M/s Alopi Parshad & Sons, Ltd.

Vs

The Union of India

Civil Appeal No. 693 of 1957

(S. K. Das, K. N. Wanchoo, J. C. Shah JJ)

20.01.1960

JUDGMENT

SHAH, J. -

On May 3, 1937, M/s. Alopi Parshad and Sons Ltd., who will hereinafter be referred to as the Agents, were, under an agreement in writing, appointed by the Governor-General for India in Council, as from October 1, 1937, agents for purchasing ghee required for the use of the Army personnel. The Government of India, by cl. 12 of the agreement, undertook to pay to the Agents the actual expenses incurred for purchasing ghee, cost of empty tins, expenses incurred on clearance of Government tins from the railway, export land-customs duty levied on ghee purchased and exported from markets situated in Indian States, octroi duty, terminal tax or other local rates on ghee, and certain other charges incurred by the Agents. The Government also agreed to pay to the Agents at rates specified in the agreement :

(1) the financing and overhead (mandi) charges incurred in the buying markets.

(2) the cost of establishments and contingencies provided by the Agents on the Government's account for carrying out the purchase and supply of ghee, and

(3) the buying remuneration.

In consideration of the Government paying to the Agents a sum of rupee one and anna one only per one hundred pounds nett weight of finally accepted ghee, as combined financing and overhead (mandi) charges, the Agents by cl. 13 undertook to provide the working capital and also to bear the costs, charges and expenses, including financing and overhead charges incurred by them in buying ghee in the market.

The Agents also undertook, by cl. 14, to bear the establishment and contingency charges for the due performance by them of the terms of the agreement, and the Government agreed to pay in consideration thereof annas 14 and pies 6 per every hundred pounds of ghee accepted. The Government also agreed to pay to the Agents remuneration for services rendered in purchasing ghee, at the rate of one rupee per one hundred pounds nett weight of accepted ghee.

Pursuant to the agreement, the Agents supplied from time to time ghee to the Government of India, as required. In September, 1939, the World War II broke out, and there was an enormous increase in the demand by the Government of ghee. On June 20, 1942, the original agreement was, by mutual consent, revised, and in respect of the establishment and contingencies, the uniform rate of annas 14

and 6 pies per hundred pounds of accepted ghee, was substituted by a graded scale : for the first 5 thousand tons, the Agents were to be paid at the rate of Re. 0-14-6 per hundred pounds, for the next five thousand tons, at the rate of annas 8 per hundred pounds, and at the rate of annas 4 per hundred pounds, for supplies exceeding ten thousand tons. Even in respect of remuneration for services, a graded scale was substituted : for the first five thousand tons, remuneration was to be paid at the rate of Re. 1 per hundred pounds, at the rate of annas 8 per hundred pounds, for the next five thousand, and annas 4 per hundred pounds, for supplies exceeding ten thousand tons. This modification in the rates became effective from September 11, 1940.

By their communication dated December 6, 1943, the Agents demanded that the remuneration, establishment and contingencies, and mandi and financing charges, be enhanced. In respect of the buying remuneration, they proposed a 25 per cent increase; in respect of establishment and contingencies, they proposed an increase of 20 per cent., and in respect of mandi and financing charges, an increase of 112 per cent. This revision of the rates was claimed on the plea that the existing rates, fixed in peace time, were "entirely superseded by the totally altered conditions obtaining in war time." To this letter, no immediate reply was given by the Government of India, and the Agents continued to supply ghee till May, 1945. On May 17, 1945, the Government of India, purporting to exercise their option under cl. 9 of the agreement, served the Agents with a notice of termination of the agreement. On May 22, 1945, the Chief Director of Purchases, on behalf of the Government of India, replied to the letter dated December 6, 1943, and informed the Agents that normally no claim for revision of rates could be entertained during the currency of the agreement and especially with retrospective effect, but a claim for ex-gratia compensation to meet any actual loss suffered by an agent, might be entertained, if the Agents established circumstances justifying such a claim. The Chief Director of Purchases called upon the Agents to submit the report of their auditors on the agency accounts, for the ghee supplied, as also a statement in detail, showing the actual expenditure incurred.

The notice dated May 17, 1945, was waived by mutual consent, and under an arrangement dated May 16, 1946, the Agents agreed to supply five thousand tons of ghee by October 31, 1946, on which date, the agreement dated May 3, 1937, was to come to an end.

