

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 15825 of 2017****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE J.B.PARDIWALA**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

Circulate to all Civil Judges of the Subordinate Judiciary

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NAYANABEN FIROZKHAN PATHAN @ NASIMBANU FIROZKHAN
PATHAN....Petitioner(s)

Versus

PATEL SHANTABEN BHIKHABHAI & 4....Respondent(s)

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Appearance:

MR DHRUV K DAVE, ADVOCATE for the Petitioner(s) No. 1

MR UTKARSH SHARMA, AGP for the Respondent(s) No. 5

MR PARTHIV B SHAH, ADVOCATE for the Respondent(s) No. 1 - 2

NOTICE NOT RECD BACK for the Respondent(s) No. 3 - 4

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA**Date : 26/09/2017****ORAL JUDGMENT**

As a neat question of law is raised in this petition, the

matter is taken up, with the consent of the learned counsel appearing for the respective parties, for final disposal at the admission stage itself.

This petition although titled as one under Article 226 of the Constitution of India, yet, in substance, is a petition under Article 227 of the Constitution of India.

By this application under Article 227 of the Constitution of India, the applicant calls in question the legality and validity of the order dated 22nd March 2017 passed by the SSRD at Ahmedabad, by which the SSRD rejected the revision application filed by the applicant herein, thereby affirming the order of the Collector, Vadodara, dated 29th November 2011.

The facts of this case may be summarised as under :

The applicant herein took birth as a Hindu. There is no dispute in this regard. The dispute between the parties pertains to the parcels of land enumerated below :

Village	Block No.	Area [H-R-A]	Type
Vemali	52/8	0.33.39	2.50 Rs./Ps.
Vemali	54/8	0.31.36	2.25 Rs./Ps.
Vemali	107/B/8	0.04.05	0.25 Rs./Ps.
Vemali	191/8	1.89.19	16.18 Rs./Ps.

The lands referred to above are the ancestral properties. The applicant herein happens to be the sister of the respondent no.1 and the respondent no.2. They all are children of one Bhikhabhai Patel. Bhikhabhai Patel passed away on 12th

October 2004. On his demise, the names of the respondent nos.1 and 2 came to be entered in the record of rights by succession vide entry no.1502. At that point of time, the name of the applicant herein was not entered along with her brother and sister.

It appears that the applicant, having learnt about the mutation of entry no.1502 in the record of rights, filed an affidavit dated 13th December 2007 and produced it before the authority concerned for the purpose of getting her name also mutated in the revenue record. This led to the mutation of entry no.1668 dated 19th December 2007. This entry no.1668 came to be later certified. The private respondents herein questioned the mutation of revenue entry no.1668 before the Deputy Collector, Vadodara, by filing an R.T.S. Appeal No.137 of 2008. This entry came to be challenged substantially on the ground that the applicant herein although Hindu by birth, but later having married to a Muslim and having embraced Islam, she would cease to be a Hindu and, therefore, the Hindu Succession Act would not apply in her case.

The appeal filed by the private respondents before the Deputy Collector came to be dismissed vide order dated 16th September 2009. The private respondents, being dissatisfied with the order passed by the Deputy Collector, preferred a revision application before the Collector. The Collector accepted the argument of the private respondents and allowed the revision application. The disputed entry no.1668 came to be cancelled. The applicant herein, being dissatisfied with the order passed by the Collector, preferred a revision application before the SSRD and the SSRD, by its impugned order, rejected the revision application and thought fit to affirm the order

passed by the Collector.

Being dissatisfied with the orders passed by the SSRD and the Collector, the applicant is here before this Court with this application under Article 227 of the Constitution of India.

The Collector, while allowing the appeal filed by the private respondents, held as under :

“On carefully examining the case-papers of the lower court and the submissions made by the parties, it appears that the lands situated at Mouje Vemali, Taluka Vadodara, bearing Survey Nos.52/8, 54/8, 107/B/8, 191/8 are the ancestral lands owned by late Shri Bhikhabhai Ranchhodbhai. On his demise, an entry bearing no.1502 came to be entered on 12.4.2004, which is also certified. The present opponent – Nayanaben alias Nasimbanu has renounced the Hindu religion and on 11.7.1990 she has voluntarily and without any force embraced Islam. On 25.1.1991, she married to one Muslim boy Firozkhan as per the Muslim rites and rituals, which is also registered on 30.1.1991 as per the provisions of the Registration Act. As the opponent has embraced Islam, the provisions of the Hindu Succession Act, 1956 cannot be enforced in her case, which itself is apparently clear. Therefore, the present opponent will have to seek appropriate relief to establish her right of share from the civil court. Moreover, at the relevant point of time the succession entry no.1502 of the deceased has also been certified, for which they have not raised any dispute. As per the provisions of the law, they should have come with a dispute with regard to the mutation entry no.1502. As she failed to do that, her demand to consider her as the heir by reentering the succession entry of the deceased is not as per the rules. As the decision taken by the lower court is contrary to the provisions of the law, the same deserves to be rejected. Therefore, the following order is passed:

O R D E R

The application of the applicant is allowed and the order

bearing no.RTS/Appeal/137/2008 dated 16.9.2009 passed by the Deputy Collector, Vadodara, is rejected. It is ordered to cancel the mutation entry no.1668 dated 21.2.2008 entered in the village record."

The SSRD, while rejecting the revision application filed by the applicant herein, held as under :

"Considering the revision application filed by the applicant, oral submission, written submissions made on behalf of the opponent nos.1 and 2 as well as considering the impugned order of the Collector, it appears that the disputed lands are the ancestral properties owned by late Bhikhabhai Ranchhodbhai and on his demise, succession entry no.1502 came to be entered. Nayanaben had voluntarily renounced the Hindu religion and embraced Islam on 11.7.1990 and married to one Firozkhan Pathan on 25.1.1991 as per the Muslim rites and rituals, which has also been registered on 30.1.1991. The applicant has also changed her name from Nayanaben to Nasimbanu. As the applicant has adopted Muslim religion, the provisions of the Hindu Succession Act, 1956, cannot be enforced in her case. Despite that, she can seek an appropriate relief with regard to her share and right from the competent civil court. That itself is a clear fact. The detailed and reasoned order passed by the Collector after examining the orders of the lower courts and considering the provisions of the Act, Rules and Circulars of the Government is a just, legal and proper order."

Mr.Dhruv K.Dave, the learned counsel appearing for the applicant, vehemently submitted that the SSRD committed a serious error in passing the impugned order. He would submit that merely because his client got married to a Muslim and converted herself by embracing Islam that by itself would not disentitle her to claim a share in the ancestral property in accordance with the provisions of the Hindu Succession Act. In such circumstances referred to above, Mr.Dave prays that there being merit in this petition, the impugned orders be

quashed and the petition be allowed.

On the other hand, this petition has been vehemently opposed by Mr.Parthiv Shah, the learned counsel appearing for the private respondents.

Mr.Sharma, the learned AGP has appeared on behalf of the State respondents.

Mr.Shah submitted that a Hindu woman who has embraced Islam by renouncing her religion is not entitled to inherit the properties of a Hindu. Relying on Section 2 of the Hindu Succession Act, Mr.Shah submitted that the Act applies to any person, who is a Hindu by religion, in any of its forms or developments and to any person who is a Buddhist, Jain or Sikh by religions and to any other person who is not a Muslim, Christian, Parsi or Jew by religions.

The second limb of Mr.Shah's submission is that without questioning the legality and validity of the revenue entry no.1502 mutated in the record of rights on 12th October 2004 on the demise of Bhikhabhai Patel, the applicant herein could not have got her name mutated vide entry no.1668. To put it in other words, according to Mr.Shah, the applicant is guilty of filing a false affidavit, which is at page-72 Annexure-R2, wherein she has solemnly affirmed in the name as Nainaben, daughter of Bhikhabhai Ranchhodbhai Patel. According to Mr.Shah, on the date when the affidavit was affirmed, she was already married to one Firozkhan Pathan and her name was also been changed to Nasimbanu Firozkhan Pathan. According to Mr.Shah, unless and until the competent authority cancels

the entry no.1502, the entry no.1668 could not have been mutated. This argument of Mr.Shah proceeds on the footing that even if the applicant herein is held to be liable to inherit the ancestral property, the name of the applicant could not have been entered in the revenue record without the cancellation of entry no.1502.

