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Mohan Lal Vs. Udha Ram

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Court : Delhi

Decided On : May-25-1984

Reported in : 26(1984)DLT291

Judge : J.D. Jain, J.

Acts : Code of Civil Procedure (CPC), 1908 - Order 7, Rule 2 - Order 9, Rule 13 - Order 39, Rule 1; Evidence Act, 1872 - Sections 73

Appeal No. : First Appeal No. 54 of 1983

Appellant : Mohan Lal

Respondent : Udha Ram

Advocate for Pet/Ap. : I.S. Mathur and; Rishikesh, Advs

Judgement :

T.D. Jain, J.

(1) This appeal is directed against order dated 8th September 1983 of Commercial Sub-Judge, Delhi, whereby he dismissed the application of the appellant-Shri Mohan Lal under Order Ix Rule 13, Code of Civil Procedure (for short the Code) for setting aside an ex-parte decree which had been earlier passed against Shri Bul Chand, deceased father of the appellant, on 24th July 1974.

(2) The facts giving rise to this appeal in brief are that the respondent Shri da Ram instituted a suit against Bul Chand, deceased, for specific performance of the contract and for recovery of Rs. 2,000.00 on 2nd March 1974. It was alleged that vide agreement to sell dated 26th June 1971 the deceased had agreed to sell house No. 11838, Streets 7 and 8 (Rehabilitation No. 91), Mata Rameshwari Nagar,Karol Bagh, New Delhi, for a total consideration of Rs. 21,000.00 . The plaintiff-respondent also made an application under Order Xxxix Rules I and 2 of the Code for an ad-interim injunction restraining the deceased from transferring the aforesaid property during the pendency of the suit. On 5th March 1974, notice of the said application was directed to be issued for 20th March 1974. Simultaneously with it an order for issue of summons in the suit for the aforesaid date was also made. On 20th March 1974 the deceased defendant was directed to be proceeded against ex-parte on the ground that he had been served personally but there was no appearance on his behalf. Eventually, as stated above, an ex-parte decree was passed against him on 24th July 1974.

(3) Shri Bul Chand died on 29th August 1974. Thereafter an application was made by the respondent-Decree Holder on 29th September 1974 under Section 50 of the Code for enforcement of the decree and for substitution of his legal heirs. The appellant Mohan Lal, being one of the legal heirs of the deceased, was served with notice on 18th October 1974. He then moved an application on 28th October 1974 for setting aside the ex-parte decree, interalia, contending that he came to know of the suit having been filed against his deceased father on 18th October 1974 when the aforesaid notice was served upon him and that his lawyer then made inquiries from the court concerned and came to know of the ex-parte decree having been passed against his deceased father who had expired on 29th August 1974 after prolonged illness. He further contended that the deceased was never aware of the institution of the aforesaid suit against him nor was he ever served by registered post or through a Process Server. He also asserted that the deceased was not residing at the address given by the respondent-Decree Holder in the suit, viz.. House No. 83, Block 'E,' J.J. Colony, Madipur, as he had been all along residing at house No. 11838, Sat Nagar, New Delhi (which was the house in dispute).

(4) The said application was vehemently opposed by the respondent- Decree Holder who assessed that the deceased defendant bad been duly served but he failed to appear intentionally on the date fixed for hearing of the suit. He also raised the legal objection to the maintainability of the application under Order Ix Rule 13 by Mohan Lal alone without joining the other legal representatives of the deceased.

(5) The learned Sub-Judge vide impugned order dismissed the application holding that the deceased had been personally served with the summons but he failed to appear and that the application for setting aside the ex-parte decree had been made long after the expiry of the prescribed period of limitation. As for the other objection, the learned Sub-Judge observed that one of the legal representatives could move the application as he had locus standi to do so. However, in the next breath he observed that 'whether the application is maintainable in the absence of other L. Rs. is not necessary to be decided in view of my findings on issues No. I and 3 (i.e. on merits).'

