

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.163/2018**

Shri Shiva Subha Morye

(since deceased),

Through the legal representatives :

1(a) Smt. Parvati Shiva Morye

(since deceased)

1(b) Shri Rajendra Morye,

1(c) Shri Govind Morye,

1(d) Shri Vinayak Morye,

1(e) Shri Satish Morye

1(f) Shri Sanjay Morye,

All of major age,

Indian Nationals,

residents of Kumbarjua, Ilhas-Goa.

Petitioner No.1(d) for self and

constituted power of attorney for

Petitioner nos.1(b),1(c),1(e) & 1(f)

.... Petitioners

V/s

1. Mr. Menino Xavier Gomes,
son of Ricardo Gomes,
major, retired,
resident of House No.466,
near Tonca Bridge,
P.O. Marcela, Ponda
Taluka, Goa.
2. Mr. Juvenal Torres,
son of Prudente Torres,
and his wife,
3. Smt. Annie Mary Pinto E Torres
(both since deceased)
through their legal heir:
- 3(a) Mr. Cleophas Torres,
major, resident of Palmar
Santo Estevam, Tiswadi-Goa.
4. Mr. Teofilo Souza Mathias D'Souza,
major, married, businessman,
resident of Bambolim,
near Bambolim Holy Cross,

Bambolim, Tiswadi-Goa.

.... Respondents

Shri S.D. Lotlikar, Senior Advocate with Ms. A. Naik, Advocate for the Petitioners.

Shri G. Agni with Shri E. Usapkar, Advocates for the Respondent No.1.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 24th APRIL, 2018

Pronounced on: 4th MAY, 2018

JUDGMENT :

Rule. Heard forthwith with the consent of the learned Counsels appearing for the parties. Learned Counsel for the respondent no.1 waives service.

2. This petition takes exception to the impugned order dated 5/10/2017 passed by the Civil Judge Junior Division, Panaji pursuant to which the learned Trial Judge declined to stay the suit in view of the issue of tenancy and dismissed the application moved on behalf of the petitioners seeking the suit to be kept in abeyance and invoking the jurisdiction of this Court under Article 227 of the Constitution of India. The case of the petitioners briefly was that the respondent no.1 had filed the suit for declaration, cancellation of the Sale Deed, recovery of possession, permanent and mandatory injunction against the petitioners relating to the property "Horta" bearing the distinct Survey No.40/5 with distinct boundaries. The respondent no.1 claimed ownership of the property pursuant to the Sale Deed dated 10/09/2004. It was their case that on going through the survey

records Form I and XIV of Survey No.40/5, the respondent no.1 found that the name of the deceased petitioner no.1 was found recorded in the other rights column having leasehold rights of the coconut trees in the suit property who did not hold any leasehold right at any point of time nor had any property or any portion thereof and on that premise sought for the stated reliefs.

3. The petitioners in their written statement had set up a case that they were the leaseholders of the suit property, as such the tenants/deemed purchasers and therefore the Civil Court had no jurisdiction to decide the issues involved in the suit. The tenancy issue in respect of the suit property was already pending decision before the Mamlatdar much prior to the filing of the suit and therefore the sale of the property made by the owners in favour of the respondent no.1 by the Deed dated 10/09/2004 was bad in law and contrary to the provisions of the Agricultural Tenancy Act. An issue was framed by the Trial Court whether the petitioners proved that they were in exclusive possession of the Survey No.40/5 as tenants/deemed purchasers and therefore the Sale Deed dated 10/09/2004 in favour of the respondent no.1 was null and void. It was the petitioners' case that the respondent no.1 had moved an application under Order XV Rule 5 read with Section 151 of CPC for striking of the issue nos.5 & 7 and for framing additional issues on the premise that the tenancy issue did not arise in the suit and the same ought not to have been framed.

