

The State of Maharashtra Vs. Deepti Anil Devasthali and Leena Anil Devasthali

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Court : Mumbai

Decided On : Oct-15-2008

Reported in : (2008)110BOMLR3643; 2008(4)MhL.R.476

Judge : Bilal Nazki and ;A.A. Kumbhakoni, JJ.

Acts : Indian Penal Code (IPC) - Sections 120B, 201, 302, 328, 342, 364A, 387, 419, 465, 468 and 471; Code of Criminal Procedure (CrPC) - Sections 304, 311, 329, 329(1), 374, 375, 376, 377 and 423; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 374, 375 and 376; Code of Civil Procedure (CPC) - Order 41

Appeal No. : Confirmation Case No. 1 of 2008 and Criminal Appeal No. 173 of 2008

Appellant : The State of Maharashtra;deepti Anil Devasthali and Leena Anil Devasthali

Respondent : Deepti Anil Devasthali and Leena Anil Devasthali; the State of Maharashtra

Advocate for Def. : Shirish Gupte, Sr. Adv., ;S.V. Kotwal and ;Rucheeta Dhuru, Adv.

Advocate for Pet/Ap. : S.R. Borulkar, Public Prosecutor, ;S.D. Shinde, ;Rajeshree Gadhvi and ;Pawar, Additional Public Prosecutors

Judgement :

ORDER

Bilal Nazki, J.

1. Both the accused-appellants are convicted under Section 302 of the Indian Penal Code read with Section 120B along with certain other offences. Under Section 302 read with Section 120B, they have been sentenced to death, subject to confirmation of this Court. Therefore, this Court is hearing the confirmation case as well as the appeal filed by the appellants against the conviction and sentence.

2. The first accused Deepti is the daughter of the second accused Leena (mother). The allegations on the basis of which the accused-appellants went to trial were that they were related to one Dr. Deepak Shridhar Mahajan, an Orthopedic Surgeon, who was staying with his family at Pune. The accused-appellants made him believe that they needed his services for one Omkar Charitable Trust, Mumbai, and for this purpose, a letter offering him an honorary assignment of Orthopedic Surgeon in Pradeep Hospital at Nigdi was given to him.

3. Thereafter, Dr. Deepak was invited for discussion at Shantanu Lodge, Tilak Road, Pune. Appellant-Deepti, after making all sorts of arrangements, received Dr. Deepak at Shantanu Lodge. Deepti disguised herself by changing her appearance with a make-up. She used a wig, a denture, round frame spectacles and was wearing a sari. Two others, Rahul Bhosale and Ketan Kale, were present in Room No. 7, which was booked by the accused in the names of Mr. and Mrs. Ranade. Dr. Deepak accompanied Deepti to Room No. 7. As he entered the room, the door was closed, and at the instance of Deepti, Ketan Kale and Rahul Bhosale caught hold of the legs and hands of the doctor. They also closed his mouth. Accused Deepti took out vials of drug and syringe from the bag and administered an injection to Dr. Deepak, due to which, within a short time, he became unconscious.

4. Thereafter, Deepti, with the help of Rahul Bhosale and Ketan Kale, moved Dr. Deepak in an unconscious state to the car that was parked near the building of the Shantanu lodge, under some pretext. He was made to sit on the rear seat in the middle. At one side, Rahul Bhosale and the other side of him, Ketan Kale were

sitting, whereas Deepti had driven the car. The car was driven towards Deccan Karve Road. Accused Deepti stopped the car at Deccan corner, while accused No. 2, Leena, was waiting. Rahul Bhosale and Ketan Kale were instructed to get down from the car and accused Nos. 1 and 2 took Dr. Deepak in the car, and the car proceeded towards Karve Nagar.

5. After some days, parts of the body of Dr. Deepak were recovered, allegedly at the instance of Leena, after both the accused were arrested, and the prosecution whipped up a story that Dr. Deepak was kidnapped by the accused persons, and he was administered an injection, which was anaesthetic. This drug was injected in order to make him unconscious, so that he did not create trouble. He was kidnapped for the purpose of getting ransom from his wife, and his wife was later on phoned on several occasions, and an amount of Rs. 25 lakhs was demanded as ransom from her. Because of the overdose of the anaesthetic injected to Dr. Deepak after he was removed from the aforesaid Shantanu Lodge and taken to another location, he died. Thereafter, the body was cut into pieces, put into bags, and parts of the body were left at different places, which were recovered at the disclosure of one of the accused. However, the head of the deceased was not found, but on the basis of the DNA reports, the identity of the recovered body parts as that of the deceased was established.

