MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING
SUIT NO.: 22-88-2002-I

BETWEEN

MOHAMAD RAMBLI BIN KAWI
(WN KP 470806-13-5403)
NO. 110 KAMPUNG LINTANG
93050 KUCHING ... **PLAINTIFF**

AND

1. **SUPERINTENDENT OF LANDS AND SURVEY KUCHING DIVISION**
2. **STATE GOVERNMENT OF SARAWAK**
3. **THE FEDERAL LANDS COMMISSIONER** ... **DEFENDANTS**

BEFORE THE HONOURABLE
MR. JUSTICE DATUK LINTON ALBERT **IN OPEN COURT**

JUDGMENT

The Plaintiff claims to have acquired native customary rights over sixty-five parcels of land at Loba Rambungan, Kuching representing about 1010 acres of land which are together referred to as *'the native customary land'*. On 12.8.1997 the 1st and 2nd Defendants alienated the whole of the native customary land to the 3rd Defendant for a period of 99 years under a provisional lease described as Lot 300, Block 4 Salak Land District. The Plaintiff's claim is premised on sixty-five separate *'Agreements to surrender Native Customary Land'* (the agreements) between the Plaintiff and the sixty-five claimants to the native customary land

respectively in respect of which the Plaintiff paid a monetary consideration to each of the claimants.

The Plaintiff testified that he is an ethnic Malay and is therefore a native of Sarawak. He came to know that land at Loba Rambungan was owned under native customary rights by the villagers of Kampong Loba and they were willing to surrender their respective native customary land to the Plaintiff which afforded the Plaintiff the opportunity to pursue his interest in cultivation and farming. This soon led the Plaintiff to pay a visit to the late Penghulu Sadam bin Hashim whose jurisdiction covered Loba Rambungan and learned that the land there belonged to the villagers at Kampung Loba but this had to be verified with the village chief of Kampung Loba one Bujang bin Hassan in relation to owners of individual parcels of land there. Between 1985 and 1987 the Plaintiff, sometimes accompanied by the son of Penghulu Sadam bin Hashim, one Mahlee @ Mahli Bin Sadam, made many trips to kampong Loba to meet the village chief Bujang Bin Hassan as well as the owners of native customary land at Loba Rambungan. In 1987 the Plaintiff engaged some of his friends to undertake a survey and came up with a locality plan identifying the various parcels of land and their respective acreages and this locality plan was attached to each of the 65 agreements which were executed variously between 1989 and 1998 and each was witnessed or endorsed and verified by either the village chief Bujang Bin Hassan or by Mahlee @ Mahli bin Sadam who was by then the Penghulu, having succeeded his late father. The Plaintiff testified that to his knowledge and belief the respective native customary land he had acquired was where the original villagers

foraged for food and earned a living from collecting such riverine creatures as clams, prawns and crabs and taking mangrove wood for sale which was used to produce charcoal before the advent of kerosene and gas stoves. An attempt to settle the matter amicably proved futile because the letter from the Plaintiff to the minister having ultimate responsibility for the acts and deeds of the 1st and 2nd Defendant was ignored and remained unanswered to this day.

Mahlee @ Mahli Bin Salam (PW5) aged 60 testified that he was born at Kampung Sibu Laut, a short distance by boat from Kampung Loba whose erstwhile village chief the late Bujang Bin Hassan was his father's first cousin, but now resides at Kampung Telaga Air which, together with Kampung Loba and various other villages in their vicinity came under his jurisdiction when he was the duly appointed Penghulu succeeding his father from 1995 to 2002. His grandfather was also Penghulu before his late father.

