

Sri Chand Vs. State of U.P.

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Court : Allahabad

Decided On : Mar-28-2003

Reported in : 2003CriLJ4094

Judge : R.B. Misra, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 340

Appeal No. : F.A.F.O. No. 46 of 1985

Appellant : Sri Chand

Respondent : State of U.P.

Advocate for Def. : Rafiquddin Ansari, S.C.

Advocate for Pet/Ap. : V.K.S. Chaudhary, ;R.S. Maurya, ;Ashok Kumar Singh and ;Rakesh Bahadur, Advs.

Disposition : Appeal allowed

Judgement :

R.B. Misra, J.

1. Heard Sri. V.K.S. Chaudhary, learned senior advocate, for the applicant along with Sri Rakesh Bahadur and learned Standing Counsel for, the respondents.

2. The first appeal from order No. 46 of 1985 preferred under Section 83 of Lunacy Act read with Section 341/195(4), Cr.P.C. challenging the order dated 19-10-1984 passed under Section 340, Cr.P.C. in Misc. Case No. 285 of 1982 (Madan Lal v. Sri Chand) was finally disposed of by the District Judge, Azamgarh on 18-3-1983 where the District Judge has observed that Sri Chand had filed a false affidavit indicating that Madan Lal happened to be his real brother. On that aspect the District Judge had indicated for issuance of show cause notice for institution of a criminal complaint against him. The miscellaneous application No: 205 of 1983 has been originated from the said observation in respect of the alleged false affidavit filed by Sri Chand before the lower Court. Undoubtedly Sri Chand has filed an affidavit in Misc. Case No. 285 of 1982 which is allegedly to be a false affidavit wherein he had averred that Madan Lal happened to be his real brother whereas in another litigation regarding partitions of property Sri Chand the appellant before this Court has made and categorically asserted that Madan Lal is not his brother, that litigation was pending from much before the instant proceeding in which the impugned order in question and the cognizance of alleged false affidavit was noted on this aspect learned lower Court took a view that Sri Chand has filed a false affidavit. Learned lower Court has also made observations in the order dated 19-10-1984 that learned counsel for Sri Chand had very humbly stated before the lower Court that he has not done so intentionally with a view to gain something. However, learned District Judge had viewed such averment of Sri Chand presented on affidavit that definitely it was a false statement in the knowledge of Sri Chand and has been viewed that Sri Chand has deliberately filed a false affidavit touching his relationship with Madan Lal. Learned lower Court has also noted that Sri Chand was not instrumental in drafting of the affidavit as it was got prepared by the then learned counsel engaged in that case and Sri Chand had only made a signature at the bottom of the plain paper and as a common litigant and he could not make an attempt to peruse or he could not realise the necessity; of perusing the entire contents of the affidavit. According to Sri Chand he had simply put a signature under the affidavit in a blind folded manner without making any endeavourance to know the contents. However, learned lower Court has ignored these aspects in the matter and has viewed that such phenomena is uncommon and has considered that it a fit case where criminal' complaint was to

be filed against Sri Chand for filing false affidavit in the miscellaneous case.

3. According to Section 340, Code of Criminal Procedure, 1973 provides as below.

340. Procedure in cases mentioned in Section 195 --- (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Clause (b) of Sub-section (1) of Section 195 which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court such Court may, after such preliminary inquiry, if any, as it thinks necessary,--

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate, and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by Sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under Sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of Sub-section (4) of Section 195.:

4. A complaint made under this section shall be signed,--

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(3) According to Sri V.K.S. Chaudhary, learned senior Advocate for the applicant, in order to prevent Section 340 the concerned Court after preliminary inquiry if any is necessarily to record the finding to the effect that a deliberate attempt initially knowingly in the blind manner has been made for gain by distorting true aspects of the matter. Sri Chaudhary, learned senior advocate for the applicant has contended that learned lower Court was under legal obligation to records finding or to arrive at opinion that it is expedient in the interest of justice that the inquiry should be made into any offence referred in Clause (b) of sub section (1) of S. 195 which at least committed in addition in that Court or in respect of documents produced in the proceeding in that case.

