

Lt. Col. H.N. Tripathi Vs. State

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Court : Jammu and Kashmir

Decided On : Jul-01-1987

Reported in : 1988CriLJ582

Judge : A.S. Anand, C.J.,; M.L. Bhat and; R.P. Sethi, JJ.

Appellant : Lt. Col. H.N. Tripathi

Respondent : State

Advocate for Pet/Ap. : Mr. S. L. Koul

Judgement :

A.S. Anand, C.J. and R.P. Sethi, J.

1. The point of law on which the learned Judges constituting the Division Bench differed in their opinion is : whether the Central Bureau of Investigation (for short, CBI) constituted under the Delhi Special Police Establishment Act, 1946 (for short, the 1946 Act) has jurisdiction to investigate cases under the Ranbir Penal Code and the Jammu and Kashmir Prevention of Corruption Act, 2006 (for short the P.C. Act) and to file the final report before the Special Judge, Anti-Corruption in a case where one of the accused is an Indian Army Officer? Whereas Brother Bhat, J. held that it does not, Brother Sethi J. held otherwise. In view of this divergence of opinion the case has been referred to me.

2. The question being essentially legal, reference to some salient facts would suffice.

According to the prosecution case the accused are alleged to have committed offences punishable under Section 120-B, R.P.C. read with Section 5(2) of the P.C. Act and Sections 161 and 165 RPC. Accused No. 1 Lt. Col. H.N. Tripathi, at the time of the alleged occurrence was serving in the Armed Forces and posted in this State. The Superintendent of Police, Delhi Special Police Establishment, CBI, Jammu, registered FIR No. 8 of 1975 on 9-9-1975 against him and the partners of M/s. Bee Shukla and Company. Shri G. S. Kapila, Inspector, Special Police Establishment, CBI, Jammu, who was entrusted with the investigation found the charges made out on the basis of which Government of India accorded sanction on 7-9-1977 under Section 6(1)(b), P.C. Act and Section 197 of the J & K Code of Criminal Procedure for the prosecution of Lt. Col. Tripathi, accused No. 1, under the P.C. Act and offences punishable under other provisions of law. Following this a regular charge-sheet was produced in the court of learned Special Judge, Anti-Corruption, Srinagar on 30-9-1977. When the accused put in their appearance they moved an application stating therein that the proceedings against them were not maintainable as the investigation had not been conducted by an agency competent to investigate cases under the P.C. Act. They also challenged the validity of the order of sanction for their prosecution. The learned Special Judge after hearing the parties dismissed the application vide order dated 18-10-1978. Aggrieved, a revision petition was filed which in view of the importance of the questions raised, was referred to the Division Bench.

3. Mr. S. L. Koul, learned Counsel for the petitioner, firstly submitted that an officer of the CBI is not an officer competent to investigate the case within the meaning of Section 2-A of the P.C. Act which reads as under:

2-A. Establishment of Anti-Corruption Organisation.- The Government may, by an order published in the Government Gazette set up a special organisation of the police for the investigation of offence sunder this Act and such organisation shall be known as 'Anti-Corruption Organisation.

The section on its plain reading provides that the Government may by an order published in the Government Gazette set up a special organisation of the police for the investigation of the offences under the Act to be called 'Anti-Corruption Organisation' (ACO, for short). So according to Mr. Koul, investigation under the P.C. Act can only be carried out by the officers of the ACO and, thus investigation by any other police organisation is excluded. Mr. Koul further contended that the police officer referred to in Sections 2-A and 3 of the P.C. Act being officers who belong to the ACO and the CBI not having been included in the said section, it has, as such, no jurisdiction to investigate into the offences under the P.C. Act.

4. With a view to appreciate the submissions of Mr. Koul, it is necessary to consider how the CBI gets any jurisdiction to investigate in this State.

