

Ranendra Narayan Sinha and Others

Vs

State of West Bengal

Civil Appeal No 1649 of 1966

(J. C. Shah, A. N. Grover JJ)

12.10.1970

JUDGMENT

SHAH, J. -

1. On December 17, 1945, Raja Bhupendra Narayan Sinha commenced an action in the Court of the Subordinate Judge, Murshidabad, against the Province of Bengal, for an order declaring that he "is entitled to abatement out of the revenue payable by him for Pargana Goas Tauzi No. 523 of the Murshidabad Collectorate on account of resumption of 11 ferries lying within Huda Alaipur to the extent of Rs. 4,800/- per annum", and for a decree "refunding excess revenue realized by the Province of Bengal". Raja Bhupendra Narayan Sinha died during the pendency of the suit and his legal representative Ranendra Narayan Sinha prosecuted the suit. The suit was resisted after the India Independence Act by the State of West Bengal. The Subordinate Judge decreed the suit. He awarded to the plaintiff a decrees for abatement of revenue payable by the plaintiff in respect of the estate "bearing separate account No. 523-3 in consequence of resumption by the Government of 11 ferries referred to in the plaint to the extent of Rs. 4,800/- per annum", and a decree for Rs. 14,400/- being the amount of revenue recovered during three years immediately preceding the institution of the suit. In appeal the High Court of Calcutta reversed the decree and dismissed the plaintiff's suit. The plaintiff has appealed to this Court with certificate granted by the High Court.

2. There is not much dispute about the facts which gave rise to the claim. By Regulation 1 of 1793, called "The Bengal Permanent Settlement Regulation, 1793", the Governor-General in Council gave legislative recognition to the Proclamation previously addressed to the Zamindars, independent Talukdars and other actual proprietors of the land paying revenue to Government in the Province of Bengal. Thereby, inter alia, the Jamma assessed upon the lands under the permanent settlement was to be continued after the expiry of the period of the current decennial settlement and to remain unalterable. The amount payable to the Government for the Pargana Goas was determined at the time of permanent settlement at (Sicca) Rs. 99,160/11/11, 3/4 Gondas. The Pargana consisted of 12 Hudads or groups of Mouzas, one of which was Huda Alaipur. Appertaining to Huda Alaipur are 11 ferries. The revenue of Alaipur estate was fixed at (Sicca) Rs. 10,052/6/5 including (Sicca) Rs. 4,500/- as the revenue payable in respect of the ferries. By Act 17 of 1835, the Sicca rupees of the Company in terms of which the revenue was assessed were converted into New Company's rupees, and in view of the change in the coinage for every 15 Sicca rupees, 16 New Company's rupees were payable. The revenue assessed in respect of the 11 ferries was accordingly fixed at Company Rs. 4,800/-. The Zamindars of Pargana Goas were before and after the permanent settlement in possession of the ferries and were receiving income by letting out the right to transport passengers and goods and were levying tolls on the ferries. Between the years 1857 and 1860 the ferries were, in exercise of the power conferred by Regulation VI of 1819, declared public ferries by the

Government of Bengal, and the then Zamindar was paid as compensation Rs. 53,923/4/6 being ten times the income received from the ferries in the year next after resumption of the ferries by the Government. The Zamindar claimed abatement of revenue in respect of the ferries resumed by the Government, but no reply was given thereto, and according to the plaintiff under threat of coercive action the plaintiff's predecessor-in-interest the Court of Wards which was in management for a long time since the year 1860, and Raja Bhupendra Narayan Sinha were made to pay (Sicca) Rs. 4,500/- per annum as revenue in respect of the ferries even after the ferry rights had ceased to belong to the Zamindar.

