A

ROSHANLAL KUTHIALA & ORS.

v.

R. B. MOHAN SINGH OBERAI

October 17, 1974

[H. R. KHANNA, M. H. BEG and V. R. KRISHNA IYER, JJ.]

B

Code of Civil Procedure (Act 5 of 1908) s. 13—Enforcement of foreign judgment.

Limitation Act (9 of 1908), s. 14—Scope of.

Practice—Application of equity by Indian Courts.

The appellant agreed to sell his hotel to the first respondent and the first respondent paid an earnest money of Rs. 5 lacs. Alleging a breach of contract the
C first respondent filed a suit in the sub-court Lahore, for return of the earnest money, and the suit was decreed. The appellant filed an appeal to the High Court at Lahore and the execution of the decree was stayed on condition of his depositing Rs. 3 lacs. The appellant deposited the amount but the decree holder (first respondent), on objection by the appellant, was not allowed to withdraw the amount before the disposal of the appeal. The appeal was allowed by the High Court, and thereafter, the appellant moved the High Court for refund of the deposit made by him. The Pakistan (Administration of Evacuee Property) Ordinance, 1949, having come into force by then, notice was given by the High Court to the Custodian and the
D Custodian prayed for staying the return of the amount on the ground that the appellant was an evacuee and also for the payment of the amount in deposit to the Custodian. The amount however continued to be in deposit in court. The respondent appealed to the Federal Court of Pakistan against the Judgment of the High Court and his appeal was allowed. The amount, however, continued to be in the Pakistan Treasury. In January, 1954, the appellant filed a petition in the High Court of Lahore praying, that the amount of Rs. 3 lacs deposited by him may be directed to be adjusted towards the satisfaction of the decree as orginally intended, and that
E his request for the refund may be treated as withdrawn, and that the objections filed by the Custodian dismissed. As a result of political understanding between the two countries, court deposits were agreed to be transferred to the respective countries. On the strength of that law in Pakistan the respondent moved the High Court at Lahore for transfer of the deposit of Rs. 3 lacs to the concerned officer or authority in India on the ground that the money was deposited in part satisfaction of his decree. The High Court dismissed the application but the Supreme Court of Pakistan allowed it and directed the transfer of the deposit to the concerned authority in India after dismissing the Custodian's objections. But the deposit continued in the Pakistan Treasury.
F

The respondent thereupon moved the High Court of Punjab in India for levying execution of his decree and invoked the provisions of the Indian Independence (Legal Proceedings) Order, 1947. The High Court dismissed the execution application. In appeal, the Supreme Court of India held that the forum for enforcement and the process for getting relief and execution of the foreign decree was a suit under ss. 9 and 13, Civil Procedure Code, in the Competent Court. The respondent thereupon filed a suit for recovery of the decree amount based on the foreign
G judgment in his favour and the trial court and the High Court, in appeal, decided in his favour.

In appeal, to this Court, it was contended by the appellant: (1) that the decree of the Federal Court of Pakistan which was the foundation of the action in India had vested automatically in the Custodian under the Pakistan Ordinance of 1949, and that therefore, the respondent had no right to recover on the basis of the foreign judgment; (2) the six years period available under art. 117 of the Indian Limitation Act, 1908 for a suit upon a foreign decree having expired long ago the
H suit was barred by limitation; and (3) in any event, the sum of Rs. 3 lacs already deposited to the credit of the decree in the Lahore Court, having been actually adjusted towards the decree, the appellant would be liable only for a sum of Rs. 2 lacs together with subsequent interest.

Allowing the appeal on the last ground,

HELD : 1 (*a*) A foreign judgment is enforceable by a suit upon the judgment and it shall be conclusive as to any matter thereby directly adjudicated upon between the same parties subject to the exceptions enumerated in s. 13, C.P.C. In the present case, the judgment of the Pakistan Court was in favour of the respondent, and none of the nullifying clauses in that section being attracted, it is conclusive under s. 13. [500G-H]

(*b*) Since the decree was not treated as evacuee property under s. 3 of the Pakistan Administration of Evacuee Property Act, 1957, it is not evacuee property, and therefore, did not vest in the Custodian. The Custodian never demanded any right *qua* the decree-holder-respondent nor as stepping into his shoes. His claim in the Lahore court was that the *appellant* became an evacuee and that the amount should not be returned to him; and, at no stage did the appellant even contend that the respondent was not entitled to sue for the amount and that the Custodian alone had such right. [501F-H]

(2) Section 14 of the Limitation Act, 1908, saves the respondent's suit from the bar of limitation. [502 D]

It is a *sine qua non* of a claim under s. 14 that the earlier proceeding is prosecuted in good faith; and any circumstances, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of s. 14. Section 14 is also wide enough to cover periods covered by execution proceedings. In the present case, the launching of execution of the Pakistani decree in India was done after consulting two leading Indian lawyers and the circumstance shows the bona fides of the respondent; and the prosecution of the execution proceedings in the High Court of Punjab was repelled, because and only because, the institution of such proceedings on the execution side was without jurisdiction. The question thus was one of initial jurisdiction of the Court to entertain the execution proceedings. [502E-H; 503A-C]

Raghunath Das v. *Gokal Chand and Another* [1959] S.C.R. 817 at 818, *India Electric Works Ltd.* v. *James Mantosh & Anr.* [1971] 2 S.C.R. 397 at 401 and *The Associated Hotels of India Ltd. and Another* v. *R. B. Jodha Mal Kuthalia* [1961] 1 S.C.R. 259 at 272 referred to.

