

Constitutional And Judicial Approach of Adultery

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Abstract- Adultery, the act of engaging in sexual relations with someone other than one's spouse, has been a subject of intrigue, controversy, and moral scrutiny throughout history. This abstract aims to provide a concise overview of the multifaceted aspects of adultery, exploring its underlying causes, its impact on individuals and relationships, and the varying societal perspectives surrounding it. The causes of adultery are complex and multifactorial, ranging from individual psychological factors such as dissatisfaction within the marriage, to external influences such as societal norms and cultural attitudes towards infidelity. Research suggests that factors such as marital dissatisfaction, lack of emotional intimacy, and opportunities for extramarital encounters play significant roles in precipitating adultery.

The consequences of adultery extend beyond the individuals involved and often have profound effects on marriages, families, and communities. Betrayal, trust erosion, and emotional trauma are common outcomes for the betrayed spouse, leading to profound psychological distress and potential long-term damage to the relationship. Children within the family unit may also suffer from the consequences of adultery, experiencing emotional upheaval and instability. Societal perspectives on adultery vary widely across cultures, religions, and legal systems. While some societies view adultery as a grave moral transgression punishable by severe social stigma or legal consequences, others adopt a more permissive attitude, emphasizing individual autonomy and personal freedom in matters of relationships and sexuality. The evolving landscape of societal attitudes towards adultery reflects changing norms, values, and gender dynamics in contemporary society.

I. INTRODUCTION

Having analysed conceptual and general aspects and after dissecting matrimonial aspects of the chosen problem, it becomes necessary to determine criminological perceptions on adultery and judicial

application of sec. 497, IPC. The chapter provides textual analysis of sec. 497 which is also followed and supported by detailed analysis of the cases decided by the judiciary on sec. 497. Another salient feature of the chapter is determination of constitutionality of sec. 497.

II. SECTION 497 IPC

The term 'adultery' has its origin in the Latin term 'adulterium' which means voluntary sexual intercourse between a married person with another. Every religion treats it as an unpardonable sin.² Almost all the legal systems recognize it as ground for divorce. In India, adultery is a ground for divorce as well as a crime under the Indian Penal Code. IPC treats adultery as an invasion of the right of the husband over his wife and puts it under Chapter XX of Offences Relating to Marriage. In India feminists say that the law on the adultery is based on the outdated notion of 'marriage'. It is based on the husband's right to fidelity of his 'wife' and also treats the wife as a chattel of her husband. This is against the spirit of equality guaranteed under the Constitution of India.

Section 497, IPC, which deal with adultery provides: Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Adultery is an offence which is committed by a third person against the husband in respect of his wife and the man alone is held guilty³ This means that adultery

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² K. I. Vibhute, *Adultery in the Indian Penal Code : Need for a Gender Equality Perspective*, (2001) 6 SCC 16(J)

³ *Olga Gomes v. M. Qomes*, AIR 1959 Cal 451

is an infringement of the right of the husband towards his wife and the law considers it as an offence. The reason for enacting the section is to punish those who interfere with the sacred relation of marriage. As adultery is an anti-social and illegal act, no peace loving citizen would like that it should be permitted under his nose.⁴ Adultery is not committed by a married man who has sexual intercourse with an unmarried woman.

The Law Commission of India in its forty-second report⁵ after discussion and careful considerations gave its opinion that exempting the wife from punishment under section 497 should be removed and the punishment of five year imprisonment is unreal and should be reduced to two years. Even the Joint Select Committee of Parliament was in favour of holding man and married woman at fault liable and favoured the deletion of last sentence i.e., "In such case the wife shall not be punished as an abettor." Thus, the Committee favored a gender neutral clause. The legislature should take notice of social changes taking place in the Indian society.'

(A) Object

The basic notion behind this provision is that the social goodwill should be promoted between the husband and wife by permitting them to make up the matrimonial tie rather than to drag to the criminal court. They may condone the offence of adultery by way of 'forgive and forget' and can live separately whether officially or unofficially. They may break up their relationship by taking divorce. Sec. 497 IPC and sec. 198 Cr.P.C. appear to be based on the inequality in the status of husband and that of wife in the institution of marriage in India. It assumes man is the seducer and the woman is a passive victim and he trespasses upon the marital property of another man. It is the husband of the married woman who is an aggrieved party and therefore, law must authorize him to lodge a complaint against the offender. The married woman at fault is not considered aggrieved party and hence precluded from filing the complaint.

