

IN THE HON'BLE HIGH COURT OF JUDICATURE AT ALLAHABAD

CASE LAWS AND WRITTEN SUBMISSIONS OF PETITIONER

1

IN

CRIMINAL MISC. WRIT PETITION NO. 24160 OF 2014

(Under Article 226 of the Constitution of India)

(DISTRICT: KANPUR NAGAR)

Anupam Dubey

.....**Petitioner**

Versus

1. State of U.P.
2. Additional District Judge-23, Kanpur Nagar
3. Shivanjali Dubey

.....**Respondents**

To,

The Hon'ble Chief Justice and his other companion Judges of the aforesaid Court.

Humble written submissions of the above named petitioner seeking natural justice.

Most respectfully showeth as under:-

1. In compliance to this Hon'ble Court's order dated 10/12/2014, the petitioner herein is filing case laws along with the written submissions in support of his contentions.

Introduction

2. Instant writ is filed against the ex-parte interim order passed by Ld. Court below on Respondent No. 3/Plaintiff's application u/s 23 of Domestic Violence Act.

Impugned Order

3. The impugned order was passed as ex-parte after hearing the petitioner's arguments, in petitioner's presence, which is mentioned in the impugned order also.
4. The impugned order was passed infringing constitutional rights of the petitioner. Right to equality, to defend and to prove ones innocence were allowed even to hardcore terrorists like Afzal Guru and Ajmal Kasab! But they are denied for the petitioner.
5. The Ld. Court below passed the impugned order as ex-party, arbitrary and illegal order, exercising his powers u/s 28(2) of Domestic Violence Act, in a very controversial manner.

In the order after narrating the contentions of the plaintiff and the applicant, Ld. Court below has very precisely stated that:

प्रार्थनापत्र अन्तर्गत धारा-23 अन्तरिम भरण पोषण पर उभयपक्षों को सुना एवं पत्रावली पर उपलब्ध साक्ष्यों का अवलोकन किया अवलोकन से यह स्पष्ट है कि उभय पक्ष आपस में पति पत्नी है उनका विधिक रूप से हिन्दू रीति रिवाज़ से विवाह संपन्न हुआ था। और उनके संसर्ग से एक बच्चा उभयपक्षों को है, यह भी पत्रावली पर स्पष्ट है कि परिवादिनी का यह कथन कि उसकी आय का कोई साधन नहीं है जिसका खण्डन विपक्षी द्वारा अपने प्रार्थनापत्र में यद्यपि किया गया है परन्तु कोई भी साक्ष्य अपने खण्डन के समर्थन में प्रस्तुत किया गया है। पत्रावली पर उपलब्ध साक्ष्यों के अवलोकन से यह भी स्पष्ट है कि परिवादिनी का भरण पोषण एवं अपने पुत्र का भरण पोषण उसके पति का नैतिक एवं विधिक दायित्व है कि वह अपनी पत्नी का भरण पोषण करे। उभयपक्ष वर्तमान में अभी दिनों पति पत्नी हैं और भरण पोषण का दायित्व विपक्षी संख्या-1 पर है। विपक्षी द्वारा कोई भी घरेलू हिंसा की गयी या नहीं यह साक्ष्य का विषय है जो कि दौरान विचारण देखा जाएगा। इस स्तर पर मात्र यह देखना है कि क्या विपक्षी संख्या-1 का अन्तरिम भरण पोषण देने का दायित्व है या नहीं। अतः उपरोक्त परिस्थितियों को दृष्टिगत रखते हुए एवं धारा-23 के उपबन्धों को दृष्टिगत रखते हुए भी यह न्यायोचित प्रतीत होता है कि परिवादिनी को अन्तरिम भरण पोषण के रूप में न्यायालय द्वारा 2000/-रु प्रतिमाह दिलायाजाना न्यायोचित प्रतीत होता है। जिससे कि वह अपना अन्तरिम भरण पोषण एवं न्यायिक प्रक्रिया सुचारु रूप से चला सके। परिवादिनी द्वारा इस प्रार्थनापत्र के जरिये अन्तरिम रूपसे भरण पोषण की याचना की गयी है। अतः इस अधिनियम की धारा-23(2) को दृष्टिगत रखते हुए परिवादिनी का प्रार्थनापत्र स्वीकार होने योग्य है।

