

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 215 of 2004****Judgment reserved on 14/01/2020****Judgment delivered on 03/02/2020**

1. Hinchharam, S/o Shri Dariyav Singh (died) through
Lrs.

a. Laxmi Bai W/o Meenaram, Aged about 52 years,
R/o Village Takam, Tahsil Berla, District
Bemetara, Chhattisgarh (Daughter).

b. Hemin @ Jamuna Bai W/o Deenbandhu, Aged about
35 years, R/o Village Kandai, Post Ninva, Tahsil
and District Bemetara, Chhattisgarh (Daughter).

2. Churaman Singh, S/o Shri Hinchharam, Aged about
35 years.

3. Khemraj Singh, S/o Shri Hinchharam, Aged about 31
years.

4. Dilip Kumar, S/o Shri Hinchharam, Aged about 27
years.

All are Agriculturist, R/o Village and Tahsil
Berla, Distt. Durg, Chhattisgarh.

--- Appellants/Defendants

Versus

1. Smt. Shyama Bai, Widow of Late Guharam, Aged about 54 years, R/o Gheevri, Tahsil Saaja, Distt. Durg, Chhattisgarh.
2. Pyari Bai, Aged about 33 years, W/o not known, R/o Village Khairjhitee, Tahsil Saaja, Distt. Durg, Chhattisgarh.
3. Indrani Bai, Aged about 30 years, W/o not known, R/o Village Khairjhitee, Tahsil Saaja, Distt. Durg, Chhattisgarh.

--- Plaintiffs

4. Kaijabai W/o Shri Tulsi (died) through Lrs.
 - a. Tulsi (husband) (died and deleted).
 - b. Loop Singh S/o Tulsi, Aged about 40 years, R/o Village Hathmudi, Tahsil Saaja, District Durg, Chhattisgarh.
 - c. Sunder S/o Tulsi, Aged about 38 years, R/o Village Hathmudi, Tahsil Saaja, District Durg, Chhattisgarh.
 - d. Smt. Champa Bai, R/o Near Kesdebri, Village Kodwa, Post Deverbeeja, Tahsil Berla, Distt. Durg, Chhattisgarh.

5. Dheliya Bai, W/o Shri Tilakram, Aged about 59 years, Occupation Agriculturist, R/o Sonesarar, Tahsil dhamdha, Distt. Durg, Chhattisgarh.

6. State of Chhattisgarh, Through District Collector, Distt. Durg, Chhattisgarh.

--- Respondents

For Appellants/Defendants :-

Mr. Shashi Bhushan Tiwari, Advocate

For Respondents/Plaintiffs :-

Mr. H.S. Patel, Advocate

For Respondent No. 6/State :-

Mrs. Astha Shukla, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the appellants / defendants herein was admitted for hearing on the following two substantial question of law :-

