JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

Writ Petition No. 2735 of 2023

Muhammad Bilal Ayub

VERSUS

Amna Farouk, etc.

PETITIONER BY:	Mr. Ahmed Shahzad Awan, Advocate
RESPONDENTS BY:	M/s Ehtisham Malik and Muhammad Ali, Advocates for respondents No. 2 &3.
DATE OF HEARING:	08.09.2026

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AYYAZ SHAUKAT, J:- The petitioner is the father of the minor, Hamna Bilal, who was born on 18.06.2019. Through the instant petition, he seeks a direction to the respondents to trace and recover the minor, to produce her before this Court and to hand over her custody to him. The minor has remained in the custody of her mother, respondent No.1, since the separation of the parties, and has been residing outside Pakistan since September, 2022. The petitioner, for his part, has himself been residing in the United States of America since 2024.

2. Learned counsel for the petitioner submitted that the parties had been married to each other and that the minor was born of that wedlock. The marriage stood dissolved on 14.10.2020. The minor remained in the custody of respondent No.1 throughout. As the petitioner was denied access to his daughter, he instituted a petition under sections 12 and 25 of the Guardians and Wards Act, 1890 **(the "Act of 1890")** before the Guardian Court at Islamabad. In the course of those proceedings, the minor was produced for meetings, albeit hesitantly, and the petitioner was repeatedly compelled to approach the Guardian Court to secure her production.

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3. It was further submitted that respondent No.1 had got a false case registered against the petitioner, vide F.I.R. No.232 of 2021, Police Station Margalla, in which he stood acquitted, and that she had also instituted a suit for defamation, which was decreed, the appeal against which is pending before this Court. Learned counsel further contended that respondent No.1 had all along been planning to leave the country, that she removed the minor to a place unknown to the petitioner, and that he has not seen his daughter since June, 2022. The bailiff deputed by the Guardian Court was unable to locate her at the address furnished. Applications were moved and interim orders were passed, but no coercive measure followed.

4. Learned counsel next submitted that a petition under section 491 of the Code of Criminal Procedure, 1898 **(the "Code"**) was filed and dismissed in limine on 27.07.2023; that his applications to respondents No.5 to 7 were declined on the ground that the matter was pending before the Guardian Court; and that he is thus left without any alternative remedy. He further submitted that this Court had, in W.P. No.2671 of 2021, secured the return of minors from Turkey through the Federal Investigation Agency and the Interpol, and that the petitioner is entitled to similar relief.

5. Notices were issued to the parties by this Court on 12.09.2023. By the same order, respondents No.5 and 6 were directed to ensure that the minor was not removed from the jurisdiction of this Court, and respondent No.7 was directed to produce her on the next date of hearing. The reports submitted in compliance are of some significance. The Ministry of Interior reported that respondent No.1 had already departed abroad from Islamabad airport before the order was made, and that the Director General, Federal Investigation Agency, had been requested to place the names of respondents No.1 and 2 on the Provisional National Identification List. The Federal Investigation Agency, on the basis of its Integrated Border

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Management System, reported that the mother and the minor had already departed for China before the order was passed. The two reports give different years of departure, the Ministry of Interior reporting 05.09.2023 and the Federal Investigation Agency 05.09.2022. The latter date, being drawn from the border record of departures, is accepted, and it accords with the remainder of the record; in either event, the minor had left the country before this Court passed its order.

6. Learned counsel for respondents No.1 and 2 submitted that the petition is not maintainable, as the subject matter, namely custody, is committed by the Act of 1890 and the Family Courts Act, 1964 to the exclusive jurisdiction of the Guardian Court. He submitted that the Guardian Court had granted interim custody to respondent No.1 by order dated 03.07.2021, that the said order was never assailed in appeal or revision, and that it remains in force and operative. He further submitted that respondent No.1 has not been appointed or declared as guardian by any court, therefore section 26 of the Act of 1890 is not attracted, and that no order of the Guardian Court restrained her from travelling. She had been offered admission to a doctoral programme abroad and took the minor along with her in the interest of the future of both.

