

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5120 of 2011

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Janardan Prasad Singh, Son of Late Jamuna Prasad Singh, Resident of Village
Bania, P.S. Gopalpur, District Bhagalpur

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Water Resources Department,
Government of Bihar, 3rd Secretariat, Sichai Bhawan, Patna
2. Deputy Secretary, Water Resources Department, Government of Bihar, 3rd
Secretariat, Sichai Bhawan, Patna

.... Respondents

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Appearance:

For the Petitioner/s : Mr. Shivendra Kishore, Sr. Advocate.
Mr. Dhrub Mukherjee, Sr. Advocate as Amicus Curiae.
For the Respondent/s: Mr. Syed Md. Najmul Bari, AC to SC 20.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

Date: 13-08-2018

Heard learned Senior Counsel representing the petitioner
and learned AC to SC 20 on behalf of the State.

2. Petitioner has invoked writ jurisdiction of this Court
under Article 226 of the Constitution of India for quashing of the
notification / memo no. 117 dated 01.02.2011 issued under the
signature of Deputy Secretary, Water Resources Department, Govt. of
Bihar whereby and whereunder the petitioner has been dismissed from
service with retrospective effect from 25.09.1997. The petitioner is
said to have retired from service on 30.06.2002. Further, the petitioner



has vide I.A. No. 6425 of 2011 challenged the order as contained in Memo No. 2164 dated 05.04.2011 passed by the Principal Secretary, Water Resources Department, Govt. of Bihar by which it has been held as under:-

“समीक्षोपरान्त यह पाया गया कि श्री सिंह के विरुद्ध बिहार पेंशन नियमावली के नियम 43 (बी) के तहत विभागीय कार्यवाही प्रभावी थी एवं इन्हें विभागीय अधिसूचना संख्या – 117 दिनांक 01-02-2011 के द्वारा दिनांक 25.09.1997 के प्रभाव से सेवा से बर्खास्त करने का आदेश संसूचित किया जा चुका है।

वर्णित परिस्थिति में विभागीय अधिसूचना संख्या – 117, दिनांक 01-02-2011 एवं बिहार पेंशन नियमावली के नियम 101 (क) के आलोक में श्री सिंह को सा० भ० नि० में संचित राशि की अन्तिम निकासी की स्वीकृति को छोड़कर कुछ भी देय नहीं होगा। अतएव सा०भ०नि० में संचित राशि की अन्तिम निकासी को छोड़कर शेष प्रदत्त सेवान्त लाभ यथा- 90 प्रतिशत औपबंधिक पेंशन एवं अन्य प्रदत्त लाभ जब्त किया जाता है।”

3. While assailing the impugned orders Mr. Shivendra Kishore, learned Senior Counsel has, at the outset, drawn the attention of this Court towards the previous decision of this Court vide judgment and order dated 29.04.2008 passed in CWJC No. 8681 of 2000 (Janardan Prasad Singh Vs. State of Bihar & Ors.) which is Annexure-‘9’ to the present Writ Application. The facts and circumstances in which the petitioner while posted as Superintending Engineer in Water Resources Department in the year 1997 was dismissed from service w.e.f. the date of order in terms of Rule 2(1/3) of Bihar and Orissa Subordinate Services (Discipline and Appeal)



Rules, 1935 read with Rule 167 of Board's Miscellaneous Rules and the subsequent decision of the appellate authority are all discussed in detail in Annexure-‘9’.

4. The allegation against the petitioner was that while he was discharging his duties as Executive Engineer, Minor Irrigation Division during the year 1982-1985 had committed irregularities in the construction of Ranikudar and Kurpani spillway scheme. It was alleged that the said irregularities had resulted in breach in spillway within a short span of time and caused excess payment beyond estimate. A departmental proceeding was initiated against the petitioner vide Memo No. 6051 dated 07.09.1991 in terms of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930 for the charges divided under two heads – one relating to Ranikudar MI scheme which was further sub-divided into three charges and the other relating to Kurpani MI scheme which was sub-divided into two charges. The Enquiry Officer, after holding the enquiry, held that the charges relating to Kurpani MI scheme were not proved, hence, the petitioner was exonerated from all those charges. As regards the charges relating to Ranikudar MI scheme, the petitioner was exonerated from charge no. 3 which was framed alleging that the constructions were made in sub-standard manner and that those were not in accordance with the specifications. As regards charge no. 1 and



2 with respect to Ranikudar MI scheme, the Enquiry Officer recorded certain observations against the petitioner without holding him fully guilty of those charges but at the same time without fully exonerating him of the same.

