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Ram Kishun Vs. State Election Commissioner and ors.

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Court : Allahabad

Decided On : Apr-16-2003

Reported in : 2003(3)AWC2271; (2003)2UPLBEC1340

Judge : S. Rafat Alam and ;M. Chaudhary, JJ.

Acts : Constitution of India - Articles 226 and 243O; Uttar Pradesh Kshetra Panchayats (Election of Pramukhs and Up Pramukhs and Settlement of Election Disputes) Rules, 1994 - Rules 26-29 and 35

Appeal No. : C.M.W.P. No. 8864 of 2001

Appellant : Ram Kishun

Respondent : State Election Commissioner and ors.

Advocate for Def. : B.D. Mandhyan, ;Chandreshwar Prasad, ;Yogesh Agarwal and ;Indra Sen Singh, Advs. and ;S.C.

Advocate for Pet/Ap. : P.K. Singh and ;Mahendra Pratap, Advs.

Disposition : Writ petition dismissed

Judgement :

S. Rafat Alam, J.

1. In the instant writ petition the petitioner has prayed for the following reliefs :

'(a) issue a writ, order or direction in the nature of certiorari quashing the impugned declaration dated 8.3.2001(Annexure-6 to this writpetition) declaring Balwantrespondent No. 4 as electedPramukh Kshettra PanchayatBhathat, district Gorakhpur ;

(b) issue a writ, order or direction in the nature of mandamus commanding respondent not to administer oath of office to respondent No. 4 for elected post of Pramukh Kshettra Panchayat Bhathat, district Gorakhpur ;

(c) issue a writ, order or direction in the nature of mandamus commanding the respondents to treat the petitioner as validly elected Pramukh of Kshettra Panchayat, Bhathat, district Gorakhpur in pursuance of the declaration dated 8.3.2001 (Annexure-4 to this writ petition) ;

(d) issue any other suitable writ, order or direction which this Hon'ble Court may deem just and proper under the facts and circumstances of the case ;

(e) award the costs of this writ petition.'

2. The short facts giving rise to the present petition are that the election process for the election of Pramukh and Up Pramukhs of Kshettra Panchayat in the district of Gorakhpur was set in motion by issuance of notification dated 1.3.2001. As per notified election programme, the nomination papers were to be filed on 5.3.2001 between 11 a.m. to 3 p.m., scrutiny was to be done on 5.3.2001 after 3 p.m., and the last date for withdrawal of nomination was 7.3.2001 between 9 a.m. to 1 p.m. The date of the poll, if necessary, was fixed between 10 a.m. to 3 p.m. on 8.3.2001 and the counting of votes and declaration of result thereafter was to take place after 3.30 p.m. on the same day. Both the petitioner and respondent No. 4 being elected members of Kshettra Panchayat, Bhathat, filed their nominations pursuant to the aforesaid notification dated 1.3.2001 for contesting the election of Pramukh of Kshettra Panchayat, Bhathat. After verification and scrutiny of their nomination papers, they contested the election. Immediately after the polling, counting of votes was taken up. The version of the petitioner is that total 60 votes were cast out of which 13 votes were found to be invalid by the Assistant Returning Officer, hence the same were not counted and thus only 47 votes which were found valid

by the Assistant Returning Officer were counted, out of which 25 votes were polled in favour of the petitioner and 22 votes were cast in favour of respondent No. 4 and on that basis the Assistant Returning Officer, respondent No. 3 declared the petitioner as elected Pramukh of Kshettra Panchayat, Bhathat and also issued declaration in Form-VIII under Rule 29 of Uttar Pradesh Kshettra Panchayats (Election of Pramukhs and Up Pramukhs and Settlement of Election Disputes) Rules, 1994 (hereinafter referred to as Rules). Consequently, the declaration of result was also communicated to the District Magistrate, Gorakhpur for communicating the same to the State Election Commission and the State Government. However, this fact has seriously been disputed by the respondents and according to them the petitioner was not declared elected as provided under Rule 29 of the rules and it was only determination of result under Rule 27. Their case is that immediately after determination and pasting of result, a complaint was filed by respondent No. 4 alleging that 13 votes have wrongly been rejected and the Assistant Returning Officer, therefore, forwarded the papers to the District Election Officer who immediately sent Fax message to the Election Commission along with full details together with the report of the Assistant Returning Officer. The Election Commission thereafter communicated its decision to the District Election Officer that 13 votes have wrongly been rejected and, therefore, directed the Assistant Returning Officer to count those votes also. Accordingly, those 13 votes were recounted as valid votes under Rule 28, out of which 9 votes were found to be polled in favour of respondent No. 4 and 4 votes in favour of the petitioner. Thus, the petitioner could secure only 29 votes whereas 31 votes were polled in favour of respondent No. 4. The result was thereafter declared in the presence of the parties and their signatures were also obtained on Form-VIII.

