

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1231 of 2023**

Arising Out of PS. Case No.-91 Year-2016 Thana- BAISI District- Purnia

DEEPAK KUMAR RAI SON OF KAMAL RAI R/O VILLAGE-
CHILLAHAR, P.S.- ITARI, DISTRICT- BUXAR

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Manoj Kumar, Advocate Mr. Raghvendra Kumar Pratik, Advocate Mr. Himanshu Kumar Ranjan, Advocate
For the State	:	Mr.Abhay Kumar, APP

CORAM: HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

Date : 04-02-2025

The present appeal has been preferred against the the **judgment** and **order** dated **13.01.2023** as also the **sentence** dated **16.01.2023** passed by the **learned Additional District & Sessions Judge-1 Purnia** in **Special Case No- 02/2016/CIS No.01/2016** arising out of **Baisi P.S. Case No. 91/2016** dated **20.06.2016** by which the appellant has been convicted under **section 20(b)(ii) (c) Narcotics Drugs and Psychotropic Substances Act, 1985** (henceforth for short ‘the **NDPS Act**’) and sentenced to **undergo rigorous imprisonment for 10 years** and **fine of Rs. one lakh** and in default, **six months of**



simple imprisonment.

2. The prosecution story as read in the FIR is/are as follows:

*(i) on 20.06.2016 at 7:45 hours morning, the informant, Police Inspector cum S.H.O., Baisi Police Station namely Tarkeshwar Prasad Singh has recorded his statement at village Sadipur that while on 20.06.2016 at 00:30 hours, he was on patrolling duty and checking the vehicles along with the police force at Bausi, around 02:30 hours, they found a one car coming from Dalkola side. However, upon sight of the Police, the car took a turn with the intention to escape. The Police however, chased and was able to stop it. The Driver gave his name as **Deepak Kumar Rai (the appellant herein)** whereas another person gave his name a **Karanbir Singh;***

*(ii) the further allegation is that the villagers have assembled there. On query, the accused persons failed to give satisfactory reply. Thereafter, in the presence of two local witnesses 1. **Md. Sarbar** and 2. **Md. Raisul**, the*



*checking of the vehicle was made. Upon search from the dicky of the said vehicle (**Honda City Car**) having registration no. **CG-11BB-1701**, **42 packets** were recovered and on weighing, it was found to be **215.400 kg 'ganja'**;*

*(iii) this followed the physical search in the presence of the aforesaid two independent witnesses and from the possession of **Karanbir Singh**, three mobiles and 19,000/- cash were recovered whereas from **Deepak Kumar Rai**, one mobile was recovered;*

(iv) the informant further alleged that on the measurement taken by electronic measurement tools, the recovery/seizure were as follows:

(i) 1st group of 22 packets contained 2.770 kg to 3.000 kg 'ganja';

(ii) 2nd group of 12 packets contained 3.820 to 5.730 kg 'ganja'; and

(iii) 3rd group of 8 packets contained 7.130 kg to 12.700 kg. 'ganja';

(v) after measurement, all the packets were seized in the presence of accused persons as



also independent witness;

*(vi) on the basis of aforesaid written report, FIR
has been lodged against the appellant and
another.*

3. According to the learned counsel for the appellant, Karanbir Singh was found juvenile and as such, his case was separated. The **charge-sheet** came to be submitted on **31.10.2016**, cognizance taken on **08.12.2016** and **charges** were **framed** on **21.01.2017** against the appellant who pleaded not guilty and this resulted into rolling of the trial.

4. During the trial, the prosecution side examined altogether 9 witnesses. They are as follows:

(i) PW1-Swaminath Sah

(ii) PW2-ASI Lal Babu

(iii) PW3-Kaleshwar Paswan

(iv) PW4-Babu Lal Rai

(v) PW5- Tarkeshwar Prashad Singh (Informant)

(vi) PW6- Subash Chandra Mandal

(vii) PW7- Jitendra Rana

(viii) PW8- Md. Raisul. (Independent witness)

(ix) PW9-Md. Sarbar. (Independent witness)

5. The exhibits put forward by the prosecution is/are



as follows:

(i) Exhibit-1- Seizure list

(ii) Exhibit-2- Written Application.

