



**IN THE HIGH COURT OF ANDHRA PRADESH: AT AMARAVATI**

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**CIVIL MISCELLANEOUS APPEAL No.1118 OF 2009**

Between:-

Kurivella Rama Rao, S/o Late Kotaiah (Died)  
and three others

...Appellants

AND

Kurivella Krishna Rao, S/o Late Kotaiah,  
R/o Guntur.

...Respondent

**DATE OF JUDGMENT PRONOUNCED: 01.05.2023**

**HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA**

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? : Yes/No
2. Whether the copies of judgment may be marked to Law Reports/Journals? : Yes/No
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? : Yes/No



**\*HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA**

**+ Civil Miscellaneous Appeal No.1118 of 2009**

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Kurivella Rama Rao, S/o Late Kotaiah (Died)  
and three others

... Appellants

Vs.

Kurivella Krishna Rao, S/o Late Kotaiah,  
R/o Guntur.

... Respondent

! Counsel for the petitioner : Sri D. Hanumantha Rao,  
Sri K.V. Vijaya Kumar

^Counsel for respondents : Sri Satyanarayana Murthy

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➤ Head Note:

?CASES REFERRED:

- 1) Dt. 29.09.2021 in Special Leave Petition No.1855 of 2020. Supreme Court of India
- 2) 2023 LiveLaw (SC) 380.
- 3) 2007 ALT 222 SC
- 4) (1967) 2 SCR 757 : AIR 1967 SC 1384
- 5) (2000) 3 SCC 54 : 2000 SCC Online SC 505
- 6) (2017) 8 SCC 406: (2017) 4 SCC (Civ) 101 : 2017 SCC Online SC 760
- 7) 1987 AIR 1353 : 1987 SCR (2) 387 : 1987 SCC (2) 107
- 8) (2014) 14 SCC 127



**HONOURABLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA**

**Civil Miscellaneous Appeal No.1118 of 2009**

**JUDGMENT: -**

**1.** This Civil Miscellaneous Appeal is preferred impugning order dated 02.09.2009 dismissing I.A. No.1884 of 2008, filed by the petitioner under Order 9 Rule 13 of C.P.C. to set aside the ex-parte decree dated 30.09.2005 in O.S. No.359 of 2005 on the file of the Principal Senior Civil Judge, Guntur (henceforth trial Court).

**2.** Appellant No.1 was the defendant and the respondent was the plaintiff before the trial Court in O.S. No.359 of 2005. The suit was decreed ex-parte in favour of the plaintiff and subsequently, I.A. No.1884 of 2008 was filed by the defendant seeking to set aside the ex-parte decree.

**3.** For the sake of convenience, the parties hereinafter will be referred to as they arrayed before the trial Court. During pendency of the appeal, as the sole Appellant died, Appellant Nos.,2 to 4, who are sons of the 1<sup>st</sup> Appellant came on record as his legal representatives.



#### **4. Case of the Appellants/Petitioner/Defendant:**

**4.1.** In the affidavit filed in support of the petition filed before the trial Court, it was averred by the Appellant No.1/defendant that, he is the defendant in the suit filed by his younger brother/plaintiff seeking partition of the suit schedule property, that he never received any summons, till the date the learned Advocate Commissioner visited the suit schedule property on 13.12.2006 for division and he was taken aback to know about the exparte decree. Further, he would submit that he filed his objections to inspection and he also found out that preliminary decree was passed on 30.09.2005 without his knowledge and in the same manner a final decree was also likely to be passed as he was set ex-parte once again on 07.07.2006 in I.A. No.698/2006.

**4.2.** It is also averred that the defendant possesses all the necessary documents and plaintiff deliberately suppressed registered gift deed dated 30.09.1967 executed by their mother in favour of defendant. On these submissions, Appellant No.1 sought to set aside the exparte preliminary decree and to provide him a fair opportunity to submit his case.



## **5. Version of the Respondent/Respondent/Plaintiff**

Per contra, the plaintiff contended that no valid reason was assigned by the defendant to obtain the relief of setting aside the ex-parte decree and as such the I.A. was filed with an intention to drag on the suit proceedings, suppressing the material facts. He would further submit that the report of the process server is very clear to the effect that the defendant refused to receive the summons in the presence of the mediator and therefore the said summons got affixed to the door and even in final decree petition also, the Process Server endorsed that the defendant refused to receive the summons. Further the plaintiff contends that the set aside petition since is filed without filing delay condonation petition, it is not maintainable and as such he sought for its dismissal.

