

LIBRARY

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CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

O.A. No. 350/00126/2017
M.A.No.350/587/2017

Date of order: 07.02.2018

Coram : Hon'ble Ms. Manjula Das, Judicial Member

Ashim Kumar Sarkar,
S/o Late A.R. Sarkar,
Aged about 57 years,
At present working as Sr. Assistant (Ministerial)
In Central Reference Library,
Under Librarian (1/C)
at present residing at Uttarayan,
Netaji Subash Bose Road,
P.O. Hridaypur,
Kolkata – 700 127.

..... Applicant.

Versus

1. Union of India through secretary,
Govt. of India,
Ministry of Culture Library Section,
'C' Wing Shastri Bhawan;
2. Joint Secretary,
Govt. of India,
Ministry of Culture,
Library Section,
'C' Wing Shastri Bhawan,
New Delhi – 110 115;
3. Director,
Govt. of India,
Ministry of Culture,
Library Section,
'C' Wing, Shastri Bhawan,
New Delhi – 110 115;
4. Under Secretary,
Govt. of India,
Library Section,
Shastri Bhawan,
New Delhi – 110 115;
5. Librarian In Charge
Central Reference Library,

Ministry of Culture, Belvedere,
Kolkata – 700 027;

6. Accounts Cum Administrative Officer
& DDO Central Reference Library,
Ministry of Culture, Belvedere,
Kolkata – 700 027.

..... Respondents.

For the applicant : Mr. C. Sinha, counsel

For the respondents : Mr. B.P. Manna, counsel

ORDER

Being aggrieved with the order of recovery from salary, the applicant approached this Tribunal under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:-

"8.(a) To set aside and quash the Impugned Order No. CRL/Lib/2016-17/228 dated 10.6.2016 issued by Accounts Cum Administrative Officer, Central Reference Library, Ministry of Culture, Belvedere;

(b) To set aside and quash Impugned Order No. CRL/AKS/683 dated 07.12.2016 issued by Librarian, Central Reference Library;

(c) To set aside and quash Impugned letter no. F. 13-3/2014-Lib dated 05.12.2016;

(d) To set aside and quash Impugned Due and Drawn Statement;

(e) To direct the respondents not to recover an amount of Rs. 1,88,134/- as assessed from the salary of the applicant;

(f) To direct the respondents to refund any amount if recovered;

(g) Any other order or orders as the Hon'ble Tribunal may deem fit & proper."

2. This Tribunal granted an interim order on 08.06.2017. Thereafter the said interim order was extended from time to time.

3. The respondents of O.A. have filed M.A. No.587 of 2017 on 11.07.2017 for vacation of interim order dated 08.06.2017.

4. Pleadings were completed in the O.A. and vide order dated 16.08.2017 this Tribunal fixed the entire matter for hearing . Accordingly we have heard the entire matter.

5. I have heard Mr. C. Sinha, Id. counsel for the applicant and Mr. B.P. Manna, Id. counsel for the respondents and perused the pleadings and materials placed before us.

6(a) Brief facts as narrated in the original application are that the applicant is working under the Respondents' department in the post of Senior Assistant(Ministerial)in Central Reference Library under the Ministry of Culture. An office order No.187 of 2014-2015 dated 11.08.2014(Annexure A/7) was issued by the Respondent No.5 whereby the applicant was asked to refund an amount of Rs.3,47,234/- on the ground that such amount was overdrawn by him due to a mistake in calculation of pay.(as per audit objection) within 15 days from the date of issue of the said order. Immediately thereafter the applicant made an application to the Respondent No.5 on 13.08.2014(Annexure A/4) with a request not to recover the amount as mentioned in the office order dated 11.08.2014 and to provide him a copy of the audit query on the subject of the over payment, calculation sheet and letter of instruction from the Ministry, if any. The applicant stated that without considering his representation dated 13.08.2014(Annexure A/4) the Respondent No.5 issued another order dated 22.09.2014(Annexure A/5) whereby direction was given to recover the amount of Rs.3,47,234/- from the applicant's salary commencing from September 2014 in 35 instalments.

(b) Being aggrieved by such impugned orders, the applicant approached this Tribunal in O.A.No.1323/2014 which was disposed of vide order dated 11.08.2015 by setting aside the orders of recovery dated 11.08.2014 and 22.09.2015 and directing the respondents to calculate the due drawn statement afresh after giving due notice to the applicant and pass an appropriate order.