4. This application was vehemently resisted by the petitioners who claimed that they were entitled to pursue the issue of tenancy before the Mamlatdar and that in view thereof the Civil Suit had to be kept in abeyance. The Trial Judge partly allowed the application rejecting the request of the respondent no.1 to delete the issue of tenancy and that it would stand amended by deletion of a portion thereof which required the petitioners to prove the invalidity of the Sale Deed dated 10/09/2004. The petitioners had moved an application to refer the issue of tenancy to the Mamlatdar for adjudication which the Trial Court rejected observing that the petitioners were only required to prove their possession and that the Civil Court was empowered to decide the issue of fact and it was not required to be referred to the Mamlatdar. They had preferred a Writ Petition before this Court being Writ petition No.561/2014 and while disposing off the same this Court vide its order dated 7/11/2004 had made certain observations at para 16 namely:

"The order to keep the inquiry in tenancy case in abeyance with respect to the suit property does not appear to be correct. In fact the issue of tenancy has to be decided in the first instance. But the fact remains that the said order dated 25/06/2009 passed by the learned Deputy Collector is not under challenge before this Court. It is for the defendants no.1(a) to 1(f) to challenge the said order dated 25/06/2009 of the Deputy Collector, before the appropriate Authority and get it set aside and to see that the Regular Civil Suit No.111/2005 is kept in abeyance till the decision of the Mamlatdar on the question of tenancy."

5. It was further the case of the petitioners that in view of the said observations of this Court in the Writ Petition no.561/2014, they had moved an application for keeping the suit before the Trial Court in abeyance alongwith all the necessary documents which was contested by the respondent no.1 on the ground that the order of this Court was being misquoted and the counter claim filed by the petitioners was already dismissed. The Trial Judge vide the order dated 5/10/2017 dismissed the application on the ground that it was clear from the records that no tenancy issue was framed in the suit and no material was brought on record before the competent Court of jurisdiction thereby giving rise to the petition under Article 227 of the Constitution of India.

6. Heard Shri S.D. Lotlikar, learned Senior Counsel for the petitioners who contended that the issue of tenancy was framed by the Trial Court pursuant to which the petitioners were to prove that they were in exclusive possession of the Survey No.40/5 as tenants/deemed purchasers of Mrs. Yvonne Torres and her children. The Civil Court could not decide the issue of tenancy and which had to be necessarily decided by the Mamlatdar being the Court of competent jurisdiction. He next adverted to the judgment of this Court dated 7/11/2014 and invited attention to the paragraphs 15 and 16 thereof and submitted that in view of the clear observations made by this Court, though the question of referring the issue no.5 to the

Mamlatdar did not arise in view of the separate proceedings filed by the petitioners, nonetheless, the order to keep the inquiry in abeyance did not appear to be correct and quite on the contrary the issue of tenancy had to be decided in the first instance and in view thereof disposed off the petition.

7. Shri Lotlikar, learned Senior Counsel further contended that in view of the judgment of the Hon'ble Apex Court in **Shri Inacio Martins (deceased) through LR's V/s. Narayan Hari Naik [AIR 1993 SC 1756]**, the Trial Court while passing the order proceeded on an assumption that no issue of tenancy was raised even though an issue of tenancy was framed by the Trial Court. Besides, the application to delete the issue at the instance of the respondents was dismissed. He next adverted to the plaint and the relief clause 'd' and submitted that the Civil Court did not have the jurisdiction to decide the same. There was no basis in the case of the respondents that the suit should proceed on the basis of possession when the issue of tenancy was at large before the competent Court. Last but not the least, he contented that the counter claim was executed in terms of Order VIII Rule 6C CPC and it was not a case of rejection of the counter-claim as was the case of the respondents. The petition had therefore to be allowed quashing and setting aside the impugned order and keeping the suit in abeyance pending the determination of the issue of tenancy.

8. Shri G. Agni, learned Advocate for the respondents submitted that the petitioners had raised the counter claim alongwith the written statement raising a plea that they were the tenants/deemed purchasers of the property bearing Survey No.40/05 and in exclusive possession and enjoyment of the same and seeking declaration of the Sale Deed dated 10/09/2004 executed by Smt. Yvonne and her children in favour of the respondent no.1 being null and void. The counter claim was dismissed vide the order dated 15/07/2008. The Trial Court refused to hear the issue of tenancy and there was no challenge to this order which had the force of a decree. He next adverted to the order passed by the Trial Court dated 26/06/2014 in which the Trial Court had rendered a finding that the issue no.5 of tenancy was framed on a pleading of the factum of possession and to that extent allowed the amendment of the issue no.5 to delete the part seeking a declaration of the Sale Deed as null and void and deleted the issue no.5 as the counter claim was rejected. He next adverted to the order dated 13/02/2008 passed by the learned District Judge pursuant to which the learned District Judge partly allowed the appeal of the respondent no.1 with a direction to the petitioners to maintain the status quo in respect of the suit property bearing Survey No.40/5.

