

Reserved on :05.07.2019

Pronounced on :11.07.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Original Petition No.812 of 2016

Creation Investments Equitas Holdings LLC
A wholly owned subsidiary of
Creation Investments Social Ventures Fund II LP,
2711, Centerville Road, Suite 400, Wilmington,
County of New Castle, Delaware 19808,
United States of America

... Petitioner

Vs

Small Industrial Development Bank of India (SIDBI)
7561, Overseas Towers, Anna Salai,
Chennai – 600 002.

... Respondent

Prayer :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the Majority Award dated 19.09.2016 passed by the Arbitral Tribunal.

For Petitioner

: Mr.Satish Parasaran (Sr. Counsel)
for Mr.Vinod Kumar

For Respondent

: Mr.P.H.Arvind Pandian (Sr. Counsel)
M/s.Cyril Amarchand Mangaldas

ORDER

Aggrieved over the majority award rejecting the claim of the petitioner, the present Original Petition has been filed.

2. Brief facts leading to filing of this petition is as follows :

The Claimant and the respondent have entered into a Share Purchase Agreement on 11.12.2013 for purchase of 20,59,277 equity shares of Rs.10/- for a consideration of Rs.140.85 per equity share constituting 3.56 of the fully paid up equity share capital of the respondent company. The total sale consideration agreed was Rs.29,00,49,165/-. The agreement provides for compliance of certain conditions precedent for the sale and purchase of shares. One of the condition precedent for sale/purchase of share was the receipt of all necessary regulatory approvals and consent by RBI, Foreign Investment Promotion Board [FIPB]. The term of the said Agreement was fixed for a period of 90 days from 11.12.2013 with an option to extend the said agreement for a period of 60 days, if the regulatory approvals are pending.

3. It is the case of the Claimant that they made an application before FIPB on 21.12.2013 seeking approval of the transfer of the said shares. Since approval could not be obtained within 90 days, the parties mutually extended the duration of the said agreement for a further period of 60 days i.e., on or before

09.05.2014. It is the further case of the Claimant that FIPB in its meeting on 28.03.2014 considered the application of the said company for transfer of the shares to the Claimant and granted approval for the same. The said approval dated 09.05.2014 has been received by the company on 15.05.2014. The said company had transferred the said approval to the petitioner and the respondent on 15.05.2014. On 24.06.2015, M/s.Equitas Holdings Private Limited had issued bonus shares to its shareholders. In each Equity Shares, two Bonus Equity shares were issued to the share holders. The respondent was issued 41,18,554 Equity Shares as Bonus Shares. Therefore, it is the case of the Claimant that the above bonus shares are liable to be transferred to the Claimant in consequence of holding the sale shares. As the respondent had refused to sell the shares in terms of the Agreement of Sale, the matter was referred to Arbitration.

4. It is the case of the respondent that as per the agreement, Equitas Holdings Company was to issue necessary notice on approval from the FIPB for completion of transaction. As per the SPA, as the approvals should be obtained within 90 days from the date of Share Purchase Agreement and though the claimant and the respondent have extended the Share Purchase Agreement for further period of 60 days as per clause 8.2, the regulatory approvals are pending. The above clause is the essence of Share Purchase Agreement. FIPB approval was not obtained within a period of 90 days from the date of execution of Share

Purchase Agreement. Accordingly, further period of 60 days was extended upto 09.05.2014 for receiving FIPB approval and consequently for the purchase of 20,59,277 on or before 09.05.2014. Admittedly, the approval of FIPB was received only on 15.05.2014 and forwarded to the respondent company on 09.05.2014, after the expiry of Share Purchase Agreement. It is the further contention of the respondent that the receipt of FIPB approval authorises other conditions in accordance with clause 3.2 of Share Purchase Agreement. Since the conditions precedent were not satisfied, the sale and purchase of equity shares much after expiry on 09.05.2014 cannot be considered and hence, the respondent communicated not to proceed with the transaction.

