

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

FAMILY COURT APPEAL NO. 1 OF 2014
WITH
CIVIL APPLICATION NO. 577 OF 2014

Dr. Mrs. Tejeswini d/o. Gangadharrao
Pathrikar w/o. Sachin Patil,
Age 30 years, Occu. Service,
Resident of C/o. Dr. Satyajit Pathrikar,
209, Nandanvan Colony,
Aurangabad.

**....Appellant.
(Ori. Respondent)**

Versus

Sachin s/o. Ashok Patil,
Age 36 years, Occu. Government
Service, Resident of "Anand-Vihar"
Beed Road, Osmanabad, Taluka
and District Osmanabad.

**....Respondent.
(Ori. Applicant)**

Mr. V.D. Salunke & Mr. M.S. Taur, Advocates for appellant.

Mr. Hemant Surve h/f. Mr. Abhay Ostwal, Advocate for respondent.

WITH
FAMILY COURT APPEAL NO. 7 OF 2014

Sachin s/o. Ashok Patil,
Age 36 years, Occu. Government
Service, Resident of "Anand-Vihar"
Beed Road, Osmanabad, Taluka
and District Osmanabad.

**....Appellant.
Father**

Versus

Tejeswini w/o. Sachin Patil,
Age 30 years, Occu. Service,
Residing at : 209, Nandanvan Colony,
Aurangabad.

**....Respondent.
Mother**

Mr. Hemant Surve h/f. Mr. Abhay Ostwal, Advocate for appellant.

Mr. V.D. Salunke and Mr. M.S. Taur, Advocates for respondent.

**CORAM : T.V. NALAWADE AND
ARUN M. DHAVALÉ, JJ.
DATED : October 31, 2017**

JUDGMENT : [PER T.V. NALAWADE, J.]

1) Both the appeals are filed against judgment and decree of Hindu Marriage Petition No. A-440/2012, which was pending in Family Court, Aurangabad. The proceeding was filed by husband under the provision of section 13 (1) (i-a) of Hindu Marriage Act, 1955 for divorce and one more relief like the custody of child was claimed. The Trial Court has granted the relief of divorce, but the relief claimed of the custody of minor son is refused by the Trial Court. The wife has challenged the decision by which divorce is given by filing present Family Court Appeal No. 1/2014 and the husband, original petitioner has challenged the remaining part of the decision by which relief of custody of minor son is refused. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

The relevant incidents with dates in the present matter are as under :-

- (i) 19.2.2006 - date of marriage.
- (ii) 23.1.2007 - son by name Aryan was born.
- (iii) 30.8.2011 - the date from which the parties started living

separate

(iv) 15.11.2011- the date of proceeding filed by wife under the provisions of Domestic Violence Act in which interim relief like custody of minor child was claimed.

(v) 16.11.2011- F.I.R. given against husband.

(vi) 7.4.2012 - the date of petition filed for divorce.

3) In the Trial Court written statement was filed by wife. But from July 2013 the wife and her advocate did not turn up before Family Court. The husband filed evidence on affidavit. Order of no cross was made as nobody turned up to cross examine the husband. The husband then filed evidence on affidavit of three witnesses. The wife did not turn up to cross examine these witnesses also. No cross order was made in respect of these three witnesses and ultimately, the petition came to be decided on 10.1.2014. In view of these circumstances, the wife could have filed proceeding for setting aside ex parte decree in Trial Court itself in view of provisions of Order 17, Rule 2 of Civil Procedure Code ('CPC' for short) read with Order 9 Rule 13 of CPC. She preferred not to file such proceeding and she filed the appeal on 22.1.2014. Thus, the appeal was filed within prescribed period of limitation from the date of decree. But, in view of the aforesaid provisions of CPC, it is necessary for the wife, appellant to make out case of 'sufficient cause'.

4) In the appeal, it is contended that after filing of evidence of three witnesses on affidavit, on 3.10.2013, the copies of affidavits were not supplied, not served on the advocate of wife but on 24.10.2013 order of no cross was made in respect of these witnesses. It is the contention of wife that her counsel did not inform her about the progress made in the proceeding and the dates fixed by the Court. It is her contention that from July 2013, no specific date was given to her and her advocate had promised to inform the date, if any, fixed by the Court. It is her contention that on 19.1.2014 at about 6.15 p.m. the husband contacted her and informed that he was going to perform second marriage. It is her case that only due to such information given by the husband, she learnt about the decision and she filed the appeal. It is her contention that she is entitled to contest the matter as the relief of divorce was claimed against her. It is her contention that the Trial Court has not considered her contentions made in the written statement and proper issues were not framed by the Trial Court.

