



Crl.A.No.630 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :04.07.2022

Pronounced on :12.07.2022

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.630 of 2018

K.Jagmal

.. Appellant

/versus/

State by Intelligence Officer,
Narcotics Control Bureau,
Chennai Zone, Chennai.
(N.C.B.F.No.48/1/3/2013-NCB/MDS)

.. Respondent

Prayer: Criminal Appeal has been filed under Section 374(2) of the Criminal Procedure Code to set aside the judgment of the learned Principal Special Judge, Principal Special Court under NDPS Act cases made in C.C.No.2/2014, dated 27.03.2018.

For Appellant

:Mr.S.Charles

For Respondent

:Mr.N.P.Kumar,
Special Public Prosecutor
(NCB cases)



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JUDGMENT

The appeal is directed against the judgment of conviction and sentence passed by the Special Court of NDPS Act Cases at Chennai in C.C.No: 2 of 2014, dated 27/03/2018.

2. Based on the complaint filed by the respondent against two persons viz K.Jagmal (A-1) and Shravan Kumar (A-2), Charges under Section 8(c) r/w 29 and Section 18(b) and Section 28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “NDPS Act”) against A-1 and Section 8(c) r/w 29, Section 18 (b) and Section 28 of the NDPS Act against A-2 were framed by the Special Court for NDPS Act cases in Chennai. After considering the evidence let in on behalf of the complainant, the Court held A-1 K.Jagmal guilty of offences under Section 8(c) r/w Section 18 (b) of NDPS Act and sentenced A-1 to undergo 10 years RI and fine of Rs.1,00,000/- in default, one year RI. A-2 (Shravan Kumar) found not guilty and acquitted from all charges.



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3. The case of the complainant as spoken by the witnesses:-

PW-2—Thiru.Sharvanraj, Intelligence Officer, NCB, Chennai Zone Unit, while at his office at about 10.40 hrs on 03/07/2013, his informant told about illegal trafficking of opium from Jodhpur, Rajasthan to Chennai by one Jagmal aged about 35 years in Train No:16126 JU MS Express, which will reach Chennai at 16.55 hours. He after alighting the train at Chennai Egmore Station will go to Vasanth Bhavan opposite to Egmore Railway Station. On receipt of this information over phone, PW-2 typed the information (Ex.P-4) in his computer and submitted it to his immediate superior officer Mr.Santanu Aich, Superintendent. He, on receiving the information, instructed Mr.Sathish Kumar (PW-3) to take necessary action.

4. Accordingly, PW-3 along with a team left NCB office and reached Chennai Egmore railway Station at about 16.00 hrs. He went to GRP office, told about the information and requested K.Jagan and Kathiravan to be witnesses for the search proceedings. PW-3 and his team along with the witnesses and the informant kept surveillance near the exit gate of the



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Egmore Railway Station. At about 6.55 hrs, as the train arrived and passengers exiting out, the informant identified Jagmal. Then, PW-2 and his team intercepted Jagmal. Introduced themselves and interrogated him about any possession of opium. The said Jagmal admitted possession of 5.5 kgs of opium. The search of the bag held by Jagmal, led to recovery of 5.5 kgs of opium from the trolley bag of Jagmal kept in 3 packets. Samples were drawn from each tested and confirmed to opium. Before conducting the personal search of Jagmal, he was informed about his right under Section 50 of the NDPS Act and the option of being searched before a gazetted officer or a Judicial Magistrate, Jagmal declined to exercise the option.

5. Jagmal voluntarily handed over the following articles:-

- 1.A samsung touch screen dual sim mobile with two SIM card and battery bearing IMEI No.35935104388143/601 & No.35935604388143/501.
- 2.Indian Currency of Rs.3100/- (Rupees Three Thousand and one hundred only)
- 3.One coin (inscribed 5 grams fine silver 999 on it) and one golden colouring as stated to be gold).



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4.One identity card issued by Election Commission of India bearing No.RJ/24/185/192437 in the name of Jagmal.K., S/o Kesaram.

