

Dilli Babu Vs. MelwIn Enterprises

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Court : Chennai

Decided On : Jun-12-2013

Judge : The Hon'Ble Mrs.Justice R.Banumathi

Appellant : Dilli Babu

Respondent : MelwIn Enterprises

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

12. 06.2013 CORAM: THE HON'BLE MRS.JUSTICE R.BANUMATHI AND THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM C.M.A.NO.1826 OF2010 Dilli Babu Appellant Vs. 1.M/s.Melwin Enterprises, No.17-B, Thangam Colony, II Street, Anna Nagar, Chennai 600 040, 2.M/s.New India Assurance Co.Ltd., Academic Court, II Floor, No.204, Poonamallee High Road, Chennai 600 007. Respondents Prayer: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the award and decree dated 29.6.2007 made in M.C.O.P.No.4704 of 2002 on the file of the Motor Accident Claims Tribunal (V Court of Small Causes), Chennai. For Appellant : Mr.M.Balachandar For Respondents : Mr.S.Manohar for Respondent No.2

JUDGMENT

R.BANUMATHI,J.

The appeal is filed by the claimant seeking enhancement of compensation awarded by the Motor Accident Claims Tribunal (V Court of Small Causes), Chennai in M.C.O.P.No.4704 of 2002 for the injuries sustained by him in the road accident occurred on 23.7.2002.

2. The brief facts are as under: On 23.7.2002 at about 2.30 p.m, when the appellant/ claimant was riding his motor cycle bearing Regn.No.TN.22-M-1879 on Thirumangalam Road, a goods auto rickshaw bearing Regn.No.TN.01-B-0677 came from the opposite direction and dashed against the motor cycle and caused the accident in which the claimant sustained sustained grievous injuries in the fore-head, back of neck, spinal card, lips, hands and legs. A criminal case was registered in Crime No.108 of 2002 in B.5 Police Station, Thirumangalam against the driver of the auto rickshaw. After the accident, the claimant was admitted in Sridevi Hospital, Anna Nagar, Chennai, where he had taken treatment for about two weeks and in April, 2003, got admitted in Apollo 1st Med Hospital. The claimant is a Civil Contractor and was earning Rs.7,000/- per month. Alleging that the accident occurred due to rash and negligent driving of the auto rickshaw driver and claimant sustained permanent disability due to the accident and that the owner of the auto rickshaw and insurance Company are liable to pay the compensation, the injured appellant - claimant has filed the claim petition claiming compensation of Rs.34,75,000/- 3. Denying the manner of accident and alleging that the accident was due to the negligence of the claimant, the 2nd respondent - Insurance Company filed counter contending that the appellant - claimant has to prove his age, employment, income and injuries sustained and the permanent disability and that the auto rickshaw bearing Regn.No.TN-01-B-0677 was insured with the 2nd respondent and the claim is highly excessive.

4. Before the Tribunal, the claimant examined himself as P.W.1 and Dr.Senthil Nathan, Managing Director of Sridevi Hospial as P.W2, Dr.Balamurugan, a neuro surgeon in Apollo Hospital as P.W.3 and Exs.P.1 to P.10 were marked on the side of the respondents. No oral and documentary evidence was adduced on the side of the Insurance Company.

5. Upon consideration of oral and documentary evidence, and also the evidence of claimant P.W.1, the Tribunal held that the accident was due to the rash and negligent driving of the auto rickshaw driver and held the Tribunal also held that the first respondent has not proved that the auto rickshaw driver had valid driving licence at the time of occurrence and as such the first respondent, being the owner and the 2nd respondent, being insured, are liable to pay the compensation.

6. Insofar as the quantum of compensation, based upon Ex.P.8 income tax return, the Tribunal had come to the conclusion that the claimant was earning Rs.7,000/- per month. The Tribunal has awarded total compensation of Rs.4,32,146/- together with interest at 7.5% under the following heads: Loss of Earnings : Rs. 70,000/- Transportation : Rs. 16,072/- Extra Nourishment : Rs. 2,000/- Damages to Motor Vehicle, Clothing and Articles : Rs. 2,000/- Permanent Disability : Rs. 40,000/- Pain and suffering : Rs. 9,000/- Other Expenses : Rs. 2,000/- Medical Bills : Rs.2,90,444/- Total : Rs.4,32,146/- 7. Mr.M.Balachandar, the learned counsel for appellant/claimant contended that the Tribunal failed to consider the evidence of claimant - P.W.1, who explained the medical expenses and also about his disabilities from the work. Drawing our attention to the evidence of P.W.2, Dr.Senthil Nathan, Sridevi Hospital and P.W.3 Dr.Balamurugan, Neuro Surgeon in Apollo Hospital, who gave the treatment to the appellant, the learned counsel submitted that the appellant/claimant has established that the appellant has sustained severe injuries in his spinal cord and operation was done on him and in spite of the intensive treatment, the claimant has spasticity below the hip, which has caused permanent disability and while so Tribunal erred in awarding a lumpsum compensation of Rs.70,000/- towards loss of earnings and Rs.40,000/- towards permanent disability and the learned counsel prayed for enhancement.