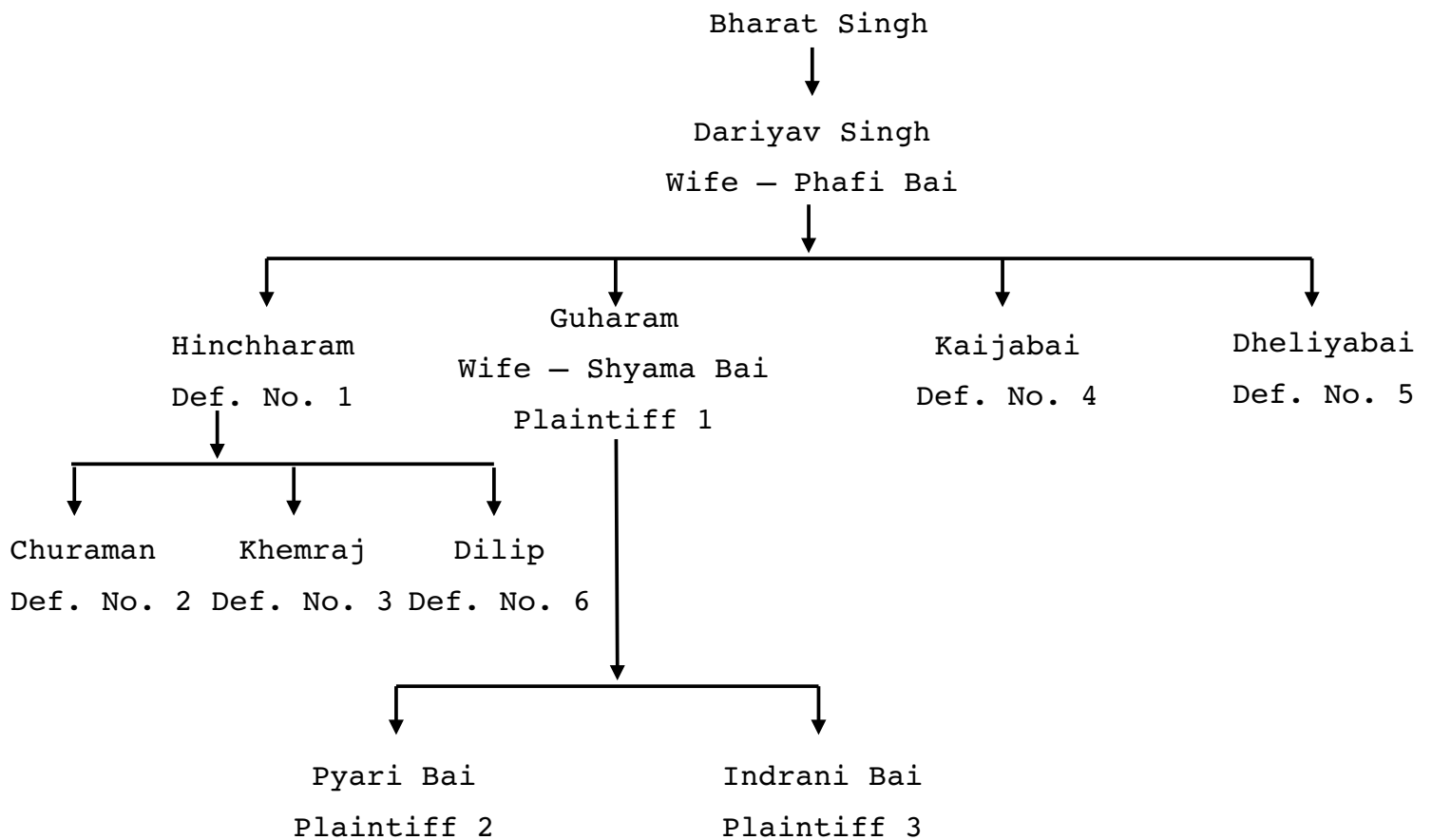
“1. Whether both the Courts below were justified in arriving at a finding that Dariyavsingh was not competent to sell his undivided share ?

2. Whether both the Courts below were justified in holding that will

executed by Phafibai was not genuine ?”

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court.)

2.The following genealogical tree would demonstrate the relationship between the parties :-



3.The suit property (land as well as house) mentioned in Schedule 'A' and 'B' annexed with the plaint situated at Village Takam, Tahsil Berla was originally held by Dariyav Singh. He

and his wife Phafibai had two sons namely defendant No. 1 – Hinchharam and Guharam; and two daughters namely defendant No. 4 – Kaijabai and defendant No. 5 – Dheliyabai. The three plaintiffs are widow and daughters of Late Guharam. Defendants No. 2, 3 and 6 are Hinchharam's sons namely Churaman, Khemraj and Dilip respectively.

