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**Court :** Kolkata

**Decided On :** Jun-08-1983

**Reported in :** [1986]59CompCas222(Cal)

**Judge :** Dipak Kumar Sen, J.

**Acts :** [Companies Act, 1956](#) - Sections 397 and 398

**Appeal No. :** Civil Appeal No. 243 of 1982 in C.P. No. 511 of 1980

**Appellant :** Subir Kumar Basu

**Respondent :** New Central Group Engineering P. Ltd. and ors.

**Advocate for Def. :** P.C. Sen and ;R.K. Lala, Advs.

**Advocate for Pet/Ap. :** S.B. Mukherjee, ;U.B. Mukherjee and ;A.C. Konar, Advs.

**Judgement :**

**Dipak Kumar Sen, J.**

1. On or about December 5, 1980, Subir Kumar Basu, the applicant herein, moved an application under sections 397 and 398 of the [Companies Act, 1956](#), against New Central Group Engineering (P.) Ltd. (hereinafter referred to as ' the company ') and Chirantan Mukherji and Arunangshu Ghose, two directors of the company, praying, inter alia, for appointment of a special officer or an administrator and for

investigation into the dealings in respect of the office, assets and affairs of the company by its directors and other reliefs.

2. On February 1, 1982, an order was passed in the said application as follows:

' The parties agree that the petitioner, Subir Kumar Basu, will sell his shares in the company to the individual respondents or their nominee or nominees or to the respondent company. In the event of the shares being purchased by the respondent company, there will be a corresponding reduction in the share capital of the respondent company.

Shri A. Basu, F.C.A., partner of M/s. G. Basu & Co. of 3, Chowringhee Approach, Calcutta 700 013, is appointed to ascertain the fair value of the shares of the petitioner in the respondent company as on December 8, 1980.

In ascertaining such value, the said valuer will take into consideration such factors as he considers relevant after hearing the parties in regard thereto.

The valuation report is to be submitted to this court by the valuer on or before March 15, 1982. He will forward copies of the report to the advocates on record of both the parties. The fees of the valuer will be paid out of the funds of the company. The initial remuneration of the valuer is fixed at Rs. 5,000....

By this order, the interim applications are disposed of and the main application will appear in the list on April 5, 1982, for further orders.'

3. On February 27, 1982, the valuer held a meeting of the parties where the applicant, the company as also one of its directors were present. In the minutes of the said meeting, it is recorded, inter alia, as follows :

' A letter dated February 22, 1982, received by me from Shri Subir Kumar Basu, a copy of which was given to New Central Group Engineering P. Ltd. was discussed at the meeting. Shri Chirantan Mukherji was requested to make such submission as New Central Group Engineering P. Ltd. would desire in respect of the letter dated February 23, 1982, from Shri Subir Kumar Basu, Shri Subir Kumar Basu wanted to make further submission and he was requested to make such

submission in writing.....

It was further agreed that all future correspondence with New Central Group Engineering P. Ltd. would be made at its principal office at 8, Camac Street, Calcutta, marked for the attention of Shri Chirantan Mukherji. The correspondence addressed to Shri Subir Kumar Basu would be sent C/o. Shri A. C. Kary Attorney-at-law and Advocate, 7, Old Post Office Street, Calcutta. Copies of all correspondence would be sent to both the parties and their replies to me should also be sent to the respective other party.

The company was requested to furnish certain particulars and the company agreed to do so by March 10, 1982.

The next meeting would be called on March 10, 1982, or later and the balance-sheet and profit and loss account of the company made up to December'8, 1980, would be prepared by the company and submitted to the valuer by March 10, 1982.'

4. On the same day, that is, on February 27, 1982, under a covering letter, the company submitted to the valuer audited accounts of the company, list of its shareholders and minute books of the meetings of the directors. It was recorded in this letter that some documents of the company, strictly confidential, would be available for consideration of the valuer but would not be disclosed to the applicant, an outsider.

5. Thereafter, correspondence were had in the proceedings before the valuer under which further documents were submitted and representations were made. The letters on record are :

(a) A letter dated March 15, 1982, from the company to the valuer ;

(b) A letter dated March 16, 1982, from the applicant to the valuer ; and

(c) A letter dated April 5, 1982, from the company to the valuer.