In support of his submissions, he has placed reliance on the following case-law :

- (1) Sundarammal v. Ameenul, AIR 1927 Madras 72;
- (2) C.V.N.C.T. Chidambaram Chettyar v. Ma Nyein Me and others, AIR 1928 Rangoon 179;
- (3) Ponniah Nadar Devadas Silas v. Esakki Deviana and others, AIR 1954 Kerala 180;
- (4) Rajeshwar Baburao Bone v. State of Maharashtra, AIR 2015 SC 3024; and
- (5) Sitaben v. Bhanabhai Madaribhai Patel, (2002)2 GLR 1365.

Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is, whether a Hindu daughter can inherit from her father after getting married to a Muslim and embracing Islam.

Section 2 of the Hindu Succession Act reads as under :

"2. Application of Act.- (1) This Act applied -

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo,

Prarthana or Arya Samaj.

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person who is not a Muslim, Christian, Parsis or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation. -The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be :

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

Sub clause (a) of Sub-Section (1) of Section 2 of the Act

specifies that the Act applies to any person, who is a Hindu by religion in any of its forms. Explanation (a) to Section 2 of the Act makes it clear that any child, legitimate or illegitimate both of whose parents are Hindus, are Hindus by religion. Sub-Section (3) to Section 2 of the Act explains that the term "Hindu", in any portion of the Act, shall be construed as if it included a person, who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this Section. This makes clear that if the parents are Hindus, then, the child is also governed by the Hindu Law or is a Hindu. Perhaps, the Legislature might have thought fit to treat the children of the Hindus as Hindus without foregoing the right of inheritance by virtue of conversion. This is also clear by virtue of Section 4 of the Act.

Section 4 of the Act reads as under :

"4. Over-riding effect of Act.- (1) Save as otherwise expressly provided in this Act, -

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Section 4(1)(b) of the Act envisages that any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in the Act. Following the said

provision, a number of Central Acts had been repealed, which are inconsistent to the provisions of the Act. However, the Caste Disabilities Removal Act, 1850 (Act 21 of 1850) had not been repealed so far. This Act contains only one Section, which is as follows :

"Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced ; So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in any Court."

A change of religion and loss of caste was at one time considered as grounds for forfeiture of property and exclusion of inheritance. However, this has ceased to be the case after the passing of the Caste Disabilities Removal Act, 1850.

Section 1 of the Caste Disabilities Removal Act *inter alia* provides that if any law or (customary) usage in force in India would cause a person to forfeit his/her rights on property or may in any way impair or affect a person's right to inherit any property, by reason of such person having renounced his/her religion or having been ex-communicated from his/her religion or having been deprived of his/her caste, then such law or (customary) usage would not be enforceable in any court of law. The Caste Disabilities Removal Act intends to protect the person who renounces his religion.

In the case of E.Ramesh and Anr. v. P. Rajini and 2 Ors. [(2002) 1 MLJ 216], a Division Bench of the Madras High Court has held that by virtue of Section 1 of the Caste Disabilities

Removal Act, the conversion of a Hindu to another religion will not disentitle the convert to his right of inheritance to the property.

As stated above, a Hindu convert does not lose the right to inherit property under the Hindu Succession Act, 1956. Therefore, the applicant herein is entitled to inherit her share in her father's property and the Hindu Succession Act shall apply to her with regard to her right to inherit her share in her father's property.

It may be noted that Section 26 of the Hindu Succession Act states that if a Hindu has ceased to be a Hindu by conversion to another religion, children born to the convert after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens. However, this section has no impact on the convert's right to inherit property from her Hindu relatives and shall only apply to the children born after conversion and their descendants.

Thus, where 'A' has got three sons namely 'B', 'C' and 'D' converts to Christianity during the life time of 'A'. On the death of 'A', 'D' will be entitled to claim a share along with 'B' and 'C'. He would not be disqualified to inherit as per Section 26 of the Act and would get 1/3 share in the property of 'A'.

In the above illustration if 'D' dies after conversion during the lifetime of 'A' leaving behind him his two sons 'M' and 'N', who are born to him after conversion, 'M' and 'N' would be

excluded from inheritance.

WHO IS A MOHAMMEDAN ?

A whole course of conduct has been prescribed by the Muslim religion for a Mohammedan. All actions are divided into five classes by Muslim jurists or faqihs.

- (1) farz (p. faraiz), acts the omission of which is punished and the doing of which is rewarded;
- (2) manzoob or mustahabb, acts the doing of which is rewarded but the omission of which is not punished;
- (3) jaiz or mubah acts the doing of which is permitted;
- (4) makruh, acts which are disapproved but are legally valid;
- (5) haram, acts strictly prohibited and punishable.