(3) In India, the historical and artificial distinction between equity and law does not exist and equity itself is enforced as law with all its built in limitations. Our equitable jurisdiction is not hidebound by tradition and blinkered by precedent, though trammelled by judicially approved rules of conscience. When law speaks in positive terms equity may not be invoked against it, but, while applying the law, the court can and must ameliorate unwitting rigours inflicted by legalisms, where there is room for play by the use of equity. [503H; 507G; 509C-D]

In the present case, neither party was blameworthy and indeed both were agreed at a stage that the deposit should go in satisfaction of the decree affirmed by the final court in Pakistan. The decree holder had laid claim to the sum to the exclusion not only of the Custodian but also of the judgment-debtor. Taking a pragmatic view of the justice of the case, the Court has to see who should bear the loss in these circumstances. Although the courts and the parties assumed that the court deposit as specially earmarked towards the discharge of the decree, because of supervening political upheavals, and eventual disregard of the court's order by the Pakistan Government, the decree-holder-respondent could not withdraw the sum. The equity arises largely from the iniquity of a foreign government's refusal to carry out the directions of its municipal courts. Therefore, the deposit of Rs. 3 lacs should be treated as a *pro tanto* discharge of the decree in favour of the respondent from that date when the appellant agreed for such adjustment. The decree amount as on the date inclusive of costs incurred will have to be calculated and Rs. 3 lacs deducted therefrom. There will be a decree in favour of the respondent only for the balance which would carry 5% interest from then on as stipulated in the decree. [504C, E; 505F-H; 509F-G]

Chowthmull Manganmull v. *The Calcutta Wheat and Seeds Association* I.L.R. 51 Cal. 1010 and *Sheo Cholam Sahoo* v. *Rahut Hossein* I.L.R. 4 Cal. 6 referred to.

A CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2248 & 2303 of 1968.

From the Judgment & Order dated the 30th August, 1968 of the Delhi High Court (Himachal Bench), Simla in Regular First Appeals No. 21 of 1967).

B *S. T. Desai, A. Subba Rao, Naunit Lal* and *Lalita Kohli*, for the appellant (In CA No. 2248/68).

A. K. Sen, M. C. Bhandare and *Rameshwar Nath*, for respondents Nos. 1 & 2 (In CA No. 2248/68).

B. P. Singh, for respondents Nos. 4, 6-11(In CA. No. 2248/68).

C *A. K. Sen* and *M. C. Bhandare*, for the appellant (In CA No. 2303/68);

S. T. Desai, A. Subba Rao, Naunit Lal and *Lalita Kohli*, for respondents Nos. 1, 2 & 4-9 (In CA. No. 2303/68).

The Judgment of the Court was delivered by

D KRISHNA IYER, J.—The principal appeal, C. A. 2303 of 1968, has arrived in this Court by certificates, under Art. 133(1)(a) of the Constitution, granted by the High Court of Delhi. (The other, C.A. 2248 of 1968 has been extinguished by efflux of time and even otherwise is not pressed, since counsel concedes the decision to be just).

The subject matter is large, the rounds of litigation many, the arguments long and yet the issues of law and disputes of fact are E few although their ultimate decision where justice and law have, we think, come to cordial terms, has been reached after uneasy hours but with an easy conscience. Hopefully, we avoid burdening the judgment with heavy historical material much of which has been wisely jettisoned to help turn the forensic focus on the three-pronged attack on the decree made by counsel for the appellant Shri S. T. Desai.

F Even so, the sequence and significance of events leading up to the current controversy, sprawling across India and Pakistan and surviving for nearly three decades now, may be unfolded with advantage. Now to the story. Lahore was the venue of the earlier forensic episodes. The legal saga formally began in undivided India when the 1st appellant, Kuthalia, the owner of Sedous Hotel, agreed to sell it on October 2, 1946 for a price of Rs. 52,75,000/- to the 1st respon- G dent Oberoi, who became a name in the hotel industry. An earnest money of Rs. 5,00,000/- was advanced and the time fixed for completion of the sale was January 20, 1947. On alleged breach of contract, Civil Suit No. 514/61 of 1946 was filed in the Court of the Senior Sub-Judge, Lahore, by the 1st respondent (Oberoi) as the 1st plaintiff and the Associated Hotels of India Ltd., as the 2nd plaintiff, for recovery of the earnest money with interest. A decree in favour of H the 1st plaintiff was made in the sum of Rs. 5,08,333-5-4 with future interest and costs. So far as the 2nd plaintiff was concerned the reason for whose presence as party is obscure, if not oblique—

the suit was dismissed . An appeal was successfully carried by the present appellant to the High Court of West Pakistan in Lahore since, by the time the trial Court's decree was made the "Great Divide" had happened with all the blood and tears of political history and traumatic effects on the law and life in both the countries. The uprooting and overturning of human masses led to 'evacuee' legislation on both sides of the frontiers and the common case of the parties is that both of them are evacuees under the relevant Pakistani laws. The Lahore High Court, on 24th November, 1949 dismissed the suit *in toto*, but, undaunted, Shri Oberoi moved the Federal Court of Pakistan which restored the decree of the trial Court (on 21-12-53) in reversal of the High Court's decree. Thus the final Court in Pakistan at the relevant time granted a decree in favour of the 1st respondent, against the appellant, and that stands. This landmark event closes the chapter of substantive rights and here begins a set of encounters in realising the fruits of the decree. The crescendo of this unique series is the persuasive but opposing 'submissions' we have listened to.

Two crucial factors gave a dramatic turn to the course of the conflict viz., 'evacuee' legislation and the deposit of Rs. 3,00,000/- in Court, in connection with the decree, pending the High Court appeal. A brief narration of those matters is now necessary to follow the development of the dispute before us. In the High Court, stay of execution was sought and granted on condition of deposit of Rs. 3,00,000/- on July, 16 1949 and furnishing of security for the balance. Pursuant thereto, the sum was deposited by the judgment-debtor into the executing Court, but the decree holder, on objection by the former, was not allowed to withdraw the money before disposal of the appeal. All this took place in July, 1949. Thus a key fact, whatever its impact, emerges that the judgment-debtor (appellant) had put into Court this substantial sum but he had also prevented the respondent getting instant benefit of it.

The social disasters of the political surgery already adverted to were alleviated by legislative bandaging of economic wounds through laws to rehabilitate evacuees on either side. As part of this package, the Pakistan (Administration of Evacuee Property) Ordinance, 1949 was promulgated. This legislation defines an 'evacuee' and, as stated earlier, the contestants in this case are both admittedly evacuees. Section 2(3) of the Pakistan Ordinance defines 'Evacuee property' and one of the points in controversy before us is as to whether the decree passed by the Federal Court of Pakistan for the sum of around Rs. 5,00,000/- or the deposit of Rs. 3,00,000/- in connection with that decree, is 'evacuee property'. We may have to dilate on the scheme and provisions of this Pakistan Ordinance a little later, but it is sufficient to state, at this stage, that this Ordinance contemplates the appointment of Custodians of Evacuee Property and invests them with certain powers. Right away we may read s.6 (1) of the Ordinance since its effect has impact on one of the important contentions urged by Mr. Desai :

> "6(1) All evacuee property shall vest and shall be deemed always to have vested in the Custodian with effect from the first day of March, 1947."