अतः पत्रावली पर उपलब्ध साक्ष्यों एवं प्रार्थनापत्र में उल्लिखित तथ्यों एवं परिस्थितियों को अनुक्रम में न्यायालय को यह न्यायोचित प्रतीत होता है कि, परिवादिनी का प्रार्थनापत्र एक पक्षीय रूप से स्वीकार किया जाए.....

And then, on page No. 4 of the order, in 12th line, it is stated that:

..... अन्य आपत्ति जो भी विपक्षी द्वारा इस प्रार्थनापत्र में की गई वह दौरान विचारण देखा जायेगा

[Certified Copy - Page 63 of Writ; Mentioned Reference – Page 65]

[Typed Copy - Page 67 of Writ; Mentioned Reference – Page 70, 71]

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6. The said impugned order was challenged in the court of Hon'ble District and Sessions Judge, Kanpur Nagar, which Ld. ADJ-23 was pleased to dismiss; apart from several observations, also observing that the said ex-parte order is result of typing mistake.
7. Hence this Writ seeking natural justice.

Proceeds

8. On 10/12/2014, this Hon'ble Court while hearing the aforesaid writ has directed the petitioner to produce case law on the law point involved in the case.
9. The law point involved in the case is:

Section 28(2) of The Protection of Women from Domestic Violence Act, 2005 states:

Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

BUT

Can a Ld. Magistrate, after issuing notice to defendant, after giving defendant due hearing and in the presence of defendant, pass an ex-parte order against the defendant, exercising his power u/s 28(2) of Protection of Women from Domestic Violence Act.

10. The petitioner contends that the Ld. Court cannot pass ex-parte order against the defendant after issuing him notice and after giving him due hearing.

Case Laws and pleadings that petitioner relies on to establish his case against the aforesaid use of sec 28(2) DVA, in his case

11. In a recent judgment, Hon'ble Karnataka High Court while deciding Cri Rev Pet No. 2309/2013, titled as '**Sri. Vincent Shanthakumar Vs. Smt. Christina Geetha Rani & another**', decided on 28/04/2014, in para 43 has very precisely stated that:

"Section 28 also provides that the Magistrate can adopt a procedure of his own, but it should be understood that

where the procedure is not at all contemplated by any law for the time being in force, then only the Magistrate by adhering to the principals of natural justice can adopt his own procedure for the purpose of expeditious disposal of the case but normally he should adopt the recognized procedure under the CrPC”

[**Annex. 1**, on page 16; para 43 on page 70, 71]

12.Hon’ble Delhi High Court in **‘Bhupender Singh Mehra Vs. State NCT of Delhi & Anr.’**, reported in MANU/DE/2666/2010; 2011(2)RCR(Criminal)360; 2010 (4) JCC 2939, in para 5 has very precisely stated that:

“..... No doubt Section 28(2) gives power to the MM of laying down its own procedure for disposal of an application under Section 12 or under Sub-Section 23(2) but the procedure an MM can adopt cannot be violative of the Act itself or violative of principals of natural justice.....”

[**Annex. 2**, on page 73; para 5 on page 75]

13.Hon’ble Uttarakhand High Court while deciding Cri Misc Appl. No. 833 of 2010, titled as ‘Nirmal Jeet Kaur Vs State of Uttarakhand’, decided on 16/08/2012, in para 7 has very precisely stated that:

“The question, before Court, is that whether in the light of expression "its own procedure for proposal of an application", can the Magistrate recall its order passed under Section 23 or not. Certainly said expression does not give the Magistrate power to pass arbitrary orders or to pass such an order which is against the known basic principles of judicial procedure. In the opinion of this Court what aforesaid expression authorites the Magistrate is that he can pass such an order which are in consonance of the basic principles of judicial procedure.....”