4. Plaintiffs filed a civil suit only for possession and *mesne* profit stating *inter alia* that the suit property was the ancestral property of their husband/father Guharam therefore, Dariyav Singh could not have alienated the suit property in favour of defendants No. 2 and 3 vide registered sale deeds dated 18/03/1971 (Exhibits P/1 and P/2) and thereafter, Phafibai i.e. widow of Dariyav Singh was also not competent to execute Will deed dated 15/07/1979 in favour of defendant No. 6 – Dilip, as such, the plaintiffs are entitled for partition and possession of the suit property as well as *mesne* profit.

5. The defendants set up a plea that the suit property fell in share of Dariyav Singh during partition, therefore, he has rightly and

competently alienated the suit property in favour of defendants No. 2 and 3 by sale deeds dated 18/03/1971 (Exhibits P/1 and P/2) and after his death, his widow Phafi Bai has rightly bequeathed the suit property in favour of defendant No. 6 by Will dated 15/07/1979, as such, the plaintiffs are not entitled for possession of the suit property shown in Schedule 'A' and 'B' annexed with the plaint.

6. Learned trial Court, after appreciating the oral as well as documentary evidence on record, vide its judgment and decree dated 11/09/2000, decreed the suit of the plaintiffs holding that the plaintiffs are title-holders of $3/8^{\text{th}}$ share in the suit property mentioned in Schedule 'A' and 'B' annexed with the plaint and also entitled for possession of the same as well as *mesne profit*.

7. On appeal being preferred by the defendants, learned first appellate Court, by its judgment and decree dated 25/02/2004, affirmed with the rest of the findings recorded by the trial Court though held that plaintiff No. 1 is entitled for $1/16^{\text{th}}$ share and plaintiffs No. 2 and 3 are entitled for 229/640 in the suit property

mentioned in Schedule 'A' and 'B' annexed with the plaint.

8. Questioning the judgment and decree passed by both the Courts below, this second appeal under Section 100 of the CPC has been preferred by the defendants No. 1, 2, 3 and 6/appellants herein in which two substantial questions of law have been framed and set out in the opening paragraph of this judgment.

9. Mr. Shashi Bhushan Tiwari, learned counsel for the appellants/defendants would submit that the suit property fell in share of Dariyav Singh in partition and therefore, he has rightly alienated it in favour of defendants No. 2 and 3 vide sale deeds dated 18/03/1971 (Exhibits P/1 and P/2) which was not sought to be declared illegal or invalid by the plaintiffs while filing the suit, as such, both the Courts below ought not to have set aside the said sale deeds and moreover, the Will executed by Phafi Bai in favour of defendant No. 6 has already been proved by examining two attesting witnesses i.e. D.W. 2 namely Damar Singh and D.W. 5 namely Durga Prasad, thus, both the findings recorded by the Courts below that

Will executed by Phafi Bai in favour of defendant No. 6 has not been proved in accordance with law is perverse and contrary to record, as such, the second appeal deserves to be allowed and the plaintiffs' suit deserves to be dismissed with cost(s).

10. Mr.H.S.Patel, learned counsel for the respondents/plaintiffs would submit that the suit property was the ancestral property of the parties in hands of Dariyav Singh which Dariyav Singh was not entitled to alienate in favour of defendants No. 2 and 3 that too without consideration (Exhibits D/2 and D/3) and they have failed to have the legality necessity for sale of that property and the Will in question executed by Phafi Bai in favour of defendant No. 6 has not been proved in accordance with law, therefore, both the Courts below are absolutely justified in granting decree in favour of the plaintiffs and the second appeal deserves to be dismissed.

11.I have heard learned counsel for the parties, considered their rival submissions made herein-

above and went through the records with utmost circumspection.

