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Court : Rajasthan

Decided On : Apr-17-1996

Reported in : 1996(1)WLN450

Judge : M.G. Mukherji and; V.G. Palshikar, JJ.

Appeal No. : D.B. Special Appeal (Writ) No. 790 of 1995

Appellant : Deepak Kumar Khivsara

Respondent : Oil Indian Limited and ors.

Judgement :

M.G. Mukherji, J.

1. The present special appeal is directed against a judgment and order dated 30th October, 1995 passed by a learned Single Judge of Our Court in S.B. Civil Writ Petition No. 3310/90, whereby the learned Single Judge holding inter-alia that the writ petitioner-appellant has got alternative efficacious remedy before the Labour Court, apparently following a Full Bench decision of five learned Judges of this Court in Gopi Lal Teli v. The State of Rajasthan and Ors. reported in 1995 (1) W.L.C.1. : 1995 (1) W.L.N. 300, dismissed the writ application only on the ground of alternative remedy/being available to the writ petitioner-appellant.

2. We have perused the said Full Bench judgment of this Court minutely. The Full Bench took into consideration the fact that in very many judgments, the Supreme Court itself held that alternative remedy is no bar for entertainment of the writ petitions under Article 226 of the Constitution of India and there may be cases in which this Court inspite of the fact that there is an alternative remedy may interfere depending on the facts of the case. The Full Bench refused to lay down the circumstances/grounds exhaustively in which this Court, in spite of availability of alternative remedies, may interfere in the petitions under Article 226 of the Constitution of India since 'it is difficult to lay down conditions/grounds exhaustively as the facts differ from case to case and, as such, conditions/grounds which may be held as sufficient for invoking the extra-ordinary writ jurisdiction of this Court cannot be confined In a water tight compartment'. The learned Judges of the Full Bench were very much Influenced by the submissions made on behalf of the respondents and even ignored the submission made on behalf of the respondents and even ignored the submission made on behalf of the petitioner that even where the orders were wholly without jurisdiction and were passed in flagrant violation of the principles of natural justice, the writ petitioner could not be relegated to avail of the remedies provided under the Industrial Disputes Act, 1947. The Full Bench was very much influenced by the observations of the Hon'ble Supreme Court in Basant Kumar Sarkar and Ors. v. Eagle Rolling Mills Ltd. and Ors. reported in : (1964)IILLJ105SC , where the Supreme Court relegated the writ petitioners to avail of the alternative remedies, where they could ventilate their grievances in respect of the impugned notices and circulars and take recourse to Section 10 of the Industrial Disputes Act, 1947 or seek relief, if possible, under Sections 74 and 75 of the said Act. The Full Bench was also influenced by the observations of the Apex Court in Premier Automobiles Ltd. v. Kamlakar Santa Ram and Ors. reported in : (1975)IILLJ445SC and held that even the possibility that the Government may not ultimately refer an industrial dispute under Section 10 on the ground of expedience, is not a relevant consideration in this regard. However, in the penultimate paragraph by way of conclusion while propounding the ratio of the said judgment if observed that even In such cases where the order is without jurisdiction, it was essentially a question of fact and required investigation before reaching a conclusion and normally such investigation or enquiry was beyond the

scope of. Article 226 of the Constitution of India and these questions could suitably be agitated and adjudicated upon by the authorities constituted under the Act on the basis of the evidence adduced by the parties. The Full Bench therefore reached the opinion that even in such cases, the normal rule for an employee should be to avail remedies provided under the Act and entertainment of writ petition by this Court under Article 226 of the Constitution of India without exhausting the remedies should be 'with great care and caution and in very exceptional cases.' The Full Bench answered the question as referred to by the learned Single Judge to the effect that for violation of the provisions of Chapter V-A of the Industrial Disputes Act, 1947 or violation of the principles of natural justice, the normal course is to pursue the remedy provided under the Act and exercise of power under Article 226 of the Constitution of India in such cases should be 'sparingly made.'