[**Annex. 3**, on page 76; para 7 on page 80]

14.Hon’ble Delhi High Court in **‘Ravi Dutta Vs. Kiran Dutta & Anr.’**, reported in MANU/DE/0419/2014; 2014(4)Crimes182(Del.);

208(2014)DLT61; I(2014)DMC784Del, in para 5 has very precisely stated that:

“..... No doubt, Section 28 of the DV Act does permit the Court dealing with cases under DV Act to lay down its own procedure for deciding applications under Section 12 or sub-Section 2 of Section 23 of DV Act but the procedure so evolved has to be fair and reasonable.....”

[Annex. 4, on page 83; para 5 on page 84, 85]

15.Hon'ble Mumbai High Court in '**Vishal Damodar Patil Vs. Vishakha Vishal Patil**', reported in MANU/MH/1323/2008; 2008 (6) AIR Bom 297; 2009 Cri. LJ 107 Bom, in para 6 has very precisely stated that:

“..... However, while considering the question of granting the ex-parte ad-interim or interim relief, the Magistrate will have to consider the nature of the reliefs sought in the main application under 12 (1) of the said Act in as much as an interim relief under section 2 of the said Act can be granted in aid of the final relief sought in the main application. On the basis of an affidavit in Form III prescribed by the Rules, in a given case, learned Magistrate can grant ex-parte ad-interim relief. However, before granting an interim relief, an opportunity of being heard has to be afforded to the respondent. The respondent can always file a reply to the affidavit.”

[Annex. 5, on page 86; para 6 on page 88]

16.Hon'ble Mumbai High Court in '**Mr. Sachin Vs. Sau. Sushma**', reported in MANU/MH/0601/2014; 2014(3)BomCR(Cri)266, in para 5 has very precisely stated that:

“Therefore, it is abundantly clear that basically the learned Magistrate has to follow the procedure laid down in Code of Criminal Procedure for recovery of maintenance either final or interim. Sub-section (2) of Section 28 of the Protection of Women from Domestic Violence Act, 2005 can be pressed into service when there is no provision available for implementing a particular order passed under the Protection of Women from Domestic Violence Act,

2005. If the procedure is available in Code of Criminal Procedure, that is necessarily to be followed."

[Annex. 6, on page 90; para 5 on page 91]

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17. The powers under sec 28(2) are discretionary powers for the Ld. Magistrate. Discretionary powers should be used only in emergent situation and not as a matter of practice. When a well established CrPC is available under the law of the land, then any use of discretionary powers must be warranted in extreme and emergent situations. Such use of discretionary powers should not be arbitrary, based on personal whims, fancies and prejudices. The same has been propounded by various decided cases by various Hon'ble High Courts and Hon'ble Apex Court too.

18. Hon'ble Apex Court in '**Lanka Venkateswarlu Vs. State of A.P.**', reported in MANU/SC/0153/2011; (2011) 4 SCC 363; AIR2011SC1199, in para 26 has very precisely stated that:

"All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers."

[Annex. 7, on page 93; para 26 on page 99]

19. Also very interesting point for consideration here is that, Hon'ble Apex Court in '**Ayaubkhan Noorkhan Pathan v. State of Maharashtra & Ors.**', reported in AIR 2013 SC 58, while placing reliance upon a large number of earlier judgments held in para 31 that:

"Affidavits are therefore, not included within the purview of the definition of "evidence" as has been given in Section 3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure,

1908. Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation"

Further held that, in a case where the deponent is available of cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon.

[**Annex. 8**, on page 101, para 31 on page 107]

20. Even then, leave aside the opportunity of cross-examination; Ld. Court below, God knows under what influence and on what grounds, was pleased to blindly rely on Respondent No. 2/plaintiff's contentions to the extent that petitioner was denied opportunity of being heard even.