A In simplistic terms, if we may here anticipate Shri Desai's submission, there was a statutory vesting of the decree obtained by Oberoi in the Custodian and no rights accruing from that decree could be claimed by the former. The foundation of the present suit thus collapsed, according to him. We will investigate the merits of this knock-out blow to the plaintiff's case in due course. Two other legislations, the Transfer of Evacuee Deposit Act, 1954 and the Pakistan B Administration of Evacuee Deposit Act, 1954 and the Pakistan Administration of Evacuee Property Act, 1957 loom large as the legal chronicle continues. The former primarily provides *inter alia* for transfer of court deposits of evacuees by each country to the other and the latter saves some items from the all-embracing of operation evacuee property. More later.

C Anyway, the present appellant, when be won in the High Court, moved for refund of the deposit by his application of December 1, 1949. Follow-up by way of an order for refund was natural the Court having dismissed the suit. But the Court tacked on a further direction that intimation be given to the Custodian to take appropriate proceedings, if he thought fit. Thus alerted, the officer hastened. Hardly had 4 days passed when the Custodian moved the High Court for D interdicting the return of the amount on the score that the entitled party was an evacuee under the aforesaid Ordinance of 1949. The High Court thereupon stayed refund of the deposit to the appellant by an order dated December 20, 1949. The sequel shows that this amount has eluded the hands of both parties up till now, an extra-legal misfortune which has a bearing on the ultimate relief claimable in this appeal.

E

To resume the fluctuating fortunes of the deposit, the main apple of discord. The Custodian's petition of 20th December, 1949 included a prayer for payment out to him of the amount in deposit, as, according to him, it belonged to Kuthalia (the defendant) an evacuee. However, it was kept pending on notice having been ordered to the depositor. But when the suit by Oberoi was decreed by the Federal F Court, the right to refund put forward by the defendant disappeared. Even so, since both parties were evacuees the Rehabilitation Commissioner sent a request to the High Court in these terms:

"From

S.S. JAFRI ESQUIRE C.S.P.
REHABILITATION COMMISSIONER AND SECRETARY
G TO GOVERNMENT PUNJAB, REHABILITATION DEPARTMENT.

To

THE REGISTRAR HIGH COURT OF JUDICATURE
PUNJAB LAHORE

H Dated Lahore the 4th January, 1954

Subject:—Hedous Hotel Lahore Deposit of Rs. 3 lacs in the High Court of Lahore.

MEMORANDUM

A sum of Rs. 3,00,000 was deposited by R.B. Jodha Mal of Hoshiarpur, in the High Court Lahore for the benefit of the Associated Hotel of India Limited. A decree was passed by the Senior Civil Judge Lahore in favour of the Associated Hotel of India Limited against R.B. Jodha Mal for a sum of Rs. 5,08,333-5-4. The deposit of Rs. 3,00,000 was made in part payment of the above decree. R.B. Jodha Mal preferred an appeal in the High Court against the order of the Civil Judge. This appeal was accepted on 24th November, 1949. Against this decree of the High Court the Associated Hotel of India Limited, filed an appeal in the Federal Court of Pakistan. This appeal was accepted by the Federal Court on 21st of December, 1953.

2. Since both the contesting parties are evacuees the amount in question cannot be paid until instructions from Government of Pakistan are received in the matter. It is therefore requested that the amount of Rs. 3;00,000 may please be deposited in the Treasury under the detailed head.

"Sale proceeds of Immovable Property and debts due to Evacuee etc." Under the head. "P. Deposits and Advances Part II Deposits not bearing interest Departmental and Judicial Deposits Civil Deposits, Deposits on account of Evacuee Estates" in the accounts of the Deputy Rehabilitation Commissioner (Rent and Repairs), Lahore under intimation to this office.

(Sd.) GHULAM SHABBIR,
Deputy Secretary Rehabilitation,
for Rehabilitation Commissioner and
Secretary to Government Punjab Rehabilitation
Department.

No. U. Reh. Acc. G/333, Dated Lahore, 4th January, 1954."

Thus the amount remained frozen. A couple of days later (January 6) the defendant Kuthalia moved the High Court at Lahore not for refund of the deposit—which he could not ask for in view of the Federal Court decree—but praying 'that the aforesaid amount of Rs. 3,00,000/- may be directed to be adjusted towards satisfaction of the decree as originally intended and the request for refund be treated as withdrawn and the objections filed by the Deputy Custodian be dismissed.' Anyway, the lid was put on this part of the *lis* bearing on the Custodian's claim to keep the deposit in Pakistan by the Supreme Court of Pakistan, holding to the contrary. To appreciate this decision of the Supreme Court reference has to be made to s.4 of the Pakistan Ordinance 1 of 1954 (which reincarnated as Act VI of 1954 with the same name) relating to transfer of deposits. This enactment had its counterpart in India. As a result of political understanding reached between the two countries, Court and other deposits were agreed to be transferred to the respective countries into which the evacuees entitled to them had moved. On the strength of this law Shri Oberoi the decree-holder, moved the High Court at Lahore for transfer of the deposit

A of Rs. 3,00,000/- together with the records relating thereto 'to such officer or authority in India as the Central Government has by order specified in this behalf or specifies in future as the provisions of the said Act fully applies to it.' It may incidentally be mentioned since it has considerable importance at a later stage, that in this application Shri Oberoi had categorically asserted:

B "That Rai Bahadur Mohan Singh, decree-holder submits that judgment-debtor had no interest in the said sum and the same is lying deposited with this Hon'ble Court for the payment to him, as it was deposited for the due performance of such decree as may ultimately be passed in his favour. The said decree-holder contends that no other person has any right or interest in the said amount and that the same is lying with C this Court in trust for payment to him. The judgment-debtor has accepted this position, and claims no right or interest in the said amount."

Although the High Court declined to uphold the claim for transfer of the deposit under Act. VI of 1954, on being approached by the decree-holder the matter received different treatment at the hands of D the Supreme Court.

Shri Oberoi's contention was :

"That the Federal Court of Pakistan having passed a decree in favour of the petitioner and the sum deposited being for the satisfaction of the decretal amount this Hon'ble Court has erred in holding that the petitioner had no interest in the E deposit. It was neither within its jurisdiction to decide the same nor its decision on that point is legal and correct."

