IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13042 of 2018

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Narsingh Ram S/o Late Lagan Ram, R/o Vill- Dullahpur, P.O.- Harnathpur, P.S.- Mohania, District- Kaimur.

... ... Petitioner

Versus

1. The State Of Bihar through the Chief Secretary, Patna
2. The Principal Secretary, Department of Education, Government of Bihar, Patna.
3. The Director, Primary Education Department, Government of Bihar, New Secretariat (Bikas Bhawan), Patna
4. The District Magistrate-cum-Collector, Kaimur at Bhabhua.
5. The Regional Deputy Director of Education, Patna Division, Patna.
6. District Education Officer, Kaimur.
7. District Programme Officer Establishment, Kaimur.
8. The Deputy Collector Establishment-cum-Nodal Officer, Kaimur Bhabhua.
9. The Sub-Divisional Education Officer, Bhabhua.
10. The Accountant General, Bihar, Birchand Patel Path, Patna.

... ... Respondents

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Appearance :
For the Petitioner : Mr. Kumar Brijnandan, Advocate
For the Respondents : Mr. Amit Bhushan, AC to GP 17
For Accountant General : Mr. Chaitanya Swaroop, Advocate

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT
Date : 27-02-2020

Heard learned counsel appearing on behalf of the petitioner, learned counsel appearing on behalf of the State and learned counsel appearing on behalf of the Accountant General.

2. The petitioner has approached this Court for the following reliefs:-

"(i) For issuance of an order(s)/ direction(s) or appropriate writ(s) for setting aside the orders dated 12.06.1998 and 29.06.1998 by

which the petitioner was dismissed from service on the basis of his conviction in Sessions Trial No. 1467 of 1979 arising out of Mohania P.S. Case No. 8 of 1978. And/or

(ii) For issuance of further order(s)/ direction(s) or writ(s) in the nature of Certiorari to quash the order of suspension of the petitioner w.e.f. 29.05.1979 on account of his being an accused in the F.I.R. bearing Mohania P.S. Case No.8 of 1978. And/or

(iii) For issuance of further order(s)/ direction(s) or writ(s) in the nature of mandamus directing the respondents to make payment of entire salary and allowances to the petitioner along with interest from the date of his suspension i.e. 29.05.1978 till the date of his superannuation i.e. 28.02.2003. And/or

(iv) For issuance of further order(s)/ direction(s) or writ(s) in the nature of mandamus directing the respondents to treat the petitioner on duty from the date of his suspension i.e. 29.05.1978 till the date of his superannuation i.e. 28.02.2003 and fix the pay of the petitioner accordingly and also grant to the petitioner all consequential benefits including gratuity, pension etc.

(v) Pass such other appropriate Writ(s) or Order(s) or Direction(s) as may be deemed fit and proper in the facts and circumstances of the instant case."

3. The petitioner was appointed as Assistant Teacher in Primary School, Dumrawan, Aghoura, Shahabad on 21.06.1971. In 1978, he was made accused in Mohania P.S. Case No. 08 of 1978. On account of his involvement in the criminal case, he was put under suspension by office order dated 20.01.1989 issued under the signature of the District Superintendent of Education vide Annexure-1. The petitioner

and along with other persons was convicted by 4th Additional Sessions Judge, Rohtas at Sasaram vide judgment dated 18.12.1987

4. After punishment of life imprisonment in Sessions Trial No. 1467 of 1979, the petitioner preferred Criminal Appeal No. 28 of 1988. During the pendency of the appeal, the petitioner was dismissed from service vide orders dated 12.06.1998 and 29.06.1998. The order of dismissal was challenged by the petitioner in CWJC No. 1974 of 1999. In Criminal Appeal preferred by the writ petitioner, the Court admitted the criminal appeal and the petitioner was granted bail.