5.One PAN Card bearing No.AODPJ2232E issued by Income Tax Department in the name of Jagmal.K., S/o Kesaram.

6.One India Driving Licence (Tamil Nadu) DL No.TN/02 20110000758 in the name of Jagmal.K, S/o Kesaram.

7.One International Debit Card of Axis Bank bearing number 4688 0590 0153 5753, valid from 10/09 to 10/19 in the name of Jagmal.K., S/o Kesaram.

6. On weighing the parcels, one parcel was 3.5 kgs. The rest of the two packets were one kilogram each. Two samples each about 25 grams from each parcels and kept separately duly packed and sealed. NCB seal was affixed on each packets. The incriminating materials recovered from his possession were also seized under the mahazar marked as Ex.P-5. On completion of drawing mahazar at about 20.00 hrs, Jagmal was summoned to appear at NCB office on the same day. The accused came to NCB office

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along with the NCB officials. Accused Jagmal gave a statement under Section 67 of the NDPS Act to one P.Shankar, Investigating Officer(PW-4) and in his statement (Ex.P18), Jagmal informed that he transported opium for Jodpur to Channai, for it to be delivered to one Shravan of Sowcarpet and gave him the residential and shop address of Shravan. Ex.P18 – Ex.19, is the information about Shravan disclosed by A-1. The said information was shown to PW-9 at 10.40 am on 04/07/2013. On perusing the information, he directed PW-4 to proceed along with Intelligence Officers, Mr.Bumesh Kumar (PW.-5) and Mr.Smith Arya (PW-6) and take necessary action. Accordingly, they all went to shop of Shravan at No: 76/4, Narayana Mudali Street, Sowcarpet and to the house of Shravan at 99/203 Amman Koil Street, Sowcarpet. They secured Shravan and he was brought to NCB office by PW-4. The said Shravan gave a confession statement admitting he and Jagmal conspired to procure 5.5 kgs of Opium and sell it in retail. Based on his confession he was arrested at 6.30 pm on 04/07/2013.

7. Meanwhile, PW-8 (Mr.Sheelbadra Samrat), conducted search of the premises bearing door No:99/203, Amman Koil Street, Kondithoppu,



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Sowcarpet, the residence of Shravan. Search was conducted in the presence of two witnesses Mr.Virdharam (DW-1) and Saravana kumar. Driving license, Voter ID card, UCO Bank ATM Card, Cheque books of Kodak Mahindra Bank, Indian Overseas Bank, ING Vaisya Bank and B-Form issued by Tamil Nadu Commercial Tax Department were seized under mahazar Ex.P-47. The seized materials were marked as Ex.P-37 to Ex.P-46 respectively. The search commenced at 2.00 p.m. and completed at 5.00 p.m. Both the accused were handed over to Satish Kumar (PW-3) and he produced them before the Judicial Magistrate No.IX, Saidapet for remand.

8.The full report under Section 57 of the NDPS Act was prepared and submitted to PW-9 by PW-3. He on 06/07/2013 at about 00.30 hrs submitted the seized contraband and other properties to PW-9 for safe custody in the godown, along with the forwarding memo (Ex.P-14). The godown receipt Ex.P-15 was issued by the Superintendent (PW-9). The contraband was produced before the Special Court for NDPS Cases at Chennai on 09/07/2013 and the requisition letter to the Court for forwarding the samples drawn from the bulk contraband to lab analysis was made.



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Accordingly, the sample was sent to Customs Laboratory, Chennai for testing. PW-1, the Assistant Chemical Examiner at Customs Lab, had deposed that, on examining the sample sent for test, she found it contain opium morphine, a narcotic drug. Her report was marked as Ex.P-2.

