

Rabindra Chamria and others

Vs

The Registrar of Companies, West Bengal and others etc.etc.

Civil Appeals Nos. 3012, 3117, 3118 and 3738 of 1990 with Special Leave Petn. (civil) No. 8081 of 1990

(CJI Ranganath Misra, S. Mohan, Kuldeep Singh JJ)

19.11.1991

JUDGEMENT

S. MOHAN,J.:-

1. All these matters can be dealt with under a common judgment since the question which arises for consideration is the scope of Section 633 of the Companies Act, 1956.

2. It is enough if we refer to the facts in Civil Appeal No. 3012 of 1990. The short facts are as follows:

Eastern Manufacturing Company Ltd. "(The Company" in short) is the owner of a jute mill in West Bengal. The appellants were appointed Directors between 10-4-1981 and 15-6-1984. There was a lockout in the Jute Mill On 2-6-1982. By a notification dated 26-10-1983, Government of West Bengal declared the said jute mill as a relief under taking under the provisions of West Bengal Relief Undertakings (Special Provisions) Act, 1972. However, on 24-11-1983, the lock'out was lifted. Thereafter the mill resumed its manufacturing operation between 16-1-1984 and 8.4.1984. There was a strike in the Jute Industry throughout West Bengal. Between 7-3-1985 and 3-8-1985 there was a lock out due to labour unrest. As a result of all these the company defaulted in the payment of the provident fund dues. On 28-1-1986, a petition was moved on behalf of the appellants under Section 633 of the Companies Act, 1956 (hereinafter referred to as 'the Act) for being relieved of liability for delayed as well as nonpayment of the provident fund dues and other ancillary dues. On 21-8-1986 a consent order was passed by the learned single Judge allowing the outstanding provident fund dues to be paid in monthly instalments of Rupees 50,000/-commencing from April, 1986, until the entire liability is paid off.

3. Since this course was accepted by the provident fund authorities it was not considered necessary to serve summons on the Registrar of Companies because what was sought to be recovered were the dues under the Provident Fund Act. It was further ordered concerning Prayer-B that an injunction shall issue restraining the respondents from initiating any criminal proceedings against the appellants or any of them for nonpayment or delayed payment of the provident fund.

4. Aggrieved by this order, the first respondent before us namely, the Regional Provident Fund Commissioner filed appeal No. 286 of 1987. The division Bench which heard the matter rendered its impugned judgment on 13-3-1990. The sole point which came up for determination was, whether the learned single Judge was right in granting relief under Section 633 of the Act that in respect of offences committed under the Employees' Provident Fund and Miscellaneous Provisions Act of 1952

(hereinafter referred to as "The Provident Fund Act").

5. It was argued on behalf of the appellants that the relief under Section 633 of the Act could be granted only in respect of offences committed under the Companies Act and not in respect of offences under any other law. It is also submitted that in respect of violations of the provisions of the Act, it is the Registrar of Companies or any one authorised on his behalf who could initiate criminal cases. On the contrary, in respect of offences committed under the Provident Fund Act the appropriate authority to initiate such action would be the Regional Provident Fund Commissioner. On an elaborate consideration with reference to decided cases, it was held that any proceeding referred to in Section 633 of the Act would mean only under the provisions of the Act.

6. Reference was also made to Sec. 14A of the Provident Fund Act inserted by Amending Act 37 of 1953 and it was concluded:

"If the contention that Section 633 applies in respect of liabilities arising also under the provisions of any Act other than the said Act, is accepted, then and in that case a peculiar situation will arise, a person who is otherwise liable in view of the provisions of Section 14A would be entitled to relief under Section 633 if he is employed by or connected with a company which is covered both by Provident Fund Act and the Companies Act but a person shall not be so entitled to such relief if he is not an employee of a body corporate covered by the Companies Act though he is an employee of a company within the meaning of explanation to Section 14-A. Besides if that contention that all proceedings would include proceedings under other Act also all the statutory provisions made for the welfare of weaker sections of the community stand modified automatically to the extent specified in Section 633 for all time to come, even for all future legislation. This would frustrate the object of welfare legislations."

7. Accordingly it was held that Sec.633 of the Act has no application in respect of any liability under any other Act. In the result, the order of the learned single Judge was set aside and the application under Section 633 was dismissed. We do not think worthwhile to refer to certain preliminary objections raised by the Division Bench in relation to maintainability as that is not argued before us. It is against this judgment that the appeal by special leave has been preferred.

