

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 21 OF 2012

Mrs. Agustha D' Souza Cardozo,
 Daughter of Diago D'Souza,
 Aged about 26 years,
 House No.748, Velim,
 Cutobona, Salcete, Goa. Appellant

V e r s u s

1. Mr. Ismail,
 (Driver of Truck No.KA-5/A-295)
 son of Akbar Sha alias Ibrahium
 295, Purse Colony,
 H. No. 89, 14th Cross, 9th Main
 Tumkur
2. The Managing Director,
 Kesar Roadlines P. Ltd.
 (Owner of Truck No.KA-25/A-295)
 Chada House, Deshpande Nagar,
 Hubli, Karnataka.
3. The Oriental Insurance Company Ltd.,
 321/A2, Oswal Bandu Samaj Bldg.
 J. Nehru Road
 Pune 411042 Respondents

Mr. S. S. Kakodkar, Advocate for the Appellant.

Mr. E. Afonso, Advocate for the Respondent nos.3.

Coram :- SMT. M. S. JAWALKAR,J.

Reserved on : 16th October, 2020

Pronounced on: 29th October, 2020

JUDGMENT

1. Heard Mr. S. S. Kakodkar, learned Counsel for the appellant and Mr. E. Afonso, learned Counsel for the respondent no.3.

2. The present appeal is filed being aggrieved by the judgment and award dated 17.05.2011 passed by the Motor Accident Claims Tribunal, South Goa, at Margao, in Claim Petition No.73 of 2004.

3. The claim of the claimants before Claims Tribunal was as under:

On 02.10.2001, at around 2.30 p.m., when claimant along with others was travelling in Tata Sumo bearing no. GA-02/J-5376 from Goa to Vailankanni, at K. Balikatte Gate of Chitradurg Taluka, on NH-4 road, the respondent no.1 drove truck bearing no. KA-25/A-295 belonging to respondent no.2 in fast speed and in rash and negligent manner and dashed the same against the Tata Sumo in which the

claimant was travelling. Due to the dash, the driver of Tata Sumo lost control and dashed the vehicle against the border of the left side road side gutter. In the said accident, the right hand of the claimant fractured and she also suffered other injuries.

4. Before the claims tribunal, the respondent no.3 denied the claim and submitted that driver of Tata Sumo drove his vehicle in high speed and in rash and negligent manner.

5. The learned Claims Tribunal framed issues and after considering the evidence on record, come to the conclusion that the claimant failed to establish rash and negligence on the part of the driver of the truck and rejected the claim.

6. The appeal is preferred against the said Judgment and Award on the ground that learned Tribunal erred in answering the issue no.1 in negative without considering evidence on record. The learned Tribunal failed to appreciate that respondent nos.1 and 2 did not file written

statement nor stepped into the witness box and, therefore, adverse inference ought to have been drawn against the driver of the truck. It is submitted that on the basis of FIR, panchanama and evidence on record, the Claims Tribunal ought to have applied the principle of *res ipsa locutor* and ought to have allowed the Claim Petition. The learned Claims Tribunal rejected the claim on the ground that claimant failed to prove the issue no.1 i.e. rashness and negligence on the part of the truck driver. Even if the learned Tribunal failed to apply the principles of *res ipsa locutor* atleast in the alternative, principle of composite negligence ought to have been applied for. The claimant was merely occupant of Tata Sumo and has not contributed in any manner to the accident. The learned Tribunal failed to appreciate that one of the occupant in Tata Sumo died and all other occupants sustained grievous and bleeding injuries including the claimant. The learned Counsel also pointed out that claim of legal heirs of deceased and other claims of four injured persons were settled in Lok Adalat by the Company with whom the truck was insured and payment of compensation is also paid. It shows

that Insurance Company accepted their liability. If that would be the case, then respondent-company ought to have settled the claim of the claimant. This fact is also not considered by the Claims Tribunal. The learned Claims Tribunal erred in holding that panchanama is not supported by sketch. It is submitted that drawing of sketch along with panchanama was not within the hands of claimant. However, panchanama is there in detail and Court is required to draw the conclusion about rashness and negligence of the driver therefrom. The learned Tribunal scrutinised the evidence as if the matter is in Civil Court or Criminal Court. The Claim Petitions are required to be decided on the basis of touch stone of preponderance of probabilities . Proceedings are summary in nature. It is submitted that learned Claims Tribunal failed to apply the very purpose of this beneficial legislation. In fact, it was sufficient for the claimant to prove that he was injured in accident occurred between two vehicles.

