

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2017

PRONOUNCED ON : 09.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.742 of 2001

Chemmeri Sreeja ... Appellant

Vs.

Nallakandy Heer ... Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 14.10.1999 made in A.S.No.10 of 1996 on the file of the Second Additional District Court, Pondicherry, reversing the judgment and decree dated 30.11.1995 made in O.S.No.32/1993 on the file of the Subordinate Court, Mahe.

For Appellant : Mr.V.Manohar
for Mr.C.Rajan

For Respondent : Mr.S.J.Jagadev

JUDGMENT

Challenge in this second appeal is made to the Judgment and decree dated 14.10.1999 passed in A.S.No.10 of 1996 on the file of the Second Additional District Court, Pondicherry, reversing the judgment and decree dated 30.11.1995 passed in O.S.No.32 of 1993 on the file of the Subordinate Court, Mahe.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration, permanent injunction and mandatory injunction.

4. The case of the plaintiff, in brief, is that the plaintiff "A" schedule property was obtained by the plaintiff's father as per the assignment deed dated 09.03.1988 and on the same date, the defendant had also taken a small plot situated to the East of the plaintiff "A" schedule property shown as the plaintiff "B" schedule property and the plaintiff's father and the defendant's husband were good friends and accordingly, they made arrangement to purchase the adjacent plots and construct houses in plots belonging to them. It was also agreed between them to dig a common Well covering both plots, since the area in possession is very small and the larger area of the Well is located in "B" schedule property and the smaller area of the Well is located in "A" schedule property and the Well was dug in common with the funds contributed by the plaintiff's father as well as the defendant and an undertaking was entered into between the plaintiff's father and the defendant with regard to the digging of the common Well and

accordingly, the plaintiff's father, while putting up construction in his property i.e. "A" schedule property, submitted the plan shown the well as common in the plan and accordingly, the permission was given to him by Mahe Planning Authority and the Well was dug in 1988 and the defendant has also put up construction in her property and due to financial difficulty, the plaintiff's father was unable to proceed with the construction of his house and subsequently, on 21.10.1991, he gifted the plaintiff "A" schedule property to his daughter viz., the plaintiff and accordingly, the plaintiff has to apply for fresh permission and plan for putting up house construction and the same was granted on 17.09.1992 and accordingly, while doing preliminary work for the construction, the plaintiff's men were drawing water from the common Well and at that time, the defendant obstructed them claiming that the Well belongs to her absolutely and the defendant, without any consultation or permission from the plaintiff, constructed a wall across the Well in the plot of the plaintiff to obstruct the plaintiff from taking water from the Well and thereby, prevented the plaintiff from drawing water from the Well, which belongs to both the plaintiff and the defendant. The defendant has no right to prevent the plaintiff from using the Well as the said Well was dug in common as above stated and hence, the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the plaint "A" schedule property was originally purchased by the plaintiff's father and it is also true that on the same date, the defendant had purchased the "B" schedule property described in the plaint and it is also true that the plaintiff's father and the defendant's husband were close friends and however, it has not been agreed that the Well should be dug in common covering both plots and it is denied that a smaller portion of the Well area is situated in the plaint "A" schedule property belonging to the plaintiff, in fact, the entire Well is situated in the plaint "B" schedule property belonging to the defendant and the entire amount for digging of the Well was met by the defendant and no fund was contributed by the plaintiff's father for digging the Well as claimed in the plaint. The defendant is not aware of any undertaking said to have been entered into between the plaintiff's father and the defendant, regarding the digging of the Well and the defendant had signed three white papers, wherein, her name alone was typed, which were brought by her husband and represented that the same would be required for submitting necessary plan and permit with the authority concerned and taking advantage of the friendship with the defendant's husband and also using his official position, the plaintiff's father would have