6. The incident of kidnapping took place on July, 2006. Both the accused were arrested on July 2006. The Additional Sessions Judge received the file on 30th September, 2006. The charges were framed on 5th May 2007 for offences punishable under Sections 419, 465, 468, 471, 328, 364/A, 342, 387, 302, 201 r/w 120-B of the Indian Penal Code. Both the accused pleaded not guilty and claimed to be tried. Their defence was of total denial and both claimed to be totally innocent.

7. A perusal of paragraphs 15 to 19 of the impugned judgement indicates that both the accused were directed by the learned Sessions Judge to engage a lawyer on their behalf at the time of hearing of their bail application itself and that both the accused did not engage any lawyer not only at the time of hearing of the bail application but also during the entire trial. The learned Sessions Judge appears to

have passed some orders in that regard. It is also noted in the impugned judgement that both the accused filed purshis before commencement of the trial itself to the effect that they did not want to engage any lawyer and that they have decided to prosecute the case personally.

8. It is also noted by the learned Sessions Judge that both the accused were made aware that they could seek legal assistance from the District Legal Aid Committee. It is also further stated therein that upon the accused submitting an application for getting legal advise, one advocate Sanjay Kadu was appointed at the request of the accused to defend both the accused. To prove these events one Sudhir Nahar Mokashi, Superintendent of District Legal Aid Committee, was examined as Court witness (PW-27). The learned advocate Sanjay Shankar Kadu, (PW-38) was also examined as Court witness who has disclosed during the course of his evidence that the accused wanted him only to give legal advise and both the accused did not want him to conduct the trial on their behalf by engaging him as their lawyer and consequently they refused to allow him to participate in the trial to defend them. He made a grievance that neither the accused signed the Vakalatnama in his favour nor supplied him the requisite case papers. Thus, both the accused have conducted the entire trial themselves.

9. The prosecution examined 46 witnesses and about 255 documents. Out of these 46 witnesses, 25 i.e. PW 13 to PW 46 were not cross-examined at all, and the cross-examination to which the other 21 witnesses were subjected by both the accused in-person was very perfunctory and cursory, as the accused were not represented by a lawyer. Ultimately the conviction was pronounced on 27th December, 2007.

10. The learned Sessions Judge has observed that the second accused Leena (mother) is a law graduate and that she has enrolled herself with the Bar Counsel of Maharashtra and Goa. It is further observed that she has also obtained Sanad permitting her to practice as a lawyer. On the basis of the evidence led by one Ramchandra Patil, the representative of the Bar Council of Maharashtra and Goa, who produced a letter of Secretary of the Bar Council at Exhibit-28 stating therein that Leena has obtained Sanad on 12th January 1982, the learned Sessions

Judge concluded that Leena was a practicing lawyer and that, therefore, she is having legal knowledge.

11. The learned Sessions Judge thereafter, while considering the over all conduct of the accused in paragraphs 143 to 150 of the impugned judgement, has dealt with the provisions of Section 304 of Code of Criminal Procedure (hereinafter referred to as the Code for brevity). It is further observed therein that the learned Sessions Judge made attempts to afford necessary opportunity to both the accused to defend themselves and that they did not avail of such opportunity. It is further observed that there is nothing on record to conclude that both the accused were handicapped for want of legal aid leading to negation of a fair trial. The learned Judge further noted that no lawyer could legally be forced upon both the accused when they were themselves reluctant to engage a lawyer. The learned Judge noted that both the accused have purposely conducted the trial themselves without engaging a lawyer, for the reasons best known to them when, all the time, their interest was protected by him. The learned Judge has further observed that both the accused have cross-examined material witnesses.

