IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.987 of 2019

Arising Out of PS. Case No.-68 Year-2019 Thana- BEGUSARAI TOWN District- Begusarai

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1. S.K. EDUCATION PRIVATE LIMITED having its office at S.K. Tower, 9988/B-1, SaraiRohilla, New Rohtak Road, Police Station- Sarai Rohilla, New Delhi- 110005 through its authorized representative Mr. Dinesh Kumar, aged about 33 years, Male, S/O- Mr. Chander bhan, Resident of House No. 399, Near PNB Bank, Rasoi (42), Pritampura, Police Station- Kundali (Sonipat), Haryana-131029
2. Mr. Tijay Gupta S/O- Mr. Shri Krishna Gupta Resident of House No. 6, Shakti Vihar, Pritampura, Police Station- Rani Bagh, Delhi- 110034.

... ... Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Deptt. Of Home, Govt. Of Bihar, Patna
2. The Director General of Police, Government of Bihar, Patna.
3. The Inspector General of Police, Government of Bihar, Begusarai.
4. The Senior Superintendent of Police, Begusarai.
5. The Superintendent of Police, Begusarai.
6. The Officer In-Charge, Ratanpur (O.P.), Police Station, Begusarai.
7. The Sub Inspector of Police cum Investigating Officer, Ratanpur (O.P.), Police Station, Begusarai.
8. Vishwanath Sharma, the Sub Inspector of Police, Ratanpur O.P. Police Station, Begusarai.
9. DinanathJha S/O - Late Jagdev Jha Resident of Ratanpur, Ward No-21, Thana (Ratanpur O.P.), Nagar, District- Begusarai.
10. The State Bank of India through its Chief General Manager, Gandhi Maidan, Patna.
11. The State Bank of India through its Branch Manager, Begusarai Branch, Begusarai.
12. The Branch Manager, State Bank of India, Begusarai Branch, Begusarai.

... ... Respondents

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Appearance :
(In Criminal Writ Jurisdiction Case No. 987 of 2019)

For the Petitioner	:	Mr. Sanjeev Kumar, Advocate
		Mr. Ansul, Advocate
	:	Mr.Rajeev Shekhar, Advocate
For the State	:	Mr.Sheo Shankar Prasad, SC-VIII
For Respondent No.9	:	Mr. Vikramdeo Singh, Advocate
	:	Mr. Rakesh Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT
Date : 27-08-2019

Heard Mr. Ansul, learned counsel for the petitioners, Mr. Sheo Shankar Prasad, learned standing counsel for the State and Mr. Vikramdeo Singh, learned counsel for the respondent no.9.

2. The instant writ petition under Articles 226 and 227 of the Constitution of India has been filed by the petitioners for quashing the First Information Report (for short 'FIR') of Begusarai Town P.S. Case No.68 of 2019 dated 03.02.2019 registered under Sections 406 and 420 read with 34 of the Indian Penal Code (for short 'IPC')

3. Mr. Ansul, learned counsel for the petitioners submitted that the present case is out and out a civil dispute for which no FIR could have been registered. The petitioner no. 1 is a Company and is operating Pre-Schools & Formal Schools on franchisee model. It is operating and promoting education across India since 2004 and has been able to set up a chain of over 1100+ Pre-Schools under the brand name Bachpan a Play School. The petitioner no. 2 Mr. Tijay Gupta is one of the directors of the Company. The Company Trade Mark 'Bachpan, a Play School' is registered under the provisions of the Copy Rights Act, 1957. The informant approached the petitioners in

the month of July, 2016 and shown his interest to become franchisee of 'Bachpan a Play School' and intended to open its unit in Begusarai. The respondent no. 9 Dinanath Jha after being satisfied regarding the procedure, filled up personal details form and made payment. After completion of all the formalities, the Company conducted site inspection and entered into a memorandum of understanding with the informant on 01.08.2016. As per the terms and conditions of the said memorandum of understanding, the informant paid one time non-refundable franchisee fees to the Company. Accordingly, a franchisee agreement was entered into between the parties on 08.08.2016. The Company provided all necessary support to the informant for establishing the play school at Begusarai which was made operational in the year 2016. On account of the reputation of the company in the field of play school, the school established by the informant attracted large number of students. However, the informant developed dishonest intention and in complete violation of the terms and condition of the franchisee agreement dated 08.08.2016 stopped paying royalty and stopped purchasing materials from the company. Vide letters dated 12.10.2017, 28.10.2017 and 08.12.2017 reminders were sent by the Company to the informant for payment of royalty but of no avail. Vide letter dated 19.01.2018, the Company sent notice whereafter the informant was asked to clear all outstanding dues failing which termination proceeding would be initiated. The Company sent another letter dated 16.02.2018 whereby the informant was requested to make payment of the outstanding dues, failing which termination proceeding would be initiated. However, the informant failed to comply with the aforesaid letters which compelled the Company to terminate the franchisee agreement dated 08.08.2016 vide letter dated 28.03.2018, which was communicated to the informant through registered post. The informant vide e-mail dated 27.03.2018 and letter dated 29.03.2018 requested the Director, Finance of the Company not to terminate and grant permission for supply of study materials order for new academic session of 2018-19. The Company turned down the request of the informant and vide letter dated 09.05.2018 invoked the procedure for closure of school and clearance of outstanding dues. It sent reminder letters on 17.07.2018 and 31.07.2018 for this purpose. However, the informant did not pay any heed to its request. In the month of the August 2018, the Company came to know that the informant was still illegally running the said school under its franchisee even after its termination. Being aggrieved by the illegal act of the informant, it preferred Trademark Infringement Suit against the informant before the Tis Hazari Court, Delhi on 20.12.2018. After hearing the petitioner, learned District Judge Central, Tis Hazari Court directed to serve the summons to the informant, who was impleaded as defendant in the suit and the next date of hearing was fixed on 19.04.2019. After service of summons, the informant filed a written report to the Officer-in-Charge, Assistant Police Station, Ratanpur, Begusarai on 03.02.2019 pursuant to which a malicious FIR in question has been registered under Sections 406 and 420 read with 34 of the Indian Penal Code.

