

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Miscellaneous Appeal No.9 of 2015

JUDGMENT:

This Civil Miscellaneous Appeal under Order XLIII Rules 1 and 2 of the Code of Civil Procedure, 1908 ('the Code', for brevity) by the unsuccessful defendant (since died) [now being represented by his legal representatives, i.e., the appellants 2 to 9] is directed against the decretal order and order dated 10.04.2014 of the learned Senior Civil Judge, Siddipet passed in I.A.No.163 of 2013 in O.S.No.76 of 2010 filed under Order IX Rule 13 read with Section 151 of the Code requesting to set aside the *ex parte* decree dated 04.02.2011 in the aforementioned suit.

2. I have heard the submissions of the learned counsel for the appellants/legal representatives of the sole defendant (since died) and the learned counsel for the respondent/plaintiff.

3. The parties in this appeal shall hereinafter be referred to as 'the appellants' and 'the respondent' for convenience and clarity.

4. The introductory facts, in brief, are:

The respondent herein brought the suit against the sole defendant for specific performance of an agreement to sell dated 23.06.1997 in respect of Ac.5.00 guntas of agricultural dry land situated in Survey No.325 of Kallakal village, Toopran Mandal of Medak District, more fully described in the schedule annexed to the plaint. The said suit was decreed *ex parte*. The sole defendant had filed an interlocutory application in I.A.no.163 of 2013 for setting aside the said *ex parte* decree in the said suit. That application was resisted by the respondent/plaintiff by filing a counter. At the time of enquiry no oral was adduced. No documents were marked on the side of the defendant/petitioner. Exhibits B1 to B8 were marked on the side of the respondent/plaintiff. On merits, the trial Court had dismissed the application of the

defendant and had refused to set aside the *ex parte* decree. Therefore, the defendant had preferred this appeal. Now, this appeal is being prosecuted by the appellants 2 to 9, who are the legal representatives of the deceased defendant.

5. To begin with, it is necessary to refer to the pleadings of the parties.

5.1 The case of the sole defendant in support of his request to set aside the *ex parte* decree, in brief, is this:

The defendant had received on 06.02.2013, through courier, an envelope containing the copy of a plaint and documents. On verification, he came to know that the said papers pertained to the suit O.S.No.33 of 2013 on the file of the Court of the learned Senior Civil Judge at Siddipet claiming rights over Ac.5.00 guntas in Survey no.325 of Kallakal village. After verification of the Court records on 12.02.2013, the defendant was told that the plaintiff had filed O.S.no.76 of 2010 for specific performance of an agreement to sell dated 23.06.1997 in respect of the said land and that the said suit was decreed *ex parte* after the defendant was set *ex parte* on 22.12.2010 on the basis of the endorsement 'unclaimed' made on the envelope by the postal department. The decree and the judgment were passed on 04.02.2011 in the said suit O.S.no.76 of 2010. The plaintiff had filed the execution petition in E.P.no.26 of 2011 for execution of the document through the process of the Court. In the said execution petition also the defendant was set *ex parte* on 03.02.2012 for the same reason that postal envelope by which the notice was sent was returned as 'unclaimed'. Hence, the Court had directed the Chief Ministerial Officer to execute the sale deed. The endorsement 'un-claimed' on the envelope containing the notice made by the postal authorities is false. The defendant never had knowledge about the litigation in O.S.no.76 of 2010. The postal people did not bring any envelope to the defendant nor was any information given about the envelope to him. The plaintiff had played fraud on the Court and had obtained an *ex parte* decree. The so called endorsement by the postal department is a bogus one and was made at the behest of the plaintiff. The plaintiff had also filed bogus receipts. It was mentioned in the legal notice dated 11.03.2010 filed in the said suit that the sale consideration that was paid to the defendant till 10.03.2010 by way of cheques and cash was Rs.3,60,000/- out of the total sale consideration of Rs.5,50,000/- and that the

balance sale consideration payable was Rs.1,90,000/-. In the plaint, the plaintiff had pleaded payment of consideration of Rs.5,25,000/- without any basis. Even if the payments shown in the agreement of sale and the receipts filed along with the plaint are admitted to be true, the total consideration paid comes to Rs.3,90,000/-. Prior to 12.02.2013, the defendant had no knowledge of the *ex parte* decree and hence, the present petition is within limitation. Hence, it is necessary to set aside the *ex parte* decree.