These two sections jointly deal with the offence committed by a stranger to the marriage who destroys the peace and privacy of the matrimonial home.

Society punishes such man who violates the sanctity of the institution of marriage but not the woman, who is also responsible for this violation. As the erring woman is not punished under the section, there is a reverse discrimination in favour of the woman rather than against her. The wife is not punished because she is not offender in the eyes of law and law takes her as the victim and not the authoress of the crime.

(B) Essentials

The essential ingredients to prove adultery are as follows:

1. There must be sexual intercourse
2. Woman must be married one
3. The offender has knowledge or reasonable belief that the woman is married.
4. Sexual intercourse was committed without consent or connivance of the husband of the woman.
5. The offence must not amount to rape.

III. CONSTITUTIONALITY OF SECTION 497 IPC

Sec. 497 IPC, which defines adultery and provides punishment for the offence has also faced three constitutional challenges. It has been argued that it is violative of Arts. 14,15 and 21 of the Constitution on many counts. With the passage of time, many changes have taken place in the society. Empowerment of women, sexual freedom, liberal values, and change in socio-economic position has diluted the constitutionality of sec. 497. The question of constitutionality of sec. 497 IPC for the first time arose in *Yusuf Abdul Aziz v. State*⁶ it was contended before the Bombay High Court that sec. 497 IPC was unconstitutional as it was in violation of Arts. 14 and 15(3) of the Constitution.²⁹ Sec. 497 IPC discriminated man and woman by making only the man responsible. It discriminated in favour of women and against men on the ground of sex.

The historical background of sec. 497 and the prevailing social conditions which were oppressive to women and the unequal status of women led the High Court to uphold the constitutional validity of sec. 497.

⁴ *Hatim Khan v. State*, AIR 1963 J&K 56

⁵ Chidananda Reddy, "Legal Bias Against Men", IV

Lex Et Juris, 78 (1989)

⁶ AIR 1951 Bom. 470

In this connection, Chagla, C. J. observed:
What led to this discrimination in this country is not the fact that women had a sex difference from that of man, but women in this country were so situated that special legislations are required to protect them and from this point of view one finds in sec. 497 a position which takes a sympathetic and charitable view of the weakness of women in India. The court observed that the alleged discrimination in favour of women is saved by Art. 15(3) of the Constitution which permits the State to make any special provisions for women and children.

The matter again came up before the Supreme Court in Yusuf Abdul Aziz v. State of Bombay⁷ The question before the court was whether sec. 497 IPC violated Arts. 14 and 15 of the Constitution. It was argued that the last sentence of sec. 497 i.e. "in such case the wife shall not be punishable as an abettor" offended Arts 14 and 15. On behalf of the appellant, Art. 15(1) was relied but Art. 15(3) were overlooked. The court rejected the argument that Art. 15(3) should be confined to provision beneficial to women and could not be used to give them a licence to commit and abet crimes. Upholding the constitutional validity of sec. 497, with reference to the Arts. 14 and 15, the court observed:

Art. 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two Articles read together validate the impugned clause in sec. 497, Penal Code.

In Sowmithri Vishnu v. Union of India,⁸ the question regarding the constitutional validity of sec. 497 IPC being contrary to Art. 14 of the Constitution made an irrational classification between man and woman. Following three grounds were pressed in service for its unconstitutionality:

1. Sec. 497 did not confer the right to wife to prosecute the woman with whom her husband committed adultery,
2. Sec. 497 did not confer any right on the wife to prosecute the husband guilty of committing adultery with the other woman,

3. Sec. 497 did not deal with the cases where the husband has sexual relationship with unmarried woman.

The aforesaid grounds were pressed by the counsel for petitioner though was having a strong emotive appeal but had no valid legal basis to rest upon. It was contended that definition should be recast by extending the ambit of the offence of adultery so that both the man and women should be punished for the offence of adultery. It was thus contended that sec. 497 violated Arts. 14, 15 and 21 of the Constitution. The Supreme Court rejected the contention and held the provision valid. The court observed:

In defining the offence of adultery so as to restrict the class of offenders to men, no constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the legislature to consider whether sec. 497 should be amended appropriately so as to take note of the transformation which the society has undergone.