9. It was the contention of Shri G. Agni, learned Advocate for the

respondents that the petitioner had independently filed tenancy proceedings before the Mamlatdar. However, the Deputy Collector and the Sub-divisional Magistrate vide the judgment dated 25/06/2009 had partly allowed the petition filed by the respondent no.1, quashed and set aside the impugned judgment and kept the inquiry in respect of the property surveyed under No.40/5 in abeyance till the decision of the Civil Court about the Sale Deed. The learned Deputy Collector had clearly rendered findings against the petitioners that they had denied the status of the respondents as the landlord and that from the averments made it was apparent that there was no landlord and tenant relationship between the petitioners therein i.e. the respondents here and the petitioners. He invited attention to the pleadings at paragraph 11 of the written statement and placed on record the Survey Plan of the property bearing Survey No.40/2 and that on sub-division bearing Survey No.40/2 and 40/5 relating to the same property.

10. It was the contention of Shri G. Agni that it was not available to the petitioners to claim tenancy when they had agreed for the sale of the property in favour of the respondent no.1. He next referred to the affidavit of the petitioner no.1(d) Vinayak Morye, that of Shri A.J. Fernandes, and the report of the Mamlatdar dated 8/07/2005. The issue of tenancy was set at rest and no injunction was granted in the petitioners' favour. The Deputy Collector too had not granted the relief

of tenancy and the rejection of the counter-claim had attained finality. He placed reliance in **Uttam Sambha Deshmukh & Ors. V/s. Yamunabai w/o. Chandrabhan Bhoyar & Ors. [1998 3 ALL MR 125]**, **Sadanand Vithal Naik & Ors. V/s. Smt. Rashmi Dinesh Naik & Ors. [2010 4 BomCR 688]**, **Gajanan s/o Govind Mokalkar V/s. Jagdeo s/o Ganpat Warankar [2006 2 AIR (Bom)(R) 102]**, **Baliram Maruti Satvekar V/s. Dadu Govind Tipugade & Ors. [1985 0 Mh.L.J. 311]** and **Mohammad Hayatkhan Karimkhan & Anr. V/s. Taramati w/o. Sadhu Khindkar & Ors. [2011 2 Mh.L.J. 653]** and wrapped up his arguments that no error was committed by the Court below to quash and set aside the impugned order. The order passed by this Court 7/11/2014 did not at all support the case of the petitioners and therefore the petition had to be dismissed.

11. I have heard Shri S.D. Lotlikar, learned Senior Counsel and Shri G. Agni, learned Advocate for the respondent no.1, considered the records and the judgments relied upon and on a consideration thereof proceed to decide the petition appropriately. The respondent no.1 had filed the suit in respect of the Survey No. 40/5 against the petitioners herein claiming the relief of declaration, permanent and mandatory injunction and consequential reliefs including a declaration that the petitioners did not have leasehold rights of the coconut trees of the suit property nor any rights in or to the suit property and further for a

declaration that the entries in the 'Other Rights' column in respect of the suit property where the name of the petitioner no.1 was recorded being an erroneous entry amongst others. The petitioners had filed their written statement in defence raising a plea that they were the tenants/deemed purchasers of the property bearing Survey No.40/5, that the Civil Court had no jurisdiction to decide the issue and other defences available to them alongwith the counter claim seeking for a declaration that the Sale Deed dated 10/09/2004 executed in favour of the respondent no.1 was null and void and to cancel the registration thereof. Based on these pleadings, issues were framed by the then Civil Judge and the issue no.5 casting a burden on the petitioners herein to prove that they were in exclusive possession of the suit property 40/5 as tenants/deemed purchasers and therefore the Sale Deed dated 10/09/2004 in favour of the respondent no.1 was null and void.