4. On the other hand, learned counsel appearing for the State and learned counsel for the respondent no.9 submitted that the allegations made in the FIR would clearly attract ingredients of the offences punishable under Sections 406 and 420 of the IPC. They submitted that there is no illegality either in institution of the FIR or in investigation of the same. The defence taken by the petitioners can be looked into only at the appropriate stage during trial, but the same cannot be made a ground for quashing the prosecution case when the investigation is still continuing. Their further contention is that the petitioners have not only cheated the informant of the present case rather

they have cheated many other similarly circumstanced persons in the name of offering franchisee for running a play school.

5. I have heard learned counsel for the parties and perused the record.

6. The petitioner no.1 is a company, which is being represented through various signatories and the petitioner no.2 is one of the Directors of the company.

7. The informant has filed his written statement on 03.02.2019 before Officer-in-Charge, Assistant Police Station, Ratanpur, Begusarai alleging therein that he was contemplating to open a play school in the year, 2016 in Ratanpur in his house. He went through the advertisement wherein he was attracted with 'Bachpan a Play School'. He contacted the said institution, namely, S.K.Education Private Limited. He was asked to deposit rupees ten thousand which he deposited through NEFT. He paid rupees two lacs fifty thousand and GST through different cheques to the said institution. Thereafter, memorandum of understanding was signed in February, 2017. Further, to provide study and other materials, the informant deposited rupees six lacs through cash in account, which was also confirmed by the Director of the company, Mr. Tijay Gupta. Despite deposit of the amount, all goods and

materials were not supplied to the informant nor any specialist was sent to Begusarai to help in running the school. Lastly, it has been alleged that the said institution has cheated several persons all around India in the name of giving franchisee. When he requested for providing materials and specialist for helping in running the school, the Director did not give any clear answer and when the said money was asked to be refunded, he refused to oblige. Hence, he alleged that Mr. Tijay Gupta, the Director, in conspiracy with his other colleagues cheated the informant.

8. A counter affidavit has been filed on behalf of the State wherein it is stated that the FIR speaks that a criminal offence has been committed by the petitioners and others. After completion of investigation and submission of a report under Section 173(2) of the Code of Criminal Procedure (for short 'Cr.P.C.'), the petitioners would have liberty to file discharge petition before the lower court. It is also stated that the contents of FIR prima facie make out a case against the petitioners. The investigating officer has made a fair and impartial investigation and found that the petitioners have committed offences under Sections 406 and 420 of the IPC. The SDPO, Sadar, Begusarai also made supervision of the case and found the occurrence to be true. The Superintendent of Police,

Begusarai issued report No. 2 on the basis of the supervision note of the SDPO, Begusarai.

9. Learned counsel appearing for the State, however, admitted that the investigation is still going on and a report under Section 173(2) of the Cr.P.C. has not been submitted before the court till date.

10. A counter affidavit has also been filed on behalf of the informant/respondent no. 9. In his counter affidavit, respondent no. 9 has asserted that after lodging of the FIR, the investigation is going on, but supervision report of the Deputy Superintendent of Police would clearly show that it is a case of cheating.

11. In para-6 of the counter-affidavit, respondent no. 9 has stated that he became a franchisee and the petitioner has robbed him of rupees six lacs approximately till now and he has also been instigated to spend further rupees two lacs in advertisement.

12. Learned counsel appearing for respondent no. 9 has submitted that the petitioner kept on extracting money from respondent no. 9 in the name of royalty fees/Auxiliary Education Services Charges towards the use of brand name/trademark of the petitioners. The registered trade mark of

the petitioner is different from the registered trade mark being used by him. The petitioner is making a deliberate misrepresentation to the parents and general public by using deceptively similar trademark and extorting money from the general public. He has contended that the petitioners have not suffered any loss in business rather the informant has suffered loss at the hands of the petitioners.

13. A reply to the counter-affidavit filed on behalf of respondents has been filed by the petitioners wherein they have brought on record the copies of Company Master Data and Certificate issued in favour of the petitioner no. 1 by Trade Mark Registry. They would show that the petitioner no. 1 is the trade mark owner of 'Bachpan' & 'Bachpan a play school' since 2002.

14. Clause 1.10 of the Agreement as contained in Annexure-3 to the writ petition reads as under :-

> "'Marks' represents the registered trademark, logo of First Party i.e. **'Bachpan & Bachpan...a play school'** and other registered Trade Marks of the First Party in various classes under Trade Marks Act used for educational services or any other further mark applied by First Party in relation to marks **'Bachpan & 'Bachpan...a play**

> **school’**. Both the marks connote the same concept and reference of any mark shall be construed as reference to both the marks.”

