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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 11TH DAY OF AUGUST, 2021

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

C.S.(Comm.Div) No.363 of 2018

and

A.Nos.7966 & 7967 of 2019

C.S.(Comm.Div) No.363 of 2018

M/S.Swiss Singapore India Pvt Ltd,
Rep. by its Manager,
Mr.Ankur Pungliya,
S.F.No.334/1-A, Mettupalayam Road,
G N Mills Post,
Coimbatore – 641 029.

Also at
No:17, Ground Floor,
Victoria Street,
Tuticorin – 628 001.

... Plaintiff

/versus/

M/s.Ind Barath Thermal Power Ltd.,
Rep.by its Managing Director,
having Office at
No.20, Chamiers Road,
Nandanam,
Chennai – 600 035.

... Defendant

Civil Suit praying that this Hon'ble Court be pleased to pass a
judgement and decree against the Defendants by:

a) directing the Defendant to pay a sum of Rs.11,05,43,759/- (Rupees

<https://hcservices.ecourts.gov.in/hcservices/>

Eleven Crores Five Lakhs Forty Three Thousand Seven Hundred and Fifty



Nine Only) as on 31.05.18 on the Principal sum of Rs.7,17,82,800/- (Rupees Seven Crores Seventeen Lakhs Eighty Two Thousand and Eight Hundred Only) with interest at the rate of 18% per annum from the date of Complaint till the day of payment in full to the plaintiff.

(b) the costs.

A.Nos.7966 & 7967 of 2019

M/s.Ind Barath Thermal Power Ltd.,
Rep.by its Managing Director,
having Office at
No.20, Chamiers Road,
Nandanam,
Chennai – 600 035.

... Applicant/Defendant

Vs

M/S.Swiss Singapore India Pvt Ltd,
Rep. by its Manager,
Mr.Ankur Pungliya,
S.F.No.334/1-A, Mettupalayam Road,
G N Mills Post,
Coimbatore – 641 029.

Also at
No:17, Ground Floor,
Victoria Street,
Tuticorin – 628 001.

... Respondent/Plaintiff

A.No.7966 of 2019

Application praying that this Hon'ble Court be pleased to refer the instant dispute to arbitration in terms of Section 8 of the Arbitration and Conciliation Act, 1996.



Application praying that this Hon'ble Court be pleased to allow the instant application and reject the plaint filed by the Respondent/Plaintiff under Order VII, Rule 11 of the Code of Civil Procedure, 1908.

The Civil Suit along with these applications having been heard on 05.08.2021 in the presence of Mr. Abdul Hameed for M/s AAV Partners, Advocate for the plaintiff in C.S.No.363 of 2018 and for the respondent in A.Nos.7966 & 7967 of 2019 and Mr.K.Shiva for Mr.Anirudh Krishnan, Advocates for the defendant in C.S.No.363 of 2018 and for the applicant in A.Nos.7966 & 7967 of 2019 and upon reading plaint filed in C.S.No.363 of 2018 and the Judges Summons and the Affidavit of T.S.Das filed in A.Nos.7966 & 7967 of 2019 and the other exhibits therein referred to and upon perusing the evidence adduced therein and having stood over for consideration till this date and coming on this day before this Court for orders in the presence of the said advocate for the parties and this Court finds that under the High Seas Sale Agreement (Ex.P.3 & Ex.P.5), the defendant has agreed to pay maximum 10.5% interest for the delayed payment. Therefore, the plaintiff is entitled only for 10.5% interest and

It is ordered and decreed as follows:-

That the defendant herein do pay to the plaintiff herein a sum of Rs.9,57,74,480/- (Rupees Nine Crore Fifty Seven Lakhs Seventy Four Thousand Four Hundred and Eighty only) with further interest at the rate of



10.5% p.a on the sum of Rs.7,17,82,800/- (Rupees Seven Crore Seventeen Lakhs Eighty Two Thousand and Eight Hundred only) from this date till the date of realisation.

