

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.11.2017

DELIVERED ON : 19.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.T.SELVAM
AND

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.3274 of 2010
and
M.P.No.1 of 2010

M/s.Maxwell Industries Limited
represented by its General Manager,
Having its Mill at Kolappalur,
Gobichettipalayam - 638 156. .. Appellant/Petitioner

Vs

1.Cotton Corporation of India Ltd.,
A Government Company having its
Branch Office at 1057 Trichy Road,
Ramanathapuram at
Coimbatore - 641 045.

2.M/s.Krishnakumar Tradewell,
represented by its Sole Proprietor,
Mr.P.Krishnakumar, at
5-87/34/7, Lakshmipuram Main Road,
Guntoor 522 007.
State of Andhra Pradesh.

3.P.Kali
District Judge (Retd)
Residing at No.18, Eswaran Nagar,
Vadamadurai,
Coimbatore - 641 017. .. Respondents/Respondents

Civil Miscellaneous Appeal filed u/s.37 of the
Arbitration and Conciliation Act, 1996, against the order of
learned I Additional District Judge, Coimbatore, passed in
Arbitration O.P.No.392 of 2005 on 19.11.2009.

For Appellant : Mr.R.Bharath Kumar
For Respondent s: Mr.Anirudh Krishnan for
M/s.Sarvabhauman
Associates [R1]
No appearance [R2 & R3]

J U D G M E N T

[Judgment of the Court was made by C.T.SELVAM, J.]

This appeal arises against the order of learned I Additional District Judge, Coimbatore, passed in Arbitration O.P.No.392 of 2005 on 19.11.2009.

2. First respondent/claimant, Cotton Corporation of India Ltd., alleging that pursuant to concluded contracts entered into with it by second respondent acting on behalf of appellant M/s.Maxwell Industries Limited and on appellants failure in paying the price and lifting cotton bales, it was forced to cancel the contracts and effect resale of the unlifted cotton bales resulting in a loss of Rs.51,46,573.46 and after adjustment, on final calculation, appellant and second respondent were liable to them in a sum of Rs.33,83,963.49, issued legal notice. Informing compliance with the arbitration clause in the contracts the dispute was referred to the sole arbitrator appointed under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') by first respondent/claimant for adjudication of the disputes. Second respondent, a broker of appellant, filed a defence statement contending that there were no contractual obligations and the question of committing breach of contract did not arise. It was contended that he, as a person of experience in selection of cotton bales only had assisted the appellant in selecting the same and that there was no privity of contract between him and first respondent/claimant or appellant. Appellant contended that it never had acted upon the contracts at any point of time and there were no concluded contracts between appellant and first respondent/claimant Corporation. Both appellant as well as second respondent contended that they neither were interested nor concerned with the dealings and transaction of the other with the claimant Corporation. The sole arbitrator under orders dated 05.10.2002 accepted first respondent Corporation's claim and passed an award for a sum of Rs.33,82,963.59, jointly and severally, against appellant and second respondent, with costs. Appellant moved an appeal in Arbitration O.P.No.392 of 2005 on the file of learned I Additional District Judge, Coimbatore, which was dismissed under judgment dated 19.11.2009. There against, appellant has preferred the present appeal.

3. Heard learned counsel for appellant and learned counsel for first respondent. There is no appearance for respondents 2 and 3. Perused materials on record.

4. Ex.P5 - Contract No.GNT 55 dated 13.03.2001, Ex.P6 - Contract No.GNT 58 dated 15.03.2001 and Ex.P14 - revised Contract for GNT 58 were the basis of the claim of first respondent/claimant Corporation. Learned counsel for appellant referred to Ex.P5 and Ex.P6 to submit that while the same related to the subject of confirmation of sale of indigenous

