

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 181 OF 2009

Rizvi Builders,
Builders & Contractors,
having office at
Rizvi Building, Panaji,
Goa.

... Appellants

V e r s u s

(1) Lamarck R. c. Clemente (deceased)
(a) Mrs. Maria Leta Clemente,
2 Derriman Gorge, Silverdale Road,
Ecclesall, Sheffield, S119LE,
England.

(2) Oswald Elmar Arthur (deceased)
(a) Mr. Lamarck R. C. Clemente,
residing at 2, Deniman Grove,
Silverdale Road, Ecclesall,
Sheffield, Road, Ecclesall,
Sheffield, England, U. K. (deceased)

(Respondent no. 3 Struck off)

(4) Nurullah K. Veljee,
Space Deal, P. O. Box
205, Panaji, Goa.

(5) M/s. Alfran Construction
Mapusa, Bardez, Goa.

... Respondents

Mr. S. M. Singbal, Advocate for the Appellants.

Mr. Sudin Usgaonkar, Advocate for the Respondent no. 19(a).

Coram :- **F. M. REIS,**
 K. L. WADANE, JJ.

Date : **22nd January, 2015**

ORAL JUDGMENT (Per F. M. Reis, J.)

Heard Shri Singbal, learned Counsel appearing for the Appellants and

Mr. Sudin Usgaonkar, learned Counsel appearing for the Respondent no. 1(a).

2. The above Appeal challenges the Judgment and Decree dated 05.12.2007 whereby Special Civil Suit No. 74 of 1994, filed by the Appellants for specific performance, injunction, receiver and consequential reliefs came to be dismissed.

3. Briefly, the facts of the case are that the Appellants filed a suit on the ground that there exists a property surveyed under chalta no. 102 to 114 of P. T. Sheet No. 41 of City of Panaji, belonging to the Respondent nos. 1 to 3 as owners thereof. The Respondent no. 4 is the person dealing with Real Estate and that somewhere in February, 1987, the said Respondent no. 4 represented to the representative of the Appellants that the suit property is for sale. It is further their contention that the Appellants visited the suit property and was ready and willing to purchase the said property and consequently by Letter dated 21.02.1987, the Respondent no. 4 conveyed the interest of the Appellants to the Respondent nos. 1 to 3. By letter dated 03.03.1987, the Respondent no. 1 acknowledged the receipt of the said letter and thereafter there was some correspondence and discussion between the Respondent nos. 1 and 4 with regard to such purchase of the property. It is further the case of the Appellants that by letter dated 25.04.1987, the Respondent no. 1 fixed the price i.e. the consideration expected and thereafter, the Appellants confirmed the price of the property at Rs.2,73,68,000/- and that this offer of the Appellants was conveyed by the Respondent no. 4 to the Respondent no. 1 who accepted such offer. It is accordingly the claim of the Appellants that an Agreement for sale of the suit property was concluded and that by letter dated

27.05.1987, the Respondent no. 1 wrote to the Respondent no. 4 that the Appellants should reduce the offer in black and white and, consequently, by letter dated 17.08.1987, the Appellants reduced in writing the terms which were duly received by the Respondent no. 1 through the Respondent no. 4. It was further the case that thereafter the Appellants had incurred huge expenses in getting the Reserve Bank of India licence dated 03.03.1988. It is further their case that the Appellants were always ready and willing to perform their part of the contract and that Respondent nos. 1 to 3 have no right to rescind from the concluded agreement with the Appellants. The Appellants have issued a public notice on 21.04.1994 and 22.04.1994 in the local news papers and that the Appellants learnt from a public notice issued by the Respondent no. 1 that the Respondents have entered into an agreement of sale with Alfran Constructions. Consequently, the suit was filed for the reliefs as stated herein above.

