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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(I) (COMM.) 303/2016

RITIKA AWASTY

..... Petitioner

Through : Mr Muhammad Ali Khan, Mr Yudhisthir Singh, Mr Ravi Gupta, Mr Jaspal Singh, and Mr Anand Kanojiya, Advs.

versus

HASSAD NETHERLANDS B.V. & ORS.

..... Respondents

Through : Mr Samar Kachwaha, Mr Ashok Sagar, and Mr Suryadeep Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 21.07.2016

IA No.8480/2016(Exemption)

Allowed, subject to all just exceptions.

The application is disposed of.

O.M.P.(I) (COMM.) 303/2016 & IA No.8479/2016 (Stay)

1. The petitioner has filed the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') challenging the Award delivered on 30.05.2016 (hereafter 'the impugned Award') by the Arbitral Tribunal comprising of Justice Sujata V. Manohar (Retd.), Justice B. P. Singh (Retd.) and Mr. William R. Jentes, presiding.

2. The Arbitral Tribunal was constituted pursuant to the request made by respondent nos. l and 2 (claimants nos. 1 and 2 before the Arbitral Tribunal) to adjudicate disputes that had arisen in respect of a certain set of transactions whereby the respondent nos. 1 and 2 had acquired controlling interest in Bush Foods Overseas Pvt. Ltd. (hereafter 'the Company'). Respondent no. 2 entered into the initial agreements and respondent no. 1 - a wholly owned subsidiary of respondent no. 2 - was incorporated as a Special Purpose Vehicle for the investments made in the Company. The Arbitral Tribunal awarded in favour of respondent nos. 1 and 2 (hereafter severally and collectively referred to as 'the Claimants') and against the petitioner and respondent no. 3 (collectively referred to as 'the Awastys').

3. The abovementioned set of transactions also included the Claimants standing surety for the debts owed by the Company to consortium of banks. It was the Claimants' case that they were induced by the Awastys to invest and acquire the majority interest in the Company. The Claimants asserted that they had suffered losses, *inter alia,* on account of loss of the investments resulting from the Company having failed as well as on account of payments made to discharge the dues owed by the Company to the consortium of banks.

4. The undisputed facts already recorded by the Arbitral Tribunal in the award are that the Awastys had incorporated the Company in 2005. The Company was primarily engaged until recently in the purchase and processing of basmati rice in India, and its distribution and sale both domestically and internationally. Respondent no. 3 was the Managing Director and CEO of the Company from its incorporation until late 2013. The petitioner was a shareholder and was also appointed as a director of the Company. However, her role in the Company was passive; she was essentially a homemaker and was not actively involved in the functioning of the Company.

5. In April 2012, Awastys sold 29% of their shares to two Mauritius based investors, Standard Chartered Private Equity (Mauritius) II Ltd. and Standard Chartered Private Equity (Mauritius) III Ltd. (hereinafter the 'Mauritius Investors'). In September 2012, the Mauritius investors along with Awastys approached the Claimants and other prospective buyers to purchase the majority stake in the Company. After some negotiation, the Claimants entered into an interrelated set of "Transaction Documents" with the Awastys and the Mauritius Investors to purchase 69.5% majority interest in the Company. These agreements included:

(i) Share Purchase Agreement (hereafter 'SPA') dated 09.03.2013 between the Awastys and Claimants for sale of their shares for US$ 47,737,768;

(ii) Exiting Share Purchase Agreement (hereafter 'ESHA') dated 09.03.2013 in terms of which the Mauritius Investors sold their shares in the Company to the Claimants for US$ 50,486,815;

(iii) Share Subscription Agreement (hereafter SSA) dated 28.03.2013, for subscription of additional shares of the Company for US$ 22,130,200;

(iv) Shareholders Agreement (hereafter 'SHA') dated 28.03.2013; and

(v) Letter Agreement (hereafter 'LA') dated 28.03.2013.

Consequent to the aforesaid transactions, the Claimants became the principal guarantor of the Company's debts owed to a consortium of banks. And, in terms of the SPA, SSA and ESHA, the Claimants acquired 69.5% of the Company's shares which included all the shares held by the petitioner and the Mauritius Investors.