5. Sri Chaudhary, learned senior Advocate for the applicant has referred and relied on : AIR 1970 AP119 (Nimmakayala Audi Narrayanamma v. State of Andhra Pradesh) paras 5, 6, 8, 9, 10, 15 of the judgment which is as follows :--

'5. For a proper appreciation of the point of issue, it is profitable to consider Section 476, Criminal P.C. which reads thus :

'When any Criminal Court is Of opinion that it is expedient in the interests of justice than an enquiry should be made into any offence referred to in Section 195, Sub-section (1), Clause (a) or Clause (b) which appears to have been committed in or relation to a proceeding in that Court, such Court may after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the First Class having jurisdiction..... .' Section 17, Criminal P.C. prescribes an exhaustive procedure relating to the preferring of complaints by Courts, civil, criminal or revenue, in respect of offences mentioned in Clauses (b) and (c) of Sub-section (1) to Section 195. This section enjoins the Court, below which the offence under Section 211, I.P.C. appears to have been committed in or in relation to any proceeding before it, to be satisfied objectively in each case that it was expedient in the interests of justice that an enquiry should be held into the offence. Thereafter the Court may have such preliminary enquiry as it thinks necessary and

record a finding to the effect that it is expedient in the interests of justice or that it is a fit case to prosecute the person or persons who committed the offence and then make a complaint in writing and forward the same to the First Class Magistrate for disposal according to law. The words 'such Court may after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect' must necessarily be construed that it is incumbent on the Court to record a finding to the effect that it is expedient in the interests of justice to enquire into the offence referred to in Section 195(1) Clause (b) or (c) although the preliminary enquiry may or may not be held in the discretion of the Court, depending upon the circumstances of each case. The action of the Court under Section 476 is appealable by the aggrieved party under Section 476B, Criminal P. C. to the Court having jurisdiction to receive appeals against the decisions of that Court.

In my considered opinion, the opinion contemplated under Section 476 to be formed by the Court before which the offence appears to have been committed, that it was expedient in the interests of justice to prosecute such person or persons, must be an objective but not a subjective one. The test that has to be laid must be that of a prudent reasonable person and it should be a speaking one supported by valid grounds. Otherwise it would be often very difficult and sometimes even impossible for the appellate Court under Section 476-B to arrive at the conclusion as to whether the Court has rightly applied its mind and passed the order under Section 476, Criminal P. C. or not. The opinion contemplated under Section 476 must be expressed in a speaking order. Whether it be either with or without such preliminary enquiry as the Court thinks it necessary it has to record a finding to the effect that on a consideration of the facts and circumstances, it was of an honest and bona fide opinion that it was a fit case for prosecution or that it was expedient in the interests of justice to enquire into the matter. Without such finding it would be very difficult to probe into the mind of the Court that passed the order under Section 476, Criminal P.C. or the complaint lodged by the Court before the First Class Magistrate as the appellate Court while considering under Section 476-B, Criminal P.C. is entitled to agree or disagree with such an action of the trial Court and make the complaint in cases where the subordinate Court refused to make a complaint, under Section 476-B or direct the withdrawal of the complaint in appropriate cases if it, finds that the same is not

warranted in the interests of justice.

'6. That apart, the provisions of Section 476 and Section 476-B, Criminal P.C. contemplate a different proceeding from that of the original proceeding before the subordinate Court where the offence appears to have been committed by the party.

