

* **HIGH COURT OF DELHI : NEW DELHI**

+ **IA Nos.200/2004, 14565/2007 & 8561/2008 in CS (OS) No. 22/2004**

Pachranga Syndicate Pvt. Ltd. ... Plaintiff
Through : Mr. S.K. Bansal, Adv.

Versus

Som Nath and Anr. ... Defendants
Through : Mr. N.K. Kantawala with Mr. Rajesh
Sharma and Mr. Priyank Sharma,
Adv.

AND

IA Nos. 204/2004, 8560/2008 & 3111/2009 in CS (OS) No. 23/2004

Pachranga International (Chander Group) ... Plaintiff
Through : Mr. S.K. Bansal, Adv.

Versus

Som Nath and Anr. ... Defendants
Through : Mr. N.K. Kantawala with Mr. Rajesh
Sharma and Mr. Priyank Sharma,
Adv.

Decided on : January 25, 2010

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment? No
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MANMOHAN SINGH, J.

1. By this common order I shall dispose of the applications filed by the parties in both the above-titled suits, the details of which are given as under:

CS(OS) 22/2004

a) IA No.200/2004 under Order XXXIX Rules 1 & 2 read with Section 151 of the Code of Civil Procedure, 1908 (referred to as the 'CPC' for brevity) filed by the plaintiff.

b) IA No.14565/2007 under Order VI Rule 17 read with Section 151 CPC filed by the plaintiff for amendment of the plaint.

c) IA No.8561/2008 under Order VII Rule 10 read with Section 151 CPC filed by defendants for return of plaint.

CS(OS) 23/2004

a) IA No.204/2004 under Order XXXIX Rules 1 & 2 read with Section 151 CPC filed by the plaintiff.

b) IA No.8560/2008 under Order VII Rule 10 read with Section 151 CPC filed by defendants for return of plaint.

c) IA No.3111/2009 by the plaintiff for postponement of the hearing.

2. The parties in both, suit Nos. 22/2004 and 23/2004, are common as are the counsel. Therefore, the pending applications are being disposed of by this common order.

CS(OS) 22/2004

3. The plaintiff has filed this suit under Sections 133 & 134 of the Trade Marks Act, 1999 for restraining the defendants, *inter alia*, from using the trademark PACHRANGA as well as from using packing similar/ alike to the one which can be seen as Annexure D-1.

4. The brief facts in the above said matter are that the plaintiff is a company duly incorporated under the provisions of the Companies Act, 1956 and since its incorporation in the year 1994 the plaintiff has been engaged in the business of manufacture, sale, trade and exports of pickles of various kinds and related goods like food processing. As per the plaintiff, in the year 1994 the plaintiff honestly and in a bona fide manner in the course of trade started using the trade mark Pachrangas Farm Fresh in an artistic manner and the trade name Pachranga, which is being used in a distinctive manner with artistic work which is unique due to its get up, lettering styles and colour scheme.

5. The said trade mark Pachranga Farm Fresh is being used commercially, openly and exclusively in relation to the goods mentioned

above and the plaintiff has built up valuable trade, goodwill and reputation therein and acquired proprietary rights therein.

6. As per the plaintiff, it is the proprietor and prior user of the said trade mark and name. It is also stated that in the year 1943, the ancestors of the Directors of the plaintiff company i.e. Sh. Chander Mohan Dhingra and Sh. Rajinder Dhingra started the business of pickle storage and processing and with the passage of time the business was expanded into other allied goods like food processing.

7. In the year 1953, the trade mark Pachranga was duly registered with the Registrar of Trade Marks under registration No. 158354 in the name of the firm and its partners in class 29 in respect of pickles. The name of the firm was M/s. Muralidhar Ram Narain. There was a disclaimer attached to the said registration to the effect that the registration would give no right to exclusive use of the expression "Achar Pachranga". One of the partners of the said firm was Sh. Asa Nand who is the father of Mr. Chander Mohan Shingra and grand father of Mr. Rajinder Kumar Dhingra. Both are at present Directors of the plaintiff company.