6. It is the case of the petitioner that certain misunderstandings arose between the respondents as a result of which Claimants suspended respondent nno.3 from the management of the Company. Respondent no.3 filed a criminal complaint qua the economic mismanagement of the Company against the Claimants. The Claimants also filed a complaint on 07.01.2014, with the Economic Offences Wing of the Delhi Police. The Claimants alleged that they were induced to invest to acquire majority

interest in the Company on the basis of fraudulent misrepresentations made, particularly in respect of inventories - which were practically non-existent and the financial status of the Company.

7. The SPA, SHA and SSA included arbitration clauses whereby the parties to those agreements had agreed for resolution of their disputes in accordance with LCIA India Arbitration Rules (hereafter 'LCIA Rules'). On 19.09.2014, the Claimants issued a notice of claim under various agreements including SPA and SHA. And, on 23.09.2014, the Claimants filed a request for Arbitration with LCIA India invoking the arbitration clause simultaneously and jointly in respect of the said agreements. The request for arbitration was objected to by the Awastys, however, the LCIA Court after considering the submissions of the parties appointed Justice Sujata V. Manohar (Retired), Justice B.P. Singh (Retired) and Mr William R. Jentes (as presiding arbitrator) to constitute the Arbitral Tribunal. The Arbitral Tribunal considered the objections as to jurisdiction raised by Awastys and ruled against them. Thereafter, the Arbitral Tribunal considered the briefs submitted, oral arguments and submissions filed by the parties. The Tribunal also heard oral testimonies of witnesses and passed the impugned Award. The operative part of the impugned Award is reproduced below:-

"110. Accordingly, based on the foregoing factual findings and conclusions of law, we the undersigned Arbitrators unanimously AWARD as follows:

A. The Tribunal declares the Share Purchase Agreement dated 9 March 2013 is set aside as void under Section 19(1) of the Indian Contract Act, 1872;

B. Claimant Hassad Netherlands B.V. shall recover the sum of US$43,787,768 from Respondents Virkaran Awasty and Ritika Awastv, jointly and severally, plus interest at nine percent (9%) per annum from 19 September 2014 to the date of this Award. Within sixty (60) days from the date of this Award, Respondents Virkaran Awasty and Ritika Awasty shall pay, jointly and severally, to Claimant Hassad Netherlands this sum including interest, plus interest at twelve percent (12%) per annum from the date of this Award to the date of payment.

C. Claimant Hassad Netherlands B.V. shall recover the further sum of US$72,617,015 from Respondent Virkaran Awasty, plus interest at nine percent (9%) per annum from 19 September 2014 to the date of this Award. Within sixty (60) days from the date of this Award, Respondent Virkaran Awasty shall pay to Claimant Hassad Netherlands this further sum including interest, plus interest at twelve percent (12%) per annum from the date of this Award to the date of payment.

D. Claimant Hassad Food Company QSC shall recover the sum of US$ 74,413,777.61 from Respondent Virkaran Awasty, plus interest at nine percent (9%) per annum from 19 September 2014 to the date of this Award. Within sixty (60) days from the date of this Award, Respondent Virkaran Awasty shall pay to Claimant Hassad Food Company QSC this sum including interest, plus interest at twelve percent (12%) per annum from the date of this Award to the date of payment.

E. All of the costs of the arbitration that the LCIA Court has fixed to be INR 20,227,947.94 shall be borne by Respondents Virkaran Awasty and Ritika Awastv, jointly and severally, and Claimants Hassad Netherlands B.V. and Hassad

Food Company QSC, jointly and severally, shall recover from Respondents Virkaran Awasty and Ritika Awasty, jointly and severally, the sum of US$ 284,943.83.

F. Claimants Hassad Netherlands B.V. and Hassad Food Company QSC, jointly and severally, shall recover from Respondents Virkaran Awasty and Ritika Awasty, jointly and severally, all of the legal and other costs that have been paid by Claimants and that have been determined and fixed by the Tribunal to be reasonable in the amount of US$ 2,171,951.86.

