

Sarah Abraham Vs. Pyli Abraham

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Court : Kerala

Decided On : Mar-17-1958

Reported in : AIR1959Ker352

Judge : Varadaraja Iyengar and; Raman Nayar, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11; [Divorce Act, 1869](#) - Sections 7 and 10

Appeal No. : C.M.A. No. 243 of 1957

Appellant : Sarah Abraham

Respondent : Pyli Abraham

Advocate for Def. : P. Govinda Menon (M), Adv. for Ist Respondent

Advocate for Pet/Ap. : K. Mohammed Naha, Adv.

Disposition : Appeal dismissed

Judgement :

Varadaraja Iyengar, J.

1. This appeal arises out of O. P. 75 of 1955 filed by Pyli Abraham before the District Court of Kozhikode, under Section 32 of the Indian Divorce Act, IV of 1869, for restitution of conjugal rights as against his wife Sara as the 1st respondent, and

her parents and brother as respondents 2 to 4.

There was a cross petition O. P. 5 of 1957 filed by the wife Sara against her husband for judicial separation, under Section 22 of the Act. Both these petitions were tried and disposed of together with the result that O. P. 75 of 1955 was allowed while O. P. 5 of 1957 was dismissed, the parties being directed to suffer their costs in both the petitions. The wife has acquiesced in the dismissal of her petition and has come up with this appeal against the decree allowing her Husband's petition.

2. The parties are Jacobite Syrian Christians. They married in 1942 when they were aged 25 and 17, There are two children of the marriage born, in 1942 and 1946. Both husband and wife belonged to Travancore, but in or about 1946 they gave up their place of origin and settled down in Puthupadi in Kozhikode Taluk, whither the wife's family had gone to earlier.

It is the common case of both parties that, on 15-9-1949, the wife left the marital home and went to her father's house along with the children and from that lime onwards, the husband is living separate by himself. The circumstances which led to his separation is a matter of controversy. The husband would have it that his father-in-law brought it about without his consent and knowledge because of some money dispute while the wife would say that she took the step being compelled to do so on account of the physical and mental torture she had been subjected to, at the hands of the husband.

In 1952 at the instance of the husband, the Church authorities intervened with their good offices but the wife's party would not conform, in spite of an 'interdict' -- vide Ext. A-3 resolution in the parish church dated 3-3-1953. The husband then filed petition dated 19-3-1953 under the Guardians and Wards Act for custody of the children but without success right up to the High Court -- vide Ext. B-4 order of the High Court dated 10-10-1955. Finally he issued notice demanding the return of the wife on 24-10-1955 and filed the petition herein for restitution of conjugal rights on 23-12-1955. The parents and brother of the wife were impleaded as additional respondents on the ground that they were obstructing the wife from going back to the husband. The 'wife resisted the petition on the basis that there was just cause

for her living separate in that the husband was guilty of desertion, cruelty and adultery so as to entitle her to get a decree for 'dissolution.'

In particular, she alleged that the husband used to beat her severely at all times for no fault of hers and abused her in vulgar and obscene language and had also imputed unchastity to her. She had in consequence become a physical wreck unfit for married life. She alleged further that the husband was addicted to excessive drinking and was leading an immoral life. The additional respondents filed separate objections repudiating their alleged intervention between the husband and wife. They took occasion however to repeat the wife's attacks on the husband's character and conduct.

3. In support of their respective positions, both parties led evidence, oral and documentary. The husband and wife were examined as P. W. 1 and R. W. 1. The Vicar of the Church at Puthupadi was examined on the husband's side as P. W. 2 while the wife's father gave evidence for her as R. W. 2. The learned District Judge who had the opportunity to observe the parties while tendering their testimony, was obviously not impressed with the case of the wife in any of its details.

Thus she observed in the course of the judgment, that in the absence of any independent evidence in support, the allegations made by the wife that she had been abused, beaten and molested on several occasions, could not be accepted. The evidence of the father was in this connection treated as mere partisan. The allegations of excessive drink and immorality on the part of the husband or as to his having imputed unchastity to the wife were held to be unproved.

