

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5906 OF 2003**

1) Daruwala Education Society
30/A, Gultekadi, Pune – 411 037
By its Chairman:
Mr. Abbasbhai Chandhbai Daruwala,
Age about 67 years, Occ. Business,
Residing at 30/A, Gultekadi,
Pune 411 037.
Crescent High School, 304,
Gultekadi, Pune 411 037.

2) Head Mistress,
Mrs. M. Abbas,
Age about 64 years, Occ. Service,
Residing at 37, Gultekadi,
Pune – 411 037.

... Petitioners

vs.

1) The State of Maharashtra

2) Education Officer,
Pune Zilla Parishad,
Chavan Bhavan, Mangalwar Peth,
Pune – 411 011.

3) Shri Ramesh Kisanrao Lavande,
Age about 32 years, Occ. Service,
Residing at 774, Dhankawadi,
Pune – 411 043.

... Respondents

Mr. V.K. Bodhare for the Petitioners.
Mr. S.V. Pitre for the Respondent No.3.

Coram : **A.A.Sayed, J.**
Date : 19 September 2017

JUDGMENT :

1 The challenge in this Petition under Articles 226 and 227 of the Constitution is to the judgment and order dated 18 December 2002 passed by the School Tribunal, Pune Region, Pune in an Appeal filed

by the Respondent No.3/original Appellant under section 9 of the Maharashtra Employees Private Schools (Conditions of Service) Regulation Act, 1977 ('MEPS Act' for short) questioning the termination order dated 6 December 2000 terminating his service as Assistant Teacher w.e.f. 7 December 2000. By the impugned order the order of termination was set aside and the Petitioner Management/original Respondent No.1 was directed to reinstate the Respondent No.3/original Appellant in service with full back-wages from the date of termination.

2 The case of the Respondent No.3/original Appellant before the School Tribunal in the Appeal was as follows:

He was working as an Assistant Teacher with Crescent School which is run by the Petitioner-Management/original Respondent No.1 and holding qualification of B.A., M.A. and B.Ed. He was initially appointed with the School on 12 June 1997 and mainly conducting the activities related to the physical education. He was incharge of and trained in the activities of the Maharashtra Cadet Corps. He was also teaching and instructing in the discipline of Physical Education as his subject. He was not issued any formal order of an appointment but was issued salary certificates time to time when demanded. He was also deputed to attend training course for Maharashtra Cadet Corps. He was continuously working in the School for three years from 12 June 1997 and his services were thus automatically confirmed on completion

of two academic years i.e. after the expiry of second term in the year 1999. He was issued an appointment order pursuant to his Application dated 15 June 1997 that he was appointed as teacher with effect from 14 June 1999 on temporary basis upto 30 April 2000. His services were continuous till the end of second term of the academic year 1999-2000 and he had continuously worked till April 2000 i.e. one complete academic year after his automatic confirmation in his service. After the completion of two years service, he was being paid less salary and had accordingly written to the Education Officer who had taken cognizance of his letter and who sought an explanation from the Petitioner Management. In his complaint he has stated that he has received Rs.1,90,000/- less. The Petitioner Management did not allow him to join his duty after vacation in the School when it opened on 12 June 2000. On 19 June 2000 he was reissued an order stating that he was appointed on probation for a period of two years. The said order was illegal and void. Considering the fact that he had completed three years of continuous service, he cannot be said to be on probation as he was never out of service and he was permanent in service without any break and the order dated 19 June 2000 is void. The Petitioner Management was issuing memos after memos to him and was causing harassment to him on false and fabricated grounds. He had approached the Police through a Sangh/Organization. He was issued a letter of allegations under section 36(1) of MEPS Act by the Petitioner

Management containing 12 different charges which were false and imaginary. However, no enquiry committee was formed. He has replied and refuted all the charges. Thereafter, nothing transpired and all of sudden on 6 December 2000, the Petitioner Management issued an order of termination to him with effect from 7 December 2000 accompanied by a cheque of Rs.2,805/- being the salary for one month in lieu of the notice period.

