

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Revision No.359 of 2016

Arising Out of PS. Case No.-1420 Year-2008 Thana- BEGUSARAI COMPLAINT CASE District-
Begusarai

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Surendra Prasad Son of Late Janki Sharan Prasad Resident of village- Paras Nagar
Bagha, P.O.- Paras Nagar Bagha, P.S.- Paras Nagar, Bagha, District- West
Champaran

... .. Petitioner/s

Versus

1. The State of Bihar
2. Amarnath Singh Son of Late Vishundeo Singh Resident of village- Bihat Tola,
Maksaspur, P.S.- Barauni, District- Begusarai

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. N.K. Agarwal, Sr. Advocate Mr. Sanjay Kumar, Adv.
For the Respondent/s	:	Mr. Bharat Lal, APP
For O.P. No. 2	:	Mr. Aditya Narayan Singh, Adv. Mr. Shashi Bhushan Pandey, Adv.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
C.A.V. JUDGMENT

Date : 18-12-2018

As both the parties have appeared and the lower court records are also available, this revision application is taken up for disposal at the admission stage itself.

2. Heard both the parties.

3. This revision application is directed against the order dated 02.02.2016 passed by learned District and Sessions Judge, Begusarai in Criminal Appeal No. 83/2014, whereby, the learned Sessions Judge has affirmed and uphold the order dated 05.03.2014 passed by the Judicial Magistrate -1st Class, Begusarai in Complaint Case No.1420/2008, by which, the



petitioner has been held guilty for commission of offence punishable under Section 138 of the Negotiable Instrument Act (hereinafter referred to as "the N.I. Act") and has been directed to pay a fine of Rs. 40 lacs along with interest @ 7% per annum and further directed that the amount of fine shall be given to the complainant under Section 357(1) of the Cr.P.C. within a period of three months and accordingly dismissed the appeal.

4. Case of the petitioner is that he is a contractor and has been working in East Central Railway at several sites and the petitioner approached the complainant to do contract work on his registration by investing capital on payment of bills. Petitioner promised that he would deduct only 2-1/2% of bill amount and will also pay sales tax, income tax and also handle labour issues. The complainant agreed and lieu there of power of attorney was executed.

5. Further case is that opposite party no. 2 began the execution of work by investing his own capital and a sum of Rs. 80 lacs became due on the petitioner. Thereafter, opposite party no. 2 along with one Rajeev Kumar demanded their dues, on which, the petitioner handed over a cheque of Rs. 40 lacs bearing no. 142454 of account number 1005184 of Bank of Baroda, Zeromile Branch. Thereafter, on the direction of the petitioner, opposite party no. 2 presented the cheque but



the same was dishonored by the bank with remark 'insufficient balance'. Opposite party no. 2 sent a legal notice to the petitioner but the petitioner did not reply and lastly, on 30.06.2018, the complainant – opposite party no. 2 contacted the petitioner for his payment of Rs. 80 lacs, then the petitioner became angry and refused to make any payment.

6. The complainant – opposite party filed the complaint in the court of Chief Judicial Magistrate, Begusarai on 03.07.2018 and after enquiry, the summons were issued against the petitioner under Section 417 of the Indian Penal Code and Section 138 of the N.I. Act.

7. During trial of the case, four witnesses were examined on behalf of the complainant. Apart from that some documentary evidence, have also been brought on record, which has been marked as Ext. 1 to 8.

8. On behalf of accused - petitioner six witnesses have been examined and large number of documents have been filed.

9. The trial court i.e. the Judicial Magistrate- 1st Class, Begusarai vide judgment and order dated 05.05.2014 passed in Complaint Case No. 1420/08, though not found the accused-petitioner guilty for the offence under Section 417 of the Indian Penal Code, however, held him guilty under Section 138 N.I.Act and accordingly convicted him under Section 138



N.I. Act and directed to pay a fine of Rs. 40 lacs along with interest @ 7% per annum from the date of lapse of 15 days after notice till today and further directed that the entire amount shall be given to the complainant as a compensation under Section 357(1) Cr.P.C. within a period of three months from the date of order.

10. It appears that against the aforesaid judgment and order 05.05.2014, the petitioner preferred Criminal Appeal before the Appellate Court and the Appellate Court and the appeal filed by the petitioner has also been dismissed by the learned Sessions Judge, Begusarai vide judgment dated 02.02.2010 passed in Cr. Appeal No. 83/14, affirming the judgment and order of trial court.