8. It is averred in the plaint that the family firm acquired rights under the trade mark Pachranga by virtue of being legal heirs and by transmission. In 1994, the present company was formed and promoted

by its promoter/directors being legal heirs and part of the same family adopted and used the name Pachranga and Farm Fresh. It is also stated that the directors of the plaintiff had earlier floated another partnership firm known as Pachranga International which had as its partners Sh. Asa Nand Dhingra, Sh. Chander Mohan Dhingra and Sh. Rajinder Kumar Dhingra. It was the same business as pickles.

9. The plaintiff is also using the trade mark PIP and obtained registration under No. 554681-B in class 29 on 17th February, 1999.

10. Later on, a change came in the constitution of the aforesaid firm due to ingress and egress of incoming and outgoing partners. Now the firm is comprised of Sh. Chander Mohan Dhingra, Sh. Rajesh Kumar Dhingra and Sh. Amit Kumar Dhingra as partners thereof and the firm is known as Pachranga International (Chander Group).

11. The allegations against the defendants are that they have adopted and commercially started using the trade mark/trade name Panipat Pachranga. They are not the proprietors of the impugned trade mark and trade name and have no right to adopt and use the said trade mark in relation to similar goods as the same amounts to passing off their business as that of the plaintiff. The act of the defendants also constitutes an unfair trade practice. The defendants are doing similar

business without obtaining the leave and licence of the plaintiff. They are also guilty of infringement of copyright.

12. It is also stated that the defendants were fully aware of the plaintiff's said rights, user and reputation as the plaintiff earlier lodged a complaint with the Superintendent of Police, Panipat with the allegations of infringement of copyright involved of the plaintiff's labels. In pursuance thereto, investigation, seizure and search was carried out by the Police and an FIR was registered. The defendants were arrested and released only on furnishing of proper bail as directed by the Committal Court, Panipat wherein the defendants gave an undertaking not to use the trade mark Pachranga and the copyright vesting in it. The suit filed by the defendants for declaration and cancellation of undertaking being Suit No. 529/2003 was withdrawn by the defendants.

13. The plaintiff submits that on 3rd October, 2003 the plaintiff came across the impugned goods of the defendants bearing the trade mark and trade name Pachranga in Panipat. The plaintiff immediately lodged an enquiry in the market and the present suit was filed for injunction. The defendants have opposed the present application for injunction on the following grounds:-

- a) That the defendants are carrying on lawful business as manufacturers and merchants of pickles under the

descriptive expression Pachranga with their trade mark PPI (label). The said expression Pachranga was adopted and is being used openly since 1999.

b) That the plaintiff has not approached this court with clean hands as the plaintiff has deliberately concealed the relevant facts from this court that the firm M/s.Pachranga International of which Sh. Chander Mohan Dhingra and Sh. Rajinder Kumar Dhingra are partners had already filed a suit in the year 2003 for permanent injunction, passing of, copyright etc. against the present defendants in the court of learned Additional District Judge, Panipat and the said suit has already been dismissed by the Panipat court. It is also stated that Sh. Rajinder Kumar Dhingra who has signed the plaint in the present case is the son of Sh. Chander Mohan Dhingra who is a partner of Pachranga International, Panipat. The firm filed a suit in Panipat against the defendants. It is also stated that the defendants have advertised their trade mark/ label PPI with the descriptive term Pachranga in the magazine 'Vyapar Kesari' dated 10th December 2001 at Page No.69 and in the same magazine the advertisement of the plaintiff is appearing at Page

No.72. The defendants have also advertised their trade mark PPI in another magazine under the title “2nd National Seminar on Achar and Murabba” in March 2003 in which the advertisement of the plaintiff also appears. It is also stated that the defendants have already changed the label of Achar Pachranga much prior to the filing of the suit and have not violated the undertaking in respect of the label. As regard the word ‘Pachranga’, according to the defendants it is a descriptive term for pickles with respect to which the plaintiff has no monopoly rights and it is being used by different manufacturers and merchants of pickles along with their respective trade marks and other distinguishing features. The plaintiff cannot have exclusive rights over the descriptive expression Pachranga which has become *public juris*.

- c) The suit is also bad for delay, laches and acquiescence as the defendants are using the mark PPI since the year 1999 with descriptive term Pachranga openly, extensively and continuously. The question of passing off does not arise. The name ‘Achar Pachranga’ is common to the trade. It is argued by the defendants that since the suit filed in Panipat

court has already been dismissed on merits, the present suit is barred by Section 11 of the Code of Civil Procedure. It is also argued that this court has no territorial jurisdiction to entertain and try the suit as none of the parties are carrying on their business in Delhi.

