



**IN THE MATTER OF:**

**Deepak Singh**

**...Appellant**

**Vs**

**Orissa Manganese and Minerals Ltd. & Anr.**

**...Respondents**

**Present:**

**For Appellant: Mr. Gaurav Singh, Advocate.**

**For Respondents: Mr. Arjun Asthana, Mr. Sidharth Ghosh and Ms. Sreenita Ghosh, Advocates for RP.**

**Ms. Arveena Sharma and Mr. Shantanu Chaturvedi, Advocates for Monitoring Committee.**

**With**

**Company Appeal (AT) (Insolvency) No. 444 of 2018**

(Arising out of Order dated 22<sup>nd</sup> June, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA (IB) Nos. 402, 398, 470 & 509/ KB/2018 in CP(IB) No. 371/KB/2017)

**IN THE MATTER OF:**

**Edelweiss Asset Reconstruction Co. Ltd.**

**...Appellant**

**Vs**

**Orissa Manganese and Minerals Limited**

**...Respondentm**

**Present:**

**For Appellant: Mr. Ramji Srinivasan, Senior Advocate with Mr. Sanjay Bhat, Ms. Srishti Kapoor and Ms. Sylona Mohapatra, Advocates.**

**For Respondents: Mr. Arun Kathpalia, Senior Advocate with Mr. Abhijeet Sinha, Mr. Mahesh Agarwal, Mr. Arshit Anand, Ms. Neeha Nagpal, Ms. Bani Brar and Mr. Ramya Hariharan, Advocates.**

**Mr. Arjun Asthana, Mr. Jishnu Chowdhary,  
Mr. Sidhartha Sharma and Ms. Sreenita  
Ghosh, Advocates.**

**Ms. Arveena Sharma and Mr. Shantanu  
Chaturvedi, Advocates for Monitoring  
Committee.**

**Ms. Misha and Ms. Charu Bansal, Advocates  
for SBI.**

**With  
Company Appeal (AT) (Insolvency) No. 500 of 2018**

(Arising out of Order dated 22<sup>nd</sup> June, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CA (IB) Nos. 402, 398, 470 & 509/ KB/2018 in CP(IB) No. 371/KB/2017)

**IN THE MATTER OF:**

**Sundargarh Mines & Transport Workers Union** **...Appellant**

**Vs**

**Orissa Manganese & Minerals Ltd. & Ors.** **....Respondents**

**Present:**

**For Appellant: Mr. Kapil Sankhla, Mr. Shridhar Chitale,  
Ms. Samprikta Ghosal, Mr. Vivek R.  
Mohanty, Mr. Mohit Nagar, Mr. Suait  
Purohit and Ms. Priyadarshni Patnayak,  
Advocates.**

**For Respondents: Mr. Arjun Asthana, Mr. Jishnu Chowdhary,  
Mr. Sidhartha Sharma and Ms. Sreenita  
Ghosh, Advocates.**

**Ms. Arveena Sharma and Mr. Shantanu  
Chaturvedi, Advocates for Monitoring  
Committee.**

**Ms. Misha and Ms. Charu Bansal, Advocates  
for SBI.**

**Ms. Neha Nagpal, Mr. Vivyang Chandiramani  
and Mr. Ajitesh Soni, Advocates.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

‘Orissa Manganese & Minerals Limited’- (‘Corporate Debtor’) engaged in the business of mining iron ore, graphite, manganese ore, and agglomerating iron fines into pellets through its facilities in Orissa and Jharkhand and is an unlisted Public Company. The ‘Corporate Insolvency Resolution Process’ was initiated against the ‘Corporate Debtor’ on 3<sup>rd</sup> August, 2017 by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata.

2. Upon completion of ‘Corporate Insolvency Resolution Process’ i.e. within 270 days, the ‘Resolution Professional’ has succeeded in getting approval of one ‘Resolution Plan’ among three ‘Resolution Plans’ received by him. The ‘Resolution Plan’ submitted by ‘Ghanashyam Mishra & Sons Private Limited’ (‘Successful Resolution Applicant’) has been approved by the ‘Committee of Creditors’ in the 13<sup>th</sup> Meeting of the ‘Committee of Creditors’ convened on 25<sup>th</sup> April, 2018 by more than 89.23% voting share after due negotiation.

3. Thereafter, the ‘Resolution Professional’ filed an application under Section 31(1) of the Insolvency and Bankruptcy Code, 2016 (‘I&B Code’ for

short) for approval of the 'Resolution Plan' of 'Ghanashyam Mishra & Sons Private Limited'.