Cornelius C. J., speaking for the Court, overruled the pretended claim of the 2nd plaintiff, the Associated Hotels of India Ltd., rejected the Custodian's objections and ruled:

F "....It would appear that *prima facie* the principal and direct interest in the money is that of Rai Bahadur Jodha Mal. The money having been deposited in relation to a decree of the Court, for the purpose of being applied to the satisfaction of that decree, and such decree standing exclusively in the name of Rai Bahadur Mohan Singh Oberoi, he might appear to have a secondary and indirect interest in the money...."

G In short, the highest court directed the transfer of the deposit, subject to an innocuous finding by the High Court about both contestants being evacuees. In fulfilment of the Supreme Court's remand the High Court of West Pakistan passed final orders in these peremptory terms:

H "We, therefore, have no hesitation in holding that both Rai Bahadur Jodha Mal Kuthalia, the depositor, and Rai Bahadur Mohan Singh Oberoi, for whose benefit the deposit was made are within the purview of section 4 of the Transfer

of Evacuee, Deposits Act, 1954, "evacuees" and direct that the deposit be sent to the Custodian of Evacuee Property, along with the record of the case, for transmission to such an authorised officer or authority in India as the Central Government has specified in this behalf for disposal in accordance with the law."

In the sorry scheme of affairs this direction remained a dead letter. Courts can only command, but if Governments ignore them, the finer flame of the rule of law is puffed out and the darker forces of rule by executive diktat choke the life breath of the law. Anyway, the Supreme Court's order notwithstanding, the deposit of Rs. 3,00,000/- lies idle still, after a lapse of 14 years, in Pakistan Treasury.

The scene now shifts to India. Both the *dramatis personae* move to India and, perhaps make good. Here is a decree paralysed by circumstances beyond the control of the parties. The decree-holder Oberoi, after taking legal advice at the highest level, moved the High Court of Punjab at Chandigarh for levying execution of his decree, which, by passage of time, had added adipose by way of interest and remained undiminished by the deposit in the Pakistan Court to the credit of the decree. The swollen sum claimed in execution was 10,79,820/4. In doing so he sought the aid of s.4(3) of the Indian Independence (Legal Proceedings) Order, 1947 read with O·XLV, r.15 and s. 15, C.P.C. Many road blocks in the way of the executability of the decree were placed by the judgment debtor but the High Court of Punjab at Chandigarh, assisted by eminent counsel, elaborately considered the many legal questions and dismissed the execution petition. The Court found that the situs of the decree which was 'property' was Lahore and so Oberoi, an evacuee, had been divested of all interest therein, the Pakistan Custodian being the repository of all such rights. The property in the decree being negatived, the present respondent failed. Many other findings hostile to his claim were also rendered by the High Court. However, the quietus to this Operation execution was given by the Supreme Court of India where the parties, engaging top legal talent, hopefully reached, obtaining leave under Art. 133(1)(a) and (c) of the Constitution. In that appeal the judgment debtor (present appellant) resisted the proceedings, filing a statement of the case through his advocate Shri Naunit Lal, as required by the Supreme Court Rules (This statement has pertinence to the point regarding limitation vis-a-vis s. 19 of the Limitation Act, to be dealt with later). The Court, after stating the facts of the long litigation, punctuated by the puzzling waves of evacuee legislation, by-passed issues unnecessary to the determination of the case (although decided by the High Court) and came to the crux of the matter whether this Pakistani decree could be straight executed invoking O·45, r.15, C.P.C. When one gets entangled in the skein of details impertinent to the core issue, the true problem gets obfuscated. This happened, to an extent, in the High Court. Side-stepping these inessentials, Gajendragadkar J. (as he then was) speaking for the Court, came to the scope and sweep of the Indian Independence (Legal Proceedings) Order, cleared

A the legal cobwebs and laid bare the object and ambit of that law in the back-ground of the historic surgery of Indian geography which took place then. The Court concluded thus :

> "The next question which must be considered is whether the present suit falls within Section 4(1) at all. The answer to the question must obviously be in the negative. The material
B allegations made by the appellants in the plaint filed by them in the present suit clearly show that the whole cause of action had accrued within the jurisdiction of the Senior Sub-Judge at Lahore. The original contract had taken place at Lahore, the property agreed to be sold was situated at Lahore, the earnest amount of Rs. 5,00,000/- was paid by the appellants to the respondent at Lahore, the breach of the contract took place at
C Lahore, and so under Section 20(c) of the Code of Civil Procedure the suit was properly filed in the Court at Lahore and the jurisdiction of the said Court to try the suit was in no manner affected by the passing of the Act or the transfer of territory. This position was not and is not disputed. There is, therefore, no doubt that the trial Court could have proceeded to deal with this suit even if the Order in question had not been passed; and
D so the statutory fiction raised by the provisions of the Order cannot be invoked enforcing a decree passed by the Federal Court in an appeal arising from such a suit. In our opinion, therefore, the High Court was in error in holding that the provisions of Section 4 applied to the decree sought to be executed by the appellants."

E The view, though in reversal of the High Court's holding, did not effect the ultimate outcome. For the Court ruled that the execution of the foreign decree, as if it were one of the Supreme Court of India, was misconceived. In other words, the forum for enforcement and the process for getting relief *viz.*, a suit under s. 9 and 13 of the C.P.C. in the competent Court of original jurisdiction could not be circumvented or short-circuited by resort to the exceptional methodo-
F logy indicated in s. 4(1) or (3) of the Indian Independence (Legal Proceedings) Order.

This extinguished the fires of controversy regarding executability but ignited the current original suit. Shri Oberoi, discomfited in execution, was driven to filing a regular suit for recovery of the decree amount based on the foreign judgment in his favour and indeed
G success attended his efforts, since the trial Court and the High Court made shortshrift of all the pleas to non-suit him.

It is this defeat on all points that has escalated the appellant's litigation to the top judicial deck, this Court, urging his triple opposition to the plaintiff's decree.

H Shri Desai's 'submissions' logically and sequentially, were three. Firstly, the decree of the Federal Court of Pakistan, which was the foundation of the present action, had vested automatically in the Custodian under the Pakistan Ordinance of 1949 and, therefore, the

plaintiff Oberoi had no right to recover on the basis of the foreign judgment. Absent *locus standi* or cause of action, his suit was bound to fail and therefore the appeal was bound to be allowed on that initial ground alone.

