Privy Council Appeal No. 64 *of* 1933

Raja Sarda Mahesh Prasad Singh - - - - - - - - *Appellant*

v

Badri Lal Sahu, since deceased, and others - - - - - *Respondents*

FROM

THE COURT OF THE BOARD OF REVENUE, UNITED PROVINCES OF AGRA AND OUDH, ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1935.

Present at the Hearing:
LORD ALNESS.
SIR JOHN WALLIS.
SIR GEORGE RANKIN.

[*Delivered by* SIR JOHN WALLIS.]

This is an appeal by special leave from a judgment and decree of the Court of the Board of Revenue for the United Provinces of Agra and Oudh confirming the appellate judgment and decree of the Court of the Commissioner of the Benares Division, which had decreed the plaintiffs' suit reversing the judgment of the Court of the Collector of Mirzapur which had dismissed the suit.

The Robertsgang tahsil of the Mirzapur District in which the property is situated is a scheduled district under the Scheduled Districts Act, 1874, and, under the rules for the administration of civil justice made pursuant to that Act, the Court of the Collector has power to try and determine suits of every description and is to be considered as the District and principal Court of original jurisdiction, and the Court of the Commissioner of Benares as the highest Court of Appeal. It is, however, provided by rule 9 as follows:—

> "It shall be in the power of the Local Government to refer to the Board of Revenue any case in which the Commissioner, on appeal from the Collector, may have reversed the decision of the lower Court, and the orders of the Board in such case shall be final."

In their Lordships' opinion the effect of this rule is to enable the Local Government to constitute *pro hac vice* the Board of Revenue a Court of second appeal with full appellate jurisdiction. A preliminary objection has been taken that the appeal is incompetent owing to the provision in the rules that the order of the Board is to be final. As to this, it is sufficient to say that these rules do not affect His Majesty's prerogative to grant special leave to appeal, which has been granted in this case.

The only question in this appeal is whether the ownership of the unassessed jungle or waste land included in the boundaries of 10 villages in the taluqa Kone is vested in the plaintiffs by virtue of a decision of Mr. Roberts, the settlement officer who in 1846 settled the land revenue of the villages with the plaintiffs' predecessors and at the same time recorded the wajib-ul-arz or record of rights in each village, in which case that decision not having been challenged in a civil suit became final. Many other villages in the estate were settled by Mr. Roberts at the same time and in the same way. In some of them the unassessed area was of vast extent and included other still deserted and uninhabited villages which had been inhabited before and may be inhabited again. In the correspondence on this question between the years 1868 and 1880 when Mr. Roberts's proceedings were first formally confirmed, the revenue authorities differed; and there has been the same difference of opinion among the revenue authorities who have dealt with this case in the courts below in the exercise of the exclusive civil jurisdiction conferred upon them as already mentioned. The case has been very fully argued at the Bar, and their Lordships will now proceed to state the conclusion at which they have arrived on a further consideration of the whole question.

The defendant in the case is the Raja of Agori Barhar in the Mirzapur District of Benares, whose ancestors were proprietors of the Agori Barhar estate until they were dispossessed by Raja Balwant Singh of Benares in the middle of the eighteenth century. While it was in his possession Balwant Singh incorporated in it taluqa Kone which till then had not formed part of the estate. Raja Adil Sahib had rendered good services to the Company in the pursuit of Balwant's son the well-known Raja Chet Singh and had been granted an allowance of Rs.8,000 in pargana Agori in recognition of his services by Mr. Warren Hastings in 1781 and restored to possession of his estate. In 1789 Rs.8,000 was settled with the Raja for his life as the fixed jama or land revenue of the estate. Till then the Raja had been allowed to retain the whole Rs.8,000 as a malikana jagir, but, by this sanad, Rs.4,000 was resumed and Rs.4,000 was continued to him as jagir.