4. An application under Section 30(5) of the 'I&B Code' was filed by 'Edelweiss Asset Reconstruction Company Limited' (Appellants in two of the appeals) alleging that the ranking of the bidders is not legal or proper and the selection and approval of the selected 'Resolution Plan' by the 'Committee of Creditors' does not meet the requirement to be meted out under the provisions of the 'I&B Code' and Regulations framed thereunder.

5. The plea was taken that the 'Resolution Professional' has failed in its duty of disclosing of required information in the Information Memorandum. The last date of the submission of the 'Resolution Plan' was 10<sup>th</sup> April, 2018, and the Appellant- 'Edelweiss Asset Reconstruction Company Limited' submitted its 'Resolution Plan' which was not considered properly.

6. The stand of the 'Resolution Professional' was that in the second round of bidding, on 13<sup>th</sup> April, 2018, 'Edelweiss Asset Reconstruction Company Limited' was scored as last and was declared as 3<sup>rd</sup> Highest and 'Ghanashyam Mishra & Sons Private Limited' as 1<sup>st</sup> Highest 'Resolution Applicant'.

7. Another application under Section 60(5) was filed by the 'Edelweiss Asset Reconstruction Company Limited' on the ground that the 'Resolution Professional' is not admitting the claim of 'Edelweiss Asset Reconstruction Company Limited'. So also, the Appellant raised objections in approving

the 'Resolution Plan' submitted by 'Ghanashyam Mishra & Sons Private Limited'.

8. Another application was filed by the District Mining Officer, Department of Mines and Geology, Jharkhand under Section 60 (5) of the 'I&B Code' challenging the non-admission of its claim to the tune of Rs.93,51,91,724/- and Rs.760.51 Crores as per Form B submitted before the 'Resolution Professional'. The stand of the Government of Jharkhand that it was secured creditor of 'Orissa Manganese & Minerals Limited'- ('Corporate Debtor') and instead treated as 'Operational Creditor', therefore, the Government of Jharkhand cannot be treated to be an 'Operational Creditor' and which otherwise is in violation of Section 25(2) of Mines and Mineral (Development and Regulation) Amendment Act, 1972.

9. The Adjudicating Authority by impugned order dated 22<sup>nd</sup> June, 2018, rejected both the applications filed by 'Edelweiss Asset Reconstruction Company Limited' and other application filed by Government of Jharkhand and approved the 'Resolution Plan' submitted by 'Ghanashyam Mishra & Sons Private Limited' which was approved by more than 89.23% voting shares by the 'Committee of Creditors'.

**In Company Appeal (AT) (Insol.) No. 437 of 2018**

10. In this appeal, the Appellant- 'Edelweiss Asset Reconstruction Company Limited' has raised claim against non-inclusion/ rejection of its proof of claim as 'Financial Creditor' and thereby, including it as a member of the 'Committee of Creditors' of the 'Corporate Debtor'.

11. Learned counsel for the Appellant has taken plea that it having received guarantee from the 'Corporate Debtor' comes within the meaning of 'Financial Creditor' and, therefore, its claim should be accepted.

12. The case of the Appellant is that 'Adhunik Power and Natural Resources Limited' ("APNRL" for short) had availed various financial facilities from a consortium of banks and financial institutions to the tune of Rs.1516.16 Crores. 'India Infrastructure Finance Company Limited'- ("IIFCL" for short), was approached for providing a take-out financial assistance under its Take-out Finance Scheme. As part of the security, amongst others, for the said Take-out Finance Facility, 'APNRL' procured Corporate Guarantee dated 5<sup>th</sup> December, 2014 of 'Orissa Manganese Minerals Limited'- ('Corporate Debtor') in favour of 'IIFCL'.

13. 'IIFCL' assigned debt of 'APNRL' together with underlying securities to the Appellant- 'Edelweiss Asset Reconstruction Limited' and thus, by virtue of the assignment of debt, it has stepped into the shoes of 'IIFCL' and is thus, entitled to exercise its rights in respect of the said debt and the securities created therefor.

14. During the 'Resolution Process', the Appellant- 'Edelweiss Asset Reconstruction Limited' informed the 'Resolution Professional' through various emails and letters about the loan, more particularly dated 3<sup>rd</sup> January, 2018 and 4<sup>th</sup> January, 2018, the assignment of debt along with its underlying securities, including the Corporate Guarantee dated 5<sup>th</sup> December, 2014 by 'Orissa Manganese Minerals Limited'- ('Corporate

Debtor') and requested him to bring the aforesaid fact to the knowledge of 'Resolution Applicants'/ bidders in 'Orissa Manganese Minerals Limited'- ('Corporate Debtor').