3. The contention of the learned counsel for the petitioner is that the petitioner having been elected as Pramukh and after issuance of certificate of return in Form-VIII in his favour, the Assistant Returning Officer has no jurisdiction to re-count the invalid votes and make fresh declaration after recounting of invalid votes and, therefore, the declaration issued in favour of respondent No. 4 is per se illegal and without jurisdiction. Relying on two Division Bench judgments of this Court in the case of Smt. Ram Kanti v. District Magistrate and Ors., 1995 AWC 1465, and in the case of Shambhu Singh v. State Election Commission and Ors., 2000 (4)

AWC 2777, it is vehemently contended that after the declaration of result, the election process comes to an end and the Returning Officer becomes functus officio and has no jurisdiction to direct for recounting pf votes as it will amount to reopen the election process.

4. While opposing the writ petition, Sri B.D. Mandhyan, learned counsel appearing for the State Election Commission contended that before declaration of result as provided under Rule 29, respondent No. 4 filed objection regarding rejection of 13 votes which was referred to the Election Commission and after the receipt of direction from the Election Commission to count those 13 votes, the ballot papers were recounted whereupon the declaration of result was made in presence of the parties as required under Rule 29. He also submitted that Form-VIII which has been produced by the petitioner was prepared at the stage of determination of result as provided under Rule 27 but before the declaration could be made, recounting was ordered by the Election Commission and, therefore, even if Form-VIII was given to the petitioner, that was of no value unless the result is declared in the manner prescribed under Rule 29 and the same is reported to the District Magistrate, State Election Commission and the State Government.

5. Sri Yogesh Agarwal, learned counsel appearing for respondent No. 4, took us to various provisions contained in the rules and argued that the valid votes were wrongly declared invalid on the grounds which are alien to the grounds mentioned in Sub-rule (3) of Rule 26 of the rules which provides about the rejection of invalid ballot papers. He further argued that respondent No. 4 Immediately after the determination of result under Rule 27, lodged protest before the Assistant Returning Officer by filing an application dated 8.3.2001 whereupon direction of the State Election Commission was sought through the District Magistrate/ District Election Officer and the State Election Commission having appreciated that the rejection of valid ballot papers and illegal, directed the Assistant Returning Officer to count all the 13 rejected ballot papers and on recounting respondent No. 4 was found to have secured 31 votes, whereas the petitioner could secure only 29 votes. Thereafter declaration of result was made as provided under Rule 29 of the rules. He further submitted that if the rejected ballot papers have wrongly been counted on the direction of the State Election Commission, the remedy is to

challenge the same by filing election petition as provided under Rule 35 and writ petition does not lie.

6. It is well-settled legal position that after the declaration of return of elected candidate, the election process comes to an end and the Returning Officer or the Election Commission becomes functus officio and has no jurisdiction either for recounting of votes or for repolling and it is only the Election Tribunal constituted under the law who can go into the controversy as to whether the votes have correctly been counted or have wrongly been rejected. However, in the case in hand, the core issue which falls for our determination is as to whether as claimed by the petitioner, he was declared elected in terms of Rule 29 or the alleged declaration was only determination of result under Rule 27 and not declaration of result as provided under Rule 29.

7. In order to appreciate the controversy, let us have a look of Rules 26, 27, 28 and 29, which are the relevant provisions in the facts of the case and are set out hereinafter :

'26. Procedure at the counting.--(1) As soon as the poll is closed the Returning Officer shall, in the presence of the contesting candidates and the members who may be present proceed to count the votes.

