

(2024) 05 OHC CK 0215
In the Orissa High Court
Case No : Writ Petition (C) No.1333 Of 2022

Sarat Chandra Misha

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 30-05-2024

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 227
Odisha Civil Services (Pension) Rules 1992 — Rule 18, 80(2)

Citation : (2024) 05 OHC CK 0215

Hon'ble Judges : A.K. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Bose, A.K. Parida, N.K. Praharaj

Final Decision : Allowed

Judgement

A.K. Mohapatra, J

1. By filing the present writ petition, the Petitioner calls in question the validity, legality and propriety of Office order dated 09.12.2021 under Annexure-8 to the writ petition. The Petitioner has also prayed for issuance of writ of mandamus thereby directing the Opposite Parties, particularly the Opposite Party No.2, to immediately regularize the service of the Petitioner from the date prior to his date of retirement w.e.f. 31.01.2022 by taking into consideration the policy decision of the Government vide Resolution dated 22.01.1965 under Annexure-9 and Resolution dated 15.05.1997 under Annexure-2 and letter dated 27.05.2014 under Annexure-3. Further, keeping in view the vacancy position, obtained by the Petitioner on an application under the Right to Information Act, which was intimated to the Petitioner vide letter dated 22.09.2020 under Annexure-5, so also the Resolutions of the Government in respect of the Regular Wage Establishment, regularize the Petitioner in service at least for a day prior to the date of his retirement and, accordingly, the pensionary benefits, as is due and admissible to the Petitioner, be sanctioned and disbursed in favour of the Petitioner within a stipulated period of time.

2. The factual background of the case leading to filing of the present writ petition, bereft of an unnecessary details, is that the Petitioner joined as an NMR in the office of the Executive Engineer, Stores & Mechanical Division, Samal in the year 1981. Thereafter he was transferred to Head Works Division, Samal where he was ultimately posted and worked in the said division. While working as such, the Petitioner was brought over to the work charged establishment on 02.09.1993 and, accordingly, the Petitioner joined in the post of Store Assistant. While continuing as a Store Assistant, the post of Store Assistant was re-designated as Store Clerk w.e.f. 25.03.2009. Since the Petitioner was working under the Government, a regular service book was opened in favour of the Petitioner, indicating therein the date of his entry into the work charged establishment under Annexure-1 to the writ petition, i.e. from 02.09.1993.

3. While working in the Government establishment as a work charged employee, the Petitioner was extended with all service benefits at par with the regular employee including the benefit of differential pay revision. The Petitioner was also granted with the benefit of 7th Pay Revision as per Finance Department Resolution dated 7. 09.2017 w.e.f. 01.01.2016. However, the Petitioner has been denied the regular pensionary benefit in accordance with Rule-18 of the O.C.S. (Pension) Rules, 1992.

4. Since the service of the Petitioner and similarly situated many other persons, who were working in the work charged establishment continuously for several decades, were not being regularized, some of such persons approached the Odisha Administrative Tribunal by filing O.A. Nos.1553(C)/1993, 1560(C)/1993, 1562(C)/1993, 1570(C)/1993, 1651(C)/1993 and 1781(C)/1993. The OAT after hearing the learned counsels of the respective parties by a common judgment dated 02.06.1995 directed the Opposite Parties to bring the aforesaid persons over to the work charged establishment w.e.f. 02.09.1993. The aforesaid judgment of the Tribunal was challenged before the Hon'ble Supreme Court by the State-Opposite Parties by filing SLP(C) No.5526-31/1996. In course of hearing of the matter before the Hon'ble Supreme Court, the State-Opposite Parties brought on record the resolution of the Government dated 15.05.1997 wherein a scheme has been formulated by the State-Opposite Parties for absorption of Work Charged/NMR/DLR/Job Contract employees in the regular establishment in order of seniority and subject to availability of posts. On the basis of such affidavit, the Hon'ble Supreme Court sought for clarification from the State Government. Finally, the Hon'ble Supreme Court dismissed the above noted SLP vide order dated 26.03.1999 with a further direction to the State-Government to implement its Resolution dated 15.05.1997.