12. One of the grounds of attack on the conviction and sentence made by the learned Senior Advocate, Mr. Shirish Gupte, is that this was a mistrial, which was responsible for miscarriage of justice. Mr. Gupte submits that it is curious to note that the accused persons, who were two ladies, were facing serious charges. He further submits that the accused had always complained during the trial that the Judge was biased, and, therefore, on 6th July 2007 itself they had also approached the Hon'ble Supreme Court by way of filing a transfer application, which was pending when the trial was also pending; but the learned Judge did not even stop the proceedings in the matter, and conducted day-to-day trial. He pointed out that the first witness was examined on 8th June 2007, whereas the last witness was examined on 10th December 2007. The impugned judgement was pronounced on 27th December 2007 and both the accused received a communication from the Supreme Court dated 25th February 2008 by which time their request had become infructuous in view of the earlier disposal of their case. Even in the Memorandum of Appeal, which has been hand-written by the accused and sent from the jail, allegations of bias against the learned Judge have been

leveled.

13. We are not dealing with the matter of bias in detail. We are only noting down the submissions made by Mr.Gupte, and also noting down the submissions made in the Memo of Appeal, without commenting on them at this stage, in view of the course that we are adopting hereunder.

14. The main grievance of the accused-appellants, as well as the learned Senior Counsel, is that the accused could not get a fair trial, as the material witnesses were not cross-examined and those who were were cross-examined absolutely in a perfunctory manner. The reason given by the accused-appellants is that a lawyer of their choice was not made available, and because of the attitude of the learned Sessions Judge, they were sure that they are being convicted. Therefore, it was no use putting any defence before such a learned Sessions Judge who was with all certainty going to convict them.

15. We think that it will not serve any purpose at this stage to give a finding whether, as alleged by the appellants or even otherwise the trial Court was biased or not. We also do not think it necessary, at this stage, to go into the question of the effect of cross-examination of the witnesses, because the course we are adopting in this case would ultimately render these submissions and arguments merely academic. The accused-appellants have already now the assistance of one of the Senior Advocates of this Court. Therefore, we believe that whatever shortcomings in the trial that are alleged will be removed.

16. Recently the Supreme Court in the case of what is now known as the 'Best Bakery' case had an occasion to extensively deal with the concept of 'a fair trial'. True it is that the exercise in that regard was undertaken from the point of view of prosecution, but still the same will be relevant to appreciate the fairness of a criminal trial. Some of the relevant extracts from this judgement are given hereunder. This extract is taken from *Zahira Habibullah Sheikh v. State of Gujarat* : 2006 CriLJ1694

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying

the existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial: the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as *persona non grata*. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair

hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial. 40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

17. In our view the trial Courts are not merely spectators or umpires. The Courts have to participate in the proceedings before them in order to reach the correct conclusions. The Court must ensure that the guilty is punished and the innocent acquitted. There should not be an impression in the mind of the accused or in the mind of the prosecution or in the minds of those persons, who have suffered because of a crime that the Court has pre-judged the issue or that the Court was not fair to either the prosecution or to the defence or even to those who suffered because of the crime.

18. In as much as the present case is concerned, in spite of the aforesaid observations of the learned Sessions Judge as to the legal assistance offered to both the accused and denied by both of them, the fact cannot be lost sight of that the learned Judge himself did not make any effort whatsoever on his own to find out the truth. When one reads the examination-in-chief, especially of those witnesses who were not cross-examined by both the accused, even with inquisitiveness, one feels like putting atleast few questions, to each of these witnesses in order to ascertain the veracity of their evidence. It is most crucial and pertinent that the learned Judge did not ask even a single question as a Court Question to any of the witnesses. We emphasise that not a single question was asked to even any of those witnesses who were not cross- examined at all by both the accused. Reading of the entire oral evidence led by the prosecution unmistakably and crystal clearly demonstrates that the learned Judge has played no role at all to find out the truth and/or test the veracity of any of the witnesses examined on behalf of the prosecution. It is apparent that the learned judge did not even raise an eyebrow, before accepting the evidence of all those witnesses who were examined by the prosecution, in absence of either a scanty cross or any cross at all.

19. The entire conduct of the learned Sessions Judge in recording of the oral evidence of the witnesses calmly, quietly and with no interruption/intervention at all, without even a semblance of doubt in our mind has leads us to conclude that the learned Sessions Judge recorded the entire oral evidence merely as a silent spectator and/or an umpire and to put it rather harshly, like a tape-recorder. In such an important matter, normally, a Judge who is aware of the active role that he is expected as also required to play, as observed by the Supreme Court in the case of Zahira Shaikh (supra), would certainly have put several Court questions to each of these witnesses examined on behalf of the prosecution, especially to those witnesses who were not at all cross-examined by two ladies/accused, who have rather tried to be over-wise. However, as the entire record shows, that none was put to any of the witnesses in the present case.

