

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.357 of 1981

(Against the judgment and decree dated 19.06.1981 passed by the Subordinate Judge, Khagaria in title suit No.25 of 1978).

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Most. Meena Devi & Ors.

.... Defendants 1st Party-Appellants
Versus

Jawahar Lal Sah & Ors

.... Plaintiffs-Respondents
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Appearance :

For the Appellant/s : Mr. Bindhya Keshari Kumar, Sr. Advocate
Dr. Anshuman, Advocate
For the Respondent/s : Mr. Vijay Anand Singh, Advocate
Mr. Kapildeo Singh, Advocate
Mr. Vijay Kumar, Advocate
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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date:22-07-2015

1. The defendants have filed this First Appeal against the judgment and decree dated 19.06.1981 passed by the learned Subordinate Judge, Khagaria in title suit No.25 of 1978 whereby the court below decreed the plaintiff-respondent's suit for partition to the extent of 6/20th share in the entire suit property and further held that defendant Nos.1 and 2 are entitled to get 6/20th share, defendant no.3 is entitled to get 6/20th share, defendant No.4 is entitled to 1/20th share and defendant No.5 is also entitled to get 1/20th share.

2. The plaintiffs-respondents filed the aforesaid suit



claiming 2/5th share in the suit property alleging that the common ancestor of the parties was Chhakauri Sah. He died leaving behind plaintiff No.1, Motilal Sah and defendant No.1, Amrit Lal Sah, two daughters, Ram Sakhi Devi and Laxmi Devi, defendant Nos.4 and 5 respectively and his widow, Barhiya Devi who was defendant No.3. Chhakauri Sah was karta and on his death, Amrit Lal became the karta. All the properties in suit are joint family property and the plaintiffs have got 2/5th share in the suit property. There is unity of title and unity of possession. In 1964-65, there was a panchayati but all the punches joined the camp of defendant No.1, therefore, the dispute could not be resolved. The defendant No.1 might have fabricated and manufactured some papers in collusion with the punches.

3. The defendant Nos.1 and 2 filed joint contesting written statement. Defendant Nos.4 and 5 also filed joint contesting written statement. Defendant No.3 also filed contesting written statement. The main defence of defendant Nos.1 and 2 is that Chhakauri Sah died in April, 1956 prior to passing of Hindu Succession Act, 1956 leaving behind two sons and widow, Barhiya Devi only. The three heirs of Chhakauri decided to partition the property and they divided all the properties by mutual agreement and came in separate possession of their separate properties. When



plaintiff No.1 started creating trouble, the matter was referred to punches out of whom, two were appointed by plaintiff No.1 and two punches were appointed by defendant No.1. They appointed 5th punch. Before the punches, the plaintiff gave in writing that he did not claim plot No.6562 and 6563 which belongs to defendant No.1 exclusively. The punches gave their award on 27.03.1963 whereby they confirmed the previous partition of the joint family properties between Amrit Lal Sah and Moti Lal Sah. They also prepared separate schedules of the land falling in their share respectively but thereafter also, the plaintiff started creating trouble in the year 1964. Therefore again, a registered punchnama was executed on 25.08.1964 appointing various punches before whom the plaintiff filed written statement wherein he accepted that there had already been partition in the year 1962. Award was prepared by punches on 27.04.1965 partitioning the entire joint family properties in two shares, one allotted to the plaintiff No.1 and the other to the defendant No.1. Four bighas of land was given to Most. Barhiya Devi for her maintenance. Barhiya Devi filed application before the punches for allotment of more 2 ½ kathas lands for raising maize crops. However, Barhiya Devi now has gone to the camp of plaintiff No.1. The award of the punches was acted upon and Amrit Lal Sah even had sold 10 kathas 2 dhurs of land of plot No.2561 and 2735 and the purchasers are in



possession but they have not been made party, as such, the suit is bad for non-joinder of necessary party. Plot No.6562 is homestead land and is in possession of Sitaram Pandit and title suit No.26 of 1971 is pending. Plaintiff No.2 i.e. son of plaintiff No.1 has filed partition suit No.47 of 1975 claiming partition against his brother, Hiralal Sah and father. The plaintiff No.2 in the plaint admitted that his father is separate from his brother, defendant No.1 and there had already been partition between them. Motilal Sah had filed written statement admitting the fact of partition by metes and bounds. Joint application was filed for mutation and mutation was effected finding that they are in separate possession. In the maintenance case, the plaintiff filed show cause admitting the partition between the plaintiff and defendant No.1. The further case of these defendants is that defendant Nos.4 and 5 are not the daughter of Chhakauri Sah and there had already been partition between plaintiff No.1 and defendant No.1 and in that partition, 4 bighas of land was given to defendant No.3, Barhiya Devi for her maintenance. Therefore, the suit is not maintainable and is liable to be dismissed.