The 47 plaintiffs in this case claimed to be proprietors and zemindars, being muqaddamidars or muqarraridars in 10 villages which are included in the Kone tahsil of the defendant's estate, and were claimed by them to be their absolute property. They alleged in paragraph 7 of the plaint that their predecessors were absolute proprietors of the villages from a time antecedent to the assignments of the revenue of taluqa Kone to the defendant's predecessors, because the plaintiffs' predecessors cleared the jungles, and brought the land under cultivation before or after the rights of the defendant were created, *or* because of the settlement

made with the plaintiffs' predecessors by Mr. William Roberts, the settlement officer in or about 1846. His decision in the disputes between the plaintiffs' predecessors and the defendant's predecessor had confirmed the proprietary title of the former, and that decision not having been challenged in a competent court in a manner allowed by law had become final. They also claimed title by adverse possession for 12 years. They claimed that the defendant was not entitled in any case to recover from the plaintiffs or other persons in respect of the said villages more than the amount fixed in perpetuity by Mr. Roberts in 1846, which amount was confirmed by the Board of Revenue and the Local Government in or about 1880. The defendant by his servants had been interfering with their proprietary rights and attempting to realise various kinds of levies and chaparbandy and kharchary (fees for grass and timber used for thatching).

They accordingly prayed for a perpetual injunction restraining the defendant from interfering with their proprietary rights in the villages, including the jungles, and from realising any money on account of land revenue or malikana, or in any case from recovering anything from the plaintiffs or other persons over and above what was fixed by Mr. Roberts in 1846 for land revenue and malikana.

The defendant in his written statement claimed that his family had been in possession of the estate from its foundation to the middle of the 18th century, when they were dispossessed by Balwant Singh. In consequence of his meritorious service the estate was restored to Rajah Adil Shah in 1780. The allegation that he had only received an assignment of land revenue of Rs.8,000 was without foundation. The plaintiffs had never been in possession of the jungles attached to the villages. The rights and liabilities of the plaintiffs' predecessors were defined and limited by settlement officers and Government circulars which they had accepted and were estopped from denying, and they could not set up a new case after 75 years. The defendant had been in possession of the villages and jungles adversely for 12 years.

All the Courts below have held that the defendant is the taluqdar or superior proprietor of the suit villages, and there has been no cross-appeal from that decision.

As regards the property in the village jungles or waste the Collector of Mirzapur, as trial Judge, on an examination of the documents recorded by the settlement officer in the course of his inquiry, viz., the first settlement rubkar of each village deciding that the plaintiffs' predecessors were entitled to have the settlement made with them as proprietors, the final settlement rubkar of each village settling the jama on the cultivated area and the wajib-ul-arz or record of rights recording the rights exercised by the plaintiffs' predecessors in the uncultivated jungle or forest, held that the settlement officer had not decided that the jungles and forests in each village

were the property of the respective plaintiffs but had merely recorded their customary rights in such jungles. He accordingly dismissed the suit on the 14th Sepember, 1926.

The judgment of the Commissioner of Benares, dated the 16th May, 1927, who reversed the judgment of the Collector and decreed the suit, and the judgment of the Board of Revenue, dated the 5th November, 1928, which affirmed the Commissioner's decree, were largely based on documents not before the Collector which were taken from " A collection of papers relating to the settlement of South Mizapur ", and included Mr. Roberts's letter of the 6th January, 1847 submitting to the Commissioner of Benares his report on his operations in the malikana jagir of the Raja of Agori; the letter dated the 24th July, 1868, and raising the present question of the Collector, Mr. Pollock, to the Commissioner of Benares as to the position of the Raja of Agori and the zemindars of certain villages in his perganna; the letter dated 17th August, 1868, from the Commissioner of Benares to the Board of Revenue on the subject of Mr. Pollock's letter; the " rough notes " dated the 4th March, 1871, of Sir William Muir, the Lieutenant-Governor, in which, after visiting the locality and making a full inquiry into the question he expressed the opinion that the under-proprietors had not been given any absolute rights in the village jungles and made certain suggestions as to the settlement of the present dispute; letters of the 19th March and the 1st April, 1873, of Mr. Robertson, the Collector of Mirzapur, in which he made a detailed report on all the villages in Agori settled by Mr. Roberts, controverted the late Lieutenant-Governor's conclusions, submitted that in all these villages Mr. Roberts had held the jungle to be the property of the under proprietors, and made suggestions as to certain villages with large forests which did not apply to the suit villages; a letter of 19th April, 1873, from the Secretary of the Board of Revenue to the Commissioner of Benares expressing the Board's approval of Mr. Robertson's conclusions; a letter of the 19th May, 1880, from the Secretary to the Board of Revenue to the Secretary to Government excusing delay and expressing the opinion of the Board that Mr. Roberts's report reserved to the makaddam both the sayer or jungle rights and the right to cultivate all the lands within the village boundaries; and lastly, the letter of the 28th July, 1880, from Mr. Robertson as Secretary to Government to the Secretary to the Board of Revenue conveying the Government's approval of Mr. Roberts's proceedings generally, subject to certain modifications which do not affect the present question. Thus after 34 years had elapsed Mr. Roberts's proceedings at last obtained a tardy confirmation.