The proceedings under Section 476, Criminal P.C. being judicial and criminal in nature, the interpretation that should be placed in construing the section should be just, fair, proper and equitable and must be in accordance with the principles of natural justice. By adopting such interpretation and procedure, the aggrieved party would be afforded with an adequate opportunity to show and satisfy the Court that it was not in the interests of justice, to launch the prosecution and thereby avoid further proceeding. That apart, the appellate Court also would be in a position to appreciate the reasons assigned in each case and would have the advantage of coming to its own conclusion without any difficulty about the justification or otherwise of launching the prosecution in a particular case. When once the prosecution had been launched, the accused will not be having an opportunity thereafter to raise the question of expediency in the interests of justice to launch the very prosecution itself. The case thereafter will have to be gone into on the merits. After the closure of the enquiry relating to the main offence which was decided in the Sessions Case, the further proceeding contemplated under Section 476, Criminal P.C. to prosecute the person who had filed a false complaint, which in the opinion of the Court it is expedient in the interests of justice to be enquired into is a different proceeding. No doubt it is true, as pointed out by the learned

Public Prosecutor, in some cases it happens that the very same Magistrate or the Judge who tried the original case would have been the Presiding Officer who had to consider the applicability of the provisions of Section 476, Criminal P.C. and file a complaint in appropriate cases. Even then it is just and proper that that Court whether presided by the same presiding officer or by a different officer, should proceed according to the provisions of Section 476 and issue a show cause notice as to why the person sought to be prosecuted should not be prosecuted and after affording an opportunity, record a finding to the effect that it was expedient in the

interests of justice to enquire into the offence committed by him and file a complaint before the First Class Magistrate.

'8. The decision of the Allahabad High Court in Lal Behari v. State : AIR1962 All251 , on which strong reliance has been placed by the learned Public Prosecutor, in a way supports his plea. The learned Public Prosecutor relies upon the following passage of Nigam, J., who spoke for the Bench, at page 255 :

'..... the jurisdiction of the Court to prefer a complaint does not in my opinion depend upon the recording of the opinion though it is consequent on the formation of such an opinion. In the circumstances, I am of the view that omission to record such an opinion is only an irregularity and does not affect the legality of the complaint

Normally the fact that a complaint is preferred is itself evidence of the fact that such an opinion had been formed and in proper cases a presumption may even be raised under Section 114 of the Indian Evidence Act.'

No doubt, the aforesaid passage supports the contention of the learned Public Prosecutor. It is pertinent to notice two sentences prior to the aforesaid passage, which reads thus;

'..... I am of opinion that the formation of an opinion that the prosecution is expedient in the interests of justice is a condition precedent to the preference of the complaint. The law also requires that such a finding should be recorded.

The aforesaid passage in paragraph 20 in the judgment of Nigam, J., at page 255, if read as a whole, would also support the plea of the appellant herein that a finding to the effect that the prosecution is expedient in the interests of justice should be recorded.'

'9. In Liaqat Husain v. Vinay Prakash : AIR1946 All156 , a Division Bench of the same High Court has ruled that a finding by the Court that the prosecution is expedient in the interest of justice must be given before filing the complaint. In Chhajoo v. Radhey Shyam : AIR1968 All296 , a Full Bench of the same High Court, while considering the scope and interpretation of Section 476, Criminal P.C.

observed at page 30 thus :

'An analysis of Section 476 of the Code of Criminal Procedure, as already pointed out, would show that it contemplates three stages in the making of a complaint; The first stage is when a finding has to be given by the Court concerned to the effect that it is expedient in the interests of justice to file a complaint, the second is the making of the complaint in writing signed by the presiding officer or by the officer appointed by the High Court and the third stage is that of forwarding the same to a Magistrate of the First Class.' '10. The Madras High Court is consistently of the view that the provision in Section 476, Criminal P.C. to record a finding that it is expedient in the interests of justice to enquire into the offence, is not merely directory but is mandatory and it is a condition precedent for preferring a complaint before the Magistrate in *Chaduvula Munuswami Naidu v. Emperor* : AIR1928 Mad783 , Devadoss, J. ruled thus at page 783;

