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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 218 OF 2013

Madhukar Makaji Mudgul,
Age : 40 years, resident of Gole,
Gondegaon, Taluka Niphad,
District Nashik.
(Presently lodged at Nashik
Central Prison, Nashik.

.. Appellant.

Versus

The State of Maharashtra,
[Through Lasalgaon Police Station]

.. Respondent

WITH
CRIMINAL APPEAL NO. 309 OF 2014

The State of Maharashtra
(Through Lasalgaon Police Station)

Appellant
.. (Orig. Complainant)

Versus

Madhukar Makaji Mudgul,
Age : 40 years, R/o. Gole, Gondegaon,
Taluka Niphad, District Nashik.

Respondent
.. (Orig. Accused)

WITH
SUO MOTU PETITION NO. 2 OF 2015

High Court on its own Motion

Petitioner
.. (Orig. Complainant)

Versus

Madhukar Makaji Mudgul,
Age : 40 years, R/o. Gole, Gondegaon,
Taluka Niphad, District Nashik.

Respondent
.. (Orig. Accused)

Mr. Ashish Satpute, Advocate for the Appellant in Appeal No.218 of 2013 and for Respondent in Appeal No.309 of 2014.

Mr. H.J. Dedhia, APP for the Respondent - State in Appeal No.218 of 2013 and for the Appellant – State in Appeal No.309 of 2014.

CORAM : **A.S. GADKARI &**
MILIND N. JADHAV, JJ.

Reserved on : **25th July 2022.**

Pronounced on : **19th August 2022.**

JUDGMENT (PER : MILIND N. JADHAV, J.)

. Criminal Appeal No.218 of 2013 has been filed by Appellant (accused) against the judgment and order dated 13.02.2013 passed by the learned Additional Sessions Judge, Niphad, District Nashik in Sessions Case No. 32 of 2006 (for short “learned trial court”), convicting Appellant for offences punishable under Sections 376 and 503 of the Indian Penal Code, 1860 (for short “**IPC**”) and sentencing him to suffer rigorous imprisonment of five years and to pay fine of Rs.1,000/-, in default whereof to undergo simple imprisonment for one year.

2. Criminal Appeal No.309 of 2014 has been filed by the State of Maharashtra for enhancement of the sentence passed by the learned trial court convicting the Appellant.

3. Criminal *Suo-Motu* Petition No.2 of 2015 has been registered by this court having issued a *suo-motu* notice for enhancement of the sentence passed by the learned trial court vide order dated 26.06.2013 in Criminal Appeal No.218 of 2013, which reads thus:-

“ *Heard the learned Counsel for the applicant.*

2. *The Appeal is admitted.*

3. *The applicant herein is convicted for the offence punishable under Section 376 of IPC, is sentenced to R.I. for five years and to pay fine of Rs.1,000/- in default S.I. for one month. The minimum sentence for the offence punishable under Section 376 of IPC is seven years. The reasons assigned by the Sessions Court for awarding the sentence less than minimum is not*

justified. The reasons assigned by the Sessions Judge is that the applicant-accused is facing trial for 6-7 years and, therefore, a lenient view has been taken. Another ground assigned by the Sessions Court is that the applicant is aged about 60 years. However, the fact remains that he has been convicted for the offence punishable under Section 376 of IPC for committing rape of his sister-in-law, who is physically handicapped i.e. she is deaf and dumb. Hence, there was no reason for the Sessions Court to take a lenient view.

4. Issue notice to enhancement of sentence to the accused-applicant. The notice be served upon the applicant in Nashik Central Prison. Notice returnable on 10th July, 2013.

5. The learned Counsel for the applicant submits that he would file private paper book. Time is prayed for is granted. Paper book to be filed within six weeks from today.

6. In the meanwhile, call for R & P.”

4. The facts emerging from the record of the case are as under:-

4.1. Mother of the victim, Meerabai Jairam Gare, first informant filed First Information Report (FIR) No.I-98 of 2005 in respect of the alleged incident of rape on her daughter 'X' with Lasalgaon Police Station against the Appellant. Victim 'X' is wife of Bhausahab Mudgul, younger brother of accused. Victim, her husband Bhausahab who is blind and 2 years old son, accused Madhukar, Punjabai, wife of the accused, father of the accused, Nivrutti, brother of the accused and two children of accused all stayed together in the matrimonial house. Victim 'X' is deaf and dumb and as such she communicates with the help of gestures/sign language. Victim was married to Bhausahab for five years before the date of incident and had given birth to one son.