The judgments of the Commissioner and the Board of Revenue holding that the uncultivated area was the property of the under-proprietors were largely based on Mr.

Roberts's report and on the opinions expressed in this correspondence by Mr Robertson and his superiors as to what Mr. Roberts had decided; and the Board of Revenue dismissed somewhat lightly as a red herring the proposals based on the contrary view of the former Lieutenant-Governor, Sir William Muir. Those proposals of a distinguished public servant, who had risen to the highest position in his own service and after his retirement had been chosen to preside for many years over the University of Edinburgh as its Principal, were based on a careful examination of the settlement records and aimed at doing the best for the cultivators without over-riding the just rights of the Raja; and, if effect had been given to them, the present litigation would have been unnecessary. Further, Sir William Muir was exceptionally qualified to deal with the question having been Secretary to the Board of Revenue from 1847 to 1853 when Mr. Roberts's proceedings were under the consideration of the Board, and therefore necessarily acquainted with the questions to which they had given rise.

In their Lordships' opinion the weight of the two appellate judgments is greatly impaired by the fact that the learned Judges did not sufficiently realise that Mr. Roberts's decision must be ascertained exclusively from the rubkars and wajib-ul-arzes in which his decisions as settlement officer were recorded and not from what he or others afterwards said or wrote about them. Further, as those decisions became binding, at any rate after confirmation, unless challenged in a civil suit, they must be strictly construed and be expressed with sufficient clearness to bring home to the parties concerned that questions of title were being decided against them.

The settlement in this case was completed by Mr. Roberts under the provisions of Bengal Regulation VII of 1822, which did not at first apply to Benares, where the permanent settlement had been introduced and partially put into force, but was extended to it by Bengal Regulation IX of 1825. Regulation VII of 1822 confers upon the Government very wide powers of settling what is to be paid by every class of cultivators, but it is only necessary to set out the first subsection of section 9 which provides for a record of rights being made after inquiry by the settlement officer:

> "*First.*—It shall be the duty of Collectors and other officers exercising the powers of Collectors, *on the occasion of making or revising settlements of the land revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information* in regard to landed tenures, the rights, interests and privileges of the various classes of the agricultural community. For this purpose, their proceedings shall embrace the formation of as accurate a record as possible, of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with

any heritable or transferrible interest in the land or the rents of it, care being taken to distinguish the different modes of possession and property, and the real nature and extent of the interests held, more especially where several persons may hold interests in the same subject matter of different kinds or degrees. This record shall, in Putteedaree or Bhyachara villages or the like, include an accurate register of all the coparceners, not merely the heads of divisions, such as the Puttees, Thokes or Bahrees, but also as far as possible of every person who occupies lands, disposes of its produce, or receives rent as proprietor, or as agent for one or more proprietors holding land and disposing of its produce, or receiving the rents of it in common, with a detailed statement of the interior arrangements adopted by the brotherhood, for the distribution of the profits derived from sources common to the coparcenency where any such exist, and for determining the share of the Government jumma, and of the village expenses which each parcener is to contribute, or the other modes in which the engaging parcener or intermediate Putteedars and Behreedars collect from the cultivators. A record shall likewise be formed of the rates per beegah of each description of land or kind of produce, demandable from the resident cultivators, not claiming any transferrible property in the soil, whether possessing the right of hereditary occupancy or not, and the respective shares of the sudder malgoozar or other manager and the cultivator, in lands cultivated under Kunkoot, Bataie or similar engagements with a distinct specification of all cesses or extra collections made by the malgoozar or village manager or other. The names of all the village putwarees and the village watchmen shall also be registered, with a statement of the amount and nature of the allowances assigned to them. And all lakheraj tenures shall be carefully recorded with a specification of the nature of the tenure. The information collected on the above points shall be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of Judicature; it being understood and declared that all decisions on the demands of the zemindars shall hereafter be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement, and recorded in the Collector's proceedings, until distinctly altered by mutual agreement or after full investigation in a regular suit: And all cesses or collections not avowed and sanctioned, nor taken into account in fixing the Government jumma, shall be held illegal and unauthorised, unless now or hereafter specially sanctioned by Government."