8. An application was moved before the Company Court claiming relief under Section 633 and the same was dismissed applying judgment of Civil Appeal No. 286 of 1987. Similar application was dismissed by the learned single Judge by order dated 24-4-1988 in Civil Appeals Nos. 3117 & 3118 of 1990. In Civil Appeal No. 3738 of 1990 Company Petition No. 312 of 1989 for relief under Section 633 too was dismissed.

9. In Special Leave Petition No. 8081 of 1990 also the Company Petition for similar relief has been dismissed.

10. Mr. Venugopal, learned counsel for the appellants urged that Section 633 is very wide in its amplitude and there is no justification to restrict its application to only proceedings arising under the Act. He draws our attention to Sections 420 & 423 and submits that when proceedings are taken in relation to breach of trust, for instance, which is an offence under Penal Code, against an officer of a company it would be open to him to go before the concerned Magistrate and plead a defence that he has acted honestly and reasonably. In such a case should the Court come to a conclusion he ought

fairly to be excused, the Court will relieve him.

11. While this is the submission as far as sub-section (1) is concerned, under subsection (2) it is maintained to be an anticipatory action. The High Court also exercises a similar power as that Court is exercising power under sub-section (1). Otherwise if it is restricted only in respect of any liability under the Companies Act then the protection extended under Section 633 is lost.

12. Under the Companies Act of 1913 the corresponding provision was Section 281. Though certain categories of persons were catalogued under sub-section (3) of the said section, presently Section 633 has employed the words "an officer of a company", the object is to see the Directors or a Director who rarely takes part in the affairs of the Company are not unduly harassed for offences which may arise under other acts, of which these Directors may not have any knowledge at all.

13. He also draws our attention to Section 32 of the Industrial Disputes Act, which talks of offences by Companies under the said Act. That is a sweeping provision where the burden is upon the person concerned to prove that the offences were committed without his knowledge or consent and but for that proof, the statute deems him to be guilty. If under Section 633 the protection is not so afforded against such a provision like Section 32 of the Industrial Disputes Act the entire purpose of Section 633 is rendered nugatory. The result of the Division Bench judgment of the Calcutta High Court referred to in the impugned judgment will be that these directors (the appellants) are exposed to prosecution; certainly that could not have been the intention of the law maker.

14. Mr. Kapil Sibal, learned counsel appearing for the appellants in Civil Appeal No. 3117 refers to Section 2(11) of the Act and submits that the definition of "Court" contemplates with respect to any matter relating to a company. The Court having respective jurisdiction as provided under Section 2(11) is with respect to any offence under the Act, the Court of a Magistrate of the First Class or, as the case may be, a Presidency Magistrate, having jurisdiction to try such offence.

15. This section will show that where the appellants are not working directors, they cannot be subject to prosecution. That is where Section 633 steps in and affords protection, even if it is a liability arising under any other Act, for instance, like delayed payment or non-payment of provident fund. In other respects, he adopts the arguments of Mr. Venugopal.

16. Learned counsel for the Regional Provident Fund Commissioner would urge that any proceeding occurring under Section 633 cannot relate to a proceeding other than one arising out of Companies Act. If the arguments of the appellants are accepted it would amount to treating Section 633 as a panacea for all the ills for offences committed in respect of various other enactments. It might even include not only the existing enactments but enactments which are yet to come. Insofar as each one of the other Acts not only defines penalty but also lays down the penalty therefore merely because the appellants are officers of the company it cannot mean Section 633 could be availed of. This provision is in pari materia with Section 448 of the English Companies Act, 1948. However, as on today Companies Act of 1985 has incorporated a similar provision under Section 727. In a leading case reported in (1981) 2 All ELR 697, (Customs and Excise Commissioner v. Hedon Alpha Ltd.), the scope of Section 448 of the 1948 Act came upto consideration. It was held that although section 448(1) of the 1948 Act was expressed in wide terms, in its true construction the only proceeding for which relief under Section 448 could be claimed were proceedings against a director by, on behalf of or for the benefit of his company for the breach of his duty to the company as a director or penal proceedings against a director for breach of the 1948 Act. It was this line of reasoning which found favour with the Division Bench of the Calcutta High Court which view is commanded for