(iii) Exhibit-3- Formal FIR.

(iv) Exhibit-4 and 4/A- Notices.

(v) Exhibit- 1/1 and 1/2 signatures on the seized packets 8 and 9.

(vi) Exhibit-5- Report of F.S.L., Patna.

(vii) Exhibit-6 Report of C.R.C.L., Kolkata.

6. **P.W.1 Swaminath Sah** – He was serving as the Reserve Guard in the Baisi Police Station. According to him, a White Car was found coming from Dalkola side. The Police tried to intercept the vehicle but the Driver took a turn to escape alongwith the Car. The Police chased the vehicle which left National Highway and entered **Sadipurbhutaha village** where it was finally intercepted. Those seated there were the appellant and Karanveer Singh. There was/were the recovery/seizure of three mobiles and Rs. 19,000/- from Karanveer Singh while one mobile from Deepak Kumar Rai. Upon search of the dicky, altogether 42 packets of ‘ganja’ like substance were recovered weighing 215 kgs 400 grams. The seizure list was prepared, sealed and accordingly seized. The accused were taken to the Police Station.



7. In his cross examination, P.W.-1 stated that the 'Chowkidar' Babu Lal Rai (P.W.-4) had gone to bring the weighing machine to weigh the seized *ganja*. Further, samples were prepared at the place of occurrence itself, whereafter, the packets were again sealed. It was later deposited in the "Malkhana". Upon question as to whether any seal was embossed on the samples or not, according to him, he do not have the information. Further, he acknowledged that the seized *ganja* was not presented in the Court.

8. **P.W.-2 -Lal Babu Rai** is Sub Inspector of Police who has narrated the same story. According to him, though the seal was brought by the 'Chowkidar', Babulal Rai from the Police Station, the document relating to it was not prepared. He also acknowledged that the seized materials are not available in the Court.

9. **P.W.-3-Kaleshwar Paswan** is also a Police Constable and was posted at Baisi Police Station. He has also parroted the same story. According to him, he was part of the raiding team and till they returned to the Police Station, no paper was prepared by the informant/SHO before him nor samples of *ganja* was/were taken and/or sealed.

10. **P.W.-4 Babulal Rai** is the 'Chowkidar' who



according to the other witnesses brought the weighing machine as also the materials relating to sealing the *ganja* seized from the Police Station. He supported the prosecution story and has further stated that the seized materials were sealed in his presence. According to him, three packets of samples were prepared from all the 42 packets.

11. P.W.-5 is Tarkeshwar Prasad Singh, the Informant cum Station Head Officer of Baisi Police Station.

According to him, he was on the spot checking the vehicle. At around 2:30 A.M., he found a vehicle coming from Dalkola and upon sight of the Police, the vehicle changed the track. It was ultimately intercepted at Sadipurbhutaha village. Karanbir Singh and this appellant Deepak Kumar Rai were present in the Car. Further, in the presence of two independent witnesses, Md. Sarwar and Md. Raisul, they were searched and beside mobile and cash amount, as stated above, 42 plastic packets of *ganja* were recovered/seized from the dicky of the Car.

12. According to the P.W.-5, prior to the search, the accused were informed that they can make a request for presence of a Gazetted Police Officer or a Magistrate but both the accused were satisfied that they can be searched by the Police Official. The Police recovered/seized 42 packets. It



weighed, 215.400 kgs of *ganja* and as no document was there, the same were seized in the presence of independent witnesses. This followed their arrest.

