IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.1203 of 2017

Arising Out of PS.Case No. -124 Year- 2016 Thana -AURANGABAD TOWN District- AURANGABAD

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Sanoj Pandey Son of Nawal Kishore Pandey Resident of Mohalla-Sri Krishna Nagar, P.S.-Nagar, P.S.-Nagar, District-Aurangabad

.... Petitioner/s

Versus

1. The State of Bihar
2. Ram Kishore Sharma, Son of late Ramji Sharma, R/o Mohalla – Club Road, Sri Krishna Nagar, P.S. Nagar, District – Aurangabad.

.... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Md.Imteyaz Ahmad
For the Opposite Party/s : Mr. Sri Madhuranand Jha

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL ORDER

02/ 06-04-2017 Learned counsel for the petitioner is permitted to implead the informant as opposite party no. 2.

Heard Mr. Ajay Kumar Thakur, learned counsel for the petitioner and Mr. Rajiv Ranjan, learned counsel for the informant-opposite party no. 2.

The present application has been filed for quashing the order dated 06.12.2016 passed by learned Additional District & Sessions Judge-VI, Aurangabad in Sessions Trial No. 511 of 2016/175 of 2016 arising out of Aurangabad Town P.S. Case No. 124 of 2016 whereby the petitioner's application under Section 227 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') for discharge has been rejected.

The prosecution case would unveil that the son of the informant, namely, Sanjay Sharma was pushed down on the ground by co-accused Manoj Sharma, whereas Manish Sharma caused injury with fire arm. The occurrence was seen by the neighbouring people including daughter-in-law and grand daughter of the informant. Earlier, the son of the informant, Sanjay Sharma had some dispute with this petitioner Sanoj Pandey, who under conspiracy, got the son of the informant killed by Manoj Sharma and Manish Sharma. Consequently, Aurangabad Nagar P.S. Case No. 124 of 2016 was registered under sections 302 and 120B of the Indian Penal Code and section 27 of the Arms Act.

On conclusion of investigation, the investigating agency submitted final form (chargesheet) against co accused Manish Sharma and Manoj Sharma whereas the petitioner was not sent up for trial but differing with the final form, with regard to the petitioner, the learned Magistrate directed for issuance of process after cognizance being taken under the aforementioned sections.

The petitioner filed an application for discharge under section 227 of the Code on 22.10.2016 (though the same has not been brought on record) on the ground that on investigation, no material was collected against the petitioner that he in any way participated in the commission of offence. The specific accusation is only against co accused Manoj Sharma and Manish Sharma and during investigation, materials were collected against them.

A rejoinder to the discharge application was filed on behalf of the informant on 28.11.2016. The same has also not been brought on record either by learned counsel for the petitioner or by learned counsel for the O.P. No.2 (informant) taking the plea that prior to the occurrence the informant's son Sanjay Sharma was killed under criminal conspiracy by co accused Manoj Sharma and Manish Sharma.

It is submitted by learned counsel for the petitioner that an accused can be discharged if, upon consideration of materials on record meaning thereby, the police report under section 173(2) of the Code and the documents submitted therewith and after hearing the accused and the prosecution, the Judge comes to a conclusion that there is no material against him to proceed. It is further submitted that there was no specific overt act alleged against the petitioner in the FIR and during investigation neither any material was collected against the petitioner nor he was sent up for trial. The impugned order is cryptic one as the application of the petitioner for discharge has been rejected on erroneous ground that charges can be framed even on suspicion. The impugned order does not suggest that the same has been passed upon proper consideration of the materials on record.

Learned counsel for the informant submits that on finding prima facie case, differing with the final form, cognizance was taken. The impugned order suggests that on finding material, on record the application for discharge has been rejected.

Chapter XVIII of the Code deals with the trial before the court of Sessions. Section 226 stipulates the opening of the case for prosecution by describing the charge brought against the accused and stating evidence on which the prosecution proposes to prove the case. Section 227 of the Code deals with discharge which reads as follows:

> "**227.Discharge.-** If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient

> ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

The language and intent of Section 227 of the Code stipulates "upon consideration of the records", meaning thereby the police report submitted under section 173(2) of the Code and it further stipulates, the documents submitted therewith, after hearing the submissions of accused and the prosecution, if the court finds that there is no sufficient ground for proceeding against the accused, he shall discharge the accused by recording reasons for doing so.