7. The learned Counsel for the appellant, relied on the following citations :

1. *(2013) 10 SCC 646 Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & anr.*
2. *2011 (7) ALL MR 209 Bom – Usha Arjun Kavade & Ors. vs. Shri Tahilchand Shaikh & Ors.*
3. *AIR 1999 SC 1441 – Vidyadhar vs Manikakrao & anr.*
4. *2014(3) ALL MR 869 – Royal Sunderam Alliance Insurance Company Ltd. vs. Smt. Hanamava Yamanappa Jedi & Ors.*
5. *AIR 2009 SC 2819 – Bimladevi & Ors vs. Huimachal Road Transport Company & Ors.*
6. *AIR 2011 SC 1504 - Parmeshwari vs. Chand & Ors.*
7. *AIR 1980 SC 1354 – N.K. V. Bros. Pvt. Ltd. vs. M. Karmal Ammal & Ors.*
8. *AIR 1977 SC 1735 – Pushpabai Parshottam Udeshi & Ors. vs. M/s. Ranjeet Genning and Pressing Comp. Pvt. Ltd.*
9. *(2013) 9 SCC 166 – Jijukuruwilla & Ors. vs. Kunjammamohan & Ors.*
10. *2011 (1) ALL MR 402 – Rajkumar vs. Ajay Kumar & anr.*

11. (2010) 8 SCC 591 – Bimlesh & Ors. vs. New India Assurance Comp. Ltd.)

12. First Appeal No. 15 of 2009 – Remdiana Braganza e Rebello & Ors. vs. Laxman Kollekhar, decided on 04.07.2014 by this Hon'ble Court, Panaji Bench.

13. First Appeal No, 289/2007 – Mariano Caetano Braganza vs. Shri Janardhan & Ors. decided on 21.08.2013 by this Hon'ble Court, Panaji Bench.

8. As against this, learned Counsel for the respondents-Insurance Company, Shri E. Afonso, submitted that the Claims Tribunal perfectly justified in rejecting the claim petition. The claimant failed to prove rash and negligent driving of the truck driver. They have not filed any chargesheet nor she has examined any police person to prove rashness and negligence on the part of the driver. All the witnesses of claimant on the rashness and negligence, i.e. claimant herself and her sister had deposed that they are unaware how the accident took place or what was the speed of the truck or vehicle Tata Sumo. There is no clear picture before the learned Tribunal to arrive at any conclusion of rashness and negligence on the part of the truck driver. There was no sketch along

with panchanama . The damage to the Tata Sumo vehicle and truck, if seen, there is only dash to the right side corner of the truck whereas the front portion of Tata Sumo as well as right doors of the Tata Sumo appears to be damaged. Being a heavy loaded vehicle, the truck was not in a very high speed and, therefore, the judgment and award is perfectly justified.

9. Now rival contentions of both parties fall for my determination :

In the first place, it is surprising that Claims Tribunal has not decided the quantum of compensation only on the ground that claimant failed to prove rashness and negligence on the part of the truck driver. The learned Tribunal though held that the claimant proved that on account of the accident the claimant sustained injuries, has stated in para 11 of the petition, no amount awarded towards compensation.

10. The learned Claims Tribunal also held that respondent no.3

failed to establish that the claim is bad in law for non-joinder of necessary parties i.e. the owner and driver of the Sumo Jeep. In very clear term, it is observed that no arguments were advanced on the said issue by the Counsel for the respondent no.3. In view of specific contention of the claimant that driver of the truck was rash and negligent. The learned Tribunal held that they are not necessary parties.