6. The valuer held two further meetings thereafter.

7. On October 29, 1982, the valuer submitted a report to the court as follows :

' In accordance with the order of hon'ble Mr. Justice T. K. Basu of the High Court at Calcutta dated February 1, 1982, in the matter of New Central Group Engineering P. Ltd., read with his Lordship's orders dated March 16, 1980, May 13, 1982, May 31, 1982, August 3, 1982, August 31, 1982, and October 8, 1982, I have, taking into consideration such factors as I considered appropriate after hearing the parties, ascertained the fair market value of one fully paid share of New Central Group Engineering P. Ltd., of Rs. 100 each held by Shri S. K. Basu, the petitioner at Rs. 283.55 (rupees two hundred eighty-three and paise fifty-five) as on December 5, 1980, and the fair market value of the aggregate 2,000 shares held by the petitioner at Rs. 5,67,100 (rupees five lakhs sixty-seven thousand one hundred) as on December 8, 1980.'

8. The applicant, aggrieved by the said valuation, has sought to impugn the same on the present application where the following orders are prayed for :

' (a) The valuation report dated October 29, 1982, be set aside.

(b) Another valuer be appointed to value the shares of the petitioner in the company as on December 8, 1980.

(c) Alternatively, the shares of the petitioner in the company be valued at Rs. 4,000 each or at such other sum as this court may deem fit and proper.

(d) The company be directed to pay the sum of Rs. 1,18,004 to the petitioner being the arrears of salary, ex gratia payment and commission within such time as the court may deem fit and proper.'

9. In the affidavit affirmed by the applicant on December 9, 1982, which has been filed in support of the present summons dated December 10, 1982, herein it is alleged that in spite of the demands, copies of the documents produced by the company before the valuer and which were considered by the latter, were not furnished to the petitioner.

10. It is contended that the impugned report was ex facie erroneous inasmuch as even on an estimated valuation of the main assets of the company, it would be obvious that the shares of the company had a much greater value than ascertained by the valuer.

11. It is alleged that for a portion of its plant and machinery, the company earned hire charges over Rs. 4 lakhs in the year ending May 31, 1981. Valuation of the plant and machinery at 16 times of such rental charges would be more than Rs. 65 lakhs.

12. It is alleged that the reasonable rent of the flat having over 3,000 sq. ft. floor area, at 8, Camac Street, Calcutta, owned by the company would be Rs. 8 per sq. ft. per month and at 16 times the annual rent/the valuation of the flat would be Rs. 34 lakhs. Before the valuer, it was admitted by the company that the market rent of the said property was Rs. 4 per sq. ft.

13. The books of the company, it is alleged, show that the dues of the company outstanding from other parties were over Rs. 131 lakhs.

14. Taking into account the aforesaid, the shares of the company, it is contended, should be valued at Rs. 4,000 each and not Rs. 283.55 as stated in the report.

15. The specific grounds on which the report is challenged as set out in affidavit are, inter alia, as follows I

(a) the valuer failed to disclose any basis or reason for his valuation ;

(b) the valuer did not value the shares correctly;

(c) the valuer did not afford opportunity to the petitioner to look into the documents filed by the company before the valuer for the purpose of valuation;

(d) the valuer failed to include the value of the goodwill of the company, an asset, in his valuation.

16. Chirantan Mukherji, respondent No. 2, has affirmed an affidavit on January 25, 1983, which has been filed in opposition to the petition. In this affidavit, it is

admitted that the company refused to send copies of its confidential documents to the petitioner.

17. The contention of the petitioner that the plant and machinery of the company should be valued at 16 times their rental or hire charges has been disputed and such method, it is contended, is without any basis. It is alleged that the share of the petitioner in the outstanding claims of the company has already been taken by the petitioner from the till of the company and that the balance outstanding in the share of the petitioner will not be as large as claimed.

18. It is alleged that 2,000 sq. ft. of the said flat of the company at 8, Camac Street, Calcutta, has been let out to a third party at a rent of Rs. 4 per sq. ft. per month. Taking into account corporation taxes, repairs, collection and service charges, etc., and using a reasonable multiplier or years of purchase, the value of the said tenanted portion, it is alleged, will not exceed Rs. 3,11,500. The value of the balance portion of the said flat, it is contended, should be calculated on the basis of the original price less depreciation.