Answer to substantial question NO.1:-

12.The three plaintiffs, being widow and daughters of Guharam, instituted a suit on 07/04/1971 for partition and possession of the suit property (land and house) shown in Schedule 'A' annexed with the plaint and also the property shown in Schedule 'B' annexed with the plaint alleging the said property to be coparcenary property in which he had also share in the said property, which was refused by Dariyav Singh, father of Guharam (defendant No.1) and his brother Hinchharam (both died during the pendency of the suit) and it was pleaded by defendant No.1-Hinchharam that Dariyav Singh has already transferred the suit lands by two sale deeds dated 18/03/1971 (Exhibits P/1 and P/2) in favour of defendant No. 2-Churaman and defendant No. 3-Khemraj and delivered the peaceful possession to them and Guharam and the plaintiffs had no right and title over the suit property. During the pendency of the suit, Dariyav Singh's wife Phafi Bai also died and the Will dated 15/07/1979 allegedly executed by her

in favour of Dilip (defendant No. 6) was introduced and it was also pleaded that the plaintiffs have no right/title over the suit property which the trial Court did not accept and decreed the suit holding that though they have partitioned the suit property of Schedule 'A' and 'B' in three parts in the year 1966 as a part of family arrangement for the purpose of separate residence and cultivation, but revenue records remained uncorrected and Guharam, predecessor-in-title of the plaintiffs, died in the year 1970 and thereafter, Dariyav Singh executed two sale deeds dated 18/03/1971 (Exhibits P/1 and P/2) transferring the suit property in favour of defendants No. 2 and 3 to frustrate the claim of the plaintiffs.

13. A careful perusal of the records would show that the suit property i.e. 78.46 acres along with suit house was originally held by Bharat Singh, father of Dariyav Singh, it was ancestral property, which Dariyav Singh received by inheritance, as such, the nature of property in hands of Dariyav Singh was ancestral property. Dariyav Singh had two sons namely Hinchharam and Guharam. In the month of Chait-Baishakh of 1966

Dariyav Singh separated the suit property between his sons-Hinchharam & Guharam and wife-Phafibai situated at two villages-Takan and Taksiva in three shares only for the purpose of separate residence and cultivation by way of family arrangement, but it was not recorded in revenue records, but it was not partition at all in metes and bounds. Thereafter, in Kuwar month of 1970, Guharam-predecessor-in-title of the plaintiffs died and his widow Shyambai-plaintiff No.1 wanted to remain possession of her husband's share, but she was not allowed to continue in possession of the suit property and was compelled to leave her matrimonial house and property which was in possession of Guharam was taken over by Dariyav Singh, thereafter the plaintiffs filed a suit on 7.4.71 seeking partition and possession as Hinchharam and Dariyav Singh dispossessed Guharam's widow after death of Guharam and Dariyav Singh sold the suit property by registered sale deeds dated 18/03/1971 (Exhibits P/1 and P/2) to minor sons of Hinchharam (defendants NO.2 and 3 herein).

14. The fact remains that the suit property was coparcenary property in the hands of Dariyav

Singh as it is well settled that all property inherited by a male Hindu from his father, father's father or father's father, father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth. A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons sons, and sons son and sons sons sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property. Mulla's Hindu Law, 22nd Edition, page 327 states as under:-

"All property inherited by a male Hindu from his father, father's father, father's father's father is ancestral propriety. The essential feature of ancestral property according to Mitakshara law is that the son's, grandson's and great-grandson's of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's son and son's son's son, but as regards other relations, he holds it, and is entitled to hold it as his absolute property."

15. The aforesaid principle of law has been followed recently by the Supreme Court in the matter of **Arshnoor Singh v. Harpal Kaur and others**¹.

16. The question for consideration would be, whether two sale deeds executed by Dariyav Singh in favour of defendants NO.2 and 3 (minor sons of Hinchharam) were valid or not ?

17. It is settled law that the power of a Karta to sell coparcenary property is subject to certain restrictions viz. the sale should be for legal necessity or for the benefit of the estate. The onus for establishing the existence of legal necessity is on the alinee.