9.As follow up, PW-8 wrote to the Bank Managers of the respective banks and asked for the detail about transactions pertaining to the documents seized during search of A-2 residence. The response from the respective banks along with statement of accounts. The letters of PW-8 and the response received by her are marked as Ex.P-48 to Ex.P-54 and Ex.P-56 to Ex.P-60. PW-8, also made similar request regarding the ATM card recovered from A-1 and received details from Axis Bank, Zonal Office, Chennai. PW-8 summoned the mahazar witnesses Jagan and Kathiravan to the seizure of contraband from A-1 and recorded their statements, which are marked as Ex.P-33 and Ex.P-35 respectively.

10.In total, on behalf of the complainant, PW-1 to PW-10 were examined. 71 documents were marked as Ex.P-1 to Ex.P-71 and 17 material



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objects were marked. On behalf of Shravan Kumar (A-2), one Virdharam was examined as DW-1.

11.The trial Court held A-2 not guilty. Convicted A-1 for possession of commercial quantity of narcotic drug viz. 5.5kg of opium.

12.The learned counsel appearing for the appellant, strenuously argued that the trial Court erred in convicting the accused due to improper appreciation of evidence and non-compliance of mandatory provisions envisaged in NDPS Act.

13.The learned counsel appearing for the appellant submitted that as per the complainant document Ex.P-5, the recovery of the contraband from A-1 is alleged to have made near exit point of Egmore Railway Station, Opp to Vasanth Bhavan on 03/07/2013 from the brown colour trolley bag carried by A-1. Before search of his bag, he was informed about his right under Section 50 of the NDPS Act. Only after the alleged recovery of the contraband from the trolley, it is stated in the mahazar that he was informed



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about Section 50 of NDPS Act and right of option to be searched before the Magistrate or a Gazetted officer. The said option also admittedly not reduced into writing separately.

14.The case of the complainant is that the Train No:16126 reached the platform only at 16.55 hrs. Where in the mahazar Ex.P-5, the commenced time is mentioned as 16.00 hrs and completed at 20.00 hrs. The commencement of the process is purposefully mentioned as 16.00 hrs to avoid the rigor of Section 42 of the NDPS Act which says, any search of an enclosed place between sun set and sun rise should be only on warrant. According to the learned counsel, the search process though said to have been near the exit point of the Railway Station, since the alleged contraband was found concealed along with the clothe in the trolly, Section 42 of the NDPS applies to the case.

15.The learned counsel appearing for the appellant submitted that, the contraband alleged to have been seized from A-1 on 03/07/2013 has not been forwarded to the Court immediately. According to PW-3, as per the

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direction of the remanding Magistrate, he produced the properties along with the annexures dated 09/07/2013 to the Special Court. The delay of 5 days in forwarding the contraband is not explained. This is in contravention to Section 55 of the NDPS Act.

16.In support of his argument, the learned counsel appearing for the appellant rely upon the following judgments:

1.Directorate of Revenue v. Mohammed Nisar Holia reported in (2008) 2 SCC 370;

2.State of Rajasthan v. Jagraj Singh reported in 2016 (11) SCC 687

3.D.Ramakrishnan & another v. NCB in Crl.A.No.256 of 2014, dated 11.12.2017

4.Chunna v. State of Madhya Pradesh reported in 2002(9) SCC 363;

5.State of Rajasthan v. Tarasingh reported in 2011(11) SCC 559;

6.Valsala v. State of Kerala reported in 1993 Supp (3) SCC 665;

7.Danraj v. State in Crl.A.No.319 of 2012 dated 13.03.2019;

8.Rangan v. State in Crl.A.No.331 of 2012



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dated 11.01.2019;

9.Rajapandi v. Inspector of Police reported in
CDJ 2021 MHC 5821; and

10.T.Udayachandran v. State rep.by I.O.,
reported in CDJ 2012 MHC 1209.