19. It is alleged that the valuer was appointed by consent of parties. The petitioner, it is contended, is not entitled to challenge the report or the basis of valuation. The valuer gave a hearing to the parties as directed and thereafter arrived at his decision, taking into consideration all material facts. There is no error apparent on the face of the report, which contains the opinion of the valuer acting as an expert and the said valuation report should be accepted by this court.

20. At the hearing, learned counsel for the petitioner submitted further that the impugned valuation was inadequately small and this would appear from the face of the report. It must be presumed that the assets must have been undervalued or overlooked. He urged further that the documents submitted by the company to the valuer were not disclosed to the petitioner. From a letter dated November 11, 1982, addressed by the valuer to the advocate on record for the company, it appeared that the valuer had appointed an engineer-valuer by himself. It was submitted that this appointment was made without the knowledge of the parties and the report of the engineer-valuer was not disclosed to the parties before the report was made.

21. Learned counsel submitted that the only part of the order dated February 1; 1982, agreed to by the parties was that the shares of the petitioner would be purchased by the respondents. The valuer was not appointed by consent.

22. Learned counsel submitted last that in the instant case, the valuer could not be treated as an arbitrator as there was no dispute between the parties which was referred to the valuer who was directed by the court to value the shares of the petitioner. The order did not provide that the valuation would be final and binding between the parties. The court retained seisin over the proceeding which was directed to appear later for final orders.

23. Learned counsel for the respondents submitted that the tenor of the order dated February 1, 1982, indicated that the valuer was appointed by consent. As such, the valuer was acting as an arbitrator or a quasi-arbitrator and his decision was binding upon the parties. Alternatively, it was submitted that the valuer acted as an expert. His report was non-speaking without any error on its face. It was submitted that the court should not interfere with such a report.

24. It was submitted that in any event the valuer appointed in the instant case was a *persona designata* nominated by the court, the court having delegated to him its own power and jurisdiction to make a valuation. His report was final and could not be impugned in court.

25. In support of the respective contentions of the parties, several decisions were cited from the Bar which are considered hereafter :

(a) Hopper, *In re* [1876] 2 QB 367. In this case, under a clause in a firm lease, the tenant was to quit on 6 months' notice from the lessor if the premises or any part thereof would be sold during the period of lease. The agreement further provided that each party would appoint a valuer to estimate the compensation payable to the tenant. The valuer had power to nominate an umpire. A valuation made pursuant to the above agreement was challenged in court. It was held that the proceedings before the valuer had the character of a judicial enquiry inasmuch as the parties had submitted their disputes for arbitration by the valuer, who, after hearing the parties and evidence, had come to a decision. The decision of the

valuer was in the nature of a final award of an arbitrator, binding on the parties, subject to review as provided in law and was not a mere valuation.

(b) *Dean v. Prince* [1954] 24 Comp Cas 198 ; [1954] Ch 409 ; [1954] 2 WLR 538 ; [1954] 1 All ER 749 (CA). It was provided in the articles of a private limited company that on the death of a member, his shares would be purchased by the directors at a price certified in writing by the auditor, to be in his opinion the fair value thereof at the date of death. In so certifying, the auditor would be considered to act as an expert and not as an arbitrator. The representative of a deceased member being dissatisfied with the valuation brought an action for, inter alia, a declaration that the certificate of the auditor was not binding. The calculation of the auditor showed that the valuation had been made on the basis of winding up proceedings immediately following the death of the member and where the assets were taken to be sold piecemeal. The plaintiff contended that the valuation of the assets would be much more if the company was sold as a going concern. It was further contended that the auditor had disregarded the fact that the deceased held the majority of the shares in the company and that there was a prospective purchaser specially interested in acquiring the majority shares.

It was held by the English Court of Appeal that the tenure of the company in its premises was precarious in view of which the valuation was not held to be erroneous and was not disturbed. The following observations of Lord Denning was relied on (at p. 212 of 24 Comp Cas) :

' The task of the auditor here was to act as an expert and not as an arbitrator ; and, as an expert, he was to certify what, in his opinion, was the fair value of the shares.....The reason is that it is so much a matter of opinion that it is very difficult to say it was wrong. But difficult as it is, nevertheless, if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties.....