(2) The Returning Officer shall open the ballot box and shall :

(a) count the number of ballot papers taken out therefrom and record it in a statement;

(b) scrutinize the ballot papers and separate those which in his opinion are valid from those which in his opinion are invalid endorsing on the latter the word 'rejected' with reasons for such rejection ;

(c) arrange all the valid ballot papers in parcels according to the first preference recorded for each candidate.

(3) A ballot paper shall be rejected as invalid on which :

(a) the number 1 is not marked ; or

(b) the number 1 is marked opposite the name of more than one candidate or is so marked as to render it doubtful to which candidate it is intended to apply ; or

(c) the number 1 and some other numbers are marked opposite the name of the same candidate ; or

(d) any mark is made bywhich the voter mayafterwards beidentified.'

'27. Determination of result--After all the valid ballot papers have been arranged in parcels according to the first preference recorded for each candidate, the Returning Officer shall proceed to determine the result of the voting in accordance with the instructions contained in Schedule II to those rules.

'28, Recounting.--The officer may, either on his own initiative or at the instance of any candidate recount the votes, whether once or more than once, when the Returning Officer is not satisfied as to the accuracy of the previous counting :

Provided that nothing herein contained shall make it obligatory on the Returning Officer to recount the same votes more than once."20. Declaration of result,--When the counting of the votes has been completed and the result of the voting has been determined, the Returning Officer shall in the absence of any direction by the State Election Commission to the contrary forthwith :

(a) declare the result to those present ;

(b) report the result to the District Magistrate, the State Election Commission and the State Government;

(c) prepare and certify return of the election in Form-VIII ; and

(d) seal up in separate packets the valid ballot papers and the rejected ballot papers and record on each such packet a description of its contents.'

8. The above rules are in plain and simple language having no ambiguity requiring Interpretation by this Court. A reading thereof clearly provides that when the polling is closed, the Returning Officer in the presence of the contesting candidates and the members present shall proceed to count the votes. Sub-rule

(3) of Rule 26 provides that a ballot paper shall be rejected as invalid on the grounds mentioned in Clauses (a), (b), (c) and (d) of Sub-rule (3) of Rule 26. After counting of valid ballot papers, he shall determine the result in accordance with the instructions contained in Schedule II of the Rules. Thereafter Rule 28 comes in, which provides recounting. The Returning Officer, either suo moto or at the instance of any candidate, can order for recounting of votes. Therefore, if any objection or application is moved immediately after determination of result for recounting of votes under Rule 28, that is to be disposed first before proceeding to the last stage, i.e., declaration of result under Rule 29. The declaration under Rule 29 can be made after disposal of objection/application filed against the rejection of votes or for recounting. The determination of result under Rule 27 is not declaration of result and the Returning Officer has no jurisdiction to issue Form-VIII or any certificate till the declaration is made under Rule 29 after disposal of objection or application, if any, filed by any candidate. Suppose a Returning Officer issues Form-VIII without counting of votes as prescribed in Rule 26, can it be said to be a valid declaration, obviously not. Therefore, merely issuance of Form-VIII is not the compliance of the prescription of law. Thus, issuance of Form-VIII after determination of result and without disposing the application/objection of the candidate, is not a valid declaration and in our view, such declaration is void ab initio and if any contrary view is taken, in that event Rules 28 and 29 would become redundant. The Returning Officer after determination of result and disposal of the application/ objection to recount the votes/ballot papers shall proceed to declare the result in the manner as provided under Rule 29. Rule 29 prescribes four separate and distinct steps which are to be taken, viz., (i) declare the result to those present, (ii) report the result to the District Magistrate, State Election Commission and the State Government, (iii) prepare and certify return of the election in Form-VIII, and (iv) seal up in separate packets the valid ballot papers and the rejected ballot papers and record on each such packet a description of its contents. Therefore, declaration is to be made not only to the winning candidates but also to those who are present. It has not been asserted in the writ petition that the alleged declaration was made in the presence of the persons present at the time of counting/recounting of the ballot papers.

