

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

ICA No.26/2020

Haider Bin Masood

versus

Election Commission of Pakistan & 7 others

Appellant by: Mr. Adnan Bashir Ch. and Mr. Imran Ali
Kayani, Advocates.

Respondents by: Mr. Sana Ullah Zahid, Advocate for
Respondents No.1 & 2.
Mr. Qasim Iqbal, Advocate for Respondent
No.3.
Malik Qatadah Jamal Khan, Advocate for
Respondent No.5.

Date of Hearing: 11.03.2020.

MOHSIN AKHTAR KAYANI, J: Through the instant intra court appeal, the appellant has called in question judgment passed by the learned Single Judge in Chambers, dated 10.02.2020, whereby W.P. No.318/2020 filed by Respondent No.3 was allowed and Election Commission of Pakistan was directed to issue fresh election schedule as provided in Rule 11(2) of the Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015.

2. Brief facts referred in the instant intra court appeal are that the present appellant is a contesting candidate for the seat of Chairman in Union Council-40 (Sectors I-8 & H-8), Islamabad, regarding which the Election Commission of Pakistan had notified the Poll Day as 15.02.2020 vide notification dated 30.01.2020. However, Mushtaq Ahmad Abbasi/Respondent No.3 being voter member of the said constituency filed W.P. No.318/2020 before this Court assailing the said notification, whereby the poll date with respect to elections of Union Council-40 (I-8), Islamabad as well as post election schedule has been announced. The said writ petition of Respondent No.3 was allowed by learned

Single Judge in Chambers vide impugned judgment dated 10.02.2020. Hence, the instant intra court appeal.

3. Learned counsel for appellant contended that the Election Commission of Pakistan was competent to alter the election schedule to the extent of poll day as per mandate of Section 58 of the Elections Act, 2017, which explains the consequential effect of alteration and rescission in a more remedial manner, but the learned Single Judge in Chambers had ignored the said provision of law and passed the impugned judgment in hasty manner, which is liable to be set-aside.

4. Conversely, learned counsel for Respondent No.3 opposed the filing of instant intra court appeal and contended that under Rule 11 of the Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015, the entire fresh schedule has to be issued, rather to notify the poll date solely; that the learned Single Judge in Chambers has rightly appreciated the facts of the case together with the law on subject and passed the impugned judgment in accordance with law, which is liable to be maintained.

5. Arguments heard, record perused.

6. Perusal of record reveals that the appellant is aggrieved with the consolidated judgment passed by learned Single Judge in Chambers in W.P. No.318/2020 and W.P. No.405/2020, dated 10.02.2020, whereby notification dated 30.01.2020 issued by the Election Commission of Pakistan has been set aside and following directions have been passed.

“13. For what has been stated above, both the petitions are allowed and the impugned notification dated 30.01.2020 is set-aside; consequently, Election Commission of Pakistan shall issue a fresh election schedule as provided in Rule 11(2) of the Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015. The Election Commission of Pakistan shall also announce election schedule with respect to UC-08, Tumair, Islamabad for holding of bye-elections of Chairman in compliance of Section 31 of Islamabad Capital Territory local Government Act, 2015.”

7. The controversy started when various seats of UC-40 (Sector I-8), Islamabad became vacant due to demise of its members and the Election Commission of Pakistan has notified the amended schedule through notification dated 30.01.2020 to the extent of Poll Day in the following manner:

ELECTION COMMISSION OF PAKISTAN
Islamabad, the January 30, 2020

NOTIFICATION

No.F.5(2)/2019-LGE(ICT) (Vol-I):- *In partial modification of this Commission's Notification of even number dated, 04.10.2019 & in continuation of the Notifications of even number dated 29.10.2019 & 08.01.2020 and in exercise of the powers conferred upon under Article 140(A) of the Constitution of the Islamic Republic of Pakistan, read with Sections-8(c), 58 of the Elections Act, 2017 and Rule-11(2) of the Islamabad Capital Territory local Government (Conduct of Elections) Rules, 2015, the Hon'ble Election Commission is pleased to fix poll-day and post poll/subsequent activities for Union Council-40 (I-8), Islamabad as follows:-*

S.No.	Activity	Date
01.	Poll Day	15-02-2020
02.	Consolidated and Declaration of result by the Returning Officer by	17-02-2020
03.	Issuance of Notification of Returned Candidates by ECP on	24-02-2020
04.	Oath of elected Candidates of the Union Council	02-03-2020

By orders of the Election Commission of Pakistan.