cotton and terms and conditions thereof and had been addressed by claimant Corporation to appellant informing the name of appellant's broker as 'TRADE WELL' i.e., the proprietary concern of second respondent, it is to be noted that while a seal/stamp allegedly of appellant was affixed thereon, the same had not been signed by any person on behalf of appellant. Similar was the case with Ex.P14, revised contract. Learned counsel referred to various communications of the claimant Corporation by fax to appellant wherein request had been made towards appellant affixing signature and returning the original contracts to submit that the same indicated that the contracts had not been concluded. Learned counsel relied on judgment of the Apex Court in U.P.Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. and others [1996 (2) SCC 667] to submit that unless parties were ad idem, having agreed upon the terms and conditions mentioned in the agreement and the proposal of one was accepted by the other, the contract could not be considered complete. Learned counsel referred to judgment in Dresser Rand S.A. v. Bindal Agro Chem Ltd. and another [2006 (1) SCC 751] to contend that unless on proper construction the correspondence between the parties informed a binding contract between them or permitted an appropriate implication thereof to be drawn in law, a Court could not create a contract for the parties. Learned counsel also referred to judgments in Jagdish Chander v. Ramesh Chander and others [2007 (5) SCC 719], Yogi Agarwal v. Inspiration Clothes & U and others [2009 (1) SCC 372] and Bharat Sanchar Nigam Limited v. Telephone Cables Limited [2010 (5) SCC 213] to submit that the twin requirements of the Act of there being an arbitration agreement between the parties and of the same relating to the particular dispute, were not met in the instant case. Learned counsel referred to judgments in Oil and Natural Gas Corporation Ltd., v. SAW Pipes Ltd. [AIR 2003 SC 2629 (1)] and O.N.G.C. Ltd. v. Garware Shipping Corporation Ltd. [AIR 2008 SC 456] and submitted that the arbitral tribunal had proceeded to pass an award in the absence of a contract between the parties and the same was patently illegal and liable to be set aside.

5. Referring to Ex.P28, learned counsel submitted that under such communication dated 14.03.2002, appellant had addressed respondent/claimant informing that there was no contract binding on it as no representative authorized by it had entered into any written agreement or contracts in Exs.P5 and P6, that towards maintaining good relationship appellant had sent its authorized representative supported by a written authorization from Warangal to meet first respondent/claimant officials to explain its stand and to sort out the issue. Under such communication, appellant had required respondent/claimant not to raise fictitious claims on it. Learned counsel submitted that the principle of coram non-judice could be invoked at any stage.

6. Learned counsel for first respondent raised a preliminary objection to the maintainability of the present appeal. Learned counsel contended that section 16(2) of the Act stipulated that a plea of an Arbitral Tribunal not having jurisdiction was to be raised not later than the submission of the statement of defence and appellant having failed to do so was, under Section 4 of the Act, deemed to have waived his right to object.

7. A perusal of the defence statement filed by appellant before the Arbitral Tribunal informs its contention of being that there was no concluded contracts between claimant and it and therefore, the question of non-fulfilling its obligation under the contracts did not arise. It had contended that the contract had not been accepted and signed by it and mere offer of the claimant corporation would not constitute a contract. It informs that a deposit should have been made by it in confirmation of the contract and for non-carrying beyond one month carrying charges should have been paid, for confirmation of the contract. It contended that when it had neither signed the contract nor paid deposit money or paid carrying charges, question of non-lifting and hence loss to the claimant Corporation upon re-sale did not arise. It has also contended that the reference against it has no validity as there is no dispute between claimant and it. It further contended that the Tribunal had no jurisdiction to entertain the proceedings as no part of the cause of action arose at Coimbatore as per the averments in the claim statement.

8. The contention of appellant is there was no contract, much less a concluded one, between it and first respondent/claimant. Exs.P5, P6 and P14 addressed to appellant by claimant Corporation specifically read as follows:

'Please return the duplicate copy of this contract duly signed and affixing common seal by by you, within 7 days from the date of its receipt, in token of confirmation of this contract and all the terms and condition stated above. If signed copy is not received in stipulated time, then the contract shall be treated as accepted and confirmed by you, the buyer.'