By their letter dated July 1, 1946, the Agents claimed that a dispute had arisen under the contract, and appointed one Nigam to be arbitrator on their behalf to adjudicate upon the dispute, pursuant to cl. 20 of the terms of the agreement dated May 3, 1937, and called upon the Government of India to appoint their arbitrator. The Government of India, by their letter dated July 10, 1946, nominated one Rangi Lal to be arbitrator on their behalf. Before the arbitrators, the Agents made their claim under four heads :

> (1) The Agents claimed that the agreement dated June 20, 1942, was not binding upon them, and they were entitled to Rs. 23,08,372-8-0 being the difference between the buying remuneration, establishment and contingency charges due under the agreement dated May 3, 1937, and the amount actually received. The details of this claim were set out in Sch. A.
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> (2) In the event of the arbitrators holding the agreement dated June 20, 1942, was binding, a revision of the rates for establishment and contingencies, and an additional amount of Rs. 6,91,600-4-0 at such revised rates as set out in Sch. B.
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> (3) Revision of the rates fixed under the agreement dated June 20, 1942, of the mandi

charges, and an additional amount of Rs. 14,47,204-6-3, at the revised rates as set out Sch. C.

(4) Damages for wrongful termination of the agreement in the month of October, 1946, amounting to Rs. 2,41,235, as set out in Sch. D.

The arbitrators did not arrive at any agreed decision, and the dispute was referred to Lala Achru Ram who was nominated an umpire. The umpire was of the view that the agreement dated June 20, 1942, was valid, and the claim as set out in Sch. A was untenable; that the claims set out in Sch. B and Sch. C, did not arise out of the agreement, and he had no jurisdiction to adjudicate upon the same; and that as the claim set out in Sch. D, was outside the scope of the Reference, he was incompetent to give any finding on that claim.

This Award was filed in the court of the Subordinate Judge, First class, Delhi. The Agents applied to set aside the Award on the grounds that the umpire was guilty of misconduct in that he failed to give an adequate opportunity to the Agents to present and substantiate their case before him, and that in holding that the claims as described in Schedules B, C and D, either did not arise out of the agreement or were outside the scope of the Reference, the umpire erred. The learned Subordinate Judge held that the umpire was in error in leaving undetermined claims described in Sch. B and Sch. D, which were within the scope of the Reference, and that the claim described in Sch. C was properly left undecided as it was outside the scope of the Reference. He also held that the Award was vitiated on account of judicial misconduct, because the Agents were not allowed by the umpire sufficient opportunity to place their case. The learned Subordinate Judge, in that view, proceeded to set aside the Award, but he declined to supersede the Reference, and left it to the parties to "appoint other arbitrators in view of cl. 20 of the agreement, for settling the dispute."

Against the order of the Subordinate Judge, the Union of India appealed to the High Court of East Punjab. Khosla, J., who heard the appeal, confirmed the order passed by the court of first instance. The learned Judge agreed with the view of the Subordinate Judge that the umpire had been guilty of judicial misconduct. The learned Judge observed in his judgment that the claim of the Agents, as described in Schedules B and C, was not beyond the arbitration agreement. In so observing, presumably, the learned Judge committed some error. The Subordinate Judge had come to the conclusion that the claim described in Sch. C, was beyond the arbitration agreement, and no reasons were given by Khosla, J., for disagreeing with that view.

Appeal 31 of 1953 under the Letters Patent, against the judgment of Khosla J., was dismissed by a Division Bench of the High Court of East Punjab, observing that the claim detailed in Sch. B arose out of the contract, but that it was unnecessary to decide whether the claim described in Sch. C for an increase in the financing and overhead mandi charges, was properly ruled out by the umpire.

In the meantime, by letter dated August 2, 1952, the Agents called upon the Government of India to appoint their arbitrator under cl. 20 of the agreement dated May 3, 1937, for a fresh adjudication of the dispute, and intimated that they had again appointed Nigam to be their arbitrator. The Government of India informed the Agents by their letter dated August 14, 1952, that they had filed an appeal against the judgment of the Subordinate Judge, Delhi, and in the circumstances, the question of appointing an arbitrator, did not arise until the final disposal of the appeal. The Government, however, without prejudice to their rights, including the right to prosecute the appeal, again appointed Rangi Lal to be arbitrator on their behalf.