4. The Respondent no.1 filed his written statement disputing the claim put forward by the Appellants. It is the case of the Respondent no. 1 that the suit property belonged to the Respondent nos. 1, 2 and the legal representatives of the deceased Respondent no. 3. It is further their case that the Respondent no. 4 is neither the broker nor the agent of the Respondent no. 1 and as such was not authorised by the Respondent no. 1 to act as an Agent or Broker. It is further their case that the letter dated 21.02.1987 was addressed by the Respondent no. 4 to the Respondent no. 1 alone. The contention of Respondent no.1 is that there was no acceptance of any offer by the Respondent no. 1 by letter dated 25.04.1987. On the contrary, the said letter clearly stated that its contents were only for discussion and did not confer any right to the Respondent no. 4 besides offer being valid up to

30.06.1987. The Respondent no. 1 has also denied that any Agreement was concluded by the month of May 1987. It is also the case of the Respondent no. 1, that his wife are holders of British Passports and they were not in Goa on any day in the month of February, 1987, and as such, there was no occasion for him to give any assurance as claimed by the Appellants. Consequently, it is submitted that the suit be dismissed. Separate written statements were also filed by the other Respondents disputing the claim of the Appellants that there was any contract as alleged in the suit. The Respondent no. 5 adopted the written statements filed by the Respondent no. 1 and the additional written statements filed by the Respondent no. 1. It is also stated that the Respondent nos. 1 to 3 have entered in to an agreement for sale with the Respondent no. 5 and that the construction on the ground floor and two upper floors of the proposed building in the suit property is completed. The Respondent no. 4 has not filed any written statements.

5. The learned Trial Judge on the basis of the pleadings of the parties, framed issues and recorded evidence and after hearing the parties, by the impugned Judgment dated 05.12.2007, dismissed the suit filed by the Appellants. Being aggrieved by the said Judgment and Decree, the Appellants have preferred the present Appeal.

6. Shri Singbal, learned Counsel appearing for the Petitioners, at the outset pointed out that the Appellants are not pressing for the relief of specific performance but, however, restricting their claim, only to the alternate relief for damages to the tune of Rs.1 Crore as claimed in the suit. Shri Singbal, learned Counsel further pointed out that the letter sent by the Appellants dated 17.08.1987

clearly establishes that the offer of the Respondent no. 1 to purchase the property for a total consideration of Rs. 2,73,68,000/- has been accepted by the Appellants. The learned Counsel has thereafter taken us through the correspondence between the Respondent no. 4 and the Respondent no. 1 to advance his contention that there was a concluded contract between the Appellants and the Respondent no. 1 to 3 in respect of the property in dispute. The learned Counsel further points out that the offer was accepted by the Appellants to purchase the disputed property by the said letter dated 17.08.1987, and consequently, the Appellants spent a substantial amount to finalize the execution of the Sale Deed. Learned Counsel further pointed out that as a first step in that direction, the Appellants moved the Reserve Bank of India to obtain a holding licence of the suit property by the Respondent no. 1 who was a foreign national in terms of the provisions of Section 31 of the Foreign Exchange Regulations Act, which was then in force. Learned Counsel further pointed out that the Appellants hired the services of Shri Dhume, who was a Chartered Accountant to take necessary steps in that direction which ultimately resulted in a licence being granted by the Reserve Bank of India. Learned Counsel further pointed out that the Appellants have paid for the services of getting such certificate and, as such, this conduct of the Appellants would show that the concluded agreement between the parties was duly acted upon. Learned Counsel further pointed out that despite of the existence of such agreement, the Respondent nos. 1 to 3 defiantly and without any rights took steps to transfer the property in favour of the Respondent no. 5. Learned Counsel further pointed out that in such circumstances, as the concluding agreement was subsisting between the Appellants and the Respondent nos. 1 to 3 in respect of the suit property, the Respondent nos. 1 to 3 are liable to pay damages to the Appellants. Learned

Counsel has pointed out that besides spending to obtain the permission from the Reserve Bank of India, there were other expenses which the Appellants have sustained in spending to send Respondent no. 4 to London for negotiations in connection with the Agreement to be finalised by the parties. Learned Counsel further pointed out that the Appellants have made expenses of two persons to proceed to London which the said Respondents are bound to compensate the Appellants. Learned Counsel further pointed out that the appellants have also lost profits which they would have gained on account of such transactions which the said Respondents are liable to pay to the Appellants. Learned Counsel further submits that as the Appellants were ready and willing to perform their part of the contract and taking note of the fact that the Respondent nos. 1 to 3 have committed the breach of such Agreement, the Respondent nos. 1 to 3 are liable to compensate the Appellants on account of such breaches. Learned Counsel, as such, submits that the alternate relief sought by the Appellants deserves to be allowed and a minimum sum of Rs.15,00,000/- be ordered to be paid by the Respondent nos. 1 to 3 to the Appellants as compensation.

