

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL WRIT PETITION No. 389 OF 2022.

1.Sudarshan s/o Gajanan Gaikwad,
Aged about 47 years, Occupation
Legal Practitioner and Cultivator;

2.Aaditya s/o Sudarshan Gaikwad,
Aged 19 years, Occupation – Student,

Both residents of Shikshak Colony,
Malegaon, Tahsil Malegaon,
District Washim.

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PETITIONERS.

VERSUS

1.The State of Maharashtra,
through its Secretary, Department
of Home, Mantralaya, Mumbai -32.

2.The Police Station Officer,
Police Station Malegaon, Tahsil
Malegaon, District Washim.

3.Aadharsingh s/o Sardarsingh Sonone,
Aged about Major, Occupation – Service
Police Station Karanja, Tahsil Karanja,
District Washim [Complainant]

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RESPONDENTS.

Mr. R.L. Khapre, Senior Advocate with Shri K.S. Karwade, Advocate
for Petitioners.

Mr. M.J. Khan, A.P.P. for Respondent Nos. 1 and 2 - State.
Mr.R.R. Vyas, Advocate for Respondent No.3.

**CORAM : VINAY JOSHI AND
VALMIKI SA MENEZES, JJ.**

CLOSED FOR JUDGMENT ON : 28.02.2023.
JUDGMENT PRONOUNCED ON : 03.04.2023.

JUDGMENT (PER VINAY JOSHI, J.) :

Rule. Rule made returnable forthwith. Heard finally by consent of all the learned Counsel appearing for respective parties.

2. This petition is filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, seeking to quash the charge-sheet relating to Crime No. 203/2021 registered with Malegaon Police Station, District Washim for the offence punishable under Sections 353, 332, 186, 294, 188, 269, 270, 504 read with Section 34 of the Indian Penal Code, Section 7 of

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the Criminal Law Amendment Act, 1932 and Section 3 of the Epidemic Diseases Act, 1897.

3. Petitioner no.1 is a practicing Advocate at Washim District, whilst Petitioner no.2 is his son. Challenge to the charge-sheet is inter-alia on the ground that the prosecution is actuated with malafides. Contentions raised in the police report are untrue, false and made with ulterior motive. The police paper does not disclose the alleged offences. The prosecution is untenable for want of competency of informant to launch prosecution. The continuation of such prosecution amounts to violation of right to life and liberty enshrined under Article 21 of the Constitution of India.

4. The facts of the case can be briefly stated as under :-

The first information report has been lodged by the police inspector [PI] namely Sardarsingh Sonore, attached to Malegaon Police Station, District Washim. The Government of Maharashtra has issued an order dated 04.04.2021, in exercise of powers under the provisions of the Epidemic Diseases Act, and the Disastrous

Management Act, imposing certain restrictions on the movement to curb spread of infectious corona virus. It is prosecution case that on 22.05.2021, around 6 p.m. the Superintendent of Police, Washim came to Malegaon for inspection. The informant along with police squad, headed by the Superintendent of Police were patrolling in between Jogdand Hospital to Shiv Chowk in Malegaon City. While the police party was proceeding on foot from the side of Gandhi Chowk, a motor vehicle bearing registration No. MH 37-V-2123 came from opposite direction. The police signaled the driver to stop since it was a lock down period and prohibitory order was issued. The police have asked the occupant of car as to why during lock down period he is proceeding despite restrictions on movement. Petitioner no.1 Advocate Gaikwad, who was the sole occupant, driving the car argued with the police and arrogantly replied that he being an Advocate, has right to move anywhere. The informant has asked one of the police constable Deepak Shirsat, to take details of Advocate Gaikwad and to initiate necessary action. After commanding to the subordinate constable Shri Shirsat, the informant went ahead on his patrolling duty.

5. It is informants case that round 6.40 p.m. while he was patrolling at Selufata, one of the patrolling party member constable Bhalerao conveyed that police constable Shirsat, who was asked to deal with Advocate Gaikwad, was taken by Advocate Gaikwad to his residence and was quarreling with him. It was also informed that Advocate Gaikwad was arguing with the constable Shirsat in filthy language that he knows the law and police cannot do anything with him. Immediately the informant and other police rushed to the house of accused Advocate Gaikwad near water reservoir, to see the matter.

6. Police found that Advocate Gaikwad was loudly arguing with constable Shirsat, saying that he is an Advocate and if police has courage then touch him or his motor vehicle, and nobody would dare to take action against him. The informant and other police tried to pacify Advocate Gaikwad, however, again he loudly started shouting and quarreled with them. At that time son of Advocate Gaikwad [Petitioner no.2] manhandled some of the police officials

and also dealt a stick blow at the head of one of the police personnel. On the basis of said incident both of them were brought to police station and report has been lodged. The police have investigated the matter, and on completion, filed final report.