As per the impugned order, its passed u/s 23(2) of DV Act

21. The application filed for interim relief was filed u/s 23 of the Act, which states that:

23. Power to grant interim and ex parte orders.

(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

Notice was issued, pursuant to which petitioner/defendant filed his objections and evidence.

22. Since the notice was issued on the application, Ld. Court had declined to proceed ex-parte to begin with; therefore sec 23(1) comes in light. Now sec 23(1) permits to pass interim order which has

to be governed by the provisions of CrPC by virtue of sec 28(1) of the Act.

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23. But after listening to both the parties, when Ld. Court below did not find any ground to allow the application u/s 23 DVA, he chose to exercise his power u/s 28(2) of the act, to enable him to act as per his own procedure and passed an illegal ex-parte order.

24. Since the Ld. Magistrate had initially declined to grant ex-parte relief and notice to petitioner/defendant was issued, he should have been heard, because in such cases, section 28(1) applies and the procedure prescribed by the CrPC becomes applicable.

25. In a recent judgment, Hon'ble Karnataka High Court in '**Krishna Murthy Nookula Vs. Y. Savitha**', MANU/KA/1117/2009; 2011(3)KCCR 222, in para 18 has very precisely stated that:

*“From this, it is clear that the proceeding under sub-section (1) of Section 23 which permits to pass interim order has to be governed by the provisions of Code of Criminal Procedure by virtue of Section 28(1) of the Act, but all actions in a proceeding for grant of **ex-parte** order would be by the procedure framed by the Court itself if any or on the basis of the affidavit in such form as may be prescribed. The ultimate conclusion would be for grant of **ex parte order**, the Magistrate need not necessarily apply provisions of Code or Criminal Procedure, but he could pass such orders on the basis of material in the form of affidavit in such form as may be prescribed or following the procedure it has prescribed (if any). But when the magistrate declines to grant ex parte relief and notifies the respondent (prior notice), he has to be heard and in such cases, Section 28(1) applies and the procedure prescribed by the Code of Criminal Procedure becomes applicable”*

[Annex. 9, on page 113; para 18 on page 116]

26. Also as is the mandate of the Act, Ld. Magistrate, after giving the petitioner, an opportunity of being heard, should have satisfied himself of the happening of the domestic violence.

27. Ld. Court below did not follow the guidelines laid down by Hon'ble Superior Courts, for disposal of application u/s 23 of the Act. Hon'ble Madras High Court, in '**K Rajendran and Anr Vs. Ambikavathy and Anr**', reported in (2013)2MLJ406, 2013(2)MLJ(CrI)406, in para 27 has stated those guidelines.

[**Annex. 10**, on page 118; para 27 on page 125]

28. Ld. Court below was pleased to pass arbitrary order not even considering the established preposition of law held by Hon'ble Apex Court in '**Chaturbuj vs Sita Bai**', reported in MANU/SC/8286/2007; (2008) 2 SCC 316, in para 6 has very precisely held that:

"Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient....."

[**Annex. 11**, on page 129; para 6 on page 132]

29. Ld. Magistrate just passed the order without satisfying himself of happening of domestic violence or considering any proof filed (though nonexistent) by plaintiff, mentioning petitioner's sufficient means.

30. It would not be wrong to understand that just by virtue of the impugned arbitrary and illegal order being passed; petitioner will itself be counted as criminal, for none of his fault!

31. Administration of DV Act by the Ld. Court below as in the instant case is a violation of the principle of natural justice & amounts to administration of justices in accordance with the whimsical and arbitrary procedures / rule of the Ld. Magistrate & not in accordance with the established rule of law.