9. It is seen that Exs.P5, P6 and P14 are in standard format and they, after informing the particulars of a specific transaction, inform the terms and conditions thereof. They also contain a clause providing for arbitration and inform that the same would be governed by the Act. In *Bharat Petroleum Corporation Ltd. v. Great Eastern Shipping Co. Ltd.* [AIR 2008 SC 357] Apex Court has informed thus:

'19. It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offeree's

silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance—an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct. '

10. Learned Arbitrator has found the failure of appellant to deny that second respondent was acting as its agent upon receipt of Ex.P6 and Ex.P14 was adequate reason to believe that second respondent indeed held such capacity. We consider it appropriate to place on record the reasons informed by Arbitrator in finding that a valid contract existed between parties:

'9. The claimant appears to have sent Ex.P5 contract to the second opposite party with a request to return the original contract duly signed with rubber seal in token of acceptance of the terms and conditions of the contract. It is also mentioned that if the contract is not received within 7 days it would be presumed that the terms and conditions were acceptable to the buyer. The last clause in the contract indicate that the buyer was asked to return the duplicate copy of the contract duly signed within 7 days failing which the contract would be treated as accepted and confirmed by the buyer. So far as Ex.P5 contract dated 13-3-2001 is concerned there is nothing to show that the contract was sent to the second opposite party. In the absence of any acknowledgment from the second opposite party it cannot be said that the contract was sent to the second opposite party. However the other two contracts namely Ex.P6 and P14 appear to have been sent to the second opposite party by Registered post with acknowledgment due. The receipt of these two contract were acknowledged by the second opposite party. The postal acknowledgements are filed. If the second opposite party had not authorized the first opposite party to enter into any contract with the claimant corporation, the second opposite party ought to have informed the claimant immediately on receipt of the contracts Ex.P6 and P7 that it had never authorized the first opposite party to purchase any cotton from the claimant corporation or to enter into any contract with the claimant. There is absolutely nothing to show that the second opposite party had sent any reply to the claimant on receipt of Ex.P6 and P7. This silence on the part of the second opposite party must have made the claimant to believe that the first opposite party must have acted as the agent of the second opposite party. There is yet another reason to believe that the first opposite party must have acted as the agent of the second opposite party. Ex.P21 is a communication sent by the claimant on 11-6-2001 to

the second opposite party informing them that bales that were held on the account of the second opposite party were resold and that loss on resale was being worked out and debit notes would be sent. This communication was acknowledged as could be seen from the postal acknowledgement. Like wise Ex.P.22 is another communication sent by the claimant on 6-7-2001 to the second opposite party informing the second opposite party about further resale of some more bales that were held on the account of the second opposite party. In this communication it is stated that there were still a balance of 768 bales of cotton were lying on the account of the second opposite party and that efforts were on to resell the same and to send loss on resale accounts to the second opposite party. This communication was also acknowledged by the second opposite party as could be seen from the postal acknowledgement. Since no reply denying the entering into contracts through the first opposite party was sent by the second opposite party, it has to be informed that the contracts were entered into by the second opposite party through the first opposite party. There is yet another circumstance to believe that the first opposite party as agent of the second opposite party had entered into the contracts. The second opposite party had entered into some contracts for purchase of cotton bales from the claimant corporation. The first opposite party acted as the agent of the second opposite party on earlier occasions as could be evidenced under Ex.P42 series consisting of contracts dated 19-5-2000 and 23-5-2002. The connected papers and the contracts show that the second opposite party had entered into contracts with the claimant through its agent the first opposite party. Hence it cannot be said that without any basis the present claims made against the second opposite party. It is pertinent to point out that the claimant corporation had sent fax messages in Ex.P.1 dated 14-3-2001, Ex.P4 dated 16-3-2001, Ex.P.8 dated 27-3-2001, Ex.P.11 dated 30-3-2001, Ex.P.15 dated 15-4-2001, Ex.P.16 dated 23-4-2001, Ex.P.18 dated 8-5-2001, Ex.P.19 dated 15-5-2001, Ex.P.23 dated 21-7-2001 and Ex.P.25 dated 5-10-2001 regarding the contracts and purchase of bales. The second opposite party has conveniently kept quiet without sending any reply. It may also be pointed out here that it is not the case of the second opposite party it did not receive any fax message from the claimant regarding the contracts and purchase of bales through the broker the first opposite party. The first opposite party while communicating with the claimant's branch office at Guntur has specifically mentioned that contract was

made for and on behalf of the second opposite party. In Ex.P7 dated 21-3-2001, Ex.P9 dated 29-3-2001 and Ex.P.12 dated 30-3-2001 the first opposite party has mentioned selection of bales were made for the second opposite party. On a consideration of all the aforesaid facts one has to come to the conclusion that notwithstanding the non signing of the contracts by the second opposite party the contracts were entered into by the second opposite party through the first opposite party.