11. On perusal of evidence, it appears that copy of panchanama and copy of FIR is placed on record. True that no sketch is annexed with the panchanama, however, it can be seen from the panchanama, which is at page 52 of the paper book, that there are tyre marks up to 60 feet of Tata Sumo and further on the katcha road up to the drain and then again on the katcha road crossing the drain, till the spot of its halting. The second tyre mark is to the extent of 15 feet and the other tyre mark is to the extent of 10 feet. The width of the tar road at the spot of the accident is 24 feet, and there is katcha road on both sides of the tar road. The tar road is in east-west direction, and it is levelled and a straight road. At a distance of 100 feet to the east, of the accident spot, to the

left side drain, of the road towards Chitradurga the Tata Sumo No. GA-02/J-5376, after the dash is seen facing north, in a stationary condition.

12. The learned Counsel for the respondent no.3 submitted that claimant is not aware what was the speed of the Sumo or Truck, claimant failed to file chargesheet nor police personnel examined. To this contention, the learned Counsel for appellant pointed out that filing of FIR against driver of truck is sufficient to establish rashness and negligence. The occupants in the Tata Sumo were unaware about the speed of the truck coming from opposite direction. He pointed out that in the cross of Aw.2, question put to the witness that whether she knew that the chargesheeted truck driver was acquitted by the Court. She shown her unawareness. That shows it is admitted fact that chargesheet was filed against driver of Truck.

13. Aw.2 in her affidavit of evidence also stated that driver of the truck was chargesheeted by the police. In the evidence on affidavit of claimant also it is specifically mentioned that respondent no.1 has been

chargesheeted by the police. In view of this evidence on record, whether driver of the truck was acquitted or not is immaterial and on admission of respondent itself, there is no question of establishing the fact of chargesheet against the driver of the truck.

14. Thus, there is no substance in the submission that the claimant has not placed the chargesheet on record. It is also the contention of respondent no.3 that even the investigating officer is also not called to establish the rash and negligent driving. The learned Advocate for the appellant relied on the citation in *Parmeshwari Vs. Chand and ors.* (supra), wherein the Hon'ble Apex Court held that the factum of accident can be proved by filing of the complaint in the office of the Superintendent of police. The decision of the Tribunal cannot be reversed on the ground that nobody came from the office of the Superintendent of Police to prove the complaint. Official procedure in the matters of proceeding with complaint is not within the control of the appellant who was ordinary person. It is also held that principles of proof in criminal cases have not attracted in accident claims.

15. Learned Counsel also relied on *N.K. V. Bros. Pvt. Ltd. vs. M. Karmal Ammal & Ors.* (supra) wherein the Hon'ble Apex Court held that the Accident Tribunal must take special care to see that innocent victim do not suffer and drivers and owners do not escape liability merely because of some doubt here and there or some obscurity there. Save in plain cases, **mortality** must be inferred from the circumstance when it is fairly reasonable. The Court should not succumb to niceties, inequalities and mistakes, maybes.

16. The learned Counsel also relied on the citation in *Pushpabai Parshottam Udeshi* (supra) in support of his contention that “normally it is for the plaintiff to prove negligence but in some cases considerable hardship is caused to the plaintiff as the root cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principles of 'Res Ipsa Locuter'. The general purpose of the word '*res ipas locuter*' is that the

accident “speaks for itself” or tells its own story. There are cases in which accident speaks for itself but it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence.

17. It is an admitted fact that the driver or owner have not stepped in the witness box nor filed any written statement to establish that the driver of the truck was not rash and negligent. On perusal of the panchanama, the factum of the accident is proved and from the fact that charge sheet is filed against the driver of the truck, it is also proved that the driver of the truck was rash and negligent. Even if the said driver is acquitted in the criminal matter, the evidence required in criminal matter is different than the evidence required in Claim Petition. As relied on by the learned Counsel for the appellant in *Bimladevi & Ors vs. Huimachal Road Transport Company & Ors.* (supra) and *Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & anr.* (supra) wherein the Hon'ble Apex Court held that for the purpose of determining the

issue of rash and negligence, Court is required to apply the principles underlying burden of proof in terms of the provisions of Section 106. Strict proof of an accident caused by a particular bus in a particular manner may not be possibly done by the claimants. The claimants were merely to establish their case on the touch stone of preponderance of probabilities. The standard of proof beyond reasonable doubt could not have been applied.

