IN THE ODISHA REAL ESTATE APPELLATE TRIBUNAL AT BHUBANESWAR

OREAT Appeal No. 34(T)/2020
(Arising out of C.C. No. 251 of 2018)

Jayanarayan Mishra. ...Appellant.

-Versus-

1) Odisha State Housing Board.
2) The Secretary, Odisha Real Estate Regulatory Authority, Bhubaneswar. ...Respondents.

Counsel for the appellant :Mr. S.Mohanty, Advocate
Counsel for the respondent no.1 :Mr. T.K.Biswal, Advocate
Counsel for the respondent no.2 :Mr. B.Nayak, Advocate

CORAM :

Shri S.K.Rajguru, Judicial Member

Dr. B.K.Das, Tech./Admn. Member

O R D E R
30.10.2026

Hearing of the appeal having concluded, it is taken up for final order.

2) Order dated 4.6.2019 passed in Complaint Case No.251 of 2018 by the Odisha Real Estate Regulatory Authority (hereinafter referred to as the learned ORERA) is assailed by the appellant in this appeal. The appellant was the complainant and the respondent no.1 of this appeal was the only respondent in the said complaint case. The respondent no.2 of this appeal is the learned ORERA represented by its Secretary. Prayer has been made in the appeal to set aside the impugned order dated 4.6.2019 passed in Complaint Case No.251 of 2018 so far as the same relates to the findings that, i)the escalation in price of

the flat was not illegal, ii) delay in completion of the "Kharvela Enclave" project till 24.11.2015 was beyond the control of the respondent and iii) revised due date of delivery of the project is 24.11.2018. Prayer has also been made to set aside the escalation of the price of the flat allotted to the appellant by the respondent no.1-Board vide letters dtd. 2.2.2017, 21.7.2018, 10.8.2018 and 30.8.2018 with a direction to the respondent no.1 to adhere to the cost of Rs.67,25,000/- which was originally provided in the brochure. Further prayer has been made to declare the date of completion of the project as 12.6.2017 and to direct the respondent no.1 to pay interest to the appellant w.e.f. 12.6.2017 instead of 24.11.2018.

3) Facts and circumstances leading to the filing of this appeal are as follows :

The appellant being the complainant filed the aforesaid complaint case before the learned ORERA on 29.10.2018 stating that, in response to the advertisement and brochure floated by the Odisha State Housing Board (respondent) the complainant applied for a 4BR Deluxe flat in a multi-storied premium apartment complex namely "Kharvela Enclave" proposed to be developed at Dharma Vihar, Jagamara, Bhubaneswar, depositing on EMD of Rs.7,00,000/-. The respondent vide his letter dtd. 13.6.2014 informed the complainant that on the basis of draw of lots, he was allotted with a 4BR (Dlx) flat in the aforesaid project at a provisional cost of Rs.67,25,000/-. Subsequently, the complainant was intimated by the respondent vide his letter dtd. 13.06.2014 to deposit

Rs.14,08,000/- alongwith service tax of Rs.65,137/- by 30.6.2014 and accordingly the complainant deposit the said amount on 30.6.2014. The complainant was further intimated in the said letter that the balance cost of the flat required to be deposited as per the payment schedule provided therein. The stipulated date of completion of the project as per the brochure was 36 months from the date of selection of allottee and accordingly the due date of completion and delivery of the flat was 12.6.2017. On 2.2.2017 the respondent-Housing Board issued a letter intimating the complainant with regard to escalation of price of the flat allotted to him from Rs.67,25,000/- to 91,63,000/-. On being asked to furnish a letter of consent the complainant however submitted a letter of reluctance on 1.3.2017 about unfairness of such exorbitant escalation and submitted for review of the said escalation and stick to original price. Again after a gap of one year and six months the respondent vide letter no.8804 dtd.18.7.2018 intimated the complainant that the escalated cost of Rs.91,63,000/- was reduced to Rs.88,40,875/- with details of payment schedule which provided for payment in seven installments with the last payment scheduled on 31.8.2019. The complainant in response to the said letter issued a letter of reluctance on 13.8.2018. The respondent-Housing Board vide letter no.10684 dtd. 30.8.2018 again revised the schedule of payment as per which the allottee had to pay eight installments from 31.8.2019 to 30.6.2020. The expected date of completion of the project was fixed to 30.6.2020. The complainant requested the respondent vide