15. Further, the case of the Appellant- 'Edelweiss Asset Reconstruction Limited' is that the proof of claim under Form C was filed for a sum of Rs.648,89,62,395/- along with supporting documents on 6<sup>th</sup> January, 2018 which was received by the 'Resolution Professional'. However, the 'Resolution Professional' vide email dated 8<sup>th</sup> January, 2018 enquired about the invocation of the Corporate Guarantee of 'Orissa Manganese Minerals Limited'- ('Corporate Debtor') by the Appellant, placing reliance upon the order passed by the Adjudicating Authority in the case of **"Axis Bank vs. Edu Smart Services Limited"**.

16. The grievance of the Appellant is that the claim of the Appellant was not taken into consideration by the 'Resolution Professional' because of non-invocation of the Corporate Guarantee, and was neither invited or made a member of the 'Committee of Creditors' despite it being a 'Financial Creditor' of the 'Corporate Debtor' on the basis of its claim against the Corporate Guarantee given by the 'Corporate Debtor'.

17. The 'Resolution Professional' and the 'Successful Resolution Applicant'- ('Ghanashyam Mishra & Sons Private Limited') have taken similar plea that the Appellant- 'Edelweiss Asset Reconstruction Limited' having not invoked the Corporate Guarantee cannot claim to be a 'Financial Creditor'.



18. Section 5(7) defines 'Financial Creditor' whereas Section 5(8) defines 'Financial Debt', which reads as follows:

**“5. Definitions.—** (7) *“financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to”*

*“5 (8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*

*(a) money borrowed against the payment of interest;*

*(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*

*(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

*(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the*

*Indian Accounting Standards or such other accounting standards as may be prescribed;*

*(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*[Explanation.- For the purposes of this sub-clause,-*

*(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

*(ii) the expression, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development Act, 2016 (16 of 2016));]*

*(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for*

*calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*

*(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*

*(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”*

19. In terms of Section 5(8)(h), any counter-indemnity obligation in respect of a guarantee also comes within the meaning of ‘financial debt’, therefore, the Appellant- ‘Edelweiss Asset Reconstruction Limited’ on the basis of such guarantee can technically claim to be a ‘Financial Creditor’ within the meaning of Section 5(7).

20. Section 3(6) defines ‘claim’ whereas Section 3(11) defines ‘debt’:

*“3(6) “claim” means—*

*(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

*(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured”*

*“3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”*

21. The question arises for consideration in this case whether the Appellant- ‘Edelweiss Asset Reconstruction Limited’ can make claim and thereby has a right of payment of which liability and obligation in respect of the claim is due from the ‘Corporate Debtor’?

22. On declaration of ‘Moratorium’, under Section 15 public announcement of the ‘Corporate Insolvency Resolution Process’ to be made showing the last date for submission of the claims.

23. Under Section 18(1) (b), it is the duty of the ‘Resolution Professional’ to receive and collate all the claims submitted by creditors, as on the date of initiation of ‘Corporate Insolvency Resolution Process’ (date of admission).

24. It is true that the 'Corporate Debtor' had taken guarantee but the said guarantee was not invoked in favour of the Appellant- 'Edelweiss Asset Reconstruction Limited'. However, the said guarantee was not invoked by the Appellant- 'Edelweiss Asset Reconstruction Limited' as on the date of admission or filing of the claim.

25. On declaration of 'Moratorium', it was not open to the Appellant- 'Edelweiss Asset Reconstruction Limited' to invoke the guarantee (Corporate Guarantee).

26. It is also not the case of the Appellant- 'Edelweiss Asset Reconstruction Limited' that it has not received the amount from the 'Principal Borrower' on default and, therefore, it was liable to invoke the Bank Guarantee which it invokes. In this background, the claim having not matured in absence of alleged default on the part of the 'Principal Borrower' and for non-invocation of the Bank Guarantee, the Appellant- 'Edelweiss Asset Reconstruction Limited' claim cannot be accepted the debt payable by the 'Corporate Debtor' as on the date of the admission (initiation of 'Corporate Insolvency Resolution Process').