3. The facts of the present case however make out one of the sparing exceptions.

4. In A.V.Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani and Anr. reported in : 1983ECR2151D(SC) , the Full Bench of Five learned Judges went into the question of existence of alternative remedy and how far it was a bar to entertainment of a writ petition. It was held to be not a bar to the exercise of jurisdiction by the High Court to entertain the petition. Or to deal with it, but it was rather a rule which Courts have laid down for the exercise of their discretion. The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Article 226 of the Constitution of India was found to be a general rule unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and, therefore, could be treated as void or non est and that in all other cases Courts should not entertain petitions under Article 226 or in any event, not grant any relief to such petitioners, cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy were found by no means exhaustive it was said that even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The broad lines pf

the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be supplied with rigidity in every case which comes up before the Court.

5. In Dr. (Smt.) Kuntesh Gupta v. MGT. of Hindu Kanya Mahavidyalaya, Sitapur and Ors. reported in 1987 Supreme Court Service Rulings (Vol.2) Page 129 to 132, the Supreme Court held that where the order is without jurisdiction or nullity, writ petition should not be dismissed on the ground that alternative remedy was available, in the facts and circumstances of the said case, an order of dismissal passed by the Vice-Chancellor was challenged by the writ petitioner appellant and the High Court dismissed the writ petition on the ground of availability of an alternative remedy. The Supreme Court held that the alternative remedy is not an absolute bar to the maintainability of a writ petition and when an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution of India on the ground of existence of an alternative remedy. In the facts of the case, it was held that the Vice-Chancellor had no power to review and the exercise of such a power was absolutely without jurisdiction and it was a nullity and such an order could surely be challenged before the High Court by a petition under Article 226 of the Constitution and the Supreme Court observed inter-alia that the High Court was not justified in dismissing the writ application on the ground that an alternative remedy was available to the appellant under Section 68 of the U.P. State Universities Act. As the impugned order of the Vice-Chancellor was found to be a nullity, it was taken to be an useless formality to send the matter to the High Court for disposal of the writ petition on merits. It was accordingly quashed and the appellant was directed to be reinstated to the post of the Principal by setting aside the judgment of the High Court and by allowing the appeal, even though liberty was given to the respondents to initiate departmental proceedings against the appellant, if they so think fit and proper, on the basis of the allegations as made in the reports of the Joint Director of Higher Education U.P.

6. Our attention has been drawn to a Division Bench Judgment of the Gujarat High Court in K.S. Joy v. Indian Institute of Management and Ors. reported in 1993 (7) SLR 650. On the question of writ petitioner having not availed of alternative remedy, the Division Bench of the Gujarat High Court comprising of A.P.Ravani and J.M.Panchal, JJ. held that once the writ petition is entertained by the High Court and is heard on merits, it would not be proper for the High Court to relegate the party to an alternative remedy. This observation was made following the view taken by the Supreme Court in Hriday Narain v. It Officer, Bombay reported in : [1970]78ITR26(SC) . Their Lordships following the decision in Ram and Shyam Company v. State of Haryana reported in : AIR 1985 SC1147 observed that the Hon'ble Supreme Court imposed a restraint in its own wisdom on exercise of jurisdiction under Article 226 where the party invoking the jurisdiction has an effective and adequate alternative remedy, but stated clearly that at any rate it does not oust the jurisdiction of the High Court. The Supreme Court further observed that where order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the instance of a person adversely affected by it, would lie to the High Court under Article 226 and such a petition cannot be rejected on the ground that an alternative remedy is available to him because such an alternative remedy cannot be said to provide in all situations a really effective alternative remedy keeping aside the nice distinction between the jurisdiction and merits.

7. In the present writ application, the learned Single Judge failed to appreciate that the writ petition was admitted in the year 1990 and at the time of its admission, the learned Single Judge did not reject the writ application on the ground of availability of alternative remedy, but issued notice to the respondents, which prompted the respondents to file a detailed reply on the merits of the case, to which the writ petitioner- appellant also filed a rejoinder and as and when the writ application was ripe for final arguments', the learned Single Judge, who took up the writ application for final disposal, cryptically made an observation interlaid to the effects that since an alternative remedy was available and a Full Bench decision was there, the writ application stood rejected. This was done after a full-throated hearing of the case when the writ petitioner-appellant submitted his written arguments and argued the matter for three consecutive days. While one of the learned Single Judges was

prompted to decide the writ application on merits and did not refer the writ petitioner to his alternative remedy, it was rather said that the learned Single Judge (B.J.Shethna.J.) ultimately refused to go into the merits and took resort to the Full Bench decision of this Court and passed such a judgment in a cryptic fashion.