10. The claimants in their letter Ex.P26 dated 21-11-2002 have requested the second opposite party to pay Rs.51,46,573.46 towards loss on resale of the bales. The claimants have not omitted to mention about the good business relationship that existed between the parties and requested the Finance Secretary of the second opposite party to arrange for the payment. No reply was sent to this letter. It was only after a legal notice in Ex.P.27 was sent to the opposite parties on 7-2-2002 a reply was sent by the second opposite party in Ex.P.28 dated 14-3-2002 to the claimant stating that there was no contract binding on the company. It is stated in this letter that no authorized representative of the company (Second opposite party) had entered into any written agreement. However in the concluding position of this letter it is written as follows : "In view of maintaining good relationship". If there was no transaction between the claimant and the second opposite party the second opposite party would not have bothered to maintain good relationship. That apart, it is mentioned in this letter that an authorized representative of the claimant met the officials of the claimant corporation and explained their stand. Now a pertinent question arises as to why the second opposite party did not send any reply to the claimant when the latter sent communication after communication mentioning about the contracts and non lifting of the bales. The only inference that could be drawn is that the second opposite party did enter into contracts with the claimant through the first opposite party. Now advertng to what was stated towards the end of para 8, I hold that there are strong circumstances to show that the contracts were entered into between the parties for the benefit of the second opposite party. In other words I held that the first opposite party as agent of the second opposite party had entered into contracts with the claimant and as such there was privity of contract between the claimant and opposite parties and that the contracts are enforceable against the opposite parties.'

To permit appellant to now contend that since Exs.P5, P6 and P14 were not signed by it there was no concluded contracts would be to allow it to take advantage of its own wrong. We may non-suit the appellant on this ground alone. As against the contention of appellant in its counter in the claim petition of there being no contracts/concluded contracts between it and respondent/claimant, appellant's present contention is of there being no arbitration agreement between them. We will deal also with such contention.

11. Section 7 of the Act defines arbitration agreement thus :

'7. Arbitration agreement. - (1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in -

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.'

It would be seen that under sub-section (1) parties may submit to arbitration a dispute between themselves and is not even necessary that the same must be one arising under a contract, it would suffice if it arises out of a legal relationship. Sub-section (4)(c) of such section informs that an arbitration agreement is in writing if in an exchange of statements of claim/defence it is alleged by one party and has not been denied by the other. Respondent/claimant has, in its claim, alleged the existence of an arbitration agreement. We find that contentions raised in the defence statement of appellant before arbitrator would not amount to denial of the arbitration agreement.

12. In S.N.Prasad, Hitek Industries (Bihar) Limited v. Monnet Finance Limited and others [2011 (1) SCC 320], Apex Court has held thus:

'11. What therefore remains to be considered is whether there is an arbitration agreement as contemplated under Section 7(4)(c) of the Act, which provides that an arbitration agreement in writing can be said to exist, if it is contained in an exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other. The statement of claim filed by the first respondent before the arbitrator does not contain an allegation or assertion of an arbitration agreement between the first respondent and the appellant. Nor has the appellant accepted the existence of any arbitration agreement by not denying such arbitration agreement in the defence filed before the arbitrator. On the other hand, the appellant specifically contended before the arbitrator that there was no arbitration agreement between them (the first respondent and the appellant) and therefore the arbitrator did not have jurisdiction.

12. But the words, "statements of claim and defence" occurring in Section 7(4)(c) of the Act, are not restricted to the statements of claim and defence filed before the arbitrator. If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of Section 7(4)(c) of the Act. It follows that if in the application filed under Section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties.'

13. We may also consider the effect of appellant's participation in the arbitration proceedings since a perusal of the order of learned Arbitrator reveal that his order has been passed after hot contest and on detailed consideration of the merits of the case.

