HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

Single Bench: HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, J.

WP (C) No. 44 of 2014

PETITIONERS:

1. Shri Bhupal Gurung
   S/o Man Bahadur Gurung,
   R/o Chakung,
   West Sikkim

2. Shri Nabin Tamang,
   S/o Ram Bahadur Tamang,
   R/o Singling,
   West Sikkim.

VERSUS

RESPONDENTS:

1. The State of Sikkim,
   Through the Chief Secretary,
   Government of Sikkim,
   Gangtok.

2. The Principal Chief Engineer-cum-Secretary,
   Department of Buildings and Housing,
   Government of Sikkim,
   Gangtok.

3. The Secretary,
   Department of Personnel,
   Administrative Reforems (DOP),
   Government of Sikkim,
   Gangtok.

4. Mr. Rajen Pradhan,
   S/o Meg Bahadur Pradhan,
   R/o Mangsari Busty,
   Soreng,

West Sikkim.

5. Lila Devi Bista,
W/o Late Dak Man Pradhan,
R/o Tharpu Block,
West Sikkim.

A Petition under Article 226 of the Constitution of India.

Appearance:

Dr. Doma T. Bhutia with Ms. Rupa Dhakal, Ms. Mina Bhusal, Ms. Bhawana Chhetri and Ms. Yangchen Bhutia, Advocates for the Petitioners.

Mr. J. B. Pradhan, Additional Advocate General with Mr. S.K. Chettri, Assistant Government Advocate for the State Respondents 1, 2 and 3.

Ms. Samita Gurung and Ms. Punnyawati Pokhrel, Legal Retainers for Buildings & Housing Department, Respondent No. 2.

Mrs. Kesang D. Bhutia, Legal Aid Counsel for Respondents 4 & 5.

J U D G M E N T

(22.06.2015)

Meenakshi Madan Rai, J.

1. By filing this Petition under Article 226 of the Constitution, the Petitioners seek a direction to the State Respondents for quashing the impugned Office Order No. 55/Bldgs dated 18.06.2014 and impugned Office Note Sheet Page No. 14 of the Buildings & Housing Department, Government of Sikkim terminating the services of the Petitioner No. 1 and Petitioner No. 2 respectively, and to reinstate them in service, regularise their services and pay compensation for the illegal termination.

2. The facts adumbrated briefly are that the Petitioner No. 1 was employed in the Office of the Assistant Engineer, Buildings &

Housing Department, Soreng Sub-Division on Muster Roll where he reported for work on 11.08.2005, while the Petitioner No. 2, also employed on Muster Roll, joined on 19.09.2007 in the post of Supervisor, in the Soreng Sub-Division Office of the same Department.

3. Subsequently, the service of the Petitioner No. 1 was terminated on verbal orders, while the service of the Petitioner No. 2 was terminated vide the impugned Office Order *supra* dated 18.06.2014. On enquiry by the Petitioner No. 1 about the same, he was informed that their services were terminated as per the orders of the Minister, Human Resource Development Department, as reflected in the impugned Note Sheet *supra*. That, the termination was unjust and unfair having been made without issuance of a show cause notice or an advance notice of one month, which is to be mandatorily issued even for temporary employees, hence violating the principles of natural justice and the fundamental rights of the Petitioners. That, the Petitioners were illegally removed from service to accommodate two candidates of the said Minister, who were employed in their place and joined accordingly on 02.07.2014 and 18.07.2014 respectively, while the Petitioners have been pushed to stark poverty. That, their colleagues appointed almost at the same time are still in employment. That, *"……employees working on Muster Roll basis because of the nature of their services are of a permanent,……" (sic)* therefore, their termination is punitive in view of the ground given that there were complaints against them, although this remained unsubstantiated.

4. It is the contention of Learned Counsel for the Petitioners that employees on Muster Roll in the Buildings & Housing Department work for several years without any break in their service and after completion of a period of more than five years, their services are regularized. That, infact both Petitioners have completed more than five years in service and were assuming that their services would be regularized as per the policy of the State Government and in terms of the Government **Notification bearing No. 196/GEN/DOP dated 22.07.2013**, instead they were terminated in colourable exercise of power. It is also submitted that no terminal gratuity was paid to the Petitioners, thereby violating **Notification No. 349/GEN/DOP dated 28.02.2011.** Hence, the above prayers. Learned Counsel has relied on a catena of decisions to fortify her submissions, which shall be discussed later.