In all matters to which the Mohammedan Law applies, all Mohammedans are governed by the Mohammedan Law even if they are converts to Islam. Conversion to Islam makes the Islamic Law applicable. The previous religious and personal law is substituted by Islam and with so much of the personal law as necessarily follows from that religion.

According to the Mohammedan Law, a Hindu cannot succeed to the estate of a Mohammedan. When a person becomes a Mohammedan by conversion and had a child which survived him the child would be his heir and not his relatives who are still Hindus.

None of the contentions put forward by Mr.Shah, the learned counsel appearing for the private respondents, has appealed to me. Section 2 of the Hindu Succession Act simply

provides a class of persons whose properties will devolve according to the Act. It is only the property of those persons mentioned in Section 2 that will be governed according to the provisions of the Act. Section 2 has nothing to do with the heirs. This section does not lay down as to who are the disqualified heirs.

Sections 24, 25, 26 and 28 of the Act lay down the provisions how a person is disqualified.

Section 24 provides, "certain widows re-marrying may not inherit as widows". Section 25 disqualifies a murderer from inheriting the property of the person murdered. Section 28 provides that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever. The most important section is Section 26. Section 26 reads as follows :

"26. Convert's descendants disqualified. - Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens."

This Section, therefore, does not disqualify a convert. It only disqualifies the descendants of the convert who are born to the convert after such conversion from inheriting the property of any of their Hindu relatives. Section 28 of the Act discard almost all the grounds which impose exclusion from inheritance and lays down that no person shall be disqualified

from succeeding to any property on the ground of any disease, defect or deformity. It also rules out disqualification on any ground whatsoever except those expressly recognized by any provisions of the Act. The exceptions are very few and confined to the case of re-marriage of certain widows. Another disqualification stated in the Act relates to a murderer who is excluded on the principle of justice and public policy (Section 25). The change of religion and loss of caste have long ceased to be the grounds of forfeiture of property and the only disqualification to inheritance on the ground that the person has ceased to be a Hindu is confined to the heirs of such convert (Section 26). The disqualification does not affect the convert himself or herself. This being the position, I have no hesitation to hold that the applicant who is admittedly a sister of the private respondents, i.e. the daughter of late Bhikhabhai Patel, is entitled to succeed in getting her name mutated in the record of rights as one of the legal heirs. The provisions contained in Section 26 of the Hindu Succession Act is the only provision dealing with the right of succession of children born to a convert after the conversion. However, this provision does not disqualify the convert himself from succeeding to the property of the Hindu father.

What is the meaning of the expression 'on any other ground whatsoever' is the question. It is of wide import. Section 4 of the Act provides that any pre-existing law, which is inconsistent with the provisions of the Act, shall cease to have effect. Sections 24 to 26 prescribe disqualification; and Section 28 removes disabilities. To explain a little elaborately, under the Shastrik law preceding the Act, unchastity of a widow was a disqualification. But the Legislature did not engraft the unchastity as a disqualification. Under Section 24

remarriage was provided as a disqualification but not unchastity. On the other hand, Section 28 engrafts a wide language 'on any other ground whatsoever' encompassing within its ambit any other ground which was a disqualification under the Shastrik law excepting those disqualifications expressly recognised to note that the commentators on the Hindu Law have taken the view that unchastity is no longer a disqualification for the intestate successor, after the Act came into force.

In N.R.Raghavachariar's Hindu Law, Principles and Precedents, 8th Edition 1987, considering the effect of Section 28 of the Act, Prof. S.Venkataraman who edited this commentary and who himself is an authority on the Hindu Law, has stated thus :

"This Section removes the disqualification prescribed by the Hindu law based upon disease, defect or deformity. Unless the disqualification is one gatherable from the provisions of this Act it does not operate as a bar to succession. That means that the Act has made its intention specific that unchastity of a widow will, after the Act came into force, no longer be a disqualification in regard to her heritable capacity nor conversion of an heir to any other religion is a disqualification under the Act"

In Mulla's Principles of Hindu Law, 15th Edition revised by S.T. Desai interpreting Section 28 of the Act, it is stated thus :

"The present Section discards almost all the grounds which imposed exclusion from inheritance. It rules out disqualification on any ground whatsoever excepting those expressly recognised by any provisions of the Act. Unchastity of a widow is not a disqualification under the Act. Nor is conversion of an heir to any other religion a disqualification under the Act." (Page 1039).