The modification was not accepted by the legislature. The Law Commission held that the section cannot be struck down on the ground that it was desirable to delete it. Dealing with the second ground, it was held that sec. 497 did not allow the prosecution of the wife by husband for adultery. The offence of adultery was committed by a man and not the woman. No grievance was to be made if the wife was not allowed to prosecute her husband. The court observed:

The wife who is involved in an illicit relationship with another is a victim and not the author of the crime. The offence of adultery, as defined under sec. 497, is considered by the legislature as an offence against the sanctity of matrimonial home, an act which is committed by a man, as it generally is.

IV. JUDICIAL APPLICATION AND PUNISHMENT ADMINISTERED

Sec. 497 has not attracted much controversy or debates. The only controversial point is whether married woman should be punished as abettor or not. Further, the provisions of the Probation of Offenders Act, 1958 are also applicable as the maximum punishment provided for the offence is 5 years

⁷ AIR 1954 SC 321

imprisonment or fine or both. It will be interesting to examine how the courts have applied the section and the quantum of punishment imposed by the courts towards the offence. It will be convenient to study the judicial approach under the following heads.

- (a) Marital Status of the Adulteress
- (b) Consent or Connivance of the Husband
- (c) Miscellaneous

- (a) Marital Status of the Adulteress

Adultery is an offence which is concerned with marriage. The accused must know or has reason to believe that the woman with whom he has sexual intercourse is a married woman. To prosecute the accused under sec. 497, it is important that the woman with whom the adultery was committed should be married one. In *Anandaw v. King Emperor*,⁸ one Sh. Bahadur Behara brought the woman from India as his wife. They lived together as man and woman at applicant's house. When Bahadur Behara left the woman in the applicant's house and went away to work, the applicant had sexual intercourse with the woman. It was proved in the trial court that Bahadur and woman were legally married. The applicant was convicted for adultery and was sentenced to a fine of Rs. 150/- by the trial court. The High Court found no reason to interfere and there was no doubt that Bahadur Behara and the woman lived together as man and wife and the applicant was aware of their relationship. The Rangoon High Court held that the applicant was not wrongly convicted and the sentence was not severe. Dismissing the application the court observed:

There is a presumption that they were legally married, and even if it is true that they belong to caste or classes which ought not to intermarry, nevertheless, *factum valet quod fieri non debuit*.

Even if the accused admits marriage between complainant and the woman, the marriage must be strictly proved. In *Ganga Patra v. Binperor*,⁹ the applicant was convicted for having committed adultery with the wife of complainant knowing her to be the wife of complainant. There was no findings of the trial court regarding the point that whether the woman was married or not. In a prosecution under section 497 IPC, the marriage had to be proved strictly. So the point in controversy in this case was whether

the marriage was proved strictly or not. There was no evidence on record on whose statement reliance could be placed except by the woman that the complainant was her husband and this did not comply with strict proof within meaning of sec. 50 of the Indian Evidence Act. This important issue was not dealt with by the trial court. Setting aside the conviction the court observed: 'It is necessary to set out the facts and circumstances surrounding the alleged ceremony of the marriage in order to enable the court to determine the question whether the marriage in fact took place and whether the relationship of husband and wife in fact existed at the time of prosecution.

- (b) Consent or Connivance of the Husband

Where the sexual intercourse is had by the accused with the consent or connivance of the husband the accused is not liable for the offence of adultery. In *Gul Mohammad v. Emperor* the complainant Bhimo was a Menghwan and claimed that Rani, daughter of Jethi was his married wife. After marriage the couple came to Karachi with Jethi. When they shifted to old market Mohalla, Gul Mohammad who was resident of that Mohalla developed friendship with Rani. The complainant was thrown out of the house by his wife, mother-in-law and Gul. Bhimo did nothing and went to his native place and returned after six months. But again he was not allowed to enter in his house. After very long time he filed the present complaint against Gul Mohammad and his mother-in-law for offences under sec. 497 and 498 IPC. Jethi was discharged because trial court found no case against her. Gul Mohammad was sentenced to rigorous imprisonment for two months for each section and fine of Rs. 50/-. The point to be determined in the appeal was whether the conviction of the appellant under sec. 497 and 498 IPC was justifiable or not.