5. Mr. J.B. Pradhan, Learned Additional Advocate General on behalf of Respondents 1, 2 and 3, *per contra* denying and disputing the allegations urged that the Petitioners were temporary employees on Muster Roll basis and thus, there is no requirement of issuing

either a show cause notice or an advance notice of one month before their termination. That, the Respondents have acted in terms of **Notification No. 349/GEN/DOP dated 28.02.2011** and denies that the Petitioners were terminated illegally with the malafide motive of replacing them with the candidates of the Minister. That, the termination was made in public interest on account of a series of complaints against them. It was submitted that a Policy decision was taken by Respondent No. 3 for regularizing the services of its employees who have been working on Muster Roll, Work-charged and Ad hoc basis in the Government Departments for more than 15 years and not less, towards which, attention of this Court was drawn to **Notification No. 264/GEN/DOP dated 12.02.2014** but that the Petitioners do not fall within its ambit. It was also expostulated that a policy decision taken by the Government cannot be compelled to be enforced by the issuance of a Writ, towards which, decision of the Hon'ble Apex Court in ***(2003) 5 SCC 134: J.B. Bansal vs. State of Rajasthan & Ors.*** was relied on with specific reference being made to Paragraph 7 of the Judgment. It is also vehemently disputed that there has been violation of fundamental rights guaranteed under Articles 14 & 16 of the Constitution, as no Law gives any right to the Petitioners who were Muster Roll employees being employed in the exigencies of services. To fortify this submission, Learned Additional Advocate General has placed reliance on the decisions of the Hon'ble Apex Court in ***State of Karnataka vs. Uma Devi and others : (2006) 4 SCC 1*** and ***Chief Commercial Manager, South Central Railway vs. G. Ratnam : (2007) 8 SCC 212*** .

6. With regard to the removal being punitive, it is contended that the Petitioners were not dismissed from service but were removed from the list of Muster Roll employees, therefore, the question of any stigma being attached to the Petitioners do not arise, as nothing debars them from applying for reemployment. In the alternative, it is also contended that, in the first place there is no appointment letter employing them and therefore their joining reports have no sanctity in the eyes of Law. That, as such, there is no illegal act on the part of the State Respondent and the Writ is liable to be dismissed, being not maintainable either in law or facts.

7. Putting forth her contention, on behalf of the Respondents No. 4 & 5, Learned Counsel while relying on the submissions put forth by Learned Additional Advocate General, strenuously argued that the Writ of *Mandamus*/*Certiorari* does not lie in the present case, as no fundamental or legal rights of the Petitioners have been violated. That, **Notification No. 196/GEN/DOP dated 22.07.2013**, is clearly applicable only to Office Assistants, Junior Drivers and Office

Attendants and not to Labourers/Supervisors appointed on Muster Roll basis. Moreover, with regard to the arguments of the Petitioners that the Government ought to have regularized their services in terms of **Notification No. 264/GEN/DOP dated 12.02.2014**, the same pertains to a policy decision taken by the Government and it is for the Government to consider or reject their case for regularisation. Apart from which, the Notification speaks of employees who have completed 15 years of service and thus, is of no assistance to the case of the Petitioners. That, there is no provision in the Service Rules and Service Jurisprudence to serve notice on temporary employees before termination of their services. It is submitted that since the Petitioners are not entitled to any of the reliefs prayed in the Writ Petition the same be dismissed with costs.

8. In rejoinder, it is submitted by Learned Counsel for the Petitioners, that the Government has nowhere defined "Muster Roll" in any Rule, hence the Petitioners are temporary employees as envisaged in **Notification No. 349/GEN/DOP dated 28.02.2011** and even though the State has made no law for temporary employees they are protected by the Constitution under Article 14.

9. I have heard at length the submissions made by learned Counsels and given due consideration to the same. I have also carefully considered the entire documents on record and perused the plethora of Judgments relied on by the Learned Counsel for the Petitioners and Learned Counsel for the Respondents.

10. The point that falls for consideration is whether the Petitioners have a legal right which can be enforced by Mandamus in terms of the prayers made by them, in view of the fact that their services as Muster Roll employees were terminated without giving them advance notice of termination or show cause notice.

