

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.296 of 2013

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Dileep Kumar Jha Son Of Sri Jibanand Jha Resident Of Village Araj Jagat, P.O.
And P.S. Benipatti, District Madhubani

.... Petitioner/s

Versus

1. The State Of Bihar, Through The Principal Secretary, Department Of Health,
Government Of Bihar, Patna
2. Director-In-Chief, Health Services, Darbhanga Division, Darbhanga
3. Regional Deputy Director, Health Services, Darbhanga Division, Darbhanga
4. Civil Surgeon-Cum-Chief Medical Officer, Patna
5. Incharge Medical Officer, Primary Health Centre Rahika, Madhubani

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Banwari Sharma, Adv.

Mr. Shiv Kumar, Adv.

For the Respondent/s : Mr. Anjani Kr Sharan, SC-9

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

CAV JUDGMENT

Date: 27-03-2015

Heard learned counsel for the parties.

2. The prayer of the petitioner in this writ application

reads as follows:-

"1. That the present application is for issuance of a writ in the nature of writ of certiorari for quashing the Judgment dated 13.2.2012 passed in Case No. 23/2011 by the One Man Enquiry Committee as contained in Annexure-8, whereby and whereunder the application filed by the petitioner has been dismissed. And further a writ in the nature of writ of mandamus for directing the respondent authorities to reinstate the petitioner on the post on which he was working before termination of his service like other similarly situated persons."

3. Learned counsel for the petitioner in support of the

aforementioned prayer has submitted that the petitioner's appointment



on the post of Basic Health Worker on 31.12.1989 on the basis of an advertisement issued on the notice board could not have been terminated on 26.7.1995 by the Civil Surgeon cum Chief Medical Officer, Madhubani on the basis of an order of the Lokayukt declaring the appointment of the petitioner to be forged. Learned counsel for the petitioner has also submitted that thereafter the petitioner had made representation before the authorities and ultimately the petitioner moved this Court assailing the order of termination dated 2.4.1995 by filing CWJC No. 10466 of 2006 and thereafter the petitioner had moved Justice Uday Sinha Committee appointed by this Court to look into the issue of termination of service of the employee of the Health Department. According to the learned counsel for the petitioner, the order passed by Justice Uday Sinha Committee dated 13.2.2012 is wholly incorrect both on fact and in law.

4. The main plank to assail the order of the One Man Committee holding the appointment of the petitioner to be illegal and void ab initio is that one Man Committee did not take into consideration certain orders which were passed by this Court in the case of Sanjay Kumar Jha who was reinstated in service by an order of this Court dated 16.11.1989 in CWJC No. 13729 of 2009 which is also affirmed by the Division Bench by order dated 12.7.2011 in CWJC No. 1809 of 2010.



5. The very fact that the petitioner did not assail the order of appointment dated 26.7.1995 for next eleven years till passing of CWJC No. 10466 of 2006 would go to show that the petitioner had virtually acquiesced his right to assail the aforesaid order. Let it be noted that his appointment was declared to be forged in the order of termination dated 21.4.1995.

6. That apart, once the findings of forgery was recorded, this Court will have no difficulty in holding that the plea of violation of principle of natural justice will not be applicable as was held by the Full Bench Judgment of this Court in the case of **Rita Mishra & Ors. Vs. Director, Primary Education, Bihar & Ors.** Vs. reported in **1987 PLJR 1060** which was affirmed in the case of **R. Vishwanatha Pillai Vs. State of Kerala & Ors** reported in **(2004) 2 SCC 105** wherein the Apex Court while approving the judgment of the Full Bench of this Court in the case of Rita Mishra had held as follows:-

“15. ----- Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of a false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Castes. In view of the finding recorded by the Scrutiny



Committee and upheld up to this Court, he has disqualified himself to hold the post. The appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As the appellant had obtained the appointment by playing a fraud, he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practicing fraud or deceit, such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all.