4.2. First informant received information from Sunil (her son)

that victim was unwell, hence on 19.11.2005, her second son Shankar on making enquiry with victim on telephone came to know that she was being brought to her paternal house by her father-in-law. After victim was dropped at her paternal house it was informed by her father-in-law that she was suffering from fever and cold and had visited the hospital for treatment.

4.3. First informant inquired with victim about her wellbeing upon which victim broke down and by gestures informed that accused had ravished her three days ago and threatened her not to divulge the incident to anybody. First informant immediately approached Lasalgaon Police Station and lodged the report. Police Inspector Shri. Sangle recorded statement of victim with help of first informant and referred her for medical examination. He recorded statements of witnesses and conducted spot panchanama. Appellant was arrested and referred for medical examination. After completion of investigation, chargesheet was filed. Contents of charge that accused on 16.11.2005 at about 21.00 to 22.00 hours in the residential house of the victim committed rape without her consent and threatened her with injury to her husband and reputation if she disclosed the offence to anybody, were explained to accused in vernacular, however, Appellant pleaded not guilty to the charge and claimed to be tried.

5. Prosecution examined 6 witnesses to bring home the guilt of the accused. PW-1 – Vrushali Shrikant Gharpure, special teacher and

translator of language of deaf and dumb persons was examined vide Exhibit-23; PW-2 victim herself, was examined through PW-1 vide Exhibit-25; PW-3 - Dr. Vijaysingh Dnyanoba Mundhe, Doctor who examined the accused on 19.11.2005 was examined vide Exhibit-26; PW-4 – Meerabai Jayram Gare, mother of victim was examined vide Exhibit-31; PW-5 - Prabhakar Bhaguji Gade is the spot panchanama witness; PW-6 - Dr. Sandhya Vilas Patil, Doctor who examined the victim on 20.11.2005 was examined vide Exhibit-37. In addition prosecution relied upon Chemical Analyser's (CA) report in respect of blood sample, pubic hair sample, nail clippings of accused; CA report of blood sample, pubic hair sample, vaginal swab and vaginal smear sample of victim vide Exhibit-46.

6. Mr. Satpute, has argued that prosecutrix - victim has filed a false complaint to implicate Appellant at the behest of PW-4 i.e. mother of victim to pressurise and effect partition of the family field/property; that on 16.11.2022, Appellant was not present in the home and had gone alongwith other family members to attend '*kirtan*' program and returned alongwith the family members late in the night; that the Investigating Officer (I.O.) was not examined by prosecution to unearth the real facts; that there is substantial delay of 3 days in filing the report after the alleged incident and it is fatal to the veracity of the complaint; that no injuries were found on private parts of the victim; that victim did not reveal about any such incident to the doctor

who attended to her in the hospital where she was taken by her father-in-law and lastly recording of the statement of the victim by the police was highly suspicious as it remains unexplained. Hence, he prays for setting aside the impugned judgment and in the alternative submits that since appellant has already undergone the sentence of 5 years awarded by the impugned judgment, Criminal Appeal No.309 of 2014 filed by the State and Suo-Motu Petition No.2 of 2015, both be dismissed.

7. **PER-CONTRA**, Mr. Dedhia, learned APP, on behalf of the State submitted that accused is brother-in-law of victim and on date of incident i.e. 16.11.2005, all family members except accused, victim and her blind husband, had gone to attend '*kirtan*' program in the village temple; that at about 10:00 p.m. at night when the victim was alone inside the house, accused entered inside, forced himself on her and ravished her. He submitted that circumstantial evidence in the present case clearly established commission of the overt act by Appellant and it stands corroborated by medical evidence of the doctor. He has therefore prayed and urged for enhancement of the sentence of 5 years awarded to Appellant under the unamended provisions of Section 376 IPC prior to 2018, once the conviction is rendered by the trial court.

8. We have perused evidence of the prosecution witnesses carefully. Evidence of PW-1, PW-2 and PW-4 reveal that incident took

place on 16.11.2005 whereas FIR was lodged on 19.11.2005. It has also come in evidence that immediately after the incident, victim through gestures narrated and informed her father-in-law i.e. father of the accused about the incident but no steps were taken. It is only on 19.11.2005, when victim was dropped at her paternal house, PW-4 lodged the report on learning about the incident on the same day itself. Hence the delay, if any, in lodging the report as seen in the present case is legitimate and is properly explained.