8. The contention of the writ petitioner appellant which was sought to be made out in course of his writ application was to the effect that there was no proper enquiry in accordance with law and in utter disregard to the mandatory provisions of a just and proper enquiry and depriving him of an adequate opportunity to defend himself in the domestic enquiry and to record his own statement or tender his own defence witnesses and in utter violation to the provisions of the Standing Orders, the enquiry was completely closed leading ultimately to the dismissal order being passed by his employer. He was also deprived of an adequate opportunity to make a representation against the proposed punishment according to the Standing Orders and no copy of the enquiry report was supplied to him before the penal order was sought to be imposed on him. It was further contended by the writ petitioner appellant that his past conduct was taken into consideration by the Enquiry Officer without adequate notice to him and without ever communicating to him that those were being taken into consideration against him behind his back. He was not served with any second show cause notice in this context. It was his humble submission that the Enquiry Officer was not entitled to take into consideration his previous record of service which seems to be extraneous factor for the purpose of this domestic enquiry, without giving him adequate knowledge that the same could taken into consideration while recording the complicity of the writ petitioner-appellant with the allegations given out in the charge-sheet.

9. That apart, he took up before the Appellate Authority this aspect of the matter about his past conduct being taken into consideration, but then the respondents proceeded on the hypothesis that he was not prejudicially affected thereby, inasmuch as, while dealing with the question of punishment, this was not taken into consideration. However, since the punishment was imposed on the basis of the findings as recorded by the Enquiry Officer and the Appellate Authority duly affirmed such findings of the Disciplinary Authority, it ws the ultimate conclusion of

the writ petitioner appellant that these were looked into while holding not only the complicity of the writ petitioner appellant, but also in awarding the punishment on him

10. The third and most important submission as made by the writ petitioner appellant was that both the order of dismissal as well as the appellate order were passed by incompetent authorities, who lacked the jurisdiction to pass such orders in accordance with law. The writ petitioner-appellant was appointed in the Service by an order of the General Manager, who was his appointing authority. The Enquiry Officer was appointed by Shri B.B.Sharma, General Manager vide his letter dated 28th July, 1989. Here in the present case, the Enquiry Officer sent his findings to General Manager, which went a long way to establish that the General Manager was both his appointing authority as well as disciplinary authority. However, the appeal was decided by the General Manager, who functioned as Appellate Authority. When the Enquiry Officer sent his findings to the General Manager, obviously, the General Manager as the disciplinary authority was disentitled to dispose of the appeal. The original order of dismissal was as such without jurisdiction and void and inoperative having been passed by the General Manager. It was a basic principle of Service Jurisprudence that the disciplinary authority could not be Appellate Authority under any circumstances and in support of this proposition, the writ petitioner-appellant cited the decision in Mysore State Road Transport Corporation v. Mirja Khasim All Beg and Anr. reported in : (1977)ILLJ262SC Head Note (B) para 14.

11. The fourth contention as sought to be made out by the writ petitioner-appellant was that the proceedings in the domestic enquiry were held from 11th Sept. 1989 to 14th Sept. 1989 without paying him suspension allowance and without considering sickness certificate, which really caused a violation of the principles of natural justice. He was put under suspension on 6th of July, 1989 and as per the Model Standing Orders, he could not be kept under suspension for more than four days at a time and should have been paid full wages during the suspension period after the expiry of four days. In his case however the order of pay and allowance by way of suspension allowance was issued to him only after the conclusion of the enquiry on 15.9.1989 (Ex. 17), even though the enquiry was started on 11.9.1989

