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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 380/81 & 82/B/2018-RA / 115 : Date of Issue : 12.01.2023

ORDER NO. 98-09/2023-CUS (SZ/WZ) /ASRA/MUMBAI DATED 10.01.2023
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE
GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT,
1962.

F.No. 380/81 & 82/B/2018-RA

Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent : (i). Shri. Hassain Mohamed,
(ii). Smt. Safraby Djany Mohamed.

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTOM-PAX-APP-60 & 61/18-19 dated 27.04.2018
[F.No. S/49-181/2017] passed by the Commissioner of
Customs (Appeals), Mumbai – III.

ORDER

These revision applications have been filed by Pr. Commissioner of Customs (Airport), CSI, Mumbai (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-60 & 61/18-19 dated 27.04.2018 [F.No. S/49-181/2017] passed by the Commissioner of Customs (Appeals), Mumbai – III in respect of (i). Shri. Hassain Mohamed and (ii). Smt. Safraby Djany Mohamed [hereinafter referred to as Respondents or Respondent no. 1 (R1) / Respondent no. 2. (R2)].

2(a). Brief facts of the case are that on 29.12.2015, the Respondents who are French Nationals, were intercepted at the exit gate of the CSI Airport by Officers of Customs, after they had arrived from Dubai via Bahrain on board Gulf Airlines Flight No. GF-056 / 29.12.2015. To query put forth by the Officers whether they were carrying any gold, the Respondents had replied in the negative. The Respondents had not declared possession of any gold in the Customs declaration form filed by them i.e. the relevant column had been left blank. Personal search of the Respondents and their baggage resulted in the recovery of 2 nos of crude gold chains weighing 700 gms, 5 gold bangles of 300 gms, one gold necklace of 94 gms, one gold chain with pendant of 8 gms, 2 gold rings of 4 gms, 5 FM gold bars of 100 gms each, 1 FM gold bar of 1000 gms, totally weighing 2606 grams and valued at Rs. 60,56,013/-. Also, 10 cartons of Marlboro cigarettes were also recovered from them. The said gold and cigarettes were seized under the reasonable belief that the same were attempted to be smuggled into India without declaring the same and was in contravention of the provisions of the Customs Act, 1962.

2(b). A break up of the recovery of the above stated gold jewellery / bars is that R1 had worn a gold chain and the remaining items i.e. were recovered from R2. The 5 bangles were worn by her on her arms, one gold chain and a necklace were

worn by her on her neck, while the remaining items i.e. one gold chain with pendant, 2 gold rings, 5 FM small gold bars and 1 FM gold bar of 1kg were found in her hand baggage.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/547/2016-17 dated 27.02.2017 [F.No. S/14-5-46/2016-17 Adjn / SD/INT/AIU/426/2015 AP 'A'] ordered for the absolute confiscation of 2 nos of crude gold chains weighing 700 gms, 5 gold bangles of 300 gms, one gold necklace of 94 gms, one gold chain with pendant of 8 gms, 2 gold rings of 4 gms, 5 FM gold bars of 100 gms each, 1 FM gold bar of 1000 gms, totally weighing 2606 grams and valued at Rs. 60,56,013/- and 10 cartons of Marlboro Cigarettes under Section 111 (d), (1) and (m) of the Customs Act, 1962 and a penalty of Rs. 3,00,000/- each was imposed on the Respondents under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the Respondents preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeal), Mumbai – III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-60 & 61/18-19 dated 27.04.2018 [F.No. S/49-181/2017] allowed the impugned gold to be redeemed on payment of redemption fine of Rs. 11,00,000/- (Rupees Eleven Lakhs only) and as the Respondents were permanent residents of France, allowed the re-export of the redeemed goods. The penalty of Rs. 3,00,000/- each imposed on the respondents under Section 112(a) & (b) imposed by the Original Adjudicating Authority was however, upheld.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1. that the order passed by the appellate authority was not legal and proper.