11. In the Authorities relied on by Learned Counsel for the Petitioners being (***1983) 3 SCC 32 Kanhialal vs. District Judge and ors.,*** (***1984) 3 SCC 316 : A.L. Kalra vs. Project and Equipment Corporation of India Ltd., Nepal Singh vs. State of U.P : (1985) 1 SCC 56*** and ***Ishwar Chand Jain vs. High Court of Punjab & Haryana and anr. (1988) 3 SCC 370***, the decisions were all with regard to temporary employees against regular posts and did not pertain to Muster Roll employees and therefore, I find, are of no assistance to the case of the Petitioners.

12. In (1989) 3 SCC 311 Dr. Mrs. Sumathi P. Shere vs. Union of India & Others, although the order terminating the services of the appellant, appointed on Ad hoc was set aside, however, it was ordered that the appellant would not claim the status of a regular employee, unless the services were regularized in accordance with law. Thereby,

implying that the procedure for appointment as required by Law was to be adhered to.

13. In ***(1991) 3 SCC 291 : Om Prakash Goel vs. Himachal Pradesh Development Corporation Ltd., Shimla and Another, (1994) Supple (3) SCC 671 : Manorama Verma vs. State of Bihar & Others*** *and* ***(2002) 10 SCC 130 : U.P. SRTC through its Managing Director and Another vs. Jeevan Prasad Mishra and another,*** these are also matters with regard to appointments against sanctioned post and lends no support to the case of the Petitioner.

14. In ***(2003) 10 SCC 92 : Chief Conservator of Forests & Another vs. Rahmat Ullah,*** the respondent was engaged as a *mali* on daily wages and his services terminated. The High Court held that the termination was illegal and the respondent was liable to be reinstated with full back wages. The Hon'ble Apex Court directed his reinstatement but ordered that the Department pay only 50% of the back wages. Although, this decision pertains to a daily wage earner, this matter will have to be considered in the light of the decision of the Hon'ble Apex Court in ***Uma Devi's*** case *supra*, wherein it has indubitably held at Paragraph 54 that ***"It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."***

15. While going through the decision in the ***State of Gujarat vs PWD Employees Union and others : (2013) 12 SCC 417***, on deciding the matter as to whether it would be desirable for the Court to direct the appellants to straight away regularize the services of all the daily wage workers working for more than five years or the daily wage workers for more than five years are entitled for some other relief, it was clarified that the decision in ***Uma Devi's*** case *supra* & ***Uma Rani's*** *case* ***[(2004) SCC (L & S) 918]*** was with regard to the question of regularization of services of irregular appointees, who had entered via the back door method. The Hon'ble Apex Court was pleased to allow the benefits to the daily wage workers as envisaged in the Resolution dated 17.10.1988 referred to by the employees and accordingly, directed that the respondents be granted the benefits of the scheme as contained in the Resolution. The said facts are totally different from the facts under consideration and do not assist the case of the Petitioners.

16. *Per contra*, the Learned Additional Advocate General by referring to the decision of the Hon'ble Apex Court in ***Sureshchandra Singh vs. Fertilizers Corpn. of India Ltd. and Others : (2004) 1 SCC 592*** encapsulated that in the said matter an administrative order had been issued vide an Office Memorandum increasing the retirement

age to 60 years. The Apex Court dismissing the matter, held, it is only an administrative direction and the Court cannot issue a Writ to enforce such administrative instructions that do not have the force of law.

17. Moving ahead, we may walk through the documents relied on by the Petitioners more especially **Notification dated 22.07.2013 bearing No. 196/GEN/DOP. F**or the sake of convenience, the relevant extract is reproduced below:-

> ***"The State Government has taken a policy decision for regularization of all Work-Charged/MR/ Adhoc and Consolidated Employees who are working in the Government Department for the last more than 5 (five) years in their respective departments in the post of Office Assistants, Junior Drivers and Office Attendants, etc."***

18. As pointed out by the Learned Counsels for the Respondents No. 4 and 5, this Notification, in the first instance does not apply to the Petitioners, they being admittedly a Labourer and a Supervisor, respectively. Secondly, it is only a policy decision of the government with no statutory force, consequently, this Court can issue no directions enforcing its implementation. On this count, one may usefully refer to the decision in ***Chief Commercial Manager, South Central Railway , Secunderabad and Others vs. G. Ratnam and Others with Divisional Commercial Manager, South Central Railway, Secunderabad and Others vs. M. Subramanyam Devers and Union of India and Others vs. M. Anjaneyulu : (2007) 8 SCC 212*** , wherein it was *inter alia* held as follows:

> *"……Broadly speaking, the administrative rules, regulations and instructions, which have no statutory force, do not give rise to any legal right in favour of the aggrieved party and cannot be enforced in a court of law against the administration……"*

19. Revisiting the decision of ***Uma Devi's*** case (*supra)*, the Hon'ble Apex Court in the said Judgment has exhaustively discussed the phenomenon of "litigous employment", which had arisen due to issuance of directions of various High Courts and even the Hon'ble Apex Court, whereby equity was considered for a handful of people who had approached the Court with a claim whilst ignoring equity for the teeming millions seeking employment and a fair opportunity for competing for employment.