15. In the counter affidavit filed by the respondent no. 9, he has not denied the fact that he entered into an agreement with the petitioner no. 1 rather he has admitted that he was offered franchisee and had entered into agreement with the petitioner. He has signed the agreement after going through all its clauses. It would further appear that vide letter dated 29.03.2018, as contained in Annexure-11 to the writ petition, he has informed the petitioner no. 1 that he would pay all the dues amount against royalty.

16. In his counter-affidavit, the informant has also not denied the fact that prior to the institution of the FIR the petitioner had instituted a suit in respect of misuse of trade mark of petitioner no. 1 before the Tis Hazari Court, Delhi.

17. It is not denied that initially, a memorandum of understanding, as contained in Annexure 2 to the writ petition was executed on 1st August, 2016 between the petitioner no. 1 and the informant at Delhi. The petitioner no. 1 M/S S. K. Education Pvt. Ltd was referred to as the first party whereas the informant was referred to second party.

18. The terms of understanding as incorporated

in the memorandum are as under :-

> “The expressions "**First Party**" and "**Second Party**" shall mean and include their respective heirs, executors, successors-in-interest, representatives and assignees.
>
> The First Party and the Second Party hereinafter are referred collectively as the '**Parties**".
>
> **WHEREAS** First Party is creator, developer and sole proprietor of trademark "Bachpan...a play school" in the field of play school and "Academic Heights Public School" in the field of Senior Secondary School.
>
> **AND WHEREAS** First Party possesses the data, information, knowledge, expertise and novelty in the above-mentioned field of play school education.
>
> **AND WHEREAS**, the First Party has established chain of schools under the said brand name "Bachpan...a play school" in several states of India and has established a name and reputation in the field of play school school education.
>
> **AND WHEREAS**, the Second Party has approached the First Party for setting up a play school under the brand name of First Party at Mr. Dinanath Jha At Ratanpur, Ward No. 21, Behind dr. N. Bhaskar, Begusarai-851101.

Hereinafter called the "**Premises**" so as to run/conduct the said Play School under the name and style of "**Bachpan**".

NOW THEREFORE, in consideration of the Covenants hereinafter contained the parties hereto mutually agree as follows:

1. **INTERPRETATION CLAUSE**: In this MOU the following expression shall, unless the content otherwise requires, have the meanings respectively assigned to them hereunder:

1.1 **"References"** to the parties hereto shall include, subject to the terms to this Agreement, their respective successors and assignees.

1.2 **"Agreement"** means and includes all the software and hardware equipment, other goods and material, furniture except those under the category of "Manual" (as described hereunder), used by the Second Party in undertaking the above said 'Business'.

1.3 **"Manual"** means and includes study material, prospectus, instructional methodology, curriculum, course books, syllabus, fee structure, receipt books, school uniform, admission kit etc., rules, procedure facilitated by the First Party to the Second Party, under the 'Agreement'.

1.4 **"Services"** means and include the operating/running of play school in the name, style and concept of "Bachpan...a play school" by the Second Party & use of services relating to imparting any skill, knowledge, education or development of course content or any other knowledge – enhancement activity, for the students and the faculty of the "Bachpan...a play school" or any other services of a similar nature under the terms and conditions as prescribed by the First Party under this Agreement.

1.5 **"Auxiliary Educational Services Charges (AESC)"** means the monthly fees/consideration amount equivalent to 20 % of gross collection every month or such fixed amount of AESC agreed between the parties payable by the Second Party to the First Party every month for use of services relating to imparting any skill, knowledge, education or development of course content or any other knowledge -enhancement activity, for the students and the faculty of the "Bachpan...a play school" or any other services of a similar nature. The Second Party shall pay all other taxes extra (if any) on the **Auxiliary Educational Services** (as per Govt. Policy) to the First Party.

1.6 **"Marks"** represents the registered trademark, logo of First Party i.e. "Bachpan...a play school", "Bachpan" registered Trade Marks of the First Party in various classes under Trade Marks Act or any other further mark applied by First Party in relation to marks "Bachpan... a play school" and "Bachpan".

1.7 **“infrastructure"** shall mean and include the premises at which Second Party centre is run, with proper interior and furnishing as per the model and design specifications of the First Party and installation of the equipments therein.

1.8 **"Intellectual Property Rights"** shall mean all the Intellectual Property Rights of the First Party (whether owned by it or having such rights under any other arrangement) including its goodwill, trademark, trade name, copyright, patent or other intellectual property of the First Party or any of its associate company.

1.9 **"Know how"** shall mean and include the knowledge and expertise in relation to education i.e. for creating, innovating, planning, implementing, conducting the play school concept BACHPAN including the process, practice, techniques, principles, procedures relating to objects, manner, conditions, ways of teaching, communicating, program syllabus and methods and procedures of assessing the standards attained by students, special methods of using certain common learning aids, floor, layout drawing, equipment specifications, provision of learning reference material relating to the form and content of programme to be conducted by Second Party which is confidential and owned by the First Party.

2. PROCEDURE FOR SELECTION

2.1 The First Party has publicized advertisements in the Electronic and Print Media for inviting applications from interested parties seeking grant of authority for running play School under the brand name of the First Party.