- 5.2. that the impugned gold was not declared to the Customs as required as per Section 77 of the Customs Act, 1962; that the onus to declare the goods solely lies on the passenger; that the respondents had admitted to carriage, concealment and possession of the impugned gold; that true declaration was not made in the Customs declaration form, hence, the impugned gold was liable for confiscation under Section 111(d) of the Customs Act, 1962.
- 5.3. that the OAA while confiscating the goods absolutely had specifically observed that the respondents are foreign nationals and though they had claimed during the hearing that they are OCI, no such OCI card had been produced.
- 5.3. that the gold jewellery was of crude nature and could not be termed as bonafide personal effects; that the respondents were not eligible to import the impugned gold; the absolute confiscation of the impugned gold by the OAA was justified.
- 5.4. that the option to allow the redemption of the seized goods is the discretionary power of the OAA depending on the fact of each case and after examining the merits; that the manner in which the impugned gold had been concealed indicated the intention of the respondents to evade the payment of the Customs duty;
- 5.5. that the applicant has relied upon the order dated 25.11.1991 passed by the Delhi High Court in the matter of Jasvir Kaur vs. UOI, wherein it was held that re-export cannot be asked as a matter of right; that *“if the Customs authorities have come to a conclusion, as in the present case, that the intention of bringing an article of high value is to dispose it in India or is an attempt to smuggle the same into India then the question of re-export cannot arise when the article is recovered from the passenger, The passenger cannot be given a chance to try his luck and smuggle gold into the country and if caught the should be given permission to re-export. That is not the intention of Rule 3 or Rule 7 of the Tourist Baggage Rules. It is genuine personal jewellery which alone is permitted to be brought into the country which must be re-exported. Whenever, the Customs authorities find that in the garb of personal items goods are sought to be smuggled or brought into the country with the authority of law then there is every right with the Government to*

confiscate the same. For good and valid reasons re-export may be allowed but it cannot be claimed as a right”.

5.6. Applicant has relied on the case of Commissioner of Customs vs. Sai Copiers [2008 (226) ELT 486 (Mad.)] that any order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such order was purely arbitrary, whimsical and resulting in miscarriage of justice.

5.7. that to buttress their case, reliance is placed on decision of Hon'ble Supreme Court in the case of Samyanthan Murugesan vs Commissioner of Customs (AIR), Chennai-1 as reported in 2010(254) ELT A15 (SC) wherein the decision of the Madras High Court of absolute confiscation of gold by the lower adjudicating authority was upheld wherein, the passenger had attempted to smuggle gold by ingenious concealment in TV set with declaring to Customs.

The applicant has prayed that the order passed by the appellate authority may be set aside and the Order-In-Original be upheld or pass any other order as deemed fit and proper.

6. Personal hearing in the matter was scheduled for 29.08.2019 / 03.09.2019, 19.09.2019, 20.11.2019 / 28.11.2019. Shri. R.P Gajwani, Superintendent, Customs (Airport) had attended on 29.08.2019. After the change in the revisionary authority, online personal hearings in the case were scheduled for 10.12.2020 / 17.12.2020 / 24.12.2020, 03.02.2021, 23.03.2022 / 30.03.2022 and 28.04.2022. Shri. N.J Heera, Advocate attended the personal hearing in the office on 28.04.2022. He reiterated his earlier submissions and stated that the gold in the instant case was for personal use, respondents are foreign nationals and there was no concealment. He submitted a written submission on the matter and requested to maintain order of the Commissioner (Appeals).

6.01. In their written application submitted on 28.04.2022, the respondents have stated that the order passed by the appellate authority

is well-reasoned and the justification / rationale for permitting the redemption of the impugned goods is well founded and was based on solid grounds and sound principles of law.

- 6.02. The reasons for granting redemption of gold has been clearly and rightly expressed in the appellate order.
- 6.03. For the contravention of Section 77 of the Customs Act, 1962, the appellate authority had imposed fine and penalty.
- 6.04. that the respondents are French national and also have OCI card as dual citizenship.
- 6.05. that the gold seized from them had been purchased from their own savings and had produced the bank statements of their accounts during the investigations. Invoices showing the purchase of the gold which are in their (respondents) names too had been submitted during the investigation stage.
- 6.06. that the impugned gold had not been concealed and had been worn by them and kept in their baggage.
- 6.07. They have submitted that for similar cases, the GOI had allowed the release of gold for re-export on payment of redemption fine and penalty.
- (a). 95/2022-CUS(WZ)ASRA/Mumbai dated 23.02.2022; Gold sling totally weighing 550 gms valued at Rs. 15,21,786/-
- (b). 78/2021- CUS(WZ)ASRA/Mumbai dated 16.03.2021; Gold jewellery weighing 1497.45 grams valued at Rs. 40,52,300/- found in hand bag.
- (c). 671/2018- CUS(SZ)ASRA/Mumbai dated 07.08.2018; Gold weighing 2045 gms and valued at Rs. 46,05,835/-.
- (d). 673/2018- CUS(WZ)ASRA/Mumbai dated 06.09.2018; Gold weighing 357 gms valued at Rs. 9,28,093/-.
- (e). 673/2018- CUS(WZ)ASRA/Mumbai dated 06.09.2018; Gold weighing 210 gms and valued at Rs. 5,45,932/-
- (f). 6693/2018- CUS(WZ)ASRA/Mumbai dated 31.08.2018; Gold jewellery weighing 256 gms valued at Rs. 6,65,530/-.
- 6.08. The respondents have cited the undermentioned cases on the issue of maintaining judicial discipline;
- (a). Birla Corporation Ltd. v/s. Commissioner of C.Ex, [2005 (186) ELT 266 (SC)], on judicial discipline. When question arising for consideration and facts are almost identical to previous case, revenue cannot be allowed to take a different stand.;
- (b). Commr. Of C. Ex , Nasik vs. Jain Vanguard Polybutlene Ltd [2005 (1861) ELT 266(SC)], also on judicial discipline and binding principle.;