created the said undertaking letter in the above mentioned signed paper without the knowledge of the defendant and the defendant is not aware of any such undertaking given to the Town Planning Authority and the defendant does not know about the plain submitted by the plaintiff's father for putting up house construction and the defendant is not aware of the gift deed executed by the plaintiff's father in favour of the plaintiff as regards "A" schedule property and it is false to state that the plaintiff's men were taking water from the Well, while doing preliminary work in the plaint "A" schedule property and neither the plaintiff's father nor the plaintiff exercised any right at any point of time in the Well, which exclusively belongs to the defendant and on survey, when it was noted that the parapet Wall of the Well is slightly projecting beyond the defendant's property and when it is also noted that the plaintiff had constructed her compound wall in the north west part in the defendant's property and accordingly, in order to avoid future complications, the defendant cut and removed the projected portion and extended the compound wall marking the Well within her property and for the same, there is no need for the defendant to obtain any consent from the plaintiff and it is false to state that the defendant is preventing the plaintiff from taking water from the Well and the plaintiff is not entitled to draw water from the

Well and hence, the plaintiff is not entitled to seek and obtain the reliefs sought for in the plaint.

6. In support of the plaintiff's case, PW1 has been examined and Exs.A1 to 9 were marked. On the side of the defendant, DWs1 to 3 were examined and Exs.B1 to 6 were marked. Exs.C1 to 8 as well as Exs.X1 to 5 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suit as prayed for. On appeal preferred by the defendant, the first appellate Court set aside the judgment and decree of the trial Court and by allowing the appeal preferred by the defendant, resultantly, dismissed the suit laid by the plaintiff. Aggrieved over the same, the present second appeal has come to be preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i) Whether the appellate Court is right in setting aside the Well considered finding of the trial Court that the

document Ex.A3 which was admittedly signed by the plaintiff's father and the defendant, a copy of which is found in the Municipal records as Ex.A1, was a genuine document and to hold that the signature of the defendant in the said document was taken by the defendant's husband in blank paper, basing merely on the interested testimony of DW1?

(ii) Whether the learned appellate Judge has erred in considering the oral evidence of DW1 against the documentary evidence available under Ex.A3, against the provisions of Section 92 of the Evidence Act?"

9. It is not in dispute that the plaint "A" schedule property belongs to the plaintiff. It is also not in dispute that the plaint "B" schedule property belongs to the defendant. It is found that the plaintiff's father and the defendant's husband were close friends and accordingly, they had purchased the above said properties from one and the same owner and thus, it is seen that at the time of purchasing the properties above referred to, there was no dispute as such between the parties concerned. Now, according to the plaintiff, the

plaintiff's father and the defendant's husband agreed to dig a common Well in the properties belonging to both the parties and considering the area of the properties and accordingly, it is stated that funds were provided by both of them for the purpose of digging the common Well and it is further stated that the major portion of the Well is located in the defendant's property and the smaller portion of the Well is located in the plaintiff's property and accordingly, it is also the case of the plaintiff that accepting the common ownership of the Well belonging to both the parties, an undertaking letter has also been given by the defendant with reference to the same and accordingly, it is the case of the plaintiff that her father, while applying for necessary permission and plan approval for the house construction in the plaintiff's schedule property, submitted the said undertaking also to the authority concerned and further, it is stated that on account of the financial difficulty, as the plaintiff's father was unable to proceed with the construction, he, subsequently, gifted the "A" schedule property in favour of the plaintiff and thereafter, the plaintiff applied for fresh plan and permission and on getting the same, put up house construction in her property. While so, the defendant claiming that the Well belonged to her exclusively prevented the plaintiff's men from using the Well and also put up a parapet wall, so as to prevent the plaintiff from

drawing water from the common Well and hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

10. The case of the plaintiff that funds were provided by both parties to dig the Common Well is denied and according to the defendant, the Well had been put up by at on her own costs and she has also denied any undertaking letter given by her with reference to the common ownership of the Well and further, according to her, her husband had obtained her signature in blank papers for the purpose of obtaining permission and plan for house construction with the concerned authorities and it is alleged by her that taking advantage of the close acquaintance between the plaintiff's father and the defendant's husband, the same would have been made use of by the plaintiff's father to create an undertaking letter and therefore, the defendant is not aware of the undertaking letter and has also not given any such undertaking letter admitting the common ownership of the plaintiff in respect of the Well in dispute and accordingly, it is her case that the plaintiff is not entitled to draw water from the Well as the same belongs to the defendant absolutely and on noting that the parapet Wall of the Well was projecting wrongly on the plaintiff's

property and accordingly, it is stated that the defendant had put up a compound Wall in such a way inside her property to set right the matter and for such a course, it is the case of the defendant that she need not obtain any permission from the plaintiff and hence, it is stated that the plaintiff is not entitled to obtain the reliefs sought for in the plaint.