acceptance by this Court. Otherwise the consequences will be disastrous. The penal provision of all other Acts would be rendered ineffective by the interpretation pressed for an acceptance. The further submission of learned counsel is if one looks at Section 14 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 that lays down the penalty for the offences of companies and is dealt with in Section.14-A. The explanation to the said Section also talks of as to what a company would mean for the purpose of this Section. Therefore, where an elaborate procedure is contemplated under those sections for recovery of these dues and the Provident Funds Act being a social welfare legislation that cannot be rendered illusory by extending the benefit under Section 633 of the Companies Act. Similarly under Employees' State Insurance Act, Section 86 talks of prosecution which came to be introduced by Amending Act of 1989 also deals with Companies. The explanation under that Section specifically states as to what would be a company or Director for the purpose of that section. Hence it is submitted that no interference is called for.

17. Having regard to the above arguments, the only point that arises for determination is as to the scope of Section 633.

18. The Companies Act was enacted in the year 1956. As the Preamble itself says it is an Act to consolidate and amend a law relating to companies and certain other associations. As to the definition of Company, it is found under Section 3(1) which consists of the following:

- (i) Company
- (ii) Existing Company
- (iii) Private Company
- (iv) Public Company

Section 644 of this Act reads as follows:

"The enactments mentioned in Schedule XII are hereby repealed."

19. Schedule XII that is referred to under the Section refers to previous Companies Act of 1913 also under certain other Acts by way of ordinance or amendments.

20. Section 281 of the old Act of 1913 which talks of power of the Court to grant relief in certain cases reads as under:-

"281 : Power of Court to grant relief in certain cases

(i) if in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this Section applies, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability terms as the Court may think fit.

(2) Where any person to whom this section applies has reason to apprehend that any

claim will or might be made against him in respect of any negligence, default breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him as under this Section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are the following:-

(a) directors of a company;

(b) managers and managing agents of a company;

(c) officers of a company;

(d) persons employed by a company as auditors whether they are or are not officers of the company."

21. With this background of law, we will go on to Section 633 of the Companies Act, 1956. It reads thus :

633 : Power of Court to grant relief in certain cases:

(1) If any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably , and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think fit:

Provided that in a criminal proceeding under this sub-section, the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1).

(3) No Court shall grant any relief to any officer under sub-section (1) or sub-section (i) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted."

On a comparison of the two sections two important features emerge to be noticed. The Court under Section 633 has no power to grant relief from any civil liability. Under subsection (3) of Section 281 only four categories of persons were entitled to seek relief while under Section 633 it will be an

officer of the Company.

22. Under the Companies Act of 1956 (similarly under the Old Act of 1913) various duties and liabilities have been imposed; equally offences have been created for the non-performance of such duties. These offences are offences in relation to the performance of certain duties under the Act. The various offences are mentioned under Sections 59, 62, 63, 68, 142, 162, 207, 218, 272, 374, 420, 423, 538 to 545 & 606.

23. The expression 'any proceeding' occurring under Section 633 cannot be read out of context and treated in isolation. It must be construed in the light of the penal provisions. Otherwise what will happen is the penal clauses under the various other Acts would be rendered ineffective by application of Section 633. Again, if Parliament intended Section 633 to have a coverage wider than the Act, It would have specifically provided for it as, otherwise, it is a sound rule of Construction to confine the provisions of a statute to itself.

24. We are also of the view while referring to any proceeding under sub-section (2) the Parliament intended to restrict it only to the proceeding arising out of negligence, default, breach of trust, misfeasance or breach of duty in respect of the duties prescribed under the provisions of the Companies Act. Further examining the sub-section with reference to the context and the placement of the subsection the only conclusion that is possible is the proceedings for which relief under this sub-section could be claimed or the proceeding against the officer of a company for breach of the provisions of the Companies Act. Sub-section (2) cannot apply to proceedings instituted against the officer of the company to enforce the liability arising out of violation of provisions of other statutes. Reference could also be made to sub-section (3) where notice is required to be given to the Registrar of Companies. This is an indication that the powers under sub-section (2) must be restricted in respect of proceedings arising out of the violation of the Companies Act.

25. We will now refer to the corresponding provisions in English Law. Section 443 of the Companies Act, 1948 is replaced by Section 727 of the Companies Act, 1985. Section 727 reads thus:

"727 : Power of Court to grant relief in certain cases

(1) If in any proceedings for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company) it appears to the court hearing the case that that officer or person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him either wholly or partly, from his liability on such terms as it thinks fit.