3. The plaintiff filed the suit in 1945 in the Court of the Subordinate Judge, Murshidabad, the suit out of which this appeal arises. The suit was contested by the State of West Bengal on the pleas, inter alia, that the ferries resumed by the Government during the years 1857 to 1860 were not identical with the ferries described in the Rokhabandi papers of 1206 B.S. on which the plaintiff relied, that in any event the ferries appertaining to Huda Alaipur did not form part of the assets of the estate bearing Tauzi No. 523 of the Murshidabad Collectorate and the assets of the ferries were never taken into account in assessing the revenue of the estate, that in any case the liability to pay revenue of the ferries had not been separately assessed at (Sicca) Rs. 4,500/-, that the suit was barred by the law of limitation and estoppel and that the Court had no jurisdiction to try the suit. In the opinion of the Trial Court the Civil Court had jurisdiction to try the suit, that the suit was not barred by the law of limitation or by estoppel, that the ferries described in the Rokhabandi papers of Huda Alaipur were identical with the ferries resumed by the Government during 1857 to 1860, that the assets of the ferries were included in Huda Alaipur which was one of the 12 Hudas included in Tauzi No. 523 of the Murshidabad Collectorate, that the revenue of the ferries had been separately assessed at (Sicca) Rs. 4,500/- and that the plaintiff was entitled to abatement of revenue to the extent of (Sicca) Rs. 4,500/-, i.e. Company Rs. 4,800/-. The learned Judge accordingly decreed the plaintiff's suit.

4. The State of West Bengal appealed against that decree to the High Court. During the pendency of the appeal the rights of the Zamindar were extinguished. The dispute in the High Court was therefore restricted to the right of the plaintiff to recover the areas of revenue decreed and a declaration of the right to obtain refund of excess revenue paid by the plaintiff between date of the institution of the suit and the extinction of the interest of the Zamindar. Before the High Court it was urged that the income of the ferries did not form part of the assets of Huda Alaipur at the time of the permanent settlement; that the ferries were not separately assessed to revenue at (Sicca) Rs. 4,500/-; that the ferries resumed by the Government between 1857 and 1860 were not identical with the ferries mentioned in the Rokhabandi papers; that the suit filed by Raja Bhupendra Narayan Sinha was not maintainable; that in determining compensation for the ferries, the Government had included the value of abatement of the revenue; and that the claim for declaration of abatement was barred by the law of limitation. The High Court decided the first three contentions in favour of the plaintiff and the remaining in favour of the State. The High Court held that the compensation amounting to Rs. 53,923-4-6 which was ten times the gross collection from the 11 ferries in the year after resumption included the value of the right to abatement claim and that in any event the claim for a declaration of abatement of revenue was barred by the law of limitation. On the question of the maintainability of the suit the two learned Judges differed. S. K. Sen, J., held that the Civil Court had no jurisdiction to entertain the suit : Amaresh Roy, J., reached a contrary conclusion. But consequent upon the findings on the other two issues the High Court reversed the decrees passed by the Trial Court and dismissed the suit.

5. "Ferry" means "the right to keep a boat for ferrying passengers, to charge tolls for so doing, and

to prevent other persons from setting up another ferry so near and in such a state of facts as to diminish the custom, is a franchise. It can be created only by grant from the Crown, by prescription or by statute" : Dictionary of English Law by Earl Jowitt. In India the right to ferry is in the nature of a monopoly which entitles a ferryman to carry exclusively and to collect tolls for carriage of passengers, animals or goods carried over the line of the ferry. The Calcutta high Court in Nityabhari Roy and Others v. Dunne and Others' (ILR 18 Cal 652) elaborately examined the origin the right to ferry in Bengal. The Court observed :

"One of the first rules which the Government promulgated in 1772 was to suppress the Sayer duties levied in Bengal. On the 11th June, 1790 a Regulation was promulgated for the guidance of the Board of Revenue with reference to Sayer or internal duties. That Regulation was principally directed against such Sayer duties as were levied in Ghats or Bazars, and the Government, although it expressly declared in it that the imposition and collection of internal duties of any kind were exclusively its own privilege and could not be exercised by any subject without express sanction, yet, in the interest of the landlords, it adjudged it advisable to interfere as little as possible with the imposition they levied. This, therefore, is an express declaration of Government that the Dewani had never recognized in private individuals the right to levy any tolls of the denomination of Sayer, and this is repeated in the preamble to Regulation XXVII of 1793. When the Permanent Decennial Settlement was made, the revenue of such Zamindari Ghats as were allowed was taken as an item of the assessment and granted to the Zamindar. In Regulation XIX of 1816, Section 9, there was distinct admission of this practice. It enacted that if the profits derived from any resumed ferry may appear to have been included in the permanent assessment of the estate to which it has been heretofore annexed, the Board, or Commissioner, under whose orders the inquiry into the nature of the ferry was conducted, must report the case for the orders of the Governor-General in Council. x x x x