5. The Arbitral Tribunal framed the following Issues :

1. Whether the FIPB approval was granted within the term of the Share Purchase Agreement (SPA) in Ex.C.1 = Ex.R.1?
2. If the approval from the FIPB was granted during the term of the Share Purchase Agreement, were the parties obliged to complete the sale and purchase of the Sale Shares in terms of Clause 8.3 (i) of the Agreement Ex.C.1 = Ex.R.1?
3. Whether the receipt of approval from FIPB for the transaction as contemplated in Clause 3.2(i) of SPA in Ex.C.1 = Ex.R.1 refers to date of actual receipt by the parties of the written

approval of FIPB? And if so, whether the date of satisfaction of condition precedent as mentioned in Clause 3.2(i) of the SPA should be taken as 15th May, 2014?

4. Will the non-fulfillment of the conditions in clause 3.2(iii) to (v) of the Share Purchase Agreement Ex.C.1 + Ex.R.1 can be valid ground for the respondent to refuse to perform its obligations under the Agreement?

5. Whether the respondent had committed breach of terms of Share Purchase Agreement by not transferring the Sale Shares to the Claimant? And if so, whether the respondent is liable to transfer the sales under the Share Purchase Agreement and the bonus shares allotted to it to the Claimant?

6. Whether the SPC is a determinable contract? If yes, is the relief of specific performance sought for by the Claimant legally maintainable?

7. Whether the Claimant is entitled to the reliefs as claimed in its statement of claim? And if so, whether the Claimant is entitled to the 41,18,854 bonus equity shares issued by Equitas Holdings Pvt. Ltd. From the respondent?

and finally the majority version of the Arbitral Tribunal dismissed the claim of the petitioner for specific performance of the Share Purchase Agreement. Whereas, the minority decision of the Tribunal has granted specific performance.

Challenging the same, the present petition has been filed.

6. The learned Senior Counsel, Mr.Satish Parasan, appearing for the petitioner mainly contended that the entire issue in this matter revolves around the interpretation of the Clause 3 of the Share Purchase Agreement. It is his contention that Clause 3, condition precedent set out in the Share Purchase Agreement has been complied. It is his further contention that the intention of the parties was not to obtain physical receipt of approval. Obtaining approval from FIPB is a condition precedent for transfer of shares. Therefore, actual physical receipt of such approval is not necessary. The email of the respondent clearly prove the fact that on 28.03.2014 itself FIPB approved the transfer of shares, which are subject matter of the agreement. M/s.Equitas company communicated the same to the petitioner by email. This fact clearly indicate that the approval was granted much prior to the expiry date, viz., 09.05.2014. Similarly, it is his further contention that waiver on the part of the petitioner has also been clearly established. Once the petitioner has established the waiver, clause 3(1) of the contract is in their favour for transfer of shares. It is his further contention that approval was granted in this case by FIPB before the expiry date, i.e., 09.05.2014. Therefore, the termination of the agreement shall not relieve any party of any obligation or liability accrued prior to the date of termination of the contract as per Clause 8.3 of the contract. It is his further contention that the learned Arbitrators have failed to consider the relevant clauses and the contract has been re-written. Hence, it is his contention that when the Arbitrators have

passed the Award beyond the scope of the contract and the contract has been re-written, such an Award passed by the Arbitrators cannot be sustained in law. In support of his submissions, he placed reliance on the following judgments :

Mumbai Metropolitan Region Development Authority Vs. Unity Infraproject Limited reported in **2008 SCC OnLine Bom 190**

Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL) and another reported in **2018 (11) Supreme Court Cases 508**

ICICI Bank Limited Vs. United Breweries (Holdings) Limited and others reported in **2015 SCC Online Bom 5913**

Killipara Sriramulu (dead by his legal representative Vs. T.Aswatha Narayana (dead) by his legal representative and others reported in **AIR 1968 Supreme Court 1028**

JRRT (Investments) Ltd and others V. Haycraft and others reported in **Butterworths Company Law Cases 1993 BCLC 401**

Charter Reinsurance Co. Ltd. Vs. Fagan reported in **AC 1997 12 House of Lords 313**