18. The learned Counsel also relied on the citation in *Usha Arjun Kavade & Ors. vs. Shri Tahilchand Shaikh & Ors.*(supra); *Vidyadhar vs Manikakrao & anr.* (supra) and *Royal Sunderam Alliance Insurance Company Ltd. vs. Smt. Hanamava Yamanappa Jedi & Ors.* (supra) in support of his contention that when driver of the offending vehicle failed to enter into the witness box, adverse inference is to be drawn. Proposition of law emerges from the above citation that if the driver or owner fails to enter into the witness box, and had not given any evidence, adverse inference would have to be drawn to reject his defence that it was not liable.

19. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that a case set up by him is not correct.

20. It appears that the learned Tribunal concluded that the fact of rashness and negligence on the part of the driver of the truck is not proved by the claimant on the ground that there is no sketch of the scene of accident nor the investigating officer examined to establish the rashness and negligence on the part of the driver of the truck. The learned Counsel for the respondent submitted that the driver and owner of Sumo vehicle in which claimant was travelling is also necessary party and claim petition is liable to be dismissed for non joinder of necessary party. This issue is answered in favour of the claimant by the Tribunal and there is no challenge to that issue. Thus, it is concluded finally. As such, there is no substance in the objection raised by the learned Counsel for the respondent.

21. It is also very painful that the Claims Tribunal expect that claimant should state what was the speed of the truck coming from the opposite direction or the speed of the vehicle in which she was traveling to establish rash and negligence. The facts of negligence are required to be inferred from the evidence on record. The learned Tribunal erred in not deciding of issue of quantum of compensation on the ground that the claimant failed to establish rash and negligence on the part of the driver of the offending truck specifically when the driver or owner did not enter into the witness box nor filed any written statement in their defence.

22. The learned Counsel for the appellant relied on the judgment in *First Appeal No. 15 of 2009 – Remdiana Braganza e Rebello & Ors. vs. Laxman Kollekar*, (supra) of this Court wherein this Court observed that Order XIV Rule 2 (1) of the Code of Civil Procedure provides that notwithstanding that a case may be disposed of on a preliminary issue, a Court shall subject to the provisions of Sub Rule (2), pronounce judgment on all issues. A judgment on any issue or point for

determination must contain decision thereon and the reasons for such decision. Rule 291 of the Goa Motor Vehicles Rules, 1991 requires framing of issues and Rule 300 inter alia provides that Order XIV Rule 2 to 5 and Order XX Rule 1 to 3 are applicable to the proceedings.

23. Similar is the view taken by this Court in *First Appeal No.289/2007 – Mariano Caetano Braganza vs. Shri Janardhan & Ors.*

24. Thus, considering the principles laid down in above citations and evidence on record, in my considered opinion, the claimant has duly proved that driver of the truck was rash and negligent from the fact that chargesheet was filed against the driver of the truck, he did not enter into witness box to prove his innocence nor driver or owner filed any written statement. The spot panchanama is also there which supports the evidence of claimant. As observed by Hon'ble Apex Court, there is no necessity to examine I.O. to prove the complaint. It is a matter of record that the accident occurred in Karnataka and, therefore, it is difficult to

examine I.O. from Karnataka. As discussed earlier, no strict rules of evidence can be made applicable in the Claim Petitions, the evidence is to be appreciated on touchstone of preponderance of probabilities. Accordingly, I hold that the driver of the truck was rash and negligent.

25. Now, next question is what would be the compensation in the facts and circumstances and the evidence led by the parties. It is a matter of record that date of accident is 02.10.2001. It is also a matter of record and admitted fact that respondent-insurance company settled other claims of the occupants of Tata Sumo vehicle in Lok Adalat. Thus, after a period of around twenty years, it would not be proper and justified to relegate the matter back before the Claims Tribunal to decide the quantum of compensation. Both the learned Advocates advanced their arguments on quantum of compensation. As such, in this appeal, considering the evidence on record and submissions, I am inclined to decide the issue of compensation also.

26. It is claimed by the claimant that at the relevant time when the

accident occurred, she was working in Kuwait and earning Rs.7500/- per month (50 KD per month and 1 KD equivalent to Rs.150/-) and her employer was one Abdul Rehman Abdul Razaq.