After the time of the Permanent Settlement the same ferries were established by enactment. The first Regulation is XVIII of 1806, which, dealing with ferries in the same category as tolls on boats passing through canals, enacted that ferries should be established at places convenient for the public within the 24-Pargunnahs, and fixed the rates payable to the ferryman. x x x x In 1816 the Government considered it expedient that all ferries should be places under the complete control of the Collectors of Land Revenue. Every owner of a ferry was licensed, and any other person playing a boat for hire was liable to be convicted and fined x x x, and the boat was to be confiscated. This Regulation continued till 1819, when it was repealed by Regulation VI of that year, and the ferries were then placed under the superintendence of the Magistrate. All important ferries were declared public, and these the Magistrate had the power to resume. Other ferries of an unimportant kind were not interfered with further than was necessary for the maintenance of the police and the safety of passengers and property."

Two matters appear clear on the findings of the Trial Court and confirmed by the High Court : (1) that the revenue in respect of the 11 ferries was separately assessed; and (2) that the right to ferry was recognised as a right to property for resumption of which the Government of the day was liable to pay compensation. The ferries were appurtenant to the lands of the Zamindar each ferry being a connecting link between two highways on the lands of the plaintiff's predecessors. The right to the ferries was resumed by the Government in exercise of the power conferred by Regulation VI of

1819 and the right of the Zamindar to receive compensation for loss of the ferry right was conceded. But on the resumption of the ferries no abatement of revenue payable in respect of the ferries was not granted. The result was somewhat anomalous. Whereas the ferries in respect of which the revenue was separately payable were taken over by the Government by compulsory acquisition or by resumption, the Zamindar still remained liable to pay the revenue assessed thereon. To meet this argument, Counsel for the State of West Bengal urged that within the amount of compensation determine to be payable to the Zamindar consequent upon resumption of the ferries, was included the capitalized value of the abatement of revenue payable for the ferries. Counsel said that the Government paid to the Zamindar for resumption of the ferries Rs. 53,923-4-6 which was ninety-one times the net profit made by the Zamindar from the 11 ferries annually. He contended on that hypothesis that compensation computed on the basis of ten times the gross earned by the Zamindar, could only have been intended to be paid to compensate the Zamindar for the loss of the right to the ferries and as well as the capitalized value of the revenue attributable to the ferries. The argument that a larger compensation was paid and on that account the plaintiff was not entitled to abatement of revenue appealed to the High Court. But, in our judgment, the record of the case does not support the conclusion reached by the High Court.

6. The correspondence in relation to resumption of the ferries may be summarised. Exhibit C, dated June 9, 1954, is a petition filed by Rani Phul Kumari who was then the owner of Pargana Goas. It is recited in the petition that the ferries had ceased to be public ferries when they were restored to the applicant's ancestors in the year 1819 under the orders of the Government General in Council and, the ferries had since been continued in her occupation and possession. But by an order of the Magistrate of Rajshahya which was confirmed by the Superintendent of Police the rate or Neerick of the ferries had been considerably lowered and the result of the interference was that the ferries instead of being a source of profit were onerous and a source of expense and trouble. The applicant requested that the complaint be investigated and if the complaint be found true, the applicant may be relieved of payment of the Suddur Jumma i.e. revenue. In a letter, dated August 7, 1954, to the Secretary to the Board of Revenue, the Commissioner of Nuddea Division, stated that the statements made by Rani Phul Kumari were substantially correct, but the revenue authorities had no power of interference, and that the report of the Collector of Murshidabad was that the petitioner could not claim any compensation under Regulation XIX of 1816 since the provisions of that enactment had not been enforced against her and she was not deprived of the ferry rights.

7. On March 15, 1855 the revenue authorities prepared a list of ferries in District Murshidabad to be declared public. In a letter, dated September 16, 1857 the Magistrate Rajshahya informed the Commissioner of Rajshahya that the ferries in Alaipur belonging to the plaintiff's predecessors did not form part of the estate at the time of decennial settlement and that out of (Sicca) Rs. 4,500/-, Rs. 1,000/- may fairly represent the portion of Koodalghatee (one of the eleven ferries). It appears that it was then recommended that only the Koodalghatee alone may be resumed and the revenue attributable thereto was estimated at Rs. 1,000/-.