5. The disciplinary authority issued a second show cause notice differing with the enquiry report but without giving reasons for his differences with the same. On receipt of reply, the order of punishment was passed by the disciplinary authority which was also affirmed by the appellate authority. Those orders were challenged by the petitioner in the aforesaid Writ Application and a co-ordinate bench of this Court relying upon the judgment of the Hon'ble Supreme Court in the case of **Punjab National Bank & Ors. Vs. Kunj Bihari Mishra**, reported in (1998) 7 SCC 84, as also the judgment of the Hon'ble Apex Court in the case of **Ram Chander Vs. Union of India & Ors.**, reported in AIR 1986 SC 1173, held as under:-

“In the present mater it is evident that there has been complete exoneration of the petitioner with respect to the charges relating to Kurpani MI Scheme whereas the second show cause in an omnibus manner states that the disciplinary authority has recorded findings against the petitioner in both the schemes which is contrary to the material on the record. Even with respect to the Ranikudar MI Scheme the disciplinary authority had



clearly held that the supervision of the work of the Scheme is to be made by the Assistant Engineer and the Junior Engineer and absolved the petitioner of the said charge no. 3 in relation to the Ranikudar MI Scheme. The disciplinary authority has, without assigning any reasons, stated that the petitioner has been found guilty of negligence in the supervision of the work which is evidently contrary to the findings recorded by the Enquiry Officer. The submission of learned Additional Advocate General, that as a matter of fact reasons for differing have been assigned, is contrary to the material on the record and this Court does not find that any reason has been assigned by the disciplinary authority for differing with the findings of the Enquiry Officer in his report.

For the aforesaid reasons, there has been violation of the principles of natural justice as laid down by the Supreme Court in Kunj Bihari Mishra's case (supra). In the said circumstances, the order dated 25.9.1997 of the disciplinary authority and the appellate order dated 10.12.2002 of the appellate authority affirming the same has to be set aside as having been passed in violation of the principles of natural justice and they are accordingly quashed.

The writ application is therefore allowed.

The authorities however, shall be at liberty to proceed



afresh in the matter from the stage at which the proceedings became vitiated, that is, the stage of issue of second show cause to the petitioner, and decide the matter in accordance with law.”

6. It appears from Annexure-‘9’ to the Writ Application that during pendency of the Writ Application even though the petitioner had on 30.06.2002 attained the age of superannuation the learned co-ordinate bench of this Court was not informed about this fact. After the aforesaid judgment of the Hon’ble Court in CWJC No. 8681 of 2000, the respondents issued another second show cause notice but because some mistake was committed by the respondents by not providing the tentative reasons for differing with the findings of the Enquiry Officer, the second show cause was withdrawn. A copy of the second show cause notice dated 26.05.2009 and a reply thereto by the petitioner are available on the record as Annexure-10 to the Writ Application.

7. Thereafter, for the third time the second show cause notice dated 16.06.2009 (Annexure-11) was issued providing the reasons for differences on the part of the disciplinary authority. The petitioner submitted a reply dated 10.07.2009 (Annexure-12) in which he took a stand that even though the disciplinary authority had shown the points of differences but in support thereof no proof or logical



reason was provided by the disciplinary authority. After submission of the reply by the petitioner, the matter remained pending with the disciplinary authority.