9. It is well-settled principle of law that where a statute provides to do certain thing in a certain manner, it has to be and must be done in that manner and if any other method is adopted, the object and purpose of the provision is defeated and failure to comply with those provisions vitiates the order. Reference may be made to a Judgment of the Apex Court in the case of Ram Chandra v. Govind, AIR 1975 SC 915, wherein the Hon'ble Supreme Court relying on Taylor v. Taylor, (1875) 1 Ch D 426, observed that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.

10. Now coming to the facts of the case in hand, it has been averred by the petitioner in para 8 of the writ petition that after determining the result of counting under Rule 27, the Assistant Returning Officer, respondent No. 3, issued declaration in Form-VIII under Rule 29 declaring him to be elected as Pramukh of Kshettra Panchayat Bhathat and the report of the declaration of result was sent to the District Magistrate, Gorakhpur, for onward communication to the State Election Commission and the State Government. A true typed copy and photo copy of the declaration has been annexed as Annexure-4 to the writ petition. The petitioner conspicuously did not disclose the fact that immediately after counting of votes and determination of result before declaration, an application/ objection was filed by respondent No. 4 for recounting of votes. The statement made in para 8 of the writ petition has been replied in para 9 of the counter-affidavit filed by the Assistant Returning Officer, respondent No. 3, wherein it has categorically been stated that total sixty votes were polled, out of which 13 votes were not counted by the Assistant Returning Officer on the ground that the voters marked the sign of 'X' outside the box meant for indicating the vote and, therefore, they were treated as invalid votes and only 47 votes were counted out of which 25 votes were in favour of the petitioner and 22 votes were in favour of respondent No. 4. The Assistant Returning Officer thereafter determined the result as per Rule 27 and pasted the same on the notice board but did not declare the result as required under Rule 29. It has further been stated that after determination of result, respondent No. 4 demanded for recounting on the ground that the valid votes cast in his favour have wrongly been declared Invalid. The District Election Officer thereafter vide letter No. 296 dated 8.3.2001 through Fax addressed to the State Election Commission

apprised, it with the entire matter whereupon the State Election Commission through Fax No. 945 dated 8.3.2001, issued direction that even if a voter has indicated his vote against the name of a candidate outside the box, even then it should be treated as valid vote and there is no reason to reject the same. On receipt of the direction of the State Election Commission, all the 60 votes were counted, out of which 31 votes were found to be in favour of respondent Nos. 4 and 29 votes are found to be in favour of the petitioner and thereafter the result was declared under Rule 29.

11. The above fact has also been reiterated in the counter-affidavit filed on behalf of the Election Commission sworn by the Assistant Commissioner of the State Election Commission wherein it has been asserted that it is not correct to say that the petitioner was declared elected and only initial result was pasted on the notice board but no declaration was made as required under Rule 29.

12. The record of the Returning Officer has also been produced before us and from a perusal whereof, it appears that on 8.3.2001 immediately after determination of result under Rule 27, the respondent No. 4 applied for recounting of 13 votes, which were wrongly rejected. The said application/objection was received by the Assistant Returning Officer at 4.10 p.m. as appears from the endorsement made by the Assistant Returning Officer on the application/objection. He immediately thereafter vide his letter dated 8.3.2001, reported the entire matter to the District Magistrate/District Election Officer and sought his direction in the matter. The District Magistrate/District Election Officer through a Fax message referred the entire matter to the State Election Commission. The Election Commission thereafter by its letter dated 8.3.2001 at 8.30 p.m. communicated its Instruction through fax to count 13 votes which were not counted by the Assistant Returning Officer. The Assistant Returning Officer after receipt of Instruction, counted those 13 votes and then declared 'the result on the same day in terms of Rule 29 and also issued declaration Form-VIII to respondent No. 4, which contains the signatures of one Akshaibar Singh, Kanishth Up Pramukh, Balwant Yadav, respondent No. 4 and Virendra Kumar Yadav for the petitioner. At the top of the declaration form, it has been written in Hindi 'as per letter No. 945 dated 8.3.2001 of the Election Commission'. Thus, It appears that the declaration has been made

after receipt of direction from the State Election Commission dated 8.3.2001, whereas Form-VIII given to the petitioner, a copy of which has been annexed with the writ petition and the original has also been produced by the learned counsel for the petitioner for our perusal, does not contain the signature of the petitioner or of respondent No. 4 or their agents.