After the Appeal under the Letters Patent, was decided by the East Punjab High Court on December 16, 1953, the arbitrators entered upon the reference. On March 1, 1954, the Agents submitted their claim, contending that the supplementary agreement dated June 20, 1942, was void and binding upon them, and that, in any event, on the representations made on December 6, 1943, and from time to time thereafter, they were assured by the Chief Director of Purchases that the claim made by them would be favourably considered by the Government of India, and relying on these assurances, they continued to supply ghee in quantities demanded by the Government after incurring "heavy extra expenditure". They also claimed that they were constantly demanding an increase in the mandi and financing charges, but the Chief Director of Purchases, who was duly authorized in that behalf by the Government, gave repeated verbal assurances that their demands would be satisfied, and requested them to continue supplies for the successful prosecution of the war. Contending that the Government of India was estopped from repudiating their claim set out in Schedules B and C, in view of all the facts and circumstances stated in the petition, the Agents prayed for a declaration that the supplementary agreement dated June 20, 1942, was void and not binding upon them, and for a decree for payment of Rs. 27,48,515 within interest at the rate of 6 per cent. per annum from March 1, 1954, and, in the alternative, for a decree for Rs. 25,63,037-7-3, with interest at the rate of 6 per cent. per annum from March 1, 1954, till recovery. This claim of the Agents was resisted by the Government of India. Inter alia, it was denied that any assurances were given by the Director of Purchases or that the Agents continued to supply ghee relying upon such alleged assurances. It was asserted that the Agents continued to supply ghee without insisting upon any modification of the agreement, because they found, and it must be presumed that they found, it profitable to do so under the terms fixed under the supplementary contract dated June 20, 1942. The claims made for the additional buying remuneration, for mandi charges and for establishment and contingency charges, were denied. It was urged that, in any event, the claim for additional buying remuneration and for mandi charges and for reimbursement of establishment and contingencies, was not covered by cl. 20 of the agreement, under which the submission to arbitration was made, and the arbitrators had no jurisdiction to adjudicate upon those claims.

On the claim made by the Agents, and the denial thereof, the arbitrators incorporated the points of contest in the form of certain issues. On May 2, 1954, the arbitrators made an award rejecting the primary claim on the view that the supplementary agreement dated June 20, 1942, was for consideration and the same was valid and binding upon the Agents. On the alternative claim, they awarded, under the head of establishment and contingencies, Rs. 80,994-12-6, being the actual loss which, in their view, the Agents had suffered, and Rs. 11,27,965-11-3, in addition to the amounts received by the Agents from the Government for mandi and financing charges. The arbitrators accordingly awarded an amount of Rs. 13,03,676-12-6 with future interest from November 15, 1949, till the date of realization, and costs.

The award was filed in the court of the Commercial Subordinate Judge, Delhi, on June 2, 1954. The Government of India applied under ss. 30 and 33 of the Indian Arbitration Act, to set aside the award on the grounds that it was invalid, that it had been improperly procured, and that it was vitiated on account of judicial misconduct of the arbitrators. The Commercial Subordinate Judge held that the arbitrators had committed an error apparent on the face of the award in ordering the Union to pay to the Agents additional remuneration and financing and overhead charges, but, in his view, specific questions having been expressly referred for adjudication to the arbitrators, the award was binding upon the parties and could not be set aside on the ground of an error apparent on the face thereof. The learned Judge, accordingly, rejected the application for setting aside the award.

Against the order made by the Subordinate Judge, an appeal was preferred by the Union of India to

the High Court of East Punjab at Chandigarh. At the hearing of the appeal, counsel for the Agents sought to support the award on the plea that certain questions had been specifically referred to the arbitrators, and it was open to the arbitrators to make the award which they made, on the basis of quantum meruit. The High Court held that there was no specific reference of any questions of law to the arbitrators, and the decision of the arbitrators was not conclusive and was open to challenge, because it was vitiated by errors apparent on the face of the award. The High Court reversed the order passed by the Subordinate Judge, and set aside the award of the arbitrators, holding that there was no "legal basis for awarding any compensation" to the Agents for any loss which they might have sustained. This appeal has been filed with leave of the High Court under cl. 133(1)(a) of the Constitution.

The extent of the jurisdiction of the court to set aside an award on the ground of an error in making the award is well-defined. The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous - Champsey Bhara and Company v. Jivaraj Balloo Spinning and Weaving Company, Limited (L.R. 50 I.A. 324). If, however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of its being set aside - In the matter of an arbitration between King and Duveen and Others (L.R. (1913) 2 K.B.D. 32) and Government of Kelantan v. Duff Development Company Limited (L.R. 1923 A.C. 395).