(2) If any such officer or person as above mentioned has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief; and the Court on the application has the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) Where a case to which sub-section (1) applies is being tried by a Judge with a Jury, the Judge, after hearing the evidence, may, if he is satisfied that the defendant or defender ought in pursuance of that sub-section to be relieved either in whole or in part from the liability sought to be enforced against him withdraw the case in whole or in part from the Jury and forthwith direct judgment to be entered for the defendant or defender on such terms as to costs or otherwise as the Judge may think proper."

Halsbury's Laws of England (Fourth Edition) 7 (1) Companies, para 652 on this aspect states as follows:

"Power of Court to give relief against liability:

If in any proceedings for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by the company as auditor (whether or not he is an officer of the company), it appears to the Court hearing the case that that officer or person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court thinks fit. The power to grant relief applies to personal breaches of duty; it does not extend to claims by third parties.

Where a case within the above provision is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant ought to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper.

If any such officer or person has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief; and the court on any such application has the same power to relieve him as it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

The Application to the court is made by way of petition. The application is made to the court having jurisdiction to wind up the company. In cases in the High Court of Justice the proceedings are assigned to the Chancery Division. The petition and all affidavits, notices and other documents in the proceedings under it must be entitled in the matter of the company and in the matter of the Companies Act, 1985.

Under the above provisions a director may be relieved against liability in respect of a transaction wholly ultra vires the company or against the penalties imposed by the Act where he has acted without obtaining or after ceasing to hold his qualification shares."

The leading decision on Section 448 is reported in *Customs and Excise Commissioner v. Hedon*

Alpha Ltd., (1981) QB 818 : (1981) 2 All ER 697 (CA). That related to the interpretation to be placed on Section 448 of the Companies Act of 1948. In that case a director of a company was carrying on business as a bookmaker. The liability of the Director for general betting duty was not paid by the company. The Director was acting honestly and reasonably, and, therefore, was found not guilty of misconduct. Under these circumstances, the question arose whether the Director was entitled to relief from claim for civil liability by a stranger to the company. Claim to recover betting duty would amount to default against Director within the meaning of Section 448. Stephenson, LJ stated on this aspect as follows:

"Furthermore, the language of Section 448 was apt to describe the area in which a company director might be in breach of his duties to the company, and the ambit and concern, the context or matrix, of the section was company law and the relation of the officer or auditor of a company to the company and not to third persons. The proceedings which qualified for the statutory relief were claims made by companies, or on their behalf or for their benefit by, e.g. liquidators, the Board of Trade, private prosecutors including penal proceedings for the enforcement of the Companies Act, but not proceedings for the recovery of debts or the enforcement of civil liability to strangers. "

Griffiths, LJ was of the following view:

"In my judgment section 448 has no application to the present claim. Although the section is expressed in wide language it is in my view clearly intended to enable the court to give relief to a director who, although he has behaved reasonably and honestly, has nevertheless failed in some way in the discharge of his obligations to his company or their shareholders or who has infringed one of the numerous provisions in the Companies Acts that regulate the conduct of directors."

It requires to, be stated that though Stephenson, LJ referred to Palmer's Company Law, he also made reference to Pennington's Company Law (4th Ed., 1979, P. 548) it is stated thus:

"Under the statutory provision relief can be given against any of the criminal penalties imposed by the Companies Act, 1948 and 1976, but not, it would seem, against civil liability to anyone other than the company and so apparently no relief may be given in the rare cases where a member or auditor of a company has a personal right to sue its directors."

We will now refer to Palmer's Company Law, 23rd Edn. 1982 Vol. I, page 881. It is stated thus:

"Statutory relief (S. 448), Section 448 (which is referred to in Section 205, proviso (b) is a protective section for directors on lines similar to that accorded to trustees. It provides that in any proceedings against, inter alia, a director for negligence, default, breach of duty or breach of trust, if a director who is or may be liable has in the opinion of the Court acted honestly and reasonably, and if, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may wholly or partly relieve him from his liability; the court has a discretion in the matter, and may impose terms (Section 448(1)). In spite of the wide words of the section it has been held that the section applies only to actions brought by or oehalf of the company against its directors for breach of duty

and to penal proceedings for the enforcement of the Companies Act."