## **6. Finding of the trial court**

In the light of the pleadings and rival submissions of the parties, upon hearing, the learned trial Judge vide the impugned order dated 02.09.2009 dismissed the petition with costs as

- (i) the petitioner failed to examine the process server to prove that the summons were not served on him,



- (ii) no application is filed under Section 5 of Limitation Act to condone the delay and
- (iii) refusal to receive the summons is sufficient service as per Order 5 Rule 17 of C.P.C.

## **7. Grounds of Appeal**

Feeling aggrieved and dissatisfied with the impugned order, the petitioner carried the matter before this Court in this Appeal on the grounds that the learned trial Judge failed to observe that the petition was filed on bonafide grounds of non-service of summons in suit and that the ex-parte decree passed behind his back is on fraud, that whenever technical considerations and substantial justice are pitted against each other, the latter should be given weight as for procedural irregularity, substantial rights cannot be ignored and that if the petition is allowed, no prejudice would be caused to the respondent. As such, the appellant prayed to allow the Appeal by giving an opportunity to the petitioner.

## **8. Arguments Advanced at the Bar**

Heard Sri K.V.Vijaya Kumar, learned counsel for the Appellants and Sri S.Satyanarayana Moorthy, learned counsel for the respondent and perused the entire record.



**9.** Learned counsel Sri K.V.Vijaya Kumar would submit that the defendant never received summons in the suit as well as in final decree petition and it is only from the visit of the learned Advocate Commissioner to the schedule property, it came to his knowledge and he immediately filed a petition as such from the date of his knowledge. He would further contend that the property was purchased by the mother of both parties on 21.11.1964 under a registered sale deed and she executed a registered gift deed in his name on 30.09.1967, he constructed a house therein at about 40 years back and the Municipality authorities have also mutated his name in the records.

**10.** Learned counsel for Appellant would further submit that the suit property consists of a house of 355 Sq. yds., which is neither joint or ancestral property as alleged and that there is no possibility or probability for the defendant to refuse the summons when his substantial rights over the property are involved in the matter. Learned counsel would emphasize that the summons sent through Registered Post returned for want of door number and the door number of the defendant was not mentioned in the plaint copy.

**11.** Refuting the above submissions, learned counsel Sri S.Satyanarayana Moorthy would submit that the report of the



Process Server is very clear to the effect that the defendant refused to receive the summons and he did not choose to examine the Process Server to prove the genuineness or otherwise of the said contention. Furthermore, learned counsel would submit that the legal representatives of the deceased defendant i.e., Appellant Nos.2 to 4 herein filed a suit O.S.No.381 of 2019 seeking a declaration that the ex-parte decree obtained in O.S. No.359 of 2005 is by fraud, and as such when a comprehensive suit is filed challenging the ex-parte decree, the present civil miscellaneous appeal is not maintainable.

**12.** During the course of hearing, the learned counsel for respondent filed certified copies of plaint and written statement in O.S. No.381 of 2019. Those documents are taken into consideration. In support of his contentions, the learned counsel relied upon the judgment in *Vishwabandhu v. Sri Krishna*<sup>1</sup> .

### **13. Consideration of the Court**

In the present appeal, challenge is with regard to the order impugned dismissing the petition under Order 9 Rule 13 of C.P.C., it is profitable to extract the provision which reads thus;

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<sup>1</sup>Dated 29.09.2021 in Special Leave Petition No.1855 of 2020. Supreme Court of India





**Order 9 Rule 13:-Setting aside decree ex parte against defendant.—**

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

*Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:*

*[Provided further than no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]*

*[Explanation. —Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]*

**14.** An "ex parte decree" is a decree passed against a defendant in absentia. The language employed in Order 9 Rule 13 would give the scope for the Court to exercise discretion in a petition filed under Order 9 Rule 13 C.P.C on couple of grounds i.e.,



failure of service of summons to the petitioner and on explanation of sufficient reason for non-appearance in spite of receiving summons.

**15.** In case of failure of service, the Court would upon verification of the records and on proof that the petitioner was not served, would pass an appropriate order giving due opportunity to the party against whom the exparte decree is passed. In addition, when it is a specific case of the petitioner that suit summons were not duly served, in light of the Article 123 of the Limitation Act, 1963, the limitation would start from the date of knowledge of such a decree passed against the person. Whereas, In the second limb, i.e., explanation of sufficient reason, the test is to identify as to whether the petitioner was able to satisfy as to cogent and valid reasons for their absence despite receiving the summons.