The respondents were also directed to recover the amount from the applicant, if any amount was found to be recoverable and to release the balance amount of Rs.3,47,234/- if already recovered.

(c) Pursuant to the said order of this Tribunal, an Office Order No.91 of 2016-2017 dated 10.06.2016(Annexure A/8) was issued by the Accounts Cum Administrative Officer (Respondent No.6) whereby the overdrawn amount was recalculated and direction was given to recover an amount of Rs.1,88,134/- from the salary of the applicant in 24 instalments at the rate of Rs.7839/- p.m. with effect from June, 2016 which is under challenge in the instant O.A. The applicant had challenged the impugned order dated 10.06.2016 by filing O.A.No.350/1113/2016 before this Tribunal which was disposed of on 09.08.2016 by directing the respondents to give a personal hearing to the applicant with due notice and thereafter pass an appropriate reasoned and speaking order and the applicant was given liberty to take support of the decision of the Hon'ble Apex Court in the case of **State of Punjab and Others vs. Rafiq Masih(White Washer) and Others**. In pursuance of the said order, personal hearing was given to the applicant with due notice and the applicant requested the authorities concerned to stop recovery against him in due consideration of the decision of the Hon'ble Apex Court in case of **Rafiq Masih** and the Office Memorandum No.18/03/2015-Estt(Pay-I) dated 2nd March 2016 issued by the Ministry of personnel , Public Grievances & Pensions, Department Of Personnel and Training, but the respondent authorities did not consider the request of the applicant and passed the impugned order dated 07.12.2016(Annexure A/18) whereby the order of recovery dated 10.06.2016 was restored. Finding no other alternative, the applicant has approached this Tribunal seeking appropriate relief.



7(a) Mr. C. Sinha, Id. counsel for the respondents advanced his arguments on the following grounds:-

- (i) Recovery of Rs.1,88,134/- from the salary of the applicant vide impugned order dated 10.06.2016 is based on erroneous and faulty calculation as per the due and drawn statement and, therefore, such order is bad in law;
- (ii) The respondent authorities have not considered the dictum as laid down by the Hon'ble Apex Court in the case of **State of Punjab and Others vs. Rafiq Masih(White Washer) and Others** wherein certain situations have been specified in which recovery from the employee would be impermissible under the law;
- (iii) The Office Memorandum dated 02.03.2016 which is on the subject "Recovery of wrongful/excess payments made to Government servants" issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, New Delhi, has not been considered by the respondents in letter and spirit.

(b) According to Mr. Sinha, the applicant is a Group 'C' employee and the respondents have issued the impugned orders of recovery against him on the basis of an audit query on the ground that he had overdrawn an amount of Rs.1,88,134/-(recalculated amount) which is not permissible as per the Office Memorandum dated 02.03.2016(Annexure A/15). Mr. Sinha has drawn our attention to the Office Memorandum dated 02.03.2016 issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, New Delhi on the subject "Recovery of wrongful/excess payments made to Government servants" and submitted that as per this Office Memorandum, recovery by the employer would be impermissible in case of *recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*

According to the Id. counsel in the instant case, five years have already elapsed as the first impugned order of recovery was issued on 11.08.2014

regarding overdrawal of salary by the applicant for the period from 27.02.2006 to 31.01.2013, therefore, the impugned orders of recovery are bad in law and are liable to be set aside.

(c) Mr. Sinha further submitted that this Tribunal vide order dated 11.08.2015 (Annexure A/7) directed the respondent authorities to calculate the due and drawn statement afresh after giving due notice to the applicant and pass appropriate orders, but no notice was issued to the applicant before recalculating the amount of recovery against him, therefore, the impugned order dated 10.06.2016 cannot be sustained in the eye of law. He further submitted that the consequential impugned order dated 07.12.2016 which was issued by the respondents by restoring the impugned order of recovery dated 10.06.2006 is also bad in law because though the applicant was given personal hearing, the authorities did not consider his request to stop the recovery in view of the decision of the Hon'ble Apex Court in the case of **Rafiq Masih(supra)** and the Office Memorandum dated 02.03.2016 issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, New Delhi on the subject "Recovery of wrongful/excess payments made to Government servants"(Annexure A/15).