2. That the defendant herein do pay to plaintiff herein the costs of this suit and when taxed by the taxing officer this court and noted in the margin thereof.

3. That these A.Nos.7966 & 7967 of 2019 do stand closed.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
11th DAY OF AUGUST 2021.

Sd./-

ASSISTANT REGISTRAR (COMM.CASE)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.



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06.09.2021

C.S.(Comm.Div) No.363 of 2018
and
A.Nos.7966 & 7967 of 2019

ORDER

DATED: 11.08.2021

THE HON'BLE DR.JUSTICE
G.JAYACHANDRAN

FOR APPROVAL: 15.09.2021

APPROVED ON: 16.09.2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

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Reserved on : 05.08.2021

Pronounced on : 11.08.2021

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN**C.S.(Comm.Div).No.363 of 2018**
and A.Nos.7966 & 7967 of 2019

M/s.Swiss Singapore India Pvt Ltd.,
Rep. by its Manager,
Mr.Ankur Pungliya,
S.F.No.334/1-A, Mettupalayam Road,
G.N.Mills Post, Coimbatore – 641 029.

... Plaintiff

/versus/

M/s.Ind Barath Thermal Power Ltd.,
Rep. by its Managing Director,
having Office at
No.20, Chamiers Road, Nandanam,
Chennai – 600 035.

... Defendant

Prayer:- Civil Suit is filed under Order IV Rule 1 of Original Side Rule read with Order VII Rule 1 of C.P.C.,

a). Directing the defendant to pay a sum of Rs.11,05,43,759/- (Rupees Eleven Crores Five Lakhs Forty Three Thousand Seven Hundred and Fifty Nine Only) as on 31.05.2018 on the Principal sum of Rs.7,71,82,800/- (Rupees Seven Crores Seventeen Lakhs Eighty Two Thousand and Eight Hundred only) with interest at the rate of 18% per annum from the date of plaint till the day of payment in full to the plaintiff.



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For Plaintiff

: Mr. Abdul Hameed,
for M/s.A.A.V.Partners

For Defendant

: Mr. Anirudh Krishnan

JUDGMENT

The plaintiff is a Private Limited Company having office at Coimbatore and trading in coal. The suit is filed as a Commercial Dispute for recovery of Rs.7,17,82,800/- towards principal and Rs.3,87,60,959/- towards interest at the rate of 10.5% due and payable by the defendant for the coal sold.

2. The plaint averment is that, during the month of November-2014, the defendant approached the plaintiff for purchase of streaming, Non-coking coal in bulk of Indonesian Origin and placed the purchase order for 55000 MT +/- 10% of coal. The plaintiff and defendant entered into an High Seas Sales (HSS) Agreement on 04.11.2014 for selling 55000 MT of coal at the rate of Rs.3156.48/- PMT. Subsequently, the defendant placed purchase order dated 08.01.2015 for further 55000 MT of coal on the same specification agreed earlier. The High Seas Sale agreement was entered on 13.01.2015. The price for the coal was agreed as Rs.3202.12 PMT. As per



original were given to the Customs department for clearing the Goods from the Port of Tuticorin. The vessels MV Densalion and MV Riva Wind completely discharged the goods at Tuticorin Port on 16.11.2014 and 25.01.2014 respectively. As per the terms of the HSS agreement, the defendant is liable to pay for the goods sold within 60 days from the date of delivery.

3. In spite of expiry of the due date of payment, the defendant did not clear their dues in full. When the defendant was informed through letter dated 14.03.2015 that as per the books of accounts, the amount due and payable by the defendant as on 29.02.2015 is Rs.11,05,68,001/-, the defendant confirmed the same. After giving credit to various subsequent payments made by the defendant, the due payable on 31.05.2018 was Rs.7,17,82,800/-. Several meeting between the plaintiff and the defendant for clearing the dues yielded no result. Hence, the plaintiff filed C.P.No.372 of 2016 before the High Court, Hyderabad, for winding up the respondent company. After issuance of statutory notice, the matter is pending.