8. It appears that the disciplinary authority did not pass any order for a substantial time. Since the departmental proceeding had still not culminated and was pending, the petitioner moved this Court in CWJC no. 8793 of 2009 in which his submission was that because no final order has been passed in the departmental proceeding initiated, the petitioner cannot be deprived of his retiral dues as also the other dues to which he is legally entitled to. He claimed payment of provisional pension and gratuity in terms of the government circular contained in Memo No. 3014 dated 31.05.1980. Besides these benefits the petitioner also claimed the amount equivalent to unutilized leave. It appears that during pendency of the said Writ Application, the State Government passed an order vide Memo No. 240 dated 02.02.2010 which was brought on the record of the said case as Annexure-‘C’ to the third supplementary counter affidavit filed on behalf of the State. 90% provisional pension was sanctioned to the petitioner.

9. A co-ordinate bench of this Court, therefore, disposed of the Writ Application vide its judgment and order dated 06.04.2010 giving a direction to the Principal Secretary, Water Resources



Department, Govt., of Bihar to pass a reasoned order with regard to the entitlements of the petitioner under the rules to receive the retiral dues as also other dues on account of arrears of salary as claimed by the petitioner. It was further directed that the claim found admissible to be eventually paid to the petitioner within the period of next one month and in case any of the claims or part of the claims is not found admissible, the same shall be communicated to the petitioner specifically indicating the reasons for such refusal.

10. Learned Senior Counsel representing the petitioner submits that LPA No. 893 of 2010, arising out of the judgment and order dated 06.04.2010 passed in CWJC No. 8793 of 2009, was filed before this Court in which the Hon'ble Division Bench noted the concession recorded in the order of the learned single Judge where the statement of the learned counsel for the State that except the 90% of the provisional pension no other dues on account of gratuity and leave encashment is payable was taken note and a direction was issued that the concession that was given before the learned single Judge be respected and the amount be computed and paid to the appellant within a period of four weeks from the date of receipt of the order. The Hon'ble Division Bench order in LPA No. 893 of 2010 is annexed as Annexure-15 to the present Writ Application.

11. Finally, the impugned order of dismissal dated



01.02.2011 as contained in the notification vide memo no. 117 dated 01.02.2011 came to be issued (Annexure-‘1’ to the Writ Application).

12. The disciplinary authority held the petitioner guilty by rejecting the reply of the petitioner to the second show cause notice. The order of dismissal has been made effective from 25.09.1997 meaning thereby that the dismissal of the petitioner is with retrospective effect from the date of initiation of the departmental proceeding against the petitioner and when the petitioner was placed under suspension.

13. Consequent upon the dismissal of the petitioner w.e.f. 25.09.1997 the Principal Secretary, Water Resources Department, Govt. of Bihar came out with Memo no. 2164 dated 05.04.2011 (Annexure-‘A’ to the Counter Affidavit of the respondent State) which has been challenged by the petitioner by filing an Interlocutory Application and the same has been allowed by this Court.

SUBMISSIONS ON BEHALF OF THE PETITIONER

14. Mr. Shivendra Kishore, learned Senior Counsel has argued that on perusal of letter no. 519 dated 16.06.2009 (Annexure-11) the third show cause notice, it would appear that while recording the reasons for differences the disciplinary authority has also stated that for the alleged act and omission the petitioner is directly guilty. Learned Senior Counsel, therefore, submits that it is a kind of



composite order / show cause not only containing the reasons of differences but also holding the petitioner guilty even before consideration of his reply.

15. Relying upon a decision of this Court in the case of **Ranjan Kumar Vs. Nalanda Gramin Bank & Ors.**, reported in **2003 (1) PLJR 722**, learned Senior Counsel submits that a co-ordinate bench of this Court had occasion to peruse the judgment of the Hon'ble Supreme Court in the case of **Yoginath D. Bagde Vs. State of Maharashtra & Anr.**, (1997) 7 SCC 739, wherein it was held that “if the disciplinary authority does not agree with the findings of the enquiry officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the disciplinary authority that the findings already recorded by the enquiry officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case.”

