

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A.No.4675/2014

Reserved on 19th November 2015

Pronounced on 2nd February 2016

Hon'ble Mr. A.K. Bhardwaj, Member (J)
Hon'ble Mr. Shekhar Agarwal, Member (A)

Mrs. Swati S Patil
Aged 63 years
w/o Mr. Shrikant
r/o G-1 Keviz Park
Nagla Park, Kohlapur
Maharashtra
(Retired as Commissioner of Income Tax)

..Applicant

(Mr. S K Gupta, Advocate)

Versus

Union of India through

1. Secretary
Ministry of Defence
Department of Revenue
North Block, New Delhi
2. Chairman
Central Board of Direct Taxes
Ministry of Finance
Department of Revenue
North Block, New Delhi
3. Director General of Income Tax (Vig.)
1st Floor, Dayal Singh Library
1, Deen Dayal Upadhyay Marg
New Delhi
4. Secretary
Union Public Service Commission
Dholpur House, Shahjahan Road
New Delhi

..Respondents

(Mr. Virender Singh, Advocate for respondent Nos. 1 to 3 –
Mr. R V Sinha, Advocate for respondent No.4)

O R D E R**Mr. A.K. Bhardwaj:**

A meeting of the Departmental Promotion Committee (DPC) for promotion to the post of Chief Commissioner of Income Tax (CCIT) in Central Board of Direct Taxes (CBDT) for the vacancy year 2006-07 was held on 29.09.2006 in Commission's office. The Committee took into account total 40 vacancies pertaining to the year 2006-07. The applicant herein figured at Sl. No.54 in the eligibility list and was in the zone of consideration, but her assessment was not considered necessary for want of sufficient number of vacancies. Thereafter a meeting of supplementary and regular DPC for the years 2006-07 and 2007-08 was held. The applicant was considered against the vacancy years at Sl. Nos.2 and 11 respectively. The recommendations of DPC in respect of the promotion of the applicant were kept in sealed cover as the Department had withheld the vigilance clearance due to charge sheet dated 24.11.2003 issued to her. The applicant was again considered for promotion by the DPCs met for the subsequent years, i.e., 2008-09, 2009-10 and 2010-11 held on 18.11.2008, 23.10.2009 and 29.12.2010 respectively. Since the disciplinary proceedings initiated in view of the charge-sheet dated 24.11.2003 had not been concluded, the recommendations of the DPC in respect of the promotion of applicant were kept in sealed cover. Before sending the proposal for the vacancy year 2010-11, the DoP&T issued O.M. dated 13.04.2010 for communicating the below benchmark grading in the ACRs prior to the period 2008-09. Accordingly, the concerned authority communicated the below benchmark ACRs to the eligible officers. Since the ACR of the applicant for the period 2003-04 contained below benchmark grading, it was communicated to her.

When the competent authority decided to retain the below benchmark grading in the ACR of 2008-09, the applicant filed O.A. No.2033/2010 before this Tribunal seeking issuance of direction to the respondents not to take into account the said ACR while considering her for promotion, as the same had not been reviewed and accepted by the competent authority. In terms of the Order dated 10.02.2011, this Tribunal allowed the aforementioned Original Application. Paragraph 5 of the Order reads thus:-

“5. For parity of reasons the same direction is to be given in this OA also. We, therefore, direct the Respondents to consider the ACR of the year 2003-04 non est for the purpose of consideration of the Applicant for promotion by the Departmental Promotion Committee. An earlier ACR should be considered, while considering the Applicant for promotion.

6. The OA is disposed of in the manner indicated above. There will be no orders as to costs.”

2. The Order of the Tribunal was challenged before the Hon’ble High Court of Delhi and finally before the Hon’ble Supreme Court and was upheld in terms of the Order dated 01.04.2013 and 24.02.2014 respectively. The charge sheet dated 24.11.2003 was challenged by the applicant before this Tribunal by filing O.A. No.2034/2010 and was quashed in terms of the Order dated 26.08.2011 on the ground that the same had not been approved by the disciplinary authority. Relevant excerpt of the Order reads thus:-

“9. Considering the facts and circumstances of the cases and guided by the law laid by Hon’ble High Court of Delhi in B.V. Gopinath and S.K. Srivastava case, we are of the firm opinion that the impugned orders in all the present Original Applications where the charge sheets were issued against the applicants without getting the approval of the competent Disciplinary Authority, namely, the Finance Minister, are liable to be quashed and set aside. We order

accordingly. We also grant the liberty to the respondents to proceed against the applicants in the respective OAs and frame charges if the concerned competent authority would approve the charge memo in the respective cases.