(c). Nirma Ltd vs. Commr. Of C.Ex, Nashik, [2012 (276) ELT 283 (Tri-Ahmd)], on judicial discipline.

6.09. The respondents have relied upon and cited the following case laws;

(a). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], Absolute confiscation of goods without considering question of redemption on payment of fine although having discretion to do so under Section 125, matter remanded back.

(b). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], Section 125(1) ibid clearly mandates that it is within the power of the adjudicating authority to offer redemption of goods even in respect of prohibited goods.

(c). Vigneswaran Sethuraman vs UOI, Kerala High Court 2014 (308) ELT 394 (Ker.); Gold jewellery worn by foreign tourist allowed.

6.10. The Respondents have relied upon the following judgements wherein re-export of goods have been granted even when the goods had not been declared.

(a). Collector of Custom vs. Elephanta Oil and Inds. Ltd [2003(152) ELT 02547 Supreme Court]; once imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine.

(b). Kusum Bhai DayaBhai vs. Commr. Of Customs 1995 (79) ELT 292 Tri-Mumbai; If goods are allowed re-export on redemption, fine can be on the lower side and need not relate to margin of profit.

(c). A.K Jewellers vs. Commissioner of Customs, Mumbai, 2003 (155) ELT 585 Tri-Larger Bench; Re-export of confiscated goods, first to be redeemed on payment of fine and then to be exported. Combination of both these actions in one order is not contrary to law.

(d). etc.

The respondents have prayed that impugned order passed by the appellate authority be upheld.

7. The Government has gone through the facts of the case and the submissions made by the Respondents. The Respondents were intercepted at the exit gate after they had walked through the green channel and after having completed the immigration formalities. They were asked about possession of any gold items but they had replied in the negative. The gold chains, bangles,

necklace, rings, pendant etc were made of crude gold and had been concealed under the clothes / garments worn by the respondents to avoid detection. The Respondents had not declared the gold chains, necklace and bars as required under Section 77 of the Customs Act, 1962. The confiscation of the gold is therefore justified and thus, the respondents had rendered themselves liable for penal action.

8.1. The relevant sections of the Customs Act are reproduced below :

Section 2(33)

“prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with”

Section 125

Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, *in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal

against such order is pending.

8.2. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it liable for confiscation under Section 111(d) of the Customs Act. It is undisputed that Section (l) and (m) are also applicable in this case as the gold was found concealed and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

9. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), relying on the judgment of the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) E.L.T. 423 (S.C.), has held that *" if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods."* It is thus clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition, "prohibited goods".

10. Further, in para 47 of the said case the Hon'ble High Court has observed *"Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation....."*. Thus failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold "prohibited" and therefore liable for confiscation and the respondents thus, liable for penalty.

11. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in case of M/s. Raj Grow Impex [*CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021*] has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

12. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. In case of goods, such as, gold which become prohibited for violation of certain conditions, the Adjudicating Authority may allow redemption

13. Government notes that while allowing the redemption of the goods, the AA at para 8 of his OIA has observed as under;

“8. I find that in terms of Section 2(33) of Customs Act, 1962, “prohibited goods” means any goods the import of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with. I find that the prohibition relates to two types of goods, one which cannot be imported by any one, such as arms, ammunition, addictive substance viz. Narcotic Drugs, wild life products etc, which are categorised as ‘prohibited goods’. The other category includes the goods the import / export of which is allowed subject to fulfilment of certain condition and if the conditions are complied with, such goods will not fall in the category of ‘Prohibited Goods’. Accordingly, the intention behind the provisions of Section 125 is clear that import of such goods (which are prohibited in absolute terms) under any circumstances would cause danger to the health, welfare or morals of people