5) The Trial Court has considered the pleadings and the evidence given by husband and his witnesses as unrebutted.

6) The husband and wife are highly educated persons. The

wife has completed Post Graduate course in Medicine and the husband has passed UPSC Exams and he has been working as IPS Officer since 2006. He was, however, selected after marriage for the post. The husband has given specific instances, which according to him, involved cruel treatment given to him by the wife. The incidents right from the period of honeymoon till the last date when the parties started living separate from each other are given. The husband had already appeared in UPSC Main Exam and the wife was doing MBBS Course at the time of marriage. It was arranged marriage. The incidents quoted are as follows :-

(i) After marriage, they went to Kerala for honeymoon. It is the contention of husband that at Kerala, during the period of honeymoon, his right forearm was injured and it was a fracture injury. According to him, he was advised to take antibiotics and pain killer. According to him, he was expected to return on the next day from Kerala as he had sustained such injury. It is his contention that on the previous night he woke up from sleep as he felt that the wife was pressing injured hand by using force. It is his contention that he somehow freed his hand from the grip of his wife and it was cruel treatment of the wife.

The wife has admitted that the hand of the husband had fracture injury, but she has denied that she was pressing it to cause

pain to husband. It is her case that she was only applying medicine like Volini. It is the case of husband that wife was against taking the sedatives and she was feeling that a man who takes sedatives is a mad man. It is specific contention of wife that she first time realized in Kerala during honeymoon period that the husband had sustained fracture injury already prior to the marriage. It is her contention that due to reaction of husband during that period, she realized that he was not that sensitive and he did not like her. Thus, there was some dispute over this incident and that is admitted.

ii) The husband has quoted the incident which took place in Delhi in April 2006. The husband was to face interview as he had cleared UPSC Main Exam and the interview was in afternoon session. It is the case of husband that he had taken the wife with him and also his parents to have some moral support, but the wife started quarreling with him on the day of interview and she started passing sarcastic comments about weak mind set of husband. In the evidence, he has mentioned something more about the quarrel like insistence of wife to take her for shopping on that day.

iii) It is the case of husband that after his selection, he was expected to go for training to Masori from 29th August 2006 and at that time, the wife insisted that he would leave her with her parents

and not with the parents of husband. It is the case of husband that he then realized that the wife was harbouring strange antipathy towards his parents. It is the contention of husband that on 23.1.2007 son Aryan was born, but after birth of son only he was welcomed to the house of parents of wife and his parents were shunned.

iv) It is the case of husband that in December 2008, after training was over, he was posted in Buldhana district, Maharashtra and at that time, the wife was doing some Course in Aurangabad. According to him, he kept on visiting Aurangabad to see the wife on Saturday and Sunday and he used to give money for the expenses. It is his case that he was then posted in Nanded district. According to him, in December 2009 they decided to perform 'Javal' ceremony of son Aryan and for that they decided to go to Tirupati. It is his contention that during this visit of Tirupati, he realized that wife was giving humiliating treatment to his parents. According to him, as he was to return to Nanded he arranged for separate car for his wife and his parents and they were to catch flight at Chennai for Pune. It is his contention that during this travel, and even in the presence of driver, the wife kept on insulting and humiliating his parents.

On the other hand, it is the contention of wife that during trip of Tirupati, she realized that the parents of the husband and

husband are very rude. It is her contention that during that period she was humiliated and insulted and her brother was also insulted. It is her case that during cohabitation she was made to wash clothes and husband used to insist that she should not use brush for washing clothes. It is her contention that when after one occasion, he noticed that she was using brush, he assaulted her and gave severe bating to her. It is her case that as habit the husband used to give abuses to her. She has denied that she had hurt and humiliated the parents of the husband. It is her contention that she had taken proper care of the parents of the husband and her son.