10. In terms of our above orders, all the OAs listed here are allowed. The order is subject to the final outcome of the B. V. Gopinath's case (supra) under consideration of Hon'ble Supreme Court of India. As mentioned above, the respondents would be within their right to seek recall or review of our orders if the Hon'ble Supreme Court may reverse the judgment passed by this Tribunal and the High Court."

3. Since the Tribunal had granted the liberty to the respondents to proceed against the applicant and frame the charges if the concerned competent authority could approve the charge memo, the respondents issued fresh charge sheet dated 11.06.2014 to the applicant. In the meantime, in view of the Order passed by the Tribunal on 11.02.2011 declaring her ACR for the year 2003-04 as *non-est*, the Department requested the Commission to review the recommendations of all such DPCs regarding promotion of the applicant where her ACR for the year 2003-04 was considered by treating it non-est and by taking into account the ACRs for the earlier/previous years. Accordingly, the review DPC held on 28.11.2014 reviewed the recommendations of DPC held on 22 & 23.08.2007, 18.11.2008 and 23.10.2009 for promotion to the post of Chief Commissioner of Income Tax against the vacancy years 2006-07 (supplementary DPC) & 2007-08, 2008-09 and 2009-10 respectively. Nevertheless, in the wake of pendency of the charge sheet dated 11.06.2014 against the applicant, its recommendations were kept in sealed cover, thus the applicant filed the present Original Application praying therein:-

“(i) quash and set aside the action of the respondents in resorting to sealed cover procedure in the DPC held on 28.11.2014 and also quash the communication dated 05.12.2014 (Annexure-A-1) to the extent

that conveying that the committee has kept the recommendations in sealed cover;

(ii) direct the respondents to open the sealed cover forthwith and act upon the recommendations of the review DPC dated 28.11.2014 and in case, the applicant is found fit, she may be promoted as CCIT w.e.f the date when her immediate juniors were promoted with all consequential benefit including arrears of pay and revision of pension;

(iii) award the interest on arrears of pay and pension at the rate of 12% p.a. from the date when it was accrued upto the date of payment;

(iv) May also pass any further order(s), direction(s) as be deemed just and proper to meet the ends of justice.”

4. Though the applicant has raised several grounds pervaded in paragraph 5 (A) to (G) of the Original Application, during the course of arguments, her counsel espoused only one ground, i.e., the review DPC has to assess the record and eligibility of the applicant for promotion as on the date of meeting of the original DPC and the charge sheet dated 11.06.2014 cannot be relied upon to apply the sealed cover to the recommendations of the review DPC.

5. On the other hand, in the counter reply filed by them, the respondents have espoused that as per the instructions contained in paragraph 9 of the DoPT's O.M. dated 02.11.2012 for the purpose of vigilance clearance, the review DPC should take into consideration the circumstances prevalent at the time of original DPC and any subsequent situation arising thereafter should not stand in the way of vigilance clearance for review DPC but before an officer is actually promoted, it need to be ensured that he/she is clear from vigilance angle. Since in the case of the applicant the vigilance clearance was withheld by the Department due

to charge sheet dated 24.11.2003, the recommendations of the respondents for regular DPC for the years 2006-07 to 2010-11 were kept in sealed cover.

6. The further plea raised on behalf of the respondents is that since the fresh charge sheet dated 11.06.2014 has been issued pursuant to the decision to initiate disciplinary proceedings taken on 30.07.2003, the proceedings should be deemed pending from said date, i.e., even at the time of meeting of the original DPC. Relevant excerpt of the reply filed on behalf of respondents reads thus:-

“Reply to the contentions:

8.1 That with respect of averment made in para 6 (i) (ii) & (iii) above, it is respectfully submitted that:-

(A) Previously, a DPC for promotion to the post of Chief Commissioner of Income Tax for vacancy years of 2006-07 & 2007-08 was held on 22 & 23.08.2007. Subsequently, three more DPCs for the same post for subsequent vacancy years, viz. 2008-09, 2009-10 and 2010-11 were held on 18.11.2008, 23.10.2009 and 29.12.2010 respectively. The name of the applicant was considered in all aforesaid DPCs but the recommendation of all DPCs in respect of the applicant were kept in sealed cover as the Department had withheld for vigilance clearance due to a Charge sheet dated 24.01.2003 issued to her.