16. *In Ishwar Dayal Sah v. State of Bihar the Division Bench of the Patna High Court examined the point as to whether a person who obtained the appointment on the basis of a false caste certificate was entitled to the protection of Article 311 of the Constitution. In the said case the employee had obtained appointment by producing a caste certificate that he belonged to a Scheduled Caste community which later on was found to be false. His appointment was cancelled. It was contended by the employee that the cancellation of his appointment amounted to removal from service within the meaning of Article 311 of the Constitution and was therefore void. It was contended that he could not be terminated from service without holding departmental inquiry as provided under the Rules. Dealing with the above contention, the High Court held that if the very appointment to the civil post is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no constitutional rights under Article 311 of the Constitution can possibly flow. It was held: (Lab IC pp. 394-95, para 12)*

If the very appointment to civil post is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no

constitutional rights under Article 311 can possibly flow from such a tainted force. In such a situation, the question is whether the person concerned is at all a civil servant of the Union or the State and if he is not validly so, then the issue remains outside the purview of Article 311. If the very entry or the crossing of the threshold into the arena of the civil service of the State or the Union is put in issue and the door is barred against him, the cloak of protection under Article 311 is not attracted.

17. *The point was again examined by a Full Bench of the Patna High Court in Rita Mishra v. Director, Primary Education, Bihar. The question posed before the Full Bench was whether a public servant was entitled to payment of salary to him for the work done despite the fact that his letter of appointment was forged, fraudulent or illegal. The Full Bench held: (AIR p. 32, para 13)*

“13. It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of the law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it.”

18. *We agree with the view taken by the Patna High Court in the aforesaid cases.*
19. *It was then contended by Shri Ranjit Kumar, learned Senior Counsel for the appellant that since the appellant has rendered about 27 years of service, the order of dismissal be substituted by an order of compulsory retirement or removal from service to protect the pensionary benefits of the appellant. We do not find any substance in this submission as well. The rights to salary, pension and other service benefits are entirely statutory in*



nature in public service. The appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eye of the law. The right to salary or pension after retirement flows from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on a false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for a Scheduled Caste, thus depriving a genuine Scheduled Caste candidate of appointment to that post, does not deserve any sympathy or indulgence of this Court. A person who seeks equity must come with clean hands. He, who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of a false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practicing fraud."

(Underlining for emphasis)

7. It has to be noted that the petitioner himself admits that his appointment was made on the basis of advertisement pasted on notice board as is clearly asserted by him in paragraph no.4 of the writ application which reads as follows:-

"4. That pursuant to the advertisement issued on the Notice Board of the office of the Civil Surgeon-cum-Chief

Medical Officer, Madhubani, the petitioner has applied for his appointment and finally selected for the post."

8. There will be no difficulty for this Court to hold that the appointment of the petitioner was in fact also void ab initio on account of the vacancy being not advertised in the newspaper followed by the process of selection. This aspect of the matter has been decided by the Apex Court in the case of *State of Orissa & Anr. Vs. Mamata Mohanty* reported in 2011(3) SCC 436 wherein appointment made on the vacancy notified on the notice board has been deprecated in the following words:-

"Appointment/employment without advertisement

35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide *Delhi Development Horticulture Employees' Union v. Delhi Admn.* [(1992) 4 SCC 99], *State of Haryana v. Piara Singh* [(1992) 4 SCC 118, *Excise Supt. V. K.B.N. Vishweshwara Rao* [(1996) 6 SCC 216], *Arun Tewari v. Zila*

Mansavi Shikshak Sangh [(1998) 2 SCC 332], Binod Kumar Gupta v. Ram Ashray Mahoto [(2005) 4 SCC 209], National Fertilizers Ltd. v. Somvir Singh [(2006) 5 SCC 493], Deptt. Of Telecommunications v. Keshab Deb [(2008) 8 SCC 402], State of Bihar v. Upendra Narayan Singh [(2009) 5 SCC 65 and State of M.P. v. Mohd. Ibrahim. [(2009) 15 SCC 214])

36. *Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Article 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.*

(Underlining for emphasis)

9. Thus, in the light of the admission of the petitioner in paragraph no.4 of the writ application followed by the contents of the appointment letter whose typed copy only has been produced by way of Annexure-1 dated 31.12.1989 will leave nothing for speculation that the appointment of the petitioner was in clear breach of mandate of Article 14 & 16 of the Constitution of India, inasmuch as, the same had read as follows:-