**16.** In the case on hand, the defendant's plea is that he never received any summons in this suit. The impugned order would indicate that the suit summons were deemed to be served on the defendant on 30.07.2005 since affixed to the door in the presence of one mediator by name Mr.Pidugu Srinivasa Rao. The plaint does not contain the door number of the defendant. It is apt to mention that the notice sent through registered post was returned for want



of door number. On the other hand, on behalf of the plaintiff, the learned counsel vehemently argued that, the report of Process Server is a gospel truth. For better understanding of the issue, it is appropriate to mention events of the suit in a chronological order.

- *This suit has been filed by the plaintiff, who is younger brother to the defendant, seeking partition of the schedule property on 13.06.2005.*
- *The summons alleged to have been served on the defendant on 30.07.2005 since affixed in the presence of the mediator as per the report of process server.*
- *Exparte decree has been passed in the suit on 30.09.2005.*
- *After passing a preliminary decree in the suit, on application made by the plaintiff in the final decree petition, Advocate Commissioner was appointed in I.A. No.698 of 2006. In the said petition also, an exparte order was passed against the defendant on 07.07.2006.*
- *The learned Advocate Commissioner visited the suit schedule property on 13.12.2006 for division of the schedule property. The record further shows that, on the very same day, defendant filed memo before the Commissioner sought for time requesting to postpone the issue since he is not aware of the suit proceedings and he has to take necessary steps.*
- *The learned Advocate Commissioner filed his report alongwith affidavit mentioning about his visit and objections raised by the defendant.*



- *Thereafter, petition under Order 9 Rule 13 of C.P.C. was filed by the petitioner on 03.01.2007 and the said petition was dismissed on 02.09.2009.*
- *The petitioner carried the matter before this court on 09.11.2009.*

**17.** Keeping in mind these dates, a cursory look at the facts of the case would clearly show that, suit is for partition of the suit schedule property. The plaint itself shows that, property is purchased in the name of the mother of the plaintiff and defendant under a registered sale deed. It is further averred in the plaint that the plaintiff, defendant, and his father ran a hotel business. Thereafter, the petitioner got employment and left the place. The plaintiff sought for partition of the said property to get equal share to himself and the defendant being brothers, stating that it is a joint family property. There has been no reference of the gift deed executed by the mother in favour of elder brother i.e., defendant.

**18.** Coming to the case of the defendant, at the time of filing the petition under Order 9 Rule 13 of C.P.C., he filed a copy of registered gift deed executed by their mother on 30.09.1967. The defendant claims that, it is his absolute property by virtue of gift



deed and he has been in possession and enjoyment of the property for the last 40 years.

**19.** In the case of *Vishwabandhu* referred supra, relied on by the learned counsel for the respondent, suit is filed on 25.05.1993 for recovery of Rs.22,400/- against the defendant who failed to refund it towards part of sale consideration. The suit summons got returned as refused on 19.02.1997 and the suit was decreed ex-parte. Subsequently, the decree holder filed Execution Petition, brought the property of the judgment debtor(JDr) for sale. JDr could not be found on search by drum beats. Notice served on the JDr and the property got attached. At the stage of the sale notice under Order 21 Rule 66, has been served on the JDr, which was acknowledged. Later the property got auctioned on 16.12.2000.

**20.** The Appellant in *Vishwabandhu case*, being the highest bidder, purchased the property for Rs.1,25,000/- and deposited 1/4th amount. Thereafter on 19.12.2000 i.e., 3 days after the sale, the JDr filed a petition under Order 9 Rule 13 of C.P.C. to set aside the exparte decree asserting that he is ready to execute the sale deed till that day but had no money to return the part consideration paid. JDr also submitted that he never received the summons in the suit and in the execution petition, whereas no evidence was



produced to discard the report of the Process Server and this application has been filed more than 8 months from the date of knowledge of the exparte decree. That is how the petition was dismissed by the trial Court. Then, the JDr carried the matter before the Hon'ble High Court, wherein the petition was allowed on payment of costs of Rs.1000/-. Auction purchaser carried the matter before the Hon'ble Apex Court on two petitions, one against the order of the Hon'ble High Court allowing Order 9 Rule 13 petition and the second to recall the order which was dismissed.