His second submission was that the six-year period available under Art. 117 of the Indian Limitation Act for a suit upon a foreign decree had long ago expired, reckoned from the date when the Federal Court of Pakistan granted the present plaintiff a decree. By simple arithmetic he is right but the plaintiff has sought to salvage his action from the clutches of limitation by reliance on ss. 14 and 19 of the Indian Limitation Act. In the facts and circumstances of the present case, Shri Desai repels this rescue operation as a misapplication of the relevant provisions.

The last, yet to our mind the most meaningful, point urged by the appellant, was that although a decree for Rs. 5,00,000/- had been awarded by the Pakistan Court in favour of the present plaintiff, a sum of Rs. 3,00,000/- had already been deposited to the credit of that decree in the Lahore Court and had been actually adjusted towards the decree, with the result that the worst coming to the worst only a sum of Rs. 2,00,000/- together with subsequent interest could be claimed by the plaintiff, in law and justice. The equities between the parties were a component of the branch of jurisprudance bearing on execution of foreign decrees.

We proceed to examine the soundness of these three contentions in the order set out above.

Locus Standi

Ordinarily, a suit on fact of a foreign decree is sustainable and s. 13 C.P.C., sets out the limitations on the amplitude of the right. This proposition is not disputed but what Shri Desai argues is that the decree being 'evacuee property' under the Pakistan Ordinance, it has already vested in the Custodian by statutory Operation, so much so the plaintiff has long ago ceased to be decree-holder. May be other limited remedies, to get relief as an evacuee who has lost large properties, may be available to Oberoi under other enactments in both countries but *qua* holder of a foreign decree he cannot bring a suit to recover the debt—an infirmity affecting the root of his right.

The plaintiff's answer is simple and sufficient and deflates the defendant's resistance, based on 'evacuee' legislation. A foreign judgment is enforceable by a suit upon the judgment which creates an obligation between the parties. Indeed, it 'shall be conclusive as to any matter thereby directly adjudicated upon between the same parties' subject to the exceptions enumerated in s. 13 C.P.C. None of these nullifying clauses being attracted, *prima facie* the foreign judgment on which the plaintiff founds his present action is unassailable. Certainly, the judgment of the Pakistan Court was in favour of the plaintiff and, being conclusive under s. 13, the defendant could not be heard to urge to the contrary.

A Even so, let us analyse, the evacuee law —based bar, to see if it has substance.

To appreciate the merit of this argument, it is necessary, as earlier pointed out, to follow the provisions of the evacuee legislation in Pakistan. The Ordinance of 1949 defines 'evacuee' [s. 2(2)] and both the parties herein fall squarely within that definition. The second B question then is whether the decree, which is the source of the plaintiff's rights, is 'evacuee property' as defined in s. 2(3) of the 1949 Ordinance or is 'property' as defined in s.2(5) thereof. If it is, s. 6 of the said Ordinance will operate to divest the plaintiff of his ownership of the decree and vest it in the Custodian, notwithstanding any other law to the contrary (s.4 of the Ordinance is an over-riding provision). The first point that falls for decision therefore is to decide whether C the decree of Shri Oberoi is 'evacuee property'. Assuming for a moment that it is—and at the first flush it is—an argument which neutralises this contention is urged by the other side, based on the Pakistan (Administration of Evacuee) Property Act, 1957 (12/58). There is hardly any doubt that the parties are 'evacuees' within the meaning of this Act also. Even so, the Pakistan Administration of Evacuee Property Act, 1957 (XII of 1958) carves out D a category of evacuee property out of the Custodian's control. Does this decree thus escape the net? Yes, if it has not been *treated* as evacuee property. For, although all evacuee property vests in the Custodian by force of s. 7 of this Act s. 3(1) is of strategic significance and reads:—

> "3. Property not to be treated as evacuee property on or after 1st January, 1957.
>
> E
>
> (1) Notwithstanding anything contained in this Act, no (?) person or property not treated as evacuee or as evacuee property immediately before the first day of January, 1957, shall be treated as evacuee or, as the case may be, as evacuee property, on or after the said date.
>
> F x x x x x"

Certainly, the judgment debtor is an evacuee and the Custodian has *treated* him as such in court proceedings. But has that decree been *treated* as evacuee property ? The answer is an easy negative. The Custodian never demanded any right *qua* decree holder nor as stepping into the shoes of Shri Oberoi. Thus, whichever way we view the matter the appellant must fail in this branch of his case. G It is pregnant with meaning that the Custodian did not seek to get himself impleaded as a co-appellant in the Federal Court of Pakistan and at no tier of the long-drawn out litigation in Pakistan did the defendant contend that the plaintiff Oberoi was no longer entitled to sue for the amount and that the Custodian alone had such right if at all.

H *Bar of Limitation*

The slow flow of the plaintiff's rights along the stream of statutory limitation would have normally been stilled into a final freeze, for the

prescribed life span of six years under Art. 117 of the Limitation Act had admittedly run out. The rescue raft on which Shri Oberoi clutched o survival of his right to sue was s. 19 and his life-belt, as it were, was s. 14. The facts and law are fairly clear; their rival interpretations by counsel nevertheless diverged so much that the encounter generated at the bar as much heat as light—inevitable, may be, in an adversary system. Be that as it may, we will scrutinise the case urged by the plaintiff to attract these rejuvinatory and exclusionary provisions. Courts must as far as is reasonably permissible put a liberal construction on documents to save, not to scuttle, when faced with a plea of limitation to non-suit an otherwise good claim.

Section 19, to help renew limitation, requires, as rightly stressed by Shri Desai, an intention to own a subsisting liability by the debtor to the particular creditor. Mere chronicles of litigations and recitals of documentary events, it is argued, cannot be regarded as acknowledgement if the whole drift of the writing is a denial of the plaintiff's claim. But, in the view we take of the applicability of s. 14, a further probe into or pronouncement on the legal labyrinths of s. 19 and the rulings cited in that connection need not detain us. Suffice it to say that we do not express any opinion on the issue including an advocate's authority to acknowledge liability in the course of a Statement of the Case. It all depends on the circumstances of each case.

Section 14, which neatly fits in, is simple in its ingredients, to the extent we are called upon to consider.