27. Learned Counsel for the appellant relied on citation *Jijukuruwilla & Ors.* (supra), in support of his contention that salary has to be considered what claimant was earning abroad. The Hon'ble Apex Court in the said matter held that a victim employed in USA was earning income in US dollars, a conversion of victim's said income into Indian currency for the purpose of calculation of compensation, is justified. However, foreign exchange rate as prevalent on the date of filing of Claim Petition would be applicable in the case.

28. Learned Counsel also relied on citation *Rajkumar vs. Ajay Kumar & anr.* (supra), on assessment of amount of compensation. Learned Counsel for the appellant submitted that claimant claimed amount of Rs.2,00,000/- towards medical treatment and she has produced medical bill of Rs.1,52,270.50. She has also claimed amount

of Rs.50,000/- towards stay, food, travelling (as she required to go to Bombay for treatment) and attendant expenses. From the evidence of claimant with supporting documents, it appears that accident took place on 02.10.2001. In the said accident, her mother-in-law died, other persons were injured, her husband sustained fracture injury. She herself underwent four major operations in Goa and Mumbai and incurred around Rs.2,00,000/- towards medical treatment. At the relevant time, she was working at Kuwait as a baby sitter and prior to the accident, she has worked abroad for period of around seven years. Presently, she is unemployed due to injuries.

29. The claimant examined herself and also examined her sister who was occupant in the Tata Sumo. Apart from this she examined Dr. Nicholas Antao, Holy Spirit Hospital, Mumbai. As per evidence on record it appears that immediately after the accident she was hospitalised in District Hospital, Chitradurga, Karnataka and received first aid treatment there and thereafter she was shifted to Goa Medical College. She was admitted on 03/10/2001 and Discharged on 14/10/2001. She

was operated there for fracture to her hand. She had also nasal bone fracture and pain and bleeding was not subsiding. She was also having breathing problem due to nasal fracture. She went to ENT surgeon at Margao, Dr. Noorani. Dr. Noorani advised her to go to Mumbai as there was serious deformities of the nasal bone and for that no treatment was available in Goa. She was referred to Dr. K. S. Goleria at Jaslok Hospital, Mumbai. She was admitted in Dr. Bachas Memorial Belle Vue Nursing Home at Mumbai at 07/01/2002 and discharged on 10/01/2002, where she was operated for her nose deformity and bone grafting was carried out by Dr. Goleria. She was admitted at Holy Spirit Hospital, Mumbai on 10/04/2002 and discharged on 17/04/2002 where she was operated to the hand and bone grafting was also done after removing her right side hip bone. She was again hospitalised in Jaslok Hospital by Dr. Goleria on 31/07/2002 and discharged on 03/08/2002. She was again required to hospitalized in A.V. Da Costa Memorial Clinic, Fatorda, Margao on 10/07/2003 and was discharged on 14/07/2003 where nail fixed in her right hand at Mumbai was removed.

In support of her contention she had placed on record medical bills (Exh.29 Colly) amounting to Rs.1,52,370/-, discharge card of GMC (Exh. 31), discharge card of Jaslok Hospital (Exh. 32), Certificate of Dr. K.S. Goleria, discharge card of Holy Spirit Hospital, Discharge Summary of A.V. Da Costa Clinic (Exh. 48 Colly) and discharge card of Bacha's Memorial Hospital. She was also required to undergo plastic surgery due to deformity in nasal bone and lips. She has examined Aw.3, Dr Nicholas Antao, Holy Spirit Hospital, Mumbai. Evidence of Aw.3 fully support the contention of claimant.

30. From the above evidence, it is duly established that the claimant had to undergo/suffered several operations and for that she was required to admitted in hospital at Bombay. The medical bills produced on record are in consonance with the treatment she has received and discharge card produced by her of different hospitals. Therefore, I have no hesitation to hold that the claimant is entitled for an amount of Rs.1,52,270/- Her visits to Bombay and stay there also needs to be duly compensated. As such, claimant is entitled in lumpsum travelling

expenses, stay and expenses towards attendant, an amount of Rs.25,000/-. It is also matter of record, that she was twice operated for fracture to her hand at Goa and for nasal deformity and also for plastic surgery, she was operated at Bombay. Therefore, she is entitled for amount of Rs.25,000/- towards pain and sufferings.