20. Elucidating this point, it was succinctly put forth that *a sovereign Government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by law newly*

enacted, the National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in a year on paying wages as fixed under that Act. But a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

21. It was further laid down that, if it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued.

22. Similarly, it was also clarified that a temporary employee could not claim to be made permanent on the expiry of his term of appointment. That, merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his employment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. The situation enunciated above holds good for the instant matter under discussion.

23. The Hon'ble Apex Court being alive to the claims made by such employees held, that it is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. *It may be true that he is not in a position to bargain – not at arm's length – since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible.*

24. With regard to the pivotal point of temporary employment, it was explained that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State.

25. The Court went on to explain in the following Paragraphs

the position of law, *inter alia*, as extracted herein below:-

> *"47. ……Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned,……"*
>
> ***"48. …… <u>There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service.</u> As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could not be made only by making appointments consistent with the requirements of Articles 14 & 16 of the Constitution……. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."***
>
> *"54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."*

26. The Judgment, thus, lays to rest the question with regard to temporary employment which includes persons employed on daily wages. It is further clarified therein that there is no fundamental right to such employees to claim that they have a right to be absorbed in service.

27. Employment as a daily wage earner does not make the employee the holder of a post, as it is emphasized that a regular appointment has to be made in terms of the requirements of Article 14 and 16 of the Constitution. On the other hand, the Petitioner themselves are aware that the Respondents have nowhere specified to them that their employment was against a vacancy which entitles them to any Grade Pay or Pay Band, as would have been the case if the employment had been made against a **<u>regular vacant sanctioned post</u>**, it was without dispute employment on daily wages. There is no ambivalence on the point that the Petitioners were employed in the exigencies of service and it is for the Government to decide as to whether their services are required any further or not. By the same reasoning, it is for the Government to employ any other person if the need so arises and there can be no lien to any post by a daily wage earner.

28. The argument of the Petitioners that because of the nature of their service they are permanent employees is a misconceived argument that flies in the face of the Law laid down by the Hon'ble

Apex Court in the decision of ***Uma Devi's*** case *supra*. The Petitioners have to realise that a temporary appointment against a regular vacancy stands on a completely different footing from temporary employment as a daily wage earner.

29. So far, as the **Sikkim Government Service Rules** are concerned, on perusal of **The Sikkim State Direct Recruitment (Special Provisions) Rules, 2008, Section 2(f)** defines temporary employee as follows:-

> ***"2. Definitions.-……..***
> *(a)* ….
> *(b)* ….
> *(c)* ….
> *(d)* ….
> *(e)* ….
> *(f)**"temporary employee"** means an employee working temporarily either as ad hoc or on muster roll or work charged or as substitute or on contract or on daily wages or on consolidated pay or on co-terminus basis."*
> *(g)* ….

30. After perusing the above definition, it is essential to peruse **The Sikkim Government Servants' (Discipline and Appeal) Rules, 1985** wherein, in the Explanation to Section 3, it is stated as follows:-

> "3. **Penalties**.-….
> (i) ….
> (ii) ….
> (iii) ….
> (iv) ….
> (v) ….
> (vi) ….
> (vii) ….
> (viii) ….
> (ix) ….
> "***Explanation*** *.– The following shall not amount to a penalty within the meaning of this rule, namely,-"–*
> (i) ….
> (ii) ….
> (iii) ….
> (iv) ….
> (v) ….
> (vi) ….
> (vii) ….
> (viii) **Termination of services** -
> *(a)* ….

(b) of a temporary Government servant appointed on temporary basis, under the orders of the appointing authority; or

(c) ….

Thus, the argument that the termination was punitive has no legs to stand in view of the above Rules.