In the case of the State of Maharastra Vs. Somnath Thapa (1996) 4 Supreme Court Cases 659, the Apex Court has elaborated the scope of section 227 of the Code. Paragraph 32 reads as follows:

> "32. The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction

> the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

In yet another case, while considering the scope of section 227 and 228 of the Code in the case of Sajjan Kumar Vs. Central Bureau of Investigation (2010) 9 Supreme Court Cases 368, the Apex Court laid down certain parameters for exercise of such jurisdictions. Paragraph 21 reads as follows:

> "21. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:
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> (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.
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> (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.
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> (iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but

has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

In the case of Union of India Vs. Prafulla Kumar Samal & Anr. (1979) 3 Supreme Court Cases 4, the Apex Court laid down four parameters for exercise of jurisdiction under section 227 of the Code. Paragraph 10 reads as follows:

> “10. Thus, on a consideration of the authorities mentioned above, the following principles emerge : (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:
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> (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
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> (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and largo however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to

some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

The Apex Court in the case of State of Tamilnadu Vs. N. Suresh Rajan & Ors. (2014) 11 Supreme court Cases 709, while considering the comparative provisions for discharge in sessions triable cases under section 227, in warrant cases under section 239 and in complaint case under section 245 of the Code has held that at this stage of considering discharge the court cannot make a roving enquiry of the pros and cons of the matter and the way as if it was conducting trial. Paragraph 31 reads as follows:

> "31. Now reverting to the decisions of this Court in the case Sajjan Kumar (supra) and Dilawar Balu Kurane (supra), relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the Court can not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused.
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> 31.1 Under Section 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 can be ordered when "the Magistrate considers the charge against the

accused to be groundless". The power to discharge is exercisable under Section 245(1) when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if not repudiated, would warrant his conviction".

31.2 Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and
examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245, on the other hand, is reached only after the evidence referred in Section 244 has been taken.

31.3Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in the case of R.S. Nayak v. A.R. Antulay, (1986) 2 SCC 716. The same reads as follows:

"43……Notwithstanding this difference in the position there is no scope for doubt that the stage at which the magistrate is required to

> consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the Trial court is satisfied that a prima facie case is made out, charge has to be framed."

While examining the scope of section 227, the Apex Court in the case of P. Vijayan Vs. State of Kerala & Anr. (2010) 2 Supreme Court Cases 398 has held that if two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the judge is empowered to discharge the accused and at this stage he would not see that the trial will end in conviction or acquittal. Relevant part of Paragraph 10 reads as follows:

> "10......If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the Trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere Post

Office……”

The Apex Court in the case of State of Bihar Vs. Ramesh Singh (1977) 4 Supreme Court Cases 39 has held that mere suspicion cannot take the place of proof and hence the charges can only be framed when only grave suspicion is there on record. Paragraph 4 reads as follows:

> “4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge consider that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-......(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together

in juxta position, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and Judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if. on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

In the case of Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijjaya & Ors (1990) 4 Supreme Court Cases 76 has held that at the stage of section 227 of the Code, the court has only to decide whether or not there exists sufficient ground for framing charge, hence, enquiry must be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. Paragraph 6 reads as follows:

> “The next question is what is the scope and ambit of the 'consideration' by the trial court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding F if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material

on record as well as the documents relied on by the prosecution. In the State of Bihar v. Ramesh Singh this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In Union of India v. Prafulla Kumar Samal, this Court after considering the scope of Section 227 observed that the words 'no sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post-office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face-value establish the ingredients constituting the said offence. After considering the case law on the subject, this Court deduced as under: (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under

> Section 227 of the Code of Judge which (sic) under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

The Apex Court in the case of Soma Chakraborty Vs. State through CBI (2007)5 Supreme Court Cases 403 has held that if the court on the basis of materials on record forms an opinion that the accused might have committed the offence, it can frame charge. Paragraph 10 reads as follows:

> "10. It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges

> the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial."