(6) The learned counsel for the respondent-Decree Holder has the outset reiterated his legal objection to the maintainability of application for setting aside the ex-parte decree by the legal representatives of the deceased Judgment-Debtor. He has fervently argued that the right to make such an application vests only in the defendant against whom an ex-parte decree has been passed and his legal representatives have no locus standi to make such an application. Reference in this context has been made by him to Order Ix Rule 13 itself which lays down that :

'R.13. In any case in which a decree is passed ex-parte against a defendant, be may apply to the Court by which the decree was '...passed for an order to set it aside, and if he satisfies the Court that the Summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as as it thinks fit, and shall appoint a day for proceeding with the suit; Provided that where the decree is of such a nature that it cannot be set aside as against such defendant

only it may be set aside as against all or any of the other defendants also.'

(7) Reliance has also been placed in this context on a reported decision of this Court in Smt. Santosh Chopra v. Teja Singh and another, : AIR1977 Delhi110 . In the said case an application was made by the tenant-petitioner for fixation of standard rent of the premises in her occupation. The said application was decided ex-parte on 12th October 1971 as the landlady Smt. Harbans Kaur did not enter appearance and standard rent was fixed by the Additional Rent Controller. On October 15, 1971, Harbans Kaur sold the said property to the respondents, Shri Teja Singh etc., who then made an application under Order Ix Rule 13 praying that the ex-parte order fixing the standard rent be set aside. The locus standi of the transferee of the property to make an application for setting aside an ex-parte order was questioned by the petitioner-tenant. Prakash Narain, J., as his Lordship then was, held on these facts that:

'ON the very reading of the Rule (viz. R. 13 of Order IX) it is clear that it is only the defendant in an action who can move an application under this provision of law. A person who is not a party, though he may be interested in the suit, is not entitled to apply under this Rule.'

(8) A contention was raised by the respondents therein that they had succeeded to the rights of Harbans Kaur and so they must be regarded as defendants within the meaning of Order Ix Rule 13 of the Code. However, this contention was repelled by his Lordship with the observations :

'FACTUALLY the position is that the respondents became the owner of the property subsequent to the passing of the ex-parte order sought to be set aside. The respondent's application under Order I Rule 10, Order Xxii Rule 10 Civil Procedure Code . etc. stands dismissed by an order of this Court. They cannot, thereforee, even plead that they are the legal representatives of or entitled to be substituted in place of the original defendant or added as a party to the original proceedings. If that be the position then the respondents are outsiders to the proceedings in which ex-parte order was made and may not have locus standi to have the order set aside.'

(9) Attention of his Lordship was also invited to Section 146 of the Code and it was urged that a transferee from the Judgment-Debtor was entitled to make an application under Order Ix Rule 13 for getting the ex-parte order set aside. However, this argument too was spurned with the observation:

'SECTION 146 Civil Procedure Code . speaks of claiming 'under a party' and not 'through a party'.'

(10) Adverting to the case of Balaji Govinda Narain v. Hira Lal Air 1957 Ap 364, his Lordship said that :

'THERE is an obvious mistake in the judgment. The fallacy in the Bench decision is that the word 'through' has been substituted for the word 'under' occurring in Section 146 CPC.'

This authority, no doubt, seemingly appears to lend support to the contention sought to be raised by the learned counsel for the respondent-Decree Holder. However, with great respect to the learned Judge, I may venture to say that apart from being distinguishable on facts, this authority does not accord with the letter and spirit of Section 146 and weight of authority on the subject. Section 146 which has a direct bearing on the point in issue is reproduced below for ready reference :

'SAVE as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.'

On a plain reading it is manifest that this Section is an enabling provision and its object is to facilitate the exercise of rights by persons in whom they come to be vested by devolution or assignment. Since the deceased defendant could make an application under Order Ix Rule 13 for getting the ex-parte decree set aside, there is no valid reason why by virtue of this provision his successor in-interest legal representative cannot seek the same relief by making'"an application under Order Ix Rule 13. In Smt. Saila Bala Dassi v. Smt. Nirmal Sundari Dassi and another, : [1958]1SCR1287 , it wes held that :

'ANappeal is a proceeding for the purpose of Section 146 and further the expression 'claiming under' is wide enough to include cases of devolution and assignment mentioned in Order Xxii Rule 10.'