Multichannel (India) Limited Mumbai Vs. Kavitalaya Productions Pvt Ltd. And others reported in **AIR 1999 Madras 59**

Investors Compensation Scheme Ltd, Vs. West Bromwich Building Society reported in **1998 House of Lords 896**

Dr.Jiwn Lal and others Vs. Brij Mohan Mehra and another reported in

1972 (2) Supreme Court Cases 757

Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and another reported in **2004 (3) Supreme Court Cases 214**

7. The learned Additional Advocate General appearing for the respondent submitted that the learned Arbitrators have interpreted the contract and given a literal meaning. The contract has not been re-written as alleged by the learned counsel appearing for the petitioner. The learned Arbitrators have made threadbare analysis of the entire contract and has found that the Share Purchase Agreement has been terminated and approval has not been received within the time. Therefore, when the Arbitrators have considered the entire aspects and found that the claim of the petitioner is not maintainable, this Court cannot re-appreciate the entire evidence. Hence, it is his contention that issue of waiver, i.e, the condition precedent, cannot be raised before this Court. The plea of waiver has been given up by the petitioner before the Arbitral Tribunal. Even in the claim petition, the plea of waiver has been given up by them. It is his further contention that the respondent has sustained huge monetary loss since an injunction has been obtained by the petitioner and hence, this petition is liable to be dismissed and the respondent is entitled for price variation as undertaken by the petitioner. In support of his submission, he has relied upon the following judgments :

Board of Control for Cricket in India Vs. Kochi Cricket Pvt. Ltd. And

others reported in AIR 2018 Supreme Court 1549

Associate Builders Vs. Delhi Development Authority reported in 2015

(3) Supreme Court Cases 49

G.Sathyan Vs. B.Vasudevan and others (DB) reported in 2017 (1) CTC 553

G.Sathyan Vs. B.Vasudevan and others reported in 2017 (1) CTC 534

Satya Metal Industries Vs. Union of India and others reported in Manu/TN/0334/2017

S.Malliga Vs. The Chief Regional Manager, Hindustan Petroleum Corporation Ltd. And others reported in 2016 (4) CTC 309

National Highways Authority of India Vs. ITD. Cementation India Limited reported in 2015 (14) SCC 21

Kumar Mangat Pathak, Sole Proprietor of Big Screen Entertainer Vs.Cinema Capital Venture Fund through 1. Urmila Gupta and another reported in 2018 SCC OnLine Bom 1601

HRD Corporation Vs. Gail (India) Limited reported in 2018 (12) SCC 471

Chennai Container Terminal Private Limited Vs. The Board of Trustees of Chennai Port Trust and others reported in 2018 (4) MLJ 385

Silver Resorts Hotel India Pvt. Ltd. Vs. Wimberly Allison Tong & Goo (UK) reported in Manu/DE/1650/2016.

8. Heard the learned Senior Counsel appearing for the petitioner and the learned Additional Advocate General appearing for the respondent and perused the majority and minority Awards passed by the Arbitral Tribunal.

9. The majority view of the Arbitrators have considered various clauses in the contract and has held that the specific performance of the Share Purchase Agreement cannot be enforced in view of the specific conditions or obligations in the contract has not been fulfilled. It is not in dispute with regard to the entering into Share Purchase Agreement between the parties. The relevant clauses of the agreement reads as follows :

Clause – 2 Sale and Purchase of the Sale Shares

On and subject to the terms and conditions herein

(i) the Seller agrees to sell and transfer to the Purchases 2,059277 equity shares of the Company ("Sale Shares") at Rs.140.85 per Equity Share constituting 3.56% of the fully paid up equity share capital of the Company as on the Effective Date and the Completion Date and

(ii) the Purchaser agrees to purchase and acquire the Sale Shares on the Completion Date (defined below) for a consideration of Rs.29,00,49,165/- (Rupees twenty nine crores

forty nine thousand one hundred and sixty five only) ('Sale Consideration") which shall be payable by the Purchaser to the Seller in the manner contained in this Agreement.

