

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain,

Chief Justice

Mr. Justice Hasan Foez Siddique

Ms. Justice Zinat Ara

Mr. Justice Md. Nuruzzaman

CIVIL APPEAL NO.175 OF 2005.

(From the judgment and order dated 11.11.1999 passed by the High Court Division in Writ Petition No.695 of 1994.)

Khalishpur Jute Mills Ltd. : Appellants.

=Versus=

Rajdhani Unnayan Kartipakkha & others: Respondents.

For the Appellants : Mr. Syed Amirul Islam, Senior Advocate with Mr. Tofailur Rahman, Senior Advocate & Mr. Syed Apurd Islam, Advocate instructed by Mr. Md. Firoz Shah, Advocate-on-Record.

For the Respondent No.1 : Mr. Mahbubey Alam, Senior Advocate instructed by M. Waliul Islam, Advocate-on-Record.

For the Respondent No.2 : Mr. Kamal-ul-Alam, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the Respondent Nos.5 & 6: Mr. A.F. Hassan Arif, Senior Advocate with Mr. A.M. Aminuddin, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
(As added respondent)

For the Respondent Nos.3,4 : Mr. Khair Ezaz Maswood, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
(As added Respondent)

***Date of hearing : 30.01.2019, 12.02.2019,
13.02.2019 & 17.02.2019***

Date of judgment : 26.02.2019.

J U D G M E N T

Hasan Foez Siddique, J: This appeal is directed against the judgment and order dated 11.11.1999 passed by the High Court Division in Writ Petition No.695 of 1994 discharging the Rule.

The relevant facts, for the disposal of this appeal, are that the appellant People's Jute Mills Ltd. (at present, Khalishpur Jute Mills Ltd.) was nationalized in 1972 under President's Order No.27 of 1972 and was placed under the administrative control of the Bangladesh Jute Mills Corporation (in short, the BJMC). In the year 1968, the then DIT (at present, RAJUK) allotted 1 bigha 9 kattas and 7 chattaks of land (hereinafter referred to as "the disputed plot") being plot No.6 of Block NE(G) at Gulshan Model Town, Dhaka in favour of People's Jute Mills Ltd. Accordingly, a deed of lease was executed and registered on 22.05.1968 mentioning some specific terms and conditions in the same. The appellant took over possession of the disputed plot and it had been in possession of the same till 29.03.1992 when the appellant was dispossessed by the writ respondent by evicting their driver Abdul Aziz. The BJMC, by a letter communicated under Memo No.BJMC/Com/People's Jute-56/92/56 dated 31.03.1992, drew attention to the Chairman, RAJUK that the RAJUK had taken over possession of the disputed plot of the appellant by evicting BJMC's driver Abdul Aziz unlawfully. The RAJUK neither served any notice upon the appellant asking it to show cause as to why the lease of disputed plot should not be

cancelled nor any notice of cancellation of lease was served upon it. However, the appellant, subsequently, came to know that the notice of cancellation of the lease of the disputed plot was published in the daily Inquillab on 20.03.1992. The appellant also came to know, by collecting copy of the letter communicated under Memo No.RAJUK/Estate/588 dated 18.03.1992, that the RAJUK issued notice in the name of M.M. Jute Mills Ltd., Khalishpur, Khulna and not the appellant. From the contents of the notice published in the newspaper and the letter dated 18.03.1992 of the RAJUK it appears that its lease was cancelled on the allegation of failure to make any construction in the disputed plot. The appellant is a nationalized Jute Mill. All its properties including the disputed plot were vested in the Government. But surprisingly the disputed plot was included in the list of abandoned properties in the year 1972. The appellant and the BJMC made several representations to the authorities concerned for getting release of the disputed plot from the list of abandoned properties. Since the appellant is a nationalized Jute Mill and is under the control and supervision of the BJMC it was not possible for the appellant to act independently. However, the appellant and the BJMC have been

trying to get the disputed plot released from the list of abandoned properties and the matter is still under consideration of the authorities concerned. Since the appellant has satisfied the relevant authority regarding its claim of ownership, it was under the impression that disputed plot has been released from the list of abandoned properties. However, when the appellant realised that the disputed plot is still in the list of abandoned properties, the appellant again approached the authority concerned and has been expecting that the matter would be settled by the Managing Board of the Abandoned Properties. The appellant did not make any construction in the said plot since the disputed plot was included in the list of abandoned properties and efforts are still continuing for getting the same released from the list of abandoned properties. In such circumstances, the appellant, filing writ petition, challenged the order of cancellation of lease by the RAJUK and obtained a Rule.

