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C.M.A.No.2947 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.11.2024

CORAM :

THE HON'BLE MR.K.R.SHRIRAM, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

C.M.A.No.2947 of 2024
and C.M.P.No.24548 of 2024

Velan Hotels Ltd
registered office at No.41,
Kangayam Road,
Tiruppur - 641 604.

.. Appellant

vs

1. Mohan Clothing Pvt. Ltd,
rep.by its Managing Director,
Office at No.2E/22,
Jhandewalan Extension,
New Delhi.
2. R.Premkumar
Sole Arbitrator,
D.No.111D, Pankaja Mill Road,
Ramanathapuram,
Coimbatore - 45.

.. Respondents

Prayer : Appeal under Section 37 of the Arbitration and Conciliation Act,
1996 read with Section 13(1) of the Commercial Courts Act to set aside



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the order passed by the Commercial Court, Coimbatore, dated 24.8.2023 in A.O.P.No.26 of 2023 confirming the order of the Arbitrator.

For Appellant : Ms.Sudharsana Sunder
for M/s.Ravi Raja Bappu

JUDGMENT
(Delivered by the Hon'ble Chief Justice)

Appellant had developed a shopping mall-cum-entertainment complex by name "*The Velan Esplanade*". Appellant entered into Leave and License Agreement dated 12.12.2012 with first respondent and has agreed to grant the store space, being Shop No.E2. The license fee for the first year was Rs.85,176/- per month, excluding applicable service tax. The license fee for the second and third years was Rs.93,366/-. After the third year, the license fee was to be increased 15% for every three years.

2. The licensee was liable to pay the license fee, maintenance charges, service tax and all other charges, expenses payable for the licensed premises on and from the date of (a) completion of fit out period



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of 60 days; or (b) commencement of mall operations by appellant, whichever is later, irrespective of whether the licensee has commenced retail operations of store or not. The license agreement also provided for an initial lock-in period of 18 months. During the lock-in period, only the licensor would be entitled to terminate the agreement for reasons mentioned in the agreement.

3. Appellant handed over possession of shop No.E2 to first respondent for fit out. Disputes arose and first respondent commenced arbitration. Second respondent was the sole arbitrator. First respondent claimed a sum of Rs.44,58,691/- together with interest. Appellant filed a defence denying liability and also filed a counter-claim claiming a sum of Rs.24,46,393/- towards rental and other charges. The Arbitrator passed an award in favour of first respondent holding that first respondent was entitled to refund of a sum of Rs.9,82,800/- that it had paid to appellant as security deposit; and a further sum of Rs.22,79,581/- that first respondent had spent on fit outs and interior works in the shop. First respondent's claim for damages in a sum of Rs.10,00,000/- was reduced to



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a token sum of Rs.50,000/-. Interest of 9% was granted on the amounts payable. Cost of Rs.50,000/- was also awarded. Appellant's counter-claim for Rs.24,46,393/- towards license fee, maintenance charges, etc., was rejected.

4. The Arbitrator has given a factual finding in the award that the mall was opened on 6.12.2023, nearly one year after the assured date of opening the mall on 2.11.2012, and for that he has relied on the counter filed and the evidence.

5. Against this award, an Arbitration Original Petition was preferred under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") before the Commercial Court, Coimbatore, on various grounds. Original Petition came to be rejected by order dated 24.8.2023, impugned in this appeal.

6. In our view, there is no infirmity in the impugned order.



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7. The scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act has been discussed by the Apex Court and other Courts in various matters, but the most recent one is ***Reliance Infrastructure Limited v. State of Goa***¹, wherein the Apex Court has considered the earlier decisions in *MMTC Ltd v. Vedanta Ltd*²; *Associate Builders v. DDA*³; *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India*⁴; *PSA Sical Terminals (P) Ltd v. V.O.Chidambranar Port Trust*⁵; *Delhi Airport Metro Express (P) Ltd v. DMRC*⁶; *Haryana Tourism Ltd v. Kandhari Beverages Ltd*⁷; *UHL Power Co. Ltd v. State of H.P.*⁸; and *State of Chhattisgarh v. SAL Udyog (P) Ltd*⁹, and held in paragraphs 25 to 33 as under:

“25. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by this Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the 1996 Act.

26. In *MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163, this Court took note of various decisions including that in *Associate Builders v. DDA*, (2015) 3 SCC

1 (2024) 1 SCC 479

2 (2019) 4 SCC 163

3 (2015) 3 SCC 49

4 (2019) 15 SCC 131

5 (2023) 15 SCC 781

6 (2022) 1 SCC 131

7 (2022) 3 SCC 237

8 (2022) 4 SCC 116

9 (2022) 2 SCC 275



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49 and expositied on the limited scope of interference under Section 34 and further narrower scope of appeal under Section 37 of the 1996 Act, particularly when dealing with the concurrent findings (of the arbitrator and then of the Court). This Court, inter alia, held as under:

'11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA) reasonableness. **Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.**

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. **An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.** (See Associate Builders v. DDA, (2015) 3 SCC 49] Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34,



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which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. **In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings'**

27. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, this Court has set out the scope of challenge under Section 34 of the 1996 Act in further details in the following words:

'37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappraisal of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award

39. To elucidate, para 42.1 of *Associate Builders v. DDA*, (2015) 3 SCC 49, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders*, however, would remain, for if an arbitrator gives no reasons for an award and



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contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders v. DDA*, (2015) 3 SCC 49, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders v. DDA*, (2015) 3 SCC 49, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.’