12. The respondent no.1 had moved an application before the Trial Court raising a plea that the defence of the petitioners of being tenants of the suit property was fraudulent, that there was no foundation for the same in the written statement and on that premise sought for the striking of the issue no.5 of the tenancy and the undervaluation of the counter claim. The learned Trial Court vide its order dated 26/06/2014 observed that though the counter claim was rejected vide the order dated 15/07/2008, nonetheless, the issue of

tenancy was framed on a pleading of the factum of possession and to that extent did not delete the issue but instead amended the same to delete the part which sought to declare the Sale Deed null and void and deleted the issue no.7 as the counter-claim was rejected. It is another matter that the counter claim was excluded in terms of Order VIII Rule 6C CPC and not rejected as erroneously recorded by the learned Trial Court in its said order. The petitioners herein had moved the Trial Court seeking a reference of the tenancy issue to the Mamlatdar for a decision thereof. The Trial Court however vide its order dated 26/06/2014 proceeded to hold that there was an order of the Mamlatdar and the Deputy Collector on the issue of tenancy and that it was open to the defendants to raise their issue of tenancy before the Mamlatdar. However, the Trial Judge took a tangential view and held that the said issue required the petitioners only to prove their possession and not title for which they had to approach the appropriate forum and therefore recorded a finding that the Civil Court was empowered to decide the issue of fact such as possession and that the issue was not required to be referred to the Mamlatdar and dismissed the application.

13. The petitioners took exception to this order in Writ Petition No.561/2014 before this Court where a learned Single Judge of this Court considered the contention on the petitioners' behalf that by virtue of Section 58(2) of the Agricultural Tenancy Act, 1964, the Civil

Court had no jurisdiction to decide any question relating to the tenancy and on considering the material and arguments as well as the judgments relied upon, observed at para 11 that consequent to the amendment, the issue no.5 required the petitioners to prove that they were in exclusive possession of the property bearing Survey No.40/5 as tenants/deemed purchasers of Mrs. Yvonne and her children and therefore the Trial Court had wrongly observed in the impugned order that as per the amended issue no.5, the petitioners herein were required only to prove their possession and not title. Rather, the learned Single Judge observed that the issue no.5 as framed involved the possession of the petitioners in the capacity as the agricultural tenants under the Act and which could not be decided by the Civil Court in view of the express bar under Section 58(2) of the Act.

14. The learned Single Judge went on to observe at paragraph 12 that the finding of the Trial Court in the impugned order that the issue no.5 as framed and amended required the petitioners only to prove their possession and not title and set aside the same reiterating that the issue required the petitioners to prove their possession in their capacity as the agricultural tenants under the Act. However, in so far as referring the issue no.5 to the Mamlatdar was concerned, the learned Single Judge found from the records that the petitioners had already filed a tenancy case before the Mamlatdar against the respondent no.1 and the original owners claiming to be the tenants

and that the Sale Deed executed by the owners in favour of the respondent was null and void. The learned Single Judge observed further that though the Mamlatdar could not declare the Sale Deed as null and void but certainly the question whether the petitioners were the tenants or not could be decided by the Mamlatdar. The learned Single Judge further rendered findings that since the proceedings of tenancy of the petitioners against the original plaintiff/respondent no.1 were filed before the Mamlatdar and pending, the question of referring the issue did not arise and observed that there was a roadblock created by the learned Deputy Collector by staying the said tenancy proceedings until the decision of the Civil Court on the declaration qua the Sale Deed dated 10/09/2004. The learned Judge observed that the order to keep the inquiry in tenancy case in abeyance did not appear to be correct and quite on the contrary the issue of tenancy had to be decided in the first instance. This judgment amply advances the case of the petitioner that once the Mamlatdar was seized of the tenancy proceedings, there was no necessity of referring the issue for determination and that the finding of the Trial Court that it had to render finding only on the basis of the possession was incorrect and that it could proceed with the suit.