2.2 The First party has selected the Second party from the short listed applications after expending substantial resources and monies on the said procedure including advertisements etc.

2.3 The Second Party has placed its documents and credentials reflecting its worth, capacity to run play school under the brand of the First Party and the second party has expressed readiness to possess such infrastructure and invest on, interiors furniture etc. as will be required to run play school under the brand -Bachpan...a play school" of the First Party.

2.4 The Second Party has also satisfied itself regarding the rights and proprietorship and good will, name and reputation of the First Party with its brand name "Bachpan...a play school" and the Second Party is ready to run play school under brand name and brand image of the First Party on the terms as set out in this MOU.

2.5 The First party on the representations of the second party to run play school under the brand of the First Party is ready to grant Authority to the Second party subject to such terms as enshrined in this MOU.

2.6 The Second Party has agreed to pay the non-refundable fee for grant of authority to run “Bachpan ...play school" to the First Party as per the schedule mentioned in this MOU.

2.7 The Second Party will acquire authority to use the brand name and services of the First Party only making the complete payment of the non refundable fee to the First Party and only after execution of after Agreement of Authority with the First Party.

2.8 The First Party and Second Party will execute Agreement of authority within a period of 6 months days/week from this MOU and failure of the Second Party to execute the said Agreement, will entitle the First Party to terminate the MOU and forfeit the non refundable fee. The Second Party has gone though the terms of Agreement to be executed and shall not raise objection/grievance at the time of signing of the agreement. Non-Execution of agreement will lead to termination of MOU and forfeiture of the fee for grant of authority.

2.9 The execution of this MOU does not in any way confer status or any other such right(s) upon the Second Party and Second Party shall not commence running of play school under the brand of the first party till the execution of Agreement and till the complete payment of non-refundable fee to the First Party.

3. OBLIGATIONS OF SECOND PARTY

3.1 The Second Party prior to the entering of the Agreement of Authority shall have an infrastructure of its own including the premises, equipments at the said premises to facilitate the efficient running of play School which may be granted under the Agreement. The Second Party shall create and develop the infrastructure at the guidance and directions of the team of architects and interior designers of the First party at its cost and expenses.

3.2 The Second Party undertakes to posses such infrastructure, financial and administrative means, resources etc. as per the standards required for granting of service of "Bachpan... a play school".

3.3 The Second Party will only use the Manual and Equipment, including Furniture, kits, uniforms etc of the brand and specifications as prescribed by the First party and will purchase the same either directly from the First Party or from its authorized/approved supplier, as the case may be for different items of Manual and Equipment.

3.4 The Second Party shall not claim any infrastructure cost from the First Party under any circumstances whatsoever, including cost of furniture, interiors, uniforms, other items of Manual and Equipments etc. supplied to the Second party at any time.

3.5 The investment made by the Second Party as stated above does not by itself entitle the Second Party for the grant of services of "Bachpan...a play school".

3.6 The Second Party prior to the entering of the Agreement shall adhere to any/all such Prescriptions/conditions pertaining to Services, Manuals, Equipments Marks etc. as prescribed by the First Party for the efficient set up of play School under this Agreement.

3.7 The Second Party shall pay above said one time non-refundable fee of Rs.Two Lakh Fifty Thousand + S.T(15%) (applicable taxes extra) to the First Party as per the schedule given below:

CHEQUE DETAILS	SERVICE TAX DETAILS
Ch. No. NEFT/B-	Ch.N.. Dt.. Amt.

N210160172840285 Dt.28.07.16 Amount.10000/- Ch. No.000027 Dt. Amount.80000/-	

3.8 The Second party agrees with the first, Party that the first party has incurred substantial expenses and costs by way of advertisement and for short listing the parties for grant of services and, therefore, this fee is non-refundable and Second party will not demand refund of the same under any circumstances.

3.9 If Second Party makes default in the payment of onetime non-refundable fee as per the schedule mentioned above to the First Party shall reserve the right to forfeit the paid amount and terminate this MOU with immediate effect and to claim the balance of fee.

3.10 The Second Party before making complete payment of the non refundable fee, will not use or represent itself to have any authority or right to use the Brand Name, Marks, or Brand Image of the First Party for running the play School and any such representation or running of school under the Brand name of the First Party will be illegal, unauthorized and liable to be acted upon by the First Party for seeking the damages etc. against the Second Party and other legal action as permissible under the law.

3.11 all The Second Party shall further pay Auxitiary Educational Services Charges (AESC) to the First Party at the rate of 20 % of the gross collections of fee received by the Second Party from the students at the Centre on monthly basis along with taxes for use of services relating to imparting any skill, know how, knowledge, education or development of course content or any other knowledge — enhancement activity, for the students and the faculty of the Bachpan... a play school or any other services of a similar nature.

3.12 The Agreement of grant of authority shall subsist for a term/period of Five years.

4. OBLIGATION OF FIRST PARTY

The First Party will execute grant of Authority for running "Bachpan...a play school" with Second Party after complete payment of above said non-refundable fee and will comply with obligations as stipulated in the agreement of authority to be executed.

5. TERMINATION OF MOU

5.1 Failure of Second Party to fulfill its obligations as specified in this MOU or violation of all/any of the terms and conditions of this MOU, including non payment of one time non-refundable fees, non adherence to the time schedule etc. use of the brand name, marks, IPR and running of school without executing the agreement shall entitle the First Party to terminate/cancel this MOU with immediate effect.

