

Pratap Narain Agarwal Vs. Ram Narain Agarwal and ors.

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Court : Allahabad

Decided On : Sep-20-1979

Reported in : AIR1980All42

Judge : Satish Chandra, C.J., ;Yashoda Nandan and ;K.C. Agrawal, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2, 2(2), 47, 49, 96 and 99A; [General Clauses Act, 1897](#) - Sections 97(2)

Appeal No. : Ex. First Appeal No. 341 of 1978

Appellant : Pratap Narain Agarwal

Respondent : Ram Narain Agarwal and ors.

Advocate for Def. : Swami Dayal, Adv.

Advocate for Pet/Ap. : A.K. Banerji, Adv.

Judgement :

K.C. Agrawal, J.

1. This appeal was initially heard by a Division Bench consisting of Hon. H. N. Seth and Hon. V. K. Mehrotra, JJ. Being of the view that the controversy relating to maintainability of the appeal was of importance, which needed an authoritative pronouncement by a larger Bench, the following questions were referred for

opinion:--

1. Whether notwithstanding the provisions of Section 97 (3) of the Amending Act 1976 and amendment of Section 2(2) of the Civil P. C. by Section 3 of that Act, right of a party to file an appeal against an order determining the question falling under Section 47 of the Civil P. C. remains unaffected because of the provisions contained in Section 97 (2) (a) of the Amending Act ?

2. If answer to question No. 1 is in the negative, does Section 97 (2) of the Amending Act preserve the right of appeal against orders passed under Section 47 of the Code only in respect of appeals pending on the date on which the Amending Act came into force or does it permit appeals in cases where the right to file the same had accrued before coming into force of that Act ?

3. If it is held that Section 97 (2) saves the right of appeal against order passed under Section 47 of the Code also in cases where the right to file the same had accrued before coming into force of the Amending Act, when does the right to file an appeal against such orders accrue ?

2. For deciding the aforesaid questions, a brief reference to the facts is necessary. Ram Narain Agarwal, plaintiff-respondent, filed a suit against Pratap Narain and others for dissolution of partnership, rendition of accounts, and winding up of the affairs of the firm M/s. Agarwal Ice Factory, Ahmedabad. Certain orders were passed in the suit. Against those orders, three First Appeals from Orders were preferred in this Court. These appeals were numbered 31 of 1971, 196 of 1972 and 197 of 1975. In these appeals, on 21-1-1975, the parties entered into a compromise. The compromise was verified and, thereafter, the appeals were decided in terms of the compromise, which was directed to form part of the decree.

3. On 20-1-1975, the plaintiff-respondent moved an application for execution of the compromise decree. An objection under Section 47 of the Civil P. C., was filed by Pratap Narain Agarwal objecting to the execution, inter alia, on the ground that there being no executable decree, the application was not maintainable. The case of the defendant-appellant was that the decree relied on by the plaintiff-respondent

was purely declaratory and, as such was incapable of being executed. On 23-8-1978, the objection was dismissed, and a writ of attachment was directed to be issued. Against the dismissal of the objection filed under Section 47, Civil P. C., the present appeal was preferred in this Court on 11-9-1978.

4. On 25-9-1978, an objection was filed by the plaintiff-respondent that the appeal was not maintainable. The appeal came up for hearing before a revision Bench. As already stated above, the Division Bench having found that the point relating to the maintainability of the appeal was of general importance and was likely to affect the rights in a large number of cases, made the present reference for deciding the questions stated above.

5. For deciding the question of maintainability of the appeal, it is necessary to refer to some of the provisions of the Civil P. C. as it stood before the Civil Laws (Amendment) Act (104 of 1976) (hereinafter referred to as Act 104 of 1976). The first thing to be noted in this regard is the definition of the word 'decree', given in Section 2(2) of the Civil P. C. The definition, as it originally stood, reads as under:--

' 'decree' means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 41 or Section 144, but shall not include --

(a) to (b)