7. On the other hand, Shri Sudin Usgaonkar, learned Counsel appearing for the Respondent no. 1(a) has supported the impugned Judgment. Learned Counsel further pointed out that there is no concluded contract entered into between the Appellants and the Respondent nos. 1 to 3. Learned Counsel further pointed out that there were only proposals which did not crystallise into a binding agreement between the Appellants and the Respondent nos. 1 to 3. Learned Counsel further pointed out that the offer given by the Respondent no. 1 was valid up to 30.06.1987 and the alleged letter sent by the Appellants on 17.08.1987 does

not in any way meet the requirements of the offer made in the said letter. Learned Counsel further pointed out that it is the case of the Appellants themselves that the letter dated 17.08.1987 was only an offer submitted by the Appellants in black and white which does not crystallise to any Agreement or commitment in respect of the disputed property. Learned Counsel has taken us through the correspondence exchanged between the parties to show that there was no concluded contract entered into between the parties. Learned Counsel further pointed out that the Respondent no. 4 had only introduced the Chartered Accountant to assist the Respondents to obtain the holding licence from the Reserve Bank of India. Learned Counsel further pointed out that the attorney of the Respondents in fact took steps to obtain the holding licence from the Reserve Bank of India and in fact the expenses were paid by the said Attorney. The learned Counsel also submitted that any expenditure allegedly incurred by the Appellants to send the representatives to London are not at the request of the Respondent nos. 1 to 3. Learned Counsel further pointed out that as there is no contract between the parties, the question of directing the payment of any compensation to the Appellants would not arise at all. Learned Counsel further submits that the suit itself is an abuse of the process of the Court and as such the above Appeal deserves to be rejected.

8. Upon hearing the learned Counsel, the following points for determination arise in the above Appeal :

POINTS FOR DETERMINATION

- (1) Whether there was a concluded contract entered into between the Appellants and the Respondent nos. 1 to

3 in respect of the disputed property ?

(2) Whether the Appellants are entitled for compensation to the tune of Rs.15,00,000/- as claimed by the Appellants.

9. To examine as to whether there was a binding contract between the Appellants and the Respondent nos. 1 to 3, we shall first examine the pleadings of the Appellants in the plaint. In the initial part of the plaint, the talks between the Respondent no. 1 and the Respondent no. 4 who is shown to be dealing in Real Estate and acting as a Broker have been pleaded. At para 9, it is alleged that the Appellants in their discussions with the Respondent no. 4 confirmed the price of the property at Rs.2,73,68,000/- for FAR of 2.5 and Rs. 2 Crores only if the FAR availed was 2 and that this offer was conveyed by the Respondent no. 4 to the Respondent no. 1 herein who accepted the same and an Agreement to sell the suit property to the Appellants had been concluded. It is further alleged at para 10 that by a letter dated 27.05.1987, the Respondent no. 1 wrote to the Respondent no. 4 that the Appellants should put the offer in black and white so as to confirm the offer. It is further their case at para 11 that to comply with the aforesaid request, the Appellants by letter dated 27.08.1987, put in writing the terms accepted by the Respondent no. 1 which letter was duly received by the Respondent no. 1 through the Respondent no. 4 herein. It is further their case, inter alia, at para 12 that there is a concluded contract with the said Respondents having agreed to sell the suit property to the Appellants and consequently, the Appellants was seeking approval from the Reserve Bank of India for permission and other facilities which were required under the relevant statutory provisions. Hence, essentially, it is the case of