27. For the said reasons, we hold that the 'Resolution Professional' has rightly not accepted the claim of the Appellant- 'Edelweiss Asset Reconstruction Limited' and the Adjudicating Authority has rightly rejected the application filed by the Appellant- 'Edelweiss Asset Reconstruction Limited' for accepting its claim.



plans which were before the 'Committee of Creditors' to find out whether any of the 'Resolution Applicant' has been discriminated. The comparative chart and scoring summary produced by the 'Resolution Professional' was noticed as shown below:

	<b>Payment plan of Ghanshyam Misra</b>	<b>Payment plan of SRIE</b>	<b>Payment plan of Edelweiss ARC</b>
Total payment to all Creditors, Workmen and employees & CIRP cost	321.19	300.00	282.00
Payment estimated for CIRP costs	3.41	3.41	3.41
Payment for workmen & employees	0.38	0.38	0.38
Payment to critical Operational Creditors	7.40	0.74	
Payment to Financial Creditors	310.00	295.47	166.21
- Of which Upfront payment (within 90 days)	250.00	50.00	166.21
- Of which NPV of balance payments	40.83	250.00	-
- Total of Upfront payment and NPV	290.83	300.00	166.21
- Actual payment terms of balance payments	Compulsorily Redeemable Preference Shares of Rs.60 Crores redeemable at the end of 5 <sup>th</sup> year from NCLT approval date (NPV Rs. 40.83 crores at discount rate of 8% p.a.)- 0.01% dividend *Banks to have a put option on RA (GMS & NPSPL) at the end of 5 <sup>th</sup> year from NCLT approval  *Promoters of RA to have call option on preference shares at anytime at the then NPV	Continuing debt of Rs.250 or to be paid in 20 equal quarterly instalments to be paid over 5 years	-
Equity stake to be provided by RA	25% equity in mining only company to the Financial Creditors	10% stake to Financial creditors in the Pellet Plan Co. and OMML (mining operations).	24% stake to Financial Creditors
NPV of Offer amount/Enterprise Value	60.95%	62.87%	34.83%
NPV of Offer amount/ Liquidation Value	105.99%	109.34%	60.58%

32. Looking at the above comparative chart and scoring summary, it having revealed that the offer of 'Ghanashyam Mishra & Sons Private Limited' is better than the offer of other two 'Resolution Applicants', the Adjudicating Authority rightly approved the 'Resolution Plan' and we find no illegality in the same.

**Company Appeal (AT) (Insol.) No. 500 of 2018**

33. This appeal has been preferred by the Appellant- 'Sundargarh Mines & Transport Workers Union' on behalf of the workmen of the 'Corporate Debtor'. According to the Appellant, which represent the Workmen who are poor, illiterate mines workers (1476 workers) mostly belonging to tribal community in interior parts of Odisha, who have been made to run from pillar to post for getting their hard earned wages and statutory dues as per the Constitution of India, Labour Laws and 'I&B Code'.

34. Their grievance is that the 'Resolution Professional' vide order dated 8<sup>th</sup> March, 2018, stated before the Adjudicating Authority that they have engaged around 1000 workers for its mining operations and still after admitting the above fact and knowing about existence and hardship of these workmen, the 'Resolution Professional' has chosen to completely ignore their rightful wages, statutory dues and other benefits under the 'Corporate Insolvency Resolution Process'.



35. The case of the Appellant is that these 1476 workers are working for the 'Corporate Debtor' for a long period of time and there have been various agreements entered into between the 'Corporate Debtor' and the Appellant over the years thereby showing continuity of work, which is evident from the Settlement/Agreement dated 23<sup>rd</sup> May, 2007, 24<sup>th</sup> September, 2008 and 19<sup>th</sup> September, 2009. Subsequently, another Settlement dated 5<sup>th</sup> June, 2015 was entered into between the management of the 'Corporate Debtor' and the Appellant and the said Settlement specifically provides that the continuity of service of the workmen will be maintained from the date 14<sup>th</sup> January, 2007, thus unequivocally evincing that these workmen are continuously working with the 'Corporate Debtor'.

36. 'Ghanashyam Mishra & Sons Private Limited'- ('Successful Resolution Applicant') submitted that the 'Corporate Insolvency Resolution Process' commenced on 3<sup>rd</sup> August, 2017 and expired on 1<sup>st</sup> May, 2018. After expiry of 270 days of the 'Resolution Process' period, the Appellant filed its claim before the 'Resolution Professional' only on 18<sup>th</sup> June, 2018. It is informed that the Adjudicating Authority vide its order dated 22<sup>nd</sup> June, 2018 approved the 'Resolution Plan'. Further, the Appellant moved before the Adjudicating Authority which having dismissed at belated stage.