5.2 The averments in the counter affidavit of the president of the plaintiff/ respondent society, in brief, are as follows:

The petition filed by the defendant is ill conceived and untenable and is liable to be dismissed. The defendant had received the plaint and written statement in O.S.no.33 of 2013 through courier is incorrect. The said documents pertained to O.S.No.31 of 2013 on the file of the Court of the learned Senior Civil Judge, Siddipet and are related to the lands in Sy.No.325 in an extent of Ac.5.00 guntas in Kallakal village. The petitioner had got verified the Court record and was told about the suit in O.S.no.76 of 2010 is absolutely false. The trial Court was pleased to set the defendant *ex parte* on 22.01.2010 after verifying the veracity of the endorsement on the registered parcel. The further allegation that the defendant was set *ex parte* in the execution proceedings also on the same ground is incorrect. The defendant had suppressed the real facts. The defendant had managed and avoided to receive the notices in E.P.No.26 of 2011 on the file of the learned Senior Civil Judge's Court, Siddipet. Hence, the plaintiff had got made publication in Eenadu daily on 19.01.2012 and a copy of the publication was filed into the Court on 03.02.2012. On account of the negligence of the defendant to appear in the execution proceedings, he was set *ex parte* on 03.02.2012. The defendant had knowledge of the pendency of the suit and the execution proceedings. The allegation that the postal people did not bring any envelope and that no information was given about any envelope to the defendant is incorrect. The said averment is denied. Since the application is filed under Order IX rule 13 of the Code, the merits of the suit which was decreed *ex parte* cannot be looked into. The agreement of sale filed in O.S.no.76 of 2010 contains the address of the defendant. The legal notice that was sent to the said address was served on the defendant. As per the orders of the Court, summonses were sent to the same address of the defendant and were returned as 'unclaimed'. In the

execution petition, notice was sent to the same address and later a publication was made in Eenadu Telugu daily on 19.01.2012 having circulation in the same locality. The defendant had mentioned the self same address in his affidavit. The plaintiff had filed O.S.no.31 of 2013 for perpetual injunction. The same address was mentioned by him in the written statement and vakalat. The claim that he has no knowledge of the suit prior to the receipt of the envelope on 06.02.2013 and the *ex parte* decree till the verification of the court records on 12.02.2013 is false. The defendant did not come to Court with clean hands and hence, the petition may be dismissed. The defendant did not file any petition for condonation of delay. The petition is not maintainable. Hence, the petition may be dismissed.'

6. The learned counsel for the appellants would submit as follows:

The alleged agreement for sale was allegedly executed on 23.06.1997 and the suit for specific performance was filed in the year 2010, i.e., nearly 13 years from the date of the suit agreement. The delay is not explained in the plaint. The Court below had failed to see that the mandatory requirements for granting the relief of specific performance were not made out and that therefore, the plaintiff is not entitled to seek specific performance of the alleged agreement to sell. The court below had failed to see that the defendant was not served with the suit summonses in the suit and the notices in the execution proceedings. The court below had set the defendant *ex parte* on the basis that the suit summons sent were 'not claimed'. Even in the execution proceedings, the notices were not served. The plaintiff had managed the postal authorities and had played fraud in order to knock away the valuable property. As the suit was decreed *ex parte*, the defendant was prevented from establishing his defence. The court below without considering the material facts had dismissed the application filed by the defendant for setting aside the *ex parte* decree. The observation that the defendant did not produce any evidence is incorrect. The court below ought to have examined the material record and the report of the Process Server, which formed part of the suit record, and ought to have allowed the application to set aside the *ex parte* decree. The appellants who are the legal representatives of the deceased defendant are in continuous possession and enjoyment of the property and it is a part and parcel of their joint family properties. The appellants are running a dairy farm in the property. There are servant quarters