It is a *sine qua non* of a claim under s.14 that the earlier proceeding is prosecuted in good faith. It is beyond cavil that before launching on execution of the Pakistani decree Shri Oberoi had taken advice from two leading Indian lawyers and set about the job diligently. Bona-fides is thus writ large in his conduct. The controversy is that the defect of non-executability of the foreign decree by virtue of the Governor General's Order does not savour of a jurisdictional or like error but of a mere mis construction of law. We need not labour the obvious that here the prosecution of the execution proceedings was repelled because and only because the institution of such proceeding on the execution side was without jurisdiction. Normally, a money claim due under a foreign decree can be enforced on the original side by a suit under ss. 9, 13 and 26, C.P.C. in the appropriate Court and the executing court has no jurisdiction to straightway levy execution under O·21, C.P.C. An exception is provided in this regard by the Governor General's Order and a special forum *viz*, the High Court is indicated when the decree to be executed is of the Supreme Court of Pakistan. All this pertains to jurisdiction and in the Associated Hotels case this Court negatived executability solely on grounds jurisdictional or quasi-jurisdictional. Section 14 thus comes to the rescue of the defendant in this suit.

Certainly, Section 14 is wide enough to cover periods covered by execution proceedings (See 1959 SCR 817 at 818). After all, s. 47 itself contemplates transmigration of souls as it were of execution

A petitions and suits. The substantial identity of the subject matter of the *lis* is a pragmatic test. Moreover, the defects that will attract the provision are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance legal or factual, which inhibits entertainment or consideration by the Court of the dispute on the merits, comes within the scope of
B the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right (See (1971)2 SCR 397 at 401). In the *Associated Hotels* case (i.e. the very *lis* in its earlier round on the execution side this Court pointed out [1961] I SCR 259 at 272) that the question was one of *initial jurisdiction* of the Court to *entertain* the proceedings. Thus in this very matter, the obstacle was jurisdictional and the exclusionary
C operation of s. 14 of the Limitation Act was attracted.

Equitable Adjustment

The last ditch battle fought by the appellant relates to the deposit of Rs. 3,00,000/- which, if deducted from the date of payment into
D Court from the amount decreed a huge scaling down of the figure will be the result. While Shri Desai staked his case on equitable considerations which must be applied while executing foreign decrees, Shri Ashok Sen wondered what legal principle could sanction such inroad into sums legitimately due. While Shri Desai's two earlier defences are easily vulnerable, we think his plea on equity, in a less extreme form, is impregnable. "What is truth said jesting Pilate
E (in Jesus trial) and would not stay for an answer." We choose to pause and answer that Truth is Law cast in the compassionate mould of justice and equity being one of its facets.

Shri Sen's strenuous submission summed up fairly is that undefined rules of equity are unruly horses and in India legal rights cannot be chased out by nebulous notions of good conscience labelled equity.
F In a sense, he is right but to deny equitable jurisdiction for courts to promote justice is too late and too tall a jurisprudential proposition in any system. For, equity is not anti-law but a moral dimension of law rather, it is the grace and conscience of living law acting only interstitially. The quintessence of this concept may be stated thus :

> "All great systems or jurisprudence have a mitigating
G principle or set of principles, by the application of which substantial justice may be attained in particular cases wherein the prescribed or customary forms or ordinary law seem to be inadequate. From the point of view of general jurisprudence, "equity" is the name which is given to this feature or aspect of law in general."(1)

H Certainly when law speaks in positive terms, equity may not be invoked against it; but while applying the law the Court can and must

(1) American Jurisprudence 2nd Edn. Vol. 27 p. 516.

ameliorate unwitting rigours inflicted by legalisms, where there is room for play, by the use of equity. After all, equity is the humanist weapon in the Court's armoury, whereby broad justice may be harmonised with harsh law, based, of course, on established principles. In the present case, certain sympathetic circumstances stand out indubitably and the benign interference sought by the appellant is spelt out of these facts. What are they ?

The judgment debtor did apply for stay of execution and, on the direction of the High Court, did deposit rupees three lakhs on July 16, 1949 (to be correct, out of it Rs. 50,000/- was paid in only on 16th August), not in discharge of but as security for the decree pending the first appeal. We cannot blink at the fact that but for supervening political upheavals and eventual disregard of the Court's order by the Pakistan Government the judgment creditor would have withdrawn this sum. But partially to antidote the effect of this factor must be remembered the opposition of the debtor to the creditor drawing the money from Court in July 1949 when the 1949 Ordinance vesting evacuee property in the Custodian had not been promulgated. And since the appeal was allowed by the High Court and the suit dismissed, the deposit ceased to be security for the decree, although factually the money did not leave the custodia legis. Shri Oberoi's decree was re-born, as it were, only when the Federal Court allowed his appeal on December 21, 1953. Till then he had only a potential right to claim the money.

Now, a close-up of the post-decretal happenings with special reference to the conduct of either party bears on the 'conscience' of the situation. Neither party was blameworthy and indeed both were agreed at a stage that the deposit should go in satisfaction of the decree affirmed by the final court. The judgment was delivered on December 21, 1953. Most probably the Christmas vacation, intervened and soon after the reopening (January 6, 1954) the *judgment debtor* rushed to the Lahore High Court with the request that his application for withdrawal of deposit filed 4 years' back be dismissed as withdrawn and it be adjusted towards the decree. 'It is therefore respectfully prayed' concluded the petitioner, 'that the aforesaid amount of Rs. 3,00,000/- may be directed to be adjusted toward satisfaction of the decree as originally intended and the request for refund be treated as withdrawn and the objections filed by the Deputy Custodian be dismissed." In this application he stated that the amount was deposited 'towards partial satisfaction of the decree as a condition for stay of execution.....". Let us look at the decree-holder's stance. On March 31, 1954 he hopefully moved the High Court at Lahore for transfer of the deposit to India on the strength of s.4 of the Transfer of Deposit Ordinance (later enacted as Act VII of 1954). True, his final success in the Supreme Court proved a Dead Sea fruit, the judicial order having been ignored by the Government but the fact remains that he averred in his application of March 31, 1954, in harmony with the position taken up by the judgment debtor.