The settlement of Agori was first entrusted in 1840 to another Deputy Collector, Rai Manick Chand, who, as stated at page 418 of the record, having first fixed the village boundaries, made a complete record, including statements as per margin of the existing state of things in each village in the pargana. On the 25th April, 1843, having completed his operations, he submitted a report to Mr. Wynward, the settlement officer for the District, in which he recommended that the Tappa Kone (which includes the suit villages) and taluqa Agori with tappa Chaurari should be settled as two mahals with the Raja of Agori Barhar as zemindar at Rs.1,000 and Rs.1,400 respectively. He gave the names of the villages in detail but did not fix separate jamas on each. In the wajib-ul-arz or record of rights of 6th April, 1843, the Raja was recorded as proprietor of the tappa.

Mr. Thomason, who was Lieutenant Governor from 1843 till his death in 1853, was not satisfied with this

settlement, as he was of opinion that the under proprietors were entitled to have the settlement of the land revenue made with them, and in 1846 he appointed Mr. Roberts, who was then a Deputy Collector, to effect a settlement in accordance with his instructions. Mr. Thomason appears to have been of opinion that the predecessors of the persons in actual possession of the cultivable area in these villages who in past times had entered on lands in the villages and by their labour had reclaimed and brought them under cultivation had become the proprietors of such lands. Modern legislation as to the " occupancy rights " of the cultivators has been largely based on this view, but it was then and long afterwards the subject of acute controversy. In their Lordships' opinion, for reasons which they will proceed to give, all that Mr. Roberts did was, in accordance with his instructions, to decide that the lands so brought under cultivation became the property of those who brought them under cultivation.

Under Regulation VII of 1882 as settlement officer Mr. Roberts had two distinct duties to perform: to settle the land revenue and to prepare the record of rights, generally known under the vernacular name of wajib-ul-arz recording the matters specified in section 9 of the Regulation which has been set out above. In the first settlement rubkar all that was decided was that the claimants were the proprietors of the cultivable area and as such were entitled to have the settlement of the land revenue made with them. That settlement was completed by the final settlement rubkar which assessed land revenue on the cultivable area which had been accurately surveyed and is referred to as the " entire area ". As will be seen the only reference to the jungle or waste included in the village boundaries is to be found in the wajib-ul-arz in which rights in the waste falling far short of ownership were claimed by the plaintiffs' predecessors and recognised by the settlement officer. It has not been contended in this case and could not be contended, that the acquisition of the rights recorded as having been acquired by the plaintiffs' predecessors or other inhabitants of the village in the jungle or waste included in the boundaries of the village which in many cases was of vast extent divested the owner, whether that owner was the taluqdar or the State, of the property in the jungle or waste. Their case is that Mr. Roberts so decided, and that effect must be given to his decision as it was not challenged in a civil suit.

Having been drawn up under the same instructions the three records for each village are all of the same character, and, as the Collector did in his judgment, their Lordships will take the records of the village of Kachnarwa as a specimen of them all.