Similarly unproved was the allegation of the husband's wilful neglect to maintain the wife and children. The learned Judge finally refused to accept the wife's plea as to her serious ill-health. In the result the learned Judge found that there was no reasonable excuse for the wife to withdraw from the society of the husband and the proper decree was to grant the husband's petition for restitution.

4. Learned counsel for the respondent-husband raised a preliminary objection that this appeal was barred by res judicata, inasmuch as no appeal had been taken against the order dismissing the wife's petition for judicial separation which had

relied for its support on the grounds raised in bar of the husband's petition for restitution of conjugal rights. There is however no substance in this contention.

For the petition for judicial separation was only in the nature of a cross proceeding vis-a-vis the petition for restitution of conjugal rights herein, and they were disposed of by a single judgment only as distinguished, from two separate judgments one in each of the proceedings. Referring to suits of this nature it has been observed in Mulla's Civil Procedure Code, 12th Edn. Vol. I p. 38.

'There was a conflict of decisions as to whether if two suits involving common issues are disposed of in one judgment and an appeal is filed against the decree in one and not in the other, the matter decided in the latter suit becomes res judicata so that it cannot be reopened in the appeal. The Supreme Court was inclined to the view that the matter would not be res judicata.'

And after referring to *Narahari v. Sanker*, (1950) 1 SCR 754: (AIR 1953 SC 419), the learned author goes on to observe that this decision lends support to the view which has been taken in the several cases (also referred to) which proceeded on the basis that decisions given simultaneously cannot be said to be a decision in a former suit, within the meaning of Section 11. In *Raghunandan Singh v. Soubhagya Sundari Devi*, AIR 1947 Pat 125 the subject was discussed as follows:

'In the case of cross suits, each suit having the same subject-matter, the same issue and the same parties though differently arraigned, that is, plaintiff in one suit being defendant in the other, the decree in one suit is the duplicate of the other. In such a case when appeal is preferred against one decree done the other decree not appealed from does not operate as res judicata because the challenge of one decree in appeal amounts in substance though not in form to challenge of the other and the adjudication in appeal covers the same subject-matter in the presence of the same parties.' Further a party may be able to successfully resist a petition for restitution of conjugal rights because of just cause for separation though that party may not be entitled to succeed automatically on a petition for judicial separation for desertion on the same facts.

5. Learned counsel for the wife-appellant strongly urged before us that the court below has gone wrong in not accepting the evidence let in on the wife's side as to the charges of cruelty and desertion let alone adultery, levelled against the husband, merely because there was no corroboration by 'independent' evidence on the matter.

According to learned counsel the charges must be held to be made out and even otherwise the husband was guilty of constructive desertion and wilful neglect to maintain so as to disentitle him to a decree for restitution of conjugal rights and he referred to various cases where the courts had exercised their discretion on an overall view of the situation as between the spouses to refuse the husband's demand of marital rights as against the wife.

6. Now Section 7 of the Indian Divorce Act apart from the Proviso to it provides:

'Subject to the provisions contained in this Act, the High Courts & District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.'

There is some controversy whether mere adjectival law or procedure is comprised within the expression, 'principles and rules' herein but there is no doubt that substantive law does come within the scope of the expression, though of course it is subject to provisions of the Act -- See *Grace Isabel v. Anneley Eliardo*, AIR 1945 Cal 75. And as 'cruelty' and 'desertion' are here set up in answer to the husband's petition, we have first to understand the English law governing them and then see how far they are made out by the facts and circumstances of the case.

7. Taking up the first aspect of 'cruelty', as a matrimonial offence, Halsbury, 3rd Edn. Vol 12, p. 269, paragraph 514 defines its meaning:

'The legal conception of cruelty, which is not defined by statute, is generally described as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such

danger.'

This question, it will be remembered, was the subject of remarkable difference of judicial opinion in *Russel v. Russel*, (1897) AC 395. The wife had there petitioned for restitution of conjugal rights on the ground that the husband had left her and the husband counter-petitioned for judicial separation on the ground of cruelty in that the wife had made an unfounded charge of an unnatural offence committed by him. At the trial before Pollock B. the Jury found for the respondent.