Was the reference made by the parties to the arbitrators a specific reference, that is, a reference inviting the arbitrators to decide certain questions of law submitted to them ? If the reference is of a specific question of law, even if the award is erroneous, the decision being of arbitrators selected by the parties to adjudicate upon those questions, the award will bind the parties. In the reference originally made to the arbitrators by the letter of the Agents on July 1, 1946, and the reply of the Government dated July 10, 1946, a general reference of the dispute was made in terms of cl. 20 of the agreement. Even though the award made on that reference, was set aside by the Subordinate Judge, the arbitration was not superseded, and the reference was expressly kept alive, reserving an opportunity to the parties to appoint fresh arbitrators pursuant to the agreement, for settling the dispute; and by letters respectively dated August 2, 1952, and August 14, 1952, a general reference was again made to the arbitrators. Paragraph 14 of the letter written by the Agents on August 2, 1952, evidences an intention to serve the notice under cl. 20 of the agreement. Issues were undoubtedly raised by the arbitrators, but that was presumably to focus the attention of the parties on the points arising for adjudication. The Agents had made their claim before the arbitrators, and the claim and the jurisdiction of the arbitrators to adjudicate upon the claim, were denied. The arbitrators were by the terms of reference only authorized to adjudicate upon the disputes raised. There is no foundation for the view that a specific reference, submitting a question of law for the adjudication of the arbitrators, was made.

We agree, therefore, with the view of the High Court that the reference made, was a general reference and not a specific reference on any question of law. The award may, therefore, be set aside if it be demonstrated to be erroneous on the face of it.

The original agreement dated May 3, 1937, was modified by the supplementary agreement dated June 20, 1942, and the arbitrators have held that the modified agreement was binding upon the Agents. By the agreement as modified, a graded scale was fixed for the establishment and the

contingencies to be paid to the Agents, and also for the mandi charges and overhead expenses. The arbitrators still proceeded to award an additional amount for establishment and contingencies and an additional amount for mandi charges. By cl. 14(a), read with cl. 12(b)(2) of the agreement, the rate at which establishment and contingency charges were to be paid, was expressly stipulated, and there is no dispute that the Government of India have paid to the Agents those charges at the stipulated rate for ghee actually purchased. The award of the arbitrators shows that the amount actually received from the Government, totalled Rs. 6,04,700-9-0, whereas, according to the account maintained by the Agents, they had spent Rs. 6,77,542-0-3. Granting that the Agents had incurred this additional expenditure under the head 'establishment and contingencies', when the contract expressly stipulated for payment of charges at rates specified therein, we fail to appreciate on what ground the arbitrators could ignore the express covenants between the parties, and award to the Agents amounts which the Union of India had not agreed to pay to the Agents. The award of the arbitrators, awarding additional expenses under the head of establishment and contingencies, together with interest thereon, is on the face of it erroneous.

Before the arbitrators, a number of arhatias, who supplied ghee to the Agents, appeared and produced extracts from their books, showing the amounts actually due to them from the latter. Detailed charts, showing the total amount due under each head of expenditure to each arhatia, were produced. The arbitrators were satisfied that the statements produced, reflected a general rise in prices and cost of labour. Taking into consideration the fact that the other persons were buying ghee at rates considerably in excess of the stipulated rates, the arbitrators held that the Agents were entitled to be reimbursed to the extent of Rs. 11,27,965-11-3. But the terms of the contract, stipulating the rate at which the financing and overhead charges were to be paid under cl. 13(a) read with cl. 12(b), remained binding so long as the contract was not abandoned or altered by mutual agreement, and the arbitrators had no authority to award any amount in excess of the amount expressly stipulated to be paid. Mr. Chatterjee, on behalf of the Agents, submitted that the circumstances existing at the time when the terms of the contract were settled, were "entirely displaced" by reason of the commencement of hostilities in the Second World War, and the terms of the contract agreed upon in the light of circumstances existing in May, 1937, could not, in view of the turn of events which were never in the contemplation of the parties, remain binding upon the Agents. This argument is untrue in fact and unsupportable in law. The contract was modified on June 20, 1942, by mutual consent, and the modification was made nearly three years after the commencement of the hostilities. The Agents were fully aware of the altered circumstances at the date when the modified schedule for payment of overhead charges, contingencies and buying remuneration, was agreed upon. Again, a contract is not frustrated merely because the circumstances in which the contract was made, are altered.

Section 56 of the Indian Contract Act provides that :

> "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

Performance of the contract had not become impossible or unlawful; the contract was in fact performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at

all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (Lord Wright in Constantine's case ((1942) A.C. 154, 186) or one 'which justice demands' (Lord Sumner in Hirji Mulji v. Cheong Yue Steamship Co. Ltd. ((1926) A.C. 497, 510), this result is arrived at by putting a just construction upon the contract in accordance with an 'implication ..... from the presumed common intention of the parties' - speech of Lord Simon in British Movietonews Ltd. v. London and District Cinemas Ltd. (L.R. 1952 A.C. 166 at pp. 185 & 186).