According to PW5, whose knowledge of the old customs, traditions and way of life of the Malays was undisputed, the Malays who were mostly fishermen and where arable land was available, also padi farmers, and were settled, especially those in and around Kuching along the coastal areas and along riverbanks in the lower reaches close to the river mouths. PW5 had many relatives and friends in Kampung Loba and knew the background of the land in Loba Rambungan which is now claimed by the Plaintiff as land under native customary rights of the respective villagers of Kampugn Loba and these ancestral lands are referred to by the Malays as *'Tanah Pesaka'*. The nipah palm and mangrove forests in the neighbourhood of the villages afforded the Malays their

livelihood because they collected edible living creatures found on the swampy ground of these forests namely crabs, clams and snails, the nipah leaves gathered for roofing material and mangrove wood chopped for charcoal, just to name but a few of the bounty that these nipah palm and mangrove forests presented to the Malays. The pioneer in a particular place would stake his claim to the land, some of which, although very little, was cleared by the original pioneer for padi farming and some eventually planted with valuable fruit trees. Consistent with their settled way of life the forests were not indiscriminately cleared but selectively and sustainably harvested. This was how the pioneers at Loba Rambungan acquired customary rights over land and subsequently inherited by their children and children's children and the ultimate beneficiaries transferred their respective native customary land to the Plaintiff for valuable consideration under the 65 agreements which constituted the Plaintiff's claim. PW5 testified that since 1987, initially at his father's behest, he had accompanied the Plaintiff on several occasions to negotiate and conclude the respective transactions for the transfer of the various native customary land to the Plaintiff. After he was appointed Penghulu in 1995 and until 1998, PW5 went to the site of the native customary land on many occasions to check and verify who the respective owners were. Hence, all the agreements from 1995onwards were witnessed and endorsed by PW5.

Halim Bin Bujang (PW2) aged 42 is the son of the late village chief Bujang bin Hassan whom the Plaintiff met and consulted when he first thought about purchasing land at Loba Rambungan. PW2 was born in Kampung Loba which is near Loba Rambungan

and lived there until he moved to Kampung Samariang but still has a house in Kampung Loba where he goes back to during holidays. His testimony relating to the Malay custom of acquiring *'Tanah Pesaka'* was identical to the account given by PW5. Like most of the villagers in Kampung Loba his father also owned *'Tanah Pesaka'* in Loba Rambungan which he and his siblings inherited and some of their *'Tanah Pesaka'* have since been issued with titles. He confirmed that he is one of the 65 original owners who surrendered his land to the Plaintiff for monetary consideration which he utilised for his business and identified the specific agreement and the locality plan in respect of the transaction with the Plaintiff. The land was 19.66 acres which was first acquired by his granduncle one Onn Bin Salleh. He also testified that the Plaintiff engaged someone by the name of Mustapha to survey the relevant parcels of land and a locality map was produced as a result of the survey. Several other witnesses also testified to some of the other agreements they had respectively entered into with the Plaintiff for the surrender to him of their *'Tanah Pesaka'*. For example, Awang Marsidi Bin Awg Yahya (PW3) a 68-year-old Malay fisherman, born and brought up in Kampung Loba testified that he surrendered two parcels of the 65 parcels of native customary land to the Plaintiff under two separate agreements signed with the Plaintiff in 1997. These two parcels of land namely Field Lot 33 and Field Lot 39 were first occupied by PW3's father in 1943 and 1948 respectively and were about 10 minutes' boat ride by 4 horse-power outboard engine from Kampung Loba. His account of how the Malays acquired native customary rights over land or *'Tanah Pesaka'* as commonly known among the Malays of Sarawak and the accounts of the other witnesses for the Plaintiff

converged, including that of Sebi Bin Masran (PW6) a 68-year old farmer who was from 1980 to 2008 a Penghulu and whose jurisdiction covered several Malay communities and kampongs in Kuching.