3 Written Statement/Reply was filed by the Petitioner Management/original Respondent No.1 & 2 before the School Tribunal. Their case in the Written Statement was as follows:

Respondent No.3/original Appellant was appointed as an Assistant Teacher to teach Physical Education as well as Hindi to the higher classes. The Respondent No.3 was B.Ed. (with Physical Education). The Respondent No.3 was initially appointed as Assistant Teacher on 12 June 1997. One teacher namely, Smt. Tiwari was serving as a teacher in the subject of Hindi from 1990 and she had indicated that she would be proceeding on long leave and therefore, taking into consideration the Respondent No.3's qualification he came to be appointed on purely temporary basis from June 1997 in the post held by her. Smt. Tiwari however tendered resignation in July 1997 and it came to be accepted by the Petitioner Management by the end of September 1997. The Respondent No.3 was continued as a purely

temporary teacher for a period of one academic year. Mr. Patel Shehzada Abbas was serving as a physical teacher in the School since 11 August 1990 and had informed the Petitioner Management that he would proceed on long leave and therefore, the Respondent No.3 was again appointed on purely temporary basis in two subjects i.e. Physical Education as well as Hindi. As Mr. Patel Abbas remained absent from the School from 6 July 1998 and when called upon to resume his duties, however, he expressed his inability to resume. Mr. Patel Abbas thereafter tendered his resignation and he was relieved from 31 October 1998. The Respondent No.3 was appointed as temporary teacher for the academic year 1997-98 in the post held by Smt. Tiwari and in the year 1998-99 on the post held by Mr. Patel. Hence, the appointment of the Respondent No.3 was purely temporary. Thereafter, the Respondent No.3 was again appointed on purely temporary basis for the year 1999-2000. The Respondent No.3 was appointed on probation on 19 June 2000 by an appointment order of even date. It was falsely suggested that Respondent No.3 was not paid the prescribed salary. Without prejudice to the other contentions the Management was ready to give one more opportunity by appointing him on probation for a period of two years. The Respondent No.3 thereafter withdrew his complaints with Sanghatana/Union i.e. Bharatiya Bahujan Alpasankhyank Shikshak Maha Sanghatana. The Respondent No.3 was accordingly appointed on probation for two

years from 19 June 2000. The Respondent No.3 was given memos or warnings to which he responded in a vicious manner. He had committed misconduct by remaining absent on the occasion of 15 August 2000 and 15 August 1999 thus avoiding to hold proper flag hoisting ceremony which is the responsibility as a teacher in Physical Education. He sent false certificates of his sickness and sought leave. He also made false complaint against the Petitioner Management with the police as well as with the Sanghatana. His behaviour with the Head Mistress and lady co-teachers was not sober for which he was issued memos and warnings from time to time and ultimately he was given 'letter of allegations' considering his behavior. His response to the letter of allegations was also vicious in nature and under these circumstances, the Petitioner Management had no option but to terminate the services of the Respondent No.3. The Respondent No.3 was never in the permanent service as alleged. The Respondent No.3 was on probation and the order of termination was given to him and he was paid one month's salary in lieu of notice period.

4 After hearing the parties, the School Tribunal passed the impugned order as stated in paragraph 1 above. Hence, the present Petition by the Petitioner Management.

5 I have heard the learned Counsel for the Petitioner Management and the learned Counsel for the Respondent No.3 teacher.

6 Learned Counsel for the Petitioner Management has placed reliance on the following judgments:

- (i) Hindustan Education Society and Anr. vs. Sk. Kaleem Sk. Gulam Nabi and Ors., (1997) 5 SCC 152;
- (ii) Ramkrishna Chauhan and Ors. vs. Seth D.M. High School and Ors., 2013 (30) All MR 1.

7 Learned Counsel for the Respondent No.3 has relied upon the following judgments:

- i) Arvind Shamshabd Ojha vs. Saraswati Education Society, Thane and others, 2010 (3) Mh.L.J. 945;
- ii) Ramnath Govind Sonavane vs. Secretary, Janata Shikshan Prasarak Mandal Chandanpuri & others, 2001 (Supp. 2) Bom.C.R. 203;
- iii) V.P. Ahuja vs. State of Punjab, 2000 (3) SCC 239;
- iv) Dipti Prakash Benerjee vs. Satvendra Nath Bose National Centre For Basic Sciences, Calcutta, 1999 (3) SCC 60.