16. Learned Senior Counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of **State of Uttar Pradesh Vs. Shri Brahm Datt Sharma & Anr.** (AIR 1987 SC 943) to submit that there cannot be a dismissal with retrospective effect; Para 4 of the said judgment which has been relied upon is quoted hereunder for a ready



reference:-

“4. The respondent had already retired from service during the pendency of the petition before the High Court. On attaining the age of superannuation disciplinary proceedings could not be taken against him. The State Govt. however issued a notice dated 29.1.86 to him calling upon him to show cause as to why orders for forfeiture of his pension and gratuity be not issued in accordance with [Art. 470\(b\)](#) Civil Service Regulation as his services have not been wholly satisfactory. The notice contained allegations of misconduct against the respondent regarding financial irregularities committed by him. The respondent submitted a reply to the notice but before the same could be examined or a decision could be taken by the Govt. he filed an application before the High Court in Writ Petition No. 82449 of 1980 which had already been finally disposed of on 10.8.84. By his Order dated July 11, 1986 the learned single Judge of the High Court held that since the departmental proceedings taken against the respondent had already been quashed, it was not open to the State Govt. to issue show cause notice under [Art. 470\(b\)](#) of Civil Service Regulations, on those very allegations which formed charges in the disciplinary proceedings, the Learned single Judge quashed the show cause notice and directed the State Govt. to pay arrears of salary, pension and other allowances to the respondent.”

17. Learned Senior Counsel has next relied upon a Full



Bench judgment of this Court in the case of **Shambhu Saran Vs. The State of Bihar & Ors.**, reported in **2000 (1) PLJR 665**; Para 5 of the said judgment states thus:-

“5. The only point involved before us is whether Rule 43(b) is attracted in the facts of this case and whether under the said Rule, even when such disciplinary proceeding was initiated before the retirement, whether it could be continued after the retirement under the provisions of Rule 43(b). It is true that Rule 43 does not say expressly that such proceeding may be continued after such superannuation. However, in our opinion, it is inherent in the said Rule. The opening words of proviso (a) state that “such departmental proceedings, if not instituted while the Government Servant was on duty either before retirement or during re-employment”, in our opinion such expression makes it quite clear that such enquiry if initiated before, may be continued even after such retirement. In any event, by necessary implication also it is quite clear that continuance of such enquiry after superannuation is permitted by the said Rules. In this context, it may be pointed out that if the Government servant is in service, the disciplinary proceeding can be initiated against him and certain punishments may be imposed upon him as provided in the relevant Classification, Control and Appeal Rules. However, such punishments cannot be imposed upon him if retired from service. After his retirement he cannot be punished otherwise but pension can be



withheld and other steps taken as contemplated by the said Rule 43. Punishments, major or minor, like dismissal or removal from service or withholding of increments etc., which contemplates that he is still in service, cannot be imposed upon him. In such view of the matter, if such a person has committed some wrong, merely because he retires and no remedy remains available to the Government even if there was good case against him, then it would be incongruous. Accordingly such a provision was made to that effect. It is in order to fill up this lacuna that provisions like rule 43(b) has been introduced.”

18. Learned counsel has also relied upon a Division Bench judgment of this Court in L.P.A. No. 1845 of 2012. In the judgment dated 22.03.2018 (to which I am a party) the Hon’ble Division Bench in Paragraph 16 while setting aside the impugned order of the punishment imposed on the petitioner of the said case granted liberty to the Bank (employer) to proceed with the enquiry in accordance with law but it was made clear that in case petitioner is found guilty of the charge the punishment to be imposed on him must be the punishment which may be imposed on an employee who has superannuated during the pendency of the departmental proceeding.

19. Learned Senior Counsel further submitted that the petitioner had already attained the age of superannuation had he been



in service and by virtue of the decision of this Court in CWJC No. 8681 of 2000 (Annexure-9) the disciplinary proceeding remained pending on the date when the petitioner had attained the age of superannuation on 30.06.2002. Learned Senior Counsel submits that this Court while passing the order as contained in Annexure-9 to the Writ Application categorically held that the order of punishment as well as the appellate order were in violation of the principles of natural justice as laid down by the Hon'ble Supreme Court in the case of **Kunj Bihari Mishra** (Supra). Since the impugned orders passed in the disciplinary proceedings were set aside vide Annexure-'9' and the petitioner had already attained the age of superannuation on 30.06.2002, the petitioner would be deemed to have retired under suspension on 30.06.2002 and the disciplinary proceeding against him which was initiated prior to attainment of the age of superannuation cannot proceed under the service rule and the only option left was to convert the proceeding under the Bihar Pension Rules. It is submitted that in fact the government had sanctioned 90% of the pension under Rule 43(b) of the Bihar Pension Rule only. It is submitted that now in view of the Full Bench judgment of this Court in the case of **Arvind Kumar Singh & Ors. Vs. The State of Bihar & Ors.**, reported in 2018(2) PLJR 933 (HC), the gratuity amount is also liable to be paid to the petitioner.