32. It is also pertinent to draw this Hon'ble Court's kind attention to an order passed by Hon'ble Apex Court in '**A. R. Antulay Vs. R. S. Nayak**', reported in MANU/SC/0082/1984; AIR 1984 SC 718; 1984 SCR (2) 914; 1984 SCC (2) 500; 1984 SCALE (1)239, in para 27 has very precisely stated that:

"Where a statute requires to do a certain thing in a certain way, the thing must be done in that way and all other methods of performance are necessarily forbidden"

[**Annex. 12**, on page 133; para 27 on page 144]

33. Hon'ble Apex Court in '**Manish Goel Vs. Rohini Goel**', reported in MANU/SC/0106/2010; AIR 2010 SC 1099; 2010 (2) SCR 414, in para 10, has very precisely held that NO COURT HAS COMPETENCE TO ISSUE A DIRECTION CONTRARY TO LAW and stated that:

"Generally, no Court has competence to issue a direction contrary to law nor the Court can direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law"

[**Annex. 13**, on page 152; para 10 on page 155]

34. But the Ld. Court below has not only passed order/direction contrary to law, but has also infringed constitutional rights of the petitioner.

35. Also necessary to mention here is that pursuant to the illegal, arbitrary and ex-parte order, petitioner is facing recovery warrant and NBW.

36. At this juncture, it's necessary to draw this Hon'ble Court's kind attention to an order passed by Hon'ble Apex Court in '**Patangrao Kadam Vs. Prithviraj S Deshmukh**', reported in MANU/SC/0133/2001; AIR 2001 SC 1121; (2001)3SCC594, in which in para 13 has very precisely stated that:

"When there is an ambiguity in terms of a provision, one must look at well-settled principles of construction but it is not open to first to create an ambiguity which does not

exist and then try to resolve the same by taking recourse to some general principle”

[**Annex. 14**, on page 158; para 13 on page 163, 164]

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37.Its once again pertinent to mention here and draw this Hon'ble Court's kind attention that even Hon'ble Apex Court in '**B. Premanand & Ors. v. Mohan Koikal & Ors**', reported in MANU/SC/0249/2011; (2011) 4 SCC 266; AIR2011SC1925, has held that LAW MUST PREVAIL and in para 19 has very precisely stated that:

“Once we depart from the literal rule then any number of interpretations can be put to a statutory provision each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience it has to be followed. Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection”

[**Annex. 15**, on page 168; para 19 on page 171]

38.Petitioner is in this Hon'ble Court with the pleading that just by virtue of a non-maintainable and false case of domestic violence, with intent to extract money, being filed against the petitioner; he cannot be treated like and made a criminal. Nothing till date has been proved against him and he is also denied opportunity to being heard.

39.Hon'ble Apex Court in '**Arun Bhandari Vs. State of U.P. and Ors**', reported in MANU/SC/0020/2013; (2013)2SCC801; 2013 (1) JT 467; 2013 (1) SCALE 229, in para 29, has very precisely held that:

"It is worth noting that it was observed therein that one of the paramount duties of the superior court is to see that person who is absolutely innocent is not subjected to prosecution and humiliation on the basis of a false and wholly untenable complaint"

[**Annex. 16**, on page 173; para 29 on page 189]

40. By virtue of Ld. Court below having passed illegal ex-parte order, Ld.

Court below has denied petitioner, opportunity to present his case!

Having said that Ld. Court below has not only denied natural justice

to the petitioner but has also infringing constitutional rights of the

petitioners. Right to equality, to defend, to prove ones innocence

were allowed even to hardcore terrorists like Afzal Guru and Ajmal

Kasab, which the Ld. Court was pleased to disallow to the petitioner.

This is absolutely against the law settled by Hon'ble Apex Court in

'Maneka Sanjay Gandhi Vs. Rani Jethmalani', reported in

MANU/SC/0134/1978; AIR 1979 SC 468; (1979)SCC(Cri)934; 1979 SCR

(2) 378, where in para 2 it is very precisely stated that:

"Assurance of a fair trial is the first imperative of the dispensation of justice"

[**Annex. 17**, on page 191; para 2 on page 191]

41. In order to appreciate the matter to this Hon'ble Court, the following

decisions of Hon'ble Apex Court and Hon'ble High Courts, referred

above, are placed as reliance.