**21.** The Hon'ble Apex Court in the above context observed that, the JDr expressed his readiness to execute the sale deed, but he had no money to repay the part of sale consideration. On the other hand, the auction purchaser complied all the legal requirements. The Hon'ble Court observed that, even after passing of the exparte decree, notice was served on him and despite having knowledge, the JDr allowed the parties to go for auction of the property. It was only after auction, JDr filed petition under Order 9 Rule 13 of CPC and such an attitude is not vigilant. Having observed so, the Hon'ble Supreme Court allowed the appeals filed by the auction purchaser, setting aside the orders passed by the High Court in allowing the petition under Order 9 Rule 13 of C.P.C.



**22.** At this juncture, it is apt to refer to the judgment of Hon'ble Apex Court in ***Career Institute Educational Society v. Om Shree Thakurji Educational Society***<sup>2</sup> distinguishing ratio and obiterthus;

*"In Jayant Verma (supra), this Court has referred to an earlier decision of this Court in Dalbir Singh & Ors. vs. State of Punjab to state that it is not the findings of material facts, direct and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is the vital element in the decision and operates as a precedent. Even the conclusion does not operate as a precedent, albeit operates as res judicata. Thus, it is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided and, for this reason, it is important to analyse a decision and isolate from it the obiter dicta."*

**23.** In that view of the matter, the judgment relied on by the counsel for the respondent is not helpful in one sense that, in the said case, no prejudice would be caused to the JDr if the exparte decree was not set aside because he has already parted with the property, received the part of sale consideration and he is not in a position to return the sale consideration and in such context, the observations referred supra were made.

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<sup>2</sup>2023 LiveLaw (SC) 380.



**24.** Coming to the present case, the younger brother filed the suit for partition stating that the plaintiff, defendant (being his brother) and their father did business, purchased the property in the name of mother, treated it as joint family property. The plaintiff would contend that since their sisters got married and they were given money at the time of marriage and their parents died, the defendant and himself were entitled for the partition. At this juncture, when contra version is introduced by the defendant by filing registered documents, the Court should have understood the intricacies of the matter.

**25.** Learned counsel for the respondent raised a plea during the course of arguments as to the maintainability of C.M.A., when comprehensive suit filed for declaration that ex-parte decree obtained by fraud. This court is of the considered view that it will never be a bar to maintain a C.M.A., that is filed immediately after order impugned is passed by the trial court.

**26.** Coming to the point of filing Section 5 petition, it is beneficial to refer the judgment of the Hon'ble High Court in ***Veluru Satish and others Vs. Chittaturu Sailaja and others***<sup>3</sup>, wherein two I.As were moved seeking to set aside ex-parte decree and to

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<sup>3</sup>2007 ALT 222 SC





enlarge time to file written statement by condoning delay of 429 days. In this case as well, the petitioners have moved the said I.As without filing a Section 5 petition. Para 8 and 9 of the said judgment read thus;

*"8. No doubt, the respondents-defendants in support of their pleas relied upon various judicial pronouncements to the effect that the Court is competent to condone the delay even without filing formal application under Section 5 of the Limitation Act, 1963 if the petitioners properly explained the delay in the affidavits filed in support of the I.As., filed under Order IX Rule 13 C.P.C. There is no quarrel with the settled proposition of law. In fact, way back in the year 1957, a Division Bench of this Court in **Ramachandra Rao v. Sessaiah** 1957 (2) An.W.R. 106 (D.B.) held that non-filing of formal application under Section 5 of the Limitation Act, 1963 would not come in the way of the Court exercising power conferred on it under Order IX Rule 13 C.P.C. Once the petitioner satisfies the Court by giving valid or cogent reasons, the Court is competent to condone the delay without a formal application under Section 5 of the Limitation Act, 1963 being filed. The Division Bench further held that non-filing of application under Section 5 of the Limitation Act, 1963 would itself not be a ground to dismiss the application filed under Order IX Rule 13 C.P.C. as held by the Hon'ble Supreme Court."*

While so, in the facts and circumstances of **Veluru Satish** (supra) the Hon'ble Court observed that the defendant entered



appearance and has filed the petitions making allegations against a counsel who is no more. Further, when the plaintiff filed execution application, the defendant having filed stay petition, filed the petitions to set aside the ex-parte and to enlarge time indicating his non-diligence in prosecuting the suit. The Hon'ble Court while observing these situations has upheld the orders of trial court allowing the petitions subject to exemplary costs.