“कार्यालय असैनिक शल्य चिकित्सक सह मुख्य चिकित्सा पदाधिकारी,
मधुबनी

आदेश

निम्नलिखित व्यक्तियों के सहानुभूतिपूर्वक विचार करते हुए इनकी नियुक्ति उनके नाम के सामने अंकित पदनाम, अनुमान एवं संस्थान में प्रकार द्वारा समय समच पर जीवन यापन भत्त एवं अन्य भत्ताओं के साथ की जाती है। यह नियुक्ति पूर्णतः अस्थायी है तथा किसी भी समय बिना पूर्व सूचना के समाप्त की जा सकती है। संबंधित व्यक्ति अपने स्वास्थ्य में प्रमाण पत्र किसी असैनिक सहायक शल्य चिकित्सक से प्राप्त तथा अपने नाम के सामने अंकित संस्थान के प्रभारी चिकित्सा पदाधिकारी के समक्ष एवं निर्गत की तिथि से पन्द्रह दिनों के अन्दर देंगे अन्यथा नियुक्ति रद्द समझी जायेगी।

क्रमांक	नाम एवं पता	पदनाम	वेतनमान	पदस्थापित
1.	श्री महेन्द्र मण्डल पिता श्री वीरचंद मंडल ब्लाक द0 टोल, मनोज	दु0स्वा0कार्यकर्त्ता	976-1540	प्राथमिक स्वा0 केन्द्र पचडीहा
2.	श्री संजय कुमार झा पिता बीबा नन्द झा आरजी जगत, बेनीपट्टी मधुबनी	तथैव	तथैव	तथैव
3.	श्री दिलीप कुमार झा पिता श्री जीवानन्द झा	तथैव	तथैव	तथैव

ह0/- अस्पष्ट

असैनिक शल्य चिकित्सक सह

मुख्य चिकित्सा पदाधिकारी, मधुबनी

ज्ञापांक 2911

मधुबनी, दिनांक 31.12.89”

(Underlining for emphasis)

10. It would thus become very clear that the appointment of the petitioner was made out and out an illegal appointment and only by way of bestowing favour to the petitioner. Such sympathetic consideration "(सहानुभूतिपूर्वक विचार करते हुए)" as specifically mentioned in the appointment letter produced by the

petitioner by itself would be sufficient to show that the appointment of the petitioner was made without following the mandate of Article 14 of the Constitution of India. Such an illegal appointment which also was declared to be forged in the order of termination of the petitioner did not vest any right to the petitioner and he cannot claim his reinstatement in service on the basis of such out and out illegal appointment.

11. This aspect of the matter in fact has also been gone at great length in the impugned order passed by the One Man Committee of Hon'ble Justice Uday Sinha and to that extent, it would be also useful to extract the impugned order passed by the One Man Committee of Justice Uday Sinha which reads as follows:-

"Justice Uday Sinha

One Man Enquiry Committee

42, Hardinge Road, Patna

Case No. 23, 24 and 25/2011

Arising out of CWJC No. 10466, 10058 and 9791/2006

Dilip Kumar Jha, Rajesh Kumar Jha and Subhash Kumar Jha

V/s

State of Bihar & Ors.

Counsel for the Petitioner ---- Mr. Ratnakar Jha, Advocate

Counsel for the State --- Mr. Arup Kumar Chongdar, Advocate

Judgment

All the three applications have been heard together and are being disposed off by this common judgment, as the acts are common and the submissions are the same.

All the three petitioners were appointed as Basic Health Workers by Civil Surgeon, Madhubani by appointment order

dated 31.12.1989. All of them were posted at Ghoghardiha, Primary Health Centre in the district of Madhubani. Later petitioners Dilip Kumar Jha and Subhash Kumar Jha were transferred at Rahika. By order dated 26.7.1995 the services of all the petitioners were terminated. Since then neither have they worked nor have they been paid any salary. It is obvious thus, their services were terminated within six years of their appointment.

The petitioners represented against their terminations to Deputy Director Health Services, Darbhanga Division. The latter Directed Civil Surgeon, Madhubani to investigate the legality of the appointment and to permit them to continue with their duty and pay them their salary. Since it is conceded by the petitioners that they have neither worked after 26.7.1995 nor have they been paid I have not the least hesitation in holding that Annexure-3 is a fabricated or illegal document. At least it was not given effect to. Clearly the petitioner's appointment was terminated on 26.7.1995. The supplementary affidavit filed by the petitioners shows that they had moved the Lok Ayukt. After the Lok Ayukt rejected their applications the Civil Surgeon, Madhubani terminated their service by Annexure-5 dated 26.7.1985.