(Ghulam Abbas)
Deputy Director (LGEB/ICT)

8. The above referred notification had been assailed in W.P. No.318/2020 by Respondent No.3 and as such, the learned Single Judge in Chambers has set aside the said notification and directed ECP to issue fresh election schedule in terms of Rule 11(2) of the Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015 and at the same time the ECP was also directed to announce fresh schedule to the extent of UC-208, Tumair, for holding of By-election of Chairman in compliance of Section 31 of the ICT Local Government Act, 2015.

9. In order to resolve the controversy, it is necessary to go through the concept of election schedule provided in Rule 11 of the Islamabad Capital Territory Local Government (Conduct of Elections), Rules, 2015, which is as under:

***"11. Election Schedule.** – (1) The Election Commission shall announce the schedule for conduct of local Government elections under the Act, hereinafter referred to as "Election Schedule", and shall publish it in the official Gazette for the information of general public.*

(2) Election Commission may at any time before the date of poll rescind or alter the Election Schedule published under sub-rule (1) and shall issue a revised Election Schedule."

10. Similarly, the substantive provision dealing with said proposition is Section 228 of the Elections Act, 2017, which is as under:

***"228. Bye-elections.**--- When the seat of a Member of a local Government becomes vacant and bye-election is required to fill the seat under the applicable local Government law, the Commission shall, by notification in the official Gazette, call upon the constituency or electoral college to elect a person to fill the seat on such date as may be specified in the notification and the provisions of the Act, the Rules and applicable local Government law shall apply to the election to fill such seat."*

11. Keeping in view the above referred legal position, there is no cavil to the situation that the Elections Act, 2017 together with its Rules are applicable to the Local Government law and if there is some inconsistency or difference, the provision of Section 229 of the Elections Act, 2017 harmonizes the same by using phrase, ***"the provision of Chapter V, Chapter IX, Chapter X and Chapter XII of this Act, as nearly as possible, shall apply to the conduct of Local Government Election"***. The legislative intent has to be seen in the light of this phrase of *"applicable as nearly as possible"* and the Election Commission of Pakistan has to ensure the fair fresh and just election in terms of Section 8(c) of the Act. Similarly, Section 58 of the Elections Act, 2017 deals with the alteration in the election programme. However the substantive provision dealing with the Local

Government election in such scenario is Rule 11 of the Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015.

12. Keeping in view the above legal position on record, we have attended to the reasoning rendered by the learned Single Judge in Chambers in the impugned judgment, whereby it has been held in Para-11 of the impugned judgment that when the Election Commission of Pakistan, due to law and order situation in Islamabad Capital Territory, has deferred the election schedule and the polling date, then the Election Commission of Pakistan *under Rule 11(2) ibid is required to revise entire election schedule with respect to by-election in Union Council-40 (I-8) Islamabad*. Such analogy drawn by the learned Single Judge in Chambers is on the strength of Rule 11(2) of the Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015, although such interpretation has to be seen in the light of entire scheme of Elections Act, 2017, Islamabad Capital Territory Local Government Act, 2015 and Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015.

13. While going through the provisions referred above, we have not seen the wisdom regarding revision of entire election schedule from any law, especially when the election schedule was already announced and the schedule has been followed up to certain stages prior to polling date, including submission of nomination papers, scrutiny of nomination papers and final list of the candidates. However, in emergence of any untoward incident prior to the polling date or after going through the said stages, the ECP can consider it appropriate to change the date of poll or alter the election schedule pursuant to its publication apprising about the revised election schedule. Although, there is no specific definition in these electoral laws regarding the terms, "*revised election schedule*" hence, under the rules of interpretation, this Court is bound to consider the term "*revised*" in its ordinary dictionary meaning, which means

“reconsider, review, re-examine, reassess, reevaluate, reappraise, rethink, think-over, take another look at, take a fresh look at, look at in a different light, change, alter, modify” (as referred in Oxford Thesaurus of English). Therefore, all these meanings have to be based upon the changed circumstances or in emergence of new situation before the polling date, whether it is the law and order situation, death of any of the candidate contesting the election, or any other situation making the conduct of election impracticable.