4. While so, a settlement agreement was arrived on 28.09.2017 between the plaintiff, defendant and one M/s.Star Thermal Power Pvt Ltd (STPPL), as against the actual due of Rs.7,15,68,001/- payable by the



defendant, STPPL agreed to pay Rs.5,72,54,401/- towards full settlement on or before 25.12.2017. The said settlement failed since STPPL did not pay the agreed amount within the due date and informed the plaintiff that it will not be a position to settle the outstanding due of the defendant. STPPL requested not to proceed with the legal proceedings before the High Court of Hyderabad till an alternate settlement proposal is agreed mutually. However, no alternate settlement proposal was forthcoming neither the defendant paid the dues. Hence, the instant suit for recovery of money.

5. The defendant received the suit summons on 04.07.2018. The written statement was not filed within the time prescribed under the Commercial Courts Act. However, filed two applications one to refer the dispute to arbitrator (Application No.7966 of 2019) and other to reject the plaint under Order VII Rule 11 of C.P.C., (Application No.7967 of 2019). On filing common counter by the plaintiff, these applications were not taken up for consideration. Since they were filed after 120 days from the date of receipt of the suit summons.

6. The defendant, who lost its right of filing written statement, filed its affidavit of admission and denial of documents and also cross examined the plaintiff witness P.W-1. Through this witness the plaintiff has



marked 16 documents. Except Ex.P-13 the settlement agreement dated 28.09.2017 and Ex.P-14, the notice issued by STPPL intimating the failure to pay the agreed amount and request to settle the dues, rest of the documents are secondary evidence either photocopy or certified copy.

7. The Learned Counsel for the plaintiff submitted that, Ex.P-2 and Ex.P-4, are the purchase orders placed by the defendant. Pursuant to the purchase orders, the parties entered into the HSS agreements which are Ex.P-3 and Ex.P-5. The defendant, in Ex.P-7 had confirmed due of Rs.11,05,68,001/- payable as on 29.02.2016. To the statutory notice, Ex.P-10 dated 02.05.2016 demanding Rs.13,20,34,807/- together with interest at the rate of 10.5%, the defendant through its lawyer sent reply Ex.P-11 dated 13.05.2016 admitting the liability and undertaking to settle the arrears. After initiating the winding up proceedings before the High Court, Hyderabad, the defendant came forward to settle the dues through M/s.Star Thermal Power Pvt Ltd (STPPL) and entered into the settlement agreement dated 28.07.2018. As against the actual due of Rs.7,15,68,001/- as on 27.09.2017 it was agreed by the parties that STPPL will pay to the plaintiff Rs.5,72,54,401/- before 25th December 2017. The settlement agreement Ex.P-13 did not fructify and STPPL which was supposed to pay the said amount on behalf of the defendant, invoking clause 9 of the settlement



agreement the agreement was terminated.

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8. The defendant has admitted the due payable in unequivocal terms in the settlement agreement and in the earlier letters. The defendant is having its Office at Chennai and the subject business transactions were dealt by the Chennai Office of the defendant. The suggestions to the plaintiff witness regarding the place of transactions did not impeach the case of the plaintiff that the defendant carry on business at Chennai and the negotiations took place in Chennai. Therefore, the submission made by the defendant to reject the plaint for non disclosure of cause of action is not sustainable.

9. Regarding the Application for referring the dispute to arbitration, the Learned Counsel for the Plaintiff submitted that, the settlement agreement dated 27.09.2017 is a contingent agreement. The implementation of said agreement was subject to the completion of the arrangement between STPPL and the defendant with 25.12.2017. In the letter dated 12.12.2017 (Ex.P-14), STPPL has informed the plaintiff that due to unforeseen circumstance, the transaction contemplated between the defendant Company, its shareholder and STPPL will not be completed on or before 25.12.2017. Therefore, invoking clause 9 of the agreement, STPPL



terminated the agreement. As per clause 9, once the agreement is terminated, the *status quo ante* will be restored. The arbitration clause might have come into effect, had the arrangement between the defendant and STPPL got completed by 25.12.2017. Since, the said arrangement between the defendant and STPPL never materialised, the agreement got vitiated. The defendant had become liable for the actual dues STPPL by virtue of under clause 9(d) got fully exonerated from any liability. The plaintiff cannot have recourse to STPPL for any claim in relation to the actual dues or any other payment payable by the defendant from the date of receipt of the intimation.