5.2 Upon violation/breach of the terms and conditions of this MOU as mentioned above the First Party may terminate this MOU by sending a written communication to the Second arty in that behalf.

5.3 The Second party upon termination will bear on its own all costs and consequences, for the cost of Infrastructure, resources, furniture, interiors, all Manual and Equipments etc. purchased by the Second Party for the for the play school under the brand of the First Party and will not demand refund of any amount in that behalf from the First Party. First Party is not liable for any such costs incurred by the Second Party.

6. AGREENIENT

The Parties to this MOU shall enter into the Agreement in due course of time, not exceeding six months from the date of singing of this MOU.

7. INDEMNITY

The Second Party shall indemnify and keep the First Party fully indemnified against all claims, demands, damages, losses, expenses and costs which the First Party may suffer or incur as a result of breach of any of the provision(s) of this MOU by the Second Party.

8. ARBITRATION

(a) The First Party and the Second Party, voluntarily and out of their own free will agree that any dispute or differences arising out of or incidental to, directly or indirectly, to this Agreement shall be adjudicated between the parties by way of arbitration conducted under Arbitration and Conciliation Act, 1996 or any amendment thereof. The Second Party is ready and willing to submit itself to such arbitration proceedings, to be conducted by sole arbitrator, who shall be appointed by the First Party. The Second Party has full faith in the First Party that the sole arbitrator appointed by the First Party shall be impartial in the conduct of arbitration proceedings between the parties. The Second Party shall not object to or challenge, right of the First Party to appoint sole arbitrator, as a ground for seeking appointment of any other arbitrator.

(b) The language of arbitration proceedings shall be English only.

(c) The place of arbitration shall be at Delhi only and the venue of arbitration shall be at the place as fixed by the sole arbitrator at Delhi.

9. JURISDICTION

> The parties to this Agreement voluntarily and out of their own free will mutually agree to fix the courts at Delhi only and to the exclusion of any other place of jurisdiction, as the venue for the purposes of jurisdiction for the adjudication or settlement of all disputes between the parties to this Agreement.
>
> The terms and conditions set forth in this clause shall survive the termination or expiration of this Agreement.
>
> In witnesses whereof the parties to this Agreement execute and sign this Agreement on this 01 day, August month of 2016."

19. Thereafter, an agreement was entered into between the parties on 8th September, 2016 at Delhi. The party position was the same as in the memorandum of understanding. Clause 8 of the agreement is under the heading of 'Consideration and Payment'. The said clause is divided into seven sub-clauses. Clause 8.1 to Clause 8.7 of the agreement reads as under:-

> "**8. CONSIDERATION AND PAYMENT**
>
> 8.1 The Second Party shall pay to the First Party a onetime non-refundable fee of Rs.2,50,000/- + S. Tax (plus service tax and other taxes are extra, if any) as per the below detailed payment schedule upon the

execution of this Agreement towards permission to use of marks/IPR of the First Party:

a) Rs.1000/- by NEFT dated 28.07.2016

b) Rs. 80,000/- By cheque No. 000027 dated 06.08.2016

8.2 The Second Party shall pay to the First Party a fixed percent of the monthly gross collection as **Auxiliary Educational Services Charges (AESC)**, by the 10th day of every English calendar month @ 20 % of the gross collection plus applicable taxes (if any) or any such fixed AESC amount agreed between the Parties towards the use of services relating to education i.e. imparting skill, knowledge, education or course content development or any other knowledge - enhancement activity for the students and the faculty of the **Bachpan...a Play School** or any other services of a similar nature at the centre. If the government demands tax/taxes (if any) on AESC, the Second Party shall pay the necessary taxes. The Second Party shall not raise objection in paying the monthly AESC on the ground that no new curriculum or manual or skill or know how is provided/amended by First Party during term of this Agreement.

8.3 In addition to above said, the Second Party shall make payments to the First Party as per the invoice terms regarding the manual, furniture, books, dresses and other items supplied and other dues and incidental expenses incurred by the First Party on behalf of the Second Party.

Further, upon the opening/running of any day boarding, second shift, crèche by the Second Party, the Second Party shall pay a monthly AESC to the First Party which shall be decided at that point of time. No credit will be given/provided by the First Party.

8.4 If the Second Party commits default in the payment of the AESC or any other due amount under the agreement, then Second Party shall pay interest @18% per annum on delayed payments. It is expressly acknowledged and understood by the Second Party that all the payments due to the First Party from the Second Party under this Agreement shall be made by the Second Party to First Party by **A/c payee bank draft/pay order drawn in favour of 'S. K. Educations Pvt. Ltd.'** payable at Delhi or may be made by cash.

8.5 If the Second Party commits default in the payment of the ASEC for the continuous period of 3 months without any sufficient and proper reasons then the First Party may have the right to terminate this Agreement without any notice.

8.6 The Second Party shall be liable to pay AESC to the First Party, except for all or any of the following head namely refundable amounts (caution money), sale of admission kit/book/dress/prospectus, food charges and transport charges.

8.7 All taxes, duties and levies as may be applicable under the existing laws or imposes or assessed by the central govt., state govt., local authorities or any other government body by virtue of new enactment or amendment to the existing statutes or otherwise, in respect of and/or applicable to the operations of the Second Party or the goods, materials, information or services arranged and/or supplied by the First Party to the Second Party or materials & services procured by the Second Party directly shall be entirely borne and paid by the Second Party."