5. So far the present Petitioner is concerned, he was taken over to the work charged establishment w.e.f. 02.09.1993 and posted as Store Assistant under the work charged establishment in the scale of pay of Rs.950-20-1150-EB-25-1500. Despite such action on the part of the Opposite Parties in bringing over the Petitioner and other similarly situated persons over to the work charged

establishment, the Government initiated steps for retrenchment of such employees. Being aggrieved by such conduct, the Samal Barrage Employees' Union approached this Court by filing W.P.(C) No.7974 of 2023. Further, it appears that the order of preference dated 30.06.2003 has been stayed by this Court vide order dated 20.08.2003 in the above noted writ petition.

6. Learned counsel for the Petitioner, at this juncture, contended that the order dated 30.06.2003, whereby the employees were retrenched by the Government, was challenged by one Bidyadhar Nath and others belonging to Brahmani Right Basin, Dhenkanal in W.P.(C) No.7813 of 2003 and in Samal Barrage Employees v. State and others bearing W.P.(C) No.10562 of 2013, wherein the retrenchment order was quashed by this Court vide order dated 07.02.2019 and 24.10.2019 respectively. He further contended that after the aforesaid advertisement, the Government has sanctioned for creation of 569 number of regular (wages) post vide order dated 27.05.2014. It was also decided to fill up such posts by converting the eligible work charged employees. For the aforesaid purposes, a gradation list of employees under the work charged establishment of Water Resources Department was prepared, in which, the name of the Petitioner appeared at Serial No.907. Accordingly, the conversion of work charged post to regular wage post continued upto Serial No.700. Thereafter, the regularization of work charged employees has been stopped by the Government on the ground that the Finance Department did not give concurrence for absorption of rest of the work charged employees.

7. At this juncture, learned counsel for the Petitioner submitted that he had obtained information on an application filed under the R.T.I. Act from the Government. On such application, the applicant has been informed by the Government that as on 22.09.2020 about 462 numbers of Regular (Wages) post are lying vacant for regularization. However, the Opposite Parties are deliberately not regularising the work charged employees, like the Petitioner, since the year 2016 on some pretext or the other. As a result, the Petitioner and other similarly situated employees, who are next in the list for regularization, have been deprived of the opportunity to come over to the regular wage establishment, although they are eligible for such regularization. A copy of letter dated 27.05.2014, creating posts in the regular wage establishment, has already been annexed to the writ petition as Annexure-3. A copy of the information obtained under R.T.I. Act with regard to the vacancy position has also been annexed as Annexure-4.

8. Learned counsel for the Petitioner further contended that the Petitioner has been working under the Government as an NMR employee since the year 1981 and thereafter under the work charged establishment since 02.09.1993. He further contended that despite working in the work charged establishment continuously for over three decades, the services of the Petitioner and similarly situated other employees have not been regularized although 462 vacancies are available in the regular wage establishment as has been informed by the

Government on an application under the R.T.I. Act. Moreover, after working continuously for almost four decades, the Petitioner has superannuated from service w.e.f. 31.01.2022.

9. It was also contended that despite serving the Government continuously for over four decades, the Petitioner has been left high and dry and he has not been paid his pensionary benefits by treating him as a regular employee of the Government. In the aforesaid context, learned counsel for the Petitioner referred to the provisions contained under Article 21 of the Constitution of India. He also contended that despite working for his entire career under the Government continuously, non-payment of pensionary benefit to the Petitioner would definitely infringe the right of the Petitioner and similarly situated other persons as guaranteed to them under Article 21 and 300-A of the Constitution of India and the same would definitely violate their right to life as has been guaranteed under the Constitution of India.

10. After retirement of the Petitioner from service, he had earlier approached the authorities by filing representation on 30.09.2020 with a prayer to bringing him over to the regular (wage) establishment before his retirement so that the Petitioner would be entitled to the pension and pensionary benefits as is due and admissible to the regular employees. However, the authorities remained silent over such representation, which has compelled the Petitioner to approach this Court by filing W.P.(C) No.30481 of 2021. This Court vide order dated 29.09.2021 disposed of the said writ petition with a direction to the Opposite Party No.2 to consider the representation of the Petitioner and to dispose of the same by passing a speaking and reasoned order. After disposal of the said writ petition although the Petitioner filed a representation on 06.10.2021 under Annexure-7 to the writ petition, however, the Opposite Party No.2 rejected the said representation vide order dated 09.12.2021 under Annexure-8 to the writ petition.