10. The Learned Counsel for the defendant, submitted that the relief sought under the two applications are based on questions of law, even though, the defendant had failed to file the written statement in time and right to file written statement got forfeited, question of cause of action and jurisdiction need to be satisfactorily explained by the plaintiff, which in this case conspicuously absent. Therefore, the suit is liable to be dismissed for lack of jurisdiction.

11. According to the Learned Counsel for the defendant, firstly,

plaint does not disclose any cause of action within the jurisdiction of this



Court. Secondly, the defendant is not actually carrying on business within the jurisdiction of this Court. Having office at Chennai does not mean the defendant is carrying on business at Chennai. No dealing in respect of the sales, which are subject matter of the suit took place in Defendant's Chennai Office. Thirdly, the settlement agreement dated 28.09.2017 is in substitution of all the earlier arrangements and agreements (clause 5). Therefore, applying the *Doctrine of novation*, the terms of the new agreement shall prevail. The new agreement namely the settlement agreement, clause 22 oust the Civil Court jurisdiction and specify that any dispute arising out of or in connection with this agreement shall be referred to arbitration in accordance with arbitration and conciliation (Amendment) Act, with the place of arbitration at Chennai.

12. The Learned Counsel for the plaintiff submitted that at the outset, two applications filed after the time limit prescribed for filing written statement. Having forfeited the substantial right to file written statement, these two applications are not maintainable. Relying on the judgment of the Delhi High Court *SSIPL Lifestyle Private Limited -vs- Vama Apparels (India) Private Limited and Another* reported in *2020 SCC Online Del 1667 = (2020) 267 DLT 467*, it was submitted that, the defendant having

admitted the liability at all time and before all forum, having its Office at



Chennai where transactions took place, the plea of non disclosure of cause of action and want of jurisdiction are defences to delay the proceedings.

Ouster of Jurisdiction and cause of action are at the most mixed question of fact and law. Not pure question of law. The settlement agreement entered between the plaintiff, defendant and STPPL is a contingent contract. Under clause 9 of the settlement agreement (Ex.P-13), the parties have agreed that, in case, the transaction contemplated under the arrangement between STPPL and the company (Defendant herein) or its shareholders delayed beyond 25th December 2017, for the payment of outstanding dues or does not materialise for any reason, then notwithstanding anything contained in the agreement, the Company (defendant herein) shall become liable for making the payment of the actual dues in terms of the supply agreements. Hence, arbitration clause in the settlement agreement is not applicable to the facts of the case.

(i). Clause 5 of the Settlement agreement (Ex.P-13) reads as below:-

The parties hereby agree that, subject to payment of the outstanding dues in the manner provided herein, as on Settlement Date:

a. All arrangements including the Supply Agreement(s) (excepting this agreement) in relation to



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the outstanding Dues or supply of the product shall stand terminated.

b. The parties further covenant that the rights, obligations and claims under the supply agreement(s) shall be terminated and cancelled and the Trade Creditor shall be deemed to have fully and completely discharged the Company and STPPL from the same.

c. The Trade Creditor shall be deemed to have:

i). Discharged the Company and STPPL from the obligation to make any further payments in relation to the Outstanding Dues, supply agreement(s), supply of products or any document executed in connection therewith.

ii). Relinquished all its right, interest or claims of whatsoever nature against the Company and STPPL in relation to the Outstanding Dues, supply Agreement(s), supply of Products or any document executed in connection therewith.

d. All and any documents, agreements, notices, letters, correspondences, etc., (excepting this agreement) executed or signed between the parties (a) pursuant to or in relation to the supply agreement(s) or in relation to the product or outstanding dues; (b). to fulfill the obligations or purpose of the supply agreement(s) for and on behalf or at the request of the Trade Creditor or the Company, shall stand cancelled with no further notice or act and no liability, disability, etc., shall accrue to the Company or STPPL.