G. Within sixty (60) days from the date of this Award, Respondents Virkaran Awasty and Ritika Awasty, joint and severally, shall pay to Claimants Hassad Netherlands B.V. and Hassad Food Company QSC, jointly and severally, the above sums of US$ 284,943.83 and US$ 2,171,951.86, plus interest at twelve percent (12%) per annum from the date of this Award to the date of payment.

H. This Award is in full settlement of all claims submitted to this Arbitration, and all claims and any putative counterclaims not expressly granted in this Award are hereby expressly denied."

8. The petitioner has based the present petition principally on the ground that the Arbitral Tribunal lacked the jurisdiction to pass the impugned Award and further the same is in conflict with the public policy. The learned counsel appearing for the petitioner contended that the Arbitral Tribunal is liable to be set aside principally for four reasons as summarised hereafter:-

8.1 Mr Ali Khan, the learned counsel submitted that the Arbitral Tribunal had arrived at a finding that the petitioner's role in the Company was 'essentially passive' and there was no evidence that the petitioner had played any part in the preparation of documents or communications upon which the Claimants are stated to have relied upon. Nonetheless, the Arbitral Tribunal have awarded damages in the sum of US$ 50,192,493.91/- against the petitioner in addition to interest, costs and expenses. It was submitted that even though petitioner had no role to play in the Company, she was jointly and severally liable for the amounts paid by the Claimants for acquisition of shares under the SPA.

8.2 The second point that was canvassed by Mr Khan was that the impugned award was passed beyond the period of three months from the appointment of the Arbitrators. According to him, this was contrary to clause 10.14.2 of the SPA which expressly provided that Arbitration would be concluded within three months of the appointment of the Arbitrators. He submitted that after the expiry of period of three months, the Arbitrators lost their jurisdiction to pass an award.

8.3 Thirdly, it was submitted that the petitioner was only a party to the SPA dated 09.03.2003 and was not a party to SHA or the LA and, thus, could not be made party to the Arbitration proceedings for adjudication of the disputes arising in relation to those Agreements. He further submitted that the petitioner could only be joined as a party if she so consented as mandated under Article 22.1(g) of the LCIA Rules. He submitted that although the said objection had been taken, the Arbitral Tribunal had rejected the same by the Procedural Order No.1 holding that the said article did not appear to require petitioner's consent to such joining of her.

8.4 Lastly, Mr Khan referred to paragraph 100 of the Arbitral Award and submitted that the Tribunal had expressly limited the petitioner's liability to the Claimants' loss on account of the Agreement authorised by her. He submitted that the petitioner had not signed the SPA and the same was signed by petitioner's husband (respondent no. 3) on her behalf as she had executed a Power of Attorney in his favour. He submitted that the Power of Attorney did not authorise respondent no.3 to make any misrepresentations or to do any unlawful act; therefore, she could not be held liable for any misrepresentation under the SPA. He submitted that in any event her liability could only be limited to the sale price of the shares held by her in the Company, (which was only 1.37%) and she could not be held liable for the consideration received by respondent no.3 for sale of his shares in the Company.

9. I have heard the learned counsel.

10. At the outset, it is necessary to note that the scope of interference with an Arbitration Award is limited; an arbitration award can be set aside only on the grounds specified under Section 34(2) of the Act. The Court while examining a challenge to the award on the ground that it is conflict with public policy cannot interfere with findings arrived at by the Arbitral Tribunal unless, they so patently erroneous that no reasonable person could possibly draw the inference, on the basis of evidence, as is drawn by the Arbitral Tribunal. In ***Associate Builders v. Delhi Development Authority:*** **(2015) 3 SCC 49**, the Supreme Court explained the above principle in the following words:

> "It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

11. In the present case, the Tribunal had noted that the Claimants rested their case on three factual propositions which are quoted below:-