14. The issues in the above said matter were framed on 31.8.2007. The evidence on behalf of the plaintiff by way of affidavit of Sh. Rajesh Kumar Dhingra which was filed on 13.11.2007. In the meantime, two applications have been filed. One is filed under Order VI Rule 17 CPC being IA No.14565/2007 for amendment of the plaint and another under Order VII Rule 10 CPC being IA No.8561/2008 filed by the defendants for return of the plaint on the ground that none of the parties are residing and carrying on business in the jurisdiction of this Court.

CS(OS) 23/2004

15. The above mentioned suit has been filed under Sections 133 and 134 of the Trade Marks Act, 1999 on the basis of registered trademark PIP for restraining the defendants from using the trademark PPI or any other deceptively similar mark as well as the impugned label shown in Annexure D-1 or any other label which is similar to the plaintiff's.

16. Apart from the other facts which are common in the present case to those mentioned in CS(OS) 22/2004, it is stated that the plaintiff adopted and started using the trademark and label PIP since the year 1983. The label used by the plaintiff wherein the trademark PIP is shown is distinctive with artistic features and the plaintiff is the original owner of the same. The trademark PIP is also registered under registration No.554681-B in Class 29 as of 17.7.1991 under the Trade & Merchandise Marks Act, 1958.

17. The allegation against the defendants is that the defendants are not only using the trademark PACHRANGA but they are also using the trademark PPI which is deceptively similar to the trademark PIP of the plaintiff. The defendant is also infringing the copyright of the plaintiff in their label and also passing off their goods as that of plaintiff.

18. In the written statement, apart from the defenses taken in CS(OS) No.22/2004 which are common and have already been stated above, it is stated by the defendants that the trademark PPI as well as label for pickle was being used by the defendants from the year 1999 and the trademark PPI is dissimilar to the trademark PIP.

19. First I shall take up a) IA No.8561/2008 under Order VII Rule 10 read with Section 151 CPC in CS(OS)22/2004 and b) IA

No.8560/2008 under Order VII Rule 10 read with Section 151 CPC in CS(OS)23/2004 filed by defendants for return of plaint.

20. As far as the applications being IA No.8561/2008 and 8560/2008 under Order VII Rule 10 CPC filed by the defendant No.1 are concerned, it is stated by the defendant No.1 that the parties to the suits are carrying on business and residing outside the jurisdiction of this Court i.e. at Panipat therefore, this Court has no territorial jurisdiction to entertain and try the present suit and at least as regards a suit for passing off, which has arisen out of a separate cause of action, the plaintiff has to satisfy the Court about its jurisdiction to invoke the same.

21. It appears from the record that issue No.1 has been framed by this Court in respect of territorial jurisdiction. The present suit has been filed by the plaintiff for infringement of copyright, passing off etc. The plaintiff has also mentioned in the application for amendment that the trademark has now become registered although the registration certificates have not been filed. The plaintiff has invoked the territorial jurisdiction of this Court on various grounds i.e. (i) the defendants are committing the acts of infringement and passing off within the jurisdiction of this Court; (ii) the plaintiff is also carrying on and managing its goods and business under the said trademark in Delhi and adjoining areas; (iii) the plaintiff has its registered office at Nanak

Enclave, Kingsway Camp, Delhi; (iv) the plaintiff also has dealers in Delhi namely M/s. Amit Enterprises at C-164, Sector-7, Rohini, Delhi.

22. The issue of jurisdiction has been dealt with in the case of ***Tata Iron & Steel Co. Ltd. v. Mahavir Steels & Ors.***; 47(1992) DLT 412 wherein this court has dealt with a similar objection and has held in para 11 of the judgment which reads as under :

"11. The question regarding jurisdiction can only be gone into after the evidence of the parties is recorded in the case. Even in the Punjab case the suit was not thrown out at the threshold under Order 7 Rule 11 the Code but only after the parties were given an opportunity to lead evidence. The plaint in the present suit categorically states that the defendant no. 1 No. 1 was selling the channels of defendant no. 1 No. 2 under the offending trade mark which is deceptively similar to that of the plaintiff. On these averments the Court must assume jurisdiction and proceed with the suit to determine the question relating to the confirmation/vacation of the stay order at this stage."