"(1) That on 6th January 1954 Rai Bahadur Jodha Mal Kuthalia filed an application praying that the sum of

A Rs. 3,00,000/- which he had deposited in this Hon'ble Court on 15th/16th July, 1949, in pursuance of the order passed by this Court on 27th April 1949 for the due performance of decree as may ultimately be binding upon him be paid to Rai Bahadur Mohan Singh Oberoi decree-holder *towards partial satisfaction of the decree* and that his application, dated 15th December, 1949, B for refund of the said amount be treated as withdrawn and consequently the objection and the review application of the Custodian dated the 20th December 1949 be dismissed.

* * * * *

(3) That Rai Bahadur Mohan Singh, decree-holder submits that *judgment-debtor has no interest in the said sum and* C *the same is lying deposited with this Hon'ble Court for payment to him*, as it was deposited for the due performance of such decree as may ultimately be passed in his favour. The said *decree-holder contends that no other person has any right or interest in the said amount* and that the same is lying with this Court in trust for payment to him. *The judgment-debtor has accepted this position* and claims no right or interest in the said amount.

D

(4) That the said decree-holder further contends that in view of the Ordinance No. 1 of 1954 'Transfer of Evacuee Deposits Ordinance 1954' and subsequent enactment of the said Ordinance into an Act of the legislature to the same effect, this Hon'ble Court is requested to transfer the deposits of Rs. 3,00,000 along with the records relating thereto to such officer E or authority in India as the Central Government has by order, specified in this behalf or specifies in future as the provision of the said Act fully applies to it.

In the alternative the said decree-holder further prays that if for some reasons, this Hon'ble Court decides that the said deposits cannot be transferred to India under the provisions of F the said Act, it be held that the Custodian of Evacuee Property is not entitled to the same and it be paid to the said decree-holder at Lahore."

Without being too literal or legalistic, it is clear that the decree-holder had laid claim to the sum to the exclusion, not only of the Custodian but also of the judgment-debtor. He should have got the money, G but did not. But all that the appellant could do to help Sri Oberoi obtain the deposit he did.

Taking a pragmatic view of the justice of the case, the Court has to see who should bear the loss in these circumstances. Should the decree-holder be eligible for his 'pound of flesh' since he had not got a paise towards his legal dues? Should the judgment-debtor be H directed to pay Rs. 3,00,000/- twice over even after both sides had, in the Pakistan Court represented that the decree-holder alone was entitled to the deposit and that it be disbursed to him? The High Court at Lahore highlighted this attitude of the parties thus:

A

"The position taken up by R. B. Jodha Mal Kuthalia is that this deposit stands adjusted towards the satisfaction of the decree of rupees five lacs. The position taken up by R.B. Mohan Singh Oberoi is that neither the judgment-debtor nor any other person except himself has any right or interest in the deposit."

* * * * * B

"The position of both R. B. Jodha Mal and R. B. Mohar Singh is that the amount stands adjusted and vests in the decree-holder and for the purpose of the application for transfer of deposit we will assume that it does so vest."

The Supreme Court of Pakistan viewed the matter slightly differently C and observed:

"Certain facts stand out clearly. Since the money was deposited under the orders of the Court by Rai Bahadur Jodha Mal, and there being no order of the Court regarding the disposal of this money so as to divest Rai Bahadur Jodha Mal of his ownership thereof, it would appear that *prima facie* the principal and direct interest in the money is that of Rai Bahadur Jodha D Mal. The money having been deposited in relation to a decree of the Court, for the purpose of being applied to the satisfaction of that decree, and such decree standing exclusively in the name of Rai Bahadur Mohan Singh Oberoi, he might appear to have a secondary and indirect interest in the money."

What is loudly obstrusive from this narration is that, although the E Court deposit presented to the parties but a teasing illusion, the Courts and the parties assumed the amount as specially earmarked towards discharge of the decree. Expectantly Shri Oberoi, even after taking legal advice regarding executability of his decree in India, moved the Pakistan Court by petition dated December 11, 1954 asserting rightly:

"That the deposit being for his benefit and he being a non- F Muslim and an evacuee, is entitled to claim that the sum be transferred to India in accordance with Section 4 of Act VI of 1954, and that the words partly interested in the deposit mean parties to the said proceedings or litigations and any other person who on the face of the record can be considered to be partly interested in the deposit and therefrom it is contended that neither it is contemplated that the Court would invite all claimants or G creditors to make claims regarding the deposit and would then adjudicate regarding the bona-fides of their claims and order the distribution of the deposit amongst them accordingly, nor was enquiry of this nature, contemplated, as no procedure for enquiry of this nature has been provided for in this Section. The Court is merely transmitting authority to transfer the deposit. But as this point is still to be decided by this Hon'ble H Court and as this Hon'ble Court might take a contrary view to the one stated above, it is submitted that to avoid unnecessary

A delay, the Court might be pleased to issue such notices that it considers proper to the public or to any other parties it considers fit to do so that the matter may be finally adjudicated at the next date of hearing. It is, therefore, prayed that it be ordered accordingly."

B The fair inference flows from this stream of facts that the judgment-debtor had washed his hands off this sum and the decree-holder had clung to it with a quasi-proprietary claim. In such a situation, is it just that if politically paramount but legally extraneous forces blocked the payment to the decree-holder (he may still get it although it may be a little luny to hope for it in the near future) the hardship should fall on the judgment debtor ?

C Precedents in profusion were cited on both sides bearing on Court deposits as security for decree amounts and for allied positions. While we will presently refer only to a few of them inhibited by space and relevance, it falls to be mentioned at the threshold, contrary to the tenor of Shri Sen's contention, that equity jurisprudence is flexible and meets the challenge of new situations without the law "New days may bring the people into new ways of life and give them new outlooks; D and with those changes there may come a need for new rules of law .....(1)" But legislation lags. Here steps in equity for, the role of a judge, is to develop the law and adapt it to the needs of the members of his society (See Modern Law Review, Vol. 34, 1971—p. 28). Nor is Shri Sen right when he contends that his client admittedly not being guilty of any blamable conduct, therefore, should not be deprived of any part of his decree. Equity is not penalty but justice and even E where neither party, as here, is at fault, equitable considerations may shape the remedy. Lord Denning spoke of the *new equity* that was needed (5 Current Legal Problems 1952 p. 1) and Marshall said that the time to write *finis* to the role of the judiciary in the field of equity had not come (See Law, Justice & Equity Essays in tribute to Keeton p. 66). Of course not novel sentiments but well-settled rules, not the Chancellor's foot but standard-sized shoes, serve the judge in these F pathless woods. True, as Keeton said : (2)

> "an equitable doctrine may prove malleable in the hands of Lord Denning but intractable in the hands of Lord Justice Harman."