11. In course of his argument, learned counsel for the Petitioner submitted that the case of the Petitioner is squarely covered by the ratio laid down by the Orissa Administrative Tribunal in the case of Narusu Pradhan v. State of Odisha in O.A. No.1189(C) of 2006 which was confirmed by this Court on 11.06.2009. Thereafter, challenging the order passed by this Court in Narsu Pradhan's case (supra), the State-Opposite Parties approached the Hon'ble Supreme Court by filing SLP No.22498 of 2012. Finally, the Hon'ble Supreme Court while dismissing the State's SLP vide order dated 07.01.2013 confirmed the order dated 11.06.2009 passed by the Tribunal. Eventually, the aforesaid Narusu Pradhan was taken into Regular Establishment on the basis of the Government of Odisha, Finance Department Resolution dated 22.01.1965 vide Office Order dated 09.05.2013. Thus, the order passed by the Tribunal in Narusu Pradhan's case has been implemented by the State-Opposite Parties. He also referred to the cases of similarly situated work charged employees under the control of Chief Engineer & Basin Manager, Subarnarekha & Budhabalanga Basin, Laxmiposi, Mayurbhanj. In

the aforesaid context, learned counsel for the Petitioner submitted that the employees of the aforesaid projects, who were working in the work charged establishment have been taken over to the regular wage establishment vide order dated 27.07.2021 passed by this Court in a series of contempt applications.

12. It was also contended that the Petitioner had a legitimate expectation that pursuant to the Government Resolutions of the year 1965 as well as 1997 and also the conduct of the Government in bringing over some work charged employees to the regular establishment, the Petitioner had a legitimate expectation that in due course he will be brought over to the regular establishment. However, after working for almost four decades continuously, out of which, the Petitioner was working in the work charged establishment w.e.f. 02.09.1993, his service was not brought over to the regular wage establishment although sanctioned vacant posts were available. It was also reiterated that the Government has abruptly stopped the regularization/absorption of the employees in the regular establishment from the year 2016, which is contrary to the assurance given by the State Government before the Hon'ble Apex Court. In such view of the matter, learned counsel for the Petitioner submitted that the conduct of the Opposite Parties is highly illegal, arbitrary and discriminatory and the same is unsustainable in law.

13. Mr. R.K. Bose, learned counsel appearing for the Petitioner also referred to the judgment of the Hon'ble Supreme Court in Prem Singh and others v. State of U.P. decided in Civil Appeal No.6798 of 2019 and batch of similar other Civil Appeals vide a common judgment dated 02.09.2019 which has been reported in AIR 2019 SC 4390. In the aforesaid judgment, the Hon'ble Apex Court directed that the employees who have worked for more than ten years should be regularized. In the very same judgment, it has also been observed by the Hon'ble Apex Court that it would not be proper to relegate them for consideration of regularization as others have been regularized and, accordingly, the Hon'ble Supreme Court directed that their services be treated as regular one. He also referred to the judgment of this Court in State of Odisha v. Jyostna Rani Pattnaik in W.P.(C) No.1534 of 2008 disposed of vide judgment dated 19.12.2016 to submit before this Court that the entire service of the Petitioner during his tenure under the work charged establishment shall be taken into consideration for calculating the qualifying service period for grant of pensionary benefits.

14. A counter affidavit has been filed on behalf of the Opposite Party No.1 to 5. In the counter affidavit, in para-5, the Opposite Parties have admitted the fact that the Petitioner was initially engaged as an NMR employee w.e.f. 01.10.1981. Thereafter, while he was working as such, he was brought over to the work charged establishment w.e.f. 02.09.1993 pursuant to the common judgment dated 02.06.1995 passed by the O.A.T. in O.A. No.1562(C)/1993 and the same was confirmed by the Hon'ble Supreme Court on 26.03.1999 in SLP No.5526-31/1996. The Opposite Parties have also admitted that while the Petitioner was continuing under the work charged establishment, he had retired

form service on attaining the age or superannuation w.e.f. 31.01.2022. Therefore, it appears that there is no dispute with regard to the factual background of the present writ petition. The facts pleaded in the writ petition with regard to the service of the Petitioner have been admitted by the Opposite Parties in their counter affidavit.