8 It is an admitted position that the Respondent No.3 teacher was appointed on probation by the Petitioner Management vide appointment order dated 19 June 2000. Prior thereto, though the Respondent No.3 teacher was serving the School from 12 June 1997, his appointment can only be said to be on temporary basis. The Petitioner Management has produced the prior appointment orders of

Respondent No.3 teacher dated 16 June 1997, 8 June 1998 and 14 June 1999 which show that the appointment of the Respondent No.3 teacher was only for a fixed period i.e. till the end of the academic year. Though the Respondent No.3 teacher claims that he was not issued earlier appointment orders, he has admitted in his Appeal that his appointment order for the period 14 June 1999 to 30 April 2000 stated that his appointment was on temporary basis. The Respondent No.3 teacher, however, did not make any grievance about his appointment being made on temporary basis for the said period viz. 14 June 2000 to 30 April 2000. As a matter of fact, he did not raise any grievance even about the subsequent appointment order dated 19 June 2000 whereby he was appointed on probation for two years, till he was terminated w.e.f. 7 December 2000, whereafter he filed the Appeal before the School Tribunal challenging his termination.

9 In **Hindustan Education Society and Anr. vs. Sk.Kaleem SK.Gulam Nabi and Ors.** (1997) 5 SC 152, the Supreme Court has considered section 5 of the MEPS Act. In paragraphs 4, 5 and 6, the Supreme Court held as follows:

“4. Thus, it could be seen that the appointment of the first respondent was only a temporary appointment against a clear vacancy

5. In view of the above and the order of appointment, the appointment of the respondent was purely temporary for a limited period. Obviously, the approval given by the competent authority was for that temporary appointment. As regards permanent

appointments, they are regulated by sub-sections (1) and (2) of Section 5 of the Act according to which the Management shall, as soon as possible, fill up, in the manner prescribed, every permanent vacancy in a private school by appointment of a person duly qualified to fill in such vacancy. Every person of two years subject to the provisions of sub-section (4) and (5). He shall, on completion of the probation of period of two years, be confirmed.

i. Under these circumstances, the appointment of the respondent cannot be considered to be a permanent appointment. As a consequence, the direction issued by the High Court in the impugned judgment dated July 31, 1996 in Writ Petition No.5821/95 that he was regularly appointed is clearly illegal and cannot be sustained.”

10 In **Ramkrishna Chauhan vs. Seth D.M. High School** (supra), the Full Bench of this Court has also dealt with the very issue involved in the present Petition. The Full Bench was constituted by the Hon’ble the Chief Justice upon a reference being made by a learned Single Judge in view of the divergent opinions of different Benches of this Court. The Full Bench of this Court in its judgment in paragraph 2 has reproduced the question framed by the learned Single Judge which reads as follows:

“Would it be open to the School Tribunal to hold that an employee would be deemed to be on probation within the meaning of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 on the ground that the appointment was made in a clear and permanent vacancy, notwithstanding the fact that the letter of appointment specifically stipulated that the appointment has been made in a temporary capacity?”

The Full Bench answered the question in paragraph 28 which reads thus:

“Accordingly, we are inclined to answer the issue in the negative. We hold that it is not open to the School Tribunal to assume as of fact that the appointment made against a clear and permanent vacancy is deemed to be on probation, within the meaning of section 5(2) of the Act. The School Tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term.”

In paragraph 18, the Full Bench has observed:

i. A priori, we have no hesitation in taking the view that neither section 5(1) nor 5(2) of the Act can be construed as forbidding the Management from making an appointment on contractual or temporary basis for a limited duration against a permanent vacancy until a suitable candidate is selected. Further, there is nothing in these provisions to indicate that every appointment made by the Management, in relation to a permanent vacancy, must be deemed to have been made on probation for a period of two years. There is no such legal fiction unlike in the case of a person appointed “on probation” for a period of two years, is deemed to have been confirmed, upon completion of that period. In other words, the parties would be bound by the terms and conditions stated in the letter of appointment, as there can be no presumption of appointment having been made “on probation” unless expressly stated in the appointment letter itself.”