his letter dtd. 27.9.2018 to stick to the initially intimated flat cost and review of escalated price. The respondent however did not relent and stuck to the revised price of Rs.88,40,875/-. Being aggrieved by the violation of the terms and conditions of the brochure due to unilateral exorbitant escalation of cost of the flat and also the inordinate delay in delivery of possession of the flat allotted to him, the complainant filed the aforesaid complaint praying for cancellation of the cost escalation, delivery of possession of the Flat to him by 30.6.2017 and to complete the project from the own resources of the Board by adjusting the standard bank interest amount accrued from his deposit for the last four years.

On being noticed the respondent appeared before the learned ORERA through his counsel and took the plea in his written reply to the complaint that as per the brochure no interest was payable on the payments of the complainant if delay in delivery of possession of the flat was due to the factors beyond the control of the respondent-Housing Board. The respondent also pointed out to the condition in the brochure which provided that the EMD shall not carry any interest and the same would be adjusted against the sale price after allotment. Further pointing out to the term of the brochure that the allottee had every liberty to withdraw from the project in case of inordinate delay by the respondent in giving possession and escalation of the unit cost beyond 25% of the price announced in the brochure, with the entitlement to full refund with interest at the rate of postal savings account, the respondent

contended that, having consented to the terms and conditions of the brochure and wished to continue in the project despite a number of options given by the respondent to withdraw from the project, the complainant is not entitled now to raise the issues of escalation of cost and delay in delivery of possession of the flat allotted to him. As regards the cause of delay in completion of the project construction, the respondent-Board attributed the same to delay in tender approval by the Government, interference by the ASI, delay in finalization of detailed drawing and preparation of revision for deviation in structural design and also encroachment of the project site. Claiming that the aforesaid causes were beyond his control, the respondent-Housing Board emphasized on the fact that the reliefs claimed by the complainant are beyond the jurisdiction of learned ORERA for the reason that the allotment of the flat to the complainant was made in the year 2014, whereas project registration certificate was granted by the ORERA on 11.9.2018 on the application of the respondent for registration in the year 2017. The respondent claimed that the allegations of the complainant do not come within the scope of violation of any obligation under the Act, 2016. The respondent further claimed that the cost mentioned in the letter dated 13.6.2014 was a provisional one and letter dated 2.2.2017 issued by the respondent raising the provisional cost was due to escalation of price. The complainant having not withdrawn from the project cannot raise objection to the increase in cost and therefore the complainant cannot seek the relief that the respondent

should stick to the same. With the aforesaid averments, the respondent-Housing Board prayed for dismissal of the complaint.

The learned ORERA on the basis of the pleadings of the parties, the documents filed by them in support of their respective pleas and also on hearing the representing counsels passed the order directing the respondent-Housing Board to pay interest @10.5% per annum on the payment of Rs.14,73,137/- made by the complainant w.e.f. 24.11.2018 with quarterly compounding till the date of delivery of possession of the flat. Direction was also made to the complainant to pay interest at the same rate to the respondent for his default in payment of the amount of Rs.8,06,400/- towards installment w.e.f. 1.10.2018 with quarterly compounding till the date of actual payment. The respondent was directed to complete the project as soon as possible but not later than 30.6.2020 in any case with a further direction to handover the possession of the flat in question to the complainant, complete in all respect, with promised facilities as well as copies of necessary documents including that of the occupancy certificate.

4) In the hearing of the appeal, the learned counsel for the appellant has submitted that the learned ORERA has failed to take note of the fact that the respondent no.1 had not substantiated the escalation of cost by any material evidence. It is further contended that the learned ORERA has committed an error in observing that the delay in the completion of the project due to encroachment of the site and removal of such encroachment through process of law

