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The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

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No. 1952/40 - WEDNESDAY, FEBRUARY 03, 2016

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PART I : SECTION (I) — GENERAL

Government Notifications

My No. IR/10/14/2011.

THE INDUSTRIAL DISPUTES ACT CHAPTER 131

THE award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Mr. A. Gamage, No. 88/20, Sri Bodhi Road, Gampaha of the one part and Bank of Ceylon, No. 04, Bank of Ceylon Mawatha, Colombo 01 of the other part was referred by order dated 27.03.2013 made under Section 4(1) of the Industrial Dispute Act, Chapter 131 (as amended) and published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1807/26 dated 26.04.2013 for Settlement by Arbitration is hereby published in terms of Section 18(1) of the said Act.

M.D.C. AMARATHUNGA,
Commissioner of Labour.

Department of Labour,
Labour Secretariat, Colombo 05.
22nd January, 2016.

Ref No. : IR/10/14/2011.

In the matter of an Industrial Dispute

Between

Case No. A/3509

Mr. A. Gamage,
No. 88/20, Sri Bodhi Road,
Gampaha.

.....*Party of the First Part.*

and

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.

.....*Party of the Second Part.*

Award

The Honourable Minister of Labour and Labour Relations Gamini Lokuge, do by this virtue of the powers vested in him by Section 4(1) of the Industrial Disputes Act, Chapter 131 of the Legislative Enactments of Ceylon (1956 Revised Edition), as amended by Acts Nos. 14 of 1957, 4 of 1962 and 39 of

1968 (read with Industrial Dispute - Special Provisions) Act, No. 37 of 1968 hereby appointed me as the Arbitrator by his order dated 27th March, 2013 and referred the dispute between the aforesaid parties for settlement by arbitration.

The statement of the matter in dispute between the aforesaid parties is as follows :

"Whether Mr. A. Gamage who had served as Security Guard of the Bank of Ceylon had been caused injustice by not receiving the salary increments from year 2003 - 2008, Bonus, Holiday Allowances, the salary revisions as per Collective Agreement 2006 - 2008 and other entitlements, and if so, to what relief he is entitled".

Appearances :

Party of the First Part :

Mr. Srinath Perera, Attorney - at Law appears on behalf for the Party of the First Part.

Party of the Second Part :

Mr. Adhil Khasim, Attorney - at Law appears on behalf for the Party of the Second Part.

Mrs. Dayajini Peeris - Human Resources Officer represented the Party of the Second Part.

Both Parties mentioned above, have submitted their respective statements that has led to the disputes in terms of Regulations 21 (1) and (2) of the Industrial Disputes Regulations, 1958. Thereafter, I made every endeavor to explore a possibility of an amicable settlement which proved to be futile.

The party of the First Part A. Gamage the Workman (hereinafter referred to as Gamage) commenced to lead his sole evidence marking documents **A-I to A-ll**. Whereas the Party of the Second Part (hereinafter referred to as the **Bank**) adduced the evidence of one Kannangara Koralalagea Indira Champa Kurnari Kannangara, Senior Manager and concluded the case with documents marked **R-I to R-16**. Then they were given time to submit 'Written Submissions' returnable on 9th November, 2015.

A review of Written Submissions of both Parties as well as the evaluation of evidence reveals the factual background to this reference and the legal basis of the several reliefs sought by Gamage to be relevant to this Award is as follows:-

Gamage joined the Bank on 04.05.1981 from the position of Security Guard to Junior Security Officer without any blemish. However, on 21.05.1999 a Charge Sheet was issued against him for acts of misconduct and found him intoxicated during working hours and forcefully holding both hands of a lady Security Officer and pushing her against the wall and casting innuendoes which resulted in holding a Domestic Inquiry and found him guilty and as a punishment suspended a period of five (5) years increments with effect from 12th November, 1999 and ending on 04th November, 2004 (**R-6**).

Yet again he was Charge Sheeted for acts of misconduct on 30th May, 2003 for picking up a Gold Chain and keeping it in his possession without handing over the same to a Superior Officer (**R-8**). There ensued another Domestic Inquiry and his services were terminated with effect from 08.04.2003 by letter dated 16th June, 2004 (**R-9**).