18. In the matter of **Smt. Rani and another v. Smt. Santa Bala Debnath and others**² the Supreme Court held as under:-

"10. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited oner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal

¹ AIR 2019 SC 3098

² 1970(3) SCC 722

necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alinee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity."

19. The principle of law laid down in Smt. Rani (supra) has been recently followed by the Supreme Court in Arshnoor Singh (supra).

20. The Supreme Court, in the matter of Vallimmai Achi v. Nagappa Chethiar³, has held that a father cannot convert joint family property into absolute property of his son by merely making a Will, depriving sons of son and held as under :-

"10. But even assuming that there was some kind of election by Pallaniappa we cannot see how the nature of the property left by Pallaniappa's father would change merely because Pallaniappa's father made a will giving the residue absolutely to Pallaniappa and Pallaniappa took out probate of the will. The property being joint family property Pallaniappa's father was not entitled to will it away and his making a will would make no difference to the nature of the property when it came into the hands of Pallaniappa. A father cannot turn joint family property into absolute property of his son by merely making a will, thus depriving sons of the son who might be born thereafter of their right in the joint family property. It is

well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regards his male issues. They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently : [see Hindu Law by Mulla, Thirteenth Edition p. 249, para 223 (2) (4)]. If that is so and the character of the ancestral property does not change so far as -sons are concerned even after partition, we fail to see how that character can change merely because the father makes a will by which he gives the residue of the joint family property (after making certain bequests) to the son. A father in a Mitakshara family has a very limited right to make a will and Pallaniappa's father could not make the will disposing of the entire joint family property, though he gave the residue to his son. We are therefore of opinion, that merely because Pallanappa's father made the will and Pallaniappa probably as a dutiful son took out probate and carried out the wishes of his father, the nature of the property could not change and it will be joint family property in the hands of Pallaniappa so far as his male issues are concerned.

11. Further it is equally well settled that under the Mitakshara law each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father....." (see Mulla's Hindu Law, Thirteenth Edition, p. 251, para 224). It follows therefore that the character of the property did not change in this case because of the will of Pallaniappa's father and it would still be joint family property in the hands of Pallaniappa so far as his male issue was concerned. Further as soon as the respondent was adopted he acquired interest in the joint family property in

the hands of Pallaniappa and this interest of his was independent of his father Pallaniappa. In such circumstances even if Pallaniappa could be said to have made an election there can be no question of the respondent being bound by that election, for he is not claiming through his father."

21. Similarly, in the matter of V.K. Surendra v. V.K.

Thimmaiah and Ors.⁴, the Supreme Court has clearly held that in absence of any division in the family, joint family continues as joint family, and karta has no right to change the character of the joint family properties by transferring the same under a Will or gift without consent of other co-percener and pertinently observed as under :-

"18...In absence of any division in the family of Kunnaiah and his sons, we hold that the family of Kunnaiah continued to be the joint family. If a co-parcener of a joint family claims that properties are his self-acquired properties, the burden is on him to prove that the same are the self-acquired properties. In that background the High Court has rightly held that Kunnaiah had no right to change the character of the joint family properties by transferring the same either under a Will or a gift to any party without the consent of the other co-parceners."

22. Reverting to the facts of the present in light of the principles of law relating to transfer of joint family property by karta/one of the co-parcener, it is quite vivid that suit property

4 (2013) 10 SCC 211

was the joint family property at the hands of Dariyav Singh and Guharam – husband/father of plaintiff was one of the co-parcener in that property was one of the co-parcener in that property. There was no partition or division of joint family property during the lifetime of Dariyav Singh except for the purpose of separate residence/agricultural operation in the year 1966, but after the death of Guharam – plaintiffs' predecessor-in-title, Dariyav Singh possessed all the properties which were joint family properties and transferred them by two sale deeds in favour of defendants No. 2 and 3 without legal necessity and that too, without payment of any consideration; since the suit property was joint family property/co-parcenery property and there were no partition or division of the suit property, it could not have been alienated without legal necessity as it is, therefore, sale deeds dated 18/03/1971 (Exhibits P/1 and P/2) would have no effect and it will not be binding on the plaintiffs. It is quite apparent from the records that sale deeds were executed without any consideration as they have failed to prove legal necessity. Accordingly, the

substantial question of law No.1 is answered in favour of the plaintiffs and against the defendants.