was beyond the control of the respondent. The aforesaid observation of the learned ORERA is illegal in view of the fact that the respondent no.1 should not have allowed the encroachers to come upon the site when it was launching the project with the object to provide flats to intending buyers for price. It is further contended that, the unreasonable hike in the cost of the flat to the extent of nearly 32% above the provisional price indicated in the brochure was not taken into consideration even though it was contrary to the term of the brochure. It is further contended that, the learned ORERA failed to appreciate the fact that the respondent no.1 was totally negligent in making the project site free from encroachment before floating the advertisement for the project, stipulating price of the proposed units and collecting payments from the allottees and therefore the appellant cannot be made liable to pay the escalated price for the irresponsible act of the respondent no.1. It is the further contention of the learned counsel for the appellant that there is nothing like provisional price in the scheme of the Act, 2016 or the Odisha Real Estate (Regulation & Development) Rules, 2017 and so fixing a provisional cost for the flat in question at the time of allotment and then escalating its price as per the wish of the respondent no.1-promoter is contrary to the principle of transparency and fairness in real estate transaction. The learned counsel for the appellant has pointed out that the delay in handing over of the possession of the flat to the appellant by the respondent no.1-promoter can be held justifiable only under *force majeure*

circumstances. The explanation to section 6 of the Act, 2016 provides that the expression *force majeure* shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project, which is not there in the present case. The learned counsel for the appellant has drawn the attention of the Tribunal to the fact that as per the provision u/sec. 4 (2) (*l*) (C) of the Act, 2016, advertisement for a real estate project can be floated only after the promoter gets all the required permissions including the commencement certificate/building permit but the respondent-Housing Board by floating the brochure and inviting applications for the project and also collecting EMD as well as installments from the allottees, at a time when the project site was under encroachment, has violated the aforesaid provision of the Act. It is further contended that as per the provision of the Act, 2016 though the allottee is liable to pay interest to the promoter for the overdue installments and is also not entitled to claim compensation, but that does not authorize the promoter to enhance the initial price of the apartment to the extent of 32%, which is arbitrary. It is further pointed out that though the stipulated date for delivery of possession of the flat was 12.6.2017 but direction has been made to the respondent no.1-promoter to pay interest on the payments of the appellant from 24.11.2018, which is contrary to Section 18 (1) of the Act, 2016. With the aforesaid contentions, the learned counsel for the appellant has made the prayers as already mentioned in para-2.

5) On the other hand, the learned counsel for the respondent no.1 has stuck to his pleas made in the written reply to the complaint petition. It is contended by the learned counsel for the respondent no.1 that as the project is registered as an ongoing project the provisions under the Act, 2016 cannot be given retrospective effect as per the decision of the Hon'ble High Court of Bombay in the case of Neel Kamal Realtors Pvt. Ltd. and another Vrs. Union of India and others reported in AIR 2018 Bom., Page-558. Accordingly, the appellant cannot challenge the acts done prior to the registration of the project. It is further contended that the complaint petition is not specific about violation of any of the provisions in sections 11 to 18 of the Act by the respondent no.1 and therefore the complaint case is not maintainable. It is further contended that the appellant's not withdrawing from the project and assailing the escalation of price amount to an act of approbation and reprobation which is forbidden under law. It is further contended that the appellant having not sought for revocation of the registration of the project cannot allege unfair practice by the respondent no.1 and take advantage of section 7 (1) (c) of the Act. The learned counsel for the respondent no.1 has further contended that the heading "Refund/Withdrawal/ Cancellation" in the brochure makes it clear that the allottees is free to withdraw in case the escalation of the cost of the unit is beyond 25% of the price announced in the brochure and therefore, the contention of the appellant that the enhancement of the price by nearly 32% being against the terms of the brochure is an unfair

practice, is not acceptable. The learned counsel for the respondent no.1 has defended the escalation of price of the flat on the ground that such price is dependent on a number of factors like the cost of materials, labour and in the present case the delay in completion of the project work being due to the factors beyond the control of respondent no.1, the appellant is not entitled to challenge the same. The learned counsel for the respondent no.1 has pointed out that the project having been started prior to the commencement of the Act, 2016, the brochure should be treated as the agreement between the parties and therefore the appellant cannot dispute the terms of the brochure by taking recourse to all the provisions of the Act at this stage. The learned counsel for the respondent no.1 has categorically contended that there being no unfair term in the brochure and the appellant having not established as to how the impugned order of learned ORERA is illegal, it is not correct that the learned ORERA has failed to implement the provisions of the Act in right perspective. With the aforesaid contentions, the learned counsel for the respondent no.1 has prayed for dismissal of the appeal.