Apparently, he filed an Application on 01.09.2004 in the Labour Tribunal Case No: 1/122/04 under Section 31 B (1) of the Industrial Disputes Act, through his Trade Union, Ceylon Bank Employee' Union in a representative capacity for *reinstatement with Back Wages*. Finally, the Learned President delivered an Order dated 10.07.2009 (**OA2**) in favor of the said Union to the tune of One Million Four Hundred and Eighty-five Thousand Seven Hundred Sixty-six and Cents eighty (Rs. 1,485,766. 80) based on the evidence led and submitted thereof.

It is pertinent to note that the Learned President in his Order (**OA2**) stated that, the Union failed to lead any evidence of his (Gamage's) salary increments and according to the Respondent's (**R-27**), the Applicant's increment had been suspended and as such he had to rely on the only document (**A-9**) produced in the Labour Tribunal for the purpose of calculating Back Wages and it was calculated on the basis for a period of 5 years and 8 months and 10 days to which period Gamage was out of employment following suspension by the Respondent (the Bank), namely form 08.04.2003 to 18.12.2008 where he had reached the age of retirement of 55 years.

The Learned President has clearly determined that termination of his services was unjust and unlawful and stated in his order that, the due relief for Applicant was reinstatement with Back Wages but, for the fact that he has reached his retirement age by the time the order was pronounced on 10.07.2009.

Meantime, the Bank initiated an Appeal proceeding against the order of the Learned President of the Labour

Tribunal in the Provincial High Court Case No. HCALT 37/ 2009.

Meantime, the Bank initiated an Appeal proceeding against the order of the Learned President of the Labour Tribunal in the Provincial High Court Case No. HCALT 37/ 2009 **(R-13(a))**

After the pronouncement of Labour Tribunal's Order a new turn of events envisaged where, Gamage's wife B. Weerakoon Gamage on behalf of her husband appealed by a letter dated 20.08.2009 (**A-9/ R-I0**) making a humble request to 'withdraw the High Court proceedings for the reason that, her husband Gamage had suffered two instances of Myocardial Infarction one on 09.04.2009 and next on 11.08.2009. On humanitarian grounds the Bank by an internal Memorandum to the General Manager dated 22.10.2009 (**R-16 and R-16 (a))** sought permission to withdraw the High Court Appeal. The Bank in their magnanimity had acceded to her plea and implemented and honoured the Labour Tribunal Order of 10.07.2009.

The conduct of Gamage is not an open secret. Moreover his character and nature of behavior was well demonstrated, in that, no sooner the Bank withdrew the High Court Appeal **(R-13 (1))** on 25.11.2009 than by letter dated 30.03.2010 **(A-3)** addressed and forwarded to the Deputy Manager of the Bank and thereafter, directed a letter addressed to Commissioner of Labour dated 10.11.2010 **(A-06(a))**, followed. In fact this **(A-06(a))** has culminated in the above said reference for Arbitration.

The Learned President of the Labour Tribunal at page 10 of(**OA 2**) a specific and categorical stipulation had been underscored "***without prejudice to any statutory entitlements***'. This has created confusion in the mind of the Administrative Officer namely the Commissioner when he was labouring in terms of section 16 namely " ... shall be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties", referred to above.

From the above facts and circumstances even a cursory glance will enlighten a reader that Gamage had approached two forums to ventilate his grievances and to obtain legal remedy. One through his Trade Union namely Ceylon Bank. Employees' Union in the Labour Tribunal Case No. **1/122/04** in terms of Section **31 B (l(a))** in a representative capacity and the other one by himself (Gamage) through the Minister of Labour and Labour Relations in terms of Section 4 (1) of the Industrial Disputes Act No **43 of 1950** as amended. The matter in issue seems to be the termination of employment and consequent reliefs meted out by the Labour Tribunal Order of **(OA2)**.