11. As above noted, at the time of purchase of the respective properties by the parties concerned, there was cordial relationship between them. It is admitted by the defendant examined as DW1 that the plaintiff's father and her husband are good friends. It is the specific case of the plaintiff that the parties had agreed to put up the Well in common and accordingly, while digging the Well, the major portion of the Well is located in the defendant's property and a smaller portion of the Well is situated in the plaintiff's property. This fact, as such, is not specifically disputed by the defendant. In this matter, the Commissioner had inspected the property in dispute and accordingly, noted that the Well in a major portion is located in the defendant's property and the same Well in a smaller area is located in the plaintiff's property and the above said aspect noted by the commissioner has not been challenged. It is thus found that inasmuch

as the intention of the parties was to dig a common well, accordingly, it is seen that while digging the Well, the Well had come to be situated /located in the properties belonging to both the parties. No doubt, the larger portion of the Well lies in the defendant's property and the smaller portion of the Well lies in the plaintiff's property. Accordingly, if the parties had not intended to dig the Well in common, there would have been no necessity for digging the Well in the properties of both the parties. Now, according to the plaintiff, as directed by the Well diviner, the Well was dug in the said location and accordingly, it so happened that the major portion of the Well lies in the defendant's property and the smaller portion of the Well lies in the plaintiff's property. This aspect as rightly found by the trial Court add strength to the plaintiff's case that the intention of the parties was only to dig the Well in common and accordingly, it is seen that even though there is no other material, than the evidence of PW1, as regards the contribution of funds by both parties for digging up the Well, considering the location of the Well as seen above, it is found that the costs for digging up the Well would have been borne by both the parties.

12. Be that as it may, now, it is the case of the plaintiff that admitting the common ownership of the Well in question, the defendant has given an undertaking letter with reference to the same and accordingly, it is the case of the plaintiff that while seeking the approval for necessary permission and plan for the house construction in the property belonging to her, the plaintiff's father had also submitted the said undertaking given by the parties concerned informing the authority regarding the common ownership of the Well and the said undertaking letter is marked as Ex.A3. It is found that the official records, with reference to the same, had also been summoned by the Courts below and it is seen that Ex.X1 is the copy of the undertaking corresponding to Ex.A3. Now, on a perusal of Ex.A3, it is found that under the same, both the plaintiff's father as well as the defendant have jointly given the undertaking, wherein, they have specifically stated that both of them had decided to dig a Well in common for their own use in between their sites bearing R.S.No.136/5. If really, the Well in dispute had not been dug in common by both parties as put forth by the plaintiff, there would have been no necessity on the part of the defendant to give such an undertaking with reference to the same. To cap it all, it is also found

that the defendant has admitted her signature found in Ex.A3 and Ex.X1. The defendant being an educated lady would not have subscribed her signature to a document, which involves legal implications. Therefore, to contend that the defendant was not aware of as to why her signature had been obtained in the said document as such cannot be readily accepted.

13. The defendant examined as DW1, as stated above, had not disputed her signature contained in Ex.A3. It is further seen that during the course of cross examination, according to the defendant, the signature in Ex.X1 and Ex.A3 are her signature and according to her, her husband had obtained her signature in three white papers and further, according to her, she has signed in papers containing her name and address and she has also stated that she cannot answer whether her husband had acted against her interest and further, she has also asserted that she stands by the pleadings in her statement and not sure to assess the situation, how the undertaking had come into existence and she would further only state that she did not have the advantage of consulting her husband before filing the written statement and also admitted that she has absolute confidence in her husband, when she handed over the three blank papers and the three