5. In the aforesaid background, this Court observed in CWJC No. 1979 of 1999 that this Court cannot direct that the order of dismissal at this stage is bad and he cannot be granted any relief. The Court, however, observed that if the petitioner succeeds in this appeal, his services may be restored subject to order, if any, passed in the disciplinary proceeding. The High Court dismissed Criminal Appeal No. 28 of 1988 and approved the judgment of conviction passed by the trial court. The petitioner and others filed Criminal Appeal Nos. 493-494 of 2008 in the Apex Court and the Apex Court on 16.02.201 passed the following orders which is quoted hereinbelow:-

> *"On perusal of evidence, we find that in present case over implication is not ruled out. They have not been assigned any particular role to the assault on the deceased. Having regard to entirety of material on record, they are entitled to benefit of doubt.*
>
> *Accordingly, we set aside the conviction and sentence of the appellant and acquit them.*
>
> *The appeals are allowed in above terms. Pending application (s), if any, shall also stand disposed of."*

6. From the order of the Apex Court, the following facts and circumstances emerged.

The Apex Court on perusal of the evidence held out that in the present case over implication is not ruled out. Prosecution has not been assigned any particular role in the assault on the deceased. The Court therefore acquitted the appellant holding that **having regard to the entirety of materials on record, they are entitled to benefit of doubt.** (emphasis supplied)

7. After the judgment of the Apex Court, the petitioner has approached for quashing of the order of dismissal and for treating the petitioner as on duty from 29.05.1978 to his date of superannuation i.e. on 28.02.2003.

8. It is not in dispute that the petitioner was lodged in jail during the period 29.05.1978 to 28.02.2003. It is also not in dispute that the petitioner was dismissed after the judgment of

conviction on 29.06.1998.

9. Mr. Kumar Brajnandan, learned counsel for the petitioner, has drawn the attention of this Court to Rule 99 of the Bihar Service Code, to contend that the petitioner on account of acquittal by the Apex Court is entitled to automatic restoration of his service and grant of salary for the period upto the age of superannuation when the petitioner was kept out of employment on account of his conviction and pendency of the criminal appeal before the High Court.

10. Rule 99 of the Bihar Service Code reads as follows:-

> *"A servant of Government against whom proceedings have been taken either for his arrest for debt or on a criminal charge or who is detained under any law providing for preventive detention should be considered as under suspension for any periods during which he is detained in custody or is under going imprisonment, and not allowed to draw any pay and allowances (other than any subsistence grant that may be granted in accordance with principles laid down in rule 96) for which period , until the termination of the proceedings taken against him or until he is released from detention and allowed to rejoin his duties as the case may be. An adjustment of his allowances for such period should therefore, be made according to the circumstances of he case, the full amount being given only in the event of the Government servant being acquitted of blame or (if the proceeding taken against him, were for his arrest for debt) of its being proved that the government servant's liability arose from circumstances beyond his*

control or detention, being held by the competent authority to be unjustified."

11. Mr. Kumar Brajnandan, learned counsel for the petitioner, highlighted that Rule 99 talks about the acquittal of a person. The expression 'acquittal' is not qualified by clean acquittal, fully acquittal and as such the acquittal extending the benefit of doubt also falls in the category of acquittal enumerated under Rule 99.

12. Learned counsel appearing on behalf of the State has drawn the attention of this Court to Rule 97 of the Bihar Service Code that a conjoint reading of Rule 97 and Rule 99 would make it crystal clear that the acquittal should be clean and not technical granting the benefit of doubt. For ready reference, Rule 97 is quoted hereinbelow:-

"97. (1) When a Government servant who has been dismissed, removed, or suspended, reinstated, the authority competent to order the reinstatement shall consider and and make specific order-

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty, and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in sub-rule (1), is of opinion that the Government servant has been fully exonerated, or in the case of suspension, that it was wholly unjustified, the Government servant shall be given full pay and allowance to which he would have been entitled has he not been dismissed, removed or suspended ,

as the case may be.

(3) In other cases, the Government servant hall be given such proportion of such pay and allowances as such competent authority may prescribe;

provided that the payment of allowances under clause (2) or clause (3) shall be subject to all other conditions under which such allowance are admissible

(4) In a case falling clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose;

Provided that if the Government servant so desires such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant."

13. Mr. Kumar Brajnandan submits that scheme under Rule 97 is not applicable in the case of the petitioner as Rule 97 is applicable in relation to the treatment of period under suspension and it has nothing to do with the case of acquittal in a criminal case. In support of his contention, Mr. Kumar Brajnandan has placed reliance on the following judgments of this Court as well as Apex Court. The first judgment relied upon by Mr. Kumar Brajnandan is the judgment of the Patna High Court in the case of ***Mani Ram Yadav Vs. Union of India & others 2000(1) PLJR 239***. In that case judgment of the Patna High Court was in relation to action where special procedure

was prescribed under Rules. It was not a case under the Bihar Service Code, which is attracted in this case.