The Arbitrator under Industrial Disputes Act exercise arbitral power and jurisdiction of the Arbitrator being equitable and has an element of discretion, there can be no room for technicalities or trivialities. Further, jurisdiction of the Arbitator under the said Act is contingent on reference of an Industrial Dispute which can be challenged on the grounds that the matter referred does not relate to an Industrial Dispute. In **Brown and Company Ltd V Ratnayake [1986] 1 Bar Association Law Journal Report 229 at 231 Rodrigo J (with whom Rattwatte J concurred)** " .. functions of the arbitral power in Industrial Disputes is to ascertain and declare what in the opinion of the Arbitrator ought to be the respective rights and liabilities *as they exist at the moment the proceedings are instituted.*

From this it follows that if he is to ascertain what ought to be the rights and liabilities of parties and what they are at the institution of the proceedings he has necessarily to initiate proceedings himself. The ultimate burden of making a just and equitable order is his.

With this in view I venture upon my task. It is appropriate to cite the case, in **Silva V Kuruppu SC 182/69; HC minutes of 14.10.1971**. The Supreme Court took the view that the assessment of compensation is eminently a matter within the province of the President of the Labour Tribunal and refused to intervene to reduce the quantum awarded although it appeared to be on the high side stating the President had not acted on the wrong principle nor is the amount awarded so excessive to warrant intervention by the Appellate Court.

In a similar vein, in **Up Country Distributers (Pvt) Ltd. V Subasinghe (1996) 2 SLT 380; S.C. Appeal No. 111/95. Wijetunge, J**. observed: "*The legislature has in its wisdom left the matter in the hands of the Tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind, some degree of flexibility in that regard is both desirable and necessary if a Tribunal is to make a just and equitable order*".

The above two Supreme Court cases set the tune for the independence of judiciary and now that the Labour Tribunals Presidents are Judicial Officers and are empowered and entertained authority to act judicially on a case by case basis provided that a Trade Union or a Workman as applicant has to place solid facts and circumstances supported by documents as enshrined in the Supreme Court Rule 3 (1) : the object is to ensure that the documents tendered by the parties are authentic documents that can be

relied upon in the decision making process and it cannot be permitted to be used for taking advantage of lapse for subverting of cause if justice.

It is also very relevant to highlight **Dr. Amerasinghe J in Jayasuriya V Sri Lanka State plantations Corporation [1995) 2 S.L.R.379**. His Lordship stated that "Compensation is derived from the Latin root compensation, and what is expected is that after a weighing together of evidence and probabilities in the case, the Tribunal must form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant, but would rather consider to be just and equitable in all the circumstances of the case. There must eventually be an even balance of which the scales of justice are meant to remind us. The Tribunal must endavour to give each man that which is his right". Further, he continued and held that '***the burden of the workman to adduced sufficient evidence to enable the Tribunal to decide the actual financial loss caused because Compensation in an indemnity for such loss***'.

Before analyzing the facts of the instant case it is necessary to consider that the Bank at the very commencement of the hearings has taken up certain Preliminary Objections. The main thrust of the argument on behalf of the Bank was the reference made to me in this case is,bad in law because it dealt with a similar matter already had been adjudicated by the competent Court on its merits namely by the Labour Tribunal.

Therefore, the Doctrine of Estoppel by Res judicata applies and the Arbitrator cannot interpret what has already been decided on the quantum of Compensation and thus violates the Doctrine of 'autrefois acquit' (Double jeopardy).

What is the meaning of Res judicata? It is the Doctrine that prevents re-litigation of a claim that has been fully considered and finally decided in Courts. If the losing party attempts to re-assert such a claim in another action against the same defendant the claim will barred by the Doctrine of Res judicata.

Abeyasekara, in his book 'Industrial Law and Adjudication' chapter 54 page 998 states as follows so far as the Law of Res judicata is concerned, the key section in Industrial Disputes Act has two limbs they are as follows:

1. Where an application under Section 31 B (1) is -

(*a*) Entertained by a Labour Tribunal, and

(*b*) Proceedings thereon are taken, and

(*c*) Concluded,

the workman to whom the application relates shall not be entitled to any other legal remedy vide: Section 31 B (5) of the Industrial Dispute Act as amended - in respect of matter to which the applications relates.