7. It was further submitted, and this constitutes the core of the defence, that the petitioner left Pakistan and has not returned. He last appeared before the Guardian Court on 26.06.2023. On 26.09.2024, his counsel informed that court that he had gone abroad, but could not state whether the departure was permanent or when he would return. The custody petition instituted by the petitioner himself was dismissed for non-prosecution on 14.11.2024. Before this Court, on 20.05.2025, his counsel stated that he was in the United States of America for a short course and would return shortly; he has not returned. In a connected civil suit, an

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application was moved on his behalf for recording his evidence through video link, wherein it is stated that he resides in America for the purpose of his employment. Learned counsel submitted that the petition has been rendered infructuous and is liable to be dismissed.

8. Respondent No.3, the maternal grandmother of the minor, also filed comments, wherein it was averred that the petitioner has not approached this Court with clean hands, that an efficacious remedy under the Act of 1890 and the Family Courts Act, 1964 was available to him, and that she has been impleaded merely to harass her daughter.

9. I have heard learned counsel for the parties and have perused the record of this petition, including the orders of the Guardian Court placed thereon and the reports of the Ministry of Interior and the Federal Investigation Agency, and have considered the law relied upon by each side.

10. The petition gives rise to three questions, which are not of equal difficulty. The first is whether this Court, in exercise of its constitutional jurisdiction, should order the recovery and production of a child who is in the custody of her own mother under an order of a court of competent jurisdiction. The second is what consequence ensues from the removal of the minor from the country while a visitation order of the Guardian Court remained in force. The third, which no party has pressed but which the record compels the Court to consider, is what the welfare of the minor requires to be done now, when her father is in one country, she is in another, and she has neither seen nor heard from him for more than three years. The first two are questions of jurisdiction and forum; the third concerns the welfare of a child.

11. It is convenient to begin with the facts which are not in dispute. The minor was born on 18.06.2019. The parties were divorced on 14.10.2020. On 10.12.2020 the petitioner filed his petition before the Guardian Court.

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By order dated 03.07.2021, that court, having regard to the tender age of the child, allowed her interim custody to remain with the mother and fixed a schedule whereunder the petitioner was to meet her in court on the second and fourth Saturdays of every month between 11:00 a.m. and 1:00 p.m. That order was never challenged. It is, on any view of the matter, an order of a court of competent jurisdiction, and the custody of the minor with her mother is, therefore, custody under lawful authority.

12. The meetings took place for some time and then ceased. According to the petitioner, they ceased in June, 2022. The bailiff of the Guardian Court reported on 19.05.2023 that respondent No.1 could not be traced at the address furnished. The petitioner then moved a petition under section 491 of the Code, which was dismissed on 27.07.2023 in the following terms:

> *"... it is admitted by the petitioner that the minor was handed over to respondent No.2 Mst. Amna Farooq by the order of learned Family court dated 03.07.2021 and custody petition is pending there and visitation schedule has also been set by the learned Court, therefore, the remedy to the petitioner is available before the Guardian Court where the matter had already been pending but he has preferred the remedy through instant petition without mentioning any plausible reason."*

The present petition followed in September, 2023. By then, as the reports show, the minor was already out of the country.

13. The statement made on his behalf on 20.05.2025, that he was abroad for a short course and would return shortly, has not been borne out by subsequent events, and is irreconcilable with the application filed in the connected civil suit, wherein his residence in America for employment is the very ground for seeking the recording of evidence through video link. A litigant who invokes the aid of a court to bring his child back to a jurisdiction is under a duty to be candid as to whether he himself resides in it.