blank papers signed for the construction of the house and now, she has understood that Ex.X1 had been lodged by the plaintiff's father before the Town Planning Authority. Therefore, a perusal of the above said evidence of the defendant would go to show that her plea that she had signed the document of understanding marked as Ex.A3 without knowing the contents thereof and had signed only in blank papers as directed by her husband as such cannot be accepted readily. If really, she had signed in the blank papers as directed by her husband, at least, as a prudent person, being an educated lady, she would have asked her husband as to why her husband need to obtain her signature in blank papers. That apart, when it has been admitted that her relationship with the husband is not strained and she still maintains confidence in her husband and such being the position, to state that her signatures obtained by her husband in blank papers would have been made use of by the plaintiff's father for creating the understanding letter marked as Ex.A3 and thereby, would have submitted the same to the authority concerned as such cannot be readily countenanced.

14. With reference to her above case, other than her interested testimony, there is no other reliable and acceptable materials placed to

evidence that the plaintiff's father had influenced her husband in obtaining her signature in blank papers and thereafter, had created the undertaking marked as Ex.A3 to buttress his case. Till date, it is found that the defendant has not challenged the undertaking given by her admitting the common ownership of the Well in question and such being the position, the plea now put forth by her that the same would have been created by the plaintiff's father by making use of her signature obtained in blank papers by her husband on account of their good relationship as such cannot be accepted in any manner. It is not established that her husband had entrusted the blank paper containing her signature without any contents thereof to the plaintiff's father so as to enable the plaintiff's father to fill up the same subsequently. At the foremost, it has not been established by the defendant that she had signed in blank papers as pleaded by her at the request of her husband. With reference to the above said facts, though DW1 would admit that she is not any inimical with her husband, to establish her defence, at least, she should have endeavoured to examine her husband on her behalf as to how and in what circumstances, her husband had obtained her signature in blank papers as pleaded by her and whether her husband had entrusted the same as such without any contents written therein to the plaintiff's father etc., With reference to

the above said plea of the defendant, she had not endeavoured to examine her husband though he is readily available for examination. Therefore, it is seen that the defendant, in order to overcome the undertaking given by her marked as Ex.A3 one way or the other, has come forward with the plea, as if the same had not been executed by her as put forth in the written statement. On the other hand, when it is seen that the document Ex.A3 had come into existence, when the parties were cordial and maintaining good relationship and accordingly, it is seen that as the parties had agreed to dig a common Well in their properties, accordingly Ex.A3 undertaking had come to be executed by both parties and eventually, it is seen that the same had been submitted by the plaintiff's father to the authorities concerned for obtaining necessary plan and permission for raising the house construction in his property. Therefore, it is also amply established by Ex.A3 that the plaintiff has also ownership in the Well in question and accordingly, it is seen that the Well in question had been dug in the properties of both the parties. No doubt, the larger portion of the Well is located in the defendant's property and the smaller portion of the Well is situated in the plaintiff's property and that would not in any manner belittle the case of the common ownership of the Well in question projected by the plaintiff when it has been established that

the Well is located in the properties of both the parties as discussed above.

15. In this connection, as rightly put forth by the plaintiff's counsel, on inspection of the properties of both parties in question by the Commissioner, it is seen by him that the Well in dispute is located in the properties of both the parties and accordingly, the commissioner has given his report and the same had not been challenged. Therefore, the commissioner's report and plan also further corroborates the case of the plaintiff that inasmuch as the parties had agreed to dig the Well in common, accordingly, it is seen that a portion of the Well is also located in the plaintiff's property. No doubt, the mere fact that only negligible portion of the Well is in the property of the plaintiff, that would not in any manner affect the plaintiff's case as such that the same is a common well belonging to both the parties. If really, the Well in question had been dug by the defendant exclusively, when there is no explanation on her part as to how come the Well had come to be dug in a portion of the property belonging to the plaintiff, therefore, coupled with Ex.A3 undertaking and the Commissioner's report and plan and other materials on record, it is seen that there is abundant evidence placed on the part of the plaintiff to hold that the

Well in question belongs to both the parties in common and as such, the plaintiff is entitled to draw water from the common well.