2. Where the Workman has resorted to *any other legal remedy*, he shall not thereafter be entitled to the *remedy under Section 3IB (1)*.

An important point to note with regard to the rule of Res judicata as embracing the Sections aforesaid (Sections 31 B (l) read with 31 B (5)) is that somewhat dissimilar to the rules available in Civil Law, the principle of Res judicata as envisaged by these Section applies irrespective of the parties to the subject matter of the application. The legal remedy that is shut out in respect of the matter to which the application relates necessarily is not in respect of *the parties*. Thus where a Trade Union on behalf of a Workman is a party to an application in a Labour Tribunal, and the application has been disposed of, upon the same subject matter, the workman concerned, *though he was not a party to the application*, cannot resort to any other legal remedy.

The Principles underlying that there should be an end to litigation and person should not be vexed twice on the same matter as is provided for in Section 31 B (5).

The case law in point is, **In Namasivayam V The Superintendent, Dickoya Estate SC 69/De Novo 69 decided on 12.Feb.1971 (unrep)** the union field on an application on behalf of a workman and the application was dismissed for default of appearance. The workman field another application, which was dismissed by the Tribunal in view of the earlier application and this dismissal was upheld by the Supreme Court.

In Mendis V River Valleys Development Board (1971) 80 CLW49, held that Section 31 B (5) did not prevent an applicant who had filed an action in the District Court which was withdrawn, from thereafter proceeding within an application to a Labour Tribunal which had been pending the District Court action seeking substantially same relief since there was no final order or adjudication on the remedy sought in the District Court. The Supreme Court thus set aside the order of the Labour Tribunal upholding an objection by the employer that in terms of Section 31 B (5) the Tribunal had no jurisdiction to hear and determine the application as the workman had sought his remedy in the District Court.

However, the above said decision was not followed by the Court of Appeal in **Ceylon Tobacco Co Ltd V Illangasinghe**

(1986) 1 SLR 1, where an employee who had first applied to the commissioner of Labour in terms of the Termination of Employment of Workmen (Special provisions) Act No 45 of 1971 for relief upon termination, thereafter sought substantially the same relief on an application to a Labour Tribunal after the Commissioner determined that the workman's case was not covered by the Act since she had consented to the termination of her services. The Labour Tribunal overruled a preliminary objection to the maintainability of the application based on Section 31 B (5).

The Court of Appeal interpreted the expression 'legal remedy' in Section 31B(5) to mean a remedy provided by law, whether it be under the common law or by statute, although it did not encompass any form of administrative relief. The Court thus held that the employee had first resorted to a remedy recognized by the 1971 Act.

G.P.S. De Silva J with Abeyawardena J agreeing rejected the construction given to Section 31 B (5) in **Mendis case** cited above that what it precluded was not a workman seeking but instead obtaining more than one remedy, as it did violence to the plain language used in the Section.

Incidentally it should be noted that the amplitude ofthe powers of the Minister of the Labour is also highlighted by the recent decision of the Court of Appeal in **Winifreeda Mills Ltd V Tillekeratne (1984) 1 SLR 186**, herein the Court of Appeal followed the earlier Supreme Court decision in the **Estates and Agency Co Ltd V Perera (1975) 78 NLR 289**, where the Court held that where applications before the Labour Tribunals were dismissed or terminated without any adjudication on the merits, no finality attaches the proceedings relating to the applications made to the Labour Tribunals. In such an event if the Minister of Labour is satisfied of the existence of an Industrial Dispute, no doctrine of estoppel by Res judicata between the parties can prevent the performance by the Minister of Labour of his statutory duty. **Sharvanda J**, in a separate judgment explained the rationale for this judicial policy as follows: "It has to be borne in mind that the Industrial Disputes Act is a piece of **social legislation** having for its object the prevention, investigation and settlement of Industrial Disputes. Promotion of Industrial peace cannot be achieved by the application of technical doctrines of estoppel by Res judicata or otherwise".