In the first settlement rubkar of Kachnarwa Mr. Roberts found, as a result of his inquiry, at which the Raja and the

claimant Lalman Chero were represented, that before the advent of the British rule the village was entirely a jungle in the time of Rajas Balwant Singh and Chet Singh, and that in the time of Raja Adil Shah, the defendant's predecessor who was restored to possession in 1781, the ancestor of Lalman Chero the claimant cut away a part of the jungle and settled himself there, and remained in possession until his death, that he was succeeded by his son, who increased the area under cultivation and was in turn succeeded by his son, Lalman Chero, the claimant. No one else, it was found, had been in possession. " No order ", it was said, " can be passed against the rights of the property of such a person who has been in possession for such a long time and has cultivated the land after cutting the jungle with great labour. Nor does justice require that a person with such a title should be deprived of his property. At all events under section 8 of Regulation VII of 1822 he is entitled to a ' muqaddami ' settlement of the land revenue " The claimant was accordingly declared, subject to the sanction of the Board of Revenue, to be entitled to a settlement of this character. Nothing was decided in this rubkar about the property in the unreclaimed jungle or waste. It was not even mentioned. In their Lordships' opinion all that this rubkar did was to decide that the claimant had established his title to the reclaimed area on which alone, as will be seen, the land revenue was settled.

Their Lordships will here interpose a reference to the settlement rubkar of the village Harra on which the respondents rely. Fateh Manji was in a less strong position than the other persons with whom settlements were made, as his occupation was more recent and he had himself entered on an uninhabited village and brought lands in it under cultivation for which he paid a jama of Rs.27. Mr. Roberts did not record, as in the other cases, that he had become the proprietor of his holding, but on the ground that, " if he were allowed to remain in possession with some confidence and peace of mind " he would be encouraged to extend his cultivation, settled with him the land revenue on his holding for 20 years under a muqarrari settlement. The Raja, who was bound by his sanad to promote cultivation and was not levying any duties on the jungle produce as appears from the wajib-ul-arz, could have no objection to an extension of cultivation which would bring him additional jama. In their Lordships' opinion this was not a decision that the waste was the property of Fateh Manji.

In the Kachnarwa wajib-ul-arz or record of rights, signed five days later by the settlement officer and Lalman Chero, after reciting that the village had been settled with him, Lalman Chero in paragraph 1 undertook that the Government revenue should be deposited by him at any place appointed by the Government, and set out how " the land revenue " was to be paid. Paragraph 2, as appears from an

examination of this and the corresponding paragraphs of the wajib-ul-arzes exhibited in the case, was intended to show how land to be assessed was held as required by the section of the Regulation already set out. In the case of this particular village it begins with the statement " I am the sole proprietor of the village " which appears to mean no more than that the executant was the sole proprietor in the village, as it goes on to state that one of his brothers had disappeared 20 years previously and the other was his tenant. There is no such statement in the corresponding paragraphs of the other wajib-ul-arzes containing the particulars required by the Regulation. As already stated, the only mention of the unreclaimed village jungle or waste is in paragraph 6 in which the rights in it of the claimants as proprietors of the reclaimed area and the inhabitants of the village are recorded. This paragraph is as follows:—

> " 6. There are no tanks, ponds or wells in my village. The water of Dhundha river is consumed by men and the cattle of the village for drinking. There are forests and hills where there are 'mahua' trees, the number of which is not known to me. When these bear fruits the tenants are allowed per plough the privilege to appropriate the fruits of five or six trees. The rest is taken by me, one half of which goes to those who gather the fruits while the remaining half is appropriated by me. There are ten mango trees which were planted by my father. I appropriate the fruits of these trees. There are five trees belonging to Dhani Dube. The fruits of these trees are appropriated by Dhani Dube. There are 'pyar' and 'khair' trees, but neither 'chiraunji' is gathered nor 'khair' (catechu) is manufactured. The tenants and myself make use of the wood of the jungle for fuel. It is not sold and hence no account of it is being dictated here. The cattle graze in the jungle and no 'khar-chari' (grazing dues) is levied. In any year when 'koa' (tasar cacoon) is planted, the persons planting the 'koa' pay rupee one and annas one or two for every man to the Raja Saheb."

Their Lordships will next refer to the Kachnarwa final settlement rubkar in which the settlement of the land revenue was completed. Paragraph 1 " Re completion of boundaries and survey ", after referring to the settlement of the village boundaries and the fixing of boundary stones which had been completed by Rai Manick Chand the former Deputy Collector between 1840 and 1843 as stated at page 418 of the record, goes on : " The entire area in acres according to the trigonometrical survey carried out under the supervision of the survey officer comes to 4,948 acres."