14. Mr. Kumar Brajnandan then relied upon another judgment in the case of **Ram Sarowar Pd. Singh Vs. State of Bihar & others reported in 2005 (1) PLJR 519** and that case was decided by the learned Single Judge on the peculiar fact that no departmental proceeding was initiated nor any show-cause notice was given to him in that case while he was involved in a criminal case. The judgment of this case is not attracted for the reason that two parallel proceedings were initiated on the same set of facts. In that situation, action merely because criminal case is pending is not permissible without compliance of principles of natural justice. The fact of this case is different, as in the instant case after conviction by the competent court in a criminal trial, the order of dismissal was passed. Another judgment on which learned counsel for the petitioner has relied is the judgment in the case of **Satyendra Sharma Vs. Union of India & others reported in 2004(1) PLJR 258**. In that case, a Bench of this Court has referred the earlier decision in the case of **Mani Ram Yadav (supra)** and held out that after acquittal, petitioner preferred his application for reinstatement but without application of mind, the claim was

rejected by the authorities for reinstatement on the ground that now the petitioner has come across with criminals and anti-social element, hence reinstatement of the petitioner is unsustainable that consideration was obnoxious one and this Court has allowed the writ application and directed reinstatement.

15. Learned counsel for the petitioner then has relied upon the judgment in the case of **All Cargo Movers (India) Private Limited & others Vs. Dhanesh Badarmal Jain and another** reported in **(2007) 14 SCC 776**. In the said case, the Apex Court has occasion to consider the effect of conviction and subsequent acquittal. In that case, the Court has noted the peculiar fact that the suit is pending in between the parties and a complaint petition was filed alleging for the offence under Section 406 and 420 of the I.P.C. The Court has noted that on the face value, no offence is made out as is evident from the observation made in para 16 of the judgment. The observations made in para 16 to 20 of the aforesaid judgment is quoted below is quoted hereinbelow:-

> *"16. We are of the opinion that the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety, do not disclose an offence. For the said purpose, This Court may not only take into consideration the admitted facts but it is also*

permissible to look into the pleadings of the plaintiff-respondent No.1 in the suit. No allegation whatsoever was made against the appellants herein in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent. Breach of contract simplicitor does not constitute an offence. For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice.

17. In G. Sagar Suri & Anr. v. State of U.P. & Ors. [(2000) 2 SCC 636, this Court opined :

"8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

18. In G. Sagar Suri case also, having regard to the fact that a criminal complaint under Section 138 of the Negotiable Instruments Act had already been pending, a criminal complaint under Section 406/420 was initiated which was found to be an abuse of the due process of law.

19. In Anil Mahajan v. Bhor Industries Ltd. & Anr. [(2005) 10 SCC 228], this Court held :

"8. The substance of the complaint is to be seen. Mere use of the expression cheating in the complaint is of no consequence. Except mention of the words deceive and cheat in the complaint filed before the Magistrate and cheating in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs.3,05,39,086 out of the total amount of Rs.3,38,62,860 was paid leaving balance of Rs.33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainants own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question."

20. In Hira Lal Hari Lal Bhagwati v. CBI, New Delhi [(2003) 5 SCC 257}, this Court opined :

"40. It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the

records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers right at the time of making application for exemption . As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Indian Penal Code does not arise."

(emphasis in original)

{See also Suresh v. Mahadevappa Shivappa Danannava [(2005) 3 SCC 670] and Indian Oil Corporation v. NEPC India Ltd. & Ors. [(2006) 6 SCC 736]}.

16. The aforesaid discussion indicates that the fact of this case is different from what has been discussed by the Apex Court and it does not help the petitioner in the present case.

17. In yet another case on which learned counsel for the petitioner has relied upon is the case of ***State Bank of India & another Vs. Mohammed Abdul Rahim reported (2013) 11 SCC 67*** relating to case under Section 498A of the I.P.C, paragraphs 6 to 12 of the aforesaid judgment is quoted hereinbelow:-

"6. On the other hand, the learned counsel for the respondent has relied on the norms under the Sastry Award governing disciplinary

action in respect of employees of the public sector banks. Pointing out the relevant clauses of the Sastry Award, it is argued that upon the acquittal of the employee concerned from a criminal charge it is open for the appellant Bank to initiate a departmental proceeding which, admittedly, in the present case was not so done. The learned counsel has pointed out that in such a disciplinary proceeding, if the charges against the acquitted employee are found to be substantiated, necessary disciplinary action can be invoked. However, in that event the employee concerned would be entitled to the benefit of full pay during the suspension period, if any. In the present case, as the provisions of the Sastry Award were not invoked and no departmental proceeding was initiated, the acquittal of the respondent has attained finality and, in effect would wipe out the initial conviction thereby entitling the respondent to back wages.