and a store room in the property. The defendant having come to know of the filing of O.S.no.31 of 2013 by the plaintiff had got verified the records and came to know about the filing of the suit in O.S.no.76 of 2010 and the *ex parte* decree passed in that suit. The order of the court below is unsustainable. Since valuable rights in regard to immovable property of a large extent are involved, the *ex parte* decree may be set aside and an opportunity may be given to the appellants to contest the suit. If the *ex parte* decree is set aside and the suit is directed to be decided on merits, no prejudice would be caused and on the other hand, the parties will have an opportunity to have the cause decided on merits. The court below had applied in correct principles of law to the facts of the case. Hence, the appeal may be allowed and the *ex parte* decree dated 04.02.2011 passed in O.S.no.76 of 2010 may be set aside and an opportunity may be given to the appellants to contest the suit by filing their defence.

7. *Per contra*, the learned counsel for the plaintiff had contended as follows:

The material allegations in the affidavit filed in support of the petition to set aside the *ex parte* decree are all false. When the summonses were sent, they were returned as 'unclaimed'. After verifying the endorsement on the registered parcel and having been satisfied that service was sufficient, the trial court had set the defendant *ex parte*. The defendant had knowledge of the suit and the suit proceedings. The defendant had managed to not to receive notices sent in the execution proceedings. Hence, in the execution proceedings, the notice was ordered to be served by substituted service by publication in Eenadu Telugu daily dated 19.01.2012. The copy of the publication was filed into Court on 03.02.2012. The averments that on receipt of the cover sent on 06.02.2013 through courier, the defendant came to know about filing of the said suit and then got verified the court records and came to know about filing of the suit in O.S.no.76 of 2010 for specific performance and also regarding the *ex parte* decree passed therein are all false. The said allegations are invented. The merits of the suit and the sustainability of the judgment passed *ex parte* in the suit cannot be looked into in these proceedings. The defendant had mentioned the very same address in his present affidavit and also in the vakalat, the written statement and the counter affidavit filed in O.S.no.31 of 2013. The defendant

had suppressed the material facts. His absence is deliberate and intentional. There are no grounds to set aside the *ex parte* decree. The application that was filed to set aside *ex parte* decree without filing an application for condonation of delay is not maintainable.

8. In view of the pleadings and the contentions, which are advanced in line with the pleadings of the parties, the points that arise for determination in this appeal are –

- (i) **Whether any sufficient cause was shown for the absence of the defendant before the trial Court on the date he was set *ex parte*? And, whether the appellants, who are the LRs of the deceased sole defendant, had made out valid and sufficient grounds for setting aside the *ex parte* decree?**
- ii. **Whether the order impugned is unsustainable under facts and in law and is liable to be set aside in the facts and circumstances stated by the appellants?**
- iii. **To what relief?**

9. POINTS:

9.1 The pleadings of the parties are already stated supra, in detail. The learned counsel for the appellants would contend as follows: “The court below had failed to see that the defendant was not served with the suit summonses in the suit and that the defendant was set *ex parte* as the suit summons sent by post were returned with an endorsement ‘not claimed’. The postal people did not bring any envelope to the defendant nor was any information given about the envelope to him. The Court below had also failed to see that the defendant was not served with the notices in the execution proceedings also and that the plaintiff had managed the postal authorities and played fraud in order to knock away the valuable property. Further, as the suit was decreed *ex parte* without service of summonses, the defendant was prevented from establishing his defence. The court below without considering the material facts had dismissed the application filed by the defendant by setting aside the *ex parte* decree. Even in the execution petition notice was served by substituted