(11) The Supreme Court further said that :

'SECTION 146 was introduced for the first time in the Civil Procedure Code 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense.'

(12) Reference in this context be also made to a Bench decision of Allahabad High Court in Mst. Banno and others v. Hardwari Lal Air 1923 All 30, Singhi (minor) by guardian mother Rangamma v. Doddiah and another Air 1954 Mys 32, and Mitayagari Khadar Sahib 'v.Abdul Rasool and another (1971) 1 AWR 240, all of which clearly support the proposition that where an application can be made by any person then such an application can be made by any other person claiming under him by virtue of Section 146 of the Code. The following observations of their Lordships in Mst. Banno's case (supra) are very pertinent to note :

'IT would be a monstrous state of things if it were the law that the heirs, or legal personal representatives, could not as of right pursue any claim which a deceased man had, which death had prevented him from pursuing. Whether he bad the right to obtain a restoration of his appeal is not the question now before us. He had a right to be heard and thereforee his heirs or or legal personal representatives bad a right alter his death to be heard also.'

(13) There is thus overwhelming authority that the legal representatives of a deceased defendant are competent to make an application under Order Ix Rule 13 of the Code for setting aside the ex-parte decree. Even an assignee of the right and interest of the Judgment Debtor, by purchase or otherwise, would be entitled to make a similar application unless, of course, he is debarred from doing so by some other provision of law. This would be apparent from the opening words of Section 146 : 'Save as otherwise provided by this Code or by any law for the time

being in force.' These words simply mean that unless a person claiming under the deceased plaintiff or defendant is, expressly or by necessary implication precluded by any provision of law, he can act and seek relief in the same way as the deceased plaintiff or defendant could under law. No provision of law has been brought to my notice by the learned counsel for the respondent-Decree Holder, in the instant case, which would debar the appellant from making an application under Order Ix Rule 13 of the Code. Hence, I find that this objection of the respondent-Decree Holder is devoid of any substance.

(14) Coming to the merits of the case finding of the learned Sub-Judge, as stated above, is that the deceased defendant Bul Chand had been personally served. However, this finding is difficult to sustain having regard to the evidence on record which is not only slender but also unworthy of credence. Adrnittedly.Bul Chand owned house No. 11838, Sat Nagar, New Delhi, which he had allegedly agreed to sell to the respondent-Decree Holder. The case of' the appellant is that Bul Chand was residing at the said house at the relevant time and he never resided at house No. E-83, J.J. Colony, Madipur, which belonged to Asa Ram, brother of the deceased. Asa Ram stepped in the witness box, AW1, and deposed that he did not know where Bul Chand was on 10th April 1974 (It may be noted that the alleged date of service was 10th March 1974 and not 10th April 1974). However, he hastened to add that he might be in the hospital. But again said, that he was residing at Sat Nagar in house No. 11838 and he never resided in house No. E-83, J.J. Colony, Madipur. He further stated that Bul Chand was suffering from T.B. (tuberculosis) and cancer and he was an indoor patient in T.B. Hospital for about 2/3 months before his death which occurred on 29th August 1974. During cross-examination he explained that he had been residing in A Block, J.J. Colony, Madipur, during 1974 but the deceased never resided with him at Madipur in 1974. Bhola Ram, AW2, who is a resident of house No. 11867, Sat Nagar and Mohan Lal, appellant, himself are the other witnesses who have deposed to this effect. However, Bhola Ram felt somewhat shaky and said that he did not know if Bul Chand had resided in E-83, J.J. Colony, Madipur. So, even assuming that Bhola Ram had no personal knowledge about the residence of Bul Chand at the relevant time, there is no reason to disbelieve Asa Ram and Mohan Lal especially when it is amply borne out by documentary evidence. Shri Suraj Bhan, AW5, runs a fair

price shop and a ration depot at C-18, J.J. Colony, Madipur. He brought the relevant register for the period 13th May 1972 to 15th September 1975 which showed that Meera Devi r/o A-633. who is wife of Asa Ram used to draw-ration from his shop against ration card No. 006897 during the said period. He issued the certificate Aw 5/3 in this behalf. He explained that the name of the husband of Meera Devi was not mentioned in the said register but he had given the name of Asa Ram as her husband in the certificate Ex. Aw 5/3 at the asking of Asa Ram himself. Anyway not much would turn on this aspect of the matter because it is manifestly clear that at the relevant time Asa Ram was residing at the aforesaid house and not at E-83, J.J. Colony. It may also be stated here that according to AW4, the relevant record in the rationing department has since been weeded out and as such it was not available. Under the circumstances, it would appear at least ex-facie that on 10th March 1974 when the service of notice was allegedly effected on Bul Chand he was not residing at E-83, J, Colony, Madipur, the address given by the plaintiff in the plaint and the notice itself,