13. The packets were divided in three parts and smaller amount of 25 grams each were taken as two samples from the packets which were again sealed. After return to the Police Station, FIR lodged and the investigation was handed over to **Subhash Chandra Mandal (P.W.-6)**. He recognized his signature on the **seizure list**.

14. In the cross examination, the informant (P.W.5) stated that as he had handed over the charge of investigation to Subhash Chandra Mandal as such he cannot say whether the seized materials were again sealed or not. According to him, he always used to move with paper, pen and sealed items and on that day also, it was with him. Further, the samples from all the 42 packets were not taken. They were numbered from 1 to 42 and kept in three groups. He further could not inform the Court from where the electronic weighing machine was brought. He admits that there is "Malkhana" register in the Police Station but the S.D. entry is not available in the FIR. The said P.W. admitted that the seized materials were not produced before the Court.



15. **P.W.--6, Subhash Chandra Mandal** is again a Police Official (Police Sub-Inspector) who was given the charge of investigation. According to him, he took the statement of police witness, Lal Mohan Singh and 'Hawaldar' Swaminath Sah in the Police Station while the statement of independent witnesses **Md. Sarwar** and **Md. Raisul** were taken at the place of occurrence itself. He has also supported the prosecution story and stated that the seized materials were kept in the "Malkhana".

16. During the cross examination, he stated that no report was submitted before the Senior Police Official relating to the said occurrence/recovery/seizure. Further, whether the SHO informed the Senior Police Official or not, he does not know. He further admitted that though the seized materials were kept in the "Malkhana", the details could not be found in the diary. He did not send the samples to the Forensic Science Laboratory for its examination.

17. **P.W.-7 is Jitendra Rana** is again a Police Sub-Inspector. He has supported the prosecution story and has further stated that for sending the seized samples to the Forensic Science Laboratory, he presented himself alongwith the seized materials and upon the order given on 27.08.2016 by the learned Judicial Magistrate, the samples were sent to the **Forensic**



Science Laboratory, Patna on 13.09.2016 and the C.R.C.L, Kolkata on 20.09.2016.

18. According to him, the Car owner was one **Ramesh Kumar Agarwal** from Chhattisgarh from whom, Karanveer Singh had purchased it. He further informed that the appellant herein had given a petition that he was the Driver of Karanveer Singh. During cross examination, he has acknowledged that the statement of Ramesh Kumar Agrawal was not taken nor he checked the registration of the car from the District Transport Office. He acknowledged that the seized materials were not weighed at the time, it was kept in the "Malkhana".

19. **P.W.-8 Md. Raisul** is an independent witness. Though he has supported the prosecution story, during the cross examination, he stated that the Police did not inform him on which paper and for what purpose, his signature is being taken. Further, the Police did not open the packets for weighing and/or the same was sealed in his presence.

20. The last witness is the **P.W.-9, Md. Sarwar**. According to him, he was asked to sign on a paper by the Police but did not inform for what purpose, it has been taken. According to him, the Police did not arrest anyone in his



presence. During the cross examination, he acknowledged that the Police never informed him that for what purpose, his signature has been taken nor the packets were opened, weighed and sealed in his presence.

21. The Trial Court has taken note of the fact that at the time, the accused were taken into custody, locals assembled from whom Md. Sarwar and Md. Rasul were requested to stand as independent witnesses. Further, the accused acknowledged that all the packets contained *ganja* and also allowed the Police officials to search them in absence of a Gazetted Officer. This followed the search in the presence of independent witness. Later, Babulal Rai was sent to bring weighing machine.

22. The Trial Court has further recorded that once the machine arrived, the seized materials were weighed which came to 215.400 kgs. This followed the legal process as narrated above and their arrest. The Trial Court has also taken note of different Exhibits which stand incorporated above.