and concluded on 14.9.1989 as per Ex.19. He pleaded his inability to attend the enquiry on account of financial stringency due to non-payment of suspension allowance as would be evident from Exhibits 10,15 and 16, but neither the disciplinary authority nor the Enquiry Officer did give out any sympathetic consideration in this regard and turn a deaf ear to the genuine and legal requirements. His further contention was that if the payment of suspension allowance was not effected or deliberately delayed, not only it amount to temporary cessation of relations of Master and Servant but during such a condition an enquiry should not and could not be forced upon the worker as it amounts to not only a negation of justice, but also a severe irregularity and a cruel harassment. The writ petitioner- appellant had no funds to maintain himself though he persistently reminded the employer about the conditions of service while the enquiry was carried on without giving him the pittance of the subsistence allowance. According to the writ petitioner- appellant, this was an uncurable defect, which could not be cured after a delayed payment of the subsistence allowance to him. The provident Fund was also illegally deducted from the suspension allowance to put him to further financial harassment. Even though the writ petitioner-appellant was physically suffering and was under ailment and it was obligatory on the part of the Enquiry Officer to consider his Medical Certificate (Ex.13 and 15), he was directed to participate in the enquiry and even the Appellate Authority failed to consider this aspect of the matter while the appeal stood out for disposal as per Ex.31. In support of this proposition, he cited the decisions in Ghanshyam Das Shrivastava v. State of Madhya Pradesh reported in : (1973)ILLJ411SC and State Farms Corporation of India Ltd. v. Tarsem Lal Singh and Anr. reported in 1986 W.L.N. (UC) 516.

12. The fifth submission of the writ petitioner-appellant was that the enquiry was not held in accordance with the principles of natural justice. The statements of Management's witnesses as recorded by the Enquiry Officer on 11th September, 1989 in the ex-parte enquiry were not supplied to him even though the findings of the Enquiry Officer were fully based on the statements of such witnesses so recorded on 11th September, 1989. Even though he craved leave to have a copy of the documents which formed part of the records of the proceedings on the 11th of September, 1989 in order to efficaciously defend himself, the proceedings were

simply read out to him on 13th October, 1989 when he was asked to cross examine the witnesses and the writ petitioner-appellant also submitted a representation in this regard Ex.20. The Enquiry Officer gave out that the said documents could not be supplied to him as the findings of the enquiry had not been concluded till that point of time and the stand of the Enquiry Officer was recorded at page 33 of the Enquiry proceedings as per Annex.35 para 60. Ultimately, the respondents took a stand in reply to the writ petition that the statements of witnesses which were recorded by the Enquiry Officer during the enquiry proceedings were to be given to him after the conclusion of the enquiry. Thus there was some force in the contention of the writ petitioner- appellant that he was not supplied with the copy of examination- in-chief of the witnesses as recorded by the Enquiry Officer on 1lth Sept. 1989. The writ petitioner appellant was apparently feeling a denial of an appropriate and adequate right of cross-examination in respect of such witnesses even though the Enquiry Officer remarked that since the writ petitioner-appellant did not ask any relevant questions to the witnesses out of the statements recorded on 11th Sept. 1989, such witnesses were allowed to be discharged from the enquiry. In support of his contention, the writ petitioner-appellant cited the decisions in State of Punjab v. Bhagat Ram reported in : [1975]2SCR370 , State of Madhya Pradesh v. Chintaman Sadashiva Waishampayan reported in 1961 S.C. 1623, Amba Lal v. State of Rajasthan and Ors. reported in WLR 1992 (S) Rajasthan 816 and Kashinath Dikshita v. Union of India and Ors. reported in 1986 SCC (L&S;) 502.

13. The sixth submission of the writ petitioner appellant was that the defence witnesses were not allowed to be examined even though they were readily available for examination and they were brought by the writ petitioner-appellant so as to depose before the enquiry proceedings. The writ petitioner appellant submitted a list of his defence witnesses on 13th October, 1989 before the Enquiry Officer. In Ex.5, a commitment and assurance was given out that the defence witnesses would be examined, but ultimately, the Enquiry Officer refused to examine the defence witnesses present on the day of the enquiry, even though the enquiry proceedings were concluded as would be evident from Ex.41. The Enquiry Officer did not give any reason for not examining such defence witnesses. The Enquiry Officer arbitrarily wrote at page 61 of the proceedings that at that stage he

had nothing more to record and he thereby closed the enquiry. In this context, the writ petitioner-appellant resorted to case law in Union of India v. Harcharan Singh reported in 1974 (1) SLR 349.