31. There is nothing on record to show that she was working as baby sitter with one Abdul Rehman Abdul Razaq in Kuwait and earning KD 50 per month which is equivalent to ₹ 7500/- Indian currency, except her bare words. In such circumstances, notional income is required to be considered for assessing compensation.

32. Learned Counsel for respondents relied on the citation in the case of *(2015) 11 SCC 703 Chanderi Devi & anr. vs. Jaspal Singh & Ors.*, wherein Hon'ble Apex Court fixed earning of a indian cook employed in Restaurant of Germany, earning about 1145 Euros per month, considering flexibly estimating as to how much a cook of similar nature would have earned in India in the year 2006 and notional income

of ₹15,000/- per month is considered for compensation.

33. However, in this matter, as discussed earlier, there is no evidence on record to show that she was employed as baby sitter though passport is on record. In absence of any other document, only on the basis of passport, it is difficult to hold that she was employed in Kuwait. However, her notional income can be considered as ₹2,000/- per month considering her education upto IXth standard. From her admission in hospital, it appears that she was admitted in GMC from 03.10.2001 to 14.10.2001, from 07.01.2002 to 10.01.2002 then from 10.04.2002 to 17.04.2002 and 31.07.2002 to 03.08.2002, at Bombay in Jaslok Hospital as well as in Holy Spirit Hospital. She was again hospitalised on 10.07.2003 and discharged on 14.07.2003. Thus, she was taking treatment till 2003. This fact cannot be overlooked that she was not fully recovered by that time. Thus, it can safely be held that for this period, she could not have been gainfully employed (i.e. from 02.10.2001 to 14.07.2003). By holding notional income of Rs.2,000/- per month, the amount comes to Rs.44,000/- (22 months x 2000). It has come on

record that she was newly married and her 22 months treatment caused her mental physical agony and she is deprived of enjoyment of life, which cannot be compensated in terms of money.

34. In view of citation relied on by learned Counsel for appellant ***Rajkumar vs Ajay Kumar*** (supra), wherein different heads under which compensation is awarded in personal injuries are given. In paragraph 5 of the said citation, some guiding principles are given how to compute compensation. While calculating amount towards loss of amenities, it involves determination of lumpsum amount with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. In my considered opinion, claimant due to this accident, is deprived of her marital life and would suffer in future also. She is entitled for an amount of ₹ 10,000/- towards loss of amenities and enjoyment of life. Thus, claimant is entitled to a total amount of compensation ₹2,56,270/- (Rupees Two Lakhs Fifty Six thousand Two Hundred and Seventy only).

35. There is no dispute that the truck was owned by respondent no.2 and respondent no.1 was the driver. The said truck was insured with respondent no.3. As such, all the respondents are jointly and severally liable to pay compensation. It is settled proposition of law that just and fair compensation is required to be awarded and it may over and above claimed by the petitioner.

Towards pain and sufferings	₹ 25,000/-
Lumpsum travelling expenses, stay and expenses towards attendant	₹ 25,000/-
Medical expenses	₹ 1,52,270/-
Notional income (2000/- x 22 months)	₹ 44,000/-
Loss of amenities and enjoyment of life	₹ 10,000/-
Total	₹ 2,56,270/-

36. Thus, for the reasons discussed above, I am inclined to allow the appeal and accordingly proceed to pass the following :

ORDER

- (i) The appeal is allowed.

(ii) The judgment and award dated 07.05.2011 in Claim Petition No.73 of 2004, is hereby set aside and the Claim Petition is partly allowed with proportionate cost.

(iii) The respondent nos.1 to 3 are jointly and severally liable to pay the amount of compensation of ₹2,56,270/- to the claimant which shall carry interest at the rate of 9% per annum from the date of filing of the petition till its realisation.

(iv) The amount, if any, awarded in favour of claimant under Section 140 of the M. V. Act, shall be adjusted against the compensation.

(v) Award be drawn accordingly.

M. S. JAWALKAR,J.

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