37. It was submitted that the Appellant was completely aware about the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor'. The Deputy Director of Mines vide its letter No. 38/Mines dated 1<sup>st</sup> January, 2018 issued notice for stoppage of mining operation in respect of the

Patamunda Manganese Mines. Thereafter, Patamunda Mines were forced to shut on 1<sup>st</sup> January, 2018.

38. Aggrieved by the said order of Deputy Director of Mines, the 'Resolution Professional' filed an application before the Adjudicating Authority for re-opening of the mines, for the present. The Appellant actively contested in the said litigation for re-opening of the mines during the 'Corporate Insolvency Resolution Process' period of the 'Corporate Debtor'. This has been taken note by the Adjudicating Authority.

39. It is also stated that the public announcement made in Vernacular one in Orissa Post in English and another in Prameya in English and Odiya.

40. In the present case, as we find that the Appellant- workmen filed claim on behalf of 1476 workmen. Apart from those, who are already working and for whom the 'Resolution Professional' intimated and the 'Successful Resolution Applicant' has allocated funds, no specific finding can be given on the question of fact. As it is not possible for this Appellate Tribunal to decide who are 1476 workmen in addition to those who have been accepted to work by the 'Resolution Professional' during the 'Resolution Process' and those workmen who have filed claim within the time. It is not desirable for us to give finding one or other way.

41. Sub-Section (6) of Section 60 reads as follows:

**“60. Adjudicating Authority for corporate persons.—** (6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”

42.

.....X                          X                          X.....

43.

.....X                          X                          X.....

**Company Appeal (AT) (Insol.) No. 438 of 2018**

44. According to Appellant- Mr. Deepak Singh, he has joined Adhunik group of Industries, the holding company of 'Orissa Manganese and Minerals Ltd.' as the President- Group Head HR in E5 Grade with effect from the date effective from 2<sup>nd</sup> June, 2014 to 9<sup>th</sup> March, 2015 at the CTC of Rs. 55,00,000/- per annum.

45. Post termination of duties, the Appellant obtained the full and final settlement letter from the Head Office of 1<sup>st</sup> Respondent, having its office at Kolkata, where the period of service was admitted as starting from 2<sup>nd</sup> June, 2014 and ending on 9<sup>th</sup> March, 2015. The said full and final settlement letter mentioned that the total outstanding payable by 1<sup>st</sup> Respondent to the Appellant was to the tune of Rs.17,03,000/-.

46. The Appellant thereby claimed to be an 'Operational Creditor' and his grievance is that he filed claim before the 'Interim Resolution Professional' who has hopelessly and unlawfully denied to adhere to the rules. However, though such stand has been taken by the Appellant, it has not been made clear as to why he has not moved before the Adjudicating Authority against the rejection of the claim, if made by the 'Resolution Professional'.

47. Learned counsel appearing on behalf of the 'Ghanashyam Mishra & Sons Private Limited' ('Successful Resolution Applicant') submitted that the Appellant herein endeavors to claim 40% of the salary based on the letter dated 1<sup>st</sup> July, 2014 wherein the salary was reduced and restructured to

60%. It is stated by the 'Corporate Debtor' in its letter dated 1<sup>st</sup> July, 2014 that the company will soon announce a policy to compensate the reduction.

48. According to 'Successful Resolution Applicant', the plan having approved, the said plan can be challenged only on the ground as enumerated under Section 61(3) of the 'I&B Code'.

49. Having heard learned counsel for the parties, we are of the view that the Appellant cannot be granted any relief at this belated stage, having not challenged the decision of the 'Resolution Professional' under sub-Section (5) of Section 30 of the 'I&B Code' at appropriate stage.

50. Section 32 of the 'I&B Code' deals with 'Appeal' wherein any appeal from an order approving the 'Resolution Plan' shall be in the manner and on the grounds laid down in sub-section (3) of Section 61, which reads as follows:

***“32. Appeal.**—Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61.”*

***“61. Appeals and Appellate Authority** – .....(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—*

- (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;*

- (ii) *there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;*
- (iii) *the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;*
- (iv) *the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or*
- (v) *the resolution plan does not comply with any other criteria specified by the Board.”*

51.

.....X                    X                    X.....

52.

.....X                    X                    X.....

53. For the reasons aforesaid, we dismiss Company Appeal (AT) (Insolvency) Nos. 444 & 438 of 2018 and dispose of Company Appeal (AT) (Insolvency) Nos. 437 & 500 of 2018. No cost.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

NEW DELHI

23<sup>rd</sup> April, 2019

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