Explanation

6. From the above definition of the word 'decree', it would be gathered that a legal fiction has been created in respect of an order passed on an objection filed under Section 47, Civil P. C. Under this definition, a decree is deemed to include the determination of any question falling under Section 47, Civil P. C. although the determination of the said question is neither in a suit nor is drawn up in the form of

a decree. Undoubtedly, the execution proceeding is not a suit but the combined effect of Section 2(2) and Section 47 was that an order passed in execution proceedings was tantamount to a decree in so far as it conclusively determined the question arising between the parties relating to the execution of the decree, Hence, if an order decided a question relating to the right's and liabilities of the parties, with reference to the relief granted by the decree, it fell under Section 47 and amounted to a 'decree' within the meaning of Sub-section (2) of Section 2. The definition of Section 2(2) takes in both an order under Section 47 and that made under Section 144. The two sections are included for the purpose of giving a right of appeal (See *Mahijibhai v. Manibhai*, AIR 1965 SC 1477, para 28). Accordingly, as an order dismissing an objection amounted to a decree, an appeal lay under Section 96 of the Code against such an order.

7. In its Twentyseventh Report, the Law Commission considered at length some aspects of revision of the Civil P. C., 1908. In pursuance of the recommendations of the said Report, a Bill to implement the same was introduced in Parliament, but the Bill lapsed. When the question of re-introduction of the Bill arose, the Govt. of India considered it proper, to request the Commission to examine the Code afresh from the 'basic angle of minimising costs and avoiding delays in litigation and taking into account its revised terms of reference.' The Law Commission submitted the Fiftyfourth Report suggesting certain amendments in the Civil P. C. But, the Report did not suggest any change in the definition of the word 'decree' so as to affect the right of an appeal against an order passed on an objection filed under Section 47, Civil P. C. In order to avoid delays in execution the Law Commission suggested the insertion of a new provision as S, 99-A providing that no order made on an objection under Section 47 shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity in any proceeding not affecting the merits of the case or the jurisdiction of the Court. A Bill was drafted on the basis of the recommendations of the Law Commission. The Bill was, however, referred to a Joint Committee. The Joint Committee suggested a change in the definition of the word 'decree.' While making the suggestion, the Committee observed:

'The Committee note that according to the definition of the expression 'decree' in the Code, the determination of any question under Section 47 amounts to a decree, and as such an appeal and second appeal would lie against such determination. The Committee are of the view that this provision of the Code is mainly responsible for the delay in the execution of decrees. The Committee, therefore, feel that the definition of the term 'decree' should be amended so that the determination of question open under Section 41 may not amount to a decree.'

8. The recommendations of the Joint Committee on the amendment of Section 2(2) was accepted and a Bill was introduced incorporating the same. In the Bill, Section 99-A was also included, but the words 'in appeal', as recommended by the Law Commission, were dropped. The Bill was passed by the Parliament and, thereafter, it became the Act.

9. Consequent upon the passing of the Act, the words and figure 'Section 41 or' from Section 2 (2) have been omitted by the Civil P. C. (Amendment) Act, 1976. Section 99-A, as incorporated in the Civil P. C. now, reads:

'Without prejudice to the generality of the provisions of Section 99, no order under Section 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case.'

10. As already noticed above, the submission of the plaintiff-respondent was that as the order dismissing the objection of the defendant-appellant under Section 47 of the Civil P. C. does not now amount to a decree, the appeal filed was incompetent. It was contended that since an appeal under Section 96, Civil P. C. lies against a decree and the impugned order did not amount to the same, the appeal should be dismissed.

11. Controverting the above submission of the counsel for the plaintiff-respondent, the defendant-appellant contended that in spite of the amendment of the definition of the term 'decree', deleting Section 47, an appeal against an order under Section 47 is still maintainable. Counsel's contention was that the right to file an appeal having accrued to the defendant-appellant, at the time when the suit was filed, the

same could not be taken away. The second argument in support of the maintainability of the appeal was that Section 97 (2) (a) preserves the right of an appeal against an order made under Section 47, Civil P. C. The relevant portion of Section 97 of Act 104 of 197:6, which deals with repeals and savings, reads as under:

'(1) Any amendment made, or any provisions inserted in the principal Act by the State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment or provision is consistent with the provisions of the principal Act amended by this Act stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or the repeal under Sub-section (1) has taken effect and without prejudice to the generality of the provisions of Section 6 to the [General Clauses Act, 1897](#)--

(a) The amendment made to Clause (2) of Section 2 of the principal Act by Section 3 of this Act shall not affect any appeal against the determination of any such question as is referred to in Section 47 and every such appeal shall be dealt with as if the said Section 3 had not come into force:--

(b)

(3) Save as otherwise provided in Sub-section (2) the provisions of the principal Act, as amended by this Act shall apply to every suit, proceeding, appeal or application pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed had been acquired or had accrued before such commencement.'

12. In connection with the controversy before us, we may note that right to file an appeal is a vested right, and that it accrues to a party on the date of institution of the suit. The right is governed by the law prevailing at the date of institution of the suit. The right to file an appeal or a suit is a mere matter of procedure only or is something more than a matter of procedure was considered in *Colonial Sugar Refining Co, Ltd. v. Irving* (1905 AC 369), which is a leading case on the point.

13. The question as to whether the right of appeal was matter of substantive right and not merely of procedure came up for decision before the Supreme Court in *Garikapati v. Subbiah Choudhry* (AIR 1957 SC 540). After discussing the cases decided by various Courts, the Supreme Court found amongst others, the following principles which emerged from those decisions.

(1) The right of appeal is not a mere matter of procedure, but is a substantive right,

(2) The institution of a suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit, and

(3) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when adverse judgment is pronounced. A vested right of appeal can be taken away by a subsequent enactment, if it so provided expressly or by necessary intendment and not otherwise.

14. This decision of the Supreme Court has been followed in subsequent decisions given by the Supreme Court itself. The position of law thus being settled, it is not necessary for us to refer to those cases.

15. So far as execution is concerned, the right accrues to a litigant on the date of filing of the execution application. An execution application is not continuation of suit. It is separate from, and independent of a suit, In *Pratap Narain Agarwal v. Ragho Prasad* (1969 All LJ 244), a Full Bench of this Court was called upon to consider the question as to the right of appeal in the matter of an execution. In that regard, the Full Bench observed:

'But, the proceedings in execution of decree are entirely independent of the suit. The right of appeal against decrees passed in execution would accrue on the date of institution of the execution application.'

16. We are in respectful agreement with the view taken in the aforesaid Full Bench. It follows that in a matter of execution, the right of appeal is governed in accordance with law as it is on the date of institution or filing of the execution

application.

17. Now the question for enquiry is whether there is anything in Act 104 of 1976 demonstrating that the right to file appeal which accrued on the date of filing of the execution application was taken away. True it is as said in *Hough v. Windus* ((1884) 12 QBD 224, at page 237), the statutes should be interpreted if possible, so as to respect vested rights. It is also correct at the same time that the gold-den rule of construction is that, in the absence of anything in the enactment to show that law should have retrospective operation, an Act should be construed so as to apply prospectively. These propositions are, however, subject to the control by the legislature. The legislature can enact a law taking away the vested right of appeal by making a provision to that effect or by expressing an intention to the contrary,

18. An appellate jurisdiction is the authority of a superior Court to review, reverse, correct or affirm the decisions of an inferior Court. An appeal is considered as continuation of the original suit rather (than) as the inception of a new action, A litigant may have a right to institute a suit unless specifically barred, but there is no right of appeal unless conferred. For filing a suit right is not required to be conferred by any statute whereas since the right of appeal is the right from the statutory provision by which it is created, such a right has got to be conferred. It does not inhere in a litigant. The right of appeal conferred or acquired has to be exercised only in the manner prescribed.

19. As already pointed out above, the legislature has authority to abridge a right to appeal at its discretion. The legislature may take away the right of appeal.