23. In the case of ***LG Corporation & Anr. v. Intermarket Electroplasters(P) Ltd. and Anr.***; 2006 (32) PTC 429, para 12 reads as under :

"7. ...The question as to whether the Court has territorial jurisdiction to entertain a suit or not has to be arrived at on the basis of averments made in the plaint, that truth or otherwise thereof being immaterial as it cannot be gone into at this stage..."

24. In view the settled law, prima facie it appears that this Court has the territorial jurisdiction to entertain and try the said suits. However, the issue in this regard has already been framed. The plaintiff

ultimately has to satisfy the Court about the territorial jurisdiction at the time of final hearing of the suit. This application has no force and the same is false and frivolous which is dismissed with cost of Rs.10,000/- to be paid by the defendant No. 2 in each application by the next date of hearing.

25. Now I shall take up IA No.14565/2007 in Suit No.22/2004 under Order VI Rule 17 read with Section 151 CPC filed by plaintiff for amendment of the plaint.

26. In this application the plaintiff has sought the amendment in the plaint on the ground that the plaintiff's two applications bearing No.735067 and 672552 which were opposed by M/s. Pachranga Foods, C-3, Industrial Area, Panipat, Haryana have now been registered as the said parties had entered into an agreement on 29.10.2007 whereby both the oppositions had been withdrawn by the said party. According to the plaintiff, in view of the withdrawal of the said notice of oppositions, the said trademark applications have been registered.

27. The plaintiff sought the amendment by including relief of infringement of trademark in addition to the relief of passing off and infringement of copyright etc. already filed. It is settled law that amendment can be allowed by incorporating the relief of infringement of trademark if the said trademark is registered in favour of the plaintiff

during the pendency of the suit for passing off. However, it appears from the record in the present case that this application has been pending for the last two years and the registration certificates have not been placed by the plaintiff on record. In the absence of the said registration certificates it is not possible to give any finding to the effect that the said trademarks have been registered with the Registrar of Trade Marks and the Court cannot allow such amendment without prima facie proof of registration as per rules. Therefore, the amendment sought cannot be allowed and it will be kept pending till the time the plaintiff is able to file the copies of the registration certificates, if any, granted by the Registrar of Trade Marks.

IA No.3111/2009 (For Postponement)

28. This matter has already been heard. Hence, the application has become infructuous. Therefore, no orders are required to be passed in this application.

IA Nos.200/2004 (under Order XXXIX Rules 1 & 2 CPC) & 204/2004 (under Order XXXIX Rules 1 & 2 CPC)

29. Now I shall deal with the above mentioned applications filed by the plaintiff under Order XXXIX Rules 1 and 2 CPC. The plaintiff in both the matters is pressing interim injunction for restraining the defendants from using the trademark PACHRANGA and PPI as well as the label in question.

30. The contention of the learned counsel for the plaintiff is that on 22nd October, 2003 the plaintiff filed a complaint under Sections 63 & 65 of the Copyright Act, 1957 read with Section 420 and Section 34 of the Indian Penal Code, 1860 before the Superintendent of Police, Panipat, Haryana. It appears from the complaint filed by the plaintiff that the grievance of the plaintiff was that the plaintiff became aware of the identical labels used by the defendants in respect of pickles being sold under the brand name Garden Fresh by M/s Bharat Achar Factory of Panipat. Therefore, the complaint was filed for infringement of copyright as the defendants were found to be violating the rights of the plaintiff.

31. On 23.10.2003 an undertaking was given to the plaintiff that the defendants would not use the trademark PACHRANGA and by 15.11.2003 the defendants would not use the label as well as the trademark in any manner whatsoever. The documents filed by the plaintiff have been carefully examined by this Court. No doubt before the Police Station an undertaking as alleged by the plaintiff had been given by the defendants.

32. However, it is pertinent to mention that on 27.10.2003 the defendants filed a suit for declaration with consequential relief of permanent injunction seeking the declaration that the plaintiff had no

legal right to interfere with the business of the word PACHRANGA and label used by the defendants.