14. We have also attended to the proposition while considering the law on subject that Election Commission of Pakistan being a high constitutional functionary cannot be made accountable for subjective decision which they make in discharge of their constitutional functions, therefore, the test settled by the superior Courts for examining the actions of the Election Commission of Pakistan has to be seen on the touchstone of criteria whether the impugned action is *coram non judice*, without jurisdiction or malafide as reported in **PLD 2010 Lahore 138 (Muhammad Asghar Siddique vs. Government of Punjab)**, wherein it has been held that:

“15.High constitutional functionaries cannot be made accountable for the subjective decision that they make in the discharge of their constitutional functions. It is merely the test of existence of relevant material and the application of mind for taking an action that may be applied to assess the validity of their discretionary order. The Courts thus avoid to probe subjective element of a discretionary decision but may examine its structural elements as pointed out above to consider its validity. The Honourable Supreme Court has time and again reiterated the justiciability of constitutionally protected action on the touchstone of the triad criteria of an impugned action being coram non judice, without jurisdiction or mala fide. These criteria recognized in Ghulam Mustafa Khar's case (ibid) represent a settled rule for granting judicial review. Therefore, it cannot be maintained that a discretionary order passed by an autonomous high constitutional functionary as the Honourable CEC is immune from judicial review under all circumstances. Moreover in the context of discretionary orders passed by constitutional functionaries that are not protected by an emphatic ouster of judicial review by express constitutional provision, the apex Court has applied a broader test to assess their legal validity. In

this regard a series of cases pertaining to the exercise of power by the President under Article 58(2)(b) of the Constitution have settled the principle. The case of Haji Saif Ullah has already been referred above; its dicta was adopted with approval by the Honourable Supreme Court subsequently in the case of Mian Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473. The basic test in such cases is that a constitutional functionary must arrive at his decision on the basis of some material. What is, therefore, curtailed by judicial action is arbitrariness in the decision of a constitutional functionary. The existence of the material and application of mind thereto are the two essential ingredients for obtaining immunity from judicial review. In the case of the section 103 proceedings the record of the Commission does not show the existence of new material that could sustain an immediate decision of the proceedings.

(underlining is provided for emphasis)

Similarly, we have also attended to the proposition while considering similar situation earlier taken up in two reported cases when elections were postponed on the ground of law and order situation in province of Punjab as well as in the State of Haryana (India), whereby the superior Courts have uphold the ultimate authority of the Election Commission in this regard. Reliance is placed upon the case of *Muhammad Asghar Siddique supra*, wherein it has been held that:

17. *There are two judicial precedents that become relevant at this stage of the discussion. The first one which was quoted by the Honourable CEC in his Detailed Submissions is the case of Muhammad Shafique Chaudhry v. The Province of Punjab 1998 SCMR 1957. In this case the Honourable Supreme Court disagreed with the Provincial Government to postpone elections principally on the ground that "order of the learned Chief Election Commission dated 18-5-1998 dealt with the question of law and order problem also". The Honourable Supreme Court approved the schedule announced by the Honourable CEC because it reflected application of mind to material existing on his record. The other precedent from the neighbouring jurisdiction is titled Election Commission of India v. State of Haryana AIR 1984 SC 1406. There it was observed that it would be naïve to hold the Election Commission was not aware of the notorious law and order situation in Punjab and to some extent in Haryana. Nevertheless it was observed that the Government of Haryana was in the best position to assess the situation of law and order in areas within its jurisdiction and under its control "**but the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission.** Arbitrariness and mala fides destroys the validity and efficacy of all orders passed by public*

authorities. It is, therefore, necessary that on an issue like the present, which concerns a situation of law and order, the Election Commission must consider the views of the State Government and all other concerned bodies or authorities before coming to the conclusion that there is no objection to the holding of the elections at this point of time".
(underlining is provided for emphasis)