Sl. No.	In the Matter of	Citation
1	Sri. Vincent Shanthakumar Vs. Smt. Christina Geetha Rani & another; Cri Rev Pet No. 2309/2013, decided on 28/04/2014	
2	Bhupender Singh Mehra Vs. State NCT of Delhi & Anr.	MANU/DE/2666/2010; 2011(2)RCR(Criminal)360; 2010 (4) JCC 2939
3	Nirmal Jeet Kaur Vs State of Uttarakhand; Cri Misc Appl. No. 833	

	of 2010, titled as, decided on 16/08/2012	
4	Ravi Dutta Vs. Kiran Dutta & Anr.	MANU/DE/0419/2014; 2014(4)Crimes182(Del.); 208(2014)DLT61; 1(2014)DMC784Del
5	Vishal Damodar Patil Vs. Vishakha Vishal Patil	MANU/MH/1323/2008; 2008 (6) AIR Bom 297; 2009 Cri. LJ 107 Bom
6	Mr. Sachin Vs. Sau. Sushma	MANU/MH/0601/2014; 2014(3)BomCR(Cri)266
7	Lanka Venkateswarlu Vs. State of A.P.	MANU/SC/0153/2011; (2011) 4 SCC 363; AIR2011SC1199
8	Ayaubkhan Noorkhan Pathan v. State of Maharashtra & Ors.	AIR 2013 SC 58
9	Krishna Murthy Nookula Vs. Y. Savitha	MANU/KA/1117/2009; 2011(3)KCCR 222
10	K Rajendran and Anr Vs. Ambikavathy and Anr	MANU/TN/0584/2013; (2013)2MLJ406; 2013(2)MLJ(Cri)406
11	Chaturbhuj vs Sita Bai	MANU/SC/8286/2007; (2008) 2 SCC 316
12	A. R. Antulay Vs. R. S. Nayak	MANU/SC/0082/1984; AIR 1984 SC 718; 1984 SCR (2) 914; 1984 SCC (2) 500; 1984 SCALE (1)239
13	Manish Goel Vs. Rohini Goel	MANU/SC/0106/2010; AIR 2010 SC 1099; 2010 (2) SCR 414
14	Patangrao Kadam Vs. Prithviraj S Deshmukh	MANU/SC/0133/2001; AIR 2001 SC 1121; (2001)3SCC594
15	B. Premanand & Ors. v. Mohan Koikal & Ors	MANU/SC/0249/2011; (2011) 4 SCC 266; AIR2011SC1925
16	Arun Bhandari Vs. State of U.P. and Ors	MANU/SC/0020/2013; (2013)2SCC801; 2013 (1) JT 467; 2013 (1) SCALE 229
17	Maneka Sanjay Gandhi Vs. Rani Jethmalani	MANU/SC/0134/1978; AIR 1979 SC 468; (1979)SCC(Cri)934; 1979 SCR (2) 378

The copies of all the judgments, in the sequence referred are enclosed for ready reference.

42. That in view of the case laws and circumstance stated above, it is very humbly and respectfully prayed that this Hon'ble Court may graciously be pleased to issue a writ of certiorari and quash the

orders dated 17/08/2010 and & 16/05/2011, passed in Case No. 3520 of 2008, 'Shivanjali Dubey Vs. Anupam Dubey and others' pending in the court of Hon'ble MM-4, Kanpur Nagar and judgment & order dated 09/07/2014, passed by Ld. ADJ-23, Kanpur Nagar, in Criminal Appeal No. 87 and 88 of 2014, 'Anupam Dubey Vs. State of U.P. and another, respectively.

Please be pleased to consider!

List of Enclosures:

A total number of 16 Decisions of Hon'ble Apex Court and Hon'ble High Courts, which are mentioned serially in this memorandum of written submissions.

Petitioner

Date: 13/01/2015

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