**27.** In *Panna Lal v. Murari Lal*<sup>4</sup>, the Hon'ble Supreme Court in the context of non-service of summons and limitation held thus,

*"When the summons were not duly served, limitation under Art. 164 does not start running against the defendant because he has received some vague information that some decree has been passed against him. It is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of Art.164. The test of the sufficiency is not what the information would mean to- a stranger, but what it meant to the defendant in the light of his previous dealings with the plaintiff and the facts and circumstances known to him. If from the information conveyed to him, the defendant has knowledge of the decree sought to be set, aside, time begins to run against*

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<sup>4</sup>(1967) 2 SCR 757 : AIR 1967 SC 1384



*him under Art.164. It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree, so that he has a clear perception of the injury suffered by him and can take effective steps to set aside the decree."*

**28.** In ***G.P.Srivastava Vs. R.K.Raizada and others***<sup>5</sup>, wherein a suit for arrears of rent, ejectment and damages was decreed ex-parte, the Hon'ble Apex Court was of the view that unrealistic and technical approach should be shunned in deciding Order 9 Rule 13 applications, and even if the defendant was found to be negligent, the other side could have been compensated by costs and the ex-parte decree set aside on such other terms and conditions as were deemed proper by the trial Court.

**29.** In ***Laldhari Mistri (Dead) through Legal Representatives and another Vs. Vijay Kumar***<sup>6</sup>, the Hon'ble Apex Court observed that," it is difficult to fault the trial court and the appellate court when they dismissed the application under Order 9 Rule 13 of CPC. Both the grounds given cannot be said to be perverse. However, the facts of the present case are such that it has become necessary for us, in order to do complete justice, to set aside the three orders against the appellant".

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<sup>5</sup>(2000) 3 SCC 54 : 2000 SCC Online SC 505

<sup>6</sup>(2017) 8 SCC 406: (2017) 4 SCC (Civ) 101 : 2017 SCC Online SC 760



**30.** In ***Collector, Land Acquisition v. Katiji***<sup>7</sup>, the Hon'ble Apex Court was of the view that;

*"When substantial justice and technical considerations are A pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

**31.** In ***Dhiraj Singh (Dead) through Legal Representatives and others Vs. State of Haryana and others***<sup>8</sup>, it has been held thus,

*"The legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on merits. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice – that being the life purpose for the existence of the institution of courts. It is common knowledge that this court has been making a justifiably liberal approach in matter instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that. It must be grasped that judiciary is respected not on account of its power to*

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<sup>7</sup>1987 AIR 1353 : 1987 SCR (2) 387 : 1987 SCC (2) 107

<sup>8</sup>(2014) 14 SCC 127



*legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so'.*

**32.** The suit herein is filed on 13.06.2005 seeking partition of the property purchased in the name of the mother on 21.11.1964. She died in the year 1974 as seen from the plaint. The registered gift deed introduced by the defendant is dated 30.09.1967. Suit is decreed on 30.09.2005. From the date of knowledge i.e., the visit of Advocate Commissioner 13.12.2006, the petition under Order 9 Rule 13 was filed on 03.01.2007. The order impugned may be correct on procedural and technical grounds, but the order lacks application of the standards set by a common prudent man.

**33.** The rival claim made by the defendant needs at length investigation during course of the trial. The test would be when the registered gift deed stands in the name of defendant, on receipt of such summons, would he keep quiet? The learned trial Judge ought to have observed that what would be response of a common prudent man in similar circumstances. This Court is of the view that the order impugned lacks the theory of probability. The learned trial Judge lost sight of the rival claim made by the defendant which goes to the root of the case warranting the full-length trial in the interest of justice.



**34.** In the circumstances of this case, the Civil Miscellaneous Appeal is allowed with costs setting aside the order impugned in I.A. No.1884 of 2008 in O.S. No.359 of 2005 dated 02.09.2009. Consequently, the *ex parte* decree passed against the defendant dated 30.09.2005 in O.S.No.359 of 2005 is hereby set aside. The learned trial Judge is directed to take the file back and afford an opportunity to the defendant (dead) through his legal representatives to file their written statement and dispose of the suit on merits as per law.

**35.** It is also made clear that this Court has not expressed any opinion on the merits of the matter. It is open for the trial Court to decide the issues for consideration independently and uninfluenced by any of the observations made in the impugned order or the order passed by this Court.

As a sequel, interlocutory applications pending, if any, in this Civil Miscellaneous Appeal, shall stands closed.

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**VENKATA JYOTHIRMAI PRATAPA, J**

Date : 01.05.2023

**Note:** L.R. Copy to be marked

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