15. Likewise, the apex Court has also dealt with the proposition in hand in another case reported as PLD 2010 SC 573 (Sheikh Rashid Ahmad vs. Government of Punjab, etc.), wherein it has been held that:

"9. We have considered the above submissions and have also gone through the material placed before us and the relevant constitutional provisions. Part VIII of the Constitution comprising Articles 213 to 226 related to "Elections". Article 213 reflects that Chief Election Commissioner in this part shall be referred to as the Commissioner; whereas, Article 219(b) provides that "the Commissioner shall be charged with the duty of organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly". Thus it is quite evident that the Constitution places upon the Chief Election Commissioner an obligation to organize the election. Article 220 of the Constitution provides that "it shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions; conceptually placing the position of Commissioner and Election Commission upper most while discharge their functions requiring the executive authority to assist; in other words "to aid" the Commissioner and the Election Commission. In that course, the executive authority shall have no option but, to offer, unhesitatingly, its assistance to make the way for the Commissioner or the Election Commission smoother rather than to make it difficult; either to stop, postpone or slow down their pace in the discharge of duties, in this case holding election for seat to question. The provision of Article 220 of the Constitution also reflects to be in pari materia with the provision of Article 190 of the Constitution according to which "all executive and judicial authorities throughout Pakistan shall act in aid of Supreme Court"; which hold the Supreme Court upper most in the hierarchy of the judiciary for which the Constitution envisages that its independence shall be fully secured. Thus, to sum up, testing on the touchstone of afore-referred provisions of Constitution, the net result that comes out is that the Chief Election Commissioner and the Election Commission are absolutely independent with exclusive jurisdiction while performing duties within terms of Part-VIII of the Constitution in which no interference is allowable by any of the parties interested by resorting to any manner and mode, as was done in the present case. All the concerned quarters, namely Federal and Provincial Governments, the Law Enforcing Agencies as well, are under an obligation to ensure that

Chief Election Commissioner/Election Commission function independently; and see that they are properly strengthened enabling them to discharge their constitutional commitments fairly, freely and without any hindrance and pressure of whatsoever nature."

(underlining is provided for emphasis)

16. While considering the above case law, we are of the considered view that Election Commission of Pakistan is an independent constitutional pillar of the State, which regulates its power under the constitutional mandate given in terms of Article 222(d) of the Constitution of the Islamic Republic of Pakistan, 1973, which is reproduced as under:

222. Electoral Laws.

(d) *the conduct of elections and election petitions; the decision of doubts and disputes arising in connection with elections;*

17. In view of above, the Chief Election Commissioner is an independent constitutional authority without trace of subservient and the executive authorities are bound to assist the Chief Election Commissioner in organizing or holding the election as held in PLD 2010 SC 573 (Sheikh Rashid Ahmad vs. Government of Punjab, etc.), hence, the fixation of date of election or announcement of election schedule is the sole prerogative of the Election Commission of Pakistan and as such, the ECP is not accountable if it is performing its duties in accordance with law.

18. The appellant has also raised a serious question qua the maintainability of W.P. No.318/2020 and W.P. No.405/2020 filed by Respondent No.3 i.e. Mushtaq Ahmad Abbasi and Zahid Afzaal, who are merely the voters of the electoral area i.e. UC-40, Faizabad, Sector I-8/4, Islamabad and UC-08 Tumair, Islamabad, with the contention that they have no *locus standi* to challenge the election schedule being strangers, but this aspect has not been considered by the learned Single Judge in Chambers in a proper manner while passing the impugned judgment. We have considered this argument on the touchstone of judgment reported

as PLD 1989 SC 166 (Federation of Pakistan vs. Haji Muhammad Saifullah Khan), wherein it has been held that:

“A stranger has no right to require an order of prohibition; but where a clear excess of jurisdiction by an inferior tribunal is brought to the notice of the Court, and a prohibition is necessary in order to enforce public order in the administration of the law, the Court is bound to grant it, at least where the applicant has a personal interest in the outcome of the proceedings. It is otherwise if there is a doubt in fact or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction.