David Laeng (DW2) a Land Officer in Betong was the Assistant Settlement Officer in the Kuching Division from 1997 to 2000 and called as a witness by the 1st and 2nd Defendants. In 1998 he was instructed to make a study and give his comments on an area of land which included the native customary land claimed by the Plaintiff. His study was based on aerial photographs taken in 1948 together with land use map and topographical map. There is no evidence whatsoever that DW2 has any knowledge relating to the interpretation of aerial photographs, topographical and land use map and did not, in his testimony, claim to have any such knowledge. Hence his negative conclusions as to the Plaintiff's claim based on the claims of the original claimants to native customary land is of no assistance whatsoever. Equally inconsequential is the testimony of Anthony Jingie Ak Joseph (PW1), a Land Officer in Bintulu whose testimony consisted of stating the types of documents kept by the Lands and Surveys Office; references to statutes and statutory provisions and the procedure for the issuance of a provisional lease by the 1st and 2nd Defendants. Eric Dexter Ridu (DW3) an Assistant Photogrammetry Officer with the Lands and Surveys headquarters testified for the 1st and 2nd Defendants. He holds a diploma in Geomatic Science. His interpretation of the whole area claimed by the plaintiff from aerial photographs taken in 1948 was that the area was *'covered with primary jungle and slight cleared area'*.

DW3 nevertheless agreed that there were six man-made objects which could represent shelters or houses in the aerial photos, his main objective was to determine the existence of large cleared area and primary forest. Dr. Claus-Peter Gross (PW7) was called to testify for the Plaintiff on his interpretation of the aerial photographs interpreted by DW3 and gave concurrent evidence on their respective findings. DW7 is an Associate professor at Albert-Ludwigs University, Department of Remote Sensing and Landscape Interpretation System since 1986 and a member of the International Society of Photogrammetry and Remote Sensing. He testified that 85% of the area under the aerial photograph was predominantly primary forest and 12% was disturbed forest with evidence of human existence and the rest consisting of agriculture clearing, regeneration shrubs and clouds. While acknowledging that knowledge of the local area was very important, comparable forest and land use conditions from experience he obtained in field trips to tropical forests in Kalimantan, Vietnam and Hainan, Southern China made up for the lack of local knowledge. PW7 identified a narrow strip of about five hectares with a width of 100 metres stretching 1.5 kilometres representing recent cultivation with human presence in the form of six man-made objects which were presumably huts, shelters or small houses. The divergence in the views expressed by DW3 and PW7 was, nevertheless insignificant.

The acquisition of native customary land has lately gained prominence and consistently recognised by our appellate courts. It is now well defined and firmly established and is an integral part of the corpus of our substantive laws. In ***SUPERINTENDENT OF***

LAND & SURVEYS MIRI DIVISION & ANOR v MADELI SALLEH **[2007] 6 CLJ 509** the Respondent's claim was in respect of six acres of native customary land (the said land) acquired by his father long before 1921. The said land was situated in and formed part of Lot 660 Block 8 Miri Concession Land District. Pursuant to the Rajah Order made on 15th November, 1921 the said land was situated in the area of land which was reserved for the operation of the Shell Oilfields Limited and on 24th December, 1982 the said land was declared under gazette notification by the second appellant to be a Government Reserve for the purpose of a park and later developed into a school. The High Court dismissed the Respondent's claim but the Court of Appeal reversed the High Court decision and allowed the Respondent's claim. The decision of the Court of Appeal was upheld by the Federal Court. Ariffin Zakaria FCJ (as he then was) delivering the judgment of the Federal Court dwelt at length on two interrelated questions crucial for determining the Respondent's claim, namely, whether rights of natives to occupy untitled land in accordance with customary laws could have subsisted or would have been lost or extinguished in the area reserved for the operations of the Sarawak Oilfields Limited pursuant to Order No. XXXIX. 1921 made by the Rajah and whether having regard to the provisions of s 3 (1) and 6 of the Civil Law Act 1956 (Act 67), and the relevant Federal, State and customary laws in Malaysia, and particularly in Sarawak, which regulate the creation, exercise, loss, abandonment and extinguishment of native rights over land, the Court of Appeal in this instant case, and indeed, the courts in Malaysia generally, could rely on:

(i) *Adong Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885

(ii) *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769

and had this to say at pp 527 t 531:

"These two questions are inextricably related and for that reason we shall deal with them together.