15. The Deputy Collector and Sub-divisional Magistrate by his judgment and order dated 25/06/2009 went contrary to the law laid down by the Apex Court and held that the inquiry with respect to the

property surveyed under no.40/5 was kept in abeyance till the decision of the Civil Court about the Sale Deed when the contrary was to be done namely to proceed with the inquiry in the tenancy case and the civil proceedings being kept in abeyance till then. In **Inacio Martins** (supra), the Hon'ble Apex Court observed at para 8 that if a suit is filed to recover possession of agricultural land from a trespasser and no dispute arises, the adjudication whereof is required to be done by the special machinery set up under the Act, the Civil Court will continue to have jurisdiction. If, however, the defendant raises a dispute which is required to be resolved by the special machinery under the Act, a question will arise what procedure the Civil Court should adopt. It further took into account the case where the possession of an agricultural land was sought on the plea that the defendant was a trespasser and the defendant contended that he was a tenant. The question of the defendant's tenancy in respect of an agricultural land would be within the exclusive jurisdiction of the Mamlatdar under Section 7 read with Section 58(2) of the Act. In such a situation, what procedure should the Civil Court follow? These were some of the questions which arose for determination. It further went on to observe at para 9 that if the question of tenancy in regard to an agricultural land cannot be decided by the Civil Court under the Act and there is no express saving clause permitting the Civil Court to decide the same, it is obvious that any decision rendered by the Civil Court would be without jurisdiction. It was also observed that where a

question arose in the suit whether the defendant proved that he was a tenant in respect of the land in question, this question could not be gone into by the Civil Court in view of the clear language of Section 7 read with Section 58(2) of the Act. What procedure should the Court follow in such situations? It would not stand to reason to non-suit the plaintiff who had filed the suit in a competent Court having jurisdiction to try the same merely because of the subsequent change in law. The proper course, therefore, would be one which was followed by the Bombay High Court in **Bhimaji Shankar Kulkarni V/s. Dundappa Vithappa Udupudi [AIR 1966 SC 166]** which was a case arising under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. In **Inacio Martins** (supra), the Apex Court considered the judgment in **Bhimaji Shankar** (supra) where the Court had observed that :

"Therefore, we hold that in a suit filed against the defendant on the footing that he is a trespasser if he raises the plea that he is a tenant or a protected tenant, the Civil Court would have no jurisdiction to deal with that plea..... We would, however, like to add that in all such cases where the Civil Court cannot entertain the plea and accepts the objection that it has no jurisdiction to try it, it should not proceed to dismiss the suit straightaway. We think that the proper procedure to adopt in such cases would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. If the decision of the Mamlatdar is

in favour of the party raising the plea, the suit for possession would have to be dismissed, because it would not be open to the Civil Court to give any relief to the landlord by way of possession of the agricultural land. If, on the other hand, the Mamlatdar rejects the plea raised under the Tenancy Act, the Civil Court would be entitled to deal with the dispute on the footing that the defendant is a trespasser."

16. **Uttam Deshmukh** (supra), was a second appeal directed against the judgment and decree passed by the District Judge, Yavatmal confirming the judgment and decree passed in the Regular Civil Suit No.132/80 whereby 3/8th share was declared of the respondents in the suit land. A point was canvassed on behalf of the the appellant that in view of their plea that the land in question was being cultivated by Sambhaji as a tenant, the Sale Deed in favour of Nathuji to the extent of 1/2 share was invalid in view of the provisions of Section 120-A of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 and the issue as to whether the acquisition in favour of Nathuji was invalid or not and whether Sambhaji was a tenant of the said land were the questions arising in the suit and therefore it was submitted that the issues to that effect should have been referred under Sections 124 and 125 of the Tenancy Act to the Tenancy Authorities. In the facts at large, the learned

Single Judge found that the material facts constituting the plea of tenancy had not been pleaded namely as to when the tenancy commenced, who was the landlord, what were the terms and conditions of the tenancy, what was the rent fixed etc. and that apart it was evident that no documentary evidence namely the revenue record and/or rent receipts were produced on record to show the relationship of the deceased Sambhaji as the tenant of the said land. In the said facts, it was thus found that neither the issue arose nor was it necessary for referring the same for adjudication of the controversy between the parties and dismissed the appeal. This judgment is clearly distinguishable on facts and can find no application to the case of the respondents.