8. The respondent authorities have filed written reply denying the statements made in the O.A.

9. By controverting the arguments advanced by Mr. C. Sinha, Mr. B.P. Manna, Id. counsel for the respondents submitted that while the applicant was working as UDC, a test check of his Service Book along with Pay Bill Register and other relevant records was conducted and it revealed that the applicant, Shri Sarkar

was drawing Pay of Rs. 4800 in the scale of Rs. 4000-100-6000 in the post of UDC with DNI on 01-02-2006. Mr. Manna submitted that the applicant was suspended from 27th Feb., 2006 and subsequently his suspension was revoked w.e.f. 25.8.2006 pending finalization of the disciplinary proceedings. During the said period, he continued to draw subsistence allowance @ Rs. 2450/- (50 percent of his pay of Rs. 4900). Further scrutiny revealed that he was imposed major penalty as described in Rule (vi) of Rule 11 of the CCS (CCA) Rules, 1965 and reduced to lower post of LDC in the pay scale of Rs. 3050-75-3950-80-4590 w.e.f. 04.05.2007. The order further stated that if found fit after a period of 2 years from the date of the order, he was to be restored in his original position in the higher post of UDC / Assistant in the pay scale of Rs. 4000-6000 along with his seniority. The applicant was restrained from drawing any increment during the said period. Consequently, his pay was fixed @ Rs. 4590 in the lower scale w.e.f. 4-5-2007 to 3-5-2009. The period of his suspension was declared as non-duty and it was stated that the official can convert the period into any type of admissible leave if he so desired. Consequently, his pay was fixed at Rs. 9120 in Pay Band -2 with Grade Pay of Rs. 2400 w.e.f. January 2006. Subsequently, his grade pay was upgraded to Rs. 4200 w.e.f. 1-7-2008 and he was drawing a pay of Rs. 12450 in the Pay Band 2 with grade pay of Rs. 4200 w.e.f. 1-7-2012.

10. By referring to Para 6(b) of the written statement Mr. B.P. Manna, Id. counsel for the respondents further stated the order of reinstatement of the applicant was only for reinstating him in the scale in which he was placed prior to his being reduced to a lower pay scale. However, he was paid the full amount of his salary after his reinstatement as if no penalty was imposed on him. This was in clear violation of provisions of Government of India's order i.e. FR(2) which states

that if the original order is silent on the question of postponement of future increments, the Government servant should be allowed the pay which he would have drawn in the normal course but for the reduction. However, the drawal of actual arrears for the penalty period should not have been allowed.

11. Mr. Manna, Id. counsel for the respondents have also stated that the official had not applied for conversion of the period to any type of admissible leave, therefore, the period of suspension from 27.2.2006 to 25.8.2006 should be treated as non-duty and his next increment was advanced by the said period. Now, as his pay was fixed w.e.f. 1st January, 2006 in the revised structure by taking into account the DNI falling on 1st Feb 2006 in the pre-revised scale, his DNI in the scale should be pm 1st July 2007 instead of July 2006 as he did not render six months service in the revised scale.

12. It is further submitted by Mr. Manna that Office Order No. 187 of 2014-2015 dated 11.08.2014 (Annexure A/7) was issued on the basis of an audit objection raised on the accounts of the Central Reference Library after scrutiny by Indian Audit and Accounts which is found to be correct also. This matter has already been dealt by this Tribunal in O.A. No.350/1323/2014 wherein vide order dated 11.08.2015 it was ordered to recalculate the due-drawn statement afresh after giving due notice to the applicant and pass appropriate order. According to the Id. counsel, recalculation order vide O.M. No.91 of 2016-2017 was issued on the basis of the Tribunal's order dated 11.08.2015.

13. It was further submitted by him that the applicant was given personal hearing and notice and after due consideration of representation made by the applicant the Administrative Ministry did not accede to his request and

instructed to issue reasoned appropriate orders, therefore, the Office Order No.19 vide CRL/Lib/2016-17/228 dated 10.06.2016 has been restored through another order dated 07.12.2016. It was also submitted by Mr. Manna that the error in calculation with regard to recovery of wrongful/excess payment has been settled with the applicant and an order of recovery of an amount of Rs.1,88,134/- has been passed, he has been supplied with the calculation sheet to which he has not submitted any objection/request for rectification which he alleges now.