The CA in *superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555 endorsed the view of the learned judge in relation to native customary rights in that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation. By common law the Court of Appeal must be referring to the English common law as applicable to Sarawak by virtue of s 3 (1) (c), Civil Law Act 1956. In this regard it should be emphasized that the common law is not a mere precedence for the purposes of making a judicial decision. It is a substantive law which has the same force and effect as written law. It comes within the term of 'existing law' under art. 162 of the Federal Constitution. .....

It is a correct general statement of the common law that the courts will assume that the Crown intends that rights of property of the inhabitants are to be fully respected: .....
.....

Similarly in *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors* [2005] 4 CLJ 169, the CA at p 182 stated:

> So far as authority is concerned, there is *Amodu Tijani* to which the judge referred. There is also the decision of *Adong bin Kuwau & Ors v Kerajaan negeri Johor & Anor* [1997] 1 MLJ 418 where this court upheld a finding by the High Court that aborigines had rights at common law over land vested in the State and that such rights existed despite the 1954 Act.

.....

> With respect, we are of the view that the proposition of law as enunciated in these two cases reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No. 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land.
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> .....
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> We are conscious of the fact that in this case we are dealing with individual right not communal right, but in our view the principle applicable is the same.
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> .....
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> It is to be observed that native holdings is not only recognized by the Land Order 1920, but where possible, such holdings may even be registered. Registration however, is not a necessary prerequisite for such holdings to be recognized. In the light of the above it is erroneous to hold as was held by the learned Judicial Commissioner in the present case that native customary rights in Sarawak was only created by s 66 by the Land Settlement Ordinance Cap. 27. We are of the view that what s 66 purported to do was to stipulate new conditions before native customary rights could be recognized after the coming into force of the said Ordinance. It does not purport to nullify native customary rights which had been acquired or recognized prior to the coming into force of the said Ordinance. In other words it has no retrospective force".

Evidence of the Malay custom, practice and tradition since time immemorial of acquiring native customary land which the Malays call *'Tanah Pesaka'* by being the first to make a living or eke out a livelihood from the nipah and mangrove forests which cover the area where they settled was undisputed and incontrovertible as were the claims by the respective original claimants who entered into the agreements with the Plaintiff and duly certified, verified and endorsed by either the then current local chief or penghulu. I am satisfied that on the evidence adduced and tested against the statements of the law set out in ***MADELI***

SALLEH (supra) the Plaintiff has succeeded on a balance of probabilities that the original claimants who transferred their native customary land to him under the agreements had acquired native customary rights to land prior to 1.1.1958 the date when the Land Code (Cap 81) came into force. In the light of the pronouncements in ***MADELI SALLEH*** (supra) the strictures imposed on the creation of native customary rights under the Land Code upon which the 1st and 2nd Defendants rely on and in respect of which their witnesses took pains to amplify have no application and it is therefore unnecessary to embark on a judicial scrutiny of the relevant provisions purporting to prohibit the acquisition of native rights over land referred to by their learned counsel.

Reliance by learned counsel for the 1st and 2nd Defendants to a passage in ***SUPERINTENDENT OF LANDS & SURVEYS BINTULU v NOR AK NYAWAI & ORS*** **[2005] 3 CLJ 555 at p 574** is woefully misplaced. The passage reads:

> "... there were also self-serving testimonies by some of the respondents which should carry little or no weight in the absence of some other credible corroborative evidence".

Clearly the testimonies of the witnesses for the Plaintiff were not wholly self-serving properly so-called. Indeed their testimonies were supported by documentary and other independent evidence in the form of the 65 agreements and the testimony of PW7 which are pivotal in tipping the balance in favour of the Plaintiff. In any event, where, as here, the court has to deal with claims to native customary rights which by their very nature preclude the existence of written records, the sensible approach when dealing with proof

of native customary rights is set out in ***MASON v TRITTON*** **[1994] 34 NSWLR 572 at pg 588**.