20. Clause 10 of the agreement deals with termination and Clause 11 deals with termination consequences. They read as under :-

"**10. TERMINATION**

10.1 That the First Party may terminate this Agreement forthwith by notice in writing to the Second Party if the Second Party commits breach of terms of this Agreement hereunder and failed to rectify the breach within a period of 15 days of the receipt of a notice of the First Party requiring him to do so.

10.2 The First Party at its sole discretion may terminate this Agreement by giving 15 days notice in advance to the Second Party, if the First Party is of the opinion that any of the activities conducted by the Second Party in the Pre-School are damaging its reputation.

10.3 If any sum or document/information required under the terms of this Agreement by the First Party is not paid or submitted at the latest within 15 days following its due date, may led to termination of the Agreement without any notice.

10.4 That any act(s)/commission(s) contrary to law like cheating fraud, misappropriation, defamation etc., any other criminal or civil offence(s) committed by Second Party, in the courses of business, services under this Agreement or otherwise, which directly or indirectly effects the name and reputation of the First Party shall empower the First Party to terminate this Agreement with immediate effect without any notice to the Second Party and the First Party shall have right to seek damages from Second party.

10.5 In the event the Second Party becomes bankrupt or goes into receivership, administration or liquidation (whether creditor's voluntary or compulsory) the First Party shall have a right to terminate this Agreement.

10.6 In the event of a change in the management of the Second Party without the prior consent of First Party may lead to termination of this Agreement.

10.7 In the event the Second Party withholds any information and access or otherwise obstruct designated representative(s) from freely carrying out audit/inspections and visits as envisaged under this Agreement, the First Party shall have a right to terminate this Agreement.

10.8 The Second Party may terminate this Agreement by giving 6 months prior notice in writing but shall not close the school before expiry of the academic session, which is from 1st April to 31st March. In case, the Second Party closes the school or agreement is terminated by First Party due to breach of Second Party during academic session, than the Second Party alone shall be liable to get admitted the enrolled children in another school at its own cost and First Party shall not be responsible in any manner.

10.9 The terms and conditions set forth in this clause shall survive the termination or expiration of this Agreement.

11. TERMINATION CONSEQUENCES

11.1 Upon the termination and expiration of this Agreement, the Second Party shall immediately ceases to run the Bachpan...a play school and shall promptly pay to the First Party all sums owed to the First Party under the terms of this Agreement. The aforesaid amount shall include remaining AESC amount or any other outstanding.

11.2 All the rights of the Second Party as provided under this Agreement including the limited non-exclusive license granted to the Second Party to use the name shall cease immediately upon termination. The Second Party and all the person claiming under it shall immediately ceases and desist from the use of said name **“Bachpan...a Play School"** and the trade name of Bachpan and any other sign, mark, slogan, symbol, or any other characteristics owned by or associated with the First Party or the name **"Bachpan...a Play School"**, failing which the First Party shall be at the liberty to take any such action as available under law against the Second Party at the cost and consequences of First Party.

11.3 The Second Party from the day of the termination shall neither pretend nor act like a representative/and associate of the First Party.

11.4 All the documents, papers, stationery or other article bearing the marks shall be returned by the Second Party to the First Party within 7 days of the termination of this Agreement and on failure, the Second Party shall pay damages @ Rs. 2000/- per day to the First Party for every day delay in returning the material.

11.5 Termination for this Agreement for any reason shall not release the Second Party from any obligation, which at the date of termination has already accrued to the Second Party (whether or not the amount of such liability has been computed) or which under the terms hereof or by its nature is a continuing obligation.

11.6 The Second Party shall not run play school or engage in any other educational activity or similar activity directly or indirectly for a period of two year from the date of termination of this Agreement. If the Second Party is found running the school or conducting a learning or activity centre within the above said period, the Second Party agrees to pay such amounts as decided by the First Party as damages."

21. From perusal of Clause 10.1 of the agreement it would be evident that the informant has agreed that petitioner no. 1 may terminate the agreement forthwith in

writing after the informant commits breach of terms of agreement and failed to rectify the breach within a period of 15 days of the receipt of a notice of the petitioner no. 1 requiring to do so.

22. Similarly, Clause 11.1 of termination consequences stipulates that upon the termination and expiration of this agreement, the informant shall immediately cease to run the ‘Bachpan...a Play School’ and shall promptly pay the petitioner no. 1 all sums owned to him under the terms of the agreement.

23. The aforesaid facts would show that in course of business relationship, some dispute arose between the parties pursuant to which the FIR has been instituted.

24. The FIR has been instituted for the offences punishable under Sections 406 and 420 of the IPC. In the background of the facts noted above, it has to be seen as to whether the offences punishable under Sections 406 and 420 of the IPC are attracted against the petitioners or not.

25. Section 406 of the IPC prescribes the punishment for the offence of 'criminal breach of trust'. The offence of 'criminal breach of trust' has been defined under Section 405 of the IPC, which is extracted hereinbelow:—

> "**405. Criminal breach of trust**.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"."