9. Considering the fact that the incident had occurred inside the house, however evidence given by victim through PW-1 read with the evidence given by PW-4, mother of the victim clearly indicates and proves the incident that took place. Witnesses have stated that victim has narrated the incident to each of them by gestures. PW-4 being mother of the victim, can be said to have been certainly acquainted with the communication ability of victim. So also, PW-1 Vrushali Gharpure, expert witness has also given evidence before the court.

10. Prosecution has examined PW-1 and her evidence clearly indicates that victim informed her in the presence of the court as to how she was dealt with by the accused. Both, expert witness as well as victim have deposed before court; questions asked to victim through PW-1 and answers received by court through PW-1 having been recorded by the court show the skill set of PW-1 to have entered into a

dialogue and communication with the victim in the presence of the learned trial court Judge. In our view learned trial court has adopted a proper procedure for recording of evidence of victim i.e. PW-2 who was deaf and dumb. Having perused the evidence of PW-1 read with the evidence of PW-2 and PW-4, mother, we are convinced that the entire evidence supports the case of the prosecution. It is pertinent to note that in the present case, testimony of PW-1, expert witness, is not challenged before the trial court nor any suggestions are made challenging her confidence/skill set in this regard. PW-1 admittedly being the translator/interpreter had no interest in the trial. Statements/gestures/sign language of the victim i.e. PW-2 as interpreted by the interpreter i.e. PW-1 stand corroborated by the evidence given by PW-4 i.e. the first informant, mother of the victim. Evidence of these three witnesses is not shattered in any manner whatsoever in cross-examination. Facts in the present case clearly show that the interpreter had no interest in the prosecution's case and she had acted merely on the direction of the Investigating Officer and/or of the learned trial court on the strength of her expertise of being a special teacher in the school where hearing and speech impaired children take education. Hence, the evidence of PW-1, PW-2 and PW-4 deserves to be accepted.

11. In the present case, it seen that the incident had occurred on

16.11.2005 whereas the Partition Suit R.C.S. No.8 of 2006 was filed by Bhausahab Makaji Mudgul in 2006. If the defence relies upon the partition dispute, then the said dispute ought to have been prevailing on the date of the incident. However, that is not the case, considering that the unfortunate incident had occurred well before the suit was filed and hence defence of the pending partition suit cannot be available to the accused. It is completely misplaced.

12. It is pertinent to note that since the victim is deaf and dumb, her evidence was recorded through the expert witness PW-1 i.e. the special teacher for deaf and dumb vide Exhibit-23 under the provisions of Section 119 of the Act. It is seen that PW-1 is an experienced teacher working since 1987 with Smt. Mai Lele Shrawan Vikas Vidyalaya, Nashik as a Special Teacher and was specially deputed to give evidence after communicating with the victim by the Head-Mistress of the institution. PW-1 is qualified and holds the degree of Bachelor of Arts and Bachelor of Education (Deaf). PW-1 is thus an expert witness and her testimony is therefore crucial. PW-2 - victim through PW-1 has testified that on the date of the incident her husband was sleeping outside the house and other family members had gone out to the temple and she was sleeping inside the house along with her son. According to victim at about 10:00 p.m., accused entered into the house and closed the door of the room; thereafter

accused shut her mouth and ravished her; however before leaving, accused told her not to disclose the incident to anybody and promised to pay her a handsome amount. She has further testified that after her family members returned home she informed her father-in-law about the incident, however, the father-in-law thereafter decided to drop the victim at her paternal house after 2 days. According to the victim, she was operated upon for a surgery on her uterus and therefore her husband was sleeping outside the room; that the uterus of the victim was removed due to surgery; that after the surgery for 6 months victim stayed at her parental house and had returned to the matrimonial house 15 days before the incident and as per advice given by the doctor was required to abstain from having sexual relation with her husband for some time.

13. It will be useful to refer to the Section 119 of the Indian Evidence Act, 1872 which relates to dumb witnesses. Section 119 defines dumb witness as one who is unable to speak but may give his evidence in any other manner in which he can make it intelligible, either by writing, by signs and that such writing must be written and the signs made in open court. If the above requirement is met then evidence so given shall be deemed to be oral evidence. In the present case, it is seen that provisions of Section 119 have been fully complied with by the prosecution in proving its case. Victim i.e. PW-2 has examined herself through the expert witness i.e. PW-1, who has

interpreted by sign language and gestures of the victim in the court, as such the evidence so recorded is oral evidence. This testimony of the victim herself through PW-1 as the interpreter has not been shaken at all in cross-examination. It is seen that deposition of the victim i.e. PW-2 has been done through PW-1 together and both of them have been administered oath. Though elaborate cross-examination has been done by the Advocate for the accused, the same is insufficient in so far as disproving the incident is concerned. Questions have been asked to the victim pertaining to the alleged partition suit wherein the victim has given the following answer:-

"

I am not aware as to whether my husband has filed the case against other members of the family for getting the field. My brother and husband used to attend the court when required. The dispute prevailing between me and the accused on account of agricultural field. If accused delivered the field then the dispute come to an end....."

