vinaya Chandra Chhota Lal Pathi (AIR) 1967 Supreme Court 778, wherein the three Judges Bench of Hon'ble Supreme Court in paragraph No.10 has observed that

'A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writing. It may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of comparison, but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of Section 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of an handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove the disputed writing. It was therefore, not right for the learned Judge to consider it unsafe to rely upon the evidence of the complainant in a case like this, i.e., in case in which no handwriting expert had been examined in support of his statement.

34. This Court has carefully considered the submissions made on behalf of both sides and also perused the grounds of appeals including the judgments of the trial Court as well as the first Appellate Court. Having regard to the relevant facts and circumstances, this Court is of the view that the genesis of Ex.A2, the disputed Sale Agreement dated 20.02.1995 has not been satisfactorily established by the respondent/plaintiff.

35. On careful perusal of Ex.A2, Sale Agreement, this Court is able to find that no reference is available with regard to the handing over of possession of the suit property in favour of the respondent/plaintiff, at the time of execution of Ex.A2. In the absence of specific stipulation with reference to handing over of possession, it could not be presumed that the respondent/plaintiff has been in possession and enjoyment of the suit property. Further the mere holding of patta, which stands in the name of the first appellant does not give any

entitlement to the respondent/plaintiff, to get the relief of specific performance of contract of sale. Therefore, all the substantial questions of law are answered as against the respondent/plaintiff and in favour of the appellants.

36. This Court has also found that the trial Court has gone to the extent of analyzing the factual situation and after scrutinization of Ex.A2, the Court has clearly found that, Ex.A2 is not a true document, as the signatures purporting to have been put by the deceased Late.Punniyakotti are varied from each other.

37. Under these circumstances, this Court is of considered view that the second appeals are deserved to be allowed. Accordingly, the second appeals are allowed. The judgment and decree of the first appellate Court are set aside and the judgment and decree of the trial Court are restored to file. There is no order as to costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

- 1.The Additional District and Sessions Judge,
The Fast Track Court No.2,
Ranipet.
- 2.The Principal District Munsif,
Ranipet.

+2cc to Mr.K.V.Ananthakrishnan, Advocate sr.21620 and 21621
+1cc to Mr.R.Margabandhu, Advocate sr.22177

S.A.No.793 & 794 of 2009

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