v) It is the contention of husband that he got posting in Mumbai in April 2010 and the wife was doing M.D. in Mumbai. Till that time, wife was living in Aurangabad with her parents. It is the case of husband that as he was posted in Mumbai he suggested to wife that they should live together in Mumbai and accordingly, they started cohabiting in Mumbai from June 2010. It is the case of husband that when the son was admitted in school of Mumbai, he realized that proper care of son was not taken at Aurangabad and he was using abusive language inadvertently and casually. It is the contention of husband that to take proper care of son he brought his parents to Mumbai. It is the case of husband that he is the only issue to the parents and so, it was his responsibility to take care of

his parents. It is his case that in spite of these circumstances, the wife was avoiding his parents and she was not adjusting with his parents. It is his case that the wife was not taking proper care of his issue also.

vi) It is the case of husband that on 26.8.2011 he was expected to go to Nagpur in connection with his duty and at 16.30 hours when he went to the residential place to pack his clothes, he found that the keys of cupboard in which clothes were kept were not available and wife had taken keys with her to Haffkine Institute where she was working. It is his contention that he somehow went to Nagpur and from there, he was required to go to Delhi with Hon'ble Governor. It is his case that when he returned on 30.8.2011 he made inquiry about the keys of cupboard and told about the inconvenience caused to him, the wife became angry, she picked up quarrel and she all of a sudden started packing all her belongings. It is his contention that she packed her belonging in eight bags with intention to return to her parents. It is his contention that he requested to keep atleast Aryan with him to which she agreed. It is his contention that he provided a car with driver to the wife for going to Aurangabad, but she did not go to Aurangabad and she went to unknown location from Pune. It is his contention that he tried to contact the wife, but she stopped receiving his calls.

On the other hand, it is the case of wife that by mistake she had taken the keys of cupboard with her to her workplace. It is her contention that on other occasion husband raised that issue unnecessarily and picked up quarrel. It is her contention that by raising that issue the husband gave her severe beating. It is her case that then the husband forced her to pack her luggage by saying that he was to reach her to Aurangabad. It is her case that he and son Aryan were taken in a car by saying that he would reach them to Aurangabad, but at Panvel, he got down from the car with Aryan and he virtually compelled her to go alone in that car to Aurangabad. It is her case that she was feeling helpless and so, she used that car up to Pune where her brother was called to take her from Pune to Aurangabad. Thus, wife admits that they started living separate due to some dispute.

vii) It is the case of husband that after 30.8.2011 the wife hardly contacted him or son Aryan and in September 2011, she came to Mumbai with her uncle and other relatives who are influential persons in politics and they met Hon'ble Governor of Maharashtra as he was posted in the office of Hon'ble Governor at the relevant time. It is his contention that they made complaint to Hon'ble Governor against him to pressurize him and when he did not succumb to the pressure, they returned back to Aurangabad. It is his

contention that his son Aryan was attending school at the relevant time. It is his contention that on 7.11.2011 only to harass him and to defame him, the wife again met Hon'ble Governor with her relatives to make complaint against him. It is his contention that he allowed her to see Aryan, but at his residential place wife created a show and ultimately she returned to Aurangabad with his relatives.

viii) It is the case of husband that he had sent his son to village Bahe, District Sangli, the native place with his mother for few days as school was closed due to holidays. He has contended that on 25.11.2001 he received summons of District Court through Police Inspector of Malbar Hill Police Station, Mumbai and there was interim order to hand over the custody of Aryan to the wife. It is his contention that he informed the police and respondent that the son was at Bahe. According to him, only to malign his image, the wife took press conference outside of the premises of Rajbhavan, Mumbai and her interview was shown live on T.V. channels like Star Maza and IBN Lokmat. It is his contention that it was a planned action of the wife and he suffered lot due to the interview of wife. It is his contention that the wife sent SMS to various news agencies only to tarnish his image and to create sensation about the issue. It is his contention that on the next day, the wife again aired her interview by giving interview outside the office of Commissioner of Police of

Mumbai and that again tarnished his image. According to him, due to this conduct of wife, he started feeling humiliated and defamed and those incidents may also affect his career.