26. From a reading of Section 405 of the IPC it would be evident that a 'criminal breach of trust' involves following ingredients; (a) a person should be entrusted with property or with any dominion over property; (b) that person should dishonestly misappropriate or convert that property to his own use; or dishonestly uses or disposes of that property or willfully suffers any other person so to do; (c) such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or any of legal contract which person has made touching the discharge of such trust.

27. In **S.W. Palanitkar and Ors. vs. State of Bihar and Anr.,** since reported in **(2002) 1 SCC 241**, the

Supreme Court while dealing with ingredients of the 'criminal breach of trust' held in para 9 as under:—

> "9. The ingredients in order to constitute a criminal breach of trust are: (1) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged (ii) of any legal contract made, touching the discharge of such trust."

28. So far as Section 420 of the IPC is concerned, the same prescribes punishment for the offence of 'cheating', which is defined under Section 415 of the IPC. It reads as under:—

> "**415. Cheating.**—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and

> which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

29. The Section consists of two distinct parts, each part dealing with one way of cheating, (i) the first part contemplates where by deception practiced upon a person the accused dishonestly or fraudulently induces that person to deliver a property to any person or to consent that any person shall retain any property; (ii) the second part envisages where by deception practiced upon a person the accused intentionally induces that person to do or omit to do so, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

30. The offence punishable under Section 420 IPC reads as under:—

> "**420. Cheating and dishonestly inducing delivery of property.**—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a

> valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

31. It would be evident from combined reading of Sections 415 and 420 of the IPC that the essential ingredients of Section 420 IPC are:

> (i) cheating;
> (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything, which is sealed or signed or is capable of being converted into a valuable security; and
> (iii) mens rea of the accused at the time of making the inducement.

32. In **Dalip Kaur & Ors. vs. Jagnar Singh & Anr.,** since reported in **(2009) 14 SCC 696**, the question for determination before the Supreme Court was whether breach of contract of an agreement for sale would constitute an offence under Section 406 or Section 420 of the IPC. After examining the fact of the case and relevant Sections of the IPC, the Supreme Court held that an offence of 'cheating' would be constituted when the accused has fraudulent or dishonest intention at the time of making of promise or representation. A

pure and simple breach of contract does not constitute the offence of 'cheating'. It further held that if the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants for non-refunding the amount of advance, the same would not constitute an offence of 'cheating' or 'criminal breach of trust'.

33. In **Alpic Finance Ltd. vs. P. Sadasivan and Anr.**, since reported in **(2001) 3 SCC 513**, the Supreme Court highlighted the grounds on which criminal proceedings are to be quashed under Section 482 of the Cr.P.C. and noted the ingredients of Section 420 of the IPC. In that case, the appellant was a registered company having its head office at Mumbai. It was carrying business, inter alia, of leasing and hire purchase. The first respondent therein was the Chairman and founder-trustee of a trust. The second respondent was also a trustee. The Trust was running a dental college in the name and style of Rajiv Gandhi Dental College. The respondents therein entered into agreement with the appellant-Company therein whereby the appellant had agreed to finance the purchase of 100 hydraulically-operated dental chairs of which cost was around Rs. 92,50,000/-. The appellant-Company agreed to finance the respondents for the purchase of chairs through a lease

agreement and as per the agreement, the respondents were liable to pay rentals. The respondents agreed to pay quarterly the sum of Rs. 7,50,000/- for the first year, Rs. 12,50,000/- for the second year, Rs. 8,00,000/- for the third year and Rs. 6,25,000/- for the fourth year. In accordance with the agreement, the appellant made payments to M/s United Medico Dental Equipments and they delivered the dental chairs to the respondents. The appellant-Company alleged that the respondents were not regular in making payments and committed default in payment of the installments and that the bank had dishonoured certain cheques issued by the respondents. The appellant-Company also alleged that on physical verification, certain chairs were found missing from the premises of the respondents and thus they committed cheating and caused misappropriation of the property belonging to the appellant. The appellant-Company filed a complaint under Section 200 of the Cr.P.C. before the Chief Metropolitan Magistrate, Bangalore alleging that the respondents had committed offences under Sections 420, 406 and 423 read with Section 120-B of the IPC. The Magistrate took cognizance of the alleged offence under Section 190 of the Cr.P.C. and issued summons to the respondents. The order taking cognizance was challenged by the respondents by filing an application under Section 482 of the Cr.P.C. before the Karnataka High Court. The High Court quashed the entire proceedings. Being aggrieved, the appellant-Company preferred appeal before the Supreme Court. It was contended on behalf of the appellant in that case that the High Court had seriously erred in quashing of the proceedings under Section 482 of the Cr.P.C. It also contended that allegation in the complaint clearly made out offences punishable under Sections 420, 406, 423, 424 read with Section 120-B of the IPC. It was contended on behalf of the respondents that the complaint was filed only to harass the respondents and it was motivated by mala fide intention. It was argued that the entire transaction was of civil nature and that the respondents have made a substantial payment as per the hire-purchase agreement and the default, if any, was not willful and there was no element of misappropriation or cheating.

34. After considering the power under Section 482 of the Cr.P.C. and the facts and law involved in the case, the Supreme Court dismissed the appeal and concluded that the learned Judge of the High Court was perfectly justified in quashing the proceedings. It held in para 10 as under:—

> "10. … The injury alleged may form basis of civil claim and may also constitute the

ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that respondents committed the offence under Section 420, I.P.C. and the case of the appellant is that respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any willful misrepresentation. Even according to the appellant, parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception."