As per direction of this Hon'ble Tribunal as mentioned in para 6.5 above, a review DPC was held on 28.11.2014 which undertook a limited review of the proceedings of all those regular DPCs where the ACR of the applicant for the year 2003-04 was considered. The review DPC considered the ACR of 2003-04 as non-est and considered an earlier ACR for promotion to the post of Chief Commissioner of Income Tax as directed by this Hon'ble Tribunal.

(B) As per the instructions contained in para-9 of DOP&T OM date 02.11.2012 (Annexure R4/1), for the purpose of vigilance clearance for review DPC, “the review DPC will take into consideration the circumstances obtaining at the time of original DPC and any subsequent situation arising thereafter will not stand in the way of vigilance clearance for review DPC. However, before the officer is actually promoted it needs to be ensured that he/she is clear from vigilance angle.” In the case of

the applicant, the vigilance clearance was withheld by the Department due to a Charge sheet dated 24.11.2003 issued to her and hence, the earlier recommendations of the respective regular DPCs for the years 2006-07 to 2010-11 were kept in sealed covers.

(C) It was informed by the Department in the review DPC proposal submitted to the Commission that the applicant was not clear from Vigilance angle. It was further informed by the Department that the charge sheet dated 24.11.2003 was quashed by this Hon'ble Tribunal vide order dated 26.08.2011 on the ground that the same was not approved by the competent authority. However, the Tribunal granted liberty to the Department to proceed against the applicants if the concerned competent authority would approve the charge memo in respective cases. Accordingly, with necessary approval, the Department issued a memo/charge sheet dated 11.06.2014, stating therein that it is issued pursuant to the decision taken on 30.07.2003 for initiating disciplinary proceedings and proposing to continue the disciplinary proceedings against her. The Disciplinary Proceedings are still pending.

(D) As the charge-sheet dated 24.11.2003 was in vogue on the date of original DPC and it was mentioned clearly in the subsequent charge-sheet dated 11.06.2014 that it was issued pursuant to the decision taken on 30.07.2003 for continuing the proceedings, the sealed cover procedure was adopted by the DPC in accordance with para-9 of the DOP&T O.M dated 02.11.2012 which provides that for the purpose of Vigilance clearance, the review DPC will take into consideration the circumstances obtaining at the time of original DPC and any subsequent situation arising thereafter will not stand in the way of Vigilance clearance for review DPC. However, before the officer is actually promoted it needs to be ensured that he/she is clear from Vigilance angle."

7. We heard the learned counsels for the parties and perused the record.
8. It is not in dispute that though a decision had been taken on 30.07.2003 to initiate the disciplinary proceedings against the applicant but the charge sheet prepared pursuant to the said decision had not been approved by the disciplinary authority, thus the charge sheet, in itself, was found vitiated and was quashed.

9. As has been ruled by Hon'ble Supreme Court in **Union of India etc. etc. v. K.V. Jankiraman, etc. etc.**, AIR 1991 SC 2010, the disciplinary proceedings can be said to be pending against an employee only when the charge memo / charge sheet has already been issued to the employee.

Relevant excerpt of the said judgment reads thus:-

"6. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a chargesheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2)

(3)

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before ;"

There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.

We, therefore, repel the challenge of the appellant-authorities to the said finding of the Full Bench of the Tribunal.”

Thus, though at the time of consideration of the applicant for her promotion by the original DPC the decision to initiate disciplinary proceedings was in existence, but after quashing the charge sheet on the ground that it had not been approved by the competent authority, no charge sheet can be found to have been issued and the sealed cover to the recommendations of DPC in respect of the promotion of applicant could not have been applied. It is respondents’ own admission that in terms of paragraph 9 of DOP&T’s O.M. dated 02.11.2012 the review DPC has to take into consideration the circumstances prevalent at the time of original DPC and any subsequent situation arising thereafter should not stand in the way of vigilance clearance for review DPC but before an officer is actually promoted, it need to be ensured that he/she is clear from vigilance angle.