28. The limited scope of challenge under Section 34 of the Act was once again highlighted by this Court in *PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust*, (2023) 15 SCC 781 and this Court particularly explained the relevant tests as under :

‘40. It will thus appear to be a more than settled legal position, that **in an application under Section 34, the Court is not expected to act as an appellate court and reappraise the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act.** The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Sections 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict



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with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the Court, that can be set aside on the said ground. **An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter.** However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

41. A decision which is perverse, though would not be a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

42. To understand the test of perversity, it will also be appropriate to refer to paras 31 and 32 from the judgment of this Court in *Associate Builders v. DDA*, (2015) 3 SCC 49, which read thus :

‘31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *CCE & Sales v. Gopi Nath & Sons*, 1992 Supp (2) SCC 312, it was held:

‘7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.’



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29. In *Delhi Airport Metro Express (P) Ltd. v. DMRC*, (2022) 1 SCC 131, this Court again surveyed the case law and explained the contours of the Courts' power to review the arbitral awards. Therein, this Court not only reaffirmed the principles aforesaid but also highlighted an area of serious concern while pointing out "a disturbing tendency" of the Courts in setting aside arbitral awards after dissecting and reassessing factual aspects. This Court also underscored the pertinent features and scope of the expression "patent illegality" while reiterating that the Courts do not sit in appeal over the arbitral award. The relevant and significant passages of this judgment could be usefully extracted as under :

'26. A cumulative reading of the *UNCITRAL* Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. **While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappraisal of matters of fact as well as law.** (See *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.*, (2020) 2 SCC 455, *Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.*, (2022) 1 SCC 75, *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306.)

28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.



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29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

42. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the Court. The discussion in SCC OnLine Del para 103 of the impugned judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562] amounts to appreciation or reappreciation of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench



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further held that the fact of AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole Judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under Section 34. On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account.”

(emphasis supplied)

30. In *Haryana Tourism Ltd. v. Kandhari Beverages Ltd.*, (2022) 3 SCC 237, this Court yet again pointed out the limited scope of interference under Sections 34 and 37 of the Act; and disapproved interference by the High Court under Section 37 of the Act while entering into merits of the claim in the following words :

'8. So far as the impugned judgment and order [*Kandhari Beverages Ltd. v. Haryana Tourism Ltd.*, 2018 SCC OnLine P&H 3233] passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. **The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to : (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal.** None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable.'

31. As regards the limited scope of interference under Sections 34/37 of the Act, we may also usefully refer to the following observations of a three-Judge



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Bench of this Court in *UHL Power Co. Ltd. v. State of H.P.*, (2022) 4 SCC 116:

'15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal. 16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed'

32. The learned Attorney General has referred to another three-Judge Bench decision of this Court in *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, (2022) 2 SCC 275, wherein this Court indeed interfered with the award in question when the same was found suffering from non-consideration of a relevant contractual clause. In the said decision too, the principles aforesaid in *Delhi Airport Metro Express (P) Ltd. v. DMRC*, (2022) 1 SCC 131, *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 and other cases were referred to and thereafter, this Court applied the principles to the facts of that case. We shall refer to the said decision later at an appropriate juncture.

33. Keeping in view the aforementioned principles enunciated by this Court with regard to the limited scope of interference in an arbitral award by a Court in the exercise of its jurisdiction under Section 34 of the Act, which is all the more circumscribed in an appeal under Section 37, we may examine the rival submissions of the parties in relation to the matters dealt with by the High Court."

[emphasis supplied]

8. The principles reiterated are that: (a) in an application under Section 34 of the Act, the court is not expected to act as an appellate court and re-appreciate the evidence; (b) the scope of interference would be



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limited to grounds provided under Section 34 of the Act; and (c) interference under Section 37 of the Act cannot travel beyond the restrictions laid down under Section 34 of the Act, i.e., the court cannot undertake an independent assessment of the merits of the award and must only ascertain that the exercise of power by the court under Section 34 of the Act has not exceeded the scope of the provision.

9. It is within the domain of the Arbitrator to construe the terms and conditions of Leave and License Agreement in a reasonable manner. The view taken by the Arbitral Tribunal, in our opinion, cannot be said to be wholly perverse or suffering from patent illegality so as to be interfered with.

10. The Arbitral Tribunal, after referring to the admission made in the cross-examination of appellant's witness, has given a factual finding that the mall was opened only on 6.12.2023, nearly one year after the assured date of opening the mall. The Tribunal has also recorded that,



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admittedly, till 6.12.2023, the construction of multiplex or food court was not completed and the delay would be attributable only to appellant.

11. In our view, the appeal court has rightly concluded that the award is not contrary to the public policy. It is also settled law that in an appeal the court cannot re-appreciate the evidence. We agree with the appeal court that the view taken by the Arbitral Tribunal is a plausible view. The Tribunal has assessed and appreciated the materials available before it in the right perspective and has assigned proper reasons while answering the claims put forth by the parties. Having examined the materials available on record, the findings given cannot be faulted.

In these circumstances, the appeal is dismissed. No order as to costs. Consequently, interim application is also dismissed.

(K.R.SHRIRAM, C.J.)
RAMAMOORTHY,J.)
12.11.2024

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THE HON'BLE CHIEF JUSTICE
AND
SENTHILKUMAR RAMAMOORTHY,J.

(sasi)

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