> "[1st] At the time of acquisition of shares, Bush Foods was projected and represented to be a financially healthy company with growing profits year upon year. The financial state of Bush Foods formed the substratum and rationale of the transaction. Post transaction it became increasingly clear that the basic premise of the transaction including the financial state of Bush Foods, were false, misleading, fraudulent and in any event in breach of the express representations and warranties made under the Transaction Documents. Bush Foods was in fact not capable of meeting its day to day expenses and was on the verge of bankruptcy. [2nd] Further, it has been discovered that the inventory of rice and paddy said to be held by the Company (as a warranty) valued at Rs.1029 crores as on 30th September 2012 was to a very large extent nonexistent and bogus. [3rd] Moreover, to the utter shock of Claimants they discovered that their key employee, Mr. Sai Chandrasekhar who was involved in negotiating and concluding the transaction (and in assisting in part of the due diligence exercise) was compromised and prevailed upon by Respondent No. 1. This is evident i*nter alia* from transfer of large sums of money from Respondent No.1 to Mr. Sai Chandrasekhar and his parents which have subsequently come to light" (Par. 7)"

11.1 The Tribunal further noted that the Claimants had premised the relief on four legal bases, namely, (i) fraud under Section 17 of the Contract Act, 1872 (hereafter 'the Contract Act'); (2) misrepresentation under Section 18 of the Contract Act'; (3) breach of contractual representations and warranties contained in the Transaction Documents; and (4) tortious deceit.

11.2 On the foundation of the aforesaid factual and legal predicates, the Claimants, *inter alia,* claimed the following amounts; (a) loss of investments of US$ 120,354,783/- in the shares of the company against the Awastys. (b) US$ 8,142,827.37/- and INR 4,42,68,99,479.44/- paid to the consortium of banks on the guarantees provided pursuant to the LA.

12. The Arbitral Tribunal rejected the Claimants' claim on account of fraud as it held that the Claimants had failed to discharge the heightened level of proof required for establishing fraud. Their claim of tortious deceit was also rejected as it was not seriously pressed. However, the Tribunal held that the Claimants were induced to acquire the controlling interest in the Company by misrepresentation and the extensive material produced before the Arbitral Tribunal established the same. The Tribunal held the Awastys as liable for the representations and warranties as expressly recorded in the SPA dated 09.03.2003.

13. Although, the petitioner is not a party to SHA and the LA, it is not disputed that she is a party to the SPA dated 09.03.2013. Clause 2.4 of the SPA is relevant and reads as under:-

> "2.4 Promoters' acknowledgement
>
> The Promoters acknowledge that the Purchaser enters into this Agreement in reliance on the representations, the Promoter Warranties and the Promoter undertakings as set out in this Agreement."

13.1 The Arbitral Tribunal has also referred to clause 7 of the SPA which is captioned "REPRESENTATIONS AND WARRANTIES" and extracted clause 7.1 in the impugned Award which reads as under:-

> "7.1 The Promoters represent and warrant to the Purchaser that: (i) except as Disclosed in the Disclosure Letter and the Due Diligence Materials, the Promoter Warranties are true, accurate and not misleading on the Execution Date and shall be true, accurate and not misleading as at the Completion Date; and (ii) all information contained or referred to in the Disclosure Letter and the Due Diligence Materials is true and accurate and fairly presented and nothing has been omitted from the Disclosure Letter and the Due Diligence Materials which renders any of that information incomplete or misleading in any material respect."

Undisputedly, Schedule 4 to the SPA contained warranties which included 'promoter warranties'. On the aforesaid basis, the Arbitral Tribunal concluded that the petitioner would also be liable for the representations held out in the SPA. Insofar as the petitioner's contention that she had not signed the SPA but that was signed on her behalf by respondent no.3 as her Power of Attorney Holder, the Arbitral Tribunal held that the petitioner would, nonetheless, be liable for the acts done on her authorisation.

14. I find no infirmity with the view and, therefore, the contention that the

petitioner could not be held liable for misrepresentations, is not sustainable.