16. According to the plaintiff, inasmuch as the Well is common to both the parties, it is her case that while constructing the compound wall of her property, she has not put up the compound wall on the portion touching the Well and therefore, this aspect also would come to establish the common ownership of the parties to the Well in dispute. Similarly, from the evidence of the defendant, it is seen that she has admitted of cutting and removing the projected portion of the Well by extending the compound wall, so as to make the Well in dispute lie within her property. Therefore, on the above said act of the defendant, it is seen that she has disabled the plaintiff to use the common Well by putting up the preventive measures on the plaintiff's side and it is seen that the above said construction/obstruction had been made by the defendant only to prevent the plaintiff from drawing water from the Well. When the defendant has not established her exclusive right to the Well in question, it is seen that her acts of raising wall in the Well on the plaintiff's side, so as to prevent the plaintiff from drawing water from the Well as such cannot be accepted and in such view of the matter, it is seen that as rightly determined by the

trial Court, the plaintiff would be entitled to seek for the removal of the offending construction put up by the defendant, with a view of prevent her from drawing water from the common Well.

17. The first appellate Court on holding that the Well in question lies only in a negligible portion of the plaintiff's property and as the plaintiff has not placed any title deed, as such, for claiming the common ownership in the Well, disallowed the plaintiff's case by entertaining the appeal preferred by the defendant. However, the plaintiff does not claim title to the Well in question by relying upon any title deed and on the other hand, it is her specific case that the parties had agreed to dig the Well in common and accordingly, funds were provided by both the parties for digging the Well and thus, it is seen that the Well in question is located in the properties of both parties, that apart, to authenticate her case, the undertaking letter given by the parties admitting the common ownership of the Well marked as Ex.A3 has also been placed for consideration and when the defendant has not established the falsity of Ex.A3 in any manner and thus it is seen that Ex.A3 would only go to establish that the Well in question is the common Well belonging to the parties. In this connection, it is also to be noted that according to the plaintiff, while submitting the

plan for house construction during 1988, the defendant has shown the disputed Well as common Well and despite the above said case of the plaintiff, it is seen that the defendant had not evinced any interest to place the said plan submitted by her to the authority concerned in 1988 for the purpose of house construction in her property and this would only go to show that inasmuch as the defendant wants to suppress the same, she has not taken steps to place the same for consideration. This aspect of the matter also would go to establish that the defendant is suppressing the fact from the Court so as to prevent the plaintiff from claiming common ownership to the Well in question.

18. Despite the abovesaid factual situation as regards the dispute between the parties, it is seen that the first appellate Court has discountenanced the plaintiff's claim. Still the first appellate Court, without any plea put forth by the defendant or without any submissions placed on behalf of either parties, while disposing of the appeal filed by the defendant, has held that in order to put an end to the dispute between the parties as regards the Well in question, it has suggested that the defendant may pay Rs.10,000/- to the plaintiff towards damages or cost of the protrusion of the Well to an extent of

20 cm in the property of the plaintiff. It is thus seen that the first appellate Court unable to wriggle out of the situation that the Well in question lies in the properties of the both parties and also the undertaking given by both parties marked as Ex.A3 and also the unchallenged report and plan of the advocate commissioner indicating the location of the Well in the properties of both the parties, by discarding the above said facts, proceeded to dismiss the suit laid by the plaintiff, however, without any one asking for, had suggested for a settlement between the parties regarding the Well in question by directing the defendant to pay a sum of Rs.10,000/- to the plaintiff for the Well stating that the Well extends to the property of the plaintiff also. This would only go to show that the first appellate Court, with a view to prevent the plaintiff one way or the other from claiming the common ownership in the Well or with a view to disapprove the case of the plaintiff one way or the other, suggested the above mode of statement without any party asking for the same and therefore, as rightly put forth by the plaintiff's counsel, the above observation of the first appellate Court by itself would go to show that despite the reality that the Well in question belongs to the both parties, the first appellate Court had dismissed the plaintiff's suit erroneously and at the same, admitting the title of the plaintiff to the Well, had directed the

defendant to compensate the plaintiff for the same, which according to the plaintiff's counsel cannot be legally accepted in any manner and this observation of the first appellate Court would only strengthen the plaintiff's case that she has also right to the Well in question and the above contention of the plaintiff seems highly acceptable. If according to the first appellate Court, the plaintiff has no title or common ownership to the Well in question, it has not been explained as to then what is the need for a direction to the defendant to compensate the plaintiff for the Well in question as suggested by it. Therefore, it is seen that the first appellate Court is also aware of the position that the Well in question belongs to both the parties however, on an erroneous appreciation of the matter without considering the materials placed on record in the proper perspective, had declined the reliefs sought for by the plaintiff in the suit.