4. The defendant No.3 filed written statement alleging that defendant Nos.4 and 5 are daughters of Chhakauri and she also claimed her share to the extent of 1/5th in the suit property. The defendant Nos.4 and 5 also filed written statement claiming their



2/5th share jointly out of the suit property alleging that they are the daughters of Chhakauri Sah. All these three defendants denied previous partition and even if there was partition, it is not binding on them because their father died in September, 1956 after coming into force of the Hindu Succession Act. Therefore, they are entitled to a share in the suit property. On these grounds, these defendants stated that there is unity of title and possession between the parties and even if there was partition between plaintiff and defendant No.1, it is not binding on them.

5. The trial court on the basis of the pleadings framed the following issues:

- I. Is the suit, as framed, maintainable?
- II. Whether the plaintiffs have got a valid cause of action for the suit?
- III. Whether the suit suffers from non-joinder and mis-joinder of parties?
- IV. Is the suit barred by principles of resjudicata and principles of estoppel, waiver and acquiescence?
- V. Whether the entire suit properties belonged to the joint family properties and whether there is unity of title and unity of possession among the parties with regard to the suit properties?
- VI. Whether the story of previous partition as propounded by the defendants 1 and 2 is correct?
- VII. Whether the defendants 4 and 5 are the daughters of Late

Chhakauri Sah and whether Chhakauri Sah died in the month of April, 1956 or he died in the month of September, 1956, as alleged by the parties?

VIII. Whether the plaintiffs are entitled to a decree for partition as claimed?

IX. Whether the plaintiffs are entitled to the reliefs as claimed by them and if so, to what extent?

6. After trial, the lower Court came to the conclusion that defendant Nos.4 and 5 are the daughters of Chhakauri Sah. Chhakauri Sah died in September, 1956. There is unity of title and possession between the parties and accordingly, decreed the plaintiff's suit as stated earlier.

7. The learned senior counsel appearing for the appellants submitted that the learned court below has not properly appreciated the documentary evidences, Exhibit F-2, N-2, M-2 and L-2 and has wrongly recorded the finding that defendant Nos.4 and 5 are the daughters of Chhakauri Sah. The learned counsel further submitted that the appellants adduced evidences in support of the fact that defendant Nos.4 and 5 are not daughters of Chhakauri Sah but the learned court below has not properly appreciated even the oral evidences. At the time of hearing of the appeal, the learned senior counsel also placed the evidences of various witnesses in support of the fact that the defendant Nos.4 and 5 are not the daughters of

Chhakauri Sah.

8. The learned senior counsel further submitted that plaintiff No.1 and defendant No.1 were the only two sons, therefore, they have already partitioned the entire property and a registered award has been given by the punches. Unless it is held that the registered award is forged and fabricated, the partition which was effected between both the brothers cannot be reopened. In the said partition, the mother was given 4 bighas i.e. 2 bighas out of the share of plaintiff No.1 and 2 bighas out of the share of defendant No.1 for maintenance and she was satisfied with the said land. Since at the time of partition, no objection was raised by her, now the partition effected by the award is binding on defendant No.3. In support of the previous partition, the appellants also pleaded and adduced the evidence that plaintiff No.2 had filed partition suit No.47 of 1975 against plaintiff No.1 and his brother, Hiralal which clearly indicates that there was partition and in fact, in that suit, plaintiff No.2 claimed that the plaintiff No.1 had already partitioned the property between the plaintiff No.1 and defendant No.1. Written statement was also filed by plaintiff no.1 who was defendant in that suit to the effect that there was partition between the two brothers. Now, therefore, the plaintiffs together cannot claim partition again. In view of the above admissions of the plaintiffs themselves and the registered documents,

now the pleading of the appellants regarding previous partition stands proved but the court below has wrongly found that there was no previous partition.