20. We are now required to see as to whether there is, in the instant case, any provision made in Act 104 of 1976, which leads us to the conclusion that the right had been taken away. We have already pointed out that by the (Amending Act) definition of the expression 'decree' has been amended. As a consequence, an order passed on an objection under Section 47 ceases to be a 'decree'. As the order ceases to be a decree, it could not be appealed against. The provision amending Section 2 (2) was applied to the execution proceedings, without any reservation. We have already referred to the object with which Section 2 (2) was amended. From its experience, the legislature had gathered that frivolous

objections used to be filed to the execution of decree and the same had the tendency to prolong the litigation unduly. By filing objections, the judgment-debtors could successfully delay the execution. Accordingly, Section 2 (2) was amended for the purposes of meeting the aforesaid eventuality. As a result of the amendment, a decision on an objection filed under Section 47 is no more a decree. As it is not a decree, the order passed on such an objection is not appealable.

21. From the manner in which the amendment was made in Section 2(2) of the Civil P. C., the irresistible conclusion is that the intention of the legislature was to affect the vested right retrospectively. This intention has been manifested by express words, Even otherwise, the necessary implication of the amendment appears to be that the same was made to be a retrospective operation. It could not be and was not argued that despite the amendment made in Section 2(2) an order passed on an objection filed under Section 47 after the amendment would amount to a decree. The question only was with respect to the pending applications on the date of enforcement of the amendment. The fact that after the amendment a decision on an objection under Section 47 would not amount to a decree, establishes that the decision given on objections can no longer be treated as decrees.

22. We have already noted the report of the Joint Committee which gave the reasons for bringing about the amendment in the definition of the term 'decree'. The report of the Joint Committee is an aid to the construction and, as such, can be looked into for ascertaining or determining the intention of the legislature. The report leaves no room for doubt that the intention behind the amendment was to deprive a party of his right to file an appeal which accrued against an order passed under Section 47. This amendment negatives any appeal which lay previously. For our view, we find support from a decision reported in Mohan Das v. Smt. Kamla Devi, AIR 1978 Raj 127.

23. Counsel for the appellants, however, placed strong reliance on Section 97 (2) (a) of Amending Act 104 of 1976, and urged that as the right to file appeal in matters where an application for execution has been filed before the enforcement

of Act 104 of 1976 has since been saved under the aforesaid provision, the appeal cannot be dismissed. According to his submission, Section 97 of the Act can be classified into two classes: (1) cases where rights of instituting appeal or proceeding had been exercised by the party concerned, and (2) where the right had accrued but had not been exercised within the time the amendment came into force.

24. In the instant case, admittedly, the appeal had not been filed before the Amending Act came into force. Hence, out of the two categories made by the learned counsel, the first category should not apply. So far as the second category is concerned, we are not in agreement with his submission that in all cases where execution applications had been filed before Act 104 of 1976 came into force, the right to appeal had been preserved. On the interpretation of Clause (a) of Section 97 (2) there is no dispute about the proposition that the pending appeals at the time of enforcement of the Act had been saved under it, but it does not appear correct that in all pending execution applications the right to appeal is preserved even in respect of a pending application on the date of enforcement of the said Act. The language of Section 97 (2) (a) does not permit such an interpretation. Under this clause, the amendment made in Section 2 (2) of the principal Act does not affect any appeal against the determination of any question as is referred to in Section 47, The expression 'shall not affect any appeal', in our opinion, does not take within its sweep even the cases where execution applications were pending before the executing Court. This expression is capable of an interpretation that where the right to appeal had accrued because of passing of a decree on an objection under Section 47, the same would not be affected by the amendment, inasmuch as in such a case decree had already come into existence, As the decree had already come into existence, it should be left untouched by the amendment made in Section 2 (2). The amendment in Sub-section (2) of Section 2 was that an order would not amount to a decree. As it did not amount to a decree, such an order was not appealable. But, where a decree had already come into existence, the amendment of Section 2 (2) did not apply. Consequently, the legislature intended to save the right to file an appeal in such a case and for that purpose the saving Clause (a) in Section 97 (2) was enacted,

25. The other purpose of enactment of Section 97 (2) (a) appears to be to save the appeals which were pending on the date of enforcement of Act 104 of 1976. All those appeals, which were pending on the date of enforcement of this Act were required to be dealt with and decided in accordance with the old Act.