11. Aggrieved, the petitioner moved before this Court by filing the instant revision application.

12. Learned Senior Counsel appearing on behalf of the petitioner has not pressed the revision application so far finding of facts is concerned rather the limited argument of learned senior counsel for the petitioner is that the case under Section 138 N.I. Act is triable by the Magistrate and Section 143(1) of the N.I. Act, provides for conducting the summary trial as provided under Section 262 to 265 Cr.P.C. and further Section 143 provides that when at the commencement of, or in the course of, a summary trial under this section, it appears to



the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code, but in the present case, there is no order passed by the Magistrate directing to try the case as summons case, as such, it has to be assumed that the trial has been conducted according to Section 143(1) of the N.I. Act as summary trial, as such, the evidence recorded by the earlier Magistrate, cannot be taken into account by the transferee Magistrate. It has also been submitted that in the present case, evidence has been recorded by another Magistrate, whereas, judgment has been passed by Shri Gaurav Anand, Judicial Magistrate -1st Class, Begusarai. It has further been contended that N.I. Act is a special act and the legislator has provided a procedure for conducting a trial that cannot be deviated and furthermore Section 326 (3) of the Cr.P.C. also provides that it is not open to the transferee Magistrate to consider the evidence already recorded by another Magistrate and on that ground also, trial is vitiated, as such, the judgment and order passed by the learned trial court is not sustainable in



the eye of law, as it is against the provisions contained in Section 143 of N.I. Act as well as under Section 326 (3) of Cr.P.C. In support of his contention, learned senior counsel has relied upon a Single Judge Bench decision of this Court in the case of **Nathmal Kabra vs. The State of Bihar** reported in **PLJR 1990 (1) 477** and on the decision of Hon'ble Apex Court in the case of **Pyare Lal vs. State of Punjab** repored in **AIR 1962 SC 690**.

13. In this case, opposite no. 2 has appeared through his counsel and learned counsel for opposite party no. 2 has vehemently countered the submissions of petitioner and submitted that in this case, the evidence was recorded in the manner prescribed for recording the evidence in a summon case and instead of substance of evidence as provided under Section 264 Cr.P.C., detailed evidence has been recorded, the petitioner was given a chance to cross-examine the witness and the statement of the petitioner under Section 313 Cr.P.C has also been recorded, as such, the transferee Magistrate has relied upon the evidence recorded by the earlier Magistrate as per the provisions contained in Section 326 (1) and (2) of the Code and in such a situation, section 326 (3) Cr.P.C. has no application. Further submission of learned counsel for opposite party no. 2 is that under proviso to Section 143 of the N.I. Act, a Magistrate may conduct a trial as



summon case and in the present case, record clearly shows that the trial was conducted as summon case and the petitioner has participated in the same and he never raised any objection either before the trial court or before the appellate court and as such, it is not open to the petitioner to raise the aforesaid ground at this stage. On the basis of above contention, it has been submitted by opposite party no. 2 is that there is no illegality in the judgment of trial court as well as appellate court.

14. Heard both sides and perused the record. It appears that whole issue revolves around the ingredient of Section 143 N.I. Act, Section 263 to 265 of the Cr. P.C. as well as Section 326 of the Cr.P.C. As such, before going into the merits of the case, it is necessary to extract the provisions of Section 143 of the N.I. Act, which provides as follows:-

(1). Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials: Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not



exceeding one year and an amount of fine exceeding five thousand rupees: Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

15. Section 262 to 265 of the Cr.P.C. provides as follows:-

262. Procedure for summary trials.

(I) In trials under this Chapter, the procedure specified in this Code for the trial of summons- case shall be followed except as hereinafter mentioned.

(II) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

Section 263 of C.r.P.C. "Record in summary trials"

In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:-

(a) the serial number of the case:



(b) the date of the commission of the offence;

(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the finding

(i) the sentence or other final order

(j) the date on which proceedings terminated.

Section 264 of C.r.P.C. "Judgment in cases tried summarily"

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.

Section 265 of C.r.P.C. "Language of record and judgment"



(1) Every such record and judgment shall be written in the language of the Court.

(2) The High Court may authorise any Magistrate empowered to try offences summarily to prepare the aforesaid record or judgment or both by means of an officer appointed in this behalf by the Chief Judicial Magistrate, and the record or judgment so prepared shall be signed by such Magistrate”.