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14. This brings me to the jurisdiction that has been invoked. The relief sought is the recovery and production of a child and the delivery of her custody. In substance, whatever its form, it is a petition for a writ of habeas corpus in a custody dispute. The Act of 1890 is a self-contained code for the resolution of such disputes. Section 12 empowers the Guardian Court to direct the production of the minor and to make interim arrangements for her person; section 17 makes the welfare of the minor the paramount consideration; section 25 empowers that court to order the return of a ward who has left or been removed from lawful custody and to enforce such order; and section 26 regulates the removal of a ward from the jurisdiction. Section 5 of the Family Courts Act, 1964, read with its Schedule, confers exclusive jurisdiction upon the Family Court in matters of custody and guardianship.

15. Section 25, which the petitioner invoked before the Guardian Court, empowers that court, where a ward leaves or is removed from the custody of her guardian, to order her return if it is for her welfare, and to enforce that order by causing her to be arrested and delivered into the custody of the guardian. The powers so conferred are not merely ornamental. They include the power to compel production, to attach and to arrest. It is in this setting that the reluctance of the superior courts to entertain custody disputes in constitutional jurisdiction is to be appreciated. It is not a reluctance born of indifference; it reflects the recognition that the Legislature has created a specialised forum for this purpose and has armed it with the requisite powers.

16. The point is long settled. In ***Muhammad Javed Umrao v. Miss Uzma Vahid*** **(1988 SCMR 1891)**, the august Supreme Court elucidated the relationship between the two jurisdictions:

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> *"The two matters, one dealt with by section 491, Cr.P.C. and the other under the Guardians and Wards Act, are entirely different, and there is no question of one excluding the other, the one overlapping the other, or the one destroying the other. The law, as it stands, shows no such repugnancy. It is true that the facts of individual cases may be such where the cover of proceedings of one sort is taken for advancing the cause of another. In such cases, it has to be ascertained as to what is the substance of the proceedings, and thereafter, the proceedings are to be diverted to the appropriate channel ..."*

The substance of the present proceedings is custody; the petitioner himself concedes as much, inasmuch as he prays that custody of the minor be handed over to him.

17. In ***Mst. Nadia Perveen v. Mst. Almas Noreen and others (PLD 2012 SC 758)***, the august Supreme Court delineated the narrow compass within which a High Court may entertain such a matter:

> *"... the matter of custody of minor children can be brought before a High Court under section 491, Cr.P.C. only if the children are of very tender ages, they have quite recently been snatched away from lawful custody and there is a real urgency in the matter and also that in such a case the High Court may only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge."*

None of those conditions is satisfied here. The child was not snatched from lawful custody; she is in the lawful custody of her mother under an order that the petitioner has never challenged. Nor is the matter a recent one: it has been before this Court since 2023, and the minor had left the country a year earlier. The urgency pleaded in the petition is difficult to reconcile with the conduct of a father who ceased to appear before the Guardian Court after June, 2023 and allowed his own custody petition to be dismissed.

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18. More recently, in ***Mst. Qurat-ul-Ain v. Station House Officer, P.S. Saddar Jalalpur Jattan, Gujrat and others*** **(2024 SCMR 486)**, the august Supreme Court had occasion to deprecate the readiness of the High Courts to set the machinery of the State in motion in matters of this nature. Their Lordships observed:

> *"The tendency of the High Courts to readily and unhesitatingly resorting to extreme measures by involving law enforcement agencies in family matters cannot be appreciated, especially so where no element of criminality is there and the child is in the lawful and rightful custody of the parent. Such actions cause unnecessary trauma and harassment for the concerned parent, specially where the concerned parent is the real mother of the child. The High Court must exercise extreme care, caution, and circumspection in such matters."*

Their Lordships added that a court, when asked to order production of a child, must satisfy itself that no alternative efficacious remedy is available, that production of the child is appropriate notwithstanding that she is admittedly with her mother, and that the continued custody is, at least prima facie, without lawful authority. Tested on that touchstone, the relief claimed in this petition cannot be granted. There is no material to suggest that the custody of a six-year-old girl with her own mother is unlawful, and the forum competent to decide otherwise upon evidence is the Guardian Court.