14. Defence case solely relies upon one and only one fact i.e. the dispute of partition of family property initiated by filing of the suit by husband of the victim against the accused and the father of the accused.

15. It is to be understood that no woman would even otherwise level and take the risk of levelling such a wild charge of ravishing her

only on the pretext of partition of the property. Victim is deaf and dumb, whereas her husband is blind. For more than 5 years victim and her husband have been part of the joint family with the parent in-laws and the family of her brother-in-law. Unless and until such an incident had happened or occurred there was no reason for the victim to make such an allegation. It is further seen that since the victim was deaf and dumb every aspect of the incident has been interpreted by the PW-1 in evidence before the learned trial judge. It is pertinent to note that partition suit being RCS No.8 of 2006 was filed in February 2006 whereas the incident has occurred on 16.11.2005. The evidence given by PW-1 in interpreting the unfortunate incident as told by the victim is believable. Evidence given by the victim herself (PW-2) assumes importance in such a case.

16. Cross-examination of the victim shows that she is confronted with several questions, *inter alia*, pertaining to the partition dispute and the partition suit between her husband on the one hand and the father-in-law and accused on the other hand. In her cross-examination, victim has stated that the *lis* in the partition suit can come to an end, if the portion of the field claimed by her husband is delivered to him by accused and the father-in-law. This statement is unfortunately viewed by the defence to mean that victim has filed a false complaint. The answer given by the victim with respect to the

issue of partition would have no nexus whatsoever with the heinous act of the accused. Evidence given by victim cannot be discarded on the basis of the above statement. Such answer given by victim can never be the basis for filing the complaint.

17. That apart, evidence given by PW-4 mother of the victim in understanding and narrating the incident as told to her by the victim also deserves to be believed as the same corroborates the evidence given by PW-1 and PW-2. In this backdrop, medical evidence, therefore assumes significance. PW-3 - Dr. Vijaysingh Mundhe is the doctor who has examined the victim whereas PW-6 - Dr. Sandhya Patil has examined the accused. Certificate issued by PW-6 speaks for itself and cannot be disbelieved though she has examined the victim three days after the incident. This delay cannot be fatal for accepting the certificate. PW-3 - Dr. Vijaysingh Mundhe has examined the accused on 19.11.2005 i.e. within 24 hours after the incident and he has collected samples of his pubic hair, blood sample, nail clippings and sent them for chemical analysis. C.A. Report (Exhibit-45) clearly states that 'human semen is detected on pubic hair of accused'. Though the victim is deaf and dumb, she gathered courage and informed her father-in-law first and thereafter her mother and without wasting time report was lodged. No married woman would put at stake her life by making such a serious allegation against her family member unless

and until such a heinous act has taken place.

18. The Apex Court in the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat***¹, in paragraph No.9 has held as under:-

“9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon.....”

19. The Apex Court in the above judgment has further held that a girl or woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbors, she would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial house and happiness being shattered.

20. The Apex Court in the case of ***Sheikh Zakir Vs. State of Bihar***², has held that a reading of the deposition of the complainant

1 AIR 1983 Supreme Court 753

2 AIR 1983 Supreme Court 911

shows that it has a ring of truth around. The absence of any injury on the person of the complainant may not itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance, she cannot be disbelieved. The Apex Court has further held that if a conviction is based on the evidence of a prosecutrix without any corroboration it will not be illegal on that sole ground.

21. In the present case, testimony of PW-1, PW-2 and PW-4 if read together clearly prove the chain of circumstances and act of the accused. The defence has failed to place any cogent material on record. Therefore, taking into consideration the entire evidence on record, deposition of the prosecution witnesses and circumstances sought to be relied upon by the prosecution, we find that the prosecution has succeeded in proving its case beyond reasonable doubt.

22. In the case of **Moti Lal Vs. State of M.P.**³, the Supreme Court while considering a case under Section 376 IPC, referred to the observations of Vivian Bose, J. in **Rameshwar Vs. The State of Rajasthan**⁴, and has observed that a woman or a girl who is raped is not an accomplice; that corroboration is not the *sine qua* for conviction in a rape case; that it is settled law that the victim of sexual

3 2008 ALL MR (Cri) 2583 (S.C.)