20. It is true that the 2nd accused, mother Leena is a law graduate and has also enrolled herself as a practicing lawyer with the Bar Council of Mharashtra and Goa by obtaining a Sanad. However only on the basis of these two circumstances, in absence of any evidence on record to show as to how many cases she has conducted and/or appeared it cannot be concluded that she is an experienced and in true sense a practicing lawyer who did not need any legal assistance to defend herself in such a serious case. We therefore do not approve of the approach of the learned Sessions Judge of giving undue importance to these aspects of the matter in as much as conduct of ' a fair trial' in this case is concerned. In any event the case of the first accused, the daughter Diptti needs consideration independent of that of the first accused.

21. In our view, merely offering legal services to both the accused and whatever has been done in the present case by the learned Sessions Judge was not enough to meet the requirements of a fair trial. The learned Judge at least should have appointed an amicus to assist him to to find out the truth in the evidence led by the prosecution even though the accused had refused, for whatever reasons, the legal assistance offered to them by the learned Sessions Judge. On account of failure on the part of the learned Sessions Judge to even take the help of an amicus in the present case to ascertain the veracity of the oral evidence lead by the prosecution in this case, has led us to conclude that the trial has not been

conducted as a fair trial. In our view, applying the settled principles of law and applying the tests laid down by the Supreme Court from time to time to determine what is and what is not a fair trial, in the present case, 'a fair trial' has not been conducted.

22. The issue, which was before us, was: Whether we can summon and/or recall witnesses, for hearing confirmation/appeal in terms of Section 311 of the Code of Criminal Procedure ?

23. Section 311 of the Code of Criminal Procedure reads thus: 'Power to summon material witness, or examine person present, Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.'

24. From a bare perusal of the provision, it is clear that this power can be exercised during any stage of any enquiry, trial or other proceedings under the Code. The condition precedent for exercising this power is that it should appear to the Court that the decision for re-calling of the witnesses is essential to the just decision of the case. The facts and arguments we have mentioned hereinabove were only mentioned in order to see whether it will be essential to reach the just decision of the case; and we have no doubt in our mind that in a trial of this nature, where the sentence pronounced is ultimate that the witnesses should have been cross-examined, if not by the accused, by amicus curiae or by the judge himself, because the judge was not supposed to convict the persons, but he was supposed to establish whether the persons brought before it were guilty or not.

25. There was some doubt expressed during the hearing whether the power available under Section 311 was also available to this Court and as to whether such a power will enable this Court in the present proceedings to pass appropriate orders in that regard. In our view bare perusal of this provision itself shows that this power will be available not only during the inquiry or trial but also during 'other proceedings under the Code'. There can be no manner of doubt that the present

appeal as well as confirmation proceedings are proceedings under the Code and therefore we see no reason as to why in the present proceedings we cannot exercise power under Section 311 of the Code. There is one more reason for us to come to the same conclusion that is set out hereunder.

26. There is a provision in the Code of Criminal Procedure, which is Section 329. Section 329 relates to procedure to be adopted by the Courts as regards accused who are of unsound mind. This provision is limited to trials alone, whereas Section 311 has a larger scope. But even with its limited scope, the powers under Section 329 have been held by the Supreme Court to be available to the High Court as well while hearing a confirmation proceeding, on the ground that when a matter is sent by the Sessions Judge after pronouncing death sentence for confirmation to the High Court, the trial is not complete. It is held that in such a case the trial only completes if the death sentence is confirmed by the High Court or is rejected by the High Court.

27. In view of the aforesaid since we are not only hearing appeal, but we are also hearing the confirmation, therefore, we feel that even if it is held that the proceedings mentioned in Section 311 do not include the appeals under the Code, even then, we could summon and/or recall the witnesses under Section 311, as we are hearing confirmation proceedings as well. We hold accordingly, though we have no doubt that the proceedings under the Code of Criminal Procedure in Section 311 also include appeals being heard by the High Court under the Code.