'Before a complaint under Section 476 is made, it is necessary that a Court which thinks that an offence mentioned in Section 195, Sub-section (1), Clause (b) or Clause (c) has been committed should record a finding to that effect and after recording such finding may make a complaint.The provision is not merely directory, but it is mandatory, for an appeal lies against the order of the Court and under Section 476-B an appellate Court can either withdraw a complaint or direct a complaint to be made. That being so, it is necessary for the appellate Court to see what reasons the lower Court had for deciding to make a complaint under Section 476. It is not every case of perjury that should form the subject of an inquiry; but it is only when the interests of justice do require that a complaint should be made then and then only a complaint should be made. Though the Courts should be anxious to put down perjury as much as possible, it is not in the interest of justice that every false statement made by a witness in Court or in an affidavit filed in Court should be subject of a charge for perjury.' In *Ramayya v. Emperor* : AIR1933 Mad67 , a Division Bench of the Madras High Court ruled thus :

'The Code lays down so as to leave no room for any doubt that the Court should record a finding that it is expedient in the Interests of justice that an inquiry should be made and therefore Courts will be well advised always to make a record to that

effect if that is their opinion because most regrettable delays and waste of time sometimes arise by putting the superior Courts to the task of discovering whether they means something which they have not writ' ten,'

In re, Pakhiriswami Pillai, AIR 1948 Mad 397, Yahya Ali, J., ordered the withdrawal of the complaint as there was no finding by the Magistrate that the prosecution was expedient in the interests of Justice as the same is an incurable defect,'

'15, The decisions of the Madras High Court in : AIR1928 Mad783 : AIR1933 Mad67 and AIR 1948 Mad 297, being before June, 1954, are binding on me (see Subbarayudu v. State of Andhra : AIR 1955 AP87 . That apart, the language of Section 476, Criminal P.C. fully supports the view of the Madras High Court that it is incumbent on the Court to form an opinion that it is expedient in the interests of justice to enquire into the offence and record a finding to that effect, and that the failure to conform with such a requirement warrants the quashing of the complaint as the defect is not a one which can be cured under Section 537, Criminal P.C. I am in entire agreement with the view expressed by the Madras High Court. I am unable to agree with the view expressed by Nigam, J., who spoke for a Division Bench of the Allahabad High Court in : AIR1962 All251 , that the Jurisdiction of the Court to prefer a complaint does not depend upon the recording of the opinion and that the omission to record such an opinion is only an irregularity and does not affect the legality of the complaint.'

6. In : AIR1930 Cal352 (Surendra Nath Jana v. Kumenda Charan Misra) while dealing Section 476 of Cr.P.C. the High Court (Calcutta) has indicated that there must be express finding by that Court that it is expedient in the interest of justice that a complaint should be made into the offence of giving false evidence under Section 476, Such an express provision for a finding to be recorded is not satisfied by inference which may or may not be drawn from other findings of facts arrived at by the Court : AIR 1923 Cal 862 (Sic).

7. In : 1976 CriLJ1385 (Mohd, Ibrahim v. B. Rama Rao) para 5 of the judgment is reproduced below :--

'5. Under Section 479A, Cr, P, C, not only is it necessary that the Court must form the opinion that the witness had intentionally given false evidence, but it is further necessary that the Court must come to the conclusion that for the eradication of the evils of the perjury and in the interest of justice it is expedient that the witness should be prosecuted for the offence which appears to have been committed by him, On this aspect of the matter, there is many a circumstance showing that it is not in the instant case that the respondent should be prosecuted for having made false statements in his counter-affidavit. There is a plausible explanation as to the circumstances in which the respondent came to make the two particular statements now complained of. Secondly, the respondent did not occupy any high place in the hierarchy of the Secretariat staff and we are inclined to the view that he swore a statement which by his superior officer he was commanded to swear. Mr. Markandeya appearing for the appellant urged that the entire record of the case was before the respondent and if he were to peruse that record with any degree of care, he would not have made the particular averments in his counter-affidavit. The question before us is not whether the respondent was negligent in failing to peruse the record carefully but whether he had intentionally made the false statements complained of and whether the interests of justice require that he must be prosecuted for having made the particular statements. Those whose duty primarily it was to study the record and to draft a counter-affidavit, on the basis of that record should have exercised the care demanded of them before the respondent was asked to swear the affidavit. Their failure to display care and caution cannot be visited upon the respondent who was but a small officer in a big department of the State Government.'