7. Shri Khapre, learned Senior Counsel appearing on behalf of Petitioners, made exhaustive submissions. It is contended that though it was a lock-down period, there was exemption for agricultural movement. Advocate Gaikwad owns agricultural land and at the relevant time he was returning from his field, as he was called at his house for emergency. It is argued that the incident as alleged is, totally false and fabricated. On the other hand the police have misbehaved and without arrest detained Petitioners in the police station for long hours. The incident as alleged, is inherently improbable. Learned Senior Counsel took us through various entries in station diary to impress that some of the police officers named in the first information report were not present on the spot, rather they were at police station at the relevant time. He tried to make a point that despite absence of those police officers, it has been stated in the

first information report that they were present, therefore, the entire incidence is false and fabricated one.

8. It is argued that the first occurrence relates to an offence punishable under Sections 188, 269, 270 of the Indian Penal Code, and the second is under Section 7 of the Criminal Law Amendment Act and under Sections 353, 332, 186, 294, 504 read with Section 34 of the Indian Penal Code. According to him, the prosecution for the initial offence under Section 188 of the Indian Penal Code is untenable on account of Section 195 of the Code of Criminal Procedure. It is submitted that the police officer is not competent to lodge report for the offence punishable under Section 188 of the Indian Penal Code. According to him, by virtue of Section 195 of the Code, the Court cannot take cognizance of said offence, except for the complaint in writing made by concerned public servant or his subordinate. It is submitted that since the prosecution for primary offence is not maintainable, the entire prosecution goes.

9. In this regard, the learned Senior Counsel has invited our

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attention to the decision of Supreme Court in case of **State of Haryana .vrs. Bhajan Lal [1992 Supp [1] SCC 335]**, more particularly the guidelines contained in paragraph no.102 thereof, which reads as under :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First

Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific

provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

10. In another decision in case of **Amit Kapoor .vrs. Ramesh Chander and another** – [2012] 9 SCC 460, on objective analysis of various earlier decisions, the Supreme Court has cull out principles to consider for proper exercise of of jurisdiction, particularly with regard to quashing of charge in exercise of jurisdiction under Section 482 of the Code of Criminal Procedure, which are reproduced as under.

"27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in

terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. *The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.*

27.7. *The process of the Court cannot be permitted to be used for an oblique or ultimate/ ulterior purpose.*

27.8. *Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.*

27.9. *Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.*

27.10. *It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.*

27.11. *Where allegations give rise to a civil claim and also amount to an offence, merely because a*

civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. *In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.*

27.13. *Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.*

27.14. *Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.*

27.15. *Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.*

27.16. *These are the principles which individually and preferably cumulatively (one or*

more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence.”

11. Keeping in mind the above principles, we have examined the facts of this case. The report has been lodged by the P.I. Shri Sonare regarding the incident dated 25.05.2021 around 6 p.m. While the police were on patrolling duty during lock-down period, they came across with one person moving freely by his car, therefore, he was accosted. On enquiry, the driver Advocate Gaikwad [Petitioner no.1] arrogantly justified his movement by saying that he being an Advocate, has right to move anywhere. The informant police inspector asked his subordinate police constable Deepak Shirsat [BC No.371], to note the details of Advocate Gaikwad and to take necessary action. After giving such instructions, police sleuth went ahead on patrolling duty. Within a short time, it was informed

that Advocate Gaikwad took police constable Shirsat to his residence and was arguing with him. Immediately, the informant P.I. Sonone, along with other police staff went to the house of the accused which was near water reservoir at Nagartas Road. Advocate Gaikwad again started to argue with the police in filthy language and deterred them from taking action. Not only that son of Advocate Gaikwad [Petitioner no.2] also argued loudly, manhandled the police personnel and dealt a stick blow at the head of one of the police constable.

12. The entire endeavor of Shri Khapre, learned Senior Counsel is to show that the allegations are totally false. It is his contention that at the relevant time Advocate Gaikwad was returning from his field towards his residence on the call of his wife about medical emergency. He has denied the so called argument and stated that police have concocted a story and thereby falsely implicated Petitioners. In order to buttress said stand, learned Senior Counsel took us through some of the entries in the station diary of the concerned police station, which have been procured

under Right to Information Act. It is tried to impress that some of the police constables named in the first information report were at relevant time at police station itself, therefore, the story is totally false and fabricated. In order to appreciate the said contention, we had a re-look to the first information report in which it has been stated that the police constable Deepak Shirsat [BC 371], was initially asked to take action against Advocate Gaikwad. In second part of the incident, the informant Sonone went to the residence of Advocate Gaikwad along with police head constable – Buckle No. [BC] 692, police constables - BC 808, BC 1050, BC 786, Driver BC 1036, ladies police constables -BC 250 and 1332.