15. The petitioner has contended that the impugned award is without jurisdiction as being beyond the period of three months from the date of appointment of Arbitral Tribunal. In order to address this controversy, it is necessary to refer to Clause 10.14.2 of the SPA, which reads as under:-

> "10.14.2 Arbitration
>
> (a) Any and all disputes or differences arising out of or in connection with this Agreement or any breach thereof (the "Dispute") which cannot be settled by friendly negotiation and agreement between the Parties shall be referred to arbitration in terms of Clause 10. 14.2(b) to Clause 10. 14.2(e).
>
> (b) If after 30 days of consultation (or such shorter period if a Party wishes to apply for interim relief), the Parties have failed to reach an amicable settlement of a Dispute, the Dispute shall be submitted to arbitration at the request of either Party upon written notice to that effect to the other Party and such arbitration shall be conducted in accordance with the LCIA India Arbitration Rules in force at that time (the ((LCIA India Rules"), which LCIA India Rules are deemed to be incorporated by reference into this Clause 10.14.2.
>
> (c) While submitting the Dispute to arbitration in accordance with this Clause 10.14.2, the Party so submitting shall, in its notice, specify the name of one arbitrator appointed by it. The arbitration proceedings shall be presided by a sole arbitrator if the Parties agree upon a sole arbitrator and failing such agreement by three arbitrators. Within 30 days of the receipt of notice, the other Party to the dispute shall appoint the second

arbitrator, if it does not agree to the appointment of the sole arbitrator. The third arbitrator shall be nominated by the arbitrators appointed as aforesaid or, failing such nomination within 30 days of the appointment of one arbitrator by each Party to the dispute, shall be appointed in accordance with the LCIA India Rules.

(d) Any such arbitration shall be conducted in English and the seat of arbitration shall be Delhi, India. The arbitration shall be concluded within three months of the appointment of the arbitrator(s) in terms of this Clause 10.14.2.

(e) Any arbitral awards made in accordance with this provision shall be conclusive and binding on the Parties and none of the Parties shall be entitled to commence or maintain any action in a court of law in relation to the Dispute, except for the enforcement of an arbitral award granted pursuant to this Clause 10.14.2, or to the extent permitted under Law.

(f) The Parties agree that during the period of submission to arbitration and thereafter until the granting of the award, the Parties shall, except in the event of termination, continue to maintain the status quo. Neither the Parties nor the arbitral Tribunal may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the remaining Parties."

16. Although, in terms of Clause (d) of Article 10.14.2, it is provided that the arbitration would be concluded within three months of the appointment of the Arbitrators. However, by virtue of Clause (b) of Article 10.14.2, the LCIA India Arbitration Rules are also incorporated by reference into the Arbitration Clause. Article 4.7 of the LCIA India Arbitration Rules enables

the Arbitral Tribunal to extend any period of time as prescribed under the Arbitration Agreement. Article 4.7 of the LCIA India Arbitration Rules reads as under:-

> "4.7 The Arbitral Tribunal may at any time extend (even where the period of time has expired) or abridge any period of time prescribed under the LCIA India Rules or under the Arbitration Agreement for the conduct of the arbitration or by the Arbitral Tribunal's own orders, including any notice or communication to be delivered by one party on any other party."

17. A plain reading of the aforesaid Rule indicates that it expressly provides that the Arbitral Tribunal may extend any period of time prescribed under the Arbitration Agreement for conduct of the arbitration. Thus, notwithstanding that a period of three months is prescribed under the Arbitration Clause, the Arbitral Tribunal would have the power to extend the period of time for making the award.

18. Indisputably, the Arbitral Tribunal has the power to determine its own jurisdiction and in exercise of that power the Tribunal had examined the aforesaid provisions and also concluded that the Arbitral Tribunal would have the power to extend the time for making the award.

19. It is also relevant to mention that the said issue was also agitated by

respondent no.3 by way of a petition under Section 14 of the Act (being OMP (T) (Comm.) No.18/2015 in this Court. In that matter, respondent no.3 had urged that the mandate of the Arbitral Tribunal stood terminated with the expiry of the three months from the constitution of the Arbitral Tribunal. The aforesaid contention was repelled by this Court in the judgment delivered on 16.02.2016 in OMP (T) (Comm.) No.18/2015 (***Virkaran Awasty v. Hassad Netherland B. V. & Ors.***).