35. In **Anil Mahajan vs. Bhor Industries Ltd. and Anr**., since reported in **(2005) 10 SCC 228**, a three-Judge Bench of the Supreme Court considered a case relating to the issuance of process for the offence punishable under Sections 415, 418 and 420 of the IPC. In that case also, the Bench analyzed the difference between 'breach of contract' and 'cheating'. The appellant therein was the accused in complaint filed against him by the respondent company for the offence punishable under Sections 418 and 420 of the IPC. On the basis of the allegations made in the complaint, the Magistrate issued the process against the accused. The order of Magistrate would demonstrate that the complainant had filed documents on record to show that the accused promised to pay the amount, but he did not pay the same with the intent to deceive the complainant. Therefore, the Magistrate held that the complainant had been

able to make out a case to issue process against the accused under Sections 415, 418 and 420 of the IPC.

36. The said order of the Magistrate was challenged before the court of sessions. The learned Additional Sessions Judge, who heard the matter, set aside the order of Magistrate issuing process. The order of the learned Additional Sessions Judge was set aside by the High Court.

37. The order of the High Court was challenged by the appellant before the Supreme Court. After analyzing the provisions of the IPC under which the complaint was filed and the allegation made in the complaint, the Court observed that it was a simple case of civil dispute between the parties. It held that requisite averments so as to make out a case of 'cheating' are absolutely absent. It further held that the principles laid down in **Alpic Finance Ltd. vs. P. Sadasivan and Anr.** (supra) were rightly applied by learned Additional Sessions Judge while setting aside the order of the Magistrate issuing process to the appellant.

38. In **Hridaya Ranjan Prasad Verma and Ors. vs. State of Bihar and Anr.,** since reported in (2000) 4 SCC 168, the Supreme Court while dealing with a case in which FIR was instituted under Sections 418, 420, 423, 504 and 120-B

of the IPC held in paras 14 and 15 as under:—

> "14. On a reading of the section it is manifest that in the definition there are set-forth two separate classes of acts which the persons deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set-forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.
>
> 15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention

which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

39. **In S.W. Palanitkar and Ors. vs. State of Bihar and Anr.** (supra), it has been held by the Supreme Court in para 21 as under:—

"21. … In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulently or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating."

40. In **State of Kerala vs. A. Pareed Pillai and Anr**., since reported in **(1972) 3 SCC 661**, the Supreme Court held in para 16 as under:—

"16. … To hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise. Such a dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfil the promise."

41. In **Indian Oil Corporation vs. NEPC India Ltd. and Ors.,** since reported in **(2006) 6 SCC 736**, it has been held by the Supreme Court in para 13 as under:—

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [(2000)2 SCC 636], this Court observed:

"It is to be seen if a matter, which is

essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

42. The Court further held in para 14 as under:-

"14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power

> under Section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

43. In **Rajesh Bajaj vs. State, NCT of Delhi and Ors**., since reported in **(1999) 3 SCC 259**, the Supreme Court held in para 11 as under:—

> "11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that respondent after receiving the goods have sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities."

44. It is the case of the petitioners that in terms of the agreement arrived at between the parties, the petitioner terminated the franchisee of the informant and as a consequence

thereof, the informant was expected not to use the trade mark of the petitioner. Since the informant had violated the terms of the agreement, a suit was instituted in the Tis Hazari Court, Delhi in which notices were served. He has filed the instant case under Sections 406 and 420 of the IPC. Apparently, the action taken by the informant appears to be an act in frustration and retaliation.

45. As seen above, for offence of cheating it is imperative that the intention of the parties at the time of making promise should be dishonest. If a person has invoked the terms of agreement and terminated the agreement by notice in writing to the informant of the case, he cannot be said to have committed an offence of ‘cheating’.

46. To make out a case of ‘criminal breach of trust’, it is not sufficient to show that money has been retained by the accused persons, it also must be shown that accused persons dishonestly disposed of or dishonestly retained the same.

47. There is nothing on record on the basis of which it can be inferred that the petitioners dishonestly retained the money given by the informant of the case. The mere fact that the petitioners terminated the agreement on failure of the informant to keep up the promise as made in the agreement it

cannot be said that the petitioners committed 'criminal breach of trust'.

48. Thus, I am of the opinion that the allegations made in the FIR are malicious in nature and under the facts and circumstances of the case, the prosecution of the petitioners for the offences under Sections 406 and 420 of the IPC would not be justified. I am of the further opinion that the filing of the FIR is malafide and unwarranted. The remedy of the informant lies only in civil law and institution of the criminal case is nothing but an abuse of the process of the court.

49. In the matter of **State of Haryana & Ors. vs. Bhajan Lal and Ors.**, since reported in **1992 Supp. (1) SCC 335**, the Supreme Court laid down the principles on which the Court can quash the criminal proceedings under Article 226 of the Constitution of India or under Section 482 of the Cr.P.C. These are as under:—

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and

reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

50. I am of the opinion that principles 5 and 7 enumerated in **Bhajan Lal** (Supra) are clearly attracted in the present case.

51. In that view of the matter, the FIR of Begusarai Town P.S. Case No.68 of 2019 is quashed. The writ petition stands allowed.

52. The parties shall bear their own costs.

(Ashwani Kumar Singh, J)

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