7) It is the case of wife that when she was asked to return to Aurangabad, she contacted the maid servants from the house of the husband to make inquiry about Aryan and she was informed that Aryan was constantly crying as his mother was not with him. It is her contention that she also learnt that husband had given beating to Aryan. It is her contention that due to this conduct of the husband, she took the help of her family friends like Advocate Shri. Kakade and other close relatives and they tried to convince the husband to behave well. It is her case that she wanted to see her son, but the husband was not allowing her to see the son. It is her case that due to this conduct and approach of husband, she was required to approach Hon'ble Governor of Maharashtra State. It is her case that she was only hoping that Hon'ble Governor will give proper understanding to husband, but the conduct of the husband did not improve. It is her case that she was required to see the Hon'ble Governor again and on that occasion, due to conduct of the husband, she gave written application to Hon'ble Governor as the husband was working directly under the office of Hon'ble Governor. It is her contention that only due to these attempts, meetings with

Hon'ble Governor, the husband allowed her to see Aryan, but that was for 5-10 minutes at his residential place. It is her case that on that occasion also husband showed violent behaviour and due to that all of them returned to Aurangabad. It is her contention that due to aforesaid conduct and approach of the husband, she was required to file proceeding under Domestic Violence Act. It is her contention that District Court gave order of interim temporary custody of Aryan in her favour. It is her case that she was afraid that the husband will use his position and post and will not obey the order of District Court and so, she took the order as Hamdast order and she went with police to Rajbhavan for serving the order on husband. It is the case of wife that at that time husband created some show and he made arrangement to send Aryan on that day to Bahe, District Sangli and that was done by him only to avoid compliance of the order. It is her case that as she was not allowed to see son and she could not get the custody of son, she was in tears and when she was coming out of Rajbhavan, the reporters approached her and put some questions to her. It is her case that due to the aforesaid conduct of husband, she was required to tell about the atrocities which she was facing from the husband. It is her case that she had no intention to publish the issue, but the reporters published her interview on T.V. channels. She admitted that on the next day of that incident (on 26.11.2011), she approached the office

of Police Commissioner, Mumbai to give application and on that day also, some reporters who were present outside the office of Police Commissioner put some questions to her which she answered and that was also published on T.V. channels. It is her case that she had no intention to give publicity to the dispute which was there between her and husband.

8) It is the case of husband that on inquiry he realized that wife has filed a proceeding under Domestic Violence Act bearing No. 1725/2011 and Sessions Court had granted ex parte interim relief regarding custody of Aryan against him. It is contended that after realizing this, he went to Aurangabad with Aryan. According to him, after reaching Aurangabad, he realized that wife had approached police and in Chavani Police Station also she had made complaint against him, making allegations of harassment against him. It is contended that this time also T.V. channels picked up story and it was aired on T.V. channels at the instance of wife. It is his contention that due to this conduct of wife, he handed over custody of son to wife. It is contended that only when he handed over the custody of issue, she withdrew the complaint which was filed in the police station. It is his contention that he wanted to see that no harm is caused to his son and so, he handed over the custody of son to wife. It is his case that wife had promised to withdraw the matter filed

under Domestic Violence Act, but that matter is not withdrawn by her. It is the contention of husband that by such conduct the wife has also caused harassment and irreparable damage to his image and she has harassed his parents also. It is his contention that the aforesaid conduct of the wife amounts to cruelty and so, he is entitled to get divorce from the wife.

9) It is the case of wife that when she failed to get the interim custody of Aryan in spite of getting the order from District Court and as there were instances of aforesaid nature, she filed report against the husband in Chavani Police Station, Aurangabad. It is her case that only after giving of such report by her, the persons from both the sides sat together and settled the dispute. It is her case that the husband then agreed to resume cohabitation by taking the wife to place of his service. It is her case that under the settlement, the husband handed over the custody of son to her and he agreed to take her back to the matrimonial house within 15 days. It is her case that she kept on waiting, but the husband did not take her back to matrimonial house. It is her case that husband then gave notice of divorce and he filed divorce proceeding. It is her case that she is still willing to resume cohabitation and her act does not amount to cruelty.

10) The sum and substance of the written statement filed by the wife shows that it is her case that the husband is hot tempered, he and his father had bad habit of taking sedatives which she did not like. The husband was suffering from some skin disease like epidermosalylsis bullosa simplex. She has admitted that she wanted the custody of son and she had approached Hon'ble Governor atleast on two occasions to make complaints against the husband. She has also admitted that atleast on two occasions, she gave interview to press reporters and on both the occasions, the press reporters published her interview and in the interview, she had described the so called atrocities of the husband.