8. In : 1973 CriLJ1176 (Santokh Singh v. Izhar Hussain) para 11 of the Judgment is reproduced as below ;--

'11. The High Court also seems to have committed serious error in ignoring that in the appellant's statement he had clearly stated that he had not seen amongst the assailants the accused Izhar Hussain present in the Court, In face of his statement, there was no question of the appellant having made any accusation against, Izhar Hussain in his deposition, In any event, considering the entire statement of the appellant it is not understood how it can be considered expedient

in the interest of justice to direct the appellants prosecution, Every incorrect or false statement does not make it incumbent on the Court to order prosecution, The Court has to exercise Judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The Court orders prosecution in the larger Interest of the administration of Justice and not to greatly feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely, that the Court should direct prosecution. The High Court seems to have misunderstood the appellant's evidence and has also failed to apply its mind to the question of expediency. Reference by the High Court to Identification parade is also somewhat Inappropriate. Identification at test parades could by no stretch be considered to amount to a false charge against Izhar Hussain as contemplated by Section 211, I.P.C. Such Identification is not substantive evidence and it can only be used as corroborative of the statement in Court. The Identification parade thus could not Improve the prosecution case.'

9. In 1988 All LJ 129 (Syed Asadullah Kazmi v. Additional Magistrate, D.D.C., Allahabad) paras 8 and 11 of the judgment are as below :--

'8. Section 195(1)(a) is not concerned with the Courts rather it deals with the contempt of lawful authority of public servant hence it is outside the purview of Section 340 of the Code. In view of the procedure under Section 340, the Court may take action suo motu or otherwise or on the application made by a person provided it is of the opinion that it was expedient in the interest of justice to do so. In that event the Court may make complaint in writing or otherwise but the power of Court under Section 340 is confined with the provision that the Court is of the opinion that it was expedient in the interest of justice to do so, It is worth mention that the power under Section 340 is not absolute one, The enquiry can be made or the complaint can be directed to be filed only when the Court comes to the conclusion that it was expedient in the interest of justice to do so, There may be a case where false affidavit might have been filed or offence under Section 185(1)(b) might appear to have been committed, but nevertheless, unless it is expedient in the interest of justice, in the opinion of the Court that an enquiry should be made

or a complaint should be directed to be filed, same cannot be done.'

'11. Applying these elementary rules of interpretation to the provisions of Section 340 of the Code, it is evident that the legislature has couched the provision in such a language that the Court's insertion is circumscribed by the words used. The Court has to consider and weigh the balance of situation to ascertain as to whether in a given case it is 'expedient' in the interest of justice that an enquiry should be made. As an inescapable corollary. In case it is not 'expedient', under the circumstances, enquiry must be made. The Legislature has deliberately used the word 'expedient' which is Adjective according to grammar. This obviously connotes suitable or advisable. This word is also used as noun and means that . which serves to promote or is a suitable to an end. The word 'expediency' also means 'desirableness'. The power of the Court in directing an enquiry to be made or a complaint to be filed in view of the provisions of Section 340 is limited with a condition that it should appear to the Court to be expedient in the interest of justice to do so. To put it differently, it is only in glaring cases of deliberate falsehood when the Court can direct an enquiry to be made or complaint to be filed but this discretion has to be exercised judicially in the light of all the relevant circumstances. Section 340 of the Code is not with a view to satisfy personal feelings of vindictiveness. The Court has to be satisfied about the deliberate falsehood as a matter of substance and there must be a reasonable foundation for the charge and it must be expedient in the interest of justice. It is better to refer an observation made by their Lordships of the Supreme Court (in Santokh Singh v. Izhar Hussain : 1973 CriLJ1176 which is as follows : 'In any event, considering the entire statement of the appellant it is not understood how it can be considered expedient in the interest of justice to direct the appellant's prosecution. Every incorrect or false statement does not make it incumbent on the Court to order prosecution. The Court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The Court orders prosecution in the larger interest of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely, that the Court should direct prosecution. The High Court seems to have

misunderstood the appellant's evidence and has also failed to apply its mind to the question of expediency.'