The 5th Edn. of Pennigton's Company Law, 1985 at pages 679 and 680 contains the following observations:

"However, if a director is sued for breach of any of his duties, he may apply to the Court or relief from liability, and if the Court is satisfied that he acted honestly and reasonably, and that in all the circumstances he ought fairly to be excused, it may relieve him from liability on such terms as it thinks fit. This provision is identically worded to the provision in the Trustees Act, 1925 which enables the Court to relieve defaulting trustees, and the Court's jurisdiction will probably be exercised in the same way as under that Act. The Court is reluctant to relieve remunerated trustees and will only do so if they show that they have taken all reasonable steps and to make good their breach of trust, the same criterion has been applied when a defaulting liquidator sought relief, and it would no doubt also be applied in the case of a director. On the other hand, the Court can give relief even though the director has used the company's money for ultra vires purposes, and even though the members oppose relief being given.

.... ..

Under the statutory provision, relief can be given against any of the criminal penalties imposed by the Companies Act, 1985, but not against criminal liability under any other statute, or against civil liability to anyone other than the company whether the liability arises by statute or otherwise, and so apparently no relief may be given in the rare cases when a member or creditor of a company has a personal right to sue its directors. Reference was made to the Court of Appeal decision." (Emphasis supplied)

Thus we are clearly of the view that under Section 633 of the Act relief cannot be extended in respect of any liability for any Act other than the Act.

26. May be the Industrial Disputes Act under Section, 32 contains a stringent provision but that is no answer to hold that Section 633 of the Companies Act could be invoked for offences as under Section 32 of the Industrial Disputes Act.

27. We are dealing with a case arising under Employees' Provident Funds Act. The total areas dues for the Company are Rs. 1,77,22,000/-. Section 14 of the Employees' Provident Funds Act specifically provides for penalties with reference to contravention of the provisions of the Act. Section 14A speaks of offences by the companies. We will now extract that section:

"14-A : (1) If the person committing an offence under this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his

knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Not with standing anything contained in sub-section (1), where an offence under this Act, the Scheme or the family Pension Scheme or the Insurance Scheme has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or, other officer of the company, such director, manager secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

The authority to take action under Provident Funds Act as seen from Section 14 is a Commissioner while the procedure so far as the Companies Act is concerned under Section 621 is on a complaint in writing of the Registrar or of a shareholder of a company or of an officer authorised by the Central Government in this behalf action can be taken. As already noted under sub-section (3) of S. 633, the Court has to give notice to the Registrar of Companies or on such other person, if any, as it thinks necessary. Therefore, giving of notice is mandatory. That being so, if Section 633 is interpreted as to include proceedings under Acts other than the Companies Act it will be open to the Court to give such relief under Section 633 without giving notice to the authority competent to prosecute in respect of liabilities under the other laws or upon giving notice to other concerned and not the Registrar. Thus the mandatory requirement of subsection(3) of Section 633 can easily be bypassed. Then again under Section 14A of the Provident Funds Act officers who are talked of under this section would be deemed to have committed the offence because sub-sec. (1) states that every person who was responsible to the company as well as the company shall be deemed to be guilty of the offence. If therefore, the relief under Section 633 is extended, such officers or persons who are otherwise liable for such offence would get the benefit of Section 633 and escape the rigour of Section 14A. The explanation also makes it abundantly clear that all companies covered by the Companies Act would be companies within the meaning of explanation. On the contrary, those companies falling under the explanation to Section 14A would not be companies under the Companies Act. To put it in other words, a company falling under the explanation to Section 14A of the Provident Funds Act which does not come within the purview of the Companies Act, the liability of the persons would be governed only by Section 14A(I) and (2) of the Provident Funds Act. They will not be entitled to any relief under Section 633. The benefit available under a social welfare legislation namely the Employees Provident Funds Act cannot be defeated in this manner. We may also add if the interpretation suggested by the appellants is accepted it would cover not only the existing laws but all legislations to be enacted in future.

28. In the result, we find no merit in this appeal and it is dismissed.

29. In view of the dismissal of appeal No. 3012 of 1990 the other appeals and the special leave petition where the same questions arose are also dismissed.

30. However, looking to the facts and circumstances of the case, there will be no order as to costs.

Appeal dismissed.

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