3. Conditions Precedent

3.1 The Purchaser shall not be obligated or liable to purchase and the Seller shall not be obligated or liable to sell any or all the Sale Shares unless and until all the conditions set forth in this Clause 3 ("Condition Precedent") have been satisfied waived and or deferred in writing by the Purchaser. Upon completion of the Condition Precedent, the Seller shall promptly give written notice to Purchaser of such completion in the format provided under Schedule 1 to the Agreement ("CP Completion Certificate").

3.2 The Conditions Precedent to the Transaction shall be the follows :

(i) Receipt of all necessary regulatory approvals and/or consents for the Transaction, including approval from the Reserve Bank of India ("RBI) and FIPB for the Transaction, provided no adverse obligations are imposed on the Purchaser;

(ii) Compliance with all the requirements and conditions, as may be necessary under the articles of association of the Company ("Articles") for the consummation of the Transaction.

(iii) The representations and warranties of the Seller, set out in Clause 5 of this Agreement, being true, correct and complete as of the date of this Agreement, and as of the Completion Date, as though made on each such date.

10. The entire enforcement of the agreement revolves around clause 3 (i) and (ii) of the terms of the contract. The finding of the majority Award is also relevant to be extracted and the same reads as follows :

“Admittedly, clause 3.2 provides for the conditions precedent, the first of which is the receipt of regulatory approvals from FIPB and RBI, provided no adverse obligations are imposed on the Claimant – Purchaser. It is trite law that contracts are to be interpreted by the parties herein have categorically agreed to use the phrase “receipt” of approvals from FIPB which establishes that they intended actual physical receipt of the approval. If they had intended otherwise, the phrase 'receipt' would not have been used and instead clause would have read to mean “approvals from FIPB”. The word “receipt” makes a world of difference to clause 3.2(i). There is one other factor in clause 3.1 which supports the above interpretation. The Claimant being a non-resident Indian has to mandatorily seek the approval of FIPB.

It is open for FIPB to grant conditional approval depending on various factors. The clause specifically states “provided no adverse obligations are imposed on the Purchaser”. If FIPB had passed any adverse obligations, the same would not be known to the Purchaser as well as the Respondent unless and until the receipt of the approval is physically handed over to the Respondent. Therefore, the phrase “receipt” would mean actual physical receipt of the approval. The same cannot be equated to the factum of approval, both being two different aspects. We have to take a natural meaning of the word “receipt”. Receipt comes from receive. It involves actual and virtually or constructively received that is fact of being received. The said word is free from doubt and ambiguity. Terms of the share purchase agreement/contract are very important and as per the Section 28 of the Arbitration and Conciliation Act 1956, the Arbitral Tribunal must decide in accordance with terms of the contract. Therefore, the Respondent is not obliged to perform the terms of the SPA since the conditions precedents have not been satisfied.”

The Arbitral Tribunal has held that mainly because the approval was not granted on 09.05.2014 during the subsistence of Share Purchase Agreement and held

that the receipt cannot be equated with the approval.

11. The Minority Award when perused, the same indicate that the Award mainly focused on finding fault in the Majority Award. Whereas, the Majority Members have analysed the entire terms of the contract and also taken into consideration that the Clause 8, 8.03 does not include clause 3 (i) or clause 3 (ii) to survive termination of Share Purchase Agreement.

12. In the above background, now when the judgments cited by the learned counsel for the petitioner when analysed, in the judgment in **Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and another** reported in **2004 (3) Supreme Court Cases 214** the apex Court has held that the State and its authorities including instrumentalities of States in all their activities including those in the field of contracts have to be just, fair and reasonable. In the judgment in **Dr. Jivn Lal and others Vs. Brij Mohan Mehra and another** reported in **1972 (2) Supreme Court Cases 757**, the condition precedent in the above judgment, the waiver clause in the contract has been satisfied and the waiver clause does not create liability against the vendee and he can waive it. In the judgment in **Mumbai Metropolitan Region Development Authority Vs. Unity Infraproject Limited** reported in **2008 SCC OnLine Bom 190**, the Bombay High Court has held that in interpreting a contract, the Court cannot place emphasis on an isolated provision divorced from the context and unrelated to the other provisions which govern contractual

obligations. The duty of the Court when called upon to assess where the balance lies in a contractual dispute, is to read the contract as a whole in order to understand the business meaning which the parties attributed to their obligations. Interpretation in law must ensure in commercial matters that the view which the Court takes records the sense, which the parties to an arms length transaction attribute to the terms which they incorporate.