33. In the said suit the defendants had also mentioned that the said undertaking was illegal, null and void and against the fundamental right of the defendants as the same was obtained in the Police Station and therefore has no value in the eyes of law. The said undertaking was given because the partners of the defendant firm were arrested and taken into custody and under that pressure the defendants were compelled to give the said undertaking. It is pertinent to mention that the said suit was compromised and disposed of by order dated 3.11.2003 on the basis of a fresh undertaking given by the defendants. The said undertaking is reproduced as below:

Undertaking

In favour of M/s. Pachranga Syndicate Pvt. Ltd., Plot NO. 16, Sector-29, HUDA, G.T. Road, Panipat.

We Panipat Pachranga Industries, Partners Somnath Arora, Jitender Arora & Dinesh, Sanoli Road, Opp. Malik Petrol Pump, Panipat undertake as under:-

1. That we admit proprietary rights of Pachranga Syndicate Pvt. Ltd, Plot No. 16, Sector-29, HUDA, G.T. Road, Panipat in the copyright of existing artistic works of their complete product range.

2. We further admit copyright registrations of the aforesaid artistic work and undertake never to challenge the same.

3. We undertake not to use artistic work / copyright identical wit or deceptively similar to the aforesaid copyrights amounting to infringement and violation of copyrights in favour of Pachranga Syndicate Pvt. Ltd, Plot No. 16, Sector – 29, HUDA, G.T. Road, Panipat.

4. That we have no incriminating material pertaining to the above copyrights including dies, moulds, printing material, labels & packing material etc however few labels have been objected to and we undertake to destroy these labels by 15th Nov, 2003.

5. The said undertaking is not only binding upon us but also on our heirs, representatives, agents, distributors and all others acting for and on our behalf.

6. In breach of said undertaking M/s Pachranga Syndicate Pvt. Ltd, Plot No. 16, Sector-29, HUDA, G.T. Road, Panipat will be entitled to obtain legal reliefs against us such as injunction, seizure of goods, damages of Rs. 5 lakhs, rendition of account and other related reliefs.

7. That we undertake to withdraw the Suit dated 27.10.2003 pending in Civil Court Panipat against Pachranga Syndicate Pvt. Ltd.”

34. A mere reading of the undertaking given by the defendants when the suit for declaration was withdrawn by them shows that the said undertaking is only pertaining to the copyright/artistic work of the label and not pertaining to the trademark PACHRANGA or PPI. Therefore, *prima facie* when deciding the present applications, no benefit can be given to the plaintiff in respect of the undertaking given by the defendant before the Police Station. I feel that a trial in this regard is required and these disputes cannot be decided at the pre-trial stage.

35. Another important factor in both the matters is that M/s. Pachranga International having as partners Sh. Chander Mohan Dhingra, Sh. Rajinder Kumar Dhingra and Sh. Asa Nand Dhingra filed the suit no.1/2000 before the Additional District Judge, Panipat against the Panipat Pachranga Industries, Pachranga Achar Factory and M/s. Dilli Darbar, Panipat, for permanent injunction, rendition of accounts and infringement of copyright. It is not in dispute that Director of the present plaintiff company was one of the partners when the suit was filed before the Additional District Judge in the year 2000. The suit was filed for restraining the defendant from using the trade name 'Achar Pachranga' as well as the trademark PPI.

36. The issues in the said suit were framed on 28.8.2001 and after considering the matter on merit, the said suit was dismissed on 4.8.2004 holding that the word 'Achar Pachranga' is a generic word and the two trademarks PIP and PPI are not similar, although it is also mentioned in the judgment that after April, 2002 no purchase or sale by the plaintiff firm i.e. Pachranga International was made as the said firm is not doing any business of manufacturing or selling pickles, chatni etc. It is a matter of fact that when the present suit was filed this fact was not disclosed by the plaintiff in the plaint or in the interim application. However, later on it has been admitted by the plaintiff that the said suit

No.1/2000 was filed before the District Judge, Panipat and the Director of the present company was the partner in the said firm M/s. Pachranga International.

37. The learned counsel for the plaintiff has given the explanation that since there was a partition in the business of M/s Pachrang Interatoal between the partners and at the relevant time there was no business carried out by any of the partners after April, 2002 thus, no interest was taken by the plaintiff or its Director to continue with the said suit. Since the present plaintiff was not dealing with the matter and the plaintiff was unaware about the status of the said suit, therefore, the said fact was not mentioned in the plaint.