The Court of Appeal by a majority (Lopes and Lindley L. JJ. Rigny L. J. dissenting) reversed the 'decision, both the wife's petition and the husband's counter-petition being dismissed. The countess' petition for restitution was withdrawn from appeal and the matter then came before the House of Lords as an appeal by the Earl, for Judicial separation on the ground of cruelty. The House of Lords was called upon to decide between two opposing theories of matrimonial cruelty.

One was that in order to establish cruelty, the cause must be grave and weighty and such as to show an absolute impossibility that the duties of married life can be discharged. The rival theory was the doctrine of danger, viz., that hostile behaviour by a spouse did not amount to cruelty in law unless it caused actual injury or the reasonable apprehension of it, to the life, limb, or health of the other spouse. Lords Herschell, Watson, Macnaughten, Shand and Davey who formed the majority, felt themselves bound by a long and consistent line of authorities from which they could see no escape, & their view was summed up by Lord Hercbell in these words:

'Upon a review of the authorities prior to the time when the Divorce Act came into operation, I think it may confidently be asserted that in not a single case was divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health or a reasonable apprehension of one or other of these. And it may with equal confidence be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced. I can find no case in which the impossibility that the duties of married life could be discharged was treated as a criterion.' Lord Halsbury, L. C. and Lords Hobhouse, Ashbourne and Morris were in favour of the 'absolute impossibility'

doctrine, which Lord Hobhouse summed up as follows : 'The conclusion I draw from the authorities is that there is no rigid rule to exclude from the consideration of Judge or Jury, a case where acts in their nature, are as grave as to destroy the foundation of conjugal life. I do not think that any rule can be laid down less wide than that of Lord Stowell, 'that the causes must be grave and weighty, and such as to show an absolute impossibility (meaning, of course, a moral impossibility) 'that the duties of married life can be discharged.' The fact that violence and personal danger are at the most common ground alleged for separation has led to repeated statements of the doctrine of danger in terms applicable and appropriate to those cases. But they are only one class of the broader category indicated by Lord Stowell.'

The House of Lords in *Jamieson v. Jamieson*, (1952) 1 All ER 875 observed that there has been no change in the law of England regarding cruelty consequent on the passing of the Matrimonial Causes Act 1937. And recently the Morton Commission on Marriage and Divorce which reported in 1956 said about the doctrine as so settled.

'The test of injury or threatened injury to health has been applied for a great number of years and, in our opinion the fact that during that time social conditions have changed considerably has not altered its soundness.'

The present position in regard to this subject is summarised in Halsbury's Laws of England, Vol. 12. 3rd Edn. Page 270, paragraph 516:

'The general rule in all questions of cruelty is that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Before coming to a conclusion the Judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status.' It may be added that though the Indian Courts originally construed 'legal cruelty' in the strict sense as above, there

has come about a gradual change. The tendency has been in favour of the view that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty.

The harm apprehended may be mental suffering as distinct from bodily harm, for, pain of mind may be even more severe than bodily pain and a husband disposed to evil, may create more misery in a sensitive and affectionate wife by a course of conduct addressed only to the mind, than if, in fits of anger, he were to inflict occasional blows upon her person.

8. Coming next to the matrimonial offence of 'desertion' pleaded by the wife and still maintained before this court, the question is one of 'constructive desertion' that is to say, even though it was the wife who left the matrimonial home first, the husband was the real deserter as being responsible for driving her out. To afford the wife such justification for leaving, the conduct of the husband staying on, need not have amounted to a matrimonial offence, such as cruelty or adultery. But, as observed by Lord Asquith L. J., in *Buchler v. Buchler*, (1947) 1 All ER 319 at p. 326:

'It must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better or worse'. The ordinary wear and tear of conjugal life does not in itself suffice.' So it was held by the Court of Appeal (Denning and Hodson L. JJ. and--Lloyd-Jacob J.) in *Timmins v. Timmins*, (1953) 2 All ER 187, that in the absence of proof of an intention by the husband to injure the wife, there was no ground for reversing the decision of the trial judge Wellington J., that the husband was not guilty of cruelty, but (Hodson L. J., dissentiente.) the husband's conduct was a grave and weighty matter which gave the wife good cause for leaving him and prevented him from obtaining a decree for restitution of conjugal rights unless and until he satisfied the court that, if she returned to him, he would behave with conjugal kindness, and therefore was a defence to the husband's suit for restitution. Denning L. J., in the course of his judgment quoted the observations of Lord Herschell L. C., in *Mackenzie v. Mackenzie*, (1895) AC 384 at p. 390; 'Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the

law regards as saevitia or cruelty, can he when his own misconduct has led his wife to separate herself from him, come into court, and avowing his misdeeds, insist that it is bound to grant him a decree of adherence?' and after referring to *Oldroyd v. Oldroyd*, (1896) P. 175 at p. 179, went on, to say 'Since that time, it has been repeatedly held, by some of the most eminent judges exercising this jurisdiction, that conduct which for one reason or another falls short of cruelty may, nevertheless, afford good cause for leaving and he a defence to a suit for restitution. Instances are : false accusation, *Russel v. Russel*, (1895) P. 315, drunkenness, *Beer v. Beer*, (1906) 94 LT 704 per Sir Gorell Barnes, P.: drunkenness and violence short of cruelty; *Butland v. Butland*, (1913) 29 TLR 729, per Bar-grave Dcane J., extravagance, *G. v. G.*, (1880) P. 72 per Hill J., wife's persistent friendship with another man; *Russel v. Russel*, (1935) 80 Sol Jo. 16, per Bucknill J.; husband's association with other women; *Glenister v. Glenister*, (1945) 1 All ER 513 and *Chilton v. Chilton*, (1952) 1 All ER 1322 per Lord Merriman P. In my opinion, domineering conduct comes within the principle, at any rate, when it is such as to be likely to cause a mental break down.'

But it is useful to note that though conduct different from, not merely less than cruelty might constitute constructive desertion the same evidence as given in an unproved case of cruelty could not be relied on for constructive desertion. See *Skull v. Skull*, (1954) 1 All ER 1030 at 1033.

9. Applying the above tests to the facts and circumstances of this case, we find a total lack of substance therein for the wife's contentions in bar, as to cruelty or other just cause for separation. To begin with, the earliest statement of the wife's case, made in her answer to the husband's claim for restitution of conjugal rights before the proceedings herein began has not been made available to the court.

The husband, it would appear, was not called on to produce the wife's reply notice nor was a copy thereof produced on the wife's side. The pleadings in the case no doubt catalogued the various acts and conduct of the husband which disentitled him to relief but particulars about each of them was still wanting. The wife was thus content in paragraph 6 of her counter-statement to say:

'The petitioner had been very cruel to this respondent. While the petitioner was staying with this respondent he used to beat her severely at all times for no fault of this respondent. His behaviour towards this respondent was very cruel and unpleasant. The petitioner used to abuse her often in vulgar and obscene language. He is addicted to excessive drinking and is also leading an immoral life.'

In paragraph 8 she went on to say:

'As this respondent was ill-treated and tortured as mentioned above, her health was completely ruined and she is now reduced to a physical wreck. This respondent was not given proper medical aid and proper food, care and affection by the petitioner.' Then in paragraph 9 it was that:

'Since 1949 this respondent and her children are not looked after and cared for by the petitioner. Even before 1949 and now this respondent and children are being maintained and looked after by the 2nd respondent (father of the wife). The petitioner has not given any maintenance to this respondent or her children.' And finally paragraph 10 wound up by saying: 'While Mariyam, the daughter of the petitioner was lying seriously ill in the Marikunnu Mission Hospital the petitioner did not even make a visit to the hospital and see his ailing child in spite of his being informed of this fact several times.'