17.The learned Special Public Prosecutor (NCB Cases) for the respondent submitted that, the seizure operation was done, based on specific information received by the Investigating Officer on 03/07/2013. The surveillance was mounted at the exit point of Egmore Railway Station from 16.00 hrs. This is proved through the oral evidence of Intelligence Officer Mr.Satishkumar (PW-3) and K.Jagan, Independent Witness (PW-10). In the mahazar, therefore, the commencement of operation is rightly mentioned as 16.00 hrs. There is no necessity to preponed the time. The search and seizure of the contraband was in public place namely, exit point of the Egmore Railway Station. By concealing the contraband in a bag by itself will not make the search and seizure operation to deem it as enclosed premises. The provision of Section 42 of NDPS Act is attempted to be misinterpreted.



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18.Regarding the alleged violation of Section 50 of the NDPS Act, the learned Special Public Prosecutor (NCB Cases) for the respondent submitted that, the seizure of 5.5kgs opium was from the trolly bag carried by the accused. Before conducting body search, the accused was informed about his right under Section 50 and he declined to exercise the option. In the mahazar Ex.P-5, it is specifically recorded that the accused was informed about his right under Section 50 of the NDPS Act. The accused has affixed his signature in Ex.P-5 after it being translated and read over to him in Hindi.

19.Regarding production of the contraband before the Special Court with delay, the learned Special Public Prosecutor (NCB Cases) submitted that, the contraband seized under mahazar Ex.P-5 on 03/07/2013 was produced along with the accused before the Metropolitan Magistrate No.IX, Saidapet. At the time of remand on 05/07/2013 at about 5.50 p.m. the learned Magistrate directed to produce it before the Special Court. Therefore, the contraband was brought back to the NCB office and deposited in the godown of NCB along with forwarding memo Ex.P-14 on



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06/07/2013 at 00.30 hrs. Receipt for the deposit in the authorised godown also obtained. Thereafter, the properties were produced before the Special Court on 09/07/2013. The chain of custody of the property is explained through witnesses and documents. The samples drawn were sent to lab for testing and in Ex.P-2, the Assistant Chemical Examiner has stated that she received the sample packets seal intact. When there is no suspicion of tampering of seal in the sample, the judgment of the trial Court has to be confirmed.

20.In support of his argument, the learned Special Public Prosecutor (NCB Cases) rely upon the judgment in ***Than Kunwar –vs- State of Haryana*** reported in ***[(2020) Supreme (SC) 210]***.

21.The submission of the learned counsel appearing for the appellant is on three folds. First, violation of Section 42, next violation of Section 50 and lastly, violation of Section 52 and Section 55 of the NDPS Act.



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22.The NDPS Act, classifies search operations into two category, if the search is in the course of prior information, Section 42 of NDPS Act deals with search of enclosed place/private premises not open to public and Section 43 deals with places open to the public. To preserve and protect privacy, search restrictions imposed for search between sun set and sun rise.

23.In *State of Punjab vs. Balbir Singh* reported in *[1994(3) SCC 299]*, Hon'ble Supreme Court considered the power of the empowered officers in NDPS Act and the embargo in the Act, after detail discussion, held that

“10.It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC namely Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.

11.But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a



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Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a Gazetted Officer or other officers mentioned and empowered therein can give an authorization to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the Legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder.”



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24. Following *Balbir judgment*, a catena of judgments had been rendered by the Hon'ble Supreme Court and as binding precedent by the other Courts. *Directorate of Revenue and another v. Mohammed Nisar Holia* reported in [(2008) 2 SCC 370] is one such judgement now relied by the learned counsel appearing for the appellant. However the facts of the case cited is search of a hotel room, based on prior information not recorded by the recipient of the information. The facts of the case in hand is totally different.

25. In this case, PW-2 [Mr.Shravanraj] Investigating Officer received information. He recorded the information Ex.P-4 and placed it before his immediate superior PW-9 [Mr.Santanu Aich] who was the Superintendent. This is a clear case of search, based on prior information duly recorded and done at a public place. Therefore, it falls under Section 43 of NDPS Act and not under Section 42 of the Act.

26. Regarding violation of Section 50 which reads as below:-

“50. Conditions under which search of persons shall



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be conducted.—(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.]