19. There is a further and more general reason for arriving at the same conclusion. The Act of 1890 and the Family Courts Act, 1964 create a hierarchy of their own, and the august Supreme Court has repeatedly held that Article 199 of the Constitution is not to be employed as a further tier superimposed upon it. In ***Shajar Islam v. Muhammad Siddique*** **(PLD 2007 SC 45)**, it was clarified that the High Court, in its constitutional jurisdiction, ought not to disturb findings of fact in family matters through

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a reappraisal of evidence, nor to employ that jurisdiction as a substitute for appeal or revision. In ***M. Hamad Hassan v. Mst. Isma Bukhari and others*** **(2023 SCMR 1434)**, their Lordships concluded:

> *"... the legal position is that the constitutional jurisdiction cannot be invoked as a substitute for a revision or an appeal. This means that the High Court in constitutional jurisdiction cannot reappraise the evidence and decide the case on its facts. Interference is on limited grounds as an exception and not the rule."*

It was added that finality of litigation is essential to a fair and efficient legal system, and that the courts should not unwarrantedly make room for litigants to abuse the process of law. Likewise, in ***Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another*** **(2023 SCMR 246)**, it was explained that the appraisal of evidence in such matters belongs to the Family Court, which has been vested with exclusive jurisdiction, and that constitutional jurisdiction is available only as a corrective measure where the order of the forum below is arbitrary, perverse or in violation of law. If that is the position where a petitioner at least brings an order of the courts below for examination, it applies with greater force here, where the petitioner impugns no order at all and asks this Court to perform, at first instance, the very function which the Guardian Court exists to discharge.

20. I now turn to the second question, which was framed by this Court on 27.05.2025 and which merits a direct answer. Section 26 of the Act of 1890 prohibits a guardian appointed or declared by the Court from removing the ward beyond its local limits without leave of the Court. Respondent No.1 has not been appointed or declared as guardian. She holds interim custody under section 12. To that extent, the submission made on her behalf is correct, and section 26 is not attracted in terms.

21. It does not, however, follow that a parent holding interim custody is at liberty to act as she pleases. A visitation schedule fixed by a court is an

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order of that court. It binds the parent in whose custody the child is placed and carries with it an obligation not to defeat it. Where the custodial parent proposes to take the child out of the country while such an order subsists, the proper course is to apprise the Guardian Court and to obtain its leave, upon such undertaking as that court may consider necessary. That is the course adopted by the Sindh High Court in ***Gul Mina Afridi v. Rana Abdul Kareem and others*** **(C.P. No.S-411 of 2022)**, wherein the restrictions on the movement of the minor were lifted, but only subject to advance intimation to the Nazir of the court, together with copies of the travel documents and all relevant addresses and contacts. No such intimation was given here, nor was any leave sought. Respondent No.1 left with the child while a meeting schedule subsisted and while the custody petition was pending. Her reason, namely, that she had secured admission to a doctoral programme, may well be a bona fide one, and this Court says nothing against a mother who seeks to build a future for herself and her daughter. But the reason ought to have been placed before the Guardian Court, which was not done.

22. The consequence, however, is not the one for which the petitioner contends. A departure without leave does not convert lawful custody into unlawful detention, nor does it confer upon this Court a jurisdiction which the law has vested elsewhere. What it does is to leave the Guardian Court at liberty, upon restoration of the custody petition or upon any application under section 12, to take that conduct into account, to require of respondent No.1 such intimation and undertaking as it may deem fit in future, and to regulate meetings in a manner which the changed circumstances of both parents now demand.

23. Two further matters may be noticed in this context. The first is that Article 11 of the Convention on the Rights of the Child requires States

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Parties to take measures to combat the illicit transfer and non-return of children abroad. The second is that Pakistan is not a party to the Hague Convention on the Civil Aspects of International Child Abduction, 1980, so that no machinery exists by which the return of a child taken to China may be sought as of right. That absence does not enlarge the jurisdiction of this Court. It makes the responsibility of the Guardian Court the heavier, because leave to take a child out of the country, coupled with an undertaking as to the child's return, is in such cases the only practical safeguard available before the event and not after it.