20. Learned counsel for the petitioner earnestly contended that the impugned award was contrary to the LCIA India Arbitration Rules inasmuch as the petitioner had been joined as a respondent in relation to disputes arising from agreements to which she was not a party. He submitted that this was done without her consent and therefore, was in violation of Article 22.1(g) of the LCIA India Arbitration Rules which expressly required consent of the parties sought to be joined in any arbitration proceedings.

21. The plain reading of the award indicates that the petitioner has been proceeded against in respect of the SPA to which the petitioner is indisputably a party. The Arbitral Tribunal has also referred to Clause 1.1 of the SPA in terms of which 'Transaction Documents' is defined as under:-

> " 'Transaction Documents' means this Agreement, the Shareholders Agreement, the Subscription Agreement, the Existing Investor SPA, the Disclosure Letter, the Employment Agreement and all other agreements contemplated by this Agreement or the Shareholders Agreement to be entered into by the Parties or any of them on the Execution Date or upon or prior to Completion."

22. It is apparent from the plain reading of the SPA as well as other Agreements that the same are interrelated transactions. However, be that as it may, the Arbitral Tribunal has made an award against the petitioner only on the basis of the covenants as contained in the SPA. This is apparent from paragraph 100 of the impugned Award, which reads as under:-

> "………. Claimants stressed that Section 238 of the Contract Act is clear that, "Misrepresentations made or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principles......" The Tribunal agrees with this legal proposition, but points out that the power of attorney was not intended to cover contractual undertakings beyond the Share Purchase Agreement, such as the Shareholders Agreement, Letter Agreement, Share Subscription Agreement, and Existing Share Purchase Agreement, to which Mrs. Awasty was not a party. Accordingly, the Tribunal limits Respondent No.2's liability to Claimant No.1's loss on the Agreement she authorized."

23. The reliance placed by the petitioner on Article 22.1(g) of the LCIA India Arbitration Rules is also misconceived. The said Rule reads as under:-

> "(g) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;"

24. As is apparent from the plain language of Article 22.1(g), the same is applicable only where one or more third persons are joined in the arbitration as a party. In other words, it is applicable only where persons who are not parties to the Arbitration Agreement are sought to be joined as parties. In the present case, the petitioner is a party to the Arbitration Agreement being a party to the SPA which includes an arbitration clause (10.14.2). Thus, no further consent of the petitioner was required to be joined as a party to the arbitration.

25. Lastly, the learned counsel for the petitioner had contended that although the Tribunal had restricted the petitioner's liability to the SPA, the amount awarded far exceeded the consideration received by her for sale of the shares. He emphasised that the petitioner had held only 1.37% of the share holding of the Company and the pro rata consideration for the same would work out to US$ 1,787,379/- which is only a small fraction of the amount awarded. He contended that the petitioner was only liable for the

agreement authorized by her. Therefore, she could not be held liable for misrepresentation as the same was never authorized by the petitioner. In my view, the aforesaid contention is also bereft of any merit. Admittedly, the petitioner is a party to the SPA and, therefore, would be bound by the representations, warranties and indemnities as expressly agreed to under the SPA. The Arbitral Tribunal has restricted the claim against the petitioner to the amounts awarded in respect of the SPA. The contention that the petitioner would not be bound by the warranties, indemnities or the representations made in the SPA since she had not signed the agreement herself is also unmerited. Admittedly, the agreement was signed by respondent no.3 on behalf of the petitioner as a holder of the Power of Attorney executed by her in his favour. Thus, the petitioner undisputedly is bound by the SPA.

26. The contention that the petitioner had only received US$ 1,787,379/- as consideration for the shares sold and, therefore, the impugned Award was excessive and unsustainable, must be rejected. The amount awarded against the petitioner is not for refund of the consideration received by her but the loss/damage suffered by the Claimants.

27. In the aforesaid view, no grounds of interference under Section 34(1)

of the Act have been made out by the petitioner. The petition is, accordingly, dismissed. The pending application also stands disposed of.

VIBHU BAKHRU, J

JULY 21, 2016
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