Mere abandonment of the wife by the husband does not mean that he has consented to or connived at the sexual intercourse between the accused and his wife. In *Pothi GoUari v. Ghanni Mondal*,¹⁰ the complainant had given his daughter Kamli in marriage to Bahgwan Chandal about 10 years ago. After abandonment, Kamli was living in her father's house. The accused Ghanni Mandal induced Kamli to live with him as his

⁸ AIR 1927 Ran. 261.

⁹ AIR 1928 Pat 481

¹⁰ AIR 1963 Ori 60

wife and committed intercourse with her making her pregnant. When the father came to know about the pregnancy of his daughter, he inquired from her and come to know that accused was responsible for it. The accused admitted the fact of intercourse with Kamli in the Panchayat but later on refused to accept her as his wife and give her any maintenance. The father filed complaint under sec. 497 IPC which was quashed by the High Court. The leave to file the complaint under sec. 497 was not taken in accordance with provision of sec. 199 Cr.P.C.

After taking special leave, the accused was convicted and a fine of Rs. 100/- was sentenced. On appeal the court below acquitted the accused holding that Bhagwan having abandoned his wife did not mean that he connived at or consented to the accused having sexual intercourse with his wife and the complainant could not be said to have taken care of her daughter on behalf of her husband so as to entitle him to file the complaint. The High Court observed that there was no evidence regarding the abandonment of the wife and the question was whether the father was competent to file the complaint or not. Sec. 199 Cr.P.C. allows husband alone to file the complaint and only in his absence, the person who was in care of the woman on his behalf could file the complaint. The evidence proved that the husband was residing in the same village, so the father had not the care of woman on his behalf. Therefore, if the offence of adultery might be said to be proved on evidence, no conviction could be made on the basis of invalid complaint. The appeal was dismissed.

(c) Miscellaneous

It is no ground to dismiss any complaint under sec. 497 IPC on the ground that husband (complainant) and wife were living separately for more than a year. In *Maung Kala v. Nga Kin Mya*,¹¹ the complainant's wife left his house in Nadaw 1276 (about December 1914) and returned to her parent's house. In *Tabodwe 1277* (about February, 1916) the accused went away with her to Lemyetna in Henzada District and lived with her there as man and wife. According to the complainant he frequently went and called her to return to him but failed. The accused had been working with the

complainant for last two years and knew that the woman was the complainant's wife. The later filed a complaint against him for adultery which was dismissed. The reason given by the Magistrate was that the parties lived apart for over a year and the question regarding their relationship of husband and wife was to be decided in the civil court. There was denial on the part of complainant about the divorce between them. It was held that on the allegations in the complaint and his examination under sec. 200 Cr.P.C, the complainant was entitled to issue of process. The order dismissing the complaint was set aside and the court was directed to proceed with the case according to law.

The issue of adultery may figure incidentally also in *Balaram Kundu v. Emperor*,¹² the accused was convicted of an offence under sec. 457 IPC. Two points were argued by the petitioner. Firstly, the accused was prejudiced as the charge was vague and bad. The charge was that the accused on a certain date "committed house breaking by night- by entering into the hut of Purna Pal through a window and quitting the same through the eastern door between the hours of sunset and sunrise in order to the committing of adultery with Purna Pal's wife or any other offence punishable with imprisonment." The High Court took the view that it was elementary that the accused should know the specific offence with which he was charged. However, the court thought that the defect was cured by sec. 537 of Cr.P.C. Secondly, it was argued that the conviction could not stand because there was no evidence that the lady's husband did not consent to or connive at the act. The court agreed that it was to be satisfied that there was no consent or connivance by the husband. In course of examination in response to one question he said that, "I want redress for the wrong done to me and to my wife." Thus the court held that there was no evidence on record that the husband had consented or connived at the attempt of the accused to commit adultery on his wife.