Then follows a table showing 18 acres excluded from assessment as not yielding revenue, while the balance of 4,930 acres is entered under land yielding revenue, which is divided into cultivated, now fallow, and uncultivated, all of which was assessed to land revenue at the rates mentioned in paragraph 2, 10 per cent. being added for malikana and a small sum for road-cess. Paragraph 3 " Re zemindari rights " deals with the grant of the milkiat muqaddami settlement subject to confirmation of the Board of Revenue

in the first rubkar with which their Lordships have already dealt.

In paragraph 4, " Re customs of the village and jagir to goraits (village servants)," the proprietor again undertakes to observe all the conditions to which he had already agreed in the eleven paragraphs of the wajib-ul-arz. The rights of the proprietor and the inhabitants of the village in the jungle or waste are again set out, this time expressly under the head of customs, as follows :

> " There are jungle and hills where there are ' mahua ' trees. When these trees bear fruit the tenants are given five or six trees per plough, and the rest are retained by me. There are eight mango trees which were planted by my father and the fruits thereof are appropriated by me. Besides these, there are five mango trees belonging to Dhani Dube, who appropriates the fruits thereof. There are ' chiraunji ' and ' khair ' trees in the jungle of the village, but neither the ' chiraunji ' is gathered nor ' khair ' is manufactured. The wood of the jungle is used by me and the ' asamis ' of the villages for fire wood. The wood is not sold, and no ' kharchari ' (grazing-tax) is levied. If in any year silk cocoons are planted, the Raja Saheb realises Rs.1—2—0 or Rs.1—1—0 from every person rearing the worms."

The dues levied by the Raja in the different villages vary. Thus in the village of Nektwar the Raja is said to levy a tax of Rs.1.2 per acre in respect of wood and bamboos and Rs.1.2 per chula for manufacturing mohair, and Rs.1.2 per paaumia for planting silk cocoons (*sic*). In some villages such as Harra no dues are recorded apparently because none were being levied. No restrictions are imposed on the Raja's exercise of these rights, and the restrictions referred to in Mr. Roberts's report would appear to have taken the form of a warning that any abuse would be met with interference by the revenue authorities.

The " Final settlement rubkar relating to Taluqa Kone," the last of the recorded decisions which includes all the suit villages, contains no reference to the forests or jungles which were not included in the settlement of the land revenue. It states that after a thorough inquiry on proof of ownership based on old possession the settlement of 11 villages of the said taluqa was made as muqaddami and the settlement of seven villages as muqarrari, the only difference being that as regards the first the jama was settled permanently and as regards the second only for twenty years.

Having thus completed the settlement of these villages, which as already pointed out no doubt according to Mr. Thomason's instructions was a settlement of the land revenue with the Government and expressly made the land revenue payable to them, Mr. Roberts at the end of this rubkar took up the question of the Raja's rights, and holding that he was the superior proprietor, directed the jama to be paid to him and not, as previously directed, to the Government. In 1871 Sir William Muir, with Mr. Thomason's instructions

before him, and knowing as he must have known what happened when Mr. Roberts's report came under the consideration of the Board when he was their Secretary, expressed the opinion that Mr. Thomason's instructions were based on the view that all the Raja was entitled to was Rs.8,000 out of the land revenue, and that, though Mr. Roberts was right in deciding as to the Raja's position as he did, he had departed from his instructions and should have given his reasons for so doing. If this were so, it might go to explain why Mr. Roberts's settlement was not confirmed during the remaining six years of the Government of Mr. Thomason under whose instructions it was made. No question, however, arises in this appeal about Mr. Roberts's settlement of the land revenue or jama, and their Lordships have only referred to the settlement documents for the purpose of ascertaining whether they contained a decision by Mr. Roberts as to the plaintiffs' titles to the jungle or waste included in the boundaries of their respective villages. The onus of establishing this was on the plaintiff-respondents, and their Lordships after giving the case their most careful consideration, are of opinion for reasons already given that they have failed to discharge it. Their Lordships are therefore of opinion that the appeal ought to be allowed, the judgments of the Board of Revenue and the Commissioner be reversed and the judgment of the Collector restored, and they will humbly advise His Majesty accordingly. The respondents will pay the appellant's costs both here and in the Courts of the Commissioner and the Board of Revenue.

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In the Privy Council.

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