10. Nor was any attempt made to improve the position when the wife deposed in the case as R. W. 1. It was again only in general terms that she spoke. The violent beatings by the husband, she swore, had left marks of injury which she showed to her father. The father as R. W. 2 spoke to having heard from his daughter about the ill-treatment and also seen the marks of the beating on one or two occasions. But it was not as if the neighbours were not witnesses to the incidents on occasions.

Yet no neighbour was summoned to testify. The husband positively swore that the allegations of cruelty made by the wife were false but apart from a general questioning as to whether he was not guilty of cruelty, the matter was not pursued in cross-examination. The court demands that in a matrimonial offence, whatever it is the- evidence of the spouse making the charge should if possible be

corroborated though the necessity for corroboration it not an absolute rule of law. For, it is not unlikely, that blows and slaps, trivial in themselves and long ago forgotten are dragged up and given highly coloured versions of, once the parties fall out.

Whatever credit may be given for a wife's endurance and dignity which keeps her away from complaining to a doctor of nerves or even bruises, the practical difficulty is there for the court to appreciate the bodily or mental effects of the cruelty concerned. The only corroboration here as to the ill-treatment by the husband was afforded by the father's evidence and in these circumstances, the court below cannot be blamed if it refused to take the wife on trust in regard to the allegations of bodily violence.

11. As regards the complaint on the score of abuse and obscene language apart from the vagueness of the charge, there is absolutely little evidence. Even the wife does not speak to it. Learned counsel for the wife referred to Exs. B-2 and B-3 in this connection. Ext. B-2 is a copy of the petition by the husband praying for the custody of the minor children.

It was said there that the wife's character was above reproach till she left the husband but by her stay with her parents and brother away from him she 'had lost all her character and had become a bad influence' on the minor children. There is nothing to complain of here, particularly when the husband expressed his willingness to take back the wife, if the welfare of the minors required it. Ext. B-3 is the copy of the appeal memorandum before the High Court against the order dismissing Ext. B-2. It was said there:

'The 1st respondent's allegation that she was living separate even if true, would only strengthen the case of the petitioner that she was leading an immoral life after she was taken away from him by respondents 2 to 4.'

But the allegation as to immorality was only casual. Ext. B-3 was not also signed by the husband; it was the advocate who had prepared and filed it. In any event when the husband denied that he had made any charge as to the wife's misconduct, while giving evidence as P. W. 1 there was no cross-examination

about it nor was Ext. B-3 put to him then for purpose of explanation. Imputation of unchastity to disentitle a husband of marital rights must be persisted in by the husband. As observed by Panchapakesa Iyer J., in *Dr. Dwaraka Bai v. Prof. Nainan*, AIR 1953 Mad 792:

'Making statements of Othello-like jealousy against a wife will not amount' to cruelty under Section 10 though deliberate attribution of immorality to a wife with named persons will certainly entitle the wife to resist a petition for restitution of conjugal rights filed by the husband.'

12. Finally as to the low standard of the husband's personal habits as to wine and women, no doubt the wife and her father speak. But in the absence of clear detail, as to time, place and circumstances, their evidence is unworthy of belief. Similarly also, the criticism as regards his callousness to the ill-health of the wife and children. The father speaks to itches all over the body of the wife and her ailing from fever on the day she left the husband and went over to his house. But this does not necessarily mean that the husband had no regard for the wife's ailments.

The father's house was nearby and it is not abnormal for the daughter to seek rest and cure therein in such circumstances. We have likewise to disregard the allegation of wilful neglect to maintain, As the learned Judge has remarked, the presumption is, that he was fulfilling this obligation while the wife and children were living with him. It may be that the father was helping them occasionally but that would not mean, the husband was guilty of neglect to maintain. There is no reason why his statement during examination that he was maintaining the children till 1955 even after they left, cannot be accepted.

13. On a review of the life history of the spouses herein, it seems to us that the whole trouble between them has arisen out of an incompatibility of temperament which perhaps had its origin in an economic background. This appears clear from the emphasis laid by the wife on the eternal poor means of the husband. Vide paragraph 12 of her counter statement:

'The petitioner is a man of no means. He is not in a position to properly maintain this respondent or her children. The respondent has been medically advised to

desist from sexual intercourse because of her utter ill-health.'