To prove charge of adultery, the evidence must be clinching. If it is documentary, it must be genuine. In *R. Dorice v. O. R. Stanislaw*,¹³ the petitioner had been convicted of adultery and sentenced to rigorous imprisonment for one month and a fine of Rs. 100/- in

¹¹ AIR 1917 Lower Burma 30

¹² AIR 1925 Cal. 160.

¹³ AIR 1928 Cal 248.

default of payment one month more rigorous imprisonment was to be served by him. The case was based on oral and documentary evidence. The documentary evidence which had the most weight was a letter which admittedly was written by complainant's wife. The letter indicated that she was most affectionate to the accused and if the letter was a piece of genuine correspondence, it could support a charge of adultery. But this letter was received by the complainant from anonymous correspondent, there was no evidence regarding the possession of that letter by the accused. The High Court observed that the court below was wrong in treating it as evidence against the accused. Since the evidence was not of any importance, the conviction was not justified. The High Court made this rule absolute and the conviction was set aside acquitting the accused.

In *Kanbi Karasan Naran v. Kanbi Daiya Naran*,¹⁴ the complainant contended that accused No. 2 enticed or took her from her father with whom she was living and concealed her in his house with the intention that she might have illicit intercourse with accused No.1. Against accused No.1, the complainant contended that by deceit he caused her to believe that she was lawfully married to him and had sexual intercourse with the accused in that belief. On the complaint by father, the police raided the house of accused and found the girl there. The offence was committed between dark half of Aso and the date of complaint. The court below charged the accused under sec. 117, Kutch Penal Code (which corresponded with sec. 497 IPC) and sentenced him rigorous imprisonment for 9 months and to pay a fine of Koris 400/-. If he failed to pay this fine, he was to undergo a further term of 4 months.

In *Brij Lai Bashnoi v. State*,¹⁵ Sh. K. J. Bose claimed to be married to Minati Basu. He was working as Civilian Store Keeper in Ordinance Depot Shakurbasti. He got Minati Basu employed in the same store. In that depot, one Brij Lai was also working. Tapas Kumar was born from her womb and from the liaison of Bose and was the witness to games of flesh between Minati and Brij. Mr. Bose filed a complaint against Brij Lai under sec. 497 IPC, The accused was convicted under sec. 497 with an order to undergo rigorous imprisonment for a period of two years. Then the appeal was filed before Session Judge but was

dismissed. The High Court observed that the point in controversy was whether the marriage of Minati with Bose was proved or not. It was held by the high Court that in a prosecution under sec. 497 IPC, the question of marriage was to be proved strictly. In such cases admission by the accused that woman was legally wedded wife of the complainant would not serve the purpose. If prosecution failed to prove the marriage in the light of evidence, it was difficult to prove that all the ceremonies were performed. The High Court allowed the revision because of benefit of doubt and set aside the sentence.

V. PROCEDURAL REQUIREMENTS

(a) Requirements under Cr.P.C.

The offence of adultery is peculiar in nature as it is sexual as well as matrimonial offence. It is also undoubtedly true that it bears some objectionable features. It becomes necessary to look into special or relevant procedural provisions of law in regard to adultery. The offence under sec. 497 is non-cognizable, bailable, compoundable by the husband of the married woman at fault and triable by a Magistrate of first class. A non-cognizable offence means an offence in which a police officer cannot effect arrest without warrant and a bailable offence means where bail is claimed as of right and such offence is shown as bailable in the first schedule of the Code of Criminal Procedure, 1973 or which is made bailable by any other law for the time being in force. Broadly speaking, compoundable offence means an offence in which the compromise may be struck. Keeping in view these characteristics of the offence, criminal law takes a dim view of the offence and does not regard it to be a serious offence. Sec. 198 Cr.P.C. clearly states that no court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code, except upon a complaint made by husband of the woman, or, in his absence made with the permission of court by some person who had the care of such woman on his behalf at the time when such offence was committed. If the offence which has been committed by the accused falls under sec. 497 IPC, the complaint by the aggrieved party is must and in the absence of such complaint, no court can take