service by means of publication of the notice in a vernacular daily news paper and there was no service of notice on the defendant. Since the application to set aside the *ex parte* decree was filed within the time allowed under law from the date of the knowledge no application for condonation of delay is necessary. *Per contra*, the learned counsel for the plaintiff would contend as follows: “The summonses sent were returned as ‘unclaimed’. After verifying the veracity of the endorsement on the registered parcel and having been satisfied that the service is sufficient, the trial court had set the defendant *ex parte*. Therefore, the defendant had knowledge of the suit and the suit proceedings. The defendant had managed to not to receive the notices sent in the execution proceedings. Hence, the notice in the execution proceedings was ordered to be served by substituted service by way of publication in Eenadu Telugu daily dated 19.01.2012. A copy of the publication was filed into Court on 03.02.2012. The defendant had mentioned the very same address in his present affidavit and also in the vakalat, the written statement and the counter affidavit filed in O.S.no.31 of 2013. The defendant had suppressed the material facts. His absence before the Court in the suit and execution proceeding is deliberate and intentional. There are no grounds to set aside the *ex parte* decree. No application for condonation of the delay was filed. Hence, the petition is liable to be dismissed.

9.2 In the light of the contentions of the parties, it is necessary to refer to Article 123 of the Indian Limitation Act, which reads as under:

123. To set aside a decree passed <i>ex parte</i> or to rehear an appeal decree or heard <i>ex parte</i> . Explanation – For the purpose of this Article substituted service under Rule 20 or Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.
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The explanation appended to the provision of law would show that for the purpose of Article 123, substituted service under Rule 20 of Order V of the Code shall not be deemed to be due service. In this case, admittedly, the suit summonses were returned with an endorsement 'unclaimed' made on the envelope. The specific defence of the defendant is that the postal people did not bring any envelope to the defendant nor was any information given about the envelope to him. It is not a case where the summonses were returned with endorsement 'refused'. The Court did not take note as to what had happened to the summonses sent through Court and what was the report of the process server who was entrusted with the duty of service of summonses personally on the defendant. The fact that service of notice by substituted service i.e., by publication in a vernacular daily news paper was ordered in the execution proceedings would make it obvious that there was no personal service of the notice on the defendant even in the execution proceedings. In view of the fact that summonses were not personally served on the defendant and in the light of the provision of the explanation supra, which squarely applies to the facts of the case, the application for setting aside the *ex parte* decree filed by the defendant within thirty days from the date of the knowledge of the *ex parte* decree cannot be said to be barred by law of limitation.

9.3 Dealing with the aspect of sufficient cause for non-appearance of the defendant before the trial court on the date he was set *ex parte*, what is to be noted is that the defendant contends that he was not served with summonses personally and that he was set *ex parte* as the postal department made an endorsement on the envelope sent to him as 'unclaimed' and that no such postal envelope was ever sought to be served upon him and that no intimation of any postal envelope was ever given to him and that therefore, he had no knowledge of the institution of the suit and the *ex parte* decree prior to 12.02.2013. On the other hand, the defence of the plaintiff is that the endorsement 'unclaimed' made on the envelope by the postal authority was verified by the trial Court and that after examining the veracity of the said endorsement, the trial court was satisfied that the service was sufficient and hence, the trial court had rightly set the defendant *ex parte* and that the defendant had wantonly did not appear and contest the suit and that the defendant had knowledge of the suit and the suit proceedings. Admittedly, there is no personal service of summonses in the suit on the defendant. The postal envelope containing the suit

summonses which was said to have been sent to the defendant was returned to the trial court with an endorsement 'unclaimed'. The learned trial Judge had taken into consideration the said endorsement and had recorded that 'the service sufficient' and had therefore, set the defendant *ex parte*. The learned counsel for the defendant having filed the certified copy of the postal envelope before this court as an additional material paper had pointed out that the return endorsement on the postal envelope made as 'unclaimed' was not made by the postal authorities at Secunderabad where the defendant was stated to be residing, but, was made by the postal authority of Siddipet where the envelope was registered and posted. Be that as it may. The material record on a perusal would show that the summonses were sent not only 'by registered post with acknowledgement card' but also through Court. The docket order dated 06.10.2010 on the proceedings sheet of the trial Court reads thus: 'Await report and call on 24.11.2010.' As per the further recording on the proceeding sheet made by the trial Court on 24.10.2010, it is clear that the trial Court had directed issuance of fresh summonses simultaneously by registered post and had further directed to call the matter on 21.12.2010. On that day (21-12-2010), the Presiding Officer was on leave and therefore, the matter was called on 22.12.2010. The recording on the docket made on 22.12.2010 is as follows: "Defendant absent. Counsel for plaintiff's present. Summonses returned unclaimed. Defendant called absent. Service held sufficient. Defendant set *ex parte*. For plaintiff's evidence call on 17-01-2011."