14. The respondents' counsel has drawn my attention to para 6 of the M.A.No.587 of 2017 which has been filed for vacation of interim order and submitted that there was a revision of pay w.e.f. 1st January, 2006 i.e. from a date prior to the date of suspension and instead of paying the subsistence allowance (50% of the pay) to the applicant at the revised rate, he was paid the full pay which was highly irregular. He further submitted that the department issued an office order to that effect and all the employees were directed to give option as mandatory and on the basis of office order at the time of fixation of pay the applicant like all other staff had given a declaration that if any mistake was found in fixation, he would refund the money to the Government. By referring to para 7 of the said M.A. the Id. counsel further submitted that as per audit objection it was detected that due to mistake and irregularities resulted in overpayment of Rs.3,47,000/- to the petitioner and, therefore, authority passed an order to recover the Government money from the petitioner in easy instalments. He further submitted that the applicant moved this Tribunal challenging the order of recovery passed by the authorities and thereafter, as per direction of the Tribunal the authorities recalculated the amount revising the date of calculation and the recalculated amount stood at Rs.1,88,134/- which was directed to be recovered

from the salary of the applicant in 24 easy instalments @ Rs.7,839/-p.m. w.e.f. June, 2016. Mr. Manna submitted that no irregularities have been committed by the respondents and the O.A. is liable to be dismissed.

15. Heard the matter at length, perused the pleadings and materials placed before me and the decisions of the Hon'ble Apex Court relied upon by the applicant.

16. The basic grievance of the applicant is that the recovery of Rs.1,88,134/- vide order dated 10.06.2016 (Annexure A/8) which was restored vide order dated 07.12.2016(Annexure A/18) is not permissible under the law for which the following points have been raised :-

(i) While issuing the order of recovery of Rs.1,88,134/- the ratio laid down by the Hon'ble Apex Court in the case of **State of Punjab and Others vs. Rafiq Masih(White Washer) and Others** reported in (2015)2 Supreme Court Cases(L&S) 33 has not been considered;

(ii) The provisions mentioned in the Office Memorandum dated 02.03.2016 issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, New Delhi(Annexure A/15) have not been followed while issuing the order of recovery against the applicant;

17. Mr. B.P. Manna, Id counsel for the respondents disputed the applicability of the judgment of Hon'ble Supreme Court in the case of **State of Punjab and Others vs. Rafiq Masih(White Washer) and Others** to the present case.

18(a) Now we have in our hand the judgment of **State of Punjab and Others vs. Rafiq Masih(White Washer) and Others** reported in (2015)2 Supreme Court



Cases(L&S) 33. In the case of **Rafiq Masih** the Hon'ble Apex Court referred to the judgment of **Shyam Babu Verma vs Union of India** wherein in para 11 it was observed as under:-

"11. Although we have held that the petitioners were entitled only to the pay scale of Rs.330-480 in terms of the recommendations of the Third Pay Commission w.e.f. 1-1-1973 and only after the period of 10 years, they became entitled to the pay scale of Rs.330-560 *but as they have received the scale of Rs.330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from 1-1-1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.*" (emphasis supplied)

(b) The Hon'ble Apex Court has further referred to the judgment in the case of **B.J. Akkara Vs. Govt. Of India** wherein in Para 28 it was observed as follows:-

"28. Such relief, *restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in enquiry, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.*" (emphasis supplied)

(c) In para 16 of the Judgment in the case of **Rafiq Masih** the Hon'ble Apex Court discussed the case of **Syed Abdul Qadir v. State of Bihar**, para 59 of the said judgment reads as under:-

"59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be

out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. *The learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made.*"

(d) In para 18 of the case of **State of Punjab and Others vs. Rafiq Masih (White Washer) and Others**, the Hon'ble Apex Court observed as under:-

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employees, would be impermissible in law :

- (i) Recovery from employees belonging to Class-III and Class-IV service (or Group C and Group D service).
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would outweigh the equitable balance of the employer's right to recover."