In arriving at its conclusion, the Full Bench observed that it was bound by the exposition of the Apex Court in **Hindustan Education Society**.

11 The Division Bench of this Court in the case of **Pramod Satuppa Oulkar vs. The Kini Karyat Shikshan Mandal and others, SCC**

OnLine Bom 9421 (Letters Patent Appeal No. 340 of 2007, decided on August 22, 2016) has held in paragraph 16 as follows:

“16. The Full Bench of this Court in the case of *Ramkrishna Chauhan* (supra) has also clearly held that the terms and conditions of the letter of appointment are binding on the candidate and the Tribunal cannot presume that the appointment was made on probation. The contention of the learned counsel appearing on behalf of the appellant that section 3 read with section 5 is applicable is without any substance because the said section is in respect of appointment which is made on probation...”.

12 In view of the exposition of law in the aforesaid cases, the contention of the Respondent No.3 teacher that he was deemed to be permanent by virtue of his completing three years of service, even prior to being issued the appointment order dated 19 June 2000 (by which he was appointed on probation) cannot be accepted since he was appointed only on temporary basis prior thereto.

13 It is an admitted position that the Respondent No.3 teacher was appointed on probation by appointment order dated 19 June 2000. The Respondent No.3 teacher was thus a probationer when his services came to be terminated w.e.f. 7 December 2000 vide termination order dated 6 December 2000.

14 The provisions governing a probationer are found in section 5 of the MEPS Act and Rules 14 and 15 of MEPS Rules. Section 5 of the MEPS Act and as it then stood and Rules 14 and 15 of the MEPS Rules, read as under:

"5 Certain obligations of Management of private schools:

(1)

(2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of sub-section (4) and (5), he shall on completion of this probation period of two years, be deemed to have been confirmed.

(3) If in the opinion of the Management, the work or behaviour of any probationer during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice.

(4)

(4A)

(5)

Rule 14. Assessment of employees work.

(1) At the beginning of each term, the teacher shall prepare the plan of his academic programme and at the end of the academic year, prepare a report of the work done by him and submit it to the Head.

(2) Each employee on the teaching and non-teaching staff of a school shall submit the report of self-assessment in the respective Form in Schedule "G" within one month after the end of a year.

Rule 15. Writing of confidential reports etc.

(1) The confidential reports shall be written annually in the respective Form in Schedule "G". The reporting authorities in respect of the employees and the Head shall be the Head and the Chief Executive Officer respectively. Confidential reports shall be written in respect of the employee or the Head who had worked for six months or more during an academic year commencing from June. If the Head or a teacher is the Secretary of the Management the confidential report in his respect shall be written by the President of the Management.

(2) The confidential reports so written in respect of the employees and the Head shall be reviewed by the Chief Executive Officer and the President of the Management, respectively. The confidential report of the Head or a teacher written by the President shall be reviewed by the Managing Committee.

(3) The respective reporting authority shall arrange to communicate confidentially in writing adverse remarks, if any, to the concerned employee or the Head, as the case may be, before the end of August every year.

(4) Representation, if any, from any employee against the adverse remark communicated to him in accordance with sub-rule (3) above shall be decided by the School Committee. Similar representation, if any, from the Head shall be decided by the Managing Committee.

(5) Failure to write and maintain confidential reports and to communicate adverse remarks to the employees within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report.

(6) Performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained.”