Hence, the consideration at the stage of 227 is only for the limited purpose to see that prima facie case is made out against the accused or not as has been held in the case of State of M.P. Vs. Mohanlal Soni (2000)6 Supreme Court Cases 338. Paragraph 7 reads as follows:

> "The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

At the stage of section 227, the court has only to see whether the accusation constitutes offence or not to reach to a conclusion that prima facie case is made out as has been held in the case of Onkar Nath Mishra & Ors. Vs. State(NCT of Delhi) & Anr. (2008) 2 Supreme Court Cases 561. Paragraph 11 reads as follows:

> "It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."

The purpose of considering discharge at the threshold of the commencement of the trial has been elaborated by the

Supreme Court in the case of P. Vijayan (supra. Paragraph 25 reads as follows:

> "25. As discussed earlier, Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding against the accused. In other words, his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. This provision was introduced in the Code to avoid wastage of public time when a prima facie case was not disclosed and to save the accused from avoidable harassment and expenditure."

Now, adverting to the present case, though it appears that no specific overt act was alleged against the petitioner but the petitioner was named in the FIR as the person who gave threat to the son of the informant in the background of some dispute prevailing between them. This is an admitted fact that on conclusion of investigation, the petitioner was not sent up for trial but differing with the final form, processes were issued against the petitioner after cognizance being taken, but the impugned order does not suggest that these facts have been dealt with by the learned court below while considering the application of discharge. The word 'consider' which is sine qua non for the purpose of exercising jurisdiction under section 227 of the Code though has not been defined in the Code but the word 'consider' has been defined by Oxford dictionary as 'think about', 'take into account', 'be of the opinion'. The word 'consideration' has been defined as 'act of considering', 'think about'. The Websters Dictionary defines the word 'consider' as 'to ponder', 'to think out', 'weigh the advantages and disadvantages of', 'to assess before reaching a decision'. The word 'consideration' has been defined as 'deliberation'. The impugned order is absolutely cryptic which reads as follows:

> "Heard Both sides.
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> After hearing and perusal of the F.I.R. and case diary, it appears that accused Sanoj Pandey is named in F.I.R. and his name has come in case-diary in re-statement of informant. It is well established that charge may be framed even on mere suspicion. Cognizance has also been taken

against him and there is sufficient material available in the case-diary to frame charge.

So in the interest of justice, the petition of the petitioner is here by rejected."

The impugned order quoted above does not suggest that the materials on record have been considered in true perspective which is a *sine qua non* for the exercise of jurisdiction under section 227 of the Code.

The application for discharge has not been brought on record which could enable this Court to appreciate as to what were the grounds, which wee taken for discharge.

It appears that the application of discharge has been rejected on the ground that the petitioner was also named by the informant in subsequent statement and on the ground that the charge can be framed even on mere suspicion. On mere suspicion the charges cannot be framed unless it is strong suspicion backed by materials to support such strong suspicion. Though the learned Sessions Judge has mentioned in the impugned order that there are sufficient material available in the case diary but nothing has been referred. It was imperative on the part of the learned Additional Sessions Judge to refer those materials because the investigating agency did not send up the petitioner for trial.

In view of the discussions made above, this Court is of the view that the learned Additional Sessions Judge has not exercised jurisdiction under section 227 of the Code in its true perspective. Hence, the impugned order dated 6.12.2016 passed by the learned Additional Sessions Judge-VI, Aurangabad in S.T. No. 511 of 2016/175 of 2016 arising out of Aurangabad Town P.S. Case No. 124 of 2016 is hereby quashed with a liberty to the learned trial court to pass a fresh order in accordance with law giving due opportunity of hearing to the prosecution and defence and considering the materials on record, i.e., the police report and the documents submitted along with it.

Accordingly, this application is allowed.

(Dinesh Kumar Singh, J)

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