16. Further Section 326 of the Cr.P.C. provides for conviction or commitment on evidence partly recorded by one Magistrate and partly by another, which reads as under:

(1) “Whenever any Judge or Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself: Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re- summon any such witness, and after such further examination, cross- examination and re-examination, if any, as he may permit, the witness shall be discharged.



(II) When a case is transferred under the provisions of this Code [from one Judge to another Judge or from one Magistrate to another Magistrate], the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(III) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325”.

17. From bare perusal of Section 143 of N.I.Act, it is evident that it is the intention of the legislator that ordinarily offence under N.I. Act should be tried in summary way and only when a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, it is not desirable to try the case summarily. The Magistrate can proceed to recall the witnesses already examined and further proceed to rehear the case. One of the grounds, on which, a Magistrate may decide not to try a case summarily is that sentence of imprisonment for a term exceeding one year may have to be passed. Other grounds mentioned in second proviso of the N.I. Act is for any other reason and as such, it appears that the act permits the Magistrate not to try the case as summary case even at the commencement of trial. Further, it appears that section 143(1) of N.I. Act, also provides that as



the offence under this chapter shall be tried by the Magistrate of the first class/Metropolitan Magistrate and the provisions of Section 262 to 265 Cr.P.C. both inclusive of the code shall, as far as, may be applied to such trials.

18. On plain reading of Section 262 to 265 of the Cr.P.C., it appears that Section 262 provides procedure for summary trials. Section 263 of the Code provides for records in summary trial and Section 264 of the Code provides for Judgment in cases tried summarily. On going through the lower court records, it appears that in this case no substance of evidence was recorded by the Magistrate as provided under Section 264 Cr.P.C. rather Magistrate has noted down the evidence and made them a part of the record of the case and even the procedure of Section 263 Cr.P.C. has not been followed.

19. Hon'ble Apex Court in the case of **Nitinbhai Saevatilal Shah & Anr. vs. Manubhai Manjibhai Panchal & Anr.** reported in **AIR 2011 SC 3076** has considered the provisions, however, it was a case where complaint for an offence under Section 138 of the N.I. Act was tried summarily and successor Magistrate appreciated the evidence recorded by its predecessor. The Apex Court held that even consent of the parties cannot be given jurisdiction to try the case in ignorance of the provisions of law and judgment also disclosed that



Judicial Magistrate cannot proceed on the subsistence of evidence recorded by his predecessor, it may cause serious prejudice to the accused and for difficult for succeeding judicial Magistrate to decide the matter effectively and to do substantial justice.

20. The purpose behind the provisions under Section 326 (3) of the Code is that in summary trial under Section 264 Cr.P.C. only the substance of evidence has to be recorded and the court does not record the entire statement of the witness. Therefore, the judge or the Magistrate, who had recorded such substance of evidence is in a position to appreciate to the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor as if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and it would be difficult for a succeeding Magistrate to decide the matter effectively and to do substantial justice.

21. In the present case, as stated above, the evidence has been recorded in its entirety and even the chance has also been given to the petitioner for cross – examination and statement of the accused has also been recorded under Section 313 Cr.P.C. As such, it cannot be said that the



evidence has been recorded in a summary way or as in the case of summary trial and learned counsel for the petitioner has also not controverted this fact.

22. Learned counsel for the petitioner has cited a decision of Hon'ble Apex Court in the case of **Pyare Lal vs. State of Punjab** (supra), as well as the judgment of this Court in the case of **Nathmal Kabra and Anr. vs. The State of Bihar and Others** (supra). On perusal of the judgment in the case of **Pyare Lal (supra)**, it appears that the case was under Prevention of Corruption Act, and Criminal Law Amendment Act, 1952 and in that case, trial commenced before a Special Judge, Patiala, he recorded the evidence but before he could deliver the judgment, he was transferred and succeeded by another Special Judge, who did not recall the witnesses and hear the evidence but proceeded without objection from either side and trial started from the stage at which, his predecessor had left it and heard the argument and delivered the judgment. The question was raised that the judgment rendered by the successor judge on the basis of evidence recorded by the predecessor judge is against the provisions of the Act.