9. The learned senior counsel next submitted that the partition between the two brothers was acted upon and they came in possession of the lands allotted to them and subsequently the defendant No.1 has also sold some properties to the outsiders and the outsiders are in possession of the property. The court below has wrongly held that the suit is not bad for non-joinder of the purchasers who are in possession of the property. Moreover, it shows that the parties were dealing the properties in furtherance of the partition between them. On these grounds, the learned counsel for the appellants submitted that the First Appeal be allowed and the impugned judgment and decree be set aside and the plaintiff's suit be dismissed.

10. On the other hand, the learned counsel appearing on behalf of the respondents submitted that in fact, the learned court below has considered each and every evidence produced by the plaintiff meticulously and has given categorical finding, therefore, it needs no interference in First Appeal. According to the learned counsel, so far the submission of the learned counsel for the appellants that court below has not properly discussed various exhibits



are concerned, it would be evident from the judgment that the court below has discussed the evidences and assigned the reason for not relying on them. The witnesses examined by the defendants in support of the fact of parentage of defendant Nos.4 and 5 are not admissible at all and, therefore, the court below has rightly held that defendant Nos.4 and 5 are the daughters of Chhakauri. In view of the above fact, even if there was partition between two brothers then also it will not be binding on two daughters because in that partition, they have not given any share to the defendant Nos.4 and 5 and even the mother because mother is entitled to the same share as that of the sons but she was given only 4 bighas of land whereas the total suit property is 27 bighas 9 kathas and odd and the defendant No.3 had 1/3rd share in it i.e. more than 8 bighas land, therefore also, the partition cannot be said to be a legal partition. Considering all these aspects of the matter, the court below after recording finding that defendant Nos.4 and 5 are daughters of Chhakauri Sah and that there had been no partition between the parties, had decreed the plaintiff's suit for partition. So far share of the plaintiff is concerned, the learned counsel submitted that the defendant No.3 has died, therefore, the brothers and sisters will get 1/4th each in the suit property because there is no evidence adduced either by the plaintiffs or by the defendants regarding as to which of the properties was ancestral

properties and which of the properties were acquired by Chhakaury Sah. On these grounds, the learned counsel submitted that the First Appeal be dismissed with cost.

11. In view of the above contentions of the parties, the following points arise for consideration in this First Appeal:

- I. Whether the defendant Nos.4 and 5 are the daughters of Chhakaury Sah or not and if they are daughters, in which property they are entitled for their share?
- II. Whether there had been partition between the parties according to the provision of prevalent law and whether the impugned judgment and decree are sustainable in the eye of law?

Point No.I

12. This point is the most important point to be decided in this First Appeal. According to the plaintiffs, defendant Nos.4 and 5 are the daughters of Chhakaury Sah whereas according to the defendant No.1, they are not the daughter of Chhakaury Sah. It may be mentioned here that the defendant No.3 i.e. the mother who is the best person to say regarding parentage of defendant Nos.4 and 5 has pleaded in her written statement that they are her daughters. Defendant Nos.4 and 5 also pleaded that they are daughters of Chhakaury Sah and both these daughters claimed their share in the suit



property. The parties have adduced evidences in support of their respective cases pleaded. The plaintiffs alleged that some of the properties are self-acquired properties of Chhakauri Sah and some are ancestral property. On the contrary, according to the defendant Nos.1 and 2, the suit properties are the properties of Chhakauri Sah and Chhakauri Sah died in the year April, 1956, therefore, even if defendant Nos.4 and 5 are daughters, they are not entitled to any share. So far the case of the plaintiffs and contesting defendants regarding the property is concerned, it will not be out of place to mention here that there is no specification in pleading of the plaintiffs or the defendants regarding as to which of the property are ancestral property and which are the self-acquired property. In such circumstances, when there is no pleading and evidence, it cannot be bifurcated and, therefore, presumption will be that all the suit properties belonged to Chhakauri Sah whether it was ancestral or self-acquired. Now, if it is found that Chhakauri Sah died after passing of the Hindu Succession Act, the daughters will be entitled to share in the property of the father equal to that of brothers. If there had been no partition and admittedly, in this case, no share has been given to defendant Nos.4 and 5, the partition alleged by the defendant No.1 cannot be said to be the legal partition according to law and, therefore, it will not be binding on defendant Nos.4 and 5. For this purpose, it