7. The learned counsel for the respondent has also pointed out that in the decisions relied upon on behalf of the appellant Bank the basis for denial of back wages is the incarceration of the employee in custody following his arrest and conviction which disabled the employee from rendering any service whatsoever. In the present case the respondent was on bail all along. It is, therefore, argued that the ratio of the decisions relied upon would not apply to the facts of the present case.

8. Before delving into the contentious issues arising from the arguments advanced, the issue with regard to the applicability of the provisions of the Sastry Award may be dealt with in the first instance. According to us, the said provisions do not have any special significance inasmuch as there can be no doubt on the proposition that on the very same facts that give rise to a criminal offence it is always open to the employer to initiate a departmental proceeding which option the employer may or may not exercise. In the event the employer chooses to initiate a departmental proceeding, it would be

open for such an employer to take disciplinary action against the erring employee if the charges levelled are found to be substantiated notwithstanding the acquittal of the employee in the criminal case that may have been lodged against him. This is on the principle that standard of proof in a criminal case and a departmental proceeding is different. However, in a case where the employer chooses not to initiate a departmental proceeding and acts only on the basis of the conviction in the criminal prosecution, he would be bound by the final verdict in the same i.e. in case of a reversal. The provisions of the Sastry Award, relied upon on behalf of the respondent, therefore, do not in any manner alter the basic principles surrounding the initiation of a criminal action and a departmental enquiry on the same set of facts and the consequences thereof.

9. In the present case, the respondent was acquitted by the appellate court. There can be no manner of doubt that the said acquittal would relate back and the initial order of conviction would stand obliterated. On that basis, there can be no manner of doubt that the substratum of the cause that had led to the respondent's dismissal/discharge in the present case had ceased to exist. The same would entitle him to be reinstated in service, an act that has been duly performed by the appellant Bank.

10. *The issue relating to entitlement to back wages, however, stands on a somewhat different footing. While in Ranchhodji Chaturji Thakore [(1996) 11 SCC 603 : 1997 SCC (L&S) 491] , Jaipal Singh [(2004) 1 SCC 121 : 2004 SCC (L&S) 12] and Baldev Singh [(2005) 8 SCC 747 : 2006 SCC (L&S) 35] , the basis of refusal of back wages by this Court would appear to be the inability of the employer to avail of the service of the employee due to his incarceration in jail, in Banshi Dhar [(2007) 1 SCC 324 : (2007) 1 SCC (L&S) 205] the refusal of back wages by this Court was in a situation largely similar to the case before us, namely, where the employee was all along on bail and was thus available for work.*

11. *In Banshi Dhar [(2007) 1 SCC 324 : (2007) 1 SCC (L&S) 205] this Court answered the question against the employee by holding that grant of back wages is not automatic and such an entitlement has to be judged in the context of the totality of the facts of a given case. It is on such consideration that back wages were declined. In the present case, it will not even be necessary for the Court to perform the said exercise and delve into the surrounding facts and circumstances for the purpose of adjudication of the entitlement of the respondent to back wages in view of the provisions of Section 10(1)(b)(i) of the Act. The said provisions impose a clear bar on a banking company from employing or continuing to employ a person who has been convicted by a criminal court of an offence involving moral turpitude. No discussion as to the meaning of the expression "moral turpitude" is necessary having regard to the nature of the offences alleged against the respondent, namely, under Section 498-A IPC and Section 4 of the Dowry Prohibition Act, 1961. No doubt, the respondent was not in custody during the period for which he has been denied back wages inasmuch as the sentence imposed on him was suspended during the pendency of the appeal. But what cannot be lost sight of is that the conviction of the respondent continued to remain on record until it was reversed by the appellate court on 22-2-2002. During the aforesaid period there was, therefore, a prohibition in law on the appellant Bank from employing him. If the respondent could not have remained employed with the appellant Bank during the said period on account of the provisions of the Act, it is difficult to visualise as to how he would be entitled to payment of salary during that period. His subsequent acquittal though obliterates his conviction, does not operate retrospectively to wipe out the legal consequences of the conviction under the Act. The entitlement of the respondent to back wages has to be judged on the aforesaid basis. His reinstatement, undoubtedly, became due following his acquittal and the same has been granted by the*

appellant Bank.