8. Mr.S.Manohar, the learned counsel for the 2nd respondent - Insurance Company submits that the appellant/ claimant has not suffered any permanent disability and the award passed by the Tribunal is reasonable and warrants no interference.

9. In his evidence, P.W.1 stated that in the accident occurred on 23.7.2002, the claimant sustained spinal cord injuries causing fracture of C2 to C6 and he is

unable to move below his hip and both lower limbs. Immediately, after the accident, claimant was admitted in Sridevi Hospital, Anna Nagar, where he had taken treatment from 23.7.2002 to 3.8.2002. The claimant further stated that after his discharge he was taking bed rest and because of the complications, he got himself admitted in Apollo First Med Hospital, Chennai, where he had taken treatment from 6.4.2003 to 14.4.2003 and inspite of intensive treatment in Apollo First Med Hospital, the claimant is not in a position to move both lower limbs and difficulty in flexing and extending the fingers. P.W.1 further stated that even after discharge from Apollo First Med Hospital he continued his treatment of physio therapy and acupuncture. Inspite of his continuous treatment he has difficulty and unable to move below hip. He had also stated that he is unable to carry on his normal avocation.

10. P.W.2 Dr.Senthil Nathan from Sridevi Hospital had spoken about the treatment given to the claimant and even at the time of discharge, the spinal cord injury was not fully cured.

11. P.W.3 Dr.Balamurugan, a neuro surgeon from Apollo Hospital had stated that at the time of admission, there was rupture of the membrane between C.5 and C.6 of the neck bone and assessed the permanent disability at 65%. The claimant had discectomy and fusion to C.5 and C.6. He was advised cervical collar. Ex.P.2 is the discharge summary of Apollo Hospital containing the course of treatment given to the claimant.

12. Since the opinion of P.W.3 as to the spasticity of the lower limbs of the claimant was disputed by the Insurance Company, by Order of this Court dated 30.6.2012, the claimant was referred to the Medical Board. The Medical Board examined the claimant and assessed his permanent disability at 81.25% and opined as under: ".he has Quadripariesis, frequency of micturatian with Hyperasthesia of all limbs with disability of 81.25%.

13. Contention of the Insurance Company is that the accident was on 23.7.2002. While so, the claimant was admitted in Apollo Hospital only in April, 2003 and the treatment, which the appellant had in Apollo First Med Hospital has no nexus with the accident on 23.7.2002. The learned counsel submitted that the alleged

disability of difficulty in walking and the alleged inability in both the lower limbs is not attributable to the accident and therefore the compensation awarded by the Tribunal is not to be enhanced.

14. Learned counsel for Insurance Company placed reliance upon Ex.P.1 discharge summary issued by Sridevi Hospital to contend that the claimant did not sustain any injury on his spinal cord and while so the alleged injury to C.5 and C.6 and inability to move both lower limbs cannot be attributed to the accident. Learned counsel appearing for the Insurance Company submitted that spasticity below the hip and also injury to the cervical bone is not attributable to the accident.

15. Even though such an argument is advanced during the course of appeal, the Insurance Company has not raised the plea in their counter statement. As seen from Ex.P.2, while the claimant was admitted in Apollo First Med Hospital on 6.4.2003, while recording the case history, it is recorded as ".road traffic accident on 23.7.2002"., which strengthens the case of the claimant. When P.Ws.1 to 3 were in the witness box, no suggestion was put to the claimant or to the Doctors to the effect that spinal cord injury and the spasticity below the hip was not attributable to the accident. In the absence of any cross examination from the witnesses and the averments in the counter, the arguments now addressed during the course of appeal does not merit acceptance.