13. Learned Senior Counsel has invited our attention to station diary entry Nos. 59 to 61 [page no.146], to contend that at the relevant time lady police constable – BC 250 was at the police station itself. Relevant entry discloses that on 22.05.2021, around 4 p.m. the said lady police constable took charge of station diary from B.C. 1238. Entry no.60 denotes that on that day, around 4.08 p.m. head constable Kokate BC 692, has registered one other offence.

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Entry no.62 discloses that round 5.41 p.m. again the said head constable has registered one another offence. Entry no.65 discloses that on the said date around 6.51 p.m. the said head police constable has registered an offence. The endeavor was to show that since head constable Kokate [BC 692] was at police station, his presence on the spot on 22.05.2021 at around 6.40 p.m., was highly improbable.

14. Similarly, we have been taken through station diary entry no.158 [page no.175], which speaks that name of lady police constable Pakhale [BC 250], was mistakenly mentioned in the first information report, however, she was on station diary duty at the relevant time. On the basis of these two discrepancies emerging from the station diary, it has been submitted that though the head constable Kokate [BC 692] and lady police constable [BC 250] were not present on the spot, still their names have been mentioned in the first information report, therefore, the entire incident is concocted one.

15. Per contra, Shri Vyas, the learned Counsel appearing for

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the informant would submit that, it is a matter of trial to explain the station diary entries during the course of evidence. Moreover, he would submit that the said aspect is a matter of defence, which cannot be considered at the threshold. Though at this stage scanning of the material is permissible to the limited extent, however, the uncontroverted station diary entries can be seen to draw prima facie conclusion.

16. Though the said discrepancy is highlighted, however, we are not much swayed by the same. As regard to the lady police constable [BC 250] is concerned, the another station diary entry No.158 clarifies that her reference in the first information report was mistaken one. It is not a case that at the relevant time the informant went to the place along with head constable Kokate [BC 692] and lady police constable [BC 250] only, but, there is reference of several police constables with their buckle numbers. We have gone through the statement of other police constables who were allegedly present on the spot. For instance, we have gone through the statements of police constable Solanke [BC 1050], constable

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Wadhankar [BC 786], constable Zagare [BC 808], Driver Vyal [BC 1036], constable Shirsat [BC 371], lady police constable Bengad [BC 1332] and constable Bhalerao [BC 1423], who have specifically stated about their presence on the spot where the second incident occurred. All of them have stated that at the relevant time the accused abused the police squad in filthy language and refused to accompany them. It is specifically stated that son of Advocate Gaikwad manhandled the police as well as, gave a stick blow at the head of police constable Zagare [BC 808]. Contextually we have gone through the statement of police constable Zagare, who has stated that son of Advocate Gaikwad dealt a stick blow at his head at the relevant time. Thus, it emerges that there are consistent statements of eye witnesses which are specific on the point of actual occurrence.

17. Besides that, the prosecution has collected injury certificates of police personnel who sustained injuries at the time of occurrence. Injury certificates are of informant police inspector Sonone, Constable Zagare [BC 808], constable Kokate [BC 692],

constable Solanke [BC 1050], constable Wadhavkar [BC 786], constable Bengad [BC 1332] etc. All injured have been examined by the medical officer on the same day around 10.15 p.m. and found simple injuries at their person. Particularly, constable Zagare [BC 808] sustained simple injury at his right parital region which corroborates the prosecution case. All injured have stated about the history of assault. Medical evidence prima facie supports the prosecution version.

18. It has been argued that though the informant Sonone did not sustain injury, still his injury certificate has been produced. Minute perusal of the first information report indicates that Sonone was also allegedly manhandled by both accused. It is argued that the injuries are of mere swelling and contusion, therefore, they cannot be relied. We reiterate that this is not a stage to meticulously scan the effect of injury in context to the incident stated by the eye witnesses. It is sufficient to form a prima facie opinion that the police statements are supported by injury certificates. Meticulous examination and effect of evidence cannot be assessed at this stage.

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19. Shri Vyas, learned Counsel would submit that the prosecution case cannot be doubted in absence of any material to conceive the bias prior to filing of the first information report. In this regard he relied on the decision of Supreme Court in case of **State of Bihar and another .vrs. P.P. Sharma IAS and another – 1992 Supp [1] SCC 222**. We have gone through the said decision and noted the principles laid therein. Notably, it is not the case of prior enmity in between the accused and P.I. Sonone.