11) The aforesaid pleading shows that many of the incidents described by the husband are admitted by the wife. The pleading shows that she was interested in getting the custody of child and ultimately she got the custody after filing report by her to police. She admits that she had given interview on two occasions to reporters and her interviews were aired on many T.V. channels. The husband and his three witnesses have given evidence on the incidents described by the husband in the petition. The father of the husband has filed affidavit as evidence to describe the insulting treatment given by the wife, the present appellant to him and to his wife. The father of the husband was working on gazetted post, in

Income Tax Department and he retired from that department.

12) The driver, who has filed affidavit for husband, has described two incidents in which the wife had quarreled with the husband and when the wife had lastly left the company of husband for returning to her parents house. One Dadasaheb Yewale, who is working as maid servant in the house of parents of husband has filed affidavit which is in respect of insulting treatment which wife was giving to the husband and her parents. He has given evidence by filing affidavit that the wife quarreled virtually with everybody from the house as also with outsiders.

13) As the appeal is filed against the judgment and decree, which is virtually exparte, this Court is not expected to go in to the merits of the matter in detail. However, the aforesaid admitted circumstances cannot be ignored even in a proceeding like present one. For getting the relief in the present matter, which will be setting aside the decree of divorce and remanding the matter to the Trial Court, the wife is expected to show that there was 'sufficient cause' for her for not remanding present in the proceeding in the Trial Court for cross examination of the petitioner/husband and his witnesses and also for giving evidence. It is already observed that from July 2013, the wife and her advocate did not turn up to the

Court. The matter came to be decided in January 2014 i.e. after about five months from the first date on which the wife remained absent. Even when the order of no cross was made in respect of the evidence given by husband, no steps were taken and there is no mention about it in the present appeal memo also. The reasons given by the wife in the appeal memo that her advocate did not inform about the dates is not convincing and plausible. As per the procedure, the date is conveyed not only to the counsel, but also to the parties. In any case, when it was original proceeding, it was necessary for the wife to remain present in the Court. She was living in Aurangabad with her parents. The proceeding for divorce was initially filed in Mumbai by the husband, but due to the proceeding filed by the wife in this Court for transfer of the matter from Mumbai to Aurangabad, the matter was transferred to Family Court, Aurangabad. That was done for the convenience of wife. Considering the apprehension of the husband that wife may play delaying tactics, direction was also given by this Court to Trial Court to see that the matter is expeditiously disposed of, as early as possible. In spite of these circumstances, the wife did not turn up to contest the matter for more than five months. She admits that in other two proceedings like proceeding filed under the Domestic Violence Act and appeal filed by her against the order of notice made by J.M.F.C. in Domestic Violence case, she was regularly appearing before the Court. Those

were the proceedings filed by her and the submissions made show that the counsel who was representing her in proceeding filed under the provisions of Domestic Violence Act in the Court of J.M.F.C. and in Sessions Court was representing her in Family Court also. Due to these circumstances also, the contention of the wife that the advocate did not inform her about the date fixed after July 2013 cannot be accepted and believed. Her case that she learnt about the decision of the matter only when the husband contacted her on phone and informed that he was intending to perform second marriage also does not appear to be probable in nature. When the relations are strained and when husband had got the decree, there was no reason for him to inform the wife specifically about the decision. Further, the present appeal came to be filed within prescribed period of limitation. These circumstances create probability that the wife and her counsel were keeping watch on the proceeding and immediately after the decision of the matter, they took steps to file the appeal in this Court. These circumstances are sufficient to hold that there was no 'sufficient cause' for wife for not remaining present in the Court during trial of the matter.

14) There is one more circumstance against the wife. Even when this Court had directed the wife to see that written statement is filed on the first date of appearance in Family Court, Aurangabad

after transfer of the matter from Mumbai to Aurangabad, she did not file written statement and no written statement order was passed against her. She took few months for filing written statement but the Court gave opportunity to her to file written statement, subject to payment of some cost. This conduct of wife also shows that she was attempting to protract the things. She admits that she remained present till the date of framing issues and issues were framed on 14.6.2013. She is also not disputing that the affidavit of evidence of husband was served on her on 26.7.2013. These circumstances also show that her contention that she could not get the next date in July 2013 cannot be accepted and believed. The roznama of the matter of the Trial Court does not support this contention of wife.