The petitioners have stated that the petitioners moved the Director-in-Chief, Health Services against their termination but no action was taken by the authority. The petitioners thereafter moved the writ applications in 2006, the numbers of which have been mentioned above. The writ applications were listed before Navniti Prasad Singh J. His lordship refused to interfere with the order of terminations on the ground that the writ applications filed in 2006 against termination in July, 1995 were too late, but observed that if any committee is considering the case of the petitioners, the committee would take decision in the matter as soon as possible, preferably within a period of three months from the date of production of copy of his lordships

order before a committee. The petitioners have thus filed the present applications before me on 23.11.2011. I have heard learned counsel for the parties at length and I now proceed to render judgment.

The grounds urged by learned counsel for the petitioners are that the case of Sanjay Kumar Jha who was similarly placed as a petitioners have been allowed by the High Court. The petitioner's applications must therefore be allowed. The second ground urged on behalf of the petitioner is that having being in service for more than twelve years, their termination was unmerited.

AT the out set I must state that none of the petitioners had received training for ten and a half months prior to their appointment. Only persons trained for ten and half months could be appointed on the post of Basic Health Worker, which is a technical post. It is thus patent that they were not qualified for the appointments. Learned counsel for the petitioner conceded that they had not received training prior to their appointments. I regret only trained persons could be appointed. Training subsequent to appointment is irrelevant. If a person is not qualified for the appointment the appointment would be illegal. The appointments being illegal the termination was well merited. I have discussed this aspect of the matter at length in the case of Debashish Ghosh (Case No. 161 of 2010 arising out of LPA No. 479 of 2010) and Rabinbdra Mishra and others (case No. 182 of 2010 arising out of LPA No. 555 of 2010). Copies of those orders are annexed to this order as annexures. Therein I have held that no one could be appointed Basic Health Worker unless and until he had undergone ten and half months prior training. I have rejected several petitions against termination where the petitioners had been appointed without prior training. The same fate must meet the petitioners case as well.

The record shows that the petitioners had been appointed on 31.12.1989. That day was a Sunday. The

appointing authority could not have appointed the petitioners on a Sunday, specially the last day of the year. I am therefore inclined to take the view that the then Civil Surgeon, the appointing authority, committed a misdemeanor in issuing appointment order on Sunday. All the appointment letters appear to have been fabricated much after 31.12.1989. The appointments must therefore be held to illegal on that ground as well.

Learned counsel for the petitioners submitted that having worked for more than twelve years they were entitled to benefit of the observation and direction in the case of Uma Devi at paragraph 53 and therefore their applications should be allowed. I regret the petitioners cannot be granted that benefit. Admittedly the petitioner had been appointed on 31.12.1989 and had been removed on 26.7.1995. They had thus not worked thereafter. Thus they had not put in ten years of service. They cannot therefore get the benefit of direction in Uma Devi's case.

Learned counsel for the petitioners vehemently submitted that one Sanjay Kumar Jha who had also been appointed on 31.12.1989 is still in service. The case of the petitioners being similar to that of Sanjay Kumar Jha the petitioner's termination must also be set aside.

The writ application of Sanjay Kumar Jha (CWJC No. 13729 of 2009) was heard and allowed by Mridula Mishra J. by order dated 16.11.2009 following hundreds of writ applications allowed by her following her bunch decisions in CWJC No. 6575 of 2009. Large numbers of Letters Patent Appeals were filed against that judgment. Letters Patent Appeal No. 1809 of 2010 was filed against the judgment of Mridula Mishra J. The said appeal was heard and dismissed by a bench presided over by Prakash Chandra Verma and Aditya Kumar Trivedi JJ. The judgment of the division bench proceeded on error of record. It has been stated in the judgment that the petitioners had completed more than ten years of service against the vacant



posts appointed by competent authority and was paid salary and had been confirmed in service. The facts - I have shown above - were completely wrong. Sanjay Kumar Jha had been appointed on 31.12.1989 and had been removed in July, 1995 i.e. only after six years of service. He had not been paid salary thereafter nor had he been confirmed or promoted within ten years. Thus the judgment in the case of proceeded on error of record. The petitioners therefore cannot get the benefit of ten years service. It is not for me to comment upon the judgment of Verma and Trivedi JJ. but since learned counsel for the petitioners has placed implicit reliance upon their judgment, I have no alternative but to mention the factual position.