(15) As against this, the respondent/Decree Holder examined the Process Server Shri Jagdish Lal, who had been entrusted with the task of serving the notice on Bul Chand, Hardayal Singh, hand-writing expert and Mool Chand, now resident of E-83, J.J. Colony, Madipur, besides himself stepping in the witness box. The testimony of Jagdish Lal is helpful to the respondent/ Decree Holder only to the extent that he went to house No, E-83, J.J. Colony, Madipur on 10th March 1974 and served the show-cause notice on Bul Chand who had been indentified by none other than the respondent/Decree Holder. He admitted in cross-examination that he did not know Bul Chand personally and he made no effort to verify his identity from any other source although some persons were living in the adjoining rooms of that very house. He could not assign any reason as to why he did not get verification about the identity of the person whom he had delivered the show-cause notice.

(16) No doubt, Udha Ram respondent has deposed that he got service effected on Bul Chand deceased and he also identified his signatures on the service report but having regard to the fact that he is an interested party, it would be highly unsafe to rely solely on his testimony and we must look for some independent corroborative

evidence, direct or circumstantial. Evidently the learned Sub-Judge has over looked this important aspect. Significantly Udha Ram admitted during his cross-examination that the family of Bul Chand consisted of one daughter and three sons, all of whom were interned in an Ashram at that time. The mother Bul Chand, according to him was then in residing in house No. 11839, Sat Nagar. As for Asa Ram, with whom the deceased was allegedly living, his stand is that he was not present at the time of their visit to the residence of Bul Chand. Under these circumstances, it is difficult to place reliance on the sole testimony of the respondent himself with regard to the true identity of the person on whom. the notice was allegedly served by the Process Server as Bul Chand.

(17) Mool Chand, RW4, is the present occupant of E-83, J.J. Colony, Madipur. He seems to have purchased the said house from Asa Ram under power of attorney, Ex. Rw 4/1, which is dated 21st July 1975. No doubt, he asserted in his examination-in-chief that prior to him one Asa Ram used to reside in the said premises but during cross-examination he felt shaky and stated that he did not know who was residing in the said premises on 10th March 1974. Thus, even his testimony is too vague and indefinite to warrant an inference that Bul Chand deceased was residing at E-83, J.J. Colony, Madipur, on 10th March 1974. There is thus no reliable evidence on the record to the effect that the deceased was residing at the above address at the relevant time. The burden of proving this fact lay heavily upon the respondent/Decree Holder but be has miserably failed to discharge the same.

(18) The only other piece of evidence to prove the signatures of Bul Chand on the notice, Ex. RW2/l,is the opinion of the hand-writing expert. According to him, on a comparison of the disputed signatures on the back of summons dated 10th March 1974 with the admitted signatures of Bul Chand on the receipt dated 8th February 1973, Ex. Public Witness 3/2, he was of the opinion that the writer of both the signatures was one and the same person. He has given his detailed reasons in support of the said opinion in his report Ex. Rw I/I. He also placed on record the enlarged photographs of the signatures Ex. Rw 1/2 and Rw 1/3 which, according to him, had been taken under his supervision. During cross-examination he has shown other admitted documents, viz., receipts Ex. Public Witness I/I, Public

Witness 1/2 and Public Witness 3/4 which too bore signatures of Bul Chand. However, he could not say whether the signatures purported to be of Bul Chand on Ex. Public Witness 1/1PW 1/2, Public Witness 3/3 and Public Witness 3/4 were of the same person. He explained that he was unable to say so without taking enlarged photographs.