For instance, if the expert added up his figures wrongly ; or took something into account which he ought not to have taken into account, or conversely : or interpreted the agreement wrongly : or proceeded on some erroneous principle--in all these cases, the court will interfere. Even if the court cannot point to the actual

error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate. These cases about valuers bear some analogy with the cases on domestic tribunals, except, of course, that there need not be a hearing. On matters of opinion, the courts will not interfere ; but, for mistake of jurisdiction or of principle, and for mistake of law, including interpretation of documents, and for miscarriage of justice, the courts will interfere. '

(c) *Sutcliffe v. Thackrah* [1974] AC 727 ; [1974] 2 WLR 295 ; [1974] 1 All ER 859 (HL). The plaintiff in this case employed the defendants, a firm of architects to design a house to be constructed by the plaintiff. It was understood that builders would be employed and the defendants would have to supervise the construction. In the contract between the plaintiff and the builders, it was provided, inter alia, that the defendants, would issue interim certificates at specified intervals stating the amount due to the builders in respect of work properly executed, within fourteen days of which the plaintiff would pay the builders according to the certificate. It was further provided that in the event of a dispute arising in respect of any such certificate, the parties might submit such dispute to arbitration.

The plaintiff sued the defendants claiming damages for negligence and breach of duty in supervising the construction and for issuing two interim certificates for work which, the plaintiff alleged, were done improperly by the builders.

It was held by the House of Lords on these facts that in issuing the two interim certificates, the defendants were not acting in a judicial capacity and were not immune from liability to the plaintiff for their negligence in issuing incorrect certificates, as the giving of incorrect certificates was not the decision of a dispute between the plaintiff and the defendants ; there was no agreement to abide by the decision of the defendants as to the valuation of the work done ; and the defendants owed a duty to the plaintiff to exercise care and skill in the giving of certificates. The fact that the plaintiff became obliged to pay the amount certified by the defendants or that the defendant was expected to act fairly between the

plaintiff and the builders did not place the defendants in the position of an arbitrator. The following observations from the addresses to the House are relevant.

Lord Reid (at p. 864 of [1974] 1 All ER):

' Persons who undertake to act fairly have often been called ' quasi-arbitrators '. One might almost suppose that to be based on the completely illogical argument--all persons carrying out judicial functions must act fairly, therefore all persons who must act fairly are carrying out judicial functions. There is nothing judicial about an architect's function in determining whether certain work is defective. There is no dispute. He is not jointly engaged by the parties. They do not submit evidence as contentious to him. He makes his own investigation and comes to a decision.'

Lord Morris (at pp. 870, 876 of [1974] 1 All ER) :

' The mere fact that an architect must act fairly as between a building owner and a contractor does not of itself involve that the architect is discharging arbitral functions.

One of the features of an arbitration is that there is a dispute between two or more persons who agree that they will refer their dispute to the adjudication of some selected person whose decision on the matter they agree to accept.....It follows that the task of an arbitrator may in some cases be the task of arriving at a valuation. In some circumstances, therefore, someone might be regarded both as a valuer and an arbitrator. But it by no means follows that everyone who has a duty of valuing, a duty which obviously must be fairly and honestly discharged, is an arbitrator. A valuer may not be exercising any judicial function.....In some circumstances, a valuer may be an arbitrator just as in some circumstances an architect may be. It must depend on the contract or arrangement which is made.....There may be circumstances in which what is in effect an arbitration is not one that is within the provisions of the Arbitration Act. The expression ' quasi-arbitrator ' should only be used in that connection. A person will only be an arbitrator or quasi-arbitrator if there is a submission to him either of a specific dispute or of present points of difference or of defined differences that may in

future arise and if there is agreement that his decision will be binding. The circumstance that an architect in valuing work must act fairly and impartially does not constitute him either an arbitrator or a quasi-arbitrator. '

Lord Salmon (at p. 882 of [1974] 1 All ER):