13. No evidence has been brought on record except Form-13 and the statement of the petitioner in the writ petition and rejoinder-affidavit that the declaration was made in accordance with Rule 29. Besides that, it is admitted fact that respondent No. 4 moved application raising objection against the rejection of 13 ballot papers. Therefore, admittedly, an application was moved, which Is also borne out from the record produced by the election commission that the application was moved under Rule 27 by respondent No. 4 immediately after determination of the result and, therefore, even if some declaration is made, without disposing that objection, in our view, cannot be held to be a valid declaration made in accordance with law and, therefore, is void and does not confer any right to the petitioner.

14. In the case of Shambhu Singh v. State Election Commission, U.P. and Ors., 2000 (4) AWC 2777, whereupon strong reliance has been placed by the learned counsel for the petitioner is, in our view, not applicable in the facts of the present case. Admittedly, in that case, the result was declared after recounting of votes on 28.6.2000 and certificate was also Issued by the Returning Officer declaring the petitioner as elected candidate. However, two days after the declaration of the result on 30.6.2000 respondent No. 4 made a complaint to the District Magistrate upon which he passed an order on 3.7.2000 and directed the Returning Officer to declare respondent No. 4 as duly elected. Thereafter another declaration was made by the Returning Officer whereby he declared respondent No. 4 as duly elected on 6.7.2000. On the above facts, this Court held that the District Magistrate exceeded his jurisdiction and interfered with the declaration of the result by directing to reopen the election process, which is not permissible in law. It has further been held that on proper interpretation of the statute after the election process has come to end, the State Election Commission, the District Magistrate and the Election Officer cease to have any jurisdiction and the only authority, which can deal with and decide any complaint regarding the election is the

Election Tribunal and the State Election Commission, the District Magistrate and Election Officer can neither cancel the declaration of the result nor can direct for a fresh poll and recounting after the candidate has been declared but such declaration has to be made in accordance with law. Therefore, the declaration not made in accordance with law is no declaration and such declaration is nullity.

15. The other decision relied upon by the learned counsel for the petitioner in the case of Smt. Ram Kanti v. District Magistrate and Ors., 1995 AWC 1465, is also not applicable in the facts of the case. In that case, the nominations of all the candidates were rejected by the Election Officer and, therefore, the petitioners were declared elected unopposed as Pradhan of the village vide order dated 30.3.1995. However, on the complaint the State Election Commission vide orders dated 15.4.1995 and 6.4.1995 cancelled the declaration of the result of the election in which the petitioner was declared as elected and, therefore, it was held that after declaration of result the Returning Officer or the Election Commission can neither cancel the poll/declaration of the result nor can they direct for fresh poll or recounting after the candidate has been declared elected. Therefore, in both the cases it was an admitted position that declarations in accordance with law declaring the candidate elected, were made and after such declaration the Commission directed for repolling, which is not permissible in law.

16. In view of the settled legal position, the election commences from issuance of the notification of the election and culminates in the declaration of the returned candidate and thereafter the State Election Commission, the District Magistrate and the Election Officer becomes functus officio and cease to have any jurisdiction over that election and only authority, which can deal with and decide a complaint regarding the illegality or irregularity of the election is the Election Tribunal. However, in the case in hand, on the pleading of the parties and the material brought on record, it is difficult to hold that the petitioner was declared duly elected as prescribed under Rule 29. The alleged declaration form produced by the petitioner, in our view, cannot be said to be a valid declaration as the same was issued at the stage of determination of result as provided under Rule 27 and not in the manner prescribed under Rule 29. Therefore, in the facts of the case, we are of the view that the alleged declaration by giving Form-VIII to the petitioner was

not the declaration of result under Rule 29. That apart, the election of a Pramukh or Up Pramukh can be challenged by moving an election petition under Rule 35. Article 243(o) of the Constitution ousts the jurisdiction of every Court to entertain petition challenging the election except by an election petition presented to such authority and in such manner as provided for by or under any law made by the Legislature of a State and, therefore, the election of Pramukh can be questioned only in the manner provided under the law.