14. The seventh contention of the writ petitioner-appellant was that the Enquiry Officer failed to record the statement of the writ petitioner-appellant in his own defence, even though he was present at the time when the enquiiy was concluded. He was not afforded an opportunity to give his own statement in his defence. It was obligatory for the Enquiry Officer to record the statement of the writ petitioner-appellant.

15. The eighth contention of the writ petitioner-appellant was that the charges which were framed against him were vague and unworthy of making any representation against. They were not substantiated by a conscious reasoning based on evaluation of the prosecution witnesses. It was merely given out that the writ petitioner appellant used abusive language, but what that specific language was and what were the exact words used were not given out in the charge sheet and they were as vague and indefinite as anything.

16. The petitioner by way of elaboration of this point contended that in the purported charge-sheet dated 6.7.1989 it was given out that the writ petitioner-appellant came to the Accounts Department alongwith a Messenger of the Court to deliver notices to Y.K.Mishra de force to Complainant and he shouted and used abusive language. The messenger was thus an independent eye witness and his testimony ought to have been a vital one so far as the adjudication of the guilt of the writ petitioner-appellant is concerned. The Enquiry Officer has not recorded his statement even though the writ petitioner-appellant insisted to call him as he was mentioned as a prosecution witness in the purported charge-sheet. As and when the Management failed to arrange for his presence by way of examination in the enquiry, the writ petitioner-appellant brought him for examination in the Conference Room as a defence witness (Ex.41), but the Enquiry Officer arbitrarily and abruptly in course of the proceedings observed inter-alia that he had nothing more to record and abruptly closed the enquiry.

17. The respondents, however, in paragraph (h) of the reply have given out that the writ petitioner-appellant had deliberately failed to produce the process server as a defence witness and adopted the method of asking to summon him and if he would have wanted to produce the said process server, he could have voluntarily produced him in the enquiry. The Management apprehended that the prosecution would fail if such a procedure was adopted and this required a meaningful manoeuvre by the Management. It was however obligatory on the part of the Enquiry Officer to examine him when he was readily available for examination.

18. The respondents gave out in para (h) of the reply to the writ application that for bringing such a witness it meant a meaningful and serious notice. However, there was Ex.3 which was the affidavit of the process server himself and in this context he prayed that Ex.20 and Ex.41 of the writ application were enough evidence in this regard.

19. The tenth contention of the writ petitioner appellant was that the report of the Enquiry Officer was one sided and cryptic one and minimum expectations of requirement of natural justice were not adhered to. The Enquiry Officer's report is practically an order sheet which merely produces the stage through which the enquiry passed. The Enquiry Officer did not apply his mind on the evidence on record and he did not assign any reason as to why the evidence produced by the writ petitioner appellant did not appeal to him and as to why he did not record the version as sought to be given out by the defence witnesses. In this context, the writ petitioner appellant cited the decision in Anil Kumar v. Presiding Officer and Ors. reported in : (1986)ILLJ101SC .

20. The eleventh point as contended by the writ petitioner-appellant was that extraneous factors were considered by the Enquiry Officer and the Presenting Officer also took such steps which vitiated the entire proceedings. The findings of the Enquiry Officer at Ex.36 page 9 para (d) showed that he laid highest stress on the statement of one Shri S.N. Bohra that the writ petitioner appellant shouted at him in such a language that he was devilish as he allegedly gave out that he had a powerful personality behind his back and he had in his pocket Five Members of Parliament. We need not however go into the details of the submission as made

out by the writ petitioner-appellant by way of elaboration of this point.