The 9 of the O.M. reads thus:-

“9. For the purpose of vigilance clearance for review DPC, instructions exist in O.M. No.22011/2/99-Estt. (A) dated 21.11.2002 that review DPC will take into consideration the circumstances obtaining at the time of original DPC and any subsequent situation arising thereafter will not stand in the way of vigilance clearance for review DPC. However, before the officer is actually promoted it needs to be ensured that he/she is clear from vigilance angle and the provision of para 7 of O.M. No.22011/4/91- Estt. (A) dated 14.09.1992 are not attracted.”

10. In the wake, the fresh charge sheet issued in the year 2014 could be no ground to apply sealed cover to the recommendations of the review DPC. Nevertheless, in paragraph 9 of the O.M. (ibid) it has been stipulated that before the actual promotion of an employee fresh vigilance clearance need to be obtained. Such provision is incorporated in the wake of paragraph 7 of the O.M. No. 22011/4/91-Estt. (A) dated 14.09.1992. Paragraph 7 of the O.M. reads thus:-

“7. A Government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this O.M. will be applicable in his case also.”

11. Paragraph 7 of the O.M. was further elaborated by the Apex Court in **Union of India & another v. R.S. Sharma**, AIR 2000 SC 2337.

Relevant excerpt of the judgment reads thus:-

“16. We are not impressed by the said arguments for two reasons. One is that, what the Department did not do is not the yardstick indicated in paragraph 7 of the Sealed Cover Procedure, what is mentioned therein is that it cannot apply to the Government servant who is not actually promoted by that time. Second is that, the stand taken up by the Department is that in spite of deletion of clause (iv) of the second paragraph, the recommendations of the DPC must remain in the sealed cover on account of the conditions specified in clause (iii) of the said paragraph by virtue of the operation of paragraph 7 thereof. We cannot say that the said stand was incorrect and, therefore, we are unable to blame the Department for not opening the sealed cover immediately after 31.7.1991.

17. Learned counsel for the respondent made an endeavour to contend that in the light of the decision of this Court in *Union of India vs. K.V. Janakiraman* {1991 (4) SCC 109} the Sealed Cover Procedure can be resorted to only after Charge Memo is received or a charge-sheet is filed and that unless such an event had happened at the relevant time the Government employee cannot be denied of his promotion, if he is otherwise entitled to it. Learned counsel also submitted that *Janakiraman* was since followed in *Union of India vs. Dr. Sudha Salhan* {1998(3) SCC}; *Bank of India vs. Degala Suryanarayana* {1999(5) SCC 762}. The clauses of second paragraph of the Sealed Cover Procedure considered in *Janakiraman* were not those involved in the present case and hence that decision is of no avail to the respondent. In the other two decisions the facts warranted application of the ratio contained in *Janakiraman*. The added factor in these two cases was that the public servant concerned had been exonerated of the charges framed by the criminal courts. In the present case the respondent is still facing the trial for serious offences, and hence the situation is different.

18. We may also point out, in this context, that in *Delhi Development Authority vs. H.C. Khurana* {JT 1993(2) 695} and *Union of India vs. Kewal Kumar* {JT 1993 (2) 705} this Court found that the ratio in *Janakiraman* is applicable only to the situations similar to the cases discussed therein, and hence the Sealed Cover Procedure resorted to by the DPC in those two cases was upheld by this Court.

19. In our opinion the Tribunal has erred in overlooking paragraph 7 of the Sealed Cover Procedure (*supra*) and hence the direction issued by it as per the impugned judgment cannot be sustained. We, therefore, allow these appeals and set aside the said direction.”

In the said judgment, it could be laid down by the Apex Court that if before actual promotion of an employee the disciplinary proceedings could be initiated, the recommendation of the DPC/Selection Committee regarding promotion of the employee need to be kept in deemed sealed cover. However, the legal proposition was finally dealt with by the Apex Court in **Union of India & others v. Sangram Keshari Nayak**, JT 2007 (6) SC 272. In the said judgment, having taken note of the judgment in **R.S. Sharma's** case (supra) and all other judgments on the issue, Hon'ble Supreme Court ruled that if at the time of promotion of a junior of the applicant no disciplinary proceedings were pending, the sealed cover should not be applied. Paragraphs 5, 14 to 21 read thus:-

“5. On or about 27.08.1999, one Shri G.P. Srivastava who was immediate junior to the respondent was promoted to the post of Senior Administrative Grade but only on 24.09.1999, a departmental proceeding was initiated against the respondent by issuance of a chargesheet.