(19) The learned Sub Judge has accepted the report of this hand-writing expert as credit worthy. It would, however, appear that in doing so has been primarily influenced by the fact that the appellant had not produced any hand-writing expert to prove that the purported signatures of Bul Chand on the service report Ex. Rw 2/1 were forged. There is nothing in the impugned order to suggest even remotely that the learned Sub-Judge bothered to compare himself the disputed signatures of Bul Chand with his admitted signatures on various documents. Indeed, he has given the name of the deceased defendant as Mool Chand instead of Bul Chand in the whole of the impugned order. This circumstance alone is enough to eliminate the possibility of the learned Sub-Judge having himself compared the disputed signatures of Bul Chand with his admitted signatures. I am, thereforee, constrained to remark that he has acted rather casually in dealing with a matter of such vital importance. Under Section 73 of the Evidence Act the Court has power to compare itself the signatures and come to a decision. The exercise of that power becomes absolutely necessary in a case like the present where only one party has examined hand-writing expert as a .witness. It is well settled that a comparison of hand-writing is generally speaking a hazardous and inconclusive mode of proof. It is equally well-known that testimony of a handwriting expert may more often than not be biased in favor of the party examining him because the par examining an expert witness would like to be sure of his opinion on the matter before running the risk of producing him in Court. So even though there is no rule of law that opinion evidence of a hand-writing expert must never be acted upon unless substantially corroborated, the learned Sub Judge would have been well advised to examine and compare himself the disputed signatures of Bul Chand with his admitted signatures with a view to appreciate whether the reasons advanced by the hand-writing expert in support of his opinion were sound and dependable. Unfortunately he did not adopt this course. Any how, I have compared the disputed signatures of Bul C and with his admitted signatures and

ex-facie I am not per shaded to accept the opinion of the hand-writing expert, in the instant case, as worthy of credence. To me there appears to be substantial difference in the disputed signatures with regard to the manner of writing, made or execution of the letters and the formation etc. of the letters of which his signatures are imposed and his admitted signatures. Normally I would not have undergone his exercise of evaluating and appraising the entire evidence myself but I was constrained to do as I felt that the learned Sub-Judge has dealth with the whole matter rather casually and perfunctorily and has over-looked certain broad and important aspects which should have ordinarily guided his judgment.

(20) There is yet another cogent reason for setting aside the impugned order. As stated above, on 5th March 1974 the trial Court had ordered not only issue of show-cause notice to the deceased defendant on the application for ad-interim injunction but also issue of summons in the suit for the same date. 'Summons' in the context of the present suit would naturally mean summons for settlement of issues. There is a prescribed proforma for such summons (See appendix 'B', Form No. 2, First Schedule to the Code). A perusal of notice Ex. RW2/1 (also marked 'A') would show that it was only a notice of the application made by the plaintiff in the instant case and not summons in the suit. Needless to say that the language of the two is entirely different. (That apart Order V Rule 2 of the Code lays down that"every summons shall be- accompanied by a copy of the plaint or, if so permitted, by a concise statement.) However, the report of the Process Server would show that only a copy of the application was delivered to the addressee. Having regard to the language of Rule 2 of Order V which seems to be mandatory in nature account of the use of the word 'shall' there can be due service only when the summons is accompanied by a copy of the plaint or a concise statement thereof, if permitted. The reason for this is obvious, namely, that without a copy of the plaint or a concise statement thereof the defendant would not know what the suit against him is. Service of notice of application even though accompanied by a copy of the application was at best an intimation to the deceased that some suit had been filed against him in Court. Consequently there was no due service of the summons on him.) I am fortified in this view by a long catena of reported decisions of various High Courts commenting upon the nature, scope and requirement of Rule 2 Order V. A Division Bench of Allahabad High Court has only recently held

in Shafiqur Rahman Khan v. 2nd Addl. District Judge, Rampur & others Air 1983 All 12, that :

'THE word 'shall' raises a presumption that the particular provision is imperative. In ordinary Parlance, the term 'shall' is considered as a word of command and one which always or which must be given a compulsory meaning. It has a peremptory meaning and it is generally imperative of mandatory-..... ..... Applying the aforesaid rule of construction, interpreting Order V Rule of the Civil Procedure Code, it appears to us that the word 'shall' has to be construed imperatively and failure to be accompanied by a copy of the plaint would not amount to service of summons as required by Order V Rule 2 Civil Procedure Code .'