as a whole and therefore the discretion should not be exercised. Second category includes the goods, the import/ export of which is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with. In this situation, the release of these goods would not cause any danger or harm to the public as a whole and though it is not mandatory for the adjudicating authority to allow redemption yet such cases may be considered positively for redemption. It is an admitted fact that the import of gold is allowed in case of certain category of persons, subject to certain conditions. No permission or license from any Govt. agency or Reserve Bank of India is required now for entitled persons to bring in gold. Therefore, the relaxation is very liberal for such persons. Accordingly, the goods falling under this category may be considered for release on redemption fine. To put it differently, if the goods are unconditionally prohibited from importation, the importer/owner will not be entitled for claiming redemption. On the other hand, if the goods are conditionally prohibited from importation (i.e subject to some conditions), importer/owner may claim redemption. Nevertheless, as per Section 125 of the Customs Act, 1962 framed under the statute, an option of redemption can be given in his discretion by an adjudicating/appellate authority, even in respect of prohibited goods”.

14.1. Government finds that the AA has used his discretion in releasing the gold. The option to allow redemption of seized goods is the discretionary power of the adjudicating / appellate authority depending on the facts of each case and after examining the merits. Government observes that while allowing the goods to be redeemed, the AA has relied upon a host of cases where the adjudicating authority had released the gold of varying quantities and the same were accepted by the Department. Further, in the extant revision application, the applicant have not controverted the same. A case of parity and fairness was made out by the respondent before the AA.

14.2. The option to allow the redemption of seized goods is the discretionary power of the adjudicating authority / appellate authority depending on the facts of each case and after examining the merits. In the present case the gold was not secreted, ingeniously. Government notes that the appellate authority considering that the respondents were a foreign nationals and OCI card holders, had allowed for its re-export of the impugned gold on payment of a redemption fine of Rs. 11,00,000/-. Government finds that redemption of the gold for re-export is in congruity with the ratio of the recent Supreme Court judgement in the case of M/s. Raj Grow Impex and others Vs UOI (CIVIL APPEAL NO(s). 2217-2218 of 2021 arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021) wherein at para 97(f) it is held as under;

(f) the subject goods are held liable to absolute confiscation but, in continuity with the order dated 18.03.2021 in these appeals, it is provided that if the importer concerned opts for re-export, within another period of two weeks from today, such a prayer for reexport may be granted by the authorities after recovery of the necessary redemption fine and subject to the importer discharging other statutory obligations. If no such option is exercised within two weeks from today, the goods shall stand confiscated absolutely.

15. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Some of these cases have been cited in the OIA.

16. Government finds that the AA has relied upon the precedent case laws on the subject and have applied the case laws judiciously while granting release of the gold. Much of the gold were worn by the respondents and were not secreted, a case that the respondents were habitual offenders had not been made out. Basic contention of the applicant is that the quantum of gold is substantial and that the respondents had not declared the same. All these have been taken into account while imposing fine and penalty. Government finds that the AA has rightly held

that there was nothing to suggest that the gold was brought by professional carriers for somebody else i.e. in other words this is a case of misdeclaration of gold rather than of brazen smuggling. The AA has used discretion available under Section 125 of the Customs Act, 1962 and allowed the respondents who are foreign nationals and OCI card holders to redeem the gold for re-export on payment of a fine of Rs. 11,00,000/-. Government finds the OIA passed by the AA to be legal and proper and is not inclined to interfere in the same.

17. Revision Application filed by the applicant is disposed of on above terms.

Shrawan
10/11/23
(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER NO. 08-09/2023-CUS (SZ/WZ) /ASRA/MUMBAI DATED 10.01.2023

To,

1. Shri. Hassain Mohamed, **Address - 1** is 29, Rue De La Division Leclerc Bat .B3 91300, Massy, Paris, France. & **Address - 2** is 4, Harris Lane, Pudupet, Chennai - 600 002, Tamil Nadu.
2. Smt. Safraby Djany Mohamed, **Address - 1** is 29, Rue De La Division Leclerc Bat .B3 91300, Massy, Paris, France. & **Address - 2** is 4, Harris Lane, Pudupet, Chennai - 600 002, Tamil Nadu.
3. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Mumbai : 400 099.
4. Office of the Principal Commissioner of Customs (Airport), Review Cell, Ist Floor, Avas Corporate Point, Andheri-Kurla Road, Marol, Andheri (E), Mumbai : 400 059.

Copy to:

1. Advani Sachwani & Heera, Advocates, Nulwala Building, 41, Mint Road, Opp. G.P.O, Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
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