15. In the counter affidavit, the Opposite Parties have referred to the affidavit of the State Government dated 03.08.2017 filed before the Hon'ble Supreme Court. It further reveals that the said affidavit was filed along with the Government Resolution dated 15.05.1997 and clarifying the position to the extent that there are 4316 work charged employees existing under common seniority list for the Cadre of Major Irrigation Project and 3370 numbers of NMR/DLR workers existing under the Irrigation Projects. Such work charged employees were to be absorbed in the regular establishment before consideration of NMR/DLR/Job Contract Employees as stipulated in para-8 of the Finance Department Resolution dated 15.05.1997. It has also been stated in the counter affidavit that the Petitioner was working as an NMR employee at the time of publication of Finance Department Resolution dated 15.05.1997. Therefore, it has been stated that the case of the Petitioner and similarly situated other persons could only be considered after regularization of eligible work charged employees because the NMR employees like the Petitioner cannot steal a march over the work charged employees in the matter of regularization of service.

16. Hence, this Court would like to clarify that the averments in para-7 of the counter affidavit that the Petitioner was working as NMR employee by virtue of the Finance Department Resolution dated 15.05.1997 is not correct inasmuch as the Petitioner and similarly situated other employees were brought over to the work charged establishment pursuant to the order passed by the Tribunal w.e.f. 02.09.1993. Therefore, the assertion made in para-7 of the counter affidavit is not factually correct.

17. The counter affidavit further reveals that pursuant to the Letter No.22106 dated 30.06.2003 of the DoWR dated 30.06.2003, the Government decided and took action to retrench the balance 1224 N.M.R. employees, who have been brought over to work charged establishment pursuant to the common judgment dated 02.06.1995 passed in O.A. No.1560(C)/1993 and a batch of similar other cases. It was also contended that the Petitioner was continuing in service by virtue of an interim order dated 20.08.2003 passed in W.P.(C) No.7974 of 2003 and that during pendency of the aforesaid writ petition, the Petitioner has retired from service w.e.f. 31.03.2022. The counter affidavit further reveals that the work charged employees under Common Seniority List Cadre of Major Irrigation Project, to which the Petitioner belongs, are being regularized against the vacancies under the Regular (Wages) Establishment strictly in order of their seniority pursuant to the DoWR letter dated 27.05.2014. Since the Petitioner stands at Serial No.907 under the said gradation list, his turn for regularization had not come as the employees from Serial No.701 onwards are yet to be

considered for regularization. Furthermore, the Finance Department vide its letter dated 18.04.2017 did not agree with the proposal for absorption of work charged employees in the regular establishment.

18. With regard to the judgment of the Tribunal which was confirmed by this Court as well as the Hon'ble Supreme Court in *Narusu Pradhan v. State of Odisha*, the counter affidavit reveals that the same cannot be taken into consideration in the absence of any documentary evidence and that the Petitioner cannot be allowed similar relief as he was not a party to the aforesaid writ petition. It has also been stated that the persons working under the control of Chief Engineer & Basin Manager, Subarnrekha & Budhabalaga Basin, Laxmiposi, Mayurbhanj were converted into regular wage establishment pursuant to order dated 27.07.2021 passed by this Court CONTC (CPC) No.270 of 2000 and a batch of similar other contempt applications. Therefore, the Petitioner cannot claim parity with the aforesaid persons.

19. In the context of the judgment of the Hon'ble Supreme Court in *Prem Singh's case (supra)*, which has been relied upon by the learned counsel for the Petitioner, it has been stated in the counter affidavit that in the said reported case, the rules provide that the service rendered in the work charged establishment shall be taken into consideration while calculating the qualifying period of service for retirement and pensionary benefit. So far the present Petitioner is concerned, it was contended that he is governed under the Orissa work Charge Employees (Appointment & Condition of Service) instruction of the year 1974 and that while he was working under the work charged establishment, he has retired w.e.f. 31.01.2022. It has also been stated that the Petitioner was a regular subscriber to E.P.F. Scheme and eligible for pension under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and that he has been assigned a regular E.P.F. Account. Therefore, it was contended that the Petitioner is not eligible for pensionary benefit as has been held by the Supreme Court in *Prem Singh's case (supra)*.