6) As it appears from the brochure, the project "Kharavela Enclave", a multi-storied premium apartment complex at Dharma Vihar, Jagamara, Bhubaneswar was launched in the year 2011 by the respondent no.1, a statute created constructing agency engaged in housing and development activities in the State, inviting applications from the Public through the brochure for 3 BR, 4BR and 4BR Deluxe flats in the project. Admittedly, the

project not having been completed as on the date of commencement of the R.E (R&D) Act, 2016 (in short 'the Act, 2016') and also having been registered with the ORERA on 11.9.2018 vide registration no.RP/19/2018/ 00196, there remains no doubt that the same comes under the fold of the provisions of the Act.

There is no dispute between the parties that on the basis of draw of lots the appellant was allotted a 4BR (Dlx) flat in the project vide the respondent's letter dtd. 13.6.2014 for a provisional cost of Rs.67,25,000/-. After the appellant deposited an amount of Rs. 7,00,000/- towards EMD, he was informed by the respondent no.1 to deposit Rs. 14,08,000/- alongwith service tax of Rs.65,137/- which he had deposited on 30.6.2014. It is also not disputed between the parties that schedule of payments were revised by the respondent no.1 from time to time. It is further not disputed that the initial stipulated date for completion and delivery of the flat in question was 12.6.2017, but after revisions of schedule of payment the respondent no.1 fixed the expected date of completion of project to 30.6.2020. The bone of contention between the parties is the escalation of the cost of the flat by the respondent no.1 from Rs.67,25,000/- to Rs.91,63,000/- vide his letter dtd. 2.2.2017. Though on objection by the appellant, the respondent no.1 reduced the cost of the flat from Rs.91,63,000/- to Rs.88,40,875/-, but did not relent to make further deduction from the said price in spite of repeated requests by the appellant. The respondent no.1 has claimed that escalation of the cost of the flat allotted to

the appellant is justified due to factors like cost of materials and labour. Apart from the escalation in the cost of the flat, the appellant is also aggrieved for the inordinate delay in completion of the project and delivery of the possession of the flat allotted to him, which on the date of filing of the complaint was more than three years.

7) As regards the escalation of the cost of the flat, the learned ORERA while analyzing the legality of the said escalation by the Board in the impugned order has made the following categorical observation :

> "it will be profitable to refer to the concerned provision in the brochure for the convenience of analyzing the contention of the complainant that the Board as per the brochure does not have the power to enhance the provisional cost of the flat. The relevant provision is quoted below :
> 'Other Details'
>
> (a) xxxxx xxxxxx xxxxx
>
> (b) Final sale price of the flat will be intimated to the allottees after completion of the project which shall be payable by them before taking possession. Minimum cost escalation is expected.
>
> (c) xxxxx xxxxxx xxxxx
>
> The above provision in the brochure, which has the weight of an agreement between the parties, entitles the Board to determine the final cost of the flat after its completion and does not entitle it to enhance the provisional cost at any time during the period of project construction. But the Board has enhanced the provisional cost of the flat before its completion. Since it has become a '*fait accompli*' situation, we while not inclined to declare it illegal hold that this enhanced provisional cost of the flat is the final cost in terms of the provision in the brochure and it is not open to the Board to further escalate the flat cost hereafter."

In absence of a formal agreement for sale between the parties in writing, certainly the brochure can be treated as same. However, despite it is specifically provided in the above mentioned clause (b) of the heading

"Other Details" of the brochure that, final sale price of the flat will be intimated to the allottee after completion of the project, which shall be payable by him before taking possession and minimum cost escalation is expected, the cost of the flat in question was escalated by the respondent no.1-promoter when the project had still not been completed. That apart, no prudent mind would accept the enhancement of the cost of the flat from Rs.67,25,000/- to Rs.91,63,000/- (subsequently reduced to Rs.88,40,875/-), as a minimum cost escalation. The respondent no.1 has not explained as to under what circumstance the cost of the flat initially fixed at Rs.67,25,000/- vide letter dt. 13.6.2014 and thereafter it was enhanced to Rs.91,63,000/- vide letter dtd. 2.2.2017, which was subsequently reduced to Rs.88,40,875/- vide letter dtd. 18.7.2018. So the enhancement of the cost of the flat in question by an amount of Rs.21,15,875/- is without any reasonable explanation regarding the circumstance of such enhancement particularly when the respondent no.1-Board itself was at fault for not being able to complete the project and handover the possession of the flat within the period stipulated in the brochure. This certainly defies logic and clearly shows that the escalation is exorbitant and arbitrary. Things would have been different had the project been completed by 12.6.2017 and a minimum escalation in the cost of the flat would have been made some reasonable factors before delivery of possession of the flat. It is not understood as to how the learned ORERA despite referring to clause (b) of 'Other Details' of the brochure and noting