In short, our equitable jurisdiction is not hidebound by tradition G and blinkered by precedent, though trammelled by judicially approved rules of conscience. With this background we will glance through the decided cases, alive to the fact that they cannot necessarily furnish in every case a clear legal lodestar to steer us sure ashore. In the present case the equity arises largely from the iniquity of a foreign government's refusal, for reasons we cannot guess, to carry out the directions of its municipal courts. This uniqueness cannot H be missed.

(1) Current Legal Problems, 1952 Vol. 5, Stevens & Sons Ltd., London p. 1.

(2) Keeton-Sheriden on "Equity" p. 37, 1969 Edn. Sir Isaac Pitman and Sons Ltd. London.

Sri Desai drew our attention to *Chowthmull Manganmull* v. *The Calcutta Wheat and Seeds Association*(1); *Sheo Gholam Sahoo* v. *Rahut Hossein*(2); *Mehar Chand* v. *Shiv Lal & Anr.*(3); *Kothamasu Venkata Subbayya* v. *Udatha Pitchayya*(4); *Ex parte Banner In re Keyworth*(5) and *Bird* v. *Barstow*(6). A few other cases also were cited but since nothing fresh is contributed by them reference is not made to them.

What are the principles vis-a-vis the problem here ? That a mere security deposit does not become an automatic satisfaction of the decree when the appeal fails is simple enough. But when the judgment debtor has paid into court cash by way of security conditioned by its being made available to discharge the decree on disposal of the appeal and for means beyond the control or conduct of the judgment debtor the money is not forthcoming to liquidate the liability can he be asked to pay over again ? In *Chowthmull Manganmull* v. *The Calcutta Wheat and Seeds Association* (Supra), Sanderson C. J. observed (at p. 1013)

> "In my judgment the effect of the order was that the money was paid into Court to give security to the plaintiffs that in the event of their succeeding in the appeal they should obtain the fruits of their success. See *Bird* v. *Barstow* (6). It may be put in other words, viz., that the amount paid into Court was the money of the plaintiff resondents subject to their succeeding in the appeal and thereby showing that the decree in their favour by the learned Judge on the Original Side was correct. The words which were used by Lord Justice James in the case of *Ex-parte Banner, in re Keyworth* (5) are applicable to this case. The learned Lord Justice said that the effect of the order was that 'the money which was paid into Court belonged to the party who might be eventually found entitled to the sum."

The head note in *Sheo Gholam Sahoo* v. *Rahut Hossain* (supra) reads :

> "When money or moveable property has been deposited in Court on behalf of a judgment-debtor in lieu of security, for the purpose of staying a sale in execution of a decree pending an appeal against an order directing the sale, which is afterwards confirmed on appeal, neither the depositor, nor the judgment-debtor, can afterwards claim to have such deposit refunded or restored to him, notwithstanding that the decree-holder has omitted to draw it out of Court for more than three years, and that more than three years have elapsed since any proceedings have been taken in execution of the decree, and that the decree for that reason is now incapable of execution.

(1) I.L.R. 51 Cal. 1010.
(2) I.L.R. 4 Cal. 6.
(3) (1955) 57 P.L.R. 350.
(4) A.I.R. 1960 Andhra Pradesh 349.
(5) 1874(9) Ch. 379.
(6) [1892] 1 Q.B.D. 94.

A

Semble.—When money or moveable property is deposited in Court in such a case as the above, the Court, upon confirmation of the order for a sale, holds the deposit in trust for the decree-holder, and is at liberty to realize it and pay the proceeds over to him to the extent of his decree."

B The equity in favour of an obligor, who has deposited the obligated sum into Court pending proceedings in which he assails his liability, is underscored by these rulings and the principle cannot be different merely because the obligee who ordinarily would have, without reference to the obligor, drawn the money from Court is unable to get it for extra-legal reasons as here. We are of the view that the justice of the case, without crossing the path of any legal provision, C warrants our upholding the equity set up by the appellant. Had the decree been executed in the haleyon days in the Lahore Court this deposit would have been credited and adjusted and the freak consequences of Partition should not disadvantage the judgment debtor. In India the historical and artificial distinction between Equity and Law does not exist and equity itself is enforced as law with all the built-in limitations we have adverted to.

D

To dispel possible misapprehension we declare that the whole deposit and accretions will be drawable only by the decree-holder. Though a formal order of the Lahore Court directing adjustment of the amount towards the decree has not been passed, we direct the whole sum, whether it remain in Pakistan or is eventually transferred to India, belong to and withdrawable only by the decree-holder, E since justice and good conscience plainly require it. Equitable remedies by courts ——an institutionalised strategy in the myriad situations of complex modern societies are an expanding universe. but, for the obvious relief we grant here, no resort to any theoretical basis is needed.

Bearing these canons in mind, we must crystallise the benefit the F appellant can justly get. Till the date of the Federal Court decision on December 21, 1953 the decree-holder could not draw the deposit. Indeed, only when the judgment-debtor agreed in Court proceedings that the sum be treated as *pro tanto* discharge of the decree and the decree-holder moved the court on that basis could the benefit of equitable adjustment arise. This later event was when Shri Oberoi applied by C. M. 120 of 1954 to the High Court at Lahore on 31-3-54. G So, the decree amount as on that date, inclusive of costs incurred, will have to be calculated and Rs. 3 lakhs deducted. The balance will, as stipulated in the decree, carry 5% interest from then on. We make it clear that the entire costs incurred in the suit in India, *i. e.* in the *trial* court will also be payable but in regard to the appeals in the Delhi High Court and in this Court the decree-holder will be awarded H proportionate costs. Of course, the decree-holder lost in his attempt to execute the foreign decree in India and we leave the costs of those proceedings well alone. In the light of these directions the executing

court will quantify the amount currently recoverable and proceed to levy execution. The appeal is substantially dismissed but is also allowed in part as above indicated. C. A. 2248 of 1968 is dismissed but no order as to costs. A

We have, through the chemistry of just adjustment mixed in the crucible of law and equity, endeavoured to end a feud over money; but who knows whether Time, the supreme devourer of systems temporal, will spare this principle of 'good conscience' from the sepulchre of buried values ? B

V.P.S. *Appeals allowed.*

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