20. It is the submission of the learned Senior Counsel that on perusal of the impugned order which has been brought on record by the State during pendency of this Writ Application as contained in Memo No. 2664 dated 05.04.2011, it would appear that in the very first line of the operative part of the judgment it would appear that according to the Principal Secretary, Water Resources Department, Govt. of Bihar, a proceeding under Rule 43(b) of the Bihar Pension Rules was pending against this petitioner and the petitioner had been ordered to be dismissed from service vide notification no. 117 dated 01.02.2011 w.e.f. 25.09.1997, therefore, the entire post-retiral benefits and the provisional pension which was earlier sanctioned in favour of the petitioner have been forfeited. Learned Senior Counsel submits that apparently the impugned order is bad in law because the order of forfeiture of the post-retiral dues of the petitioner and the provisional pension is based on an erroneous consideration. Learned Senior Counsel submits that if the impugned order correctly states that a proceeding under Rule 43(b) of the Bihar Pension Rules was pending then any punishment could have been imposed upon the petitioner only in accordance with the provision of Rule 43(b) of the Bihar Pension Rules. The Bihar Pension Rules, nowhere prescribes a punishment of dismissal from service with retrospective effect, moreover, the petitioner was never given any opportunity to show



cause for purpose of passing of an order under Rule 43(b) of the Bihar Pension Rules. This being the position, the submission of the learned Senior Counsel that the impugned orders are liable to be held bad in law and be set aside with all consequential benefits to the petitioner.

SUBMISSIONS OF THE RESPONDENT-STATE

21. Earlier when the matter was heard, on behalf of the State, save and except what is stated in the Counter Affidavit, nothing more could be submitted in course of hearing. A written notes of argument has been filed on behalf of the State but a reading thereof shows that there is a mere repetition of the previous proceeding and developments so far. There is no submission in response to the submission of the petitioner. I have also considered the counter-affidavit available on the record. The Counter Affidavit nowhere speaks of the reasons either on facts or in law for passing of an order of dismissal against the petitioner with retrospective effect. Save and except that a copy of Memo No. 2164 dated 05.04.2011 has been brought on record by way of Annexure-‘A’ to the Counter Affidavit filed on behalf of the State, no pleading is there to support the action of the State in passing of the impugned order dated 05.04.2011. The counter-affidavit does not show any reason the impugned orders. Rule 101(Ka) under which the impugned order is said to have been issued only says that resignation of a public service or dismissal or removal



for his misconduct, insolvency, inefficiency, not to disclose his age or failure to pass a prescribed examination entails forfeiture of past service. It is evident from the averments made in the Counter Affidavit as also from the impugned order dated 05.04.2011 that the order of dismissal with retrospective effect is the only reason for passing of the order, it is not an order under Rule 43(b) of the Bihar Pension Rules.

22. Mr. Dhrub Mukherjee, Sr. Advocate and Amicus Curiae in this case has pointed out from the order (Annexure-‘9’) of the learned Writ Court in CWJC No. 8681/2000 that the Court has only granted liberty to the respondents to proceed from the stage of second show cause. There is no mandamus to proceed under the ‘Service Rule’, it is submitted that in absence of a provision in the Service Rule to treat the petitioner in service even after his superannuation age for purpose of completion of a disciplinary proceeding, the only option left is to proceed under the Bihar Pension Rules in accordance with law. Learned Amicus Curiae therefore submits that in the facts and circumstances of this case the respondents could not have passed an order of dismissal with retrospective effect. The petitioner had already attained the age of superannuation several years prior to passing of the impugned order of dismissal.