10. Sri Rakesh Bahadur has also been heard on behalf of Sri Madan Lal has averred that there were several proceedings where Sri Chand was a party which were being adjudicated at different stages and by any means the decision on the relationship of Sri Chand and Sri Madan Lal should not in any affect other proceedings or over any adjudication before any forum. Learned Standing Counsel has supported the judgment of lower Court.

11. In view of the above discussion, and observation the following aspects could safely be deduced :

(i) It is not every case of perjury irrespective of facts and circumstances that should form the subject of an enquiry but it is only in such cases where the Courts are of honest belief and opinion, on an objective consideration of the facts and circumstances the interests of justice.

(ii) It is not mandatory but discretionary for the Court, depending upon the facts and circumstances of each case, either to conduct any preliminary enquiry or to dispense with the same, to form an opinion that it is in the interests of justice to prosecute the person or persons that committed perjury.

(iii) The proceedings under Section 340, Criminal P.C. appealable under Sec. 341 is an independent and altogether a different proceeding from that of the original Sessions case where the witnesses have committed the offence of perjury.

(iv) The proceedings under Section 340, Criminal P.C. being penal to nature, it is not only desirable and reasonable, but just and proper and in accordance with the principles of natural justice to afford a reasonable opportunity by issuing a show cause notice to the accused partly to establish by adducing evidence oral and documentary that it was not expedient in the interests of justice to prosecute him.

(v) On a plain reading of the provisions of Section 340 and in particular the words 'such Court may Record a finding to that effect', there is no room for doubt that the Court should record a finding that it is expedient in the interests of justice that

an enquiry should be made, as a condition precedent for filing a complaint.

(vi) The provision in Section 340 relating to the recording of a finding is not merely directory but is mandatory, for, an appeal lies against the order of the Court; and under Section 341 that the appellate Court is competent either to withdraw the complaint already made or direct the complaint to be made, depending on the facts and circumstances of each case.

(vii) The opinion or the satisfaction contemplated under Section 340 is, an objective and not a subjective one and should be reflected by the finding recorded or the order passed by the Court and such an order must be a speaking one supported by valid and justifiable grounds to enable the appellate Court under Section 341 to know the material on which the Court had come to such a conclusion or opinion that it was expedient in the interest of justice to launch a prosecution.

(viii) While recording the finding contemplated under Section 340, Criminal P.C., need not strictly adhere to the very language, viz., 'that it is expedient in the interests of justice that an enquiry should be made', used in the section, it must use such language that it leaves no doubt that it was a fit and proper case and it was in the interests of justice to launch a prosecution against the person or persons that committed perjury.

(ix) Even where the Presiding Officer, before whom the offence under Section 195(1)(b) or (c) has been committed, himself prefers the complaint and forwards the same to the Magistrate, no presumption under Section 114 of the Evidence Act to the effect that he had formed an honest opinion, even though no such finding has been recorded that it is expedient in the interests of justice to enquire into the offence, can be made as on a plain and grammatical reading of the language and scheme of Section 340 it is incumbent on the Court to give a specific finding before making a complaint.

12. I have gone through the contents of the appeal and perused the documents and carefully considered the submissions of Sri V.K.S. Chaudhary and learned Standing Counsel and I find that learned District Judge, has not recorded any

finding as required under Section 340, Cr. P.C. as indicated above, therefore, the order dated 19-10-1984 passed in Misc. No. 205 of 1983 is set aside. However, it is observed that any observation made above shall not effect in any way adversely anything of the proceeding or interse party of any case are being adjudicated at any forum including the lower Court or High Court.

13. The appeal is allowed.

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