16. In Ex.P.1 discharge summary issued by Sridevi Hospital, even though there is no specific mention about the spinal cord injury, by perusal of Ex.P.1, it is seen that the claimant sustained lacerated head injury in the scalp, lacerated injury on upper lip, lacerated injury on left side of tongue and abrasion of right foot. The opinion of Neuro Surgeon was obtained. The injuries caused to the spinal cord and cervical bones might not have been visible when the claimant was clinically examined at the time of his admission. P.W.2 Dr.Senthil Nathan from Sridevi Hospital had categorically stated that at the time of discharge, the spinal cord injury was not fully cured. Of course, the claimant was admitted in Apollo First Med Hospital on 6.4.2003. In Ex.P.2 case history recorded by Apollo Hospital, the injuries and the inability to move both lower limbs are referred to road traffic accident in July, 2002 as seen from the following: ".Mr.Dilli Babu was admitted with

difficulty in walking. History of RTA on 7/02. Had inability to move both lower limb and difficulty in flexing and extending fingers had developed retention of urine. No LOC/Seizure/Vomiting. Has gradually recovered power in both lower limb LL. But finds it difficult to walk because of stiffness seizures. No history of diabetes mellitus/hypertensives.". Spasticity was noticed in the lower limbs. In the Apollo Hospital, the claimant had C.5, C.6 discectomy and fusion. Ex.P.2 states that at the time of discharge there was some improvement in spasticity.

17. In his evidence, P.W.3 Dr.Balamurugan from Apollo Hospital stated that he had examined the claimant and issued Ex.P.9 discharge certificate assessing the permanent disability at 65%. In Ex.P.9, P.W.3 has clearly stated about the disability of the claimant 1. He has disablement for work. 2.This disability is due to the injury sustained during road traffic accident. 3.This disability is permanent. and the disability is assessed at 65% based on the following : a) Inability to use hands for eating, bathing, dressing, grooming, toileting 15% b) Unable to pass urine, motion freely 15% c) Unable to partake in sexual functions 10% d) Unable to climb stairs (up & down) 15% e) Severe stiffness of hands and legs 10% The total disability is 65% and is permanent.".

18. In his evidence, P.W.3 opined that the inability in the lower limbs is only because of the injury sustained in the spinal cord and there is no possibility for further improvement in spasticity in the lower limb. Prior to the accident, the claimant along with his brother was doing construction work. Because of the spasticity in the lower limbs, now the claimant is not in a position to carry on his normal avocation. The Tribunal has awarded only a lumpsum compensation of Rs.70,000/- towards loss of earnings and Rs.40,000/- towards permanent disability. The Hon'ble Supreme Court time and again emphasised that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident. It is noteworthy to state that Tribunal while determining quantum of compensation, has to keep in view the sufferings of the injured person which would include his

inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned. Hence, while computing compensation the approach of the tribunal has to be broad based. Needless to say, it would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation the fundamental criterion is ".just compensation".. The award of just and reasonable compensation is only to restore the claimant to the extent possible.

19. Elaborately considering the factors to be kept in view in physical injury cases and also the mode of calculating the compensation, in RAJ KUMAR VS. AJAY KUMAR AND ANOTHER, (2011) 1 SCC343 the Supreme Court held as under: ".General principles relating to compensation in injury cases 5. The provision of the Motor Vehicles Act, 1988 ('Act' for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. (See C.K. Subramonia Iyer v. T. Kunhikuttan Nair : AIR 1970 SC376 R.D. Hattangadi v. Pest Control (India) Ltd. :

1995. (1) SCC551and Baker v. Willoughby 1970 AC467) 6. The heads under which compensation is awarded in personal injury cases are the following: Pecuniary damages (Special Damages) (i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure. (ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (a) Loss of earning during the period of

treatment; (b) Loss of future earnings on account of permanent disability. (iii) Future medical expenses. Non-pecuniary damages (General Damages) (iv) Damages for pain, suffering and trauma as a consequence of the injuries. (v) Loss of amenities (and/or loss of prospects of marriage). (vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

7. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) -- depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and (vi) -- involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case.

20. In so far as the future loss of earnings due to the personal disability, in the above said judgment, the Supreme Court laid down the principles as to the mode of calculation of the compensation to be awarded for permanent disability and that the permanent disability must be with reference to the whole body and the normal avocation of the injured claimant. The Hon'ble Supreme Court observed as under: ".Assessment of future loss of earnings due to permanent disability 8. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the

period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accidents injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('Disabilities Act' for short). But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

9. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would

depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this Court in *Arvind Kumar Mishra v. New India Assurance Co. Ltd.* MANU/SC/0777/2010 :

2010. 10) SCALE298 and *Yadava Kumar v. D.M., National Insurance Co. Ltd.* 2010 (8) SCALE567 12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the

Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.". The above said Raj kumar's case, (2011) 1 SCC343 was followed in Laxman v. Divisional Manager, Oriental Insurance Co. Ltd. and Anr., 2012 ACJ191 and other decisions.