9.4 A reading of the above recordings successively made by the trial Court on the docket would reveal that on 06.10.2010, the Court had only recorded 'Await report' and had adjourned the matter to 24.11.2010 and that on 24.11.2010, the trial court had directed for issuance of fresh summonses to the defendant simultaneously by registered post, without verifying as to what had happened to the summonses earlier sent to the defendant and the report of the serving officer, which was awaited. The trial Court ought not to have directed for issuance of summonses simultaneously by registered post without verifying as to what happened to the summonses earlier sent and the report of the serving officer thereon. All the orders referred to supra on the proceeding sheet of the trial Court make it manifest that the approach adopted by the trial court in the matter of ordering summonses and treating the postal endorsement 'unclaimed' as sufficient service is not a correct approach to the matter. As rightly contended on behalf of the defendant, the procedure adopted by the Court below is not in accordance with the established principles of law and practice. The court

below had acted upon the endorsement 'unclaimed' on the postal envelope and had recorded thus: 'service held sufficient'. In the well considered view of this Court, despite the fact that there is no personal service of summonses in the suit on the defendant, the trial Court, by treating the postal endorsement 'unclaimed' made on the postal envelope as sufficient service had set the defendant *ex parte* even without verifying the serving officer's report and without taking care to know as to whether the summonses sent to the defendant for personal service through court are served or not. A notice that was sent in the execution petition to the defendant's very same address could not be served personally is an undisputed fact. Therefore, in the execution proceedings, service of notice by substituted service by means of publication in a vernacular paper was ordered and on filing of a copy of such publication, the defendant was set *ex parte*.

10. In **Parimal v. Veena**, the Supreme Court while explaining the expression 'sufficient cause' had held that sufficient cause is thus a cause for which the defendant could not be blamed for his absence. In this decision, it was further held as follows: 'However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion it has to be exercised judiciously.' It is true that the proposition of law in the cited decision has to be kept in mind while deciding this civil miscellaneous appeal on merits.

11. I have bestowed my attention to the facts and the submissions. Even as per the contentions of both the sides and the facts borne out by material record, summonses were not personally served on the defendant. Therefore, the defendant would contend that there was no service of summonses in the suit and that he had no knowledge of the suit and the *ex parte* decree. The order impugned does not disclose as to what was the report of the process server who was entrusted with the duty of service of summonses on the defendant in the suit. The provision of Order V Rule 17 of the Code reads as follows:

"17. Procedure when defendant refuses to accept service, or cannot be found. - Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after

using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

It is not clear from the orders impugned as to whether the procedure under Order V Rule 17 of the Code has not been followed, in the instant case. Therefore, the contention of the defendant that he has shown sufficient cause for the non-appearance before the trial court on the day he was set *ex parte* in the suit is having acceptable merit. The learned counsel for the defendant had contended that the judgment and decree which were passed *ex parte* were passed without application of mind and that though ordinarily, interference on such matters is not warranted while considering an application under Order IX Rule 13 of the Code, still on facts of the present case, the *ex parte* decree can be set aside as the court below while decreeing the suit *ex parte* did not apply its mind. He had placed reliance on a decision in **Bogidhola Tea and Trading Company Limited v. Hira Lal Somani**. The facts of the cited case disclose that the appellants had filed an application for setting aside an *ex parte* decree and also an application to condone the delay in filing the said application, but, the said application was dismissed by the High Court; however, the appellants were able to show before the Supreme Court that the *ex parte* decree that was passed by the learned judge of the trial Court suffered from non-application of mind. In this factual back drop, the Supreme Court had held as follows:

“Ordinarily, we would not have interfered in such matter. However, it appears

to be a gross case. The appellants before us have been able to show that the *ex parte* decree dated 19.4.1990 passed by the learned Additional District and Sessions Judge, Jorhat, *ex facie* suffers from non-application of mind. Had the learned Judge applied its mind even to the averments made in the plaint, he should have asked himself the question as to whether in absence of any acknowledgment in writing, as a result whereof the period of limitation would start running afresh, the suit could have been decreed. Section 3 of the Limitation Act, 1963 mandates that a Court would not exercise its jurisdiction for any relief in favour of a party if the same is found to be barred by limitation. Although such a defence has not been raised, the statute obligated upon the Court of law to consider as to whether a suit is barred by limitation or not. In the event it was found that the suit was barred by limitation, the Court had no jurisdiction to pass a decree. It was, therefore, essential for the learned trial Judge to pose unto itself the right question, particularly when without adduction of oral evidence the pleading raised in the plaint could not be said to have been established. It was, therefore, not a case where the Court could have invoked the provisions of Order 10 Rule 8 of the CPC. Even otherwise, the suit was set down for *ex parte* hearing. The learned trial Judge stated that only a *prima facie* case was found out from the plaint and other documents which were not sufficient for passing a decree as therefore the plaintiff was bound to prove his case. For the reasons aforementioned, having regard to the peculiar facts and circumstances of this case, we think that it is a fit case where the High Court should have condoned the delay. We, therefore, set aside the judgment of the High Court.”

In the instant case also the judgment that was passed *ex parte* suffered *ex facie* from non application of mind as no findings supported by reasons were recorded in regard to passing of the consideration in full and the bar of limitation though the suit was filed in the year 2010 for specific performance of an agreement to sell dated 23.06.1997. Further, as per the ratio in the decision in **M K Prasada v. Arumogam** while deciding an application for setting aside the *ex parte* decree, the court may keep in mind the judgment impugned, the extent of property involved and the stake of the parties. The property involved in the instant suit is Ac.5.00 guntas of land and that it is a valuable immovable property, is not in dispute. The suit is one filed for specific performance of an agreement of sale, which according to the defendant/appellants is barred by time and that even the plaint allegations when read together with the contents of the legal notice do not show that entire consideration was paid as alleged in the plaint. In a suit where the subject matter is a valuable immovable property, the ends of justice would be met if the *ex parte* decree is set aside and an opportunity is given to the appellants, who are the LRs of the deceased defendant, to contest the suit on merits. Further, such a course sub-

serves the ends of justice.

12. Having regard to the facts and circumstances and the reasons *supra*, this Court is satisfied that in the absence of service of summonses personally on the defendant, the orders setting the defendant *ex parte* are unsustainable in the facts and circumstances peculiar to the case on hand. As a sequel, it must be held that the defendant is entitled to the relief and the *ex parte* decree deserves to be set aside.

13. Viewed thus, this Court finds that the order of the Court below, which is impugned, brooks interference. However, after the decree was obtained the plaintiff had obtained a regular registered sale deed through court by incurring expenditure towards stamp duty and registration charges. Therefore, it is just and fair to grant the relief after imposing adequate terms. Hence, it is trite to allow the application to set aside the *ex parte* decree subject to the condition of the appellants depositing Rs.2,00,000/- within three weeks from the date of this judgment.

14. In the result, the Civil Miscellaneous Appeal is allowed and the decretal order and the order impugned are set aside. Accordingly, I.A.no.163 of 2013 in O.S.no.76 of 2010 is hereby allowed and the *ex parte* decree dated 04.02.2011 in the afore mentioned suit is set aside subject to the appellants depositing Rs.2,00,000/- (Rupees Two Lakhs only), to the credit of the suit before the trial court towards expenditure and costs payable to the plaintiff, within three weeks from the date of this judgment. Failing such deposit, the appeal shall stand dismissed.

For reporting compliance of this conditional order, the Registry is directed to list this appeal on 26-11-2015.

M. SEETHARAMA MURTI, J

04th November 2015

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Note:- Issue copy by 06-11-2015

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