17. In the case of Krishna Ballabh Prasad Singh. v. Sub-Divisional Officer, Hilsa cum Returning Officer and Ors. AIR 1985 SC 1746, the Returning Officer announced that the petitioner Krishna Ballabh Prasad Singh is duly elected to the assembly pursuant to which certificate of election in Form 22 under Rule 66 was also granted to him but the declaration in Form 21C was not prepared under Clause (a) of Rule 64 of the Conduct of Election Rules, 1961, and sent to the authorities required thereunder. However, the Returning Officer, thereafter discovered that the ballot papers of one booth had not been counted and, therefore, after counting those votes he cancelled the election of that petitioner and declared the fourth respondent to be elected. Accordingly, a declaration in Form 21C was then prepared declaring the fourth respondent to be elected candidate, and a fresh certificate in Form 22 was issued. On the above facts it was contended that the Returning Officer had no power to cancel the election of the petitioner and declare the fourth respondent elected. It was also contended that once, after casting of votes, certificate in Form 22 was granted to the petitioner certifying that he had been elected, the process of election was completed and, therefore, the subsequent declaration by the Returning Officer in favour of fourth respondent can be challenged in a writ petition and the bar in Clause (b) of Article 329 does not operate against the writ petition and, therefore, no question arose for the petitioner to file election petition. The Apex Court repelled the contention and held that the declaration of result of an election must be in the manner provided by the Act or the rules made thereunder. It has also been held that the announcement by the Returning Officer that the petitioner had been elected has no legal status because the declaration in Form 21C had not yet been drawn up. It has further been held that even the grant of certificate of election in Form 22 to the petitioner can be of no avail to him because Rule 66 contemplates the grant of such

certificate only after the candidate hasbeen declared elected under Section 66 and, therefore, there being no declaration in Form 21C at the relevant time, the grant of certificate of election in Form 22 to the petitioner was meaningless. In para 5 of that judgment it has further been held by the Hon'ble Supreme Court that after declaration in Form 21C and completion of consequential formalities, the process of election comes to an end and the bar of Clause (b) of Article 329 of the Constitution thereafter comes into operation and the election petition alone is maintainable challenging such declaration and the writ petition cannot be entertained.

18. It is well-settled legal position that prerogative writs under Article 226 of the Constitution can be issued only in grave cases where the subordinate Tribunals or bodies or officers act wholly without jurisdiction, or in excess of jurisdiction, or in violation of principles of natural Justice, or refused to exercise jurisdiction vested in them, or there is error apparent on the face of record which has resulted in manifest injustice. In the case of Sangram Singh v. Election Tribunal Kota, AIR 1955 SC 425, in para 14 of the judgment the Hon'ble Supreme Court has observed as under :

'That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily ; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law, which do not occasion injustice in a broad and general sense, for, though no Legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the Legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.'

19. The power of this Court to issue prerogative writs under Article 226 are purely discretionary and this Court may decline to entertain the writ petition or to grant any relief unless it is found that the impugned action or the order has resulted in manifest or substantial injustice.

20. In the instant case, as we have noticed above that the alleged declaration in favour of the petitioner was not in accordance with law, and, therefore, no relief can be granted under the writ jurisdiction of this Court. However, the question as to whether 13 votes have rightly been recounted or not, cannot be gone into in this writ petition in view of bar under Article 243(o) of the Constitution and an election petition as provided under Rule 35 is the proper remedy to challenge the same.

21. In view of the discussions made above, this petition deserves to be dismissed. It would, however, be open to the petitioner to file election petition under the rules before the appropriate forum challenging the election of respondent No. 4 as Pramukh. We, therefore, observe that in the event such election petition is filed, the Tribunal shall decide the same on merits without being prejudiced or influenced with the observations made in this Judgment as in this petition, we have only adjudicated upon the question as to whether the declaration made in favour of the petitioner was in accordance with law or not.

22. The writ petition is,accordingly, dismissed with the aboveobservations. There shall be no orderas to costs.

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