4 AIR 1952 SC 54

assault is not treated as accomplice and as such, her evidence does not require corroboration from any evidence including the evidence of a doctor; that in a given case even if the doctor who has examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix; that in normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police; the Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family and only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case.

22.1. In the present case, it is seen that the victim is a helpless, deaf and dumb married woman whose privacy and personal integrity has been shattered by the Appellant. In paragraph 8 of the above judgment, the Supreme Court has held as under:-

“8. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor

*contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. This position was highlighted in **State of Punjab Vs. Gurmeet Singh**⁵.”*

22.2. Thus, from the above, it is seen that rape is not merely a physical assault but it destructs the whole personality of the helpless woman. In the present case, the victim is helpless handicapped woman and thus, the present case requires to be dealt with utmost sensitivity. As seen, the evidence of the prosecutrix in the present case inspires confidence and also stands corroborated in material particulars on the basis of testimony of the prosecution witnesses.

23. In view of the above discussion and findings, and on appreciation of the evidence, offence committed by the accused stands proved beyond reasonable doubt. The only question that now remains to be considered is as regards the sentence. Appellant has behaved in the most horrific manner and shocked our conscience. The magnitude of his offence is such that he has misused his position of trust and committed an act as alleged and proved on a helpless handicapped victim who could not speak or hear. We would have countenanced

5 1996(2) SCC 384

the leniency shown by the learned trial court, but in the facts of the present case, we are afraid that we cannot persuade ourselves to do so. We disagree with the findings returned by the learned trial court in so far as the award of sentence is concerned; learned trial court has clearly erred in awarding the sentence of 5 years rigorous imprisonment to the accused on the ground of taking into consideration the age of the accused and that the accused was facing trial for 6 - 7 years and attending the court; we do not agree with this reasoning as it is contrary to the statute. Unamended Section 376 IPC prior to 21.04.2018 as it stood referred to punishment for rape and stated that except in the cases provided by sub-section (2) whoever commits rape shall be punished with rigorous imprisonment of either description for a term which shall not be less than 7 years, but which may extend to imprisonment for life, and shall also be liable to fine. The present case is covered by the provisions of Section 376(1) IPC. In view of the statutory provision, once the trial court had come to the conclusion that the prosecution had squarely proved the offence of rape committed by the accused on the victim beyond reasonable doubt, then there is no reason to defer from the statutory provision and award a lesser sentence than what is prescribed by the statute. It is seen that the victim in the present case is a deaf and dumb woman. Ravishing such a handicapped/helpless woman and more specifically when she is alone inside the house and the entire case of the defence

falling apart without proving the chain of circumstances, the sentence awarded by the learned trial court directing the accused to suffer rigorous imprisonment for 5 years and to pay fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for 1 month is therefore set aside to that extent and substituted by the following:-

- (i) accused Madhukar Makaji Mudgul is hereby convicted in view of section 235 of the Criminal Procedure Code of the offence punishable under Section 376 IPC and is sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.25,000/-, and in default of payment of fine the accused shall further undergo simple imprisonment for 6 months; rest of the impugned judgment and order shall remain as it is.

24. Subject to the above modification of the sentence in the impugned judgment dated 13.02.2013 to the aforesaid extent, Criminal Appeal No.218 of 2013 filed by the accused fails and is dismissed.

25. In view of the above directions, Criminal Appeal No.309 of 2014 filed by the State stands allowed by substituting the sentence awarded by the learned trial court to the Appellant from 5 years to 7 years rigorous imprisonment and fine from Rs.1,000/- to Rs.25,000/-,

and in default of payment of fine simple imprisonment for 6 months.

26. Criminal Suo-Motu Petition No.2 of 2015 also stands disposed in view of the above directions in Criminal Appeal No.309 of 2014.

27. Appellant shall surrender before the learned Additional Sessions Judge, Niphad, District Nashik in order to undergo the remaining sentence as awarded within a period of four weeks from the date of uploading of this judgment. If the Appellant does not surrender within a period of four weeks as directed, non-bailable warrant be issued to effect arrest of Appellant to comply with the present order in accordance with law.

28. This Court had requested Advocate Mr. Ashish Satpute to espouse the cause of the Appellant in Criminal Appeal No. 218 of 2013; he has assisted the court in appreciating the evidence on record. His professional fee quantified as per rule to be paid to him by the High Court Legal Aid Services Committee, Mumbai.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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