15) The learned counsel for the husband placed reliance on some reported cases which are mainly on powers of the Appellate Court to set aside the exparte decree and the things which need to be considered by the Appellant Court. The case reported as **AIR 2011 SC 1150 [Parimal Vs. Veena]** is on the decree of divorce given exparte under the provisions of Hindu Marriage Act, 1955. In this case, the Apex Court has laid down that sufficient cause needs to be shown by the wife for getting the order of setting aside the exparte decree. The meaning of 'sufficient cause' is given by the Apex Court and it is observed that the discretionary relief to set

aside the exparte decree can be given by the Court only after tests laid down in Order 9, Rule 13 of CPC are applied by the Court. This Court is expected to ascertain as to whether the party against whom such decree is given honestly and sincerely remained present for hearing and the party had done his best to do so. Thus the party is expected to show that the party cannot be blamed for his absence for making of the case of 'sufficient cause'.

16) In the cases reported as **AIR 2009 Patna 31 [Tejashwari Lal Vs. Pancham Lal]** and **1993 AIR SCW 1178 [Salil Dutta Vs. T.M. & M.C. Private Limited]**, the High Court and the Apex Court laid down that when from the facts and circumstances of the matter, it can be gathered that the party against whom exparte decree is given, intended to delay disposal of the matter, such party cannot seek indulgence of the Court. Reliance is placed on some more cases which are as under :-

(i) **AIR 2001 Orissa 84 [Sabitanjali Pattanaik Vs. Priyabrata Pattanaik],**

(ii) **(2007) 4 SCC 511 [Samar Ghosh Vs. Jaya Ghosh],**

(iii) **AIR 2003 Allahabad 51 [Poonam Gupta Vs. Ghyanshyam Gupta],**

(iv) **AIR 1997 SC 1180 [Adhhyaatman Bhaamini Vs. Jagdish Ambalal Shah],**

(v) **AIR 2002 Rajasthan 345 [Smt. Raj Kumari alias Chandrakala Vs. Nandlal],**

(vi) (1994) 1 SCC 337 [V. Bhagat Vs. D. Bhatat],

(vii) (2013) 5 SCC 226 [K. Srinivas Rao Vs. D.A. Deepa],

(viii) Civil Appeal No. 10710/2017 decided on 24.4.2017 by Apex Court [Raj Talreja Vs. Kavita Talreja],

(ix) Family Court Appeal No. 71/2006 decided on 7.2.2014 by Principal Seat of this Court at Bombay, [Mr. M. Vs. Mrs. M.],

(x) Family Court Appeal No. 28/2009 decided on 25.9.2017 by this Court [Sheela w/o. Vinod Pol Vs. Vinod s/o. Ramkisan Pol].

The facts and circumstances of each and every case are always different. This Court has mentioned the relevant facts of the present matter and also grounds on which divorce is claimed. It being discretionary relief, this Court holds that in view of the facts and circumstances of the present matter, it is not possible to set aside the decree of divorce given in favour of husband.

17) The husband has filed appeal as he did not get relief of custody of the minor son. The relevant facts already mentioned show that from 2013 the son is in the custody of the wife. She has done Post Graduation in the field of medicine and she is working as Professor. The submissions made show that her job is not transferable. The husband is, however, required to give his full time for discharging his duty and his job is transferable. Considering

nature of duties which are required to be discharged by the husband, this Court has no hesitation to hold that the husband may not be in the same position as the wife is to give proper attention to the son. Due to these circumstances and as the financial condition of wife is also sound, this Court holds that the custody of the son cannot be given to the husband. Further, there is specific case of wife that only after the settlement, the husband handed over the custody of the child on his own and the husband has admitted that he had given the custody to the wife. This circumstance cannot be ignored for deciding the relief claimed by the husband for custody of the child. Thus, there is no possibility of interference in the decision given by the Family Court by which the custody of the child is refused to the husband. In the result, both the appeals stand dismissed. Civil Application stands disposed of.

[ARUN M. DHAVALÉ, J.]

[T.V. NALAWADE, J.]

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