14. In MSP Infrastructure Limited v. Madhya Pradesh Road Development Corporation Limited [2015 (13) SCC 713], it has been held as follows:

'13. Section 16(2) of the Arbitration Act, 1996 reads as follows:

"16. (2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator."

On a plain reading, this provision mandates that a plea that the tribunal does not have jurisdiction shall not be raised later than the submission of the statement of defence. There is no doubt about either the meaning of the words used in the section nor the intention. Simply put, there is a prohibition on the party from raising a plea that the tribunal does not have jurisdiction after the party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning a tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. This is exactly what has been done by the respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree.

14. Shri Divan, the learned Senior Counsel for the respondent vehemently submitted that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the court which decided the matter, since the order of such a court is a nullity. It is not necessary to refer to the long line of cases in this regard since, that is the law. But, it must be remembered that this position of law has been well settled in relation to

civil disputes in courts and not in relation to arbitrations under the Arbitration Act, 1996. Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament, in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. In the circumstances, we reject the submission on behalf of the respondent.

15. It was next contended on behalf of the respondent by Shri Divan, that Section 16 undoubtedly empowers the tribunal to rule on its own jurisdiction and any objections to it must be raised not later than the submission of the statement of defence. However, according to the learned Senior Counsel, objections to the jurisdiction of a tribunal may be of several kinds as is well known, and Section 16 does not cover them all. It was further contended that where the objection was of such a nature that it would go to the competence of the Arbitral Tribunal to deal with the subject-matter of arbitration itself and the consequence would be the nullity of the award, such objection may be raised even at the hearing of the petition under Section 34 of the Act. In support, the learned Senior Counsel relied on clause (b) of sub-section (2) of Section 34 which reads as follows:

"34.(2) An arbitral award may be set aside by the Court only if—

(a) ***

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India."

16. It is not possible to accept this submission. In the first place, there is nothing to warrant the inference that all objections to the jurisdiction of the tribunal cannot be raised under Section 16 and that the tribunal does not have power to rule on its own jurisdiction. Secondly, Parliament has employed a different phraseology in clause (b) of Section 34. That phraseology is "the subject-matter of the dispute is not capable of settlement by arbitration". This phrase does not necessarily refer to an objection to "jurisdiction" as the term is well known. In fact, it refers to a situation where the dispute referred for arbitration, by reason of its subject-matter is not capable of settlement by arbitration at all.

Examples of such cases have been referred to by the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* [(2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] This Court observed as follows:

"36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grants of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

The scheme of the Act is thus clear. All objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that the subject-matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 by the Court.'

The decision answers also the contention of learned counsel for appellant on application of the principle of coram non-judice.

15. Appellant having failed to challenge the jurisdiction of the Tribunal on the ground of there being no arbitration agreement between parties, which, in any event was not a ground available to it, for reasons earlier stated, is precluded from presently raising such contention. Even as we uphold the preliminary objection to the maintainability of the appeal, we have recorded the reasoning of the arbitral tribunal merely towards satisfying ourselves on whether even an appeal u/s.34 of the Act would lie. We have informed above that the assertion of the existence of the arbitration agreement by respondent/claimant in the claim petition and the failure of appellant to deny the same in its statement of defence amounts to acceptance of the existence of the arbitration agreement. The decision of the Supreme Court in *MSP Infrastructure Limited* informs that the act of participation in the arbitration proceedings disentitles a party from contesting the jurisdiction of the Tribunal. A reading of Section 34 of the Act makes clear that none of the circumstances which entitle a party to move an application for setting aside an arbitral award are attracted in the facts of

the present case. When so, there is no occasion for preferring appeal u/s.37 of the Act.

The Civil Miscellaneous Appeal shall stand dismissed. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

gm

To

1. The I Additional District Judge,
Coimbatore.

2. The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to M/s. R. Bharath Kumar, Advocate SR.91298

+ 1 cc to Mr. Anirudh Krishnan, Associates

AD(CO)
EU(30/01/2018)

Civil Miscellaneous Appeal No.3274 of 2010

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