The Court in the exercise of its discretion may and should take into consideration a wide variety of circumstances in determining whether the writ should issue. It may and should consider the facts of the particular case, the exigency which calls for the exercise of its discretion, the consequences of granting the writ, and the nature and extent of the wrong or injury which would follow a refusal of the writ. The Court is not bound to allow the writ merely because applicant shows a clear legal right for which mandamus would be an appropriate remedy, even though without mandamus applicant for the writ would be without remedy. The writ will not be issued on mere technical grounds, and it may be granted or refused depending on whether or not It promotes substantial justice.

Mandamus is a discretionary writ. It is not an order granted as of right and it is not issued as a matter of course, so that the Court may refuse the order not only upon the merits, but also by reason of the special circumstances of the case.

Any person and not necessarily an aggrieved person can seek redress from the High Court against the usurpation of a public office by a person who is allegedly holding it without lawful authority. But the grant of relief in writ jurisdiction is a matter of discretion, wherein it is quite legitimate on the part of the High Court to test the bona fides of the relator to see if he has come with clean hands. A writ of quo warranto In particular is not to issue as a matter of course on sheer technicalities on a doctrinaire approach. The delay occurred in the filing of the petition which has not been satisfactorily explained is not without effect on the grant of this discretionary relief.

19. In view of above, there is no cavil to proposition that a stranger has a right to invoke jurisdiction of this Court if there was a clear excess of jurisdiction by inferior tribunal or an authority, which may result into denial of personal rights of an individual or public at large, whereby any individual can approach the Court under Article 199 of the Constitution of the Islamic Republic of Pakistan,

1973. However, in this case, both the writ petitions have been filed by voters of electoral area and as such, the writs are maintainable, but other qualification test applicable in this case is regarding the personal right of a voter, who could not claim infringement of his personal right on the notification issued by the ECP, whereby a reschedule election has been notified due to demise of a candidate of the constituency, especially when those petitioners were not the candidates. Hence, they cannot claim that a new election schedule be announced from Stage-1, which has its separate concept and analogy under the law, therefore, the writ petitions filed by the respondents are not maintainable as they cannot challenge the actions of Election Commission of Pakistan as the notification of rescheduled election will not affect the rights of the petitioners of W.P. No.318/2020 and W.P. No.405/2020.

20. We have gone through the purpose of election laws and observed that the election schedule has a specific purpose, which clearly delineates steps in election so that prospective candidates could manage and regulate their election campaigns. Reliance is placed upon 2015 CLD 708 Lahore (Institute of Cost and Management Accountants of Pakistan vs. Ghulam Abbas). However, if a fresh process is initiated by the Election Commission despite closing of certain stages, such revise election schedule, if given, would disclose a facilitation to one candidate or some other persons, which would be making mockery of entire electoral process as well as its solemn and serious nature will be affected. Similar circumstances have been considered by the Hon'ble Lahore High Court in PLD 2016 Lahore 179 (Muhammad Ilyas vs. Returning Officer), wherein it has been held that:

“19. What is sought to be derived from the said phrase here is that the defect which the Returning Officer has been empowered to remedy has to

conform to the defects which have been relied and referred to above in the same sub-rule. The power cannot be expanded to include the defect of the nature which is the subject matter of this petition. For, this defect, in my opinion, constitutes a defect of a substantial nature. The defect is of the kind where the nomination of a candidate would be rendered defective and unworthy of consideration by the Returning Officer. Moreover, if the said defect was not of a substantial nature there was no point for the legislature to lay so much emphasis on the matter of proposer and seconder and would not have made it a ground for rejection of the nomination papers under rule 14(3) of the Rules, 2013. It will be tantamount to putting a premium on the misdeeds of the erring candidates. This will also involve a subjective assessment of the mental state of a candidate in order to gauge his true intent. Was the mistake made in good faith and clerical in nature or was it actuated by some mischievous design and a contraption? This subjective analysis cannot be left to the discretion of the Returning Officer.