8. By letter, dated November 25, 1857 of the Government of Bengal the Commissioner of Rajshahya was asked to intimate to the Zamindar that the Lieutenant-Governor was willing to allow abatement of the Jumma of the estate in which the ferry was situated to the extent of Rs. 1,000/- as compensation for loss of the ferry.

9. In letter, dated January 8, 1858 from the Government of Bengal it was recited that in regard to the compensation for resumption of the ferries, the Government desired that as usual it may be fixed at 10 years' purchase of profit during the first year after resumption, unless any other scheme not more

disadvantageous to Government was proposed or agreed to by the owners.

10. By letter, dated April 4, 1860 from the Government of Bengal, the Commissioner of Rajshahya Division was informed that certain ferries which were resumed by the Government orders on the ground that those ferries were the only profitable ones out of the eleven which were situated upon the estate, the amount of Jumma of Rs. 1,000/- which had been remitted was disproportionately small when compared with the profits derived from the resumed and unresumed ferries, and that the Government had "come to the conclusion that the most advisable course will be to declare the whole of the eleven ferries public under the provisions of Regulation VI of 1819 and to compensate the proprietor in the usual manner with ten years' purchase of actual collections during the first year of the resumption."

11. By this letter, dated September 20, 1860, to the Government of Bengal the Commissioner of Rajshahya Division stated that total compensation payable to the Zamindar for the 11 ferries aggregated to Rs. 53,923-4-6 according to the principles determined by the Government, and that the Zamindar of Pargana Goas had petitioned the Collector of Murshidabad on September 3, 1860 that she should be allowed the annual remission of revenue to the extent of (Sicca) Rs. 4,500/- as an equivalent for all the ferries and soliciting that the matter may be adjusted as soon as possible.

12. Finally by letter, dated November 3, 1860, the Government sanctioned payment of Rs. 53,923-4-6 as compensation for the eleven ferries of Pargana Goas, and that the arrangement cancelled the offer of a remission of Jumma to the extent of Rs. 1,000/- per annum made in the letter dated November 25, 1857, for the Koodalghatee Ferry.

13. It is clear that originally it was proposed to resume only one or some but not all the eleven ferries, and abate the revenue by Rs. 1,000/-. Later it was decided to resume all the ferries in Huda Alaipur and to pay compensation at ten times the amount of profit determined "on the basis of one year's working of the ferries" after they were taken over.

14. It was urged, however, that the Zamindar was receiving out of the 11 ferries a gross income of only Rs. 5,392/- and as they were liable to pay Rs. 4,800/- being the revenue payable to the Government, only the balance of Rs. 592/- remained on hand with Zamindar. Unless the abatement of revenue was taken into account the Zamindar, counsel for the State urged, plaintiff could not have been given as compensation nearly a hundred times the amount of the net annual profit from the ferries. But the argument proceeds upon several assumptions which are not supported by evidence. There is no evidence that the plaintiff's predecessors were making only Rs. 5,392/ grows out of the ferries. It cannot be assumed that because the Government collected from the 11 ferries Rs. 5,392/- in the first year after the ferries were taken over and the Zamindar was liable to pay Rs. 4,800/- that the annual profit of the Zamindar from the ferries was Rs. 592/- only.

15. There is nothing in the correspondence to indicate that any part of the compensation was to include the capitalised value for abatement of revenue. The ferries were regarded as assets belonging to the Zamindari and were separately assessed to revenue. It was but just that the revenue assessed upon the ferries should, to the extent of resumption or acquisition of ferries, be abated. In the absence of any evidence to show that the Government took into account the value of abatement of revenue and the Zamindar agreed to receive compensation, agreeing still to pay the revenue in respect of the ferries resumed, the conclusion inevitably follows that on the resumption or acquisition of the ferries the Zamindar ceased to be liable to pay the annual revenue assessed upon the ferries.

16. There is no evidence of a written claim made by the Zamindar for abatement of revenue since 1860, and we are unable to infer from that circumstance anything adverse to the plaintiff. For many years, the Pargana was in the possessions of the Court of Wards and it is the case of the plaintiff that from time to time requests were made for abatement of revenue, but no relief was given and the revenue including the revenue from the ferries was recovered from the Zamindar under threat of coercive process. No inference from the delay in making claim for abatement of revenue arises.