CONSIDERATION

23. Having appreciated the rival submissions and upon perusal of the records, this Court is of the considered opinion that the impugned order as contained in Annexure-‘1’ as well as Annexure-‘A’ annexed with the Counter Affidavit of the State, which has been challenged by the petitioner by filing an Interlocutory Application, are illegal, arbitrary and bad in law. Hence, those are liable to be set aside.

24. A perusal of the impugned order as contained in Annexure-‘1’ clearly shows that the order of dismissal has been given effect to from the date of suspension of the petitioner when the departmental proceeding was initiated against him w.e.f. 25.09.1997. It is a matter of record that vide Annexure-‘9’ the writ court categorically held that the order of suspension and the appellate order passed against the petitioner were in violation of the principles of natural justice in view of the law laid down by the Hon’ble Supreme Court in **Kunj Bihari Mishra** (Supra). The authorities were given liberty to proceed with the disciplinary proceeding from the stage at which the proceeding got vitiated, i.e., the stage of issuance of the second show cause to the petitioner, thereafter, the disciplinary authority issued the second show cause notice giving the reasons for his differences with the enquiry report but while recording the reasons



for differences, he went on alleging that the petitioner is guilty for the said charge, therefore, in my opinion, the learned Senior Counsel is correct in submitting that it would amount to pre-judging the guilt and the spirit of the judgment of the Hon'ble Supreme Court in the case of **Kunj Bihari Mishra** (Supra) and **Yoginath D. Bagde** (Supra), which have been relied upon by this Court in the case of **Ranjan Kumar** (Supra) does not permit such a decision to be taken or to be reflected in the second show cause notice while sending the reasons for differences.

25. I am of the considered opinion that when the Writ Court vide Annexure-'9' quashed the order of punishment and the order of the appellate authority, the disciplinary proceeding will be deemed to be pending on 30.06.2002, i.e., the date when the petitioner attained the age of superannuation. The petitioner will be deemed to have retired on 30.06.2002 under suspension. It is not a case whereunder the service rule of an employee facing a departmental enquiry the date of retirement is extended in accordance with law for purpose of completion of a disciplinary enquiry.

26. Once the petitioner will be taken to have retired from service w.e.f. 30.06.2002, by virtue of the Full Bench judgment of this Court in the case of **Shambhu Saran** (Supra), the authorities were obliged to continue with the disciplinary proceeding under the Bihar



Pension Rules as has been taken note of by the Principal Secretary, Water Resources Department, Govt. of Bihar also in his order dated 05.04.2011. In such circumstance, the punishments imposed, like dismissal from service which contemplates that the delinquent employee is still in service cannot be imposed upon him. As has been held by the Hon'ble Full Bench of this Court, if such a person has committed some wrong, merely because he retires and no remedy remains available to the government even if there was a good case against him, the provision of Rule 43(b) of the Bihar Pension Rules would fill up the lacuna and, for that purpose, this provision has been introduced. Learned Senior Counsel has, in course of argument, referred to Annexures-17 to 20 of the Writ Application which are the orders passed by the disciplinary authority in cases of Junior Engineer and Assistant Engineer who were also proceeded against and in their cases lenient view was taken by the disciplinary authority, it is submitted that there cannot be any reason as to why the petitioner will be discriminated. This Court finds force in the submission. The Court is of the considered opinion that the order of punishment as contained in memo no.117 dated 01.02.2011 as well as the consequential order dated 05.04.2011 cannot withstand the test of law on the anvil of the judicial pronouncements on the subject which have been discussed here-in-above. The impugned orders are, therefore, set aside.



27. As a result of this, the disciplinary proceeding will be held to be pending under Rule 43(b) of the Bihar Pension Rules whereunder the disciplinary authority may proceed to pass an appropriate order in accordance with law after giving a fresh show cause to the petitioner in the light of the Full Bench judgment of this Court in the case of **Arvind Kumar Singh & Ors. Vs. The State of Bihar & Ors.**, reported in 2018(2) PLJR 933 (HC), and pass all the consequential benefits during pendency of the proceeding under Rule 43(b).

28. The Writ Application is allowed to the extent indicated here-in-above.

(Rajeev Ranjan Prasad, J)

Arvind.

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	13.08.2018
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