5. The Delhi Police Establishment Act, 1946 (1946 Act), under which the CBI was established has been extended to the State of Jammu & Kashmir by the Jammu & Kashmir (Extension of Laws) Act, 1956. The validity of the extension of the 1946 Act to Jammu & Kashmir was upheld by the Supreme Court of India in *Ishwardass Malhotra v. Union of India* 1972 J & KLR 219 : 1972 Cri LJ 751 and the question is no longer *res Integra*, the argument of Mr. K. N. Raina, who was permitted to intervene to have this issue re-examined, notwithstanding,

6. Section 3 of the 1946 Act, provides that the Central Government may by notification in the official gazette specify the offences or class of offences which are to be investigated by the Delhi Special Police Establishment (SPE, for short). Under Section 5 of the 1946 Act the Central Government has been empowered to extend to an area, the jurisdiction of the members of the SPE for the investigation of any offence or the class of offences specified in the notification under Section 3, Sub-section (2) of Section 5 lays down that when by an order the powers and jurisdiction of the members of the SPE are extended to any area, a member thereof may, subject to any order which the Central Government may make in that behalf, discharge the functions of a police officer in that area and shall, while discharging such functions, be deemed to be a member of the police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force. A notification under the

1946 Act, for extension of the jurisdiction of Delhi SPE to any other State can, however, be issued only with the consent of the State Government as provided by Section 6 of the 1946 Act. The members of the Delhi SPE would, thus, acquire the jurisdiction in the other States only if the notification is issued by the Central Government with the consent of the State Government and shall extend to such offences as are specified in the notification.

7. The Central Government vide notifications No. 25/3/60-AVD (i) and (ii) dated 1-4-1964, authorised the SPE to investigate offences punishable under the State P.C. Act as well as under Sections 161 and 165, RFC besides other specified offences detailed in the notification, in Jammu & Kashmir. The notifications had been issued consequent upon the consent of the State Government for their issuance conveyed vide letter No. S-253/57-PD dated 18-12-1963 addressed by the Secretary to the Government of J & K, General Department to the Deputy Secretary to Government of India, Ministry of Home Affairs, New Delhi. These notifications are a complete answer to the first argument of Mr. Koul, as CBI vide these notifications read with the relevant provisions of the 1946 Act has jurisdiction to investigate the offences specified therein and the offences in the present case have been so specified. Brother Bhat J. has not made any reference, whatsoever, to these notifications at all in his judgment let alone considered them and thus, reached a conclusion to the contrary. Brother Sethi J. has, however, on the strength of these notifications replied the argument of Mr. Koul and I am in complete agreement with his Lordship.

8. Mr. S. L. Koul, then submitted that even if the CBI has the jurisdiction to investigate into offences under the State Act. the investigation by the CBI in the instant case could not be conducted under the State Law as ace used No. 1, at the relevant point of time being a member of the Armed Forces, was not amenable to the jurisdiction of the special Judge and could not be tried for any offence under the provisions of the P.C. Act. His contention is that the substantive or procedural law relating to defence services can be framed or made only by the Parliament under Schedule 7, Lists 1 and 2 and since the Parliament has enacted the Prevention of Corruption Act, 1947, the accused in this case could only be tried under that Act and since that Act had not been extended to Jammu and Kashmir,

the accused could not be tried for the alleged offences committed by them in the State because the special Judge, Anti-Corruption, being a creature of the Criminal Law (Amendment) Act of the State is not competent to try any member of the Indian Armed Forces. Reliance in this connection was placed on Article 246 of the Constitution of India to urge that Parliament alone was competent to legislate in respect of the law relating to naval, army and air force and that a member of the armed forces could not be tried for an offence under any Act not enacted by the Parliament.

9. The argument, though ex facie attractive, does not bear close scrutiny as would shortly appear. Section 2 of the P.C. Act provides:

For the purposes of this Act, 'Public Servant' means a public servant as defined in section 21 of the Ranbir Penal Code, 1989.