24. Having dealt with the case as presented by the parties, I turn to that aspect of it which they have left untouched. Both the petitioner and respondent No.1 addressed this Court as adversaries in a contest over custody; neither addressed it on the welfare of the child. The record discloses a girl who was three years old when she last saw her father and who is now six. For more than three years there has been no meeting, and nothing on the record suggests any other form of contact either.

25. A child of that age does not keep a relationship alive by an act of will. Affection between a parent and a small child is sustained by repetition. It is built out of the voice that is heard often enough to be recognised, the face that is seen often enough to be familiar, and the small and unremarkable exchanges of an ordinary week. Deprive the child of these for long enough and what remains is not a strained relationship but no relationship at all, a stranger standing in the place of a father. Delay in such matters is never neutral. Each year that passes determines something which no order passed afterwards can undo.

26. It is often said that contact is the right of the parent who is kept away. That is true, but it is only the lesser part of the truth. Contact is, first and foremost, the right of the child. Section 17 of the Act of 1890 makes

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the welfare of the minor the paramount consideration, a principle which the august Supreme Court has consistently reaffirmed, including in ***Shaista Habib v. Muhammad Arif Habib*** **(PLD 2024 SC 629)**, and welfare is not exhausted by food, clothing, schooling and a safe home, important as all of these are. It includes the child's sense of identity and origin, and her ability to know both of the persons who gave her that. Article 35 of the Constitution enjoins the State to protect the marriage, the family, the mother and the child. Moreover, Pakistan, having ratified the United Nations Convention on the Rights of the Child (UNCRC) on 12.11.1990, has accepted in Article 9(3) of that Convention that:

> *"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the best interests of the child."*

The august Supreme Court reproduced Article 9 of the Convention at length in **Mst. Qurat-ul-Ain** and treated it as forming part of the material by which such questions are to be judged. Nothing on this record suggests that contact between the minor and her father would be contrary to her interests, nor has respondent No.1 ever so contended. Her case is that the petitioner is not entitled to custody, that he has not maintained the child, and that he has behaved improperly towards her. Those are grievances against a husband and a litigant; they are not, by themselves, reasons for a daughter to grow up without knowing her father's voice.

27. The Convention does not stop at Article 9; its scheme carries the point further. Article 3(1) requires that in all actions concerning children, whether taken by courts of law or by administrative authorities, the best interests of the child shall be a primary consideration. Article 18(1) enunciates the principle that both parents have common responsibilities for

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the upbringing and development of the child. Article 10(2) speaks directly to the circumstances of the present case:

> *"A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents."*

None of this creates a right which our own law does not already recognise; it merely confirms the content of what section 17 of the Act of 1890 and Article 35 of the Constitution already embody.

28. Although it binds no court in this country, the Council of Europe Convention on Contact concerning Children, 2003 (ETS No.192), framed to address the very difficulty arising here, namely contact where the child and a parent reside in different States, is instructive. Article 4 recognises the right of a child and her parents to obtain and maintain regular contact, which may be restricted or excluded only where necessary in the best interests of the child. Article 2(a) defines contact to include "any form of communication between the child and such person", so that contact by telephone or video call is contact in the true sense and not a lesser substitute for it. Article 10 contemplates safeguards such as undertakings to the court and the surrender of travel documents, which is precisely the machinery whose absence has given rise to the present difficulty. The same principle is reflected in Article 24(3) of the Charter of Fundamental Rights of the European Union and in the jurisprudence of the European Court of Human Rights under Article 8 of the European Convention on Human Rights, *1950 (Hokkanen v. Finland (1994)* and *Ignaccolo-Zenide v. Romania (2000))*.