18. On perusal of the judgment in the case of **Rafiq Masih (supra)** it appears that the issue of recovery of wrongful/excess payment made to an employee has been well settled by the Hon'ble Supreme Court. The present case involves the

same issue of recovery of wrongful/excess payment made to the applicant. Therefore, in the present case, there is no ambiguity in regard to applicability of the ratio laid down by the Hon'ble Apex Court mentioned hereinabove. Further, after passing of the judgment by Hon'ble Apex Court in the case of **Rafiq Masih (supra)**, the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training issued an Office Memorandum dated 02.03.2016 (Annexure R-5) , para 4 and para 5 of the same read as under:-

"4. The Hon'ble Supreme Court while observing that it is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement has summarized the following few situations, wherein recoveries by the employees would be impermissible in law:-

- (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
- (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would for outweigh the equitable balance of the employer's right to recover.

5. The matter has, consequently, been examined in consultation with the Department of Expenditure and the Department of Legal Affairs. The Ministries / Departments are advised to deal with the issue of wrongful / excess payments made to Government servants in accordance with above decision of the Hon'ble Supreme Court in CA No. 11527 of 2014 (arising out of SLP (C) No. 11684 of 2012) in State of Punjab and others etc vs Rafiq Masih (White Washer) etc. However, wherever the waiver of recovery in

the above-mentioned situations is considered, the same may be allowed with the express approval of Department of Expenditure in terms of this Department's OM No. 18/26/2011-Estt (Pay-I) dated 6th February, 2014."

19. It appears from para 6 of the M.A. for vacation of the interim order that the respondents have taken the ground for recovery that instead of paying the subsistence allowance at the rate of 50% to the applicant at revised rate, he was paid full pay which is highly irregular. However, the department has obtained a mandatory option on the basis of the Office Order at the time of fixation of pay and the applicant like all other staff had given a declaration(as stated above) that if any mistake was found in fixation, he would refund the money to the Government. To establish his case Mr. Manna, Id. counsel for the respondents has produced a Memo dated 14.07.2017 along with the Form of Option dated 07.07.2008 wherein para 3 reads as hereunder:-

"3. That I have enclosed herewith the copy of option form/undertaking given by the petitioner for proper adjudication being named as Annexure M7. I pray that the documents may be treated the part of Miscellaneous Application."

From bare perusal of the aforementioned format it appears that the form is not a completed one. However, after exploring it is noticed that said document is the Form of Option under Rule 10 and 11 electing the running Pay Band and Grade Pay w.e.f. 01.01.2006 by the applicant.

20. It is easily discernible from the Form of Option given by the applicant and the statement made by the respondent authorities in para 5 and 6 of the M.A. for vacation of interim order that the fixation was not done on the basis of the option as much as the said option was a routine undertaking for electing the Pay Band and Grade Pay under the VIth Central Pay Commission. Therefore, I am of the view that the said form of option cannot be treated as an undertaking for

recovery of wrongful/excess payment overlooking the suspension/punishment given to the applicant or for any wrongful revision of pay/increment. Thus, submissions of Id. counsel for the respondents fail.

21. Admittedly the applicant is a Group 'C' employee which warrants to the benefit of promotion as provided in Office Memorandum dated 02.03.2016 issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel and Training, New Delhi. It is candid clear that the Office Order dated 11.08.2014(Annexure A/3) by which recovery from the salary of the applicant was calculated w.e.f. 2006 to 2013 which is prior to 5 years period from the date of recovery i.e. 11.08.2014 and such recovery after 5 years is not permissible in view of the observation made by the Hon'ble Apex Court in the case of **Rafiq Masih (supra)**. It is not disputed that the payment has been made by the respondents/employer i.e. the department in excess of the entitlement of the applicant due to a mistake on their part. Such overpayment was not made to the applicant for any misrepresentation or fraud by the applicant and it was nowhere established that the applicant was aware of the excess payment made to him.

22. By taking into the entire conspectus of the case and in view of the ratio laid down by the Hon'ble Apex Court in the case of **State of Punjab and Others vs. Rafiq Masih(White Washer) and Others(supra)** I am of the view that in the present case the orders of recovery from the salary of the applicant is not permissible under the law. Hence, I have no hesitation to set aside the order of recovery dated 10.06.2016(Annexure A/8) and the consequential orders dated 05.12.2016(Annexure A/17) and dated 07.12.2016(Annexure A/18) passed by the respondent authorities.



Order accordingly.

23. The O.A. stands allowed. Consequently the M.A. stands disposed of. No order as to cost.

(MANJULA DAS)
Judicial Member

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