20. Shri Khapre, learned Senior Counsel laid stress on the point that as per the first information report, Petitioner no.2 allegedly dealt stick blow to one of the constable. In that context, he took us through the station diary entry no.69, wherein reference has been made that Petitioner no.2 assaulted by means of stone lying on the road. It is submitted that the case is doubtful, because of said material discrepancy. We have gone through the police statements of all eye witnesses including the injured constable Zagare. All of them have been consistent about assault by means of stick, therefore,

at this stage, mere reference of stone in station diary by itself is not sufficient to discard the entire prosecution case. Obviously said point can be canvassed during the course of trial and is a matter of appreciation at the time of final adjudication.

21. Learned Senior Counsel has also submitted on the point of biased approach of the police officers. It is submitted that though on the date of occurrence itself in the late evening both Petitioners were taken to police station, however, their arrest has been shown belatedly in the morning and thus, it amounts to illegal detention. The record indicates that Petitioners have already applied to the Magistrate for taking action of contempt against the investigating officer for non compliance of the provisions of Section 41-A of the Criminal Procedure Code. The learned Magistrate after considering submissions, vide order dated 13.07.2021, rejected the same by recording a finding that the arrest was in accordance with law. The said order has not been called in question thereafter, the same has attained finality. Besides that no material illegality has been shown in the process of arrest.

22. Another limb of submission of Shri Khapre, learned Senior Counsel is that the prosecution under Section 188 of the Indian Penal Code is not tenable on the basis of the first information report lodged by the police officer. In this regard our attention has been invited to Section 195 of the Code of Criminal Procedure to contend that the Court cannot take cognizance for the offence punishable under Section 188 of the Code, unless a complaint in writing is made by the public servant concerned, or his administratively subordinate. Our attention is invited to prohibitory order dated 04.04.2021, issued by the Authority in exercise of powers conferred under the Epidemic Act, 1897.

23. Moreover, to substantiate said contention, reliance is placed on the decision of this Court in case of **HLA Shwe and others .vrs. State of Maharashtra and others – 2020 SCC Online Bom 959**. No doubt this Court after considering the said aspect has held that in absence of complaint by public servant whose lawful order has not been complied, the prosecution by police officer is not

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permissible in law. We are mindful of the said legal position, however, the existing first information report was not solely for the offence punishable under Section 188 of the Penal Code, but, there are other penal provisions like Sections 353, 332, 294, 504 of the Indian Penal Code and Section 7 of the Criminal Law Amendment Act. Those offences are cognizable in nature, and therefore, the prosecution is tenable on the basis of the first information report lodged by the police officer.

24. Petitioners have also criticized the delay in lodging of first information report. It is submitted that since there was inordinate delay, in lodging of the first information report, it is sufficient to raise doubt regarding genuineness of contents of the first information report. It is argued that though soon after the occurrence, both Petitioners were taken to police station, however, the first information report has been belatedly lodged. In that context, we have gone through the factual aspect. The incident of assault allegedly took place around 6.40 p.m. on 22.05.2021, whilst the first information report has been lodged on 23.05.2021 at about

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1.24 a.m. It means that within 6 hours from the occurrence, the first information report has been registered. Prima facie we do not consider the same as an inordinate delay, as well as the prosecution can explain the delay during the course of trial, therefore, the said point does not impress us at all.

25. Shri Khapre, learned Senior Counsel would submit that in terms of notification dated 04.04.2021, exemption was granted to essential services which includes agriculture related services. There can be no dispute about said proposition, however, the matter does not confine to the extent of violation of restriction imposed by the authority. The police paper indicates that the first occurrence was followed by the second incident happened in quick succession near the residence of Advocate Gaikwad. There are specific allegations that Petitioners have assaulted public servants while exercising their duty of patrolling. Moreover, there is prima facie material to convey that the accused has caused hurt to deter public servants from their duties.

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26. As referred above, though the Court has unbridled powers under Section 482 of the Cr.P.C., it owes duty to take care and caution while exercising the said power. The un-controverted allegations as made out in the police paper prima facie satisfies the ingredients to constitute the offences. At this stage, meticulous examination of the evidence is not required, nor the Court shall consider whether the case would end in conviction or acquittal. There is no material to prima facie hold that the prosecution was actuated with malafides since no case of enmity has been made out. Petitioners are unable to point out absolute necessity to exercise the jurisdiction to prevent miscarriage of justice. On thoughtful consideration of entire material, we are of the view that the material collected during the course of investigation makes out a prima facie case which cannot be termed as an abuse of the process of Court. For above reasons, we are not inclined to exercise our inherent powers and therefore, Criminal Writ Petition being devoid of merit, is hereby dismissed. Rule discharged.

27. We make it clear that the above observations are

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restricted to the extent of deciding this Writ Petition, which will have no bearing on the merits of the matter.

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