28. The relevant observations of the Supreme Court in this regard made in the case of *State of Maharashtra v. Sindhi alias Raman* : 1975 CriLJ1475 are as under:

This extract is taken from *State of Maharashtra v. Sindhi* : 1975 CriLJ1475 14. From the above conspectus, it emerges clear that so far as an accused person sentenced to death is concerned, his trial does not conclude with the termination of the proceedings in the Court of Session. The reason is that the death sentence passed by the Court of Session is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by the competent court. Viewed from that standpoint, the confirmation proceedings under

Sections 374, 375 and 376, Chapter XXVII of the Code of 1898, are in substance a continuation of the trial.

29. Similar observations of the Supreme Court can also be found in the case of *Jummau v. State of Punjab* reported in AIR 1957 SC 472 which are as under:

This extract is taken from *Jumman v. State of Punjab* : 1957 CriLJ586

9. ...Along with the appeals filed by the accused, there was before the High Court, a reference under Section 374 Cr PC by the Sessions Judge, submitting to the High Court the proceedings before him for confirmation of the sentences of death passed by him. Under Section 375, Cr PC, the High Court has power to direct further inquiry to be made or additional evidence to be taken in such matters and according to Section 376, Cr PC the High Court has to confirm the sentence, or pass any other sentence warranted by law, or alternatively it may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge or the High Court may acquit the accused person. Section 377 Cr PC provides that the confirmation of the sentence or order passed by the High Court, shall, when such court consists of two or more Judges, be made, passed and signed by at least two of them.

10. It is clear from a perusal of these provisions that in such circumstances the entire case is before the High Court and in fact it is a continuation of the trial of the accused on the same evidence and any additional evidence and that is why the High Court is given power to take fresh evidence if it so desires. In an appeal under Order 41 of the Civil Procedure Code an appellate court has to find whether the decision arrived at by the court of first instance is correct or not on facts and law; but there is a difference when a reference is made under Section 374 Cr PC and when disposing of an appeal under Section 423 Cr PC and that is that the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High Court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons.

Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law abovementioned it is for the High Court to come to an independent conclusion of its own.

30. The Hon'ble Supreme Court, while analyzing Section 465, posed a question: Does the trial of a murder charge end with the confirmation and pronouncement of the death sentence on accused by the Court of Sessions, or does it continue till the Reference under Section 374 is disposed of by the High Court? Then it referred to a judgment of the Punjab High Court in *Daud Shaikh v. King Emperor* 40 Cal W N 159 (B) and quoted a passage from this judgment and ultimately answered the question by holding that the trial continues till reference is answered.

31. Section 329 in the earlier Code was Section 465, and both sections are also similar, whereas Section 465 in the old Code refers to 'Trials before Courts of Sessions or a High Court'. Section 329 in the Code refers to 'a trial before Magistrate or Court of Sessions'. This is understandable, because under the Code, no trials are being conducted by the High Court.

32. Section 465, as it was, is reproduced below:

465. Finding or sentence when reversible by reason of error, omission or irregularity(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has

occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

33. Section 329(1) in the new Code is as under:

329. Procedure in case of person of unsound mind tried before Court (1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

34. It will be seen that both these sections specifically apply to trials only, and not to any other proceedings, whereas Section 311 applies to trials as well as proceedings under the Code.

35. From the above conspectus, it establishes that in case of death sentence, the trial does not conclude with the termination of the proceedings in the Court of Sessions. The reason is that the death sentence passed by the Court of Sessions is subject to confirmation by the High Court. A trial cannot be termed to have concluded till an executable sentence is passed by the Sessions Court.

36. Having thus concluded that this is a fit case in which we should exercise jurisdiction under Section 311 of the Code of the Criminal Procedure, we propose to direct that certain witnesses who are important be recalled to the Court for the purpose of cross examination; one of the witnesses, who was cited as an eye witness to certain sequences of the events, namely Rahul Bhosale shall also be summoned for being examined as a Court witness. The list of the witnesses who are needed to be examined shall be framed by this Court after hearing the learned Counsel for the appellants as well as the learned Public Prosecutor. List the matter on 16th October, 2008, for placing the same at 4.30 p.m..

37. List these matters on 16th October, 2008, at 4.30 p.m. Before this Bench.

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