> "In the nature of Aboriginal society, their many deprivation and disadvantages following European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that Aboriginal Australians will ever be able to prove; by record details, their presence genealogy back to the time before 1788. In these circumstances, it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles".

This was the approach taken by Wong J, in ***MOHAMAD RAMBLI KAWI*** (infra) which fortifies my view.

Learned counsel for the 1st and 2nd Defendants also relied on what was said in ***SUPERINTENDENT OF LANDS & SURVEYS v NOR ANAK NYAWAI*** **[2006] 256 at 269** to rebut the claims of the original claimants to their respective native customary lands.

> "Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors* that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food".

With respect the passage did not in my view constitute an inflexible principle of universal application regardless of well-established historical facts. In the first place, the Malays of Sarawak did not *'roam'* the nipah and mangrove forests as nomads, a far cry from the natives in ***SAGONG BIN TASI*** (supra) who lived nomadic lives in the forests claimed by them. Indeed, it is an obvious fact that the nipah and mangrove forests are by their

very nature too forbidding to provide a suitable habitat for human existence, even for nomadic tribes. The original claimants of the native customary land, even as a community did not claim vast areas of land as was the case in ***NOR AK NYAWAI.*** That brings me to the question of the absence of large tracts of clearance in the nipah and mangrove forests which according to the 1st and 2nd Defendants was an indication that native customary rights could not have been acquired over the area claimed by the Plaintiff which explained DW3's misplaced preoccupation with looking for large forest clearance in the aerial photographs examined by him. It is an indisputable historical fact that the Malays of Sarawak had lived a settled existence along the coasts and lower reaches of rivers well before the marauding Dayaks, mostly Sea-Dayaks who are now commonly referred to as Ibans came from across the border in kalimantan and cleared vast tracts of forests for their slash-and-burn practise of farming in the hilly interior of Sarawak and until headhunting was totally eradicated during the Colonial era the Dayaks were predisposed to move constantly either as the hunters or hunted and in so doing they fell even more areas of primary forest for their hill padi farming. The Malays were not so wasteful and destructive; their settled existence meant that they had to practise some form of sustainability which precluded destruction of extensive areas, hence, the absence of large cleared areas in the aerial photographs examined by DW3 and PW7. Therefore, the passage relied on by the 1st and 2nd Defendants has no application to the Malay custom of foraging in the nipah and mangrove forests.

Learned counsel for the 1st and 2nd Defendants advanced the argument to the effect that no evidence was adduced to show that such alleged 'Malay customary practice' which the law of Sarawak has given effect to has become part of Malay customary law and it is only when such alleged Malay customary practice has been given effect to by the laws of Sarawak, that the customary practice becomes customary laws. With respect, it is patently obvious that this proposition unsupported by authority, is ill-conceived. Malay customary law like those of other natives of Sarawak is a substantive law which has the same force and effect as written law, which does not require some specific enactment to give it the force of law (see ***MADELI SALLEH*** [supra]). The absence of written record does not militate against proof of the evidence of Malay custom. Section 48 of the Evidence Act 1950 states:

> "When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant".

Section 32 (1) (d) provides:

> "When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which if it existed he would have been likely to be aware, and when the statement was made before any controversy as to the right, custom or matter had arisen;"

The uncontroverted testimonies of the witnesses for the Plaintiff on oral accounts handed down from generation to generation clearly establish the Malay custom relating to the acquisition of what the Malays call *'Tanah Pesaka'* or native

customary land. The original claimants who signed the respective agreements had acquired their native customary land under Malay custom and hence, the principle of antiquity relied on by counsel for the 1st and 2nd Defendants – *nemo dat oui non habet* (that no one gives who possesses not) has no application whatsoever.