' As in the case of the valuer, it is said that the architect is performing much the same functions and must, therefore, be regarded as being in the same position as a judge or arbitrator and must accordingly be accorded the same immunity. I confess that I can see no more reason for regarding the architect as being in the same position as a judge or arbitrator than there is for so regarding the valuer. No reason has ever been suggested. I suspect that this is because none exists. The descriptions ' quasi-arbitrator ' and ' quasi-judicial functions ' have been invoked but never denned. They cannot mean more than in much the same position as an arbitrator or a judge. In reality, however, there are most striking differences between the roles of the valuer and the architect in the circumstances to which I have referred and the role of a judge or arbitrator. Judges and arbitrators have disputes submitted to them for decision. The evidence and the contentions of the parties are put before them for their examination and consideration. They then give their decision. None of this is true about the valuer or the architect who were merely carrying out their ordinary business activities..... I suspect that the heresy that such valuers and architects are to be regarded as being in the same position as judges and arbitrators rests on the fallacy that since all judges and arbitrators must be impartial and fair, anyone who has to be impartial and fair must be treated as a judge or an arbitrator. '

(d) *Arenson v. Casson Beckman Rutley and Co.* [1915] 3 WLR 815 (HL); [1975] 3 All ER 901 (HL). Here, the plaintiff joined the business of his uncle in a private limited company and was allotted a number of shares. It was agreed that if he ceased to be employed in the business, he would sell his shares back to his uncle at a fair value to be determined by the company's auditors acting as experts and not as arbitrators, which would be final and binding. The plaintiff's employment in the business was terminated, his shares were valued by the auditor and were transferred on payment of the valuation amount. Later, the plaintiff, on the basis of

a subsequent report of the auditor on the affairs of the said company made when the company became a public company, contended that the shares in the company had been grossly undervalued and sued the auditors for negligence claiming damages.

27. The defendant's application for striking out the statement of claim on the ground that it disclosed no reasonable cause of action succeeded in the first court and also in the Court of Appeal.

28. On further appeal, the House of Lords, following *Sutcliffe v. Thackrah* [1974] AC 727 ; [1974] 2 WLR 295 ; [1974] 1 All ER 859 (CA), held that the auditor of a private company who on request valued shares in the company with the knowledge that such valuation would determine the price to be paid for the shares under a contract for sale was liable to be sued by either party to the transaction if the valuation was made negligently. It was held by the majority that to establish immunity from such a suit, it was necessary for the valuer to show that a formulated dispute at least between the two parties had been remitted to him to resolve in such a manner that he was called on to exercise a judicial function and that the parties had agreed to accept such decision. The minority held that on principle there was no reason why even a person appointed by parties as an arbitrator to settle a dispute between them should be immune from an action on negligence.

29. An unreported decision of a Division Bench of this court in Appeal No. 483 of 1977 dated May 12, 1978, was cited by learned counsel for the petitioner. In this case, in an application under Section 397 of the [Companies Act, 1956](#), an auditor was appointed to find out the break-up and real value of the shares of a private limited company. The company had only one asset, viz., a seven storeyed building, and the only business of the company was to manage the said property and to realise rents from various tenants therein. The auditor submitted a report on the valuation after necessary enquiries and after inspection of the said premises as directed. One of the parties sought to set aside the report. The application was dismissed in the first court but, on appeal, a Division Bench of this court scrutinized the valuation and modified the same. It was observed that the valuation

of an expert was not to be lightly interfered with by the court but in exceptional circumstances the court was entitled to interfere. An early English decision in *Cottier v. Mason*, 53 ER 613, was noted and the principles laid down therein were quoted with approval as follows:

' But this court.....must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one, as if the valuer had valued something not included, or had valued on a wholly erroneous principle, or had desired to injure one of the parties to the contract, or even, in the absence of any proof of any of these things, if the price was so excessive or so small as only to be explainable by reference to some such cause ; in one of these cases, the court would refuse to act on the valuation '.

30. The Division Bench having the benefit of the break-up of the calculation of the auditor applied recognised principles of valuation from the text book ' Principles and Practice of Valuation ' by John A. Park and corrected the valuation made by the auditor on the data available.

31. In the instant case, reading the order dated February 1, 1982, I am unable to accept the contention of the respondent that the valuer was nominated or appointed by consent. All that was agreed to before the court was that the shares of the petitioner would be purchased by the respondents and nothing more. Even if the valuer was appointed by consent, in my view, it would have made little difference as, in any event, the valuer could not be held to be an arbitrator appointed by the parties.