In *Jayalakshmi v. T.V.G. Iyer*, AIR 1972 Madras 357, a Division Bench of the Madras High Court, speaking through Veeraswami C.J. considered the effect of the decision of the Full Bench in *Ramaiya v. Mottayya* (AIR 1951 Madras 954) and also the provisions of Section 28 read with Section 4 of the Act and held thus :

"It seems to us that the position under the Hindu Succession Act is entirely different. The Hindu Succession Act in so far as it covers the matters therein, is meant to be a complete Code relating to Hindu Succession and to that extent the Act prevails and the Hindu law in respect of it will cease to operate. That is the effect of S.4 which as we said, gives the provisions of the Act an effect of overriding the Hindu Law except to the extent save as otherwise, expressly provided for in the Act itself. The effect of S.8 is to limit succession to the class of persons in the order of priority specified. Unless, therefore, any rule of Hindu Law with reference to the disqualification of any of the heir mentioned in any of the classes is covered by S.8 each one of them will be, as a matter of right, entitled to succeed in accordance with the provisions of that Section."

In the said case also unchastity of widow was sought to be put forth as a disqualification. While negating this, the Madras High Court held thus :

"..... the Act has made its intention specific that unchastity of a widow will, after the Act came into force, no longer be a disqualification for her to succeed as the father's widow."

It is a settled principle of statutory construction that the court should endeavour to find what is the existing law, the defects which the law did not provide for and the remedy the Legislature intended to provide and cure the defect and the

reasons therefor. There is a presumptive evidence that the Legislature is aware of the pre-existing Shastric law as judicially interpreted including the one in Ramaiya's (AIR 1951 Mad 954) (FB) ratio in regard to unchastity as a disqualification for succession to or maintenance of Hindu women. Articles 14 and 15 of the Constitution provide equality to every citizen regardless of sex and prohibits invidious discrimination, enables the Legislature to make inroads into the pre-existing law. The Legislature felt the need most acute to remove many a disability under which the Hindu women are reeling from in matters of inheritance, succession rights. It animated to remove all the disabilities except those prescribed under the Act, used the appropriate language in Section 4 and chose not to make conversion a disqualification.

I have gone through all the decisions relied upon by Mr.Shah in support of his submissions. In my view, none of the decisions are applicable to the facts of the present case.

I am also not impressed by the submission of Mr.Shah that without questioning the legality and validity of the revenue entry no.1502 the applicant could not have got her name mutated in the record of rights vide entry no.1668. The applicant herein is not disputing even for a moment the fact that the private respondents are Class-I heirs of late Bhikhabhai Patel. The applicant is also not disputing that the respondent no.1, her sister, has also a share in the properties in accordance with the provisions of the Hindu Succession Act. In the same manner, the applicant is also not disputing that her brother, i.e. the respondent no.2, also has a share in the properties in accordance with the provisions of the Hindu Succession Act. In such circumstances, it is too technical a

submission to be canvassed that without getting the revenue entry no.1502 quashed and set-aside the applicant could not have got her name entered in the record of rights vide entry no.1668. The Supreme Court decision which has been relied upon is to fortify the submission that if the applicant got her name entered in the record of rights by playing a fraud, i.e. by filing a false affidavit, then the entire action could be termed as a nullity. The Supreme Court decision was with regard to the claim of the appellant to be a member of a Scheduled Tribe. Such claim was put forward on the basis of the false statement and the false affidavit. In such circumstances, the Supreme Court declined to interfere having regard to the report of the scrutiny committee constituted by the State Government to look into the validity of the certificate.

Prima facie, I am of the view that for the purpose of getting her name entered in the record of rights, all that was necessary to be indicated was, that the applicant is one of the Class-I legal heirs. It was not necessary for her to declare that she is married to a Muslim and she has embraced Islam by renouncing her Hindu religion. Once the question of law is answered in favour of the applicant, I do not see any good reason to lay much emphasis on the issue of affidavit filed by the applicant.

In the result, this application succeeds and is hereby allowed. The impugned orders passed by the SSRD as well as the Collector, Vadodara, are hereby quashed and the order passed by the Deputy Collector is hereby affirmed. The mutation of the revenue entry no.1668 in the record of rights is held to be just, legal and proper. The revenue record be

corrected accordingly.

(J.B.PARDIWALA, J.)

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