Further, **In Wimalasena V Navaratna (1978-79) 2 SLR 10**, the issue that arose for determination was whether the Minister of Labour has the power to refer an Industrial Dispute for Arbitration under Section 4 (1), when there was an.inquiry pending the Labour Tribunal regarding the same dispute. By virtue of the operation of Section 31 B (2) (B) a proceeding pending before the Labour Tribunal would have to be dismissed once reference to Arbitration is made. Citing the Supreme Court decision in **Perera's case** mentioned above the Court of Appeal held the Minister in terms of Section 4 (1) has the power to refer a dispute for settlement by arbitration, even though the inquiry was pending in the Labour Tribunal regarding the same dispute.

However, "in terms of article 114 of the constitution of the President of a Labour Tribunal is appointed by the Judicial Services Commission. Thus the status of a Labour Tribunal as it stands today is entirely different from what it was in 1957 when the Industrial Disputes Act was enacted. Interpretation Article 170 read with Article 114 of the constitution gave effect to the exhortations of their Lordships in **Walker Sons & Co. Ltd. V F.C.W. Fry** and went one step further by including the President of a Labour Tribunal within the definition of 'Judicial Officer'. It is interesting to note that Judicial Services Commission had published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka No. 1052 dated 30.10.1998 a notification in which eighteen (18) Labour Tribunal Presidents have been appointed as Magistrates for the limited purpose of performing duties relating to the enforcement of their orders.

The combined effect of the provisions of Interpretation Article 170, Articles 114 and 116 is that the decision in **Wimalasena V Navaratne** and Others can no longer be considered as valid authority for the proposition that the Minister has unlimited power under Section 4 (1) of Industrial Disputes Act which would enable him to refer a dispute, which is pending before a Labour Tribunal to an Arbitrator for settlement. Such an interpretation would necessarily infringe and violate the principle of independence of judiciary enshrined in Article 116 of the Constitution which is the paramount law". Vide: **Upali Newspaper Limited V Eksath Kamkaru Samithiya 1999 3 SLR 205** in this case Court of Appeal held that the Minister of Labour does not have unlimited powers to refer dispute under Section 4 (1) of Industrial Disputes Act and that the Court could quash reference if bad in law.

It is settled law that an Arbitrator has the jurisdiction to determine whether a valid industrial dispute has"been legally referred to him. In the case of Ceylon **Bank Employees' Union V Yatawara 64 NLR 49 at page 56/57** it was held that a Tribunal of special jurisdiction created by statute can only act, if terms contained in the statute giving it jurisdiction are complied with. If they are not complied with the jurisdiction does not arise.

In the light of the legal position detailed above the pivotal question that should be determined whether the Trade Union which had filed the Labour Tribunal application had afforded an opportunity with evidence and documents to substantiate its case for the Labour Tribunal President to assess, evaluate and to arrive at a decision to quantify the quantum of compensation due to them. Failure to adduce factual representations with solid and substantial evidence and documents will turn out to be to their own detriment and it is their own seeking and nothing will cure it. In fact, reference is in relation to the Labour Tribunal Order and the relief granted which had been adjudicated on the merits of the case and the quantum of compensation is determined on just an equitable principle.

It is obviously clear the documents marked in Arbitration proceedings such as documents A08, A10, A11 and salary increments referred to should have been marked and adduced in evidence in the Labour Tribunal case. The Union applicant which is a strong Trade Union should have taken interest and should have done justice to workman. Their failure cannot be remedied by another cause of action by seeking a reference by the workman himself under Section 4 (l) of the Industrial Disputes Act. The reason being Labour Tribunal President only categorically indicated without prejudice to any statutory entitlements and as such Gamage is not entitled to claim any salary increments or salary revision as the order precludes Gamage from claiming any payment other than statutory payments. Gamage admitted statutory payments include EPF and ETF. And therefore he is well aware that the other claims referred to in the reference could not be sought by the said reference which has no power or authority to go into the legality of the matter. Labour Tribunal President is a Judicial Officer who had made the order and in terms of Section 31 D (l) which stipulates an order of a Labour Tribunal shall be final and shall not be called in question in any Court.