13. In judgment in **Investors Compensation Scheme Ltd, Vs. West Bromwich Building Society** reported in **1998 House of Lords 896**, it has been held that

“The House of Lords held allowing the appeal (Lord Lloyd of Berwick dissenting) that in construing contractual documents the aim was to find the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties, including anything which would have affected the way a reasonable man would have understood it, but excluding previous negotiations and declarations of subjective intent; that the meaning which a document would convey to a reasonable man was what the parties using its words against the relevant background would reasonably have been supposed to mean and included the possibility of ambiguity and even misuse of words or syntax; that

the Court was not obliged to ascribe to the parties an intention which plainly they could not have had, and in choosing between competing unnatural meanings was entitled to decide that the parties must have made mistakes of meaning or syntax; that a claim to rescission could be made only by the owner of the mortgaged property and was not separately assignable chose in action but was simply part of the process of rescission; and that in reserving to the investor any claim to abatement of the mortgage debt consequent on rescission section 3(b) was not cutting down the scope of the chose in action assigned to the scheme but was merely intended to make clear that the investor would not be accountable to the scheme for any abatement of the debt as a result of an action for rescission of the mortgage; that the claim form was effective to assign to the scheme the whole of the investors' claim to compensation and damages, although they retained the right to claim rescission of their mortgage on such terms as the court might consider just; and that, accordingly, the scheme would maintain the actions against the building societies and the solicitors.

Decision of the Court of Appeal reversed."

14. In ICICI Bank Limited Vs. United Breweries (Holdings) Limited

and others reported in **2015 SCC Online Bom 5913**, it has been held that it is well settled position in law that while reading the contents of commercial documents, intention of the parties has to be taken into consideration. It is also well settled that apart from recitals, the main agreement itself also has to be taken into consideration.

15. In the judgment in **Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL) and another** reported in **2018 (11) Supreme Court Cases 508** it has been held that the entire contract has to be looked into. In the judgment in **Mumbai Metropolitan Region Development Authority Vs. Unity Infraproject Limited** reported in **2008 SCC OnLine Bom 190**, it has been held has follows :

“A business like interpretation of contractual provisions must be adopted in construing contracts entered into by persons of business to govern business dealings. The Court must ensure that interpretation of law in commercial cases must not be disjointed from the intent and object which those having business dealings seek to sub-serve.”

16. From the above judgments, it is well settled that in a commercial contract, the intention of the parties to be gathered from the entire terms of the

contract as a whole. Similarly, the entire contract depends upon the condition precedent set out in the contract. The majority Award has found that such condition is a condition precedent and the date of approval cannot be equated with the date of receipt of approval. The learned Arbitral Tribunal taking note of the relevant clauses has given a finding. Infact, email dated 16.05.2014 sent by the petitioner to the respondent makes it clear that parties understood that the receipt of approval is the condition precedent and not the date of approval. Therefore, when the Majority Award analysed the facts and interpreted the terms reasonably, this Court cannot re-appreciate the evidence as an appellate Court.

17. Similarly in the judgment in **McDermott International Tnc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]** wherein the Apex Court explained the term patent illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

18. It is well settled that the scope of interference under section 34 of the

Arbitration and Conciliation Act is very limited. This Court cannot sit as an appellate authority to re-appreciate the entire matter and the Court can look into factual aspects and substitute its own view. Hence, the construction of the terms of the contract is primarily for the Arbitrator to decide, unless it is found that such a construction is not a possible one as held in the judgment in **HRD Corporation Vs. Gail (India) Limited** reported in **2018 (12) SCC 471**. Similarly, in the judgment in **Chennai Container Terminal Private Limited Vs. The Board of Trustees of Chennai Port Trust and others** reported in **2018 (4) MLJ 385** the Division Bench of this Court has held that interpretation of a contract was a matter for the Arbitrator to determine even if it gives rise to determination of a question of law.