26. As the legislature intended to cover two types of cases, mentioned above, it did not deliberately use the expression 'pending' in Clause (a) of Section 97 (2). Had the legislature used that expression, the scope of the same would have been narrowed down to cases where appeals were pending on the date of enforcement of the Act. Advisedly, the legislature did not use the same. It did not intend to take away the right to appeal against an order passed on the objection before the enforcement of the Act as the status of a decree had been obtained on the date of disposal of the objection.

27. Emphasising on the circumstances that Clause (a) of Section 97 (2) since does not use the expression 'pending' like Clauses (j), (k), (m) of Sub-section (2) of Section 97. counsel emphasised that the scope of Section 97 (2) (a) should not be narrowed down to include only the aforesaid two categories. According to him, the saving clause should be so interpreted that it does not defeat the general proposition that a statute, which affects the right in existence, is not readily construed to affect the adjudication of pending proceedings. No doubt, Courts have leaned strongly against applying a new statute to a pending action, but since in this case the language employed in the Amending Clause leads us to the inescapable conclusion that it will have retrospective effect, covering the pending cases as well, we are compelled to do so. Any other interpretation placed on the amendment of Section 2 (2) is likely to defeat the object and purpose of the Act. The Court is required to interpret a law in the manner that it gives effect to the object and does not defeat it.

28. The argument of Sri Rajeshwari Prasad, in fact, would mean that the appellant had a right to appeal despite the amendment made in Section 97 (2) (a). The submission made is untenable. A saving clause has a limited role to play, It was observed by Wook V. C. in *Fizgerald v. Champneys* (1861) 70 ER 958, that saving clauses are seldom used to construe Acts. These clauses are introduced into Acts

which repeal others to safeguard rights which, but for the savings would be lost. If we were to keep the above settled proposition of law in mind, the argument of Sri Rajeshwari Prasad would be liable to be repelled. His reading of Section 97 (2) (a) was to the effect which conferred on the appellant the right to file an appeal. As observed by Craies on Statute Law, Fifth Edition, pp. 201-202, the effect of an excepting or qualifying proviso is to except out of the preceding portion of the enactment or to qualify something enacted therein, which but for the proviso should be within it. Such a proviso cannot be construed as enlarging the scope of an enactment. This proposition of law is although with respect to the interpretation of a proviso, but applies to the case of savings as well. Savings means that it saves all the rights the party previously had, not it gives him any new rights. That being so the interpretation placed on Section 97 (2) (a) must be rejected.

29. Counsel referred to Clause (f) of Section 97 (2) after the amendment and pointed out that the provisions of Section 35-A of the principal Act, as amended by Section 14 of the Amending Act, shall not apply to or affect any proceeding pending immediately before the commencement of the said Act, and every such proceeding shall be dealt with and disposed of as if the said Section 14 had not come into force. Reference was also made to Clauses (j), (k) and (m) of Sub-section (2) of Section 97 of the Civil P.C. in support of this argument.

30. We are not impressed by the submission made by the learned counsel. It is the settled rule of interpretation that the words in a statute draw their colour from the context as a whole. The context, therefore, has to be kept in mind for knowing the exact connotation of the words used. In the context in which the words 'pending before the commencement of the Act' have been used in the various clauses of Section 97 (2), seeing the context, we find that the legislature deliberately did not employ the same methodology in respect of Clauses (j), (k), (m), (n), (o). Under Section 97 (2), a different situation was contemplated and checkmated than those which were the subject-matter (of) coverage under Clauses (j), (k), (m), (n), (o). Under Clause (a), as already stated above, since the legislature intended to save the appeals where decree had already been passed, it did not use the word 'pending' or some such expressions which were employed in Clauses (j), (k), (m), (n), (o). Section 97 (2) (a) preserves the right of filing appeals

in cases where even though appeals had not been filed before the coming into force of the Amending Act, the right to file the same had already accrued before that date due to a decree coming into existence. It is not true of Clauses (j), (k), (m), (n), (o), which provide for different contingencies.