20. In the context of Finance Department Resolution dated 22.09.1965, the counter affidavit reveals that the said resolution is not applicable to big projects/dams etc. where the Petitioner was working. Moreover, the said Resolution does not provide for automatic absorption of work charged employees on completion of certain number of years of service, instead it is subject to the satisfaction of certain conditions and availability of corresponding vacant posts in the regular establishment. With regard to the Finance Department Resolution dated 15.05.1997, the reply given in the counter affidavit provides that the benefit under the said Resolution is subject to fulfilment of certain conditions like seniority, suitability, compliance of O.R.V. Act and Rules etc. Moreover, since the Petitioner failed to fulfil the required condition prescribed, his service has not been regularized during the tenure of his service.

21. In the counter affidavit, it has also been specifically averred that the Petitioner is governed under the Government instruction of the year 1974

applicable to work charged employees and that the Petitioner is entitled to get service benefits as provided under the E.P.F. Scheme as per the said instruction. It was also contended by the learned Additional Government Advocate that the work charged service has been classified as non-pensionable service under Rule-80(2) of O.C.S. (Pension) Rules, 1992. In view of such specific bar under the O.C.S. (Pension) Rule, 1992, the Petitioner is not entitled to the pensionary benefits as claimed by the Petitioner in the present writ petition.

22. Heard Mr. R.K. Bose, learned counsel for the Petitioner as well as learned Additional Government Advocate appearing for the State-Opposite Parties. Perused the pleadings of the respective parties as well as the materials on record.

23. The submissions made by the respective counsels appearing for both sides are more or the less akin to their respective pleadings, which have been quoted in detail in the preceding paragraphs.

24. Having heard the learned counsels appearing for the respective parties and on a careful examination of the materials on record, as well as the pleadings from both sides, this Court is of the opinion that the only issue involved in the present writ petition is as to whether the Petitioner, who was working in the work charged established and has retired from service, is entitled to be regularized in service and, as such, whether he is entitled to the benefits flowing from such regularization including the pensionary benefits.

25. In the aforesaid context, this Court examined the factual background of the present case. On such examination, it is found that the Petitioner was initially appointed in the year 1981. Thereafter, he continued in the work charged establishment till his retirement in the year 2022, such fact is not disputed by the either side. The only question that falls for determination is as to whether the work charged employees like the Petitioner are to be regularized in service against any regular sanctioned posts and whether in the absence of such regular vacant posts, they can be regularized by creating posts for such employees in the regular establishment. On an analysis of the resolution of the State Government dated 22.01.1965 under Annexure-9 to the writ petition, this Court observed that the Finance Department Resolution provides that an employee, who is working in the work charged establishment for a period of 5 years continuously is to be brought over to regular establishment on completion of 5 years' service in such work charge establishment and he should be absorbed against a regular post, and if necessary, by creating a post against which the persons like the Petitioner who were working in the work charged establishment could be absorbed.

26. The aforesaid issue of regularization of work charged employees is no more res integra. This Court, on several occasions, was required to consider and adjudicate the aforesaid issue. The very same question fell for determination in the case of Rama Chandra Nayak v. State of Odisha & Ors. (W.P.(C) No.11686 of 2022 disposed of on 27.07.2022), which was assailed by the State-Opposite

Parties by filing a writ appeal bearing W.A. No.663 of 2023 before the Division Bench of this Court. The Division Bench of this Court has confirmed such order vide its order dated 01.11.2023. Similarly, in the matter of Gobardhan Prusty and others v. State of Orissa and others (W.P.(C) No.21585 of 2014 disposed of on 28.06.2022), a Division Bench of this Court was testing the validity of the order dated 19.09.2013 passed by the Orissa Administrative Tribunal, Bhubaneswar Bench, Bhubaneswar in O.A. No.1273 of 2010. The Division Bench referring to the judgment of State of Odisha v. Kasidev Maharana (W.P.(C) No.7246 of 2016) allowed the writ petition filed by the Petitioner by setting aside the order dated 19.09.2013 passed by the O.A.T. in the above noted O.A.