Section 5 of the P.C. Act lays down:

Criminal misconduct in discharge of official duty - (1) A public servant is said to commit the offence of criminal misconduct in the discharge his duty -

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(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:

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Section 21 of the Ranbir Penal Code provides:

The words 'Public servant' denote a person falling under any of the descriptions hereinafter following, namely:

First,- Every Civil Servant of the State;

Second. - Every Commissioned Officer in the military, naval or air force of India;

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The aforesaid provisions unmistakably show that the members of the Armed Forces are included in the definition of a 'Public Servant'. But the argument of M/s. Koul and Raina is that the aforesaid provisions of the P.C. Act and the Ranbir Penal Code, cannot have any application to the members of the Armed Forces because Parliament alone is empowered to legislate for them and no State can intrude into a field which is the exclusive preserve of the Union Parliament. Section 21, RPC which brings within its fold the members of the Armed Forces, according to the learned Counsel, is to the extent being beyond the competence of the State legislature to legislate upon. To support this argument reliance was placed primarily on Articles 246 and 248 read with Entries 1, 2 and 93 of List I of the 7th Schedule of the Constitution of India. Entries 1, 2 and 93 of List I read:

Entry 1 : 'Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation'.

Entry 2 : 'Naval, military and air forces; any other armed forces of the Union.'

Entry 93 : 'Offences against laws with respect to any of the matters in this list.

10. Before proceeding any further, it would be relevant to point out that while in the case of other States the residuary powers lie with the Parliament, in the case of Jammu & Kashmir, they vest in the State legislature under Article 248 of the Constitution of India as applied to the State vide Constitution (Application to Jammu & Kashmir) Order No. 85 of 1969 with effect from 17-2-1969.

11. However, it is well settled that entries in the Seventh Schedule are neither to be read in isolation nor in a 'pedantic, narrow or restricted sense'. A liberal construction has to be placed on these entries (see in this connection with advantage *Sri Ram Narain v. State of Bombay* : AIR 1959 SC459). Construing entries 1, 2 and 93 of List I in the light of the settled law, it follows that these entries confer on the Parliament exclusive jurisdiction to make laws in respect of Defence of India and Naval, Military and Air Force and any other armed forces of the Union of India. The jurisdiction of the Parliament to legislate in regard to the armed forces would imply legislation relating to their raising, maintenance,

operation, conduct and discipline. An example of such legislation would be the Army Act or the Air Force Act. No State Legislature is competent to legislate on these subjects. It is, however, in this limited field alone that the Parliament has the exclusive jurisdiction to legislate. Consequently, entry 93 vests exclusive jurisdiction in Parliament to legislate in relation to the conduct and discipline of the forces as well as any of the matters included in List I, It is in this field, and in this field alone, that the Parliament can be said to have the exclusive jurisdiction. It cannot be extended to cover general criminal law.

12. Entry I of List III (Concurrent List) provides for the concurrent powers of the Union and the State to legislate with regard to general criminal law. The entry reads:

Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in list I and list II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

The words 'criminal law' used in the opening part of the entry is of wide ranging amplitude. While expressly including the general criminal law in the Penal Code, what has been excluded from its ambit are only the specific offences against laws with respect to any of the matters specified in the Union List and the State List and the use of forces of the Union of India. Entries 2 and 93 of the Union List are essentially restricted to service laws pertaining to the constitution of services and other allied and ancillary matters and do not cover all types of offences that may be committed by a 'public servant' and cannot take within its fold the general criminal law. If the entries were to be construed in any other manner, it would imply that a member of the armed forces who commits an ordinary criminal offence, while posted in the State of Jammu & Kashmir, would not be liable to prosecution for an offence under the Ranbir Penal Code or the other criminal laws enacted by the State Legislature. Such a construction would have the effect that criminal law would cease to be a matter of equal application to offenders generally and become a matter of status depending upon whether the offender is a Central

or a State Government employee. It would create yet another anomaly giving licence to the employees of the Union Government to commit acts of criminal misconduct punishable under the P.C. Act and yet escape liability, for, neither the Code of Criminal Procedure, 1973, nor the Indian Penal Code or the Central P.C. Act under which they could be prosecuted apply to the State. The law cannot countenance any such vacuum in criminal law. A somewhat identical question, where facts were slightly different, arose in *Jagjit Singh v. State of Punjab* ILR (1978) 2 Punj & Har 335. In that case charges of corruption were levelled against certain State public servants and they were sought to be prosecuted under Section 5(2) of the P.C. Act, 1947 (Central Act). The core of the argument raised on behalf of the accused was that the Central Act cannot apply to the Public-Servants of the State of Punjab because it cannot be extended to a field which is to be covered by a State Legislation. It was, thus, contended that only the State of Punjab could legislate with regard to the offences committed by the members of its public servants. Reliance for the submission was placed primarily on Article 246 of the Constitution of India and Entries 41 and 64 of the State List (List II) which are in the following terms:

Entry 41 : State Public Services, State Public Service Commission.