The writ respondent No.1 the RAJUK contested the Rule by filing affidavit-in-opposition contending that the writ petitioner-appellant failed to make any construction in the disputed plot within 4 years from the date of execution of the lease deed, thereby, it violated the terms and

conditions of the same, the RAJUK rightly cancelled the lease of the writ petitioner. It was specifically contended that notice of cancellation of the lease was published in the Newspaper on 20.03.1992. It was further contended that Driver Abdul Aziz was unauthorized occupant and he could not be the representative of People's Jute Mills Ltd. The lease was cancelled in view clause 4 and 5 of the terms and conditions of the lease deed. There was no error in the decision of cancellation of the lease deed.

The High Court Division, by the impugned judgment and order, discharged the Rule. Thus, the appellant has preferred this appeal upon getting leave.

Leave was granted to consider the submission that the Judges of the High Court Division did not consider the issue of cancellation of the lease by the RAJUK on the plea of failure to make construction even though the appellant could not undertake the work of construction on the disputed plot as it was illegally declared abandoned as being vested in the Government by operation of law and the Mills authorities were practically trying to get the disputed plot released from the list of abandoned property so long.

After cancellation of the allotment, RAJUK allotted the disputed plot to different persons who are the added respondents in this case. The new allottees, after getting allotment, constructed a multi storied building in the disputed plot and have been possessing the same. In their concise statements the added respondents stated that they are the bonafide allottee with value. They participated in the tender process in response to the tender notification published in different newspapers at the instance of the RAJUK and being the highest bidders their offers were accepted and, accordingly, the RAJUK, complying all legal formalities, executed and registered the lease deed in their favour and they, after getting lease, mutated their names in the respective offices and have been paying rent. They submitted their respective plans for construction of the buildings to the RAJUK and the RAJUK approved those plans. Accordingly, they constructed their respective building as per plans approved.

Mr. Syed Amirul Islam, learned Senior Counsel appearing on behalf of the appellant, submits that before cancellation of the lease, the RAJUK did not serve any notice upon the People's Jute Mills Ltd., consequently, the appellant has been deprived from the opportunity of being heard. He

submits that the order of cancellation of the lease, without serving any notice upon the appellant, was bad in law. He next submits that the RAJUK most illegally and arbitrarily took over possession of the disputed plot, the High Court Division erred in law in discharging the Rule. He further submits that the People's Jute Mills Ltd. was nationalized by the Government as per provision of P.O.27 of 1972 and the disputed plot was vested to the BJMC and the appellant is one of the enterprises of the Bangladesh Jute Mills Corporation, the High Court Division committed an error of law in assuming that the property is an abandoned property. He also submits that the findings of the High Court Division in Writ Petition No.137 of 1998 is illegal and so, the same is non-est. He lastly submits that subsequent allottees are not bonafide lessees of the RAJUK and in this case they are not entitled to get any protection.

Mr. Mahbubey Alam, learned Senior Counsel appearing for the RAJUK, submits that the RAJUK is the owner of the disputed property and it leased out the same to the People's Jute Mills Limited but it failed to fulfill the terms and conditions stipulated in the lease deed and, accordingly, after serving notice, the RAJUK cancelled the

lease and allotted the same to the added respondent Nos.3-6 who, constructing multi storied buildings, have been possessing the same, the RAJUK did not commit any error of law.