¹⁴ AIR 1951 Kutch 17

¹⁵ 1996 CrU 4286 (Del).

cognizance of the complaint. According to sec. 198(1) Cr.P.C. no court shall take cognizance of such offence except on a complaint made by the aggrieved person. If such person is under 18 years of age or is an idiot or lunatic or is unable to make complaint due to sickness or infirmity etc., some other person may lodge the complaint with the permission of the court. The question arises whether the wife of the accused husband can lodge the complaint or not. Sec. 198(2) clearly says that for Ss. 497 and 498, no person other than the husband of married woman shall be deemed to be aggrieved person. Sec. 198 clearly rules that wife of the husband committing the offence cannot make complaint. The provision also applies in cases of abetment and attempt. The constitutionality of sec. 198 has been questioned but Supreme Court has upheld its constitutionality in *V. Revathi v. Union of India*.¹⁶

The report to the police made by the husband of the woman is not complaint because it is not made to the Magistrate and the statement in support of police case is not complaint within the meaning of sec 2(d) of the Code of criminal Procedure, 1973. Section 198 Cr.P.C does not bar husband to file complaint. A complaint under this section if does not state facts which constitute adultery but only mentions the section, does not amount to complaint as required by sec. 198 Cr.P.C. The Magistrate will not take cognizance of such an invalid complaint. In **Suresh Chandra Vadilal Shah**¹⁷ it was held that mere mention of the section for which the accused was sought to be prosecuted may not be enough unless allegations in 'complaint' referred the act constituting the offence under any law. As the offence is compoundable, still it is a rule applicable to all compoundable cases that no compounding takes place if after the accused has been committed for trial or after he has been convicted and an appeal is pending without the permission of the court.

The husband's right of complaint does not vanish by the fact that he is living apart from his wife. The husband whose marriage is dissolved retains his right to complain of an act committed before its dissolution. In *Dhanna Singh v. Bmperor*¹⁸ it was held that the husband's grievances against a person who had enticed away his wife or committed adultery with his wife did

not cease merely on the marriage coming to end. It is enough for the husband to state the true facts in his complaint without mentioning the section and if the section made in the complaint is wrong but the facts constitute the offence, there is no bar and the complaint shall be valid.

CONCLUSION

In conclusion, it must be kept in mind that adultery was drafted into the Indian Penal Code, 1870 during the existence of the Colonial Rule in India. The prevailing conditions at this time were such that a woman was looked at as being the mere property of a man. However, in the present day, women are not mere chattel whose identities are defined by the men surrounding them, but by their own individual personalities. Law, being dynamic in nature, must evolve with society. Therefore, the dubious logic behind the adultery laws in India cannot be accepted in today's continuously evolving society.

Though except Mohammedans no community can practice polygamy, nor is child marriage legal, yet as a matter of fact Hindu women are still socially discriminated in a male dominated society on the slightest possible whisper against her character and polygamous marriages and child marriages still take place in outlying rural areas either due to ignorance of law or due to long prevailing social practices. One feels that there is much weight in the observation of the Supreme Court when it says that the change of female lifestyle is not perhaps too right and the wife who is seduced is really the victim and not the author of the crime. In this background perhaps time is not yet ripe to punish women for adultery.

Over the years polygamy has become illegal while monogamy has become prevalent. Today the personal laws are equal, operative, effective and efficient. The definition of adultery in matrimonial laws is much wider in scope than the definition of adultery as a crime. To practice polygamy or have extramarital relationships without attracting civil action is almost impossible. Women have begun to establish their own identity in the society and are no more treated merely as their husbands' chattel. There are no reasons to

¹⁶ AIR 1988 SC 835.

¹⁷ 1968 CrU 117

¹⁸ AIR 1922 Lah. 477

retain adultery as an offence in the penal code. Our personal laws are sufficient to take care of adultery as a civil wrong.

One thing is certain from the above discussion that there is an immediate need of a contemporary law of adultery in India. The latest proposals for reform deserve serious and immediate attention of the legislature. It is for the legislature to weigh the pros and cons of both the extreme viewpoints and come up with a law that best suits the present Indian scenario.

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