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(ii). Clause 9 of the settlement agreement reads as below:-

The parties agree that, in addition to any other right, in case the transaction as contemplated under the arrangement between STPPL and the Company or its shareholders delayed beyond 25th December 2017, for the payment of outstanding Dues or does not materialise for any reason and even if the same is under dispute or in the event of any dispute between the trade Creditor, the Company and STPPL, then notwithstanding anything contained in this Agreement

a. STPPL shall intimate the Trade Creditor in writing about the consequences of the delay or termination or non-materialisation or delay of the said arrangement, with a copy to the Company. The parties agree that the decision of STPPL on termination or non-materialisation or delay of the said arrangement shall be final and binding.

b. STPPL shall not be liable to make any payment towards outstanding dues.

c. The Company shall become liable for making the payment of the Actual Dues in terms of the Supply Agreement(s).

d. The Trade Creditor shall have no recourse to STPPL for any claim in relation to the Actual Dues or any other payment from the date of receipt of the intimation.



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(iii). Clause 22 of the settlement agreement reads as below:-

22. Any dispute arising out of or in connection with this agreement shall be referred to arbitration in accordance with Arbitration and Conciliation (Amendment) Act (Act), 2015 with the place of arbitration in Chennai. The dispute shall be adjudicated by a sole arbitrator to be appointed in accordance with the Act. The language of the arbitration shall be English.”

13. Invoking clause 9 of the settlement agreement, the STPPL vide letter dated 12.12.2017 (Ex P-14), STPPL had informed the plaintiff and the defendant that, they will not be able to settle the outstanding within the agreed date i.e., 25.12.2017. Clause 9(c) of Ex.P.13 says, in the event of STPPL invoking clause 9, the defendant company will become liable to make payment of the actual dues. Clause 9 (d) says, the trade creditor (the plaintiff herein) shall have no recourse to STPPL for any claim in relation to the actual dues in the terms of the supply agreement.

14. If really, the defendant had any right to invoke the arbitration clause under this settlement agreement, the defendant would have invoked this clause soon after the intimation received from STPPL



of the settlement agreement as a whole indicates the arbitration clause for enforcement of the terms of the settlement agreement shall come into effect only if the arrangement between the STPPL and the Company (the defendant herein) materialised.

15. In this case, obviously the arrangement between the defendant and STPPL, which has the pre-requisite for the settlement agreement (Ex.P-13), did not materialised. The parties to the agreement did not pursue the settlement agreement any further. As agreed under this agreement, the defendant had become liable to pay the actual dues.

16. Carrying on business:-

The Learned Counsel for the plaintiff rely upon the purchase order where the defendant is shown the Chennai Office as its address, apart from, the Corporate Office at Hyderabad. Whereas, the Learned Counsel for the defendant would submit that the Chennai Office is functioning as Post Office and no effective administration is carried at Chennai Office.

17. The following judgments are relied by the defendant.



Co.(Madras) (Pte.) and others reported in *AIR 1980 Mad 73*

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(ii). *Urooj Ahmed v. Preethi Kitchen Appliances Private Limited* reported in (2013) 6 CTC 247.

(iii). *J.D.John and others -vs- Oriental Government Security Life Assurance Company Limited* reported in [1928 SCC Online Mad 347].