that the Board is not entitled to enhance the provisional cost at any time during the period of project construction still held the enhancement of the cost to have become a '*fait accompli*' situation with a direction to the Board not to further escalate the flat cost hereafter. The enhancement of the provisional cost by an amount of Rs. 21,15,875/- being expressly contrary to the term in the brochure under clause (b) of heading "Other Details", is illegal and hence cannot be allowed as a '*fait accompli*' situation.

8) So far as the alleged delay in the delivery of possession of the flat in question is concerned, it is seen that the brochure mentions the project period as 36 months from the zero date i.e. the date of selection of the allottee. There is no sale agreement between the parties, but the date of allotment of the flat in question to the appellant being 13.6.2014 the same is to be treated as the date of his selection as an allottee and accordingly the date of handing over of possession of the flat in question as per the brochure is 12.6.2017. So, as on the date of filing of the complaint case i.e. 29.10.2018, a delay of more than 16 months in completing the project has occasioned. The brochure contains the categorical term that no interest will be paid by the Board in case of delay in construction due to the factors beyond the control of the Board. Under the heading 'Force Majeure' in the brochure it is provided that, if the construction of the houses is delayed for the reasons of force majeure, the OSHB shall be entitled to a reasonable extension of time stipulated for delivery of possession of the asset. 'Force Majeure' has been stated to include inordinate

delay in approval of tenders, delay on account of non-availability of steel, cement or any other building materials/labour or water supply or electric power backup or slow down strike or due to dispute with the construction agency employed by OSHB, civil commotion or war or criminal action or earthquake or any other act of God, delay in certain decisions/ clearances from statutory bodies or any notice, order, rule or notification of the government or any other public or competent authority or for any other reason beyond the control of OSHB. The inclusion of so many aspects in *'Force Majeure'* exhibits an arbitrary interpretation of the term in the brochure by the OSHB for its own advantage, particularly when the same brochure clearly provides that for default by allottee in payment of installment as per schedule, interest @ 15% per annum on overdue amount will be levied for the defaulted period and the allotment may be cancelled for default in two consecutive installments. For the purpose of section 6 of the RERA Act, the expression '*Force Majeure'* shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project. As the project in question is under the fold of the Act, 2016, 'force majeure, for delay in its completion can only include the aforesaid circumstances as per Section 6 but not the other circumstances as included in the brochure. The aforesaid terms in the brochure which make only the allottee liable to pay interest in case of default in payment of installments, but not the promoter in case of delay in delivery of

possession of the flat are certainly one sided clauses. In the case of **Pioneer Urban Land and Infrastructure Ltd. Vrs. Govindan Raghavan reported in 2019 SCC online SC-458,** the Hon'ble Apex Court have made it clear that, incorporation of one sided clauses in an agreement constitutes an unfair trade practice as per Sec. 2 (r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.

The project being under the fold of the Act, 2016 the respondent no.1-promoter is not entitled to keep a clause in the brochure which will be violative of appellant-allottee's right to interest u/sec. 18 (1) of the Act. The circumstance of the present case i.e. encroachment of the project land by one Gagan Behari Mohanty and ten others and the inability of the respondent no.1 to remove the encroachments is not a reason beyond his control because of the fact that the encroachments on the project land are not an over-night development and it is not the plea of the respondent no.1 that the encroachment had taken place after the publication of the brochure and initiation of the transaction with the intending buyers including the appellant. While advertising for the project or after that the respondent no.1 was well aware of the fact of encroachments on the project land and therefore, it's pea that it had initiated a statutory proceeding under section 45 of the OHB Act, 1968 against the encroachers and eviction order being passed against them they challenged the same before the District Judge, Khurda in F.A.O. No.