27. It further appears that the order passed in Gobardhan Prusty's case (supra) was assailed before the Hon'ble Apex Court by the State-Opposite Parties by filing S.L.P. (Civil) Diary No.10145 of 2023. The Hon'ble Supreme Court vide order dated 05.04.2023 after condoning the delay in filing SLP has been pleased to dismiss the SLP on merit. Thus, the order passed by this Court in W.P.(C) No.21585 of 2014 on 28.06.2022 has attained finality. Similarly, in the case of The State of Odisha & Ors. V. Hadibandhu Bhol bearing SLP (Civil) Diary No(s).23819 of 2023, the Hon'ble Supreme Court dismissed the State's SLP vide order dated 05.07.2023. The said matter also involved an identical factual scenario. While dismissing the SLP, the Hon'ble Supreme Court cautioned the State not to approach the Hon'ble Supreme Court in the matters that are covered and decided against it. On a careful examination of the factual background in the above noted case, this Court is of the considered view that the case of the present Petitioner is almost identical to the facts of the above-noted cases.

28. This Court on further analysis of facts observes that the Petitioner in the present case was appointed in the year 1981. Thereafter, he continued to work in the work charged establishment continuously and uninterruptedly till he took retirement from service upon attaining the age of superannuation in the year 2022. Never in the career of the Petitioner any question was raised with regard to his selection and entry into the service. After his retirement, when the Petitioner has approached the Government for payment of family pension, the Government comes forward and takes a ground that the Petitioner has been irregularly appointed and, therefore, he is not entitled for regularization of the service. This Court is of the considered view that after the passage of several decades such a ground is no more available to the State Government to be raised in any proceedings before any forum. Moreover, in view of the notification of the State Government in Finance Department, of the year 1965, persons appointed in the work charged establishment are to be regularized in service on completion of 5 years of service.

29. Having arrived at aforesaid conclusion, this Court also observes that had the Petitioner been appointed in an irregular manner, such question should have been raised immediately after the joining of the Petitioner or, at least within a couple of years from the date of his joining. Since such objection has not been

raised till retirement of the Petitioner, the Opposite Parties are estopped from raising such a ground after retirement of employee-petitioner from his service, especially since such Government employee has rendered a continuous and uninterrupted service spanning over several decades. Such continuance in service further gives an impression that there was an absolute necessity for creation of such a post, however, the Opposite Parties for reasons best known to them never created such posts. Moreover, they allowed the Petitioner to continue in such work charged establishment and after his retirement from service, the Petitioner has been denied the benefit of regularization of his service in the regular establishment and the consequential financial benefits which he is entitled to at the time of retirement. This Court is of the further view that such conduct of the Opposite Parties also affects the fundamental right of a person like the Petitioner as has been guaranteed under the Constitution of India, apart from the fact that such practice adopted by the Opposite Parties, too often, amounts to unfair labour practice which has been prohibited under the relevant laws.

30. In view of the aforesaid analysis of factual background of the present case, as well as the legal position and further taking into consideration the orders passed by the coordinate Bench as well as Division Bench of this Court, which have been upheld by the Hon'ble Supreme Court thereby confirming the principle laid down by this Court in such type of matters, this Court is of the view that taking a different view would cause injustice to the present Petitioner. Therefore, while concurring with the view taken by the Single Judge Bench as well as Division Bench of this Court, which has been confirmed by the Hon'ble Apex Court, this Court has no hesitation in quashing the impugned order dated 09.12.2021 under Annexure-8 to the writ petition. Accordingly, the same is hereby quashed. Further, the Opposite Party No.1 is directed to regularize the service of the Petitioner a day prior to the date of his retirement against any available vacant post in the regular (wages) establishment, and in the event no such post is available, by creating such a post. Further, it is directed that on the basis of such regularization the Petitioner be paid his retirement benefits as well as pension and pensionary benefits as would be due and admissible to the Petitioner, within a period of three months from the date of communication of a copy of this judgment.

31. It is further made clear that in the event the Petitioner has received any E.P.F. pension, the same shall be recovered from the Petitioner and it will also be open to the Opposite Parties to seek for return of the amount deposited with the E.P.F. Authorities in respect of the present Petitioner by filing an appropriate application and, on such application being made, the E.P.F. Authorities shall return the money to the Government.

32. In view of the aforesaid observations/directions, the present writ petition stands allowed. However, in the facts and circumstances, there shall be no order as to costs.

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