20. *There is yet another aspect of the issue. To allow the proposer and seconder to be substituted would mean a fresh nomination to be made. This would, in turn, mean an extension in the date of receiving of nomination papers and a change in the rest of the schedule too. Would this not impinge upon the rights of other candidates? Can the election schedule be changed for facilitating one candidate, merely? Obviously this would be making a mockery of the entire electoral process and its solemn and serious nature. I cannot imagine that this can be countenanced to be done."*

21. We have given anxious thoughts to the above referred case laws as well as the term used in the election laws with its meanings together with the reasons in detail keeping in view the original notification dated 04.10.2019, issued by the ECP, whereby 13 Stages for conduct of By-election has been provided, which are as under:

SCHEDULE FOR BYE-ELECTIONS		
S.No.	Activity	Date
1.	Public notice to be issued by the Returning Officers on	08.10.2019
2.	Filing of Nomination papers with the Returning Officers by the candidates	09.10.2019 to 10.10.2019
3.	Publication of notice of all the nomination papers received on	11.10.2019
4.	Objection to the nomination papers	12.10.2019
5.	Scrutiny of nomination papers by the Returning Officers	14.10.2019 to 16.10.2019

6.	<i>Last date for filing of appeals against decisions of the Returning Officers (accepting/rejecting the nomination papers) by</i>	17.10.2019
7.	<i>Last date for deciding appeals by Appellate Authorities by</i>	21.10.2019
8.	<i>Last date for Withdrawal of candidate</i>	22.10.2019
9.	<i>Publication of revised list of candidates along with symbols</i>	22.10.2019
10.	Poll Day	02.11.2019
11.	<i>Consolidated and Declaration of result by the Returning Officer by</i>	04.11.2019
12.	<i>Issuance of Notification of Returned Candidates by ECP on</i>	08.11.2019
13.	<i>Oath of elected Candidate of aforementioned Councils</i>	13.11.2019

22. The above referred original By-Election Schedule contains 13 Stages and prior to polling date, it has 9 stages to be followed. However, if any of the candidate, whose nomination papers have already been accepted followed by 5th Stage of scrutiny, passes away/dies prior to the poll day, then a revised election schedule has to be announced to be followed from Stage-1, by giving full opportunity to the residents of electoral area to re-submit their nominations as one of the candidate, whose nomination papers were accepted, passed away/died. In this eventuality, the entire process has to be restarted from Stage-1.

23. However, in other situation i.e. when the election could not be conducted due to law and order situation in the electoral area or due to any security situation or demonstration in which the voters are unable to cast their votes, whereby the District Administration or the ECP comes to conclusion that poll day could not be held, then the entire election schedule remains intact and the same could not be altered, amended or revised for start over from Stage-1, rather only new poll date shall be notified by the Election Commission of Pakistan.

24. On the contrary, if the ECP revises the election schedule to be start over from Stage-1, it will cause a serious prejudice to the candidates who have already completed their campaign, even their nomination papers have been scrutinized

and every contestant is familiar with the ground situation of the area while considering the working of his opponent candidates, and per se, such conduct on the part of ECP would be against the original spirit of the election laws as all the candidates, who have submitted their nomination papers, are the same and the only disability which comes in their way is the emergence of law and order situation, which is beyond their control and in this eventuality, the process of election schedule completed from Stage-1 till the Poll Day stands protected.

25. In view of above settled position, the ECP while exercising the powers provided in Rule 11(2) of the Islamabad Capital Territory Local Government (Conduct of Elections) Rules, 2015 can only issue the Revised Election Schedule for the Poll Day onwards, hence, the view taken by the learned Single Judge in Chambers is not in accordance with law or the logic/rationale given under the election laws, therefore, the instant intra court appeal is hereby ALLOWED, the impugned judgment dated 10.02.2020, is SET ASIDE, and the Election Commission of Pakistan is directed to issue revised election schedule from Stage-10 i.e. Poll Day and onwards only.

(LUBNA SALEEM PERVEZ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 30.03.2020.

CHIEF JUSTICE

JUDGE

APPROVED FOR REPORTING

Khalid Z.

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