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14. Thus, there was no bar in promoting the respondent during the period 14.01.1999 to 27.08.1999. No material was placed before the DPC to take recourse to the sealed cover procedure. In fact, none existed at the material time. Paragraph 2 of the said circular specifically refers to submission of chargesheet as the cut-off date when a departmental proceeding can be said to have been initiated. Even otherwise such a meaning had been given thereto by this Court in K.V. Janakiraman (supra) holding:

"16... The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in

many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure."

15. Reliance placed by Mr. Mohan on R.S. Sharma (supra), in our opinion, does not advance the appellant's case. In that case, cases where sealed cover procedure were applicable were contained in paragraph 2 of the office memorandum dated 12.01.1988 which reads as under:

"Cases where 'Sealed Cover Procedure' applicable.- At the time of consideration of the cases of government servants for promotion, details of government servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:

(i) government servants under suspension;

(ii) government servants in respect of whom disciplinary proceedings are pending or a decision has been taken to initiate disciplinary proceedings;

(iii) government servants in respect of whom prosecution for a criminal charge is pending or a sanction for prosecution has been issued or a decision has been taken to accord sanction for prosecution;

(iv) government servants against whom an investigation on serious allegations of corruption, bribery or similar grave misconduct is in progress either by CBI or any agency, departmental or otherwise."

(Emphasis supplied)

16. Serious allegations of financial misdemeanours were made against the respondent therein. Central Bureau of Investigation took up investigation. He was suspended on 10.03.1988. Although the said order of suspension was revoked, investigation continued. The DPC considered his case for promotion on 3.04.1991 and resorted to sealed cover procedure. Only in the aforementioned situation, K.V. Janakiraman (supra) and other decisions following the same stood distinguished opining that paragraph 7 of the said office memorandum would be attracted, which is in the following terms:

"Sealed cover applicable to an officer coming under cloud before promotion.- A government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by DPC. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this OM will be applicable in his case also."

It was held:

"One is that, what the Department did not do is not the yardstick indicated in para 7 of the Sealed Cover Procedure, what is mentioned therein is that it cannot apply to the government servant who is not "actually promoted" by that time. Second is that, the stand taken up by the Department is that in spite of deletion of clause (iv) of the second para, the recommendations of DPC must remain in the sealed cover on account of the conditions specified in clause (iii) of the said paragraph by virtue of the operation of para 7 thereof. We cannot say that the said stand was incorrect and, therefore, we are unable to blame the Department for not opening the sealed cover immediately after 31-7-1991."

17. Therein H.C. Khurana (supra) and Kewal Kumar (supra) were noticed.

18. In H.C. Khurana (supra), the question was as to what would be the meaning of the word 'issued' when a disciplinary proceeding had been initiated by framing the chargesheet and the same had been despatched. Paragraph 2 of the circular letter in question was similar to the case of R.S. Sharma (supra). It is in that context, what would be the meaning of the word 'issued' when the decision has been taken to initiate disciplinary proceeding came up for consideration. As the circular contained a provision of that nature which is absent in the present case, the said decision, in our opinion, also has no application in the instant case.

19. For the self-same reasons, the decision of this Court in Kewal Kumar (supra) is also not attracted.

20. This aspect of the matter has recently been considered in Coal India Ltd. & Ors. v. Saroj Kumar Mishra [(2007) 5 SCALE 724].

21. We, therefore, are of the opinion that there is no infirmity in the impugned judgments. Accordingly, the appeal is dismissed with costs. Counsel's fee assessed at Rs. 25,000/-."

12. In view of the aforementioned, Original Application is disposed of with direction to the respondents to revisit their decision to apply sealed cover procedure to the recommendations of the review DPC in question in the backdrop of judgment of Hon'ble Supreme Court in the cases of **K.V. Jankiraman, R.S. Sharma** and **Sangram Keshari Nayak** (supra) and take a fresh decision. The decision should be communicated to the applicant by way of a detailed, reasoned and speaking order. No costs.

(Shekhar Agarwal)
Member (A)

(A.K. Bhardwaj)
Member (J)

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