the Appellants that on the basis of the said correspondence, there is a binding contract between the Appellants and the Respondent nos. 1 to 3 to convey the disputed property in favour of the Appellants herein. Even though there is no signed Agreement between the parties, the Court can examine the correspondence exchanged between the parties to construe such correspondence with a view to ascertain whether there was any meeting of minds between the parties which would create a binding contract between the parties. In this exercise, the Court is not empowered to go outside the language used in such correspondence in order to construe the correspondence into a binding contract. Unless the correspondence unequivocally and clearly disclosed that the parties were ad idem, the question of holding that a concluded Agreement was entered in to between the parties cannot be accepted. With this in view, we shall now proceed to examine the language of the said correspondence to find out whether the parties had arrived at a concluded Agreement. On perusal of the letter dated 25.04.1987 at exhibit Pw.1/E, we find that the Respondent no. 1, inter alia, confirmed that it is the responsibility of the buyers (or brokers) to negotiate with the tenants to vacate the land and make the required payments. It is further stipulated that the full payment of the total net price has to be by Bank cheque from State Bank of India for Rs.2,73,68,000/- at the time of signing the Agreement to buy and sell the property. It is further pointed out that subsequently the application will be made to the Reserve Bank of India to sell the property. It is also stated that the area is 4221 square metres and the price is Rs.8,000/- per square metres which works out to Rs.3,37,68,000/- and the amount payable to the tenants approximately is Rs.64,00,000/- which leaves a sum of Rs.2,73,68,000/- payable to the owners. It is also stipulated that the prices would expire on 30.06.1987. It was also stated that

the plans for the building project were approved with FAR 2.5 and in case the buyers are interested in using such plans, the owners will not make any additional charges for such approved plans as it is included in the net price referred to therein. It is also stated that all the above conditions are for discussion and did not confer any right whatsoever until a relevant legal document mutually agreed are properly signed, sealed and delivered. The said letter clearly shows that the conditions stipulated therein were open for discussion and were not finalised.

10. The next letter at exhibit Pw.1/F discloses that the Respondent no. 4 started taking steps to obtain the requisite permission from the Reserve Bank of India. It is also stated therein that a letter would have to be obtained from Rizvi Builders reinstating in full the points nos. 1 to 9 in the letter addressed to the Respondent no. 4 on 25.04.1987. There was another reminder sent by the wife of the Respondent no. 1 at exhibit Pw.1/G to the effect that no offer was received from the Appellants herein. Thereafter, the letter at exhibit Pw.1/H dated 17.08.1987, was addressed by the Appellants to the Respondent no. 1. The said letter, inter alia, stipulated the terms of the Appellants to purchase the said property inter alia that they would pay a sum of Rs.2,73,68,000/- for FAR of 2.5 and a sum of Rs.2 Crores if FAR is 2. It is further stipulated therein that the Appellants have agreed to purchase the said plot because the plans have been approved for FAR 2.5 which are due to expire on 25.09.1987 and that in case there is any delay for executing the document for sale on 25.09.1987, the Appellants would pay only a sum of Rs.2 Crores because the FAR would reduce from 2.5 to 2.2.

11. As pointed out herein above, it is the case of the Appellants that the

concluded Agreement was arrived at on the basis of the discussion between the Respondent no. 1 and the Respondent no. 4 which were confirmed by the said letter dated 17.08.1987. As already noted herein above, the contents of the said letter dated 17.08.1987 at exhibit Pw.1/H addressed by the Appellants to the Respondent no. 1 are not at all in consonance with the terms stipulated by the Respondent no. 1 in the said letter dated 25.04.1987 at exhibit Pw. 1/E. In fact, that the price would vary on the basis of the change of FAR was not even a condition stipulated by the Respondent no. 1 in the letter dated 25.04.1987. Hence, the alleged confirmation by the Appellants by the said letter dated 17.08.1987 are not unequivocally accepting the terms provided in the letter at exhibit Pw. 1/E addressed by the Respondent no. 1 to the Respondent no. 4. The alleged oral discussions on that direction between the Respondent no. 1 and Respondent no. 4 has not been established by the Appellant by any evidence on record. Even on perusal of the evidence of Pw. 1, we find that the main contention of the Appellants is that the terms in the said letter dated 17.08.1987 were accepted by the Respondent no. 1 and, as such, the permissions from the Reserve Bank of India for holding the property were initiated. But, however, it is to be noted that the process to obtain the Reserve Bank of Indian permission had already begun much prior to the letter dated 27.05.1987 at exhibit Pw. 1/F wherein this fact has been recorded. There is no material on record to in any way show that the conditions as proposed by the Appellants vide letter dated 17.08.1987 were in fact accepted by the Respondent nos. 1, 2 and 3 herein. As pointed out herein above, the Court cannot go outside the clear language in the correspondence exchanged between the parties to curl out a concluded contract between them. There is nothing on record produced by the Appellants to suggest that the parties were ad idem with