23. It further appears that in the above judgment, the question arose as Section 8 makes certain provisions of the code applicable to the proceeding before a Special Judge. The question is whether Section 350 of the Code has one of such



provisions, shall apply in case of Special Judge, as Section 8 provides that special Judge shall follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates and save to this extent., the provision-,, of the Code is applicable to a Court of session, shall govern him as if he were such a Court subject to certain qualifications, whereas, section 350 of the Code is applicable only to Magistrates and not a Court of session and in such a situation, the Hon'ble Apex Court after considering the arguments, come to the conclusion in para – 14, which reads as under:-

“For all these reasons, we would prefer the opinion expressed by Mehar Singh J. We think that under the Act, as it stood before its amendment as aforesaid, s. 350 of the Code was not available when one special Judge succeeded another. 'we hold that S. Jagjit Singh had no authority under the law to proceed with the trial of the case from the stage at which S. Narinder Singh left it. The conviction by S. Jagjit Singh of the appellant cannot be supported as he had not heard the evidence in the case himself The proceedings before him were clearly incompetent”.

24. It further appears that on perusal of the above judgment of the Hon'ble Apex Court that later on Section 350 Cr.P.C. was amended and Section 350 of the Code was made



applicable to the proceedings before a Special Judge also.

25. As such, in the above judgment, Section 350 of the Cr.P.C. was not applicable prior to its amendment in the case of Special Judge rather in the case of Magistrate and considering the same, the Hon'ble Apex Court has come to the conclusion that on the basis of evidence recorded by the predecessor judge, the judgment cannot be delivered by the successor judge.

26. So far judgment on single Judge Bench of this Court in the case of Nathmal Kabra (supra) is concerned, it appears that the same relates to a case under Essential Commodities Act and the learned Single Judge relying upon the decision rendered by Hon'ble Apex Court in the case of Pyare Lal case (supra) has come to the conclusion in paragraph 20 and 22, which reads as follows:-

20. Thus provisions of sub-section 1, 2 and 3 of Section 326 of the Cr.P.C. does not apply to the cases, which are being summarily tried under the provisions of Section 12AA(i)(f) of the Essential Commodities Act".

22. There is no controversy that the general principle of law is that a judge or magistrate can decide a case only on the basis of evidence taken by him. The provision as laid down under sub-section (1) of Section 326 of the Cod of



Criminal Procedure., shall not be applicable in the present case because the summary trial of the present case was to be conducted by the special Judge. The successor, Special Judge had no authority under the law to proceed with the trial of the case from the stage at which, the predecessor had left it. Therefore, it has to be held that the conviction recorded by the successor, Special Judge against the appellants, upon the evidence recorded by the predecessor without, recalling the witnesses cannot be upheld as the successor-Special Judge had not himself heard the evidence. The illegality or irregularity cannot be cured because the question arises for the competency of the Special Judge. According to the Cardinal Principle of Law, it is a right of an accused that his case be decided by a judge, who has heard the whole of it.

27. On perusal of the above judgment, it appears that in the above case also, trial has been conducted by the Special Judge as a summary trial. In such a situation, the Single Judge Bench of this Court held that recording of the evidence by predecessor judge and on the basis of which, the judgment was by the successor judge, is not sustainable, as successor judge was not competent.

28. On the other hand, the present case, which arises out of an offence under Section 138 of the N.I. Act, the evidence has not been recorded as in the case of summary trial as the provisions of Section 263 and 264 of the Cr.P.C. has not been followed and Section 143 of the N.I. Act provides 'as far as



may be' and further Section 143 proviso provides "that when it appears to Magistrate that imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code. As such, as per Section 143 of the N.I. Act, it is not so that the Magistrate has to follow only the procedure for summary trial and he is not competent to follow the procedure of summons trial rather in the present case evidence has been recorded in its entirety and opportunity of cross-examination was given to the parties. Learned counsel for the petitioner has raised a point that neither petitioner was heard nor any reason has been assigned for trying the case otherwise. The above point was discussed by Rajasthan High Court in the Case of **Tripati Vyas vs. State of Rajasthan and Anr** reported in **2013(4)RCR(Criminal)110**, in which, it has been held that:-

"The minute examination of second proviso to [section 143](#) (1) reveals that when it appears to the Magistrate that sentence of imprisonment may be for a period of more than a year then order is not required to be recorded. The order is required to be recorded after hearing the parties when Magistrate finds it to be undesirable to try the complaint summarily. Therefore, second proviso to



[section 143](#) (1) of the Act of 1881 has to be divided in to parts so that no order is to be recorded to show pre-determination of learned Magistrate for imprisonment. It is for that reason that opening words of the proviso indicate that when it appears to the learned Magistrate that nature of the case is such which may require sentence of imprisonment of more than a year, trial can be by the mode other than summary trial. The use of word appears is of substance. The word appears means when the Magistrate prima facie finds or forms an opinion about nature of the case which may require sentence of imprisonment of more than a year, case can be tried other than by summary procedure. Prima facie opinion is not required to be recorded, otherwise, it will show pre-determination of the learned Magistrate. The second proviso gives two grounds to depart from summary procedure. In second part, when it is found undesirable to hold summary trial, reasons are required to be recorded after hearing the parties.