It is not disputed that the Plaintiff did not come from the same community as the original claimants who were all from Kampung Loba and learned counsel for the 1st and 2nd Defendants while conceding that members of a particular native community in a particular area may sell or transfer their native customary land to a person within their community (see ***HAMIT BIN MATUSSIN & 6 ORS v SUPERINTENDENT OF LANDS & SURVEYS & ANOR*** **[1991] 2 CLJ 1524**) nevertheless contended that the original claimants could not transfer their native customary land to the Plaintiff because he was from another Malay community. (See ***BISI AK JINGGOT @ HILARION BISI AK JENGGUT v SUPERINTENDENT OF LANDS & SURVEYS & 3 ORS*** **[2008] 5 CLJ 606**). With respect, the authorities relied on by learned counsel for the 1st and 2nd Defendants were decided without reference to the order declared by the Rajah on 10th August, 1899 to the effect that any Dayak removing from a river or district may not claim, sell or transfer any faming ground in such river or district nor may he prevent others farming thereon unless he holds such land under a grant. Implicit in the Order which is declaratory of the customary law is that there is no impediment to the transfer of native customary land from one native to another native so long as the transferee has not left the district or river where the native customary land is situated. (See ***UDIN ANAK LAMPON v TUAI***

Our apex court has clearly and definitively in ***MADELI SALLEH*** (supra) laid down the statement of the law in respect of claims to native customary rights over land acquired before the coming into force of the Land Code (Cap 81) on 1st January, 1958. It is completely unnecessary to apply their numerous provisions especially the veritable voodoo amendments thereto which tend to obscure, indeed practically negate and render claims to native customary land somewhat illusory. Perhaps it is not inappropriate to conclude with a postscript which in substance has also been relevant for the determination of the case that if nothing good can be said of the much maligned erstwhile foreign masters of Sarawak, the White Rajahs including their predecessors, the Sultanate of Brunei and later, the Colonial Government, their readiness to preserve and protect native customary rights had benefitted the natives of Sarawak tremendously. The cession of Sarawak by the Third Rajah to the British Crown in 1946 was *'subject to existing private rights and native customary rights'* and the solemn promise *'to ensure that the fullest regard is paid to the religious and existing rights and customs of the inhabitants of Sarawak .... by all lawful means, to protect them in their persons and in the free enjoyment of their possessions'*. And the Land Code (Cap 81) enacted by the Colonial Government in its unamended pristine form did little to alter the pre-eminent status of native customary rights to land. More importantly, for the Plaintiff who is a Malay, is the historical fact that when in 1841, the Sultan of Brunei by his viceroy in Sarawak Rajah Muda Hashim transferred *'the Government of Sarawak'* to James Brooke it was subject to the condition that under his rule *'the laws and customs of the Malays of Sarawak forever be respected'*. (See Legal

Perspectives on Native Customary Land Rights in Sarawak by Dr. Ramy Bulan with Amy Locklear).

In the circumstances and for the reasons aforesaid the Plaintiff's claim is allowed to the extent that is hereby ordered, or declared, as the case may be, as follows:

(1) A declaration that the Plaintiff had acquired native customary rights over the 65 parcels of land.

(2) That the alienation of the Provisional Lease described as Lot 300 Block 4 Salak Land District effectively extinguished the Plaintiff's Native Customary rights to the 65 parcels of land.

(3) That the 1st and 2nd Defendants do pay the Plaintiff compensation to be assessed in accordance with the relevant provisions of the Land Code concerning the extinguishment of native customary rights and the 1st and 2nd Defendants do pay costs to the Plaintiff to be taxed unless agreed.

There shall be no order relating to the legality or invalidity of Lot 300 Block 4 Salak land District nor general aggravated damages and exemplary damages because these were not pursued and no costs be ordered against the 3rd Defendant because it was only a nominal defendant.

Order accordingly.

LINTON ALBERT, J.

Date: 15th November, 2010

Certified true copy
Supplied to:
Messrs Baru Rian & Co.
Adv :
(LINDA LIM SIEW KIM)
Setiausaha Hakim
Mahkamah Tinggi Kuching
Date: 15/11/2010

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