Entry 64 : Offence against law with respect to any of the matter in this list.

The Bench repelled the argument and held: it is evident that the State legislature is vested with exclusive jurisdiction to legislate with regard to the State Public Services and the State Public Service Commission, Parliamentary legislation cannot intrude into this field. This exclusive power of the State legislature further extends to the making of any laws with regard to the offences against those State statutes which are enacted with regard to the State Public Services and the State Public Service Commission. An example of this would be if the State Legislature were to enact legislation with regard to its civil services or special legislation for the creation of the State Public Service Commission - violation of such statutes may be declared as offences and legislated upon, but it is in this field and in this field alone that the State legislature would have exclusive jurisdiction. It cannot be enlarged to the extent of covering criminal legislation with regard to the persons

who may happen to be in the public services of the State. The general power to legislate generally with regard to the criminal law has not been made the exclusive preserve of either the State legislature or Parliament.

The Bench then considered the scope of the concurrent power to legislate with regard to criminal law by virtue of Entry-I of List III (Concurrent List) by reference to some decided cases of the Supreme Court and held:

Construing the aforesaid entry I in the light of these judgments, it is plain that the power to legislate with regard to general criminal law has been vested in Parliament and the State legislature. It is obvious that the words 'criminal law' used in the very opening part of this entry is one of wide ranging nature. While expressly including the general criminal law in the Indian Penal Code within the same, what has been specifically excluded from the ambit of the concurrent power are only specific offences against laws with respect of any of the matters specified in the Union and State lists and the armed forces of the Union of India. It seems manifest that the legislative powers under entries 70 and 93 of the (Union) List 1 service laws pertaining to the constitution of services and other allied and ancillary matters, as also the constitution of the Public Service Commission, etc. The exclusive legislative power herein, therefore, does not cover all types of offences that may be committed by the Public Servants. Consequently, the aforesaid entries cannot be considered as barring Parliament and the State legislatures to enact laws relating to crime generally, which clearly falls within the wide scope of entry I of the Concurrent List III.

13. I am in respectful agreement with the view expressed which is applicable to the facts of the present case.

14. It is, therefore, futile to contend that the officers of the Delhi SPE and the CBI have no jurisdiction to investigate the cases under the P.C. Act and to file a final report. The mere fact that an accused belongs to the Indian Armed Forces, in view of the aforesaid discussion would make no difference so long as the offence alleged to be committed by him falls within the scope and purview of the offences punishable under the P.C. Act and the Ranbir Penal Code.

15. In this connection, it would also be advantageous to notice the view of the Supreme Court in this regard.

In *Rehman Shangoon v. State of Jammu and Kashmir* : 1960 CriLJ126 an argument somewhat similar to the one raised before me came up for consideration of the constitutional Bench of the Supreme Court. The challenge before the Supreme Court in that case was under the J & K Enemy Agents Ordinance, Svt. 2005, and one of the grounds of challenge was that there was no legislative competence in his Highness to issue an Ordinance under Section 5 of the Constitution Act, after the execution of the Instrument of Accession, surrendering powers regarding defence, communication and external affairs to the Government of India and that the Ordinance strictly came under the head 'Defence' and was beyond the competence of his Highness to legislate. In the schedule attached to the Instrument of Accession, which contained 20 items, grouped under four heads, the four items grouped under the head 'Defence' were:

1. The naval, military and air forces of the Dominion and any other armed forces raised or maintained by the Dominion, any armed forces, including forces, raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.
2. Naval, Military and Air Force works, administration of cantonment areas.
3. Arms, fire-arms, ammunition.
4. Explosives.