With the aforesaid interpretation, the issue raised by learned counsel for accused petitioners regarding pre-determination of Magistrate would not arise.

There is another reason not to record an order. If it appears to the Magistrate that sentence of imprisonment may be of a period exceeding one year. If order is recorded then reasons are to be given. It is to justify the order. Recording of order with reasons would comment on the nature of the case and, in that eventuality, it will cause prejudice to the accused and further show pre-determination of mind. It is required to be avoided. To have harmonious interpretation of second proviso, it has to be concluded with the comments that as and when it appears to the Magistrate that nature of the case is such where sentence of imprisonment may be for a term exceeding one year, order is not required to be recorded after hearing the parties, however, if it is found to be



undesirable to try the complaint summarily then order is to be passed after hearing parties”.

What can be the reasons to find it to be undesirable to proceed with summary trial, can be, if there is a denial of issuance of a cheque or signatures on it or showing that no legally enforceable debt or liability exist to invoke Section 138 of the Act of 1881. In such cases, proper chance of defence has to be given to the accused. The Magistrate should record an order after hearing the parties. There can be many such reasons out of which few have been illustrated above.

Accordingly, trial courts are directed to evolve the method given in this judgment while trying the complaint for offence under Section 138 of the Negotiable Instruments Act, 1881, more specifically when it is to be tried as summons case. It will avoid type of controversy raised herein. When it is summons trial without an order, it would be presumed that it appeared to the Magistrate that sentence of imprisonment may be of more than a year”.

29. From the discussions made above, it appears that so far decision of Hon'ble Supreme Court in the case of Pyare Lal (supra), is concerned, the fact of that case is somewhat different to the facts of the present case, where it was no permissible under Section 350 to give the judgment on the evidence recorded by the predecessor court, whereas, in the present case, proviso to Section 143 (1) provided for the trial other than the summary trials also. So far decision of Single Judge Bench of this Court in the case of Nathmal Kabra (supra) is concerned, the same is also not applicable in the facts of the present case as the same is also with regard to summary



trial and as such the judgment passed by the successor court on the evidence recorded by the predecessor court has been found illegal. In the Judgment of Hon'ble Apex Court in the case of **Nitinbhai Saevatilal Shah & Anr. (supra)** also evidence was recorded as summary trial, whereas, in the present case, the evidence has been recorded as summons trial case, detail evidence has been recorded and accused was given the opportunity to cross-examine and in such a situation, it cannot be said that accused was prejudiced by passing the judgment by successor court on the basis of evidence recorded by predecessor court. So far contention of learned counsel for the petitioner that the learned Trial Court has not given the opportunity to the accused to be heard nor recorded any reason under second proviso to Section 143 of the N.I. Act. However, it appears that no objection was raised by the petitioner rather the petitioner participated in the full trial and allowed the judgment to be passed and even in appeal, he did not raise any objection. On the other hand, learned Magistrate has recorded the evidence as summons case from very beginning, as such, it would be presumed that it appeared to the Magistrate that sentence of imprisonment of more than one year may be passed in that case. Furthermore, as noticed in the case of **Tripati Vyas (Supra)**, a Single Judge Bench of Rajasthan High Court has also observed that if any reason has



been assigned, it would show the predetermination of the Magistrate. Moreover, it cannot vitiate the whole trial as it is not so that learned Magistrate was not competent to proceed with other proceeding, other than summary trial. As such, it may be mere irregularity, which would not vitiate the whole trial, rather it is curable.

30. So far finding of fact is concerned, the same has not been challenged by the learned counsel for the petitioner. Moreover, appellate court has affirmed the finding of trial court and the evidence is well discussed by both the courts.

31. Accordingly, I find no merit in the instant revision application and the same is hereby dismissed.

(Vinod Kumar Sinha, J)

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