31. Another argument advanced was about the incorporation of Section 99-A. Counsel contended that if the legislature did not intend to preserve the right of appeal, as it existed before the enforcement of Act 104 of 1976, it would not have enacted Section 99-A. According to counsel's contention, Section 99-A would be rendered redundant if the interpretation placed on behalf of the plaintiff-respondent was accepted. He urged that one of the principles of construction being that the Court should interpret a law avoiding redundancy, the Court should hold that the right of appeal is not affected because of the amendment made in Section 2(2) of the Civil P. C. In this connection, counsel also pointed out that the fact that Section 99-A is to be found in Part VII which deals with 'appeals', the Court must hold that the appeals have still been preserved.

32. We are unable to find any substance. It has already been pointed out above that incorporation of Section 99-A had been pressed by the Law Commission. At the time of the proposal for incorporation of Section 99-A, there was no intention to make any amendment in Section 2 (2). Subsequently, when the Joint Committee amended Section 2 (2), the words 'in appeal' used in Section 99-A by the Law Commission were deleted. As a result, Section 99-A still applies to proceedings other than appeals, i.e. revisions. Hence, it is not correct to argue that Section 99-A would be redundant if the interpretation placed by the plaintiff-respondent was accepted. The mere keeping of Section 99-A in Part VII is not a circumstance helping the defendant-appellant in advancing his submission. If we look more closely at the Chapter, we find that reasons are manifold to reject the submission. If the intention was as suggested by the counsel by insertion of Section 99-A, to keep the right of appeal alive, where was the necessity of insertion of such a clause. Such an eventuality is clearly foreseen and guarded (against) by Section 99, which also used the word 'appeal'.

33. The other argument was that whereas the legislature has deleted the words 'Section 47 or' it has not touched the determination of any question within Section 144. Since the nature of procedure under Sections 47 and 144 is similar, the Court should not hold that whereas an appeal lies against an order deciding an objection filed under Section 144 such an appeal would not lie on an objection filed under Section 47. This submission is also devoid of merits. There is a substantial difference between the proceedings contemplated by these two sections. It is settled law of interpretation that whereas the words of a statute are clear, plain and unambiguous, the Courts are bound to give effect to it. (See *Nasiruddin v. S. T. A. Tribunal*, AIR 1976 SC 331). Since the amendment made in Section 2 (2) speaks for itself, there is no scope of construction or interpretation. At any rate, it being a matter of policy, we cannot delve into it. Appeal lies to the Legislature and not to the Courts.

34. The next submission made was with respect to S, 6 of the General Clauses Act. Counsel contended that as Section 97 (2) provides that the rights conferred by Section 6 of the General Clauses Act are preserved, this Court should apply Section 6(1)(c)(d) and hold that the right to appeal is not affected by the amendment. The submission made is not tenable. A reading of Sub-section (2) of Section 2 clearly shows that Sub-section (2) would supersede the provisions of Section 6 to the extent stated in Clauses (a) to (zb). The language of Sub-section (2) of Section 97 clearly shows that the provisions made therein would prevail despite anything contained to the contrary in Section 6 of the General Clauses Act. Hence, the submission of the appellant's counsel that Section 6 of the General Clauses Act still preserves the right of appeal cannot be accepted. Section 6 of the General Clauses Act itself provides 'unless a different intention appears, the repeal shall not affect any right, privilege or obligation or liability acquired or incurred under any enactment so repealed.' Since in the instant case, there is a different intention, Section 6 cannot be pressed into service. Section 97 (3) has a different role to play. This Section 97 (3) is subject to the provisions of Sub-section (2) of Section 97. Since in the instant case, Section 97 (2) applies, the right to file appeal has to be governed by the latter.

35. For the reasons given above, we answer the first question in the negative,

36. The second question is answered in the affirmative by saying that Section 97 (2) (a) preserves the right of appeal against orders passed under Section 47, Civil P. C. in respect of appeals already pending on the date of enforcement of the Amending Act as well as in respect of appeals where the orders on the objection filed under Section 47 had already been passed before the enforcement of the Civil Laws (Amendment) Act.

37. The third question is answered by saying that the right to file an appeal accrues on the date of filing of the execution application.

38. Let the papers of this case be laid before the appropriate Bench with the answers mentioned above.

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