21. In the light of the above principles, let us consider whether the compensation awarded to the claimant is just and reasonable. As pointed out earlier, Tribunal has awarded lumpsum compensation of Rs.70,000/- towards loss of earnings and Rs.40,000/- towards disability. As discussed earlier, the claimant has spasticity in the lower limbs and he is unable to carry on his normal avocation. The Medical Board has also noted about the Hyperesthesia of all lower limbs and assessed the permanent disability at 81.25% and because of the permanent disability claimant would not be in a position to carry on his normal avocation viz., building contract work. Having regard to the permanent disability and the avocation of the claimant, we are of the view that it is a fit case where the multiplier method has to be adopted for calculating the compensation payable towards loss of earnings.

22. Ex.P.8 is the income-tax return of the claimant for the assessment year 2002-2003. Ex.P.9 is the saral form for the assessment year 2002-2003, wherein the income of the claimant from business is stated as Rs.76,800/- per annum. The Medical Board has given the opinion fixing the disability at 81.5%, whereas P.W.3, the Doctor from Apollo First Med Hospital, who treated the claimant had issued Ex.P.9 assessing the permanent disability at 65%. As held in Raj Kumar' case, (2011) 1 SCC343 and Govind Yadav Vs. New India Insurance Co.Ltd., (2011) 10 SCC683 the assessment of permanent disability has to be with reference to the functioning of the whole body. Considering Ex.P.9 issued by P.W.3 and also the opinion of the Medical Board, we deem it appropriate to take the permanent disability at 70%. As pointed out earlier, as per Ex.P.8 - Income-tax return, the income of the deceased was Rs.76,800/-. The claimant was aged 31 years at the time of accident. As per Second Schedule, multiplier to be adopted is 18. The loss of earnings on account of permanent disability is calculated at Rs.9,67,680/- (Rs.76,800 x 18x 70/100).

23. The Tribunal has awarded Rs.2,000/- for extra nourishment and the same is enhanced to Rs.5,000/-. Tribunal has awarded Rs.9,000/- for pain and suffering. The claimant had taken treatment in Sridevi Hospital and in Apollo Hospital for two spells and continues to have spasticity in the lower limbs and therefore the compensation for pain and suffering is enhanced to Rs.30,000/-. So far as other expenses Tribunal has awarded Rs.2,000/- and the same is enhanced to Rs.5,000/- for other miscellaneous expenses and also for attendant charges. The total compensation awarded to the claimant is enhanced to Rs.13,16,196/- from Rs.4,32,146/- awarded by the Tribunal, the details of which are as under: Awarded by Tribunal by this Court Loss Earnings : Rs. 70,000/- --- Transportation : Rs. 16,072/- 16,072/- Extra Nourishment : Rs. 2,000/- 5,000/- Damages to Motor Vehicle, : Rs. 2,000/- 2,000/- Clothing and Articles Disability : Rs. 40,000/- 9,67,680/- Compensation for Pain and : Rs. 9,000/- 30,000/- suffering Other Expenses : Rs. 2,000/- 5,000/- Medical Bills : Rs.2,90,444/- 2,90,444/- Total : Rs.4,32,146/- 13,16,196/- 24. In the result, the award of compensation of Rs.4,32,146/- passed by the Motor Accident Claims Tribunal (V Court of Small Causes), Chennai in M.C.O.P.No.4704 of 2002 is enhanced to Rs.13,16,196/- and this Civil Miscellaneous Appeal is partly allowed. The enhanced compensation of

Rs.8,84,050/- (Rs.13,16,196/- minus Rs.4,32,146/-) is payable with interest at the rate of 7.5% from the date of filing of the Claim Petition. The 2nd respondent - Insurance Company is directed to deposit the enhanced compensation along with the accrued interest at the rate of 7.5% within a period of eight weeks from the date of receipt of copy of this judgment. On such deposit, the claimant is permitted to withdraw the entire award amount together with accrued interest. There is no order as to costs in this appeal. (R.B.I.,J.) (T.S.S.,J.) 12.06.2013 Index:Yes Internet:Yes Copy to: The Motor Accident Claims Tribunal (V Court of Small Causes), Chennai. R.BANUMATHI,J.

AND T.S.SIVAGNANAM,J.

usk Judgment in C.M.A.No.1826 of 2010 12.06.2013

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