14. It is the case of the wife and her father during the evidence stage, though the husband denied it, that the latter had no properties either in Travancore or in Puthupadi where they later settled and the father of the wife had put up a house for the spouses in the property which he had taken on lease from the jenmi. And it was the father of the wife that used to maintain his daughter and children even when she was living with her husband.

According to the wife she had made up her mind when she left her husband not to return back since the bleeding trouble she had contracted at the time of the first confinement and she was- still suffering from, may not permit a married life. It was on the other hand possible, she had developed antipathy to the poor circumstances of her husband's house-hold in contrast to the comparative affluence of her parent's house.

Evidence does not disclose that the husband had any particular business or occupation or had any prospect thereof. So he must have struck her as stingy or lifeless. Probably there were other causes for mutual dissatisfaction, resulting in un-happiness between the couple. But so long as it cannot be said that it is impossible to carry on as husband and wife, the law cannot step in to absolve one or the other of the spouses from the normal duties of cohabitation.'

15. Learned counsel for the appellant finally said that even assuming cruelty and desertion, capable of sustaining a claim for judicial separation under Section 22 of the Divorce Act, have not been made out within the meaning of Section 33 of the Indian Divorce Act by the wife in answer to the husband's petition under Section 32 for restitution of conjugal rights, still there was a discretion available to court to disallow the petition, on account of the husband's lack of sincerity in seeking the relief.

He referred to the fact that it was about six years after the parties had finally separated and after the refusal of the custody of the minor children, that the husband had come to court with the prayer and he urged that the motive of the husband was not reconciliation but the financial motive of withholding the

maintenance claims of the wife and children apart from any conjugal intention. Now Section 33 of the Indian Divorce Act says:

'Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit, for judicial separation or for a decree of nullity of marriage.' In spite of this positive and apparently exhaustive wording, courts have an undoubted discretion in the matter of the grant of decrees for restitution of conjugal rights. So the decree may be refused if the court finds that the petition is not presented bona fide and that there is an ulterior motive other than the sincere desire for a resumption of co-habitation. See *Williams v. Williams*, (1921) P. 131; *Harnett v. Harnett*, (1924) P. 126.

But we are not convinced that the husband is not sincere in his claim herein. He had not been inactive during all the interval. He had appealed to the Metropolitan in the first instance before he went to the Vicar--Vide Ext. A-1 petition dated 1-4-1952. He pressed the matter until a resolution of 'interdict' restraining the wife's party from attending Church on account of their default, was passed on 3-3-1953.

The husband then took the guardianship proceedings and that took on 23-12-1955. It is not possible in the circumstances to say that the husband is motivated by external and irrelevant factors in seeking conjugal union as herein. And after all it is not a bar for a petition of the kind, that there is a delay in presenting it. See *Beauclark v. Beauclark*, (1894) 71 LT 376.

16. In most cases of the kind there is no complete satisfaction that the whole story is known and that all the relevant factors have been weighed in the balance but on the whole we think the learned District Judge came to the correct conclusion in holding that this is a fit case for grant of a decree of restitution of conjugal rights. The issue was one in which the decision was largely a matter of the discretion of the Judge who saw and heard the witnesses and also appreciated the physical well-being, temperament and character of wife. We therefore confirm the decree passed by the court below.

17. Learned counsel finally urged that the decree has been wrongly prepared to the extent it declared that the petitioner (husband) is entitled to the enjoyment of

the 1st respondent's I wife) person and society as husband and wife and further providing that the petitioner and the 1st respondent do maintain relationship as husband and wife without molestation from either.

It would appear that according to English practice, the decree of the kind herein provides that the defaulting spouse 'do return home to the complaining spouse and render him or her conjugal rights.' No question of specific enforcement of the decree need be apprehended by reason of the Form in which the decree is drawn up. The execution is governed solely by Order 21, Rules 32 and 83, C. P. C. There is therefore nothing to complain about on this score.

18. In the result, this appeal is dismissed, but in the circumstances without costs.

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