29. Our own courts have said as much, in their own idiom, long before the Convention was drawn up. In ***Chiragh Bibi v. Khadim Hussain*** **(PLD 1967 Lahore 382)**, it was held that a father retains constructive custody

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of his child, so that a mother who has physical custody may not exclude him from the child's life. The Lahore High Court returned to the subject in ***Umar Farooq v. Mst. Khushbakht Mirza*** **(PLD 2008 Lahore 527)**, where it was emphasised that a Guardian Court exercises a quasi-parental jurisdiction, that its powers under section 12 of the Act of 1890 are, for that reason, unfettered, and that the non-custodial parent is not to be given a bare sight of the child but is to be enabled to build with the child a bond of affection, for which the schedule and setting of the meetings must be such as a child can enjoy. A relationship which is never allowed to come into existence cannot be weighed at all.

30. What stands in the way is not the law but the residence of the parties in different countries. The petitioner is in the United States of America. The minor is with her mother abroad. An order for meetings in a courtroom in Islamabad on the second and fourth Saturday of every month has become incapable of implementation. But an order which cannot be implemented in the form in which it was made is no reason to abandon its purpose; it is a reason to find a form in which it can be implemented.

31. The means are readily available and require nothing beyond a handset and an internet connection. The superior courts have not been slow to take cognizance of contemporary realities. The Sindh High Court, in ***Yousuf Hassan Khan v. The Xviith Family Judge Karachi South & Others*** **(C.P. Nos. S-429 and S-436 of 2020)**, modified a visitation order so that meetings between a father and his minor children could continue through video link when travel had become impossible, and our courts themselves now regularly receive evidence and arguments through video link.

32. It is necessary to state the nature of this contact and the purposes for which it is not to be used. It should be regular and brief rather than

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occasional and prolonged. A fixed day, known to the child, is of greater value than an hour granted at someone's convenience. It is a conversation between a father and a small girl; it is not an occasion for questioning her about her mother, for passing messages to the other parent, for recording the conversation, or for rehearsing the grievances which have brought these parties to court over the last five years.

33. The arrangement which follows is an interim measure in aid of the welfare of the child, made because the order of 03.07.2021 has become incapable of execution in its present form and because the child should not be left without contact while her parents litigate. It shall remain operative until the Guardian Court orders otherwise.

34. For the reasons recorded above, the relief claimed in this petition cannot be granted. The custody of the minor with respondent No.1 rests upon an order of a court of competent jurisdiction which has never been assailed. There is no illegal detention, no criminality and no urgency of the kind which alone would justify the exercise of this jurisdiction. The forum for every question raised by the petitioner is the Guardian Court, before which he remains at liberty to seek restoration of his dismissed custody petition. His conduct, in ceasing to appear before that court, in allowing his petition to be dismissed, and in describing a permanent relocation as a short course, does not warrant the exercise of a discretionary jurisdiction in his favour. The removal of the minor from the country without informing the Guardian Court was improper, but the remedy for it lies with that court and not here.

35. Accordingly, this petition is **dismissed,** and the pending miscellaneous applications stand disposed of. There shall be no order as to costs. However, until the Guardian Court directs otherwise, and in furtherance of the spirit of the order of the august Supreme Court in **Mst.**

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Madiha Younus v. Imran Ahmed (2018 SCMR 1991), in the interest of the welfare of the minor, respondent No.1 shall facilitate contact between the minor and the petitioner through video call, on WhatsApp, Skype, Google Meet, Zoom or any similar mode in ordinary use, at least once every fortnight. Either party may apply to the Guardian Court for variation, enlargement or enforcement of this arrangement, and that court may deal with the application as it deems fit upon the material before it, including in any proceedings for restoration of the custody petition. This arrangement shall remain subject to any order made by that court.

36. A copy of this judgment shall be transmitted to the learned Guardian Judge, Islamabad, for information and for such action as may be called for in any proceedings that may be brought before that court.

(AYYAZ SHAUKAT)
JUDGE

Announced in open court on **06.10.2026**

JUDGE

Saeed.

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