21. The further contention was that the Presenting Officer submitted the documents to the Enquiry Officer which were not annexed to the show cause notice. One of them being a joint complaint from M.K. Bhatt, V.C. Mathur, Y.K. Mishra, M.K. Chatterjee, V.K. Khara, A.N. Asopa and K.C. Bhati, out of whom, V.K. Khara, M.K. Chatterjee, A.N. Asopa and K.C. Bhati were not produced before the enquiry and their joint report was neither shown nor supplied at any stage. Their statements were never recorded on 11th Sept. 1989 in the so-called exparte enquiry. The said complaint in 15 original shape was very much necessary and an essential document so as to give the writ petitioner-appellant an opportunity to effectively cross examine the witnesses of the Management in this regard, which he was seriously deprived of. He thus contended that the Enquiry Officer proceeded in a biased manner. He cited in this context the decisions in State of Assam v. Mahendra Kumar Das and Ors. reported in 1970 SLR 445 (Head Note B) and State of Punjab v. Mohinder Singh Cheema and Ors. reported in 1992 (1) SLR 137.

22. The twelth point as agitated by the writ petitioner appellant was that the enquiry was held on the basis of a show cause notice which was neither a charge-sheet nor a prosecution report. The show cause notice was issued by the Superintending Engineer (Drilling), who was not the appointing authority or the disciplinary authority of the writ petitioner appellant. The assertion that the appropriate disciplinary authority appointed the Enquiry Officer shows in reality that such an Enquiry Officer was appointed by Shri B.B. Sharma, General Manager (RP). If the said General Manager is to be taken as the disciplinary authority, such a disciplinary authority could not be the Appellate Authority is well in the ultimate proceedings against the penal order imposed in the disciplinary proceedings. However, in this case, the disciplinary authority did not issue and sign the so-called charge-sheet. The confusion was worst confounded when it was revealed that all the Officers conspired against the writ petitioner appellant and supported and corroborated each other in making out a case against him which was not specific and was of a vague and general nature.

23. The thirteenth point referred to by the writ petitioner appellant was that the appellate order was not a speaking order and the Appellate Authority failed to consider crucial questions of law and fact. The writ petitioner appellant in, the memo of appeal (Ex.31) raised several points, none of which was taken into consideration by the Appellate Authority. The point as to whether the charges were established beyond doubt on the evidence recorded during the course of enquiry, was unfortunately not gone into by the Appellate Authority in the context of the requirements of law as to whether the findings of the disciplinary authority were warranted by the evidence on record. The appeal has been disposed of against the specific provisions of the law and the tenets of natural justice, especially running contrary to the provisions of Section 14(4)(C) of the Model Standing Orders in which the word 'Consider' has clearly been mentioned. It was the bounden duty of the disciplinary authority to see whether the findings of the Enquiry' Officer are in consonance with the proceedings of the enquiry. His main contentions in the writ application were that the proceedings have been initiated and finalised against all the norms and principles of natural justice and there was a flagrant violation of the principles of fair play in action. The hurried manner in which the enquiry has been stalled and finalised made out a case of Departmental malice against him.

24. All the points as stated above might not have been substantiated at the trial before the learned Single Judge so as to vitiate the order of dismissal from service, but then if any of the points could be driven home by way of effective adjudication at the trial, it might have made out a case for interference by the writ Court so as to quash the disciplinary proceedings or even the appellate order which was passed confirming the order of punishment on the writ petitioner appellant. The writ petitioner appellant has really made out a prima facie case for trial which warranted a full-throated hearing in contested proceedings. Since the respondents have not only appeared but have also filed the reply and the writ petitioner appellant has filed a rejoinder to the same and there were several attempts by the various learned Single Judges to hear out the writ application in all finality, the learned-Single Judge, who ultimately rejected the writ application, ought to have taken pains to go through the averments in their true perspective and ought not to have shirked the responsibility by resorting to the Full Bench

decision of this Court by way of dismissing the writ application in limine after it was taken up and admitted six years before.

25. We accordingly set aside the judgment and order, of the learned Single Judge and direct some other learned Single Judge to hear out the writ application on merits after a contested hearing.

26. The special appeal stands disposed of to the extent indicated above. The Impugned judgment and order of the learned Single Judge is quashed and set aside with a direction to have the matter re-heard by another learned Single Judge. There will be no order as to costs.

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