There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of contract. Mr. Chatterjee strenuously contended that in England, a rule has in recent years been evolved which did not attach to contracts the same sanctity which did not attach to contracts the same sanctity which the earlier decisions had attached, and in support of his contention, he relied upon the observations made in British Movietonews Ld. v. London and District Cinemas Ld. ((1951) 1 K.B.D. 190, 201) In that case, Denning, L.J., is reported to have observed :

> "..... no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable."

But the observations made by Denning, L.J., upon which reliance has been placed, proceeded substantially upon misapprehension of what was decided in Parkinson & Co. Ld. v. Commissioners of Works ((1949) 2 K.B.D. 632), on which the learned Lord Justice placed considerable reliance. The view taken by him, was negatived in appeal to the House of Lords in the British Movietonew's case - (1952) A.C. 166 - already referred to. In India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into, will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Parkinson and Co. Ld. v. Commissioners of Works ((1949) 2 K.P.D. 632) was a case in which on the true interpretation of a contract, it was held, though it was not so expressly provided, that the profits of a private contractor, who had entered into a contract with the Commissioners of Works to make certain building constructions and such other additional constructions as may be demanded by the latter, were restricted to a fixed amount only if the additional quantity of work did not substantially exceed in value a specified sum. The Court in that case held that a term must be implied in the contract that the Commissioners should not be entitled to require work materially in excess of the

specified sum. In that case, the Court did not proceed upon any such general principle as was assumed by Denning, L.J., in the British Movietonews Ld. v. London and District Cinemas Ld. ((1951) 1 K.B.D. 190, 201).

We are, therefore, unable to agree with the contention of Mr. Chatterjee that the arbitrators were justified in ignoring the express terms of the contract prescribing remuneration payable to the Agents, and in proceeding upon the basis of quantum meruit.

Relying upon s. 222 of the Indian Contract Act, by which duty to indemnify the agent against the consequences of all lawful acts done in exercise of the authority conferred, is imposed upon the employer, the arbitrators could not award compensation to the agents in excess of the expressly stipulated consideration. The claim made by the Agents was not for indemnity for consequences of acts lawfully done by them on behalf of the Government of India; it was a claim for charges incurred by them in excess of those stipulated. Such a claim was not a claim for indemnity, but a claim for enhancement of the rate of the agreed consideration. Assuming that the Agents relied upon assurances alleged to be given by the Director in-charge of Purchases, in the absence of an express covenant modifying the contract which governed the relations of the Agents with the Government of India, vague assurances could not modify the contract. Ghee having been supplied by the Agents under the terms of the contract, the right of the Agents was to receive remuneration under the terms of that contract. It is difficult to appreciate the argument advanced by Mr. Chatterjee that the Agents were entitled to claim remuneration at rates substantially different from the terms stipulated, on the basis of quantum meruit. Compensation quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable. It is, therefore, unnecessary to consider the argument advanced by. Mr. Chatterjee that a claim for compensation on the basis of quantum meruit, is one which arises out of the agreement within the meaning of cl. 20. Granting that a claim for compensation on the basis of quantum meruit, may be adjudicated by the arbitrators in a reference made under cl. 20 of the agreement, in the circumstances of the case before us, compensation on that basis could not be claimed.

The plea that there was a bar of res judicata by reason of the decision in the Letters Patent Appeal No. 31 of 1953, has in our judgment, no force. The Subordinate Judge set aside the award on the ground that there had been judicial misconduct committed by the umpire and also on the view that the claims made, as described in Schedules B and D, were not outside the competence of the arbitrators. The High Court in appeal under the Letters Patent, did confirm the order, setting aside the award; but there was no binding decision between the parties that the claim described in Sch. B, that is, the claim for establishment and contingency charges, was within the competence of the arbitrators in reference under cl. 20. It may be observed that according to the High Court of East Punjab in the Appeal No. 31 of 1953, under the Letters Patent, it was not necessary to express any opinion whether the claim in Sch. C was within the competence of the arbitrators, and the claims described in Sch. D does not appear to have been agitated in the second arbitration proceeding.

We, accordingly, agree with the view of the High Court that the Award of the arbitrators was liable to be set aside because of an error apparent on the face of the award. In this view, the appeal fails and is dismissed with costs.

Appeal dismissed.

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