can be said that there had been no partition in the property. The next determination will be the share of the daughters. If there had been no partition, then they are entitled to equal share as that of the son because of the amendment in the Hindu Succession Act in the year 2005 wherein the daughters have been included to be member of coparcenary family as coparcener. Now, therefore, let us consider as to whether the plaintiffs have been able to prove that defendant Nos.4 and 5 are the daughters of Chhakauri Sah.

13. To prove this fact, the plaintiff has examined P.W.2, who is the husband of Laxmi Devi, the defendant No.5. He is the relative of both the parties and has got special means of knowledge because of the fact that he is a member of the family. He has not only stated that his wife is daughter of Chhakauri Sah but also has stated that defendant No.4 is also the daughter of Chhakauri Sah. His evidence is admissible under Section 50 and 60 of the Indian Evidence Act, as has been held by the Hon'ble Supreme Court in the case of **Dolgobinda Paricha v. Nimai Charan Misra and others, AIR 1959 Supreme Court 914**. This witness has specifically stated the date of death of Chhakauri Sah to be on 23.09.1956. P.W.3 is the neighbour of Chhakauri Sah and stated about the parentage of both the daughters of Chhakauri, therefore, his evidence is also admissible as that of evidence of P.W.2. He has also disclosed the special means of



knowledge. The evidence of P.W.4, who is co-villager, P.W.6 aged about 75 years, P.W. 7 also aged about 75 years. All of them have stated that Chhakauri Sah leaving behind two daughters, defendant Nos.4 and 5 and their evidences are also admissible under Section 50 and 60 of the Evidence Act. P.W.8 is the husband of defendant No.4 who is also member of the family. He has also fully stated the same thing as that of P.W.2. Therefore, his evidence is also admissible as stated earlier.

14. The learned counsel for the appellants submitted that they are interested witnesses. So far this submission is concerned, it may be mentioned here that the evidence of a family member and co-villager, neighbour are admissible under Section 50 and 60 of the Evidence Act because of the fact that for admissibility of their evidences on the point of relationship requires special means of knowledge and a third person who is outsider cannot be expected to know the relationship. In my opinion, therefore, on the ground of interestedness, the evidences of these witnesses who have got special means of knowledge cannot be discarded. Further, from perusal of the evidences of these witnesses, it appears that they have stated about the month of death of Chhakauri to be September, 1956. P.W.9 and 10 have also stated in the same line and P.W.11 is the plaintiff No.1 himself who has fully supported the case pleaded in the plaint.



15. The most important fact is that the defendant Nos.3 to 5 i.e. Barhiya Devi, Laxmi Devi and Ram Sakhi Devi also have examined witnesses in support of the case that the defendant Nos.4 and 5 are the daughters of Chhakauri through the defendant No.3. D.W.1 is the defendant No.5 herself. In her oral evidence, he has fully supported about the date of death of her father and her relationship with Chhakauri Sah. In addition to that, he has proved Exhibit A-1 series. All these Exhibits A series i.e. A-1 and A-1/4 are the school leaving certificate or transfer certificate of defendant No.5 from the schools. In all these certificates, the name of the father has been mentioned as Chhakauri Sah.

16. Exhibit B-1 has been proved which is entry in the school admission register which shows that Amrit Lal Sah(defendant No.1) got her admitted in the school mentioning the name of father as Chhakauri Sah. Exhibit C-1 is the writing in the service book of defendant No.5 which also shows that she is daughter of Chhakauri. Exhibit D-1 has been proved which was scribed by defendant No.1, Amrit Lal Sah. This is a registered sale deed in favour of husband of this defendant No.5. This document has been produced to show that defendant No.4 is closely related to defendant No.1. The other witness D.W.2 is the defendant No.3 who is admittedly the widow of Late Chhakauri Sah. I am of the opinion that she is the best person to



say that who is father of her daughters, defendant Nos.4 and 5 and she has specifically stated that both the defendant Nos.4 and 5 are daughters of Chhakauri Sah and herself. D.W.3 and D.W.4 also have supported the date of death of Chhakauri and also the parentage of defendant Nos.4 and 5. Exhibit E-1 has been produced by the defendants in support of the date of death of Chhakauri on 23.09.1956. This is a certified copy of death register. It is needless to say that the death register is a public document and, therefore, it carries presumption of its genuineness unless it is rebutted. The certified copy is admissible, therefore, this is one of the most important evidences which shows that Chhakauri Sah died on 23.09.1956.