Answer to substantial question of No.2:-

23. Since, the suit properties were the joint family properties of Dariyav Singh and his son with no division, Phafi Bai could not have made a Will dated 15/07/1979 in favour of defendant No. 6 Dilip and could not have changed the character of the joint family property by making a Will without the consent of other co-parceners. Even otherwise, both the Courts below have rejected the theory of Will holding that defendant No. 6 has failed to establish the execution and attestation of the Will in accordance with Section 63(c) of the Hindu Succession Act read with Section 68 of the Indian Evidence Act. I do not find any illegality or perversity in said finding. Accordingly, the substantial question of law No.2 is answered in favour of the plaintiffs and against the defendants.

24. Consequently, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

25. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet

HIGH COURT OF CHHATTISGARH, BILASPUR

Order Sheet

SA No. 215 of 2004

Hinchharam (died) through Lrs. & Ors. **Versus** Smt. Shyama Bai & Ors.

SB

Hon'ble Shri Justice Sanjay K. Agrawal

10.02.2020	In final judgment dated 03/02/2020 passed in this second appeal, respondent No. 5 namely Dheliya Bai had already died and substituted by her legal representatives who were brought on record, but inadvertently, they were omitted from being included in the cause title of the final judgment, therefore, this order be read as a part of the final judgment and the following be read in the said judgment as legal representatives of deceased respondent No. 5 :- 5. Dheliya Bai (died) through Lrs. :- (a). Kapur Lodhi, Aged about 56 years, S/o Late Shri Tilak Lodhi. (b). Seva Ram Lodhi, Aged about 54 years, S/o Late Shri Tilak Sahu. (c). Rajkumar Lodhi, Aged about 50 years, S/o Late Tilak Sahu. All are sons of Dheliya Bai and R/o Village Sonesarar, Tahsil Dhamdha, Distt. Durg, Chhattisgarh. (d). Pramin, Aged about 58 years, W/o Geeta Lodhi, R/o Village Hardi, Post Nandani, Tahsil Dhamdha, District Durg, Chhattisgarh. (e). Usha, Aged about 53 years, W/o Dinesh R/o Village Kanharpuri, Post and Tahsil Dhamdha, District Durg, Chhattisgarh.

Harneet	(f). Amrika, Aged about 52 years, W/o Babala, R/o Village Surujpura, Post Chikhla, Tahsil Berla, District Bemetara, Chhattisgarh. (g). Munni, Aged about 48 years, W/o Premlal, R/o Village Bagledi, Post Beeja, Tahsil Saja, District Bemetara, Chhattisgarh. (h). Sumitra, Aged about 46 years, W/o Govind R/o Village Bijetala, Post Mulmunda, Tahsil and District Durg, Chhattisgarh. (i). Renka, Aged about 35 years, W/o Sanat, R/o Village Murmunda, Tahsil and District Rajnandgaon, Chhattisgarh. (j). Jamvati, Aged about 32 years, W/o Ghanshyam R/o Village Kanharpuri, Tahsil Dhamdha, District Durg, Chhattisgarh. (k). Annpurna, Aged about 30 years, W/o Ashwani R/o Village Surajpura, Post Chikhla, Tahsil Berla, District Bemetara, Chhattisgarh. (l) Gajendra, Aged about 28 years, S/o Surendra, R/o Village Latiya, Post Mulmula, Tahsil and District Durg, Chhattisgarh. A copy of this order be given to the parties along with the final judgment and decree. Certified copy, as per rules. Sd/- (Sanjay K. Agrawal) Judge
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