It was argued on behalf of the appellant that the provisions of the J & K Enemy Agents Ordinance, were covered by item-I under the head 'Defence' and, therefore, after the execution of the Instrument of Accession, His Highness was left with no power to legislate on the matters surrendered by the Instrument of Accession including 'Defence'. Their Lordships noticed that in pith and substance, the J & K Enemy Agents Ordinance, dealt with 'Public order' and criminal law and procedure for trial of offences under the said Ordinance and then repelled the aforesaid challenge to the Ordinance and observed:..The question then which

immediately arises is whether the Ordinance is covered by item (1) under the head 'Defence'. The other items either under the head 'Defence' or under the head 'Ancillary' are immaterial for this purpose. If the Ordinance is not covered by item (1) under the head 'Defence', it would then be within the competence of the State Legislature or of His Highness to promulgate it, for all other matters besides those covered by the twenty items in the. Schedule in any case remained with the State. Item(I) under the head 'Defence' deals with the naval, military and air forces of the Dominion and any other armed forces raised or maintained by the Dominion and includes any armed forces including those raised or maintained by any acceding State which are attached to, or operating with, any armed forces of the Dominion. However, wide an interpretation is given to this entry it will be seen that it deals only with the armed forces whether on land or sea or in the air and the raising or maintenance of such forces and their operations. The Ordinance has, in our opinion, nothing to do with the matters covered by this entry. It is true that it defines 'enemy' and 'enemy agent' and creates offences with reference to certain acts done with intent to aid the enemy including giving of assistance to the military or air operations of the enemy or impeding the military or air operations of Indian forces or His Highness' forces or the forces of any Indian State. But it is only indirectly concerned with the operations of the armed forces and its main purpose is to deal with persons who with intent to aid the enemy commit certain acts including assistance to the military or air operations of the enemy or impediment to the military or air operations of the Indian armed forces. Besides this reference to military or air operations, the rest of the provisions of the Act has nothing to do with the armed forces and if one looks at the pith and substance of the Ordinance it will be found that it deals with persons who are concerned with the subversion of the Government established by law and becoming enemy agents or doing certain acts with intent to aid the enemy. In pith and substance, therefore, the Ordinance deals with public order and criminal law and procedure; the mere fact that there is an indirect impact on armed forces in Section 3 of the Ordinance will not make it in pith and substance a law covered by item (i) under the head 'Defence' in the Schedule. We are therefore of the opinion that there is no force in the contention that the Ordinance was beyond the legislative competence of His Highness because certain matters were ceded in the Instrument of Accession dated October

26, 1947, to the Government of India. This contention must also fail.

(Emphasis supplied)

16. On the analogy of the law laid down above, it must be held and I hold that since the power to legislate in respect of law relating to the armed forces vests with the Parliament, it does not imply (that) the trial of a member of the armed forces for a specific offence covered by the P.C. Act or Ranbir Penal Code is incompetent and the argument to the contrary is fallacious.

17. Mr. Koul then submitted that in view of the provisions of Sections 52, 125 and 126 of the Army Act read with Section 549, Cr. P.C. accused No. 1 could be tried by the special Judge only after the commanding Officer had exercised his option not to try him by the court-martial. Even this argument must fail for two reasons:

Firstly, because the objection though raised in the trial court was withdrawn, as would appear from the following observations of the special Judge: Next comes the argument of learned Counsel that Officer Commanding has not been given option to try the accused No. 1, Learned Counsel withdrew his argument that he is not pressing the same to refer the matter to Officer Commanding to exercise the option under Sections 125 and 126 of the Army Act read with Section 549, Cr. P.C.

This concession before the trial court has neither been withdrawn nor otherwise questioned in the absence of which the question cannot be allowed to be reopened particularly after accused No. 1 had voluntarily submitted to the jurisdiction of the special Judge. It appears that concession was made in the trial court perhaps in view of the provisions of Section 122 of the Army Act which provides that no trial by court-martial of any person who is subject to the Army Act for any offence shall be commenced after the expiration of a period of three years from the date of such offence and that period had already expired when the objection was initially raised before the trial court.