69 of 2014 and the same was dismissed on 24.11.2015 is not acceptable for the delay in completion of the project. The respondent no.1 should not have made advertisement inviting public to apply for the 3BR, 4 BR and 4 BR Deluxe category of houses in the project and proceeded with the transaction by allotments and collection of EMDs and installments without first ensuring the project land to be free from encroachments. In the case **Jagpal Singh and Others Vrs. State of Punjab and Others reported in AIR SC-1123,** the Hon'ble Apex Court on finding encroachment by trespassers on a Gram Panchayat land by use of muscle power/money power and also in collusion with the officials and even with the Gram Panchayat, observed in clear terms that, such kind of blatant illegalities must not be condoned. Even if the appellant (encroachers) have built houses on the land in question they must be ordered to remove their constructions and possession of the land in question must be handed over back to the Gram Panchayat. The state has a responsibility to protect public land and ensure that it is used for its intended purpose. Individuals allotted with lands by the State should not suffer due to the State's failure to evict the encroachers from that land. Hence, the appellant being a legitimate allottee having no fault in the encroachment cannot be made to accept the delay on account of the same and his right u/sec. 18 (1) (b) proviso must be safeguarded.

In view of the above discussed facts and circumstances and position of law relating to encroachments on public lands, the finding of the learned

ORERA that, the period taken by the Board to make the project site free from encroachments, following due procedure of law, is a delay beyond the control of the Board and it will be unreasonable to hold the Board responsible for it, is not acceptable and cannot be sustained.

The reiterated plea of the respondent no.1 that the appellant having consented to the terms and conditions of the brochure and wished to continue in the project despite being given a number of options to withdraw from the project is not entitled now to raise the issue of escalation of cost and delay in delivery of possession of the flat, is not acceptable for the reason that, no allottee having been allotted with a flat of his place of choice at his affordable price would readily want to withdraw from the project four years after investing money in case of escalation of the initially fixed cost and delay in delivery of possession of the flat. Keeping such an option in the brochure itself shows the whimsical attitude of the respondent no.1.

Considering the nature of the project undertaken by the respondent no.1, it is certainly a promoter as contemplated u/sec. 2 (zk) of the Act, 2016 and hence is bound to discharge its obligations as per the provisions of the Act. In the present case, the respondent no.1 having failed to fulfil its contractual obligation of completing the project and deliver possession of the flat in question to the appellant-allottee within the stipulated period and the appellant having not intended to withdraw from the project, he shall be paid by the respondent no.1

interest for every month of delay, till the handing over of the possession of the flat in question to him in accordance with section 18 (1) (b) of the Act. The grounds taken by the respondent no.1 for delay in completion of the project and delivery of the flat in question to the appellant having failed, he is liable to pay interest to the appellant on expiry of the stipulated date for completion of construction i.e. from 13.6.2017 till the date of actual delivery of possession of the flat to the appellant.

9) In view of the discussions made in the preceding three paragraphs, we come to the following conclusions :

i) The escalation of the provisional cost of the flat in question from Rs.67,25,000/- to Rs.88,40,875/- being illegal, is hereby set side.

ii) The respondent no.1 is liable for the delay in completion of the project "Kharvela Enclave" beyond 12.6.2017 and accordingly shall pay interest at the prescribed rate to the appellant for such delay from 13.6.2017 till the date of actual handing over of the possession of the flat to him.

iii)The rate of interest on the amount paid by the appellant i.e. Rs.14,73,137/- shall be as per rule-16 of the Odisha Real Estate (Regulation and Development) Rules, 2017, which is 10.15% per annum (8.15% + 2%) from 13.6.2017 till the date of actual handing over possession of the flat.

iv) The order of the learned ORERA with regard to compound interest is set aside as the same is not prescribed under the ORERA Rules, 2017.

With the aforesaid modifications in the nature and rate of interest, the appeal is allowed on contest against the respondents.

Send an authentic copy of this order alongwith the record of the complaint case to the learned ORERA for information and necessary action. Also send a copy of the impugned order each to the appellant and the respondent No.1.

Shri S.K.Rajguru
(Judicial Member)

Dr. B.K.Das
(Tech./Admn. Member)

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