17. **Sadanand Naik** (supra) challenged in Writ Petition, the order of the Civil Judge Junior Division, Panaji dismissing their application whereby the petitioners as defendants had prayed for framing of two issues namely of mundkarship and tenancy and referring them to the Mamlatdar for his decision. The learned Single Judge reiterated the well said proposition that when an issue of mundkarship or tenancy is raised in a suit, they are required to be decided by the Mamlatdar in terms of Section 32(2) of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 and Section 58 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964. However, the Civil Court has the power to consider whether such a plea has been raised

without legal foundation or with the only intention to gain time by protracting the litigation. If the Civil Court is of opinion that there was not even a remote possibility of the plea being upheld the Court can proceed to dispose of the suit without resorting to the circumlocuted route via the Land Tribunal. However, in the facts at large, the learned Single Judge found that though the defendants had taken the plea that the suit property was leased to Rukmini prior to 1970, there was not a word or a whisper what was the lease rent which was payable on account of the alleged lease by Ganesh and Vimlabai in favour of Rukmini. The defendants had also not stated as to when the rent was paid for the first time and if so what was the amount or for that matter what was the amount paid last time and in those circumstances did not find fault with the Trial Court in not raising the issue of tenancy and referring it to the Mamlatdar. This judgment too is clearly distinguishable on facts.

18. **Baliram Maruti Satvekar** (supra) was a petition under Article 227 of the Constitution of India arising out of a reference under Section 85-A of the Bombay Tenancy and Agricultural Lands Act, 1948 by which the Civil Judge Junior Division, Kagal referred two issues namely; whether the plaintiff proves that he is the tenant of the suit land and whether the plaintiff proves that he is in possession of the suit land as a tenant. The respondent no.1 had filed the suit for injunction restraining the petitioner and one Dattu, since deceased

alleging that he had been cultivating the field bearing Survey No.46/1 of village Kardyal as a tenant and the present petitioner had no connection whatsoever but that he was interfering with the possession of the respondent no.1 on the ground that he had purchased the field. The said land originally belonged to one Smt. Ushadevi Khot who sold the entire survey to the respondent no.2 Dattu, brother of the plaintiff Dadu sold the field to the petitioner Baliram in 1972 by a registered Sale Deed and the suit was filed by the plaintiff in September, 1972. Dattu took a plea that he was the owner of the field from the date of his purchase and that Dadu had at no time been in possession. Since he had raised such a plea, the issues came to be referred to the Tahsildar, who held that he had failed to prove that he was a tenant and in possession as a tenant. His appeal too was dismissed by the Sub-divisional Officer, Kolhapur. In revision application, he was held to be a tenant and in actual possession giving rise to the petition.

19. In **Baliram Maruti Satvekar** (supra), the learned Judge found that the Civil Court seems to have made a reference almost mechanically the moment the plaintiff raised a plea of tenancy and ought to have realised that a reference on the issue of tenancy was not to be made the moment a plea has been raised by a person. Reference of the issue to the revenue authorities becomes necessary only when that issue required to be settled or decided for the purpose of the suit. None of these judgments relied upon by Shri Agni, learned

Advocate for the respondent no.1 can override the effect of the judgment of the Hon'ble Apex Court in **Inacio Martins** (supra) which requires the issue of tenancy to be referred and decided before the Revenue Authorities and the suit being stayed in the interregnum.

20. Moreover, going to the impugned order, it is apparent that the learned Trial Court on a reading thereof had completely misdirected itself on the premise that no issue of tenancy was framed when such an issue was framed at Serial No.5. It is another matter that the petitioners had perused the tenancy proceedings before the appropriate authorities but that did not curtail the power of the Trial Court from keeping the suit in abeyance pending the decision of the tenancy issue by the competent Court. Even otherwise, there was no basis in the order passed by the Trial Court dated 26/06/2014 that the suit should proceed on the basis of possession when the issue of tenancy was at large before the competent Court. The impugned order as is apparent clearly reflects that the Trial Court had failed to exercise the jurisdiction vested in it while passing the impugned order which is required to be corrected while dealing with the powers of superintendence under Article 227 of the Constitution of India. In view thereof, the impugned order cannot be sustained. i therefore pass the following :

ORDER

(i) The impugned order is quashed and set aside and the proceedings before the Civil Court stayed pending the determination of the tenancy issue before the Competent Court.

(ii) Rule is made absolute in the above terms.

NUTAN D. SARDESSAI, J.

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