38. The learned counsel for the plaintiff has also referred various judgments in support of his submission, particularly the judgment reported as *Bengal Waterproof Ltd. v. Bombay Waterproof Manufacturing Co. and Anr.* in AIR 1997 SC 1398. He argued that since it is a continuous cause of action, the present suit is very much maintainable, as it is case of recurring cause of action and each illegal sale of the defendants will give a fresh cause of action in favour of the plaintiff.

39. Lastly it is argued that now the trademark Pachranga has been registered in the name of the plaintiff, a fresh cause of action for

infringement of trademark has arisen against the defendant despite of dismissal of suit No.1/2000 filed by Pachranga International before the ADJ, Panipat.

40. After having gone through all the pleadings and documents and hearing the learned counsel for the parties, I am of the view that the plaintiff is not entitled to the injunction prayed for in either of the interim applications. The explanation given by the plaintiff at this stage cannot be accepted because there is no denial on its behalf that the suit filed by Pachranga International was ultimately decided on merit. If the suit would not have been decided on merit then the position ought to have been different. The other fact of the matter is that there is material on record to show that the defendants have been using the impugned trademark for the last number of years. Further as regard the question of recurring cause of action is concerned, no doubt a fresh suit is maintainable on grant of registration but in the present case no registration certificates have been filed. Further at this stage, in view of dismissal of earlier suit on merit, I do not consider proper to issue an injunction against the defendants unless the prima facie case is made out. The balance of convenience in the present circumstances is also not in favour of the plaintiff therefore none of contentions of Mr. Bansal can be accepted in the present stage of the matter.

41. However, in the interest of justice, the suit proceedings therefore be expedited in view of the judgment passed by the Supreme Court in **M/s. Shree Vardhman Rice & Gen Mills v. M/s. Amar Singh Chawalwala, 2009 (41) PTC 397 (SC)**.

42. The judgment referred by the plaintiff of *Bengal Waterproof Ltd. v. Bombay Waterproof Manufacturing Co. and Anr. (supra)* does not help the case of the plaintiff as in the present case the similar question of trademarks pending between the parties was decided by the Additional District Judge, Panipat, on merit, the said fact was not there in the case referred by the plaintiff. Thus, it is not applicable in the facts and circumstances of the present case.

43. Considering the overall circumstances of the matter and without going into the merit as to whether two names Pachranga and Achar Pachranga, PIP and PPI are deceptively similar and what is the impact of the suit decided by the ADJ, Panipat, on merit, the said question has to go into the trial. As regard the undertaking given by the defendants at the time of withdrawal of the suit filed by them for declaration, both the applications are disposed of with the directions stated hereunder.

44. After having considered the entire gamut of the matter, I feel that it is not appropriate to pass the interim order as prayed particularly

at this stage when the matter is ripe for evidence, rather to dispose of the interim application without expressing any opinion on merit with the following directions:

- a) The suit proceedings be expedited.
- b) The defendants shall maintain separate accounts pertaining to the use and sale of Pachranga products and file the same before this Court every quarterly. The first statement be filed on or before 15.2.2010 wherein the defendants shall give the sale figure of Pachranga products from the date of user till date, thereafter, the defendants shall keep on filing the statement of sale every quarterly.
- c) The defendants in both the matters shall be entitled to use the amended label with the condition that the mark Pachranga would be used in different writing style/script/font i.e. in capital letters written against a background other than the colour red/maroon and with a different coloured background wherein the words 'REAL TASTE' are written i.e. in a colour other than blue in order to avoid confusion in the market. This arrangement shall continue till the disposal of suit.
- d) The defendant No.1 by 15.02.2010 shall also file an undertaking in the form of affidavit that in case the suit of the

plaintiff is decreed after trial, the defendant No.1 shall pay the profits and damages if any suffered by the plaintiff.

e) Needless to say, these findings have been made without prejudice to the contentions on merit of either party and shall have no bearing on the final outcome of the case.

CS (OS) No. 22/2004 & CS (OS) No.23/2004

List the matter before the Joint Registrar on 24th February, 2010 for directions.

MANMOHAN SINGH, J.

JANUARY 25, 2010
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