Where the workman who, or the Trade Union which, makes an application to a Labour Tribunal or the employer to whom that application relates is dissatisfied with the order of Tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal to the Provincial High Court on a question of law, *Vide*: 31 D (2). **In Namasivayam V The Superintendent, Dickoya Estate SC 69/De Novo 69 decided on 12.Feb.1971 (unrep)** the union filed on an application on behalf of a workman and the application was dismissed for default of appearance. The workman filed another application, which was dismissed by the Tribunal in view of the earlier application and this dismissal was upheld by ,the Supreme Court. The above said case is strictly relevant and applicable to the instant case and therefore the reference made by the Minister is bad in law and therefore legally invalid.

Be that as it may, the maxim *nellus commodum compere potest de inuria sua propria* meaning - that no man shall take advantage of his own wrong. Weeramantry's "The Law of Contact" page 390 and 391. This maxim, which is based on elementary principles, is fully recognized in Courts of Law and of equity: reasonableness is the basis of this rule, which a Labour Tribunal is not entitled to ignore.

As mentioned above the Bank had initiated proceedings against the order of the learned President of Labour Tribunal in the **Provincial High Court Case No. HCALT 37/2009 (R-l3(a))** By **A9/R10** the wife of Gamage by letter dated 20th August 2009 requested the above said Appeal be withdrawn and the order of the President of Labour Tribunal to be complied with. The Bank, had acceded to the request of Gamage's wife, at the expense and to its detriment from proceeding with the Appeal in the High Court. Gamage having precluded the Bank from proceeding with the Appeal, to his advantage had thereafter made a complaint to the Commissioner resulted in this instant reference for the Arbitration for Salary Increments from year 2003- 2008, Bonus, Holiday Allowances, Salary Revisions as per the Collective Agreement 2006- 2008 and other entitlements. In that, no sooner the Bank withdrew the High Court Appeal **(R-13 (1))** on 25.11.2009 than by letter dated 30.03.2010 (A-3) addressed and forwarded to the Deputy Manager of the Bank and thereafter, directed a letter addressed to Commissioner of Labour dated 10.11.2010 **(A-06(a))**, followed.

Gamage had admitted in evidence that his wife had tendered an Appeal to the Bank This attitude depicts his dubious nature and was trying to take mean advantage of an innocent generous heart namely the Bank.

On the application of the above said maxim *nellus commodum compere potest de inuria sua propria* and considering the Supreme Court Rule 3 (1) referred to above will show Gamage is trying to take mean advantage of the generous disposition of the Bank and subverting the cause of justice. On the evidence established tend to *tilt the scale of justice* in favour of the Bank. More so in applying the following maxims namely - *equality is equity and also he who seeks equity must do equity*. The evidence demonstrated by Gamage and on a parity of reasoning thereon does not throw any light in his favour. Therefore on that count also he failed measurably and the maxim that no

man shall take advantage of his wrong is well established in this case.

It is apt to mention the concept of **Social Justice** set out very eloquently by **Sharvananda J , in Caledonian (Ceylon) Tea & Rubber Estate Ltd V Hillman (1977) 79 1 NLR 421**. " ... The goals and values to be secured and promoted by Labour Tribunals are social security and social justice. The concept of **social justice** is an integral part of industrial law and a Labour Tribunal cannot ignore its relevancy or norms in exercising its just and equitable jurisdiction. Its sweep is comprehensive as it motivates the activities of the modern welfare state. It is found on the basic ideal of *socio-economic equality.* Its aim is to assist in the removal of *socio-economic* disparities and inequalities. *It endeavors to resolve the competing claims of* ***employers and employees*** *by finding a solution which is just and fair to both parties*." One could safely conclude that equity will not suffer a wrong to be without a remedy.

On the strength of evidence adduced and considering the facts and circumstances together with documents produced it appears to me on the balance of probabilities, I am of the opinion that the Banks' evidence outweighs the evidence that of Gamage and seems justifiable in the circumstance. Even an *ex gratia* payment cannot be made out to him for the reason that it will naturally end up in travesty of justice.

For the foregoing reasons it is my candid view that Gamage has no claim to meet the ends of justice.

In the premises I make no Award.

I consider this Award as just and equitable in the circumstances.

T. EDMUND SANTHARAJAN,
Arbitrator.

At Colombo,
23rd December 2015.

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