regard to the terms of the contract. Apart from that, the terms stipulated in the letter at exhibit Pw. 1/E were open for discussion. Upon reading the clear language of the correspondence as a whole, it at no stage passed from the melting pot of negotiations to crystallise into an agreement between the Appellant and the Respondent nos. 1, 2 and 3 to purchase the disputed property. The learned Trial Judge in the impugned Judgment has clearly noted on going through the evidence of Pw. 1 that he was not personally aware about the discussions in respect of the disputed property between the Respondent no. 1 and the Respondent no. 4. The learned Judge also noted that the letter exhibit Pw.1/E clearly stipulated that the price referred to therein would expire on 30.06.1987. The learned Judge also noted that the Respondent no. 1 could not enter into any agreement without the other co-owners being parties thereto. The learned judge also noted the admission of Pw. 1 that the offer of the Appellants in exhibit Pw. 1/H was not replied by the Respondent no. 1. The contention of the Appellants that they had made an application to the Reserve Bank of India to get the requisite permission to hold the property was also rightly not accepted by the learned Judge taking note of the evidence of Pw. 1 that he was unable to produce any bill that the Appellants had paid the fees to the Chartered Accountant. The learned Judge also noted that Pw. 1 was not aware of the whereabouts of the Respondent no. 2 and, according to him, the Respondent no. 3 was in USA in 1987. The allegations of Pw. 1 were essentially based on the information of the Respondent no. 4. It is also pertinent to note that all the correspondence relied upon by the Appellants to claim that there was a concluded contract between the Appellant and Respondent nos. 1, 2 and 3 is addressed to the Respondent no. 4. The learned Judge also noted that the Pw.1 has also stated in the cross examination that so far there is no agreement executed between the

Appellants and the Respondent nos. 1 and 2 in respect of the suit property except the correspondence discussed earlier. The learned Judge also rightly noted that Pw. 2 who is the Respondent no. 4 herein had stated that some two or three parties from Mumbai were interested in the suit property. The learned Judge also noted that there was no correspondence between the Appellants and the Respondent no. 4 in connection with the disputed property as it was claimed by the Pw. 2 that it was all oral. Pw. 2 had also stated that as per the letter dated 03.03.1987, of the Respondent no. 1 to Respondent no. 4, the owners were negotiating with other parties in respect of the suit property. This evidence of Pw. 2 that the owners were also negotiating with other parties would clearly show that there was no concluded agreement between the Appellant and Respondent nos. 1, 2 and 3 with respect to the property in dispute. The letter dated 17.08.1987 can at the most constitute to be a counter offer by the Appellants which was not shown to have been accepted by the Respondent nos. 1, 2 and 3. The disparity in the consideration stipulated in the letter dated 17.08.1987 would itself suffice to show that the Appellants had not finalised the consideration as some options were unilaterally stated therein. We have also examined the evidence of Pw. 1 and Pw. 2 in the context of the finding of the learned Trial Judge and we find that the vague replies in the cross examination and the admissions by Pw. 1 as noted by the learned Trial Judge in the impugned Judgment would disclose that as no agreement was signed after the correspondence as stipulated therein that there was no concluded agreement between the Appellants and the Respondents. The learned Trial Judge as such has rightly come to the conclusion that there was no concluded agreement between the parties which could be specifically performed. In fact, Shri Singbal, learned Counsel appearing for the Appellants as pointed out earlier, has not even pressed

for the relief for specific performance. Admittedly, there was no earnest money or any part consideration paid by the Appellants to the Respondent nos. 1, 2 and 3 in connection with the alleged Agreement. The terms of the alleged contract were not even finalised. The discussions between the parties did not crystalise into a concluded Agreement between the respective parties. As such, we find no infirmity in the findings of the learned Judge that there was no concluded agreement between the Appellants and the Respondent nos. 1, 2 and 3 in connection with the disputed property. The first point for determination is answered accordingly.