15. In **Vinayak Vidhyadayini Trust through its Secretary/Trustee & Anr. vs. Aruna T. Prabhu & Ors.**, 2010(4) Bom.C.R. 543, the Division Bench of this Court considered the aforesaid provisions of the MEPS Act and Rules. Following the judgment of the Supreme Court in the case of **Progressive Education Society v. Rajendra**, (2008) 3 SCC 310, the Division Bench in paragraphs 13 and 15 held as follows:

“13 ... Thus, the appointment on probation and the termination of the service of the probationer are governed by the provisions of sub-sections (2) and (3) of section 5 of the MEPS Act. In addition, Rules 14 and 15 of the MEPS Rules, 1981, have elaborately set out the procedure for the assessment of the probationer's performance and writing of his confidential reports. When a special statute like the MEPS Act has provided for a specific procedure to be followed while terminating the employment of a probationer on the ground of unsatisfactory performance, the said procedure is mandatory and non-compliance thereof would vitiate the order of termination and the School Tribunal will be fully justified to interfere with the same and set it aside by directing reinstatement of the appointee/appellant.

15. Under Schedule “G” to the MEPS Rules, various forms have been set out and are required to be filled in for the teaching staff and they are, (1) Self-Assessment Form, (2) Confidential Report Form and (3) Reviewing Authority Remarks Form. Under sub-rule (1) of Rule 15, confidential reports shall be written in respect of the teacher who had worked for six months or more during an academic year commencing from June and the confidential reports so written shall be reviewed by the Chief Executive Officer/President of the management. Whereas the confidential reports of the Head or a teacher written by the President shall be reviewed by the Managing Committee as per sub-rule (2). The respective reporting authority shall arrange to communicate confidentially in writing adverse remarks, if any, to the concerned employee before the end of August every year and representation, if any, from any employee against the adverse remarks communicated to him, shall be decided by the School Committee or the Managing Committee, as the case may be, as per the combine reading of sub rules (3) and (4). As per sub-rule (5) failure to write and maintain confidential reports and to communicate adverse remarks to the employee within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report. Further, as per sub rule (6) of Rule 15, performance of an employee appointed on probation

shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained.

The Supreme Court in the case of *Progressive Education Society v. Rajendra*, 2008(2) Mh.L.J. (SC) 715 : (2008) 3 SCC 310 : AIR 2008 SC 1442 had an occasion to consider the scheme of section 5(3) of the MEPS Act and Rule 15 of the MEPS Rules. It held that while Rules 14 and 15 of the MEPS Rules cannot override the provisions of section 5(3) of the MEPS Act, it has to be said that the requirements of sub-rule (6) of Rule 15 would be a factor which the school management has to take into consideration while exercising the powers which it undoubtedly has and is recognized under the said section. It further held that there ought to be sufficient material to be brought by the school management before the Tribunal so as to support the order of termination passed at the end of the probationary period and such record must also inspire confidence being bona fide. Such material cannot be cooked up material and it must be genuine confidential records maintained from time to time and communicated to the teacher. It is also clear from sub-rule (5) of Rule 15 of the MEPS Rules, that failure to write and maintain confidential reports and to communicate adverse remarks to the employee within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report. In the instant case, there was nothing brought on record to show that in the prescribed form, the confidential reports in respect of respondent No.1 were written and adverse remarks were communicated to her so as to provide her an opportunity to submit her representation against the adverse remarks. In any case, the show cause notice dated 23-6-1995 would not amount to compliance of sub-rules (1) to (5) of Rule 15 of the MEPS Rules.”

16. A learned Single Judge of this Court in the case of **Anjuman-E-Taleem and anr. v/s. State of Maharashtra and anr.**, 2015 (3) MhLJ

98, following the aforesaid judgment of the Division Bench, held in paragraphs 9 to 12 as follows:

“9. The scheme of Rule 15 of the said Rules is that confidential reports shall be written in respect of the employee or the Head who had worked for six months or more during an academic year commencing from June and had to be written annually by the head of the school and reviewed by the Chief Executive Officer.

10. The sub-rule (3) of Rule 15 provides that the respective reporting authority shall arrange to communicate confidentially in writing adverse remarks, if any, to the concerned employee or the Head, as the case may be, before the end of August every year. The sub-rule (4) provides that representation, if any, from any employee against the adverse remark communicated to him in accordance with sub-rule (3) above shall be decided by the School Committee. Sub rule (5) of Rule 15 provides that failure to write and maintain confidential reports and to communicate adverse remarks to the employees within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report. Sub-rule (6) of Rule 15 finally provides that the performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained.