18. Ex.P.2 and Ex.P.4 are photocopies of the purchase orders emanated from the defendant. In these purchase orders, the Corporate Office at Hyderabad and Chennai Office at Nandanam are mentioned. In HSS agreement (Ex.P.3) E-stamp is purchased from National Capital Territory of Delhi. 55,000 MTs of coal transshipment through vessel MV DENSA LION and consideration as mentioned is Rs.17,36,06,400/-. Ex.P.5 is the 2nd HSS agreement dated 13.01.2015 for 53,250.00 MTs of coal transshipment through vessel MV RIVA WIND. In this HSS agreement, there is no signature of the buyer. Hence, it cannot be looked further for any evidence. The other communications between the parties emanated from the plaintiff are addressed to the Defendant's Hyderabad address. The settlement agreement Ex.P.13 is entered at Chennai. It is between three parties, all having its Office at Chennai. On assessing the facts based on the



this Court on the ground that the defendant did not carry on business within the local limits of this Court or in this particular transaction, the Chennai Office of the defendant had no role or acted only as as 'Post Office'. Contrarily, even according to the defendant's purchase order, they have Office at Chennai. P.W.1 had deposed transaction and negotiation took place at defendant's Chennai Office. This assertion not impeached in the cross examination. Hence, this Court holds that since the defendant carrying on business within the jurisdiction limits of this Court, leave to sue is not required and the suit is maintainable within the jurisdiction of this Court.

19. The defendant has not denied the delivery of goods and its utilisation. In fact, in the settlement agreement (Ex.P.13), due of Rs.7,15,68,001/- is admitted. Though this settlement deed did not materialised, the money due has been ascertained and agreed upon by the defendant. Even thereafter to the notice caused by the plaintiff, the defendant has not denied the liability.

20. As far as the claim of 18% interest, this Court finds that under the High Seas Sale Agreement (Ex.P.3 & Ex.P.5), the defendant has agreed to pay maximum 10.5% interest for the delayed payment. Therefore,



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21. Hence, the plaintiff entitled for a principal sum of Rs.7,17,82,800/- with interest at the rate of 10.5% p.a., from the date of plaint, till the date of realisation. Accordingly, the ***Suit is Allowed with costs.*** Consequently, connected Applications are closed.

Sd./- G.J.J
11.08.2021

List of Witness examined on the side of the Plaintiff:-

Ankur Pungliya (PW.1)

List of Witness examined on the side of the Defendant :-

Nil

List of the Exhibits marked on the side of the Plaintiff:-

Sl. Nos.	Exhibits	Dated	Description of documents
1.	Ex.P.1	10.04.2018	Certified true copy of Board Resolution (2 in nos)
2.	Ex.P.2	14.10.2014	Photocopy of Purchase order
3.	Ex.P.3	04.11.2014	Photocopy of Purchase Order
4.	Ex.P.4	08.01.2015	Photocopy of Purchase order
5.	Ex.P.5	13.01.2015	Photocopy of HSS Agreement
6.	Ex.P.6	15.03.2016	Certified Print Out of e-mail sent by the plaintiff to the defendant along with 65B certificate.
7.	Ex.P.7	15.03.2016	Certified Print Out of reply e-mail sent by the defendant to the plaintiff along with 65B certificate.
8.	Ex.P.8	08.04.2016	Certified Copy of the notice issued by the plaintiff to the defendant.



9.	Ex.P.9	18.04.201 6	Certified Copy of the notice issued by the defendant to the plaintiff
10.	Ex.P.10	02.05.201 6	Certified copy of the Legal Notice issued by the plaintiff to the defendant.
11.	Ex.P.11	13.05.201 6	Certified Copy of the reply notice issued by the defendant to the plaintiff
12.	Ex.P.12	24.05.201 6	Certified copy of the Legal Notice issued by the plaintiff to the defendant.
13.	Ex.P.13	28.09.201 7	Original of the Settlement Agreement entered between the defendant, M/s.Star Thermal Power Private Limited and the plaintiff.
14.	Ex.P.14	12.12.201 7	Original of the notice issued by M/s.Star Thermal Power Private Limited to the plaintiff.
15.	Ex.P.15	---	True copy of the statement showing amounts due to the plaintiff.
16.	Ex.P.16	13.12.201 8	Photocopy of the Memorandum of Understanding.

No documents marked on the side of the defendant

Sd./- G.J.J
11.08.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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