23. Thereafter, the Trial Court having heard the parties came to the conclusion that upon search of the dicky in the presence of the accused and the independent witnesses, total 215.400 kgs *ganja* was recovered/seized. Both the accused were present in the Car. The samples were sent to C.R.C.L, **Kolkata**



as also the **Forensic Science Laboratory, Patna** and there respective reports confirmed that the seized items are **Tetrahydro Cannabinol** which is **ganja**. In that background, the Court came to the conclusion that the case against the appellant Deepak Kumar Rai is proved under section **20(b)(ii)(c)** of '**the NDPS Act**'.

24. As stated, upon query from the learned Counsels about Karanver Singh, it has been informed that he being the juvenile, his case was taken up separately.

25. Accordingly, the appellant, Deepak Kumar Rai was convicted on **13.01.2023** u/s 20(b)(ii)(c) of '**the NDPS Act**' and vide an order dated **16.01.2023** was sentenced to undergo 10 years rigorous imprisonment and a fine of Rs. 1,00,000/-. In default of payment of fine, he was sentenced six months simple imprisonment. This included the period he has remained in judicial custody.

26. Aggrieved, the present appeal.

27. The case of the appellant as presented by Mr. Manoj Kumar is that the Police failed to strictly adhere to/act as per the different sections of '**the NDPS Act**' inasmuch as the search of the appellant was not conducted in the presence of a Gazetted Officer/Superior Officer rather by the Police Officials



present there. Further, there is nothing on record to show that in case, the Police conducted the search, the Superior Officer was immediately informed within a period of 72 hours as mandated under 'the NDPS Act'.

28. It is his further submission that even Section 52(A) of 'the NDPS Act' was violated as the representative samples of the seized materials were not drawn in the presence of the Magistrate as the prosecution story is that immediately after the seizure, the samples were prepared by opening the packets. After the samples were taken out it was not weighed. Further, neither the seized items were produced before the Trial Court nor any report/certificate presented to show that it has been destroyed. He submits that said facts clearly shows that the appellant was framed in the matter which resulted into his erroneous conviction and resultant custody since the date of lodging of the FIR (20.06.2016).

29. Mr. Abhay Kumar representing the State has taken this Court to Section 50(5) of 'the NDPS Act' to support the prosecution story that the absence of the Gazetted Officer will not be detrimental to the prosecution story. However, upon query, whether in that case, the Superior Officers are to be informed within a period of 72 hours as mandated under sub-



section 6 of Section 50 of 'the NDPS Act' and whether an information was given, the answer is in negative.

30. It is his next submission that huge quantity of 'ganja' was recovered/seized, the representative samples taken out, sent for test to the two reputed Government Laboratories which confirmed that the seized material was 'ganja' and in that background, the Trial Court rightly came to the conclusion resulting into conviction/sentence to the appellant which need no interference.

31. This Court has heard the parties and has also gone through the prosecution story. The question before this Court is whether the prosecution was able to prove its case beyond doubt before the Trial Court.

32. The case of the prosecution is that it intercepted a vehicle which tried to escape but finally apprehended. Upon search of the person and the dicky, beside mobile (from the appellant), there is/was recovery of 215.400 kg 'Ganja'. The appellant was informed whether to be searched in presence of a Magistrate or a Gazetted Officer and only on the consent given, it was conducted by the Police. This in the opinion of the Court does not fulfill section 50 of 'the NDPS Act' which talks about the search to be conducted either in the presence of the Gazetted



Officer or the Magistrate. Further, in case the same is not possible, immediately thereafter and within 72 hours, an information has to be sent to the immediate Superior Officer which was never done, a fact that cannot be ignored.

33. It is further important to incorporate section 50 of 'the NDPS Act' which deals with such provisions:

50. Conditions under which search of persons shall be conducted.-(1)When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).



(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal



Procedure, 1973

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

34. Further, 52A of 'the NDPS Act' read as follows:

52A. Disposal of seized narcotic drugs and psychotropic substances

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances of conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances,



controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.)