Secondly, because offences punishable under Section 5(2), P.C. Act are exclusively triable by the special Judge appointed under the Criminal Law

(Amendment) Act of 1958, as held by the apex court in Major E. G. Barsay v. State of Bombay : 1961 CriLJ828 . Their Lordships observed:

It is contended that Section 7 confers an exclusive jurisdiction on a special Judge only in regard to offences specified in Sub-section (1) of Section 6 and that the said sub-section does not comprise offence under Section 52 of the Army Act. There is a fallacy underlying this argument. Certain acts committed or omissions made by a person constitute offences under Section 6(1) of the Criminal Law (Amendment) Act 1952. Under Section 7 of the said Act, the said offences are exclusively triable by a special Judge. In the present case the accused were charged having committed offences expressly falling under Section 6 of the said Act and, therefore, the special Judge had clearly jurisdiction to try the accused in respect of the said offences. The mere fact that the said acts omissions might also constitute an offence under Section 52 of the Army Act would not be of any relevance, as jurisdiction was exclusively conferred on the special Judge notwithstanding anything contained in any other law. If that be so, the special Judge had exclusive jurisdiction to try offences covered by Section 6 of the Criminal Law [Amendment) Act, 1952?

(Emphasis supplied)

18. Sections 6 and 7 of the Criminal Law (Amendment) Act 1952 (Central) being identical to those of the State Criminal Law (Amendment) Act, 1958, and the Army Act being the same, the law on this question stands concluded and is no longer res integra even in respect of the State Law.

19. Lastly, Mr. Koul argued that there was no valid sanction, as contemplated by Section 6 of the P.C. Act and as such the prosecution could not proceed any further.

20. The argument, it appears, was raised before the Division Bench also and whereas Brother Bhat J. did not deal with it, Brother Sethi, J. found no illegality in the order of sanction. For what follows, I agree with Brother Sethi J. on that point.

21. Section 6 of the P.C. Act provides as follows:

6. Previous sanction necessary for prosecution.- (1) No court shall take cognizance of an offence punishable under Section 161 or Section 165 of the Ranbir Penal Code or under Sub-section (2) of Section 5 of this Act, alleged to have been committed by a Public servant except with the previous sanction -

(a) in the case of a person who is not removable from his office save by or with the sanction of the Government;

(b) in the case of any other person of the authority competent to remove him from his office.

(2) Where for any reasons whatsoever any doubt arises whether the previous sanction as required under Sub-section (1) should be given by the Government or any other authority, such sanction shall be given by the Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

The sanction, in the present case, was accorded by the Central Government in the name of the President, who alone is the competent authority to remove accused No. 1 from service. But, according to Mr. Koul, the sanction is invalid because the expression 'Government' as occurring in Clause (a) of Sub-section (1) of Section 6 and the expression 'an authority competent' as occurring in Clause (b) of Sub-section (1) only means the 'Government of the State' and the 'competent authority in the State of J & K'. There is, however, now warrant for such an interpretation. The expression 'Government' has to be construed as the Government empowered to deal with the public servants, as defined in Section 21 of the Ranbir Penal Code, but, even if the argument that the word 'Government' occurring in Sub-section (1) of Section 6 of the P.C. Act be assumed to mean 'the State Government' only, though for reasons already recorded it cannot be, the sanction in the present case was granted under Clause (b) of Sub-section (1) of Section 6 and is valid, because the Central Government admittedly is 'the authority competent' to remove accused No. 1 from his office. The expression 'competent authority' occurring in Clause (b) is to be read in conjunction with the definition of public servant given in Section 21 of the Ranbir Penal Code and not in isolation and when so construed, the conclusion is unescapable that it has reference to the

appointing authority. Any other view would defeat the very object of Section 21.1, accordingly hold that the sanction accorded in the present case does not suffer from any illegality or irregularity and is valid under Section 6(1)(b) of the P.C. Act.

22. All the arguments of Mr. Koul and Mr. Raina having failed, the revision petition merits dismissal and agreeing with Brother Sethi J., I dismiss the same and direct that the record of the case be sent back to the trial court for an expeditious trial.

23. The parties, through their learned Counsel, are directed to appear before the trial court on July 20, 1987.

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