17. These are the evidences produced by the plaintiffs and the defendant Nos.3 to 5 in support of the fact of date of death and the relationship of defendant Nos.4 and 5 which are admissible, reliable and undisputed documents.

18. On the contrary, the contesting defendants-appellants have also examined witnesses denying the case of parentage and date of death as stated by the plaintiff. D.W.9 claimed himself to be the neighbour of Chhakauri Sah and stated that Chhakauri Sah died leaving behind widow and two sons only and Chhakauri Sah died in the month of Baisakh leaving behind no

daughters. D.W.11 has stated that defendant Nos.4 and 5 are daughters of sister of wife of Chhakauri. D.W.13 has stated that the defendant No.1 and plaintiff No.1 had no sister and defendant Nos.4 and 5 are daughters of sister of mother of the plaintiff. Such is the evidence of other witnesses examined on behalf of the defendants.

19. So far the oral evidences adduced by the contesting defendants is concerned, those are negative evidences regarding the fact that Chhakauri Sah died leaving behind no daughters. So far the case of the contesting defendants that both are daughters of sister of defendant No.3 is concerned, those are their mere statements only. They have not disclosed their special means of knowledge. D.W.9 has admitted that both defendant Nos.4 and 5 were looked after by Chhakauri Sah.

20. Now, let us consider the documentary evidences produced by the defendants-appellants. Exhibit F-2 is the copy of plaint of title suit No.32 of 1963. The suit was filed by Barhiya Devi. The learned counsel gave much emphasis on this document and submitted that the suit was filed by Barhiya Devi, defendant No.3 and she never disclosed that defendant Nos.4 and 5 are the daughters of Chhakauri Sah which clearly proves that they are not the daughters of Chhakauri Sah. So far this document is concerned, no doubt, she has not disclosed that defendant Nos.4 and 5 are daughters of Chhakauri



and herself but the point is whether on this ground that because she has not disclosed, can it be said that defendant Nos.4 and 5 are not the daughters particularly when the plaintiff as well as the mother and defendant Nos.4 and 5 themselves categorically produced oral as well as documentary evidences. I am of the view that the Court cannot presume the relationship either positively or negatively for non-disclosure or disclosure in the plaint.

21. Exhibit N-2/1 is the suit register and Exhibit L-2/1 is the certified copy of petition filed by Most. Barhiya in mutation case. In none of these documents, she has stated that defendant Nos.4 and 5 are not daughters and likewise, Exhibit M-2 has been produced by the defendants-appellants which is power filed by Most. Barhiya she was identified by Laxmi Devi. It is submitted that if Laxmi Devi was daughter then she should have also claimed share along with her mother. All these points raised by the appellants are nothing but only insisting the Court to presume that because she had identified and she has not claimed, presumption will be that she is not the daughter. I do not agree with the learned counsel for the defendants-appellants.

22. The learned counsel for the appellants submitted that Barhiya Devi only claimed $1/3^{\text{rd}}$ share stating that Chhakauri Sah died leaving behind two sons and herself. Again this is nothing but a presumption only. Nowhere she has denied that she has no daughter



or that Chhakauri had no daughter. Only because she has claimed 1/3rd share without disclosing the names of two daughters of Chhakauri, no presumption can be drawn that defendant Nos.4 and 5 are not daughters. At best, it can be said that Barhiya Devi had not disclosed the names of defendant Nos.4 and 5 as daughters of Chhakauri Sah and nothing more than this. I may reiterate here that it is not the fact that there is no reliable evidence by both the parties regarding the relationship and, therefore, the Court is required to weigh the evidences and draw inference from the available evidence. Here, as discussed above, there are overwhelming documentary evidences what to speak of oral evidences. There is no explanation regarding the documentary evidences produced by the plaintiff and defendant Nos.4 and 5. Therefore, the submission made by the learned counsel for the appellants for drawing inferences on the facts alleged i.e. non-disclosure in the plaint by Barhiya is neither here nor there and no inferences can be drawn on this fact only.