19. In the light of the above discussions, the first appellate Court had failed to consider and determine Ex.A3 and Ex.X1 as genuine documents by improper reasonings and conclusions and it is further found that despite the admission of the defendant as regards the signature in the document Ex.A3, failed to uphold its validity, taking into account the unreliable and unacceptable testimony of the

defendant examined as DW1 much against the provisions of Section 92 of the Indian Evidence Act and accordingly, the substantial questions of law formulated in this second appeal are answered in favour of the plaintiff and against the defendant.

20. In conclusion, the judgment and decree dated 14.10.1999 made in A.S.No.10 of 1996 on the file of the Second Additional District Court, Pondicherry are set aside and the judgment and decree dated 30.11.1995 made in O.S.No.32/1993 on the file of the Subordinate Court, Mahe, are confirmed. Resultantly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

09.01.2018

Index : Yes/No

Internet : Yes/No

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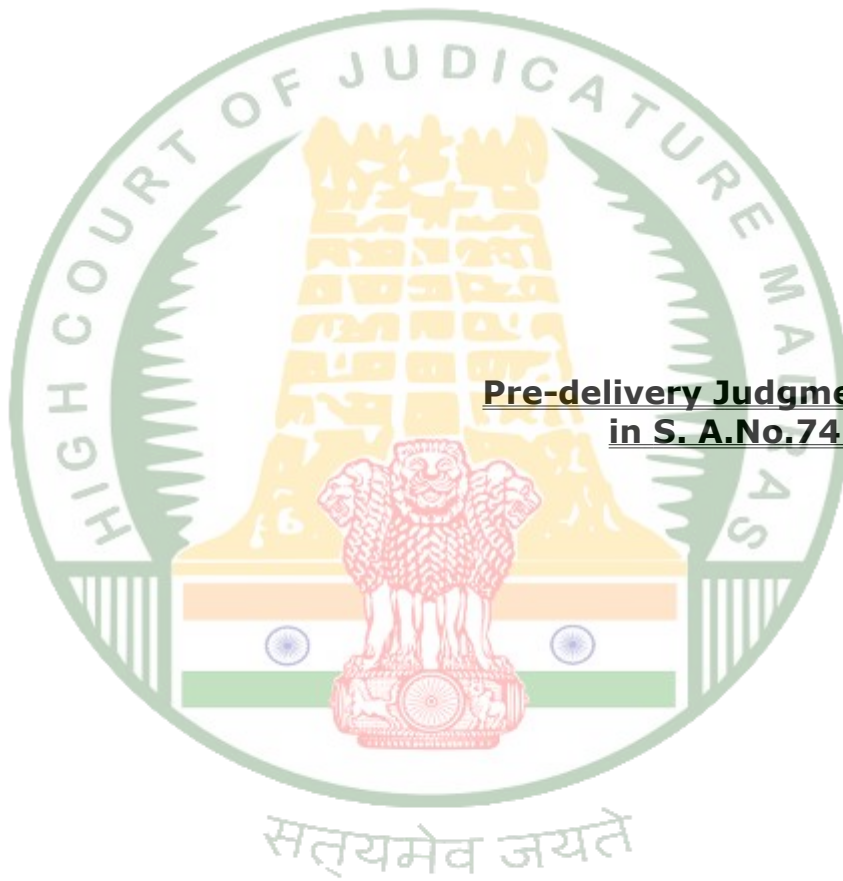
To

1. The Second Additional District Court,
Pondicherry.

2. The Subordinate Court, Mahe.

T.RAVINDRAN,J.

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**Pre-delivery Judgment made
in S. A.No.742 of 2001**

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