17. The High Court was of the view that the claim made by the plaintiff was barred by the law of limitation. The plaintiff was claiming in this suit the amount of revenue recovered from him in excess of the amount lawfully due from him and he claimed a declaration that the revenue stood abated. Right to collect revenue which is not due cannot be acquired by prescription, and if the plaintiff had been compelled to pay sums of money which he was not liable to pay the claim could properly be made within three years from the date on which the payment was made. The Trial Court was, in its judgment, right in holding that an amount of Rs. 14,440/ was properly recoverable. The Trial Court was also right in declaring that there was complete extinction of liability to pay revenue in respect of the 11 ferries. To the claim for declaration of the right to abatement there is, in our judgment, no bar of limitation. Each demand for recovery by the Government confers a fresh cause of action. In any event, there is nothing on the record which suggests that the claim for abatement was refused, before the suit.

18. It was urged also that the suit as filed in the Civil Court for abatement of revenue was not maintainable. This plea was not raised in the Trial Court. It was submitted in the Trial Court that some of the ferries in question on partition of India fell within the District of Rajshahya in East Pakistan, and on that account the Court has no jurisdiction to try the suit. It is common ground that the State of West Bengal was realising the entire revenue from the plaintiff after the partition of India into the Dominion of India and the Dominion of Pakistan in respect of Account No. 523-3 of the Murshidabad Collectorate, notwithstanding that some ferries formed part of territory of East Pakistan. In the view of the Trial Court the State of West Bengal adopted inconsistent defence. While realising the revenue the State claimed that the entire revenue-paying estate was within its jurisdiction, but when the plaintiff claimed abatement of revenue the State pleaded that because some portion of the property in respect of which abatement was claimed had fallen within the Dominion of Pakistan, the Court had no jurisdiction. It was not urged before the Trial Court that it was incompetent to entertain the suit for abatement of revenue. Before the High Court the two learned Judges who heard the appeal differed. Amaresh Roy, J., observed that the State of West Bengal had never raised the plea that the Civil Court was incompetent to try the suit. The learned Judge observed that even after the attention of the Government Pleader for the State was invited thereto he declined to adopt that plea and it was not open to the Court of its own to take up the contention and to non-suit the plaintiff. S. K. Sen, J., was of the view that the Civil Court was not competent to entertain the suit. Apparently the plea was never raised in the written statement and was not argued even after invitation by one of the Judges in the High Court invited counsel to argue it. It is undisputed that there is no express bar under any of the statutes to the maintainability of the present suit, nor is our attention invited to any provisions of law or circumstances which may justify an inference to that effect.

19. In defiance to the view expressed by S. K. Sen, J., we may briefly refer to the statutory and administrative orders on which reliance was placed by the Counsel for the State to support the view expressed by the learned Judges. Section 9 of Regulation XIX of 1816 provided :

"In the event of its appearing that the profits derived from any resumed ferry may

have been included in the permanent settlement of the estate to which it has heretofore been annexed, the Board or Commissioner, under whose orders the inquiry may be conducted, shall report the circumstances, with an opinion on the merits of the claim, for the consideration and orders of the Governor-General in Council; and the court of judicature shall not take cognizance of any claim to deductions or compensations on account of the tolls levied at any ferry or Ghaut."

20. This section does not exclude the jurisdiction of the Civil Court to entertain a claim for abatement of revenue separately assessed in respect of a ferry which has been resumed or has been compulsorily acquired. Regulation XIX of 1816 was repealed by Regulation VI of 1819 by which the management of the ferries was transferred from the Collector to the Magistrate. Clause III of Regulation VI of 1819, is so far as it is relevant, provided :

"First. No ferries shall be hereafter considered public ferries, except such as may be situated at or near the Sadr Stations of the several Magistrates or Joint Magistrates, or such as may intersect the chief military routes or other much frequented roads, or such as from special consideration it may appear advisable to place under the more immediate management of the Magistrates and Joint Magistrates.

Second. The Government reserves to itself the power of determining from time to time what ferries shall under the preceding rule be deemed public ferries and as such shall be subject to the immediate control of the Magistrates and Joint Magistrates. x x

Third. It will be the duty of the several Magistrates and Joint Magistrates to prepare lists of the ferries which in their judgment should under the foregoing rules be considered to be public ferries, and transmit them as soon as prepared through the Superintendents of Police for the information and orders of Government."