(21) See also in this connection M.G.Dua v.Balli Mal Nawal Kishore, and Suresh Chandra Sarkar v. Gosaidas Pal, : AIR1976 Cal87 . In both these cases it was held that summons cannot be regarded as duly served unless it is accompanied by a copy of the plaint. Pertinently it is common ground between the parties that no separate summons besides notice Ex. Rw 2/1 was ever served on the deceased defendant. In fact a detailed inquiry was made by the learned Sub-Judge in this respect and he found that only the aforesaid notice was issued and purported to have been delivered to the deceased defendant. Under the circumstances, there was no due service of the summons in the suit on the deceased defendant. This by itself constitutes a sufficient ground for setting aside the ex-prate decree. Unfortunately, however, for the appellant the learned Sub-Judge has overlooked this vital fact.

(22) It may be noticed at this stage that a second proviso to Rule 13 of Order Ix has been inserted by Code of Civil Procedure (Amendment) Act 104 of 1976. It lays down that 'No Court shall set aside a decree passed ex-parte merely on the ground that three has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.' Evidently this proviso would be attracted to ceases where there has been some irregularity in the service of summons but where the defendant had adequate notice of the date of hearing in

the suit. As seen above, in the instant case, there was no due service of summons at all on the defendant and as such the second provision to Rule 13 of Order Ix does not come into play merely because he had notice of the application, cannot be said to have notice of date of hearing in the suit itself. So, it cannot be looked upon as a case of mere irregularity in the service of summons. I am fortified in this view by a reported decision of Patna High Court. In Smt. Rampati Devi and another v. Mrs. Chandrika Devi and others, : AIR1979 Pat314 , wherein it was held that:

'WHAT is contemplated by the Proviso to 0.9, R. 13 is merely an irregularity in the service of summons and it cannot be equated with a case where no summons had been served at all. Provisions of the Second Proviso which preclude the Court from setting aside ex-parte decree merely on the ground of irregularity cannot thereforee be extended where the summons had not been served at all. Besides, the Court has to be satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the claim of plaintiff before it can act under the new amended Proviso. The Proviso is by way of exception to the general rules and burden to prove all the necessary conditions for the application of the proviso is-.-..upon a person who claims the benefit there under.'

Hence, looked at the matter from this aspect too, the impugned order cannot be sustained.

(23) Lastly, I am constrained to observe that the learned Sub-Judge has totally overlooked and ignored the evidence of the appellant that Bul Chand deceased was a patient of tuberculosis and cancer and he was admitted as indoor patient in T .B. Hospital for about 2/3 months prior to his death on 29th August 1974. This fact was duly corroborated by Asa Ram. The evidence of both these witnesses in this respect was allowed to go unchallenged. Further, according to Mohan Lal, appellant, he, his sisters and his brothers were interns in Arya Anath Orphanage, Daryaganj, during the period his father was admitted in the hospital. As stated above the respondent/Decree Holder admitted in terms that the children of bul Chand were interned the Ashram at the lime of effecting service of notice on him. If that be so, this itself would constitute a sufficient ground for condoning the delay

in making an application under Order Ix Rule 13 of the Code, For a patient of tuber-celosias and cancer who was counting his days in this world and whose children too were not by his side it must have been may difficult if not impossible to make necessary arrangement for his appearance through a lawyer in Court. Hence, the learned Sub Judge slipped into a grave error in dismissing the application of the appellant under Order Ix Rule 13 as being barred by time. He has totally ignored the human aspect involved in this case.

(24) To sum up, thereforee, I allow this appeal with costs and set as side the impugned order as well as the ex-parte decree dated 24th July 1974. The trial Court shall now proceed with the suit from the stage of the written statement. It shall, however, be open to the plaintiff/respondent to apply for and bring all the legal heirs of the deceased defendant on record within a reasonable time. The parties are directed to now appear the before trial Court on 10th of July 1984.

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