32. Arbitration in India, except some statutory arbitrations, is governed exclusively by the Arbitration Act, 1940. There is no arbitration in common law as noted and recognised by the English courts. The Indian statute provides as a pre-condition that for a valid arbitration, there must be an agreement in writing between the parties to go to arbitration. There is no such agreement in the instant case. Even the provisions of Section 21 of the Arbitration Act, 1940, which provide for arbitration of disputes which are the subject-matter of a pending suit, were also not complied with.

33. There was no dispute between the parties on the valuation of the shares when the matter was referred to the valuer by the order dated February 1, 1982. It was not recorded in the order that the valuation was in dispute and that his decision will be final and binding or that the same would be conclusively accepted by the court.

34. Next to be decided is whether the valuer in the instant case acted as a quasi-arbitrator and, if so, does his report acquire any extra immunity from judicial review. With respect, I agree with the observations of the English courts and hold that the expression ' quasi-arbitrator ' is misleading and forensically inappropriate. The expression is even more inappropriate in the context of the Arbitration Act, 1940, as in this country there can be no arbitration de hors the said statute except for some special statutes which provide for arbitration for particular disputes (e.g., the Indian Electricity Act).

35. It is to be noted that the expression ' quasi-arbitrator ' was used by the English court in cases where a person who had given an opinion or a report was sued for negligence and the courts had to consider whether the person concerned was acting in a judicial capacity so as to be immune from an action on negligence. The said cases do not lay down as to what extent the decision or opinion of a quasi arbitrator is unassailable in a court of law. In this country, actions in negligence are mainly confined to accident cases and I know of no decision, reported or otherwise, where an arbitrator or an expert had been sued in this country for negligence. Whether the valuer in the instant case acted as a quasi-arbitrator is of academic interest and it is not necessary for me to express any final opinion on the same.

36. Reading the order dated February 1, 1982, I hold that the auditor in the instant case was appointed in the same manner as a special officer to make a report to the court on the valuation of the shares of the company which the court intended to treat as a piece of evidence. The court retained seisin of the matter and intended to dispose of the application by a further final order. By the said order, the respondent was not called upon or directed to purchase the shares of the petitioner at the valuation of the auditor.

37. It is also found that under the said order, the valuer was directed specifically to hear the parties before making a valuation. Documents of the respondent made available to the valuer were not disclosed to the petitioner and the valuer also did not give inspection of such documents to the latter. The valuer appointed his own engineer as an expert or a valuer and acted on the report of the engineer without making the same available to the parties. Without going into the question whether under the order dated February 1, 1983, the valuer was justified in engaging another expert without the permission of the court or without the consent of the parties, it appears to me that the parties were not given a hearing by the valuer as was directed. The hearing was ineffective, incomplete and vitiated as the parties did not know and were kept unaware of the material evidence on which the valuer proceeded. This limited ground is sufficient for setting aside the report of the valuer.

38. The contention of the petitioner that, *ex facie*, the assets of the company are of more value than has been found by the valuer is not without substance as by applying the known methods of valuation on the basis of years' purchase or multipliers, the assets of the company can be shown to be of a higher value than that determined by the valuer.

39. For the reasons as aforesaid, the petitioner succeeds in this application. There will be an order setting aside the report of the valuer dated October 29, 1982.

40. Mr. K.P. Bhargava, chartered accountant, is appointed valuer to value afresh the shares of this company and to submit a report to this court stating the fair value of the said shares within eight weeks from date. He is directed to include in his report the break-up of the value of the assets of the company and the basic calculations. He will be at liberty to engage an engineer or technical expert to value any particular asset on notice to the parties. All evidence and material including the report of the engineer or expert, if any, should be disclosed to the parties who will be heard by the valuer before the report is made.

41. The initial remuneration of the new valuer is fixed at Rs. 7,000 which will be paid in the first instance by the petitioner. All parties and the valuer to act on the signed copy of the minutes of this order on the usual undertaking.

42. The report of the valuer will be subject to confirmation by the court. Other orders, as prayed for, will be considered before this application is finally disposed of.

43. Stay of operation of the order is granted for two weeks.

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