Sanjay Kumar Jha was illegally appointed and legally dismissed like the petitioners. His fate favoured him but the termination of petitioners cannot be set aside on that ground The submission of learned counsel for the petitioners is that equality between different citizens must be maintained and therefore the termination of the petitioners also must be set aside. I regret there is no merit in this submission. Equality is a positive concept. It cannot be granted in illegality. Sanjay Kumar Jha has been illegally retained. The petitioners cannot be retained on the ground of illegality. In case of illegal appointment there is no rule for misplaced sympathy : see (2003) 2 PLJR 808 at page 812 at paragraph 19.

It is cardinal principal that delay defeats grant of writ in the writ jurisdiction of a court. Navniti Prasad Singh J. was absolutely right in refusing to interfere with the terminations on the ground of delay in as much as the petitioner had moved the High Court for issuance of writ eleven years after their dismissals.

It is well established that concealment of facts defeats prayer for issuance of writ. The petitioners have concealed the facts relating to application filed before the Lok Ayukt even after direction the petitioners did not file either the petition filed by

them or the order passed by the Lok Ayukt. The petitioners must fail on that ground as well.

Having considered the case of the petitioners I have not the least hesitation in holding that the termination of the petitioners was well merited. The present applications thus lack merit and are dismissed accordingly.

Sd./- 13.02.2012

(Uday Sinha)

Chairman"

(Underlining for emphasis)

12. From reading of the impugned order, three things are absolutely clear. Firstly, there was no selection procedure adopted in the case of the petitioner. Secondly, the petitioner was not having requisite qualification necessary for being appointed on the post of Basic Health Worker for which a person has to complete prescribed training and thirdly that the petitioner had also withheld certain documents/information which could have gone to show that the appointment of the petitioner was itself forged.

13. As a matter of fact, the One Man Committee of Hon'ble Justice Uday Sinha has also rightly decided the issue as with regard to following the precedent in the case of Sanjay Kumar Jha (supra). The appointment of Sanjay Kumar Jha was also illegal and for any reason if he had succeeded in the batch of writ applications and the appeal was also dismissed by the Division Bench, that would not mean that the illegality committed in the case of Sanjay Kumar

Jha has to be perpetuated. It is this aspect of the matter which has been again gone at length in the case of *State of Bihar Vs. Upendra Narayan Singh & Ors.* reported in 2009(5) SCC 65 wherein it was held as follows:-

67. *By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order - Chandigarh Administration and another v. Jagjit Singh and another [(1995) 1 SCC 745], Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and others [(1997) 1 SCC 35], Union of India [Railway Board] and others v. J.V. Subhaiah and others [(1996) 2 SCC 258], Gursharan Singh v. New Delhi Municipal Committee [(1996) 2 SCC 459], State of Haryana v. Ram Kumar Mann [(1997) 1 SCC 35], Faridabad CT Scan Centre v. D.G. Health Services and others [(1997) 7 SCC 752], Style (Dress Land) v. Union Territory, Chandigarh and another [(1999) 7 SCC 89] and State of Bihar and others v. Kameshwar Prasad Singh and another [(2000) 9 SCC94], Union of India and another v. International Trading Co. and another [(2003) 5 SCC 437] and Directorate of Film Festivals and others v. Gaurav Ashwin Jain and others [(2007) 4 SCC 737]."*

14. Thus, this Court would find no reason now to direct for reinstatement of the petitioner by perpetuating the illegality. The appointment of the petitioner being out and out illegal and in teeth of Article 14 of the Constitution of India, the petitioner will not be

entitled for reinstatement and that too after he had remained out of service for more than two decades, his date of termination of service being 26.7.1995.

15. Thus, for the reasons indicated above, this Court does not find any merit in this application and the same is, accordingly, dismissed.

(Mihir Kumar Jha, J)

Rishi/-

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