11. The entire object of providing such detailed procedure as aforesaid, is to ensure that there is no arbitrary power vested in the appointing authority to do away with the services of the probationer. Normally, the question as to whether or not services of probationer are satisfactory, largely depend upon the subjective satisfaction of appointing authority. Such subjective satisfaction however, is by no means unfettered or unbridled lest, the same would lead to arbitrariness. The provisions in the rules, therefore provide for an objective assessment of service records coupled with maintenance of records of such assessment. Besides, with a view to introduce the element of fairness as well as natural justice, the rules provides that adverse remarks in the confidential report have to be communicated

to employee concerned and the employee concerned has to be offered an opportunity to make representation against the same before such adverse remarks are taken into consideration for the purpose of arriving at satisfaction that the services of the employee during probation, were unsatisfactory.

12. It is well settled position in law that the purpose for communication of adverse remarks is two fold. Firstly, such communication is to enable the employee concerned to improve his/her performance. Secondly, to enable the employee concerned to represent against the adverse remarks and consequently satisfy the reviewing authority that such adverse remarks ought not to have been made or were not justified”.

17. In the present case, nothing was placed on record by the Petitioner Management before the School Tribunal to show that any Confidential Reports in respect of the Respondent No.3 teacher were maintained or that any adverse remarks were communicated to him to provide an opportunity to him to make representation against the adverse remarks. In these circumstances, in view of the law laid down by the Division Bench of this Court and followed by the Single Judge of this Court as discussed above, the work of the Respondent No.3 teacher would have to be treated as satisfactory and the order of termination dated 6 December 2000 was unsustainable. To that extent, the School Tribunal has rightly set aside the order of termination of the Respondent No.3 though for different reasons which I am not in agreement with, having regard to the position of law of employment on temporary basis as discussed earlier.

18 Section 11 of the MEPS Act lays down the powers of Tribunal to give appropriate reliefs and directions. It inter alia provides that where the Tribunal, after giving reasonable opportunity to both parties of being heard, decides in any Appeal that the order of dismissal, removal, otherwise termination of service or reduction in rank was in contravention of any law (including any rules made under this Act), contract or conditions of service for the time being in force or was otherwise illegal or improper, the Tribunal may set aside the order of the Management, partially or wholly, and direct the Management inter alia to reinstate the employee, restore his rank, give arrears of emoluments or award lesser punishment. Where it is decided not to reinstate the employee or in any other appropriate case, to give to the employee twelve months salary (pay and allowances, if any) if he has been in the service of the school for ten years or more and six months salary (pay and allowances, if any) if he has been in service of the school for less than ten years, by way of compensation, regard being had to loss of employment and possibility of getting or not getting suitable employment thereafter, as it may specify or to give such other reliefs to the employee and to observe such other conditions as it may specify, having regard to the circumstances of the case.

19 Having regard to the above provision, in the facts and circumstances of the present case, since the Respondent No.3 has

been in service for only for 5½ months as a probationer and considering the passage of time (17½ years) for which the Respondent No.3 has not been in service in the School (since the operation of the impugned order was stayed by this Court), in my opinion, it would not be appropriate to grant reinstatement. In my view, interest of justice would be served if the Petitioner Management is directed to pay to the Respondent No.3 six months salary (present scale) as compensation. Since the order of the School Tribunal to the extent of setting aside the order of termination is not disturbed, the contention of Respondent No.3 that there ought to have been an inquiry does not require to be gone into. The judgments relied upon by the learned Counsel for the Respondent No.3 would be of no avail for the same reason.

20 In light of the above discussion, I pass the following order:

ORDER

- i) The Petitioner Management is directed to pay the Respondent No.3 six months salary (present scale) as compensation within a period of eight weeks from today in lieu of reinstatement.
- ii) The impugned order of the School Tribunal shall stand modified accordingly.

- iii) Rule is made partly absolute in the aforesaid terms. The
Petition is disposed of accordingly. There shall be no order
as to costs.

(A.A.Sayed, J.)

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