31. On pain of repetition, it may be pointed out that the employment of a daily wage earner being temporary as defined above, his services can be terminated at the will of the government. It is the specific argument of the Learned Additional Advocate General, that the termination was made in terms of the **Notification No. 349/GEN/DOP dated 28.02.2011**. Although, it was argued by the Petitioners that there are no statutory rules, provisions or temporary orders stating that the services of the temporary employees can be terminated without show cause or an advance notice of one month. Conversely, the Notification *supra* relied on by the Respondents lays down that the services of employees on daily wages shall be terminated at any time without notice with immediate effect.

32. It is pertinent to point out that a Muster Roll employee can by no stretch of the imagination be said to be a "regular temporary employee"*, this stands succinctly clarified in* ***Uma Devi's*** *case supra,* wherein it was observed as follows:-

> *"12. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognized and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation……"*

33. It was also held in **Para 43** *inter alia* that

> *"……If it is a contractual appointment, the appointment comes to an end at the end of the contract,* ***if it were an engagement or appointment on daily wages or casual basis the same would come to an end when it is discontinued.*** *Similarly, a temporary employee could not claim to be made permanent on the expiry of the term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled*

> *to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules.……"*

34. I also deem it essential to refer to the decision in ***(1993) 1 SCC 553 : Oriental Insurance Co. Ltd. Vs. T. Mohammed Raisuli Hassan***, wherein the Hon'ble Apex Court observed that there was no statutory requirement of one month's notice for termination by the appellant of the service of the respondent who was on probation as it is only a term of appointment order, which stipulated for one month's notice or one month's salary in lieu thereof by either side to bring an end to the service of the respondent.

This being the legal stance for a probationer, the question of a mandatory notice to a daily wage employee finds no place in the legal scheme of things.

35. ***In Air 2001 SCC 102 : Nazira Begum Lashkar and others, Appellant vs. State of Assam and Others***, while discussing the appointment of Assistant Teachers in Primary School, wherein the appointment were not made in accordance with statutory rules and without any advertisement calling for applications and without any constitution of Selection Committee or interview, cancellation of such appointments was not found to be illegal as it was opined that such appointment would not confer any right on the appointee nor could such appointee claim any equitable relief from the Court. The said two decisions clearly explain the position as would be applicable to the instant matter at hand, over and above which it is reiterated that the Petitioners were daily wage earners.

36. That apart, as far back as in 1977 in ***Mani Subrath Jain vs State of Haryana : (1977) 1 SCC 486***, it was held that it was elementary that no one can ask for a Mandamus without a legal right. There must be a judicially enforceable right, as well as a legally protected right before one suffering a legal grievance can ask for a Mandamus. The Apex Court went on to hold that a person can be said to be aggrieved only when the person is denied a legal right by someone who has a legal duty to do something or to abstain from doing something. Thus, there must be a statute by which the claim of the petitioner qualifies them for a relief.

37. In the light of the above discussions, we may carefully walk through **Notification No. 349/GEN/DOP dated 28.02.2011** which postulates *inter alia* that the services of temporary employees on daily wages shall be terminated at any time without notice.

38. Reverting back to the next document, **Notification dated 12.02.2014 bearing No. 264/GEN/DOP,** this Notification brings

within its ambit only temporary employees belonging to Group C & D category, who have completed **15 (fifteen) years and more** as on 31.01.2013. On this point, it may be highlighted, it is not the case of the Petitioners that they have completed 15 (fifteen) years or more as daily wage earners, to allow them the benefit of this Notification, while, at the same time, it must be emphasized that this is a policy decision of the government in which there can be no judicial direction.

39. With regard to **Notification No. 196/GEN/DOP dated 22.07.2013**, as already mentioned the same applies only to Muster Roll employees in the post of Office Assistants, Junior Drivers and Officer Attendants and extends no benefit to the Petitioners. Thus, it would be apt to rely on the observation of the Hon'ble Apex Court in Uma Devi's case *supra* wherein it was *inter alia* held that it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution.

40. Although, it must be stated here that the Writ of Mandamus is equipped to serve as a judicial control over administrative actions, there must however be some statutory backing for the issue of the writ. *(See Shorter Constitution of India by Durga Das Basu, 14th Edition Reprint 2011, Page 1380)*

41. In the facts and circumstances discussed above, the Petitioners have failed to show that they have a judicially enforceable legal right. Consequently, there is no scope for the issuance of a writ.

42. The Petition thus stands dismissed and is disposed of accordingly.

43. No order as to costs.

Sd/-
(MEENAKSHI MADAN RAI)
Judge
22.06.2015

Approved for reporting : Yes/~~No~~
Internet : Yes/~~No~~

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