19. In view of the above settled position of law, when the Majority Award and the Minority Award perused, in the Majority Award the Arbitrators have considered the entire issue between the parties mainly on the basis of the Share Purchase Agreement and had also given literal meaning for the terms of the contract. Therefore, when the Arbitrators have taken note of the relevant clauses and taken a view, such a finding cannot be interfered, mainly on the basis of the alternative view passed in the Minority Award. In the Minority Award also the Arbitrator has not considered the circumstances under which specific performance could be granted. Whereas, the Majority Members have taken note of the principle of the substantial law in granting specific performance.

Therefore, the petitioner has not made out any ground available under section 34 of the Arbitration and Conciliation Act to interfere the well reasoned Award passed by the Arbitral Tribunal. Further, in pursuance of the Orders passed by this Court dated 08.11.206 and 31.01.2017 in the injunction application, the petitioner has also filed an undertaking before this Court that they will compensate the respondent, in the event if there is any price variation in the value of the shares. In view of the same, it is for the respondent to work out their remedy to recover any loss sustained by them.

20. Accordingly, this Original Petition is dismissed. No cost.

11.07.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

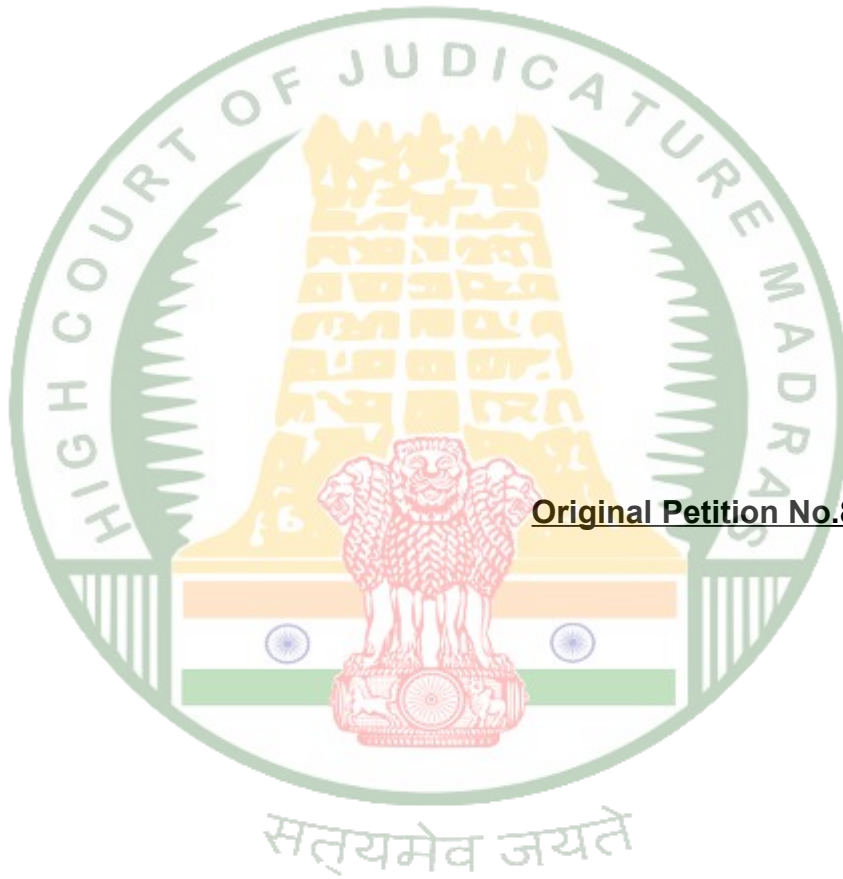
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To

Small Industrial Development Bank of India (SIDBI)
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Chennai – 600 002.

N.SATHISH KUMAR, J.

VRC



Order in
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