12. *The respondent was acquitted on 22-2-2002, the demand for reinstatement was made by him on 22-4-2002 and he was reinstated in service by the appellant bank on 7-11-2002. On the view that we have taken, at the highest, what can be said in favour of the respondent is that he is entitled to wages from the date he had lodged the demand for the same following his acquittal, namely, from 22-4-2002, until the date of his reinstatement, if the same has not already been granted by the appellant Bank."*

18. Paragraph 6 to 12 of the aforesaid judgment indicates that in that case after the judgment of acquittal, reinstatement was made but the Apex Court clarified the position regarding payment in paragraph 13. A conjoint reading of para 12 and 13 indicates that the payment was only admissible after his joining and not before the period, when he was in custody.

19. Mr. Kumar Brajnandan has also placed reliance on AIR 1966 Jammu & Kashmir 27 to contend that the petitioner is entitled to reinstatement and full back wages for the period he was in custody. Para 6 of the aforesaid judgment reads as follows:

"(6) It follows, therefore, that when the petitioner was discharged by the Magistrate and was exonerated of the allegations or charges levelled against him, the period of suspension came to an end. This being the position, there is no reason, whey he would not be entitled to the

emoluments to which he would have been entitled had the order of suspension not been passed. In Shyam Sunder v. Union of India, AIR 1965 Cal. 281, it was clearly held that an employee of the government could not be deprived of his emoluments by an order of suspension which was founded on mere allegation and which the Government had subsequently withdrawn. In this connection Basu J. observed as follows:

"On the other hand, the substantial reliefs prayed for, namely revocation of the order of suspension and re-instatement have been conceded, during the pendency of these applications. But no reason has been assigned as to why the petitioners should not get their pay and allowances during the period intervening the suspension and the reinstatement when they have been prevented from rendering their services owing to their suspension pending infructuous proceedings brought by the respondent. As matters stand there is no blemish established against the petitioners with respect to that period. An employee of the Government cannot be deprived of his emoluments by an order of suspension which was founded on mere allegations and which the government has withdrawn finding it untenable, after the employee has taken resort to a court of Justice for relief.

A claim for recovery of arrears of salary can, of course, be made only by suit. What the petitioners seek in the present proceedings is only a direction to pay. It is now established that when an order behind a levy is found to be ultra vires mandamus lies for directing the authority to make a refund: Burma Construction Co v. State of Orissa, AIR 1962 SC 1320, Orient Paper Mills Ltd. v. State of Orissa, AIR 1961 SC 1438. If so, there is no reason why an authority cannot be directed to pay arrears of pay and allowance which the petitioner could have earned unless suspended without any lawful justification."

20. The fact of that case is quite distinct and in none

of the cases relied upon, the conviction was sustained up to the High Court, more so, in a case under Section 302 of the I.P.C.

21. In the present case, the conviction was approved by the High Court and the Apex Court having regard to the peculiar facts of the case granted the benefit of doubt to the petitioner, who was appellant in that case. On the strength of the aforesaid judgment seeking declaration that the dismissal is bad is unfounded and misconceived. The order as contained in Annexure-3 was passed by a co-ordinate Bench of this Court with a qualified word “this appeal” which is relatable to Appeal No. 28 of 1998. The appeal of the petitioner was dismissed by the High Court and therefore the observations made as per the clarification under Annexure-3 were not available after the judgment of conviction sustained by the High Court.

22. In addition thereto, the petitioner was acquitted in 2017 where he attained the age of superannuation on 28.02.2003 itself. In a situation like instant case setting aside dismissal and directing for consequential benefit is not sustainable, as the judgment of acquittal extending the benefit of doubt after 14 years of attaining the age of superannuation is not a situation where equity demands that dismissal of the petitioner should be set aside and he should be reinstated or granted the

benefit of past service. However it is clarified that if the petitioner before the order of dismissal has completed the qualifying period of service for grant of pension in that situation the petitioner's case may be considered by the respondents for grant of pensionery benefit or any other benefit in the nature of post retiral benefit if otherwise is admissible then the order of dismissal will not come in the way of respondents granting those benefits.

23. With the aforesaid observations and directions, the writ petition stands dismissed.

(Anil Kumar Upadhyay, J)

BT/-

AFR/NAFR	NAFR
CAV DATE	N.A.
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