12. With regard to the second point for determination, admittedly, the Appellants have failed to produce any document on record to substantiate their contention that any amounts were paid to the Respondent nos. 1, 2 and 3 in connection with the disputed transaction. We have already come to the conclusion that the correspondence between the parties would only disclose that the negotiations in respect of the sale of the disputed property were in progress between the parties though there was no concluded agreement entered into in between them. In this background, we will examine whether the Appellants can claim any compensation from the Respondents. Section 73 of the Indian Contract Act, inter alia, provides that when a contract is broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any such loss or damage caused to him, which naturally arose in the usual course of things from such breach or if the party knew when they made the contract to be likely to result from the breach of it. In the present case, the question of invoking the said provisions does not arise as there was no concluded contract between the parties nor the correspondence on record suggests that the

parties had contemplated for payment of any compensation in case of any breach of the terms of the Contract Act. In such circumstances, the question of claiming any compensation in terms of Section 73 of the Indian Contract Act, would not arise.

13. Apart from that, as already pointed out herein above, there is no material produced by the Appellants to establish that he had sustained any loss on account of the negotiations which were in progress between the Appellants and the Respondent nos. 1 to 3. So also, as no amount is shown to be specified in the correspondence between the parties, the question of claiming any compensation in terms of Section 74 of the Indian Contract Act, also would not arise.

14. The Appellants are also not entitled to rely upon the provisions of Section 21 of the Specific Relief Act to claim any compensation for the breach of the Contract in substitution to specific performance. As already pointed out herein above, there was no concluded agreement between the parties and, as such, the question of claiming any compensation from the Respondent nos. 1 to 3, would not arise. The Appellants have also not pressed for the relief of specific performance though, in any event, the learned Trial Judge has rightly on the basis of the evidence on record has come to the conclusion that since a concluded agreement has not been established, the question of granting any compensation in lieu of performance thereof, would not arise at all in terms of Section 21 of the Specific Relief Act. The contention of the Appellants that the Appellants paid fees for obtaining permission from the RBI has not been established by the Appellants by any evidence on record. In fact, the Chartered Accountant has been examined as

Pw. 3 who has stated that the permission was obtained not to sell the property but only to hold the property under the provisions of Section 31 of the Foreign Exchange Regulation Act. He has also admitted that in order to seek permission, the drafts of the Sale Deed and the names of the parties who are the purchasers and the price has to be mentioned. Pw. 3, has also admitted that such details were not found in the document at exhibit Pw. 1/A as he had applied for permission only to hold the property. He has also stated in the affidavit that the fees to obtain such permission were paid by the Respondent no. 4. This evidence of Pw. 1 clearly shows that the claim that they had paid towards the fees and other expenses to obtain the permission to hold the property from the RBI has not been established by any cogent evidence on record. The very fact that the price nor the names of the buyers were mentioned or disclosed to the said Chartered Accountant would further show that the alleged claim of the Appellants that there was a concluded Agreement between the parties, which entitled the Appellants to claim compensation has not at all been established from the material on record. Besides the said amount, Shri Singbal, learned Counsel appearing for the Appellants, has pointed out that the Appellants incurred expenses of two persons to proceed to London in order to negotiate the transaction with the owners-Respondents. There is no evidence on record to show that at any point of time, the Respondent no. 4 or the representative of the Appellant had visited London at the request of Respondent nos. 1 to 3. Admittedly, there is no material to show that as per the discussion between the parties, the Appellants were bound to send their representative to London for the purpose of negotiating the terms of the Agreement. The alleged expenditure has not been established by any evidence on record by the Appellants. In fact, on going through the evidence of Pw.1, the material placed

on record is essentially the correspondence addressed to the Respondent no. 4. As already pointed out herein above, there was no concluded agreement between the parties and, consequently, the Appellants are not entitled to claim any compensation from the Respondent nos. 1 to 3 in respect of the transaction in dispute. Shri Singbal, learned Counsel, appearing for the Appellants was unable to point out any piece of evidence on record to substantiate such claim. In such circumstances, we find that the Appellants are not entitled for any compensation as claimed by the Appellants. The Appellants are not entitled to claim any compensation from the Respondent nos. 1 to 3. Besides, no documentary evidence has been produced by the Appellants to substantiate their claim of compensation to the tune of Rs.15,00,000/- as claimed by the learned Counsel appearing for the Appellant. The second point for determination is answered accordingly.

15. In view of the above, we find no merit in the above Appeal. The Appeal stands accordingly dismissed with no Orders as to costs.

K. L. WADANE, J.

F. M. REIS, J.

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