Clause IV dealt with the power of appointing proper persons to the charge of the public ferries, for the purpose of regulating the number and description of boats to be maintained for preventing exactions and generally for promoting the efficiency of the Police and the safety and convenience of the community. Clause VI declared that the exclusive right to ply public ferries shall belong to Government and no person shall be allowed to employ a ferry boat plying for hire without the previous sanction of the Magistrate. The other clauses dealt with the procedure and powers of the Magistrate with regard to public ferries. This Regulation dealt with the power of the Government of Bengal to declare a particular ferry to be a public ferry and to manage it. There is nothing in the Regulation which excludes the jurisdiction of the Civil Court in the matter of revenue qua a private ferry resumed or acquired.

21. Regulation VI of 1819 was repealed by Act I of 1866. By Section 2 of that Act I of 1866 it was provided that every ferry which has been or may be declared to be a public ferry under the provisions of Regulation VI of 1819 shall belong exclusively to the Government. By Section 4 if was provided that all claims for compensation which may be preferred by any person or persons for loss which may be sustained by them in consequence of any ferry having been declared public as aforesaid shall be inquired into by such Magistrate, who shall award compensation to any such person or persons who may appear justly entitled thereto. But Act I of 1866 evidently has no application because the ferries of plaintiff's predecessor were resumed by the Government between the years 1857 and 1860. In any there is nothing to show in any of the provisions to which our

attention was invited that a suit for abatement of revenue for resumption of the ferries is excluded from the jurisdiction of the Civil Court.

22. In *Secretary of State for India in Council v. Maharajadhiraja Kameshwar Singh Bahadur* (ILR 15 Pat 246) on which Counsel for the State relied it was held by the High Court of Patna that the jurisdiction of the Civil Court was barred by implication in respect of a suit filed on the ground that compensation awarded was inadequate and was based on wrong principle. That case has, in our judgment, no bearing in the present case. The method for determining the compensation is provided by Act I of 1885 and the Civil Court's jurisdiction to determine compensation may protanto be deemed excluded.

23. Reliance was also placed upon Rule 159 in the Bengal Tauzi Manual, 1940, which contains rules for the collection of and accounting for land revenue and cesses in Bengal. Rule 159, in so far as it is relevant, provided :

"The power of sanctioning abatement of the revenue or rent demand of an estate during the currency of a settlement will be exercised by Collectors, Commissioners, and the Board of Revenue as shown below :-

#X X X X"##

The diverse clauses of Rule 159 vested power in different classes of officers to sanction abatement of rent or revenue. For instance, the Collector had power to sanction abatement of rent or revenue up to a total of Rs. 1,500/- in a single year in all estates managed direct by the Provincial Government; the Commissioner had power to sanction abatement of revenue up to Rs. 5,000/-. Again the Collector had power to sanction abatement of revenue in temporarily-settled estates bearing a revenue not exceeding Rs. 500/- It was also stated that the Collector had power to sanction in all estates abatements in consequence of the acquisition of land under the Land Acquisition Act, I of 1894, and the Board of Revenue alone had power to sanction abatements due to diluvion, ascertained after a survey conducted under Act IX of 1847. The Board alone had power to sanction abatement of rent or revenue in order cases not specified in Rule 159. The Bengal Tauzi Manual, 1940 does not disclose the statutory authority under which it was published, and the sanction behind the rules. The Board of Revenue from time to time published instructions relating to the administration of revenue laws. The rules and instructions set out in the Manual are apparently not statutory. Even assuming that they are statutory there is nothing to indicate that they exclude the jurisdiction of the Civil Court in respect of matters relating to abatement of revenue in the civil suits, and as rightly conceded by Counsel for the State of West Bengal, there is no evidence that any rule like Rule 159 was in operation at the time when the ferries belonging to the Zamindar were resumed or acquired by the Government of the Province of Bengal.

24. S. K. Sen, J., was, in out judgment, in error in holding that the Civil Court had no jurisdiction to entertain the claim for abatement of revenue and for a declaration that the plaintiff was not liable to pay revenue in respect of the ferries which were resumed by the Government.

25. The appeal is allowed. The order passed by the High Court is set aside and the order passed by the Trial Court is restored with costs in this Court and in the High Court.

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