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief



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which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]”

27. It is to be noted that this Section is in respect of personal search and not for search of bag or premises. The learned counsel appearing for the appellant relying upon the judgment of Supreme Court in ***State of Rajasthan –vs- Premanand and others [(2014) 5 SCC 345]***, submitted that any search operation which includes personal search, compliance of Section 50 of NDPS Act is mandatory.

28. Adverting to this point, para 15 in ***Premanand case*** cited supra reads as below:-

“15.Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in



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the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

29. The fact of the instant case as seen from the evidence of witnesses and mahazar is that first the trolley carried by the accused was searched, thereafter they have done the body search. Before conducting body search the accused was explained about the right under Section 50 of the NDPS Act. The sequence of event and the explanation of the right under section 50 to the accused is clearly mentioned in the mahazar and the accused has affixed his signature in the mahazar. Therefore, the contention of the appellant that the respondent violated the mandate under Section 50 of NDPS Act is not sustainable.

30. In respect of violation of Sections 52 and 55 of the Act and the reliance of the judgment of this Court rendered in ***Danraj v. State in Crl.A.No.319 of 2012 dated 13.03.2019*** it is noted that in *Danraj case* the prosecution failed to produce malkhana register to prove the safe custody of the contraband seized and the doubt about the weight of the contraband was highlighted for acquitting the accused.



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31. In the above said judgment, this Court has observed that,

“47.That apart, in general, even if it is assumed that, the contraband had been produced on 15.09.2009 at the trial Court, the fact remains that, between 21.08.2009, the date of which the contraband had been returned by the Magistrate Court and 15.09.2009, the date on which the prosecution claimed to have produced the same before the trial Court, certainly the contraband should have been in the custody of the respondent/prosecution.

48.If that being so, between 21.08.2009 and 15.09.2009, i.e., for three weeks where the contraband had been kept in safe custody had not been explained by the prosecution as in this regard, no documents or evidence had been produced by the prosecution before the trial Court and the trial Court has also not asked any such evidence from the prosecution.”

32. Here is a case, where the prosecution through the Forwarding Memo Ex.P-14 and the Godown Receipt Ex.P-15 had explained the chain of custody. It is clearly established through evidence that the seized contraband was immediately produced before the Magistrate on 05/07/2013 along with the accused and as per the direction of the Magistrate, it was



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produced before the Special Court on 09/07/2013. In between it was kept in deposit of the NCB godown.

33. Therefore this Court finds that in view of the documentary and oral evidence, which proves otherwise, all the three fold submissions of the learned counsel for the appellant are not sustainable,

34. The learned counsel appearing for the appellant submitted that, the appellant suffers poverty and not able to pay the fine amount and hence, the default sentence of one year RI may be reduced. In support of his plea, he relies upon the judgement of this Court in ***Rajapandi & Another Versus State rep.by The Inspector of Police, Chennai (Crime No.91/12)*** reported in ***[CDJ 2021 MHC 5821]***, wherein the High Court on appeal has reduced the default sentence from one year RI to one month RI by recording reasons.

35. Considering the said plea while confirming substantial sentence viz., the period of imprisonment and fine amount, the default sentence for fine is reduced to three months Rigorous Imprisonment, instead of one year Rigorous Imprisonment.



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36. As a result, the trial Court sentence is modified as sentence of 10 years Rigorous Imprisonment and fine of Rs.1,00,000/-, in default, three months Rigorous Imprisonment imposed on the first accused/appellant herein.

37. With the above said modification, this Criminal Appeal is partly allowed, resulting, the conviction and sentenced imposed by the trial Court is confirmed with modification of the default sentence.

12.07.2022

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To:

1.The Principal Special Judge, Principal Special Court under NDPS Act cases, Chennai 600 104.

2.The Intelligence officer, Narcotics Control Bureau, Chennai Zone, Chennai.

3.The Special Public Prosecutor (NCB Cases), High Court, Madras.



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DR.G.JAYACHANDRAN,J.
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Delivery Judgement made in
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