23. So far the date of death is concerned, the plaintiff has produced the death register which shows the date of death of Chhakauri Sah on 23.09.1956 that means that he died after coming into force of the Hindu Succession Act, 1956. This being the public document and no contrary documentary evidence has been produced, the claim of the contesting defendants-appellants regarding the death

of Chhakauri in the month of April, 1956 cannot be relied upon. Over and above these documentary evidences, the plaintiffs have also examined the witnesses who have supported the date of death.

24. The matter may be examined in another way. The plaintiff who is brother of defendant No.1 and even the mother, defendant No.3 are saying that defendant Nos.4 and 5 are the daughters of Chhakauri Sah. Now, because of their admission, their shares will be decreased in the suit property because out of the suit property, the defendant Nos.4 and 5 will get equal share as that of plaintiff No.1 and defendant No.1. In such circumstances, it was not unexpected from them to make such statement against their own interest.

25. In view of my above discussion of the oral as well as documentary evidences produced by the parties, I find that Chhakauri Sah died on 23.09.1956 leaving behind two sons, widow and two daughters, defendant Nos.4 and 5. The plaintiff and the defendant nos.3 to 5 have been able to prove that defendant Nos.4 and 5 are the daughters of Chhakauri Sah. The findings of the learned court below, therefore, on this point are hereby confirmed.

Point No.II

26. According to the defendants-appellants, there had



already been partition between the two brothers and the mother, defendant No.3. Exhibit C-2/1 is the registered award showing partition of the entire property. So far this defence and the registered award is concerned, it may be mentioned here that it is between the two brothers. The mother was also not given her due share. The question is even if there was partition between two brothers whether their this act will disentitle the defendant Nos.4 and 5 to claim their due share. Admittedly, they were not given any share in the entire suit property. Therefore, any partition between two brothers will not be binding on them. They are not party to the registered award, therefore, whether the partition was effected by registered award or by mutual consent of two brothers or by any other means it will never disentitle the defendant Nos.4 and 5 from claiming their due share in the property and for that purpose, it will be deemed that there was no partition according to law and the persons who were entitled to a share in the property were denied by two brothers. Moreover, one of the brothers i.e. plaintiff No.1 is not admitting the partition and claiming his share in the suit property. In view of the above facts, it is not necessary here to decide the genuineness of the registered award. I am of the view that even if the award is registered and the partition was effected between two brothers, it cannot be termed as a valid partition because by this partition, no share has been allotted to the

persons who were equally entitled to the share as that of the two brothers. I, therefore, find that there was no partition between the coparceners of the joint family properties and the properties are still joint. The finding of the court below on this point is, therefore, hereby confirmed.

27. So far share is concerned, since there was no partition between five heirs of Chhakauri Sah, the property remained joint. In the year 2005, the Hindu Succession Act was amended and the daughters were given the status of coparcener. Now, therefore, the daughters are entitled to equal share as that of the brothers i.e. plaintiff No.1 and defendant No.1. Admittedly, the mother has died. Therefore, the entire property i.e. the subject matter of the present partition suit is liable to be partitioned equally between four heirs of Chhakauri Sah. Plaintiff is entitled to $\frac{1}{4}^{\text{th}}$ share, the defendant No.1 is entitled to $\frac{1}{4}^{\text{th}}$ share and defendant Nos.4 and 5 are entitled to $\frac{1}{4}^{\text{th}}$ share each. The finding of the court below on the point of share is thus modified to the extent indicated above. In view of my above discussion, the Point No.II is also answered against the appellants. The finding of the court below is thus, confirmed with modification with respect to the share.

28. In the result, I find no merit in this First Appeal and accordingly, this First Appeal is dismissed with cost of

Rs.10,000/- to be paid by the appellants to the respondents within two months failing which the respondents are entitled to realize the same through process of the Court.

(Mungeshwar Sahoo, J)

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