(2) Where any (narcotic drugs, psychotropic substances, controlled substances or conveyances) has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such "narcotic drugs, psychotropic substances, controlled substances or conveyances)



containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances) or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the (narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-----

(a) certifying the correctness of the inventory so prepared, or

(b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances)



and certifying such photographs as true, or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of (narcotic drugs, psychotropic substances, controlled substances or conveyances) and any list of samples drawn under sub-section (2) and



*certified by the Magistrate, as
primary evidence in respect of such
offence.]*

35. This Court has recorded **section 52(A) (c) of ‘the NDPS Act’** which clearly show that the representative samples has to be drawn in the presence of the Magistrate which shall certify its correctness for which a proper application has to be presented before it.

36. Here is a case where the Police Officials immediately after the seizure opened the seized items, according to them, 25 grams each of two samples were prepared from some of the packets whereafter, the same was sealed. This was in complete breach of section 52(A) (c) of ‘the NDPS Act’.

37. This Court further cannot overlook another fact. The seized materials were never produced before the Trial Court and though the prosecution side repeatedly harped that it was deposited in the “Malkhana”, even the entry made could not be provided by them. In the absence of the seized materials having been presented before the Court and/or any certificate showing that it has been destroyed in accordance with law, the entire story of seizure of 215.400 kg of ‘ganja’ falls.

38. In this case, while all the witnesses are Police



Officials, two witnesses presented by the prosecution as independent witnesses viz **P.W.-8, Md. Raisul** and **P.W.9, Md. Sarbar** have deposed during the cross examination that the Police did not inform them for which purpose their respective signatures have been taken on the paper. According to **P.W.8, Md. Raisul**, the Police did not open the packets for weighing and/or the same was sealed in his presence. **P.W.-9, Md. Sarbar** has also made the same statement that though his signature was taken, packets were not opened, weighed and sealed in his presence. This clearly falsifies the entire seizure theory of the prosecution.

39. Here it is also important to take note of the deposition of the P.W.7 who stated that seized materials were not weighed and was kept in the “Malkhana”. There is nothing on record to show that the Police weighed the seized materials again after representative samples were taken out.

40. The Hon’ble Supreme Court in the case of **Union of India Vs. Mohanlal & Another** reported in **(2016) 3 SCC 379** held that in absence of prosecution having followed section **52(A) of ‘the NDPS Act’** the accused is/are entitled for relief.

41. It would be appropriate to incorporate



paragraph nos.-**14 to 17** of the **Mohanlal** (supra) case which are as follows:

14. Section 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

"52-A. Disposal of seized narcotic drugs and psychotropic substances. (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette. specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure,



be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer



referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the Inventory so prepared; or (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. (3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be allow the application.



(4) *Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs. psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence"*

15. *It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as*



stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16 *Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including*



grant of permission to draw representative samples in his presence which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-4(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 32-A above constitute



primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

42. After incorporating the aforesaid facts as also the Hon'ble Apex Court's order in **Mohanlal** (supra) case, this Court safely holds that the prosecution has completely failed to prove its case beyond reasonable doubt. The appellant in the aforesaid circumstances is entitled for the benefit of doubt.

43. Accordingly, the impugned judgment and order of conviction dated **13.01.2023** passed by the learned Additional District and Sessions Judge-I, Purnia in Special Case No. **02/2016/CIS No.01/2016** (arising out of **Baisi P.S. Case No. 91/2016**) and the order of sentence dated 16.01.2023 by which he has been directed to undergo rigorous imprisonment for ten years and fine of Rs. one lakh for the offence under section 20(b((ii)(c) of 'the NDPS Act' relating to the sole appellant herein is hereby set aside.

44. The Criminal Appeal (SJ) No. 1231 of 2023 is



allowed and the appellant is acquitted of all the charges.

45. The appellant is in custody. Let him be released forthwith, if not required in any other case.

46. The appeal stands allowed.

(Rajiv Roy, J)

Ravi/-

AFR/NAFR	AFR
CAV DATE	N/A
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