In this case, Mr. Kamal-ul-Alam, learned Senior Counsel appeared on behalf of the respondent No.2, Mr. Khair Ezaz Maswood, learned Counsel appeared on behalf of respondent Nos.3,4 and Mr. A.F. Hassan Arif, learned Senior Counsel appeared on behalf of respondent Nos.5-6. In their submissions they stated that the RAJUK, dividing the disputed plot into different small plots, issued tender notice published in different newspapers for giving allotment of those small plots. These respondents participated in tender process and they became highest bidders of the respective plots and their offers were accepted by the RAJUK. Thereafter, the RAJUK executed and registered lease deeds in their favour, who taking actual physical possession of the plots, submitted their plans to the RAJUK for approval of the same for construction of multi storied buildings. Getting necessary approval from the RAJUK, they constructed multi storied building in the disputed plot. Mr. Khair Ezaz Maswood added that if it is found that the property, in question, has been declared as abandoned property as per provision of

P.O.16 of 1972 or the same was nationalized under P.O.27 of 1972, the Government acquired only lease hold right not the lessor's right in the property. The actual owner RAJUK, cancelling the lease of the appellant, allotted the same to the added respondents. There was no illegality in such cancellation and subsequent allotments. He submits that the RAJUK, the BJMC, Ministry of Industries and the abandoned property authorities are the Government Instruments. Since, one of the Government Instruments allotted the property, in question, to the added respondents the same is binding upon all the Government instruments. As such, in no way, the added respondents would be deprived from the property.

The disputed plot is measuring an area of 1 bigha 9 kathas and 7 chattaks being plot No.6, Block NE(Ga), Gulshan Model Town, Dhaka. The Government, acquiring the disputed plot with other properties, handed over possession of the same to the Requiring Body, the then the DIT, at present, the RAJUK. The RAJUK allotted the same to the People's Jute Mills Limited, Khulna, executing a lease deed dated 22.05.1968 (Annexure-A to the writ petition). It is not disputed that the original owners and shareholders of People's Jute Mills Limited left this country for Pakistan during the

war of liberation in 1971 and they did not turn up. The disputed property was declared as abandoned property as per provision of the P.O.16 of 1972. Article 2(1) of the P.O.16 of 1972 provides that, 'abandoned property' means any property owned by any person who is not present in Bangladesh or whose whereabouts are not known or who has ceased to occupy, supervise or manage in person his property. Article 2(1)(i) provides that any property owned by any person who is a citizen of a state which at any time after the 25th day of March, 1971, was at war with or engaged in military operations against the People's Republic of Bangladesh. While explaining the word "person" it has been stated that "Person who is not present in Bangladesh" includes anybody of persons or company constituted or incorporated in the territory or under the Laws of a State which at any time after 25th day of March, 1971, was at war with or engaged in military operations against the People's Republic of Bangladesh. Article 4 provides that on the commencement of this Order, all abandoned properties in Bangladesh shall vest in the Government and shall be administered, controlled, managed and disposed of, by transfer or otherwise, in accordance with the provisions of this Order. Article 5(1) of the said Order

provides that for the purpose of carrying the provisions of this Order into effect, and in particular for the purpose of securing, administration, control, management and disposal, by transfer or otherwise, of abandoned property, the Government may take such measures as it considers necessary or expedient and do all acts and incur all expenses necessary or incidental thereto. The disputed property was enlisted in the 'Kha' list of abandoned properties published in gazette notification on 28th April, 1986. From the judgment of writ petition No.137 of 1996 it appears that People's Jute Mills Limited, in order to get the said property released from the list of abandoned property, filed the said writ petition and obtained Rule which was, after hearing the parties, discharged by the High Court Division by a judgment and order dated 11.11.1999. In the said writ petition High Court Division has observed,

"Since the property having been declared abandoned and listed as such in the gazette it vested in the government and since the lessor government has got back the possession of the suit property by evicting Driver Abdul Aziz the representative of the petitioner, the question of challenging the cancellation of lease of the petitioner neither arise nor could it be

challenged in terms of the lease deed as we have noticed before. We therefore, hold that the lessor RAJUK , on behalf of the Government having got back ownership and possession of the disputed property has rightly cancelled the petitioner's lease and the petitioner has no right and interest in the disputed property."

People's Jute Mills Limited did not prefer any appeal against the judgment and order dated 11.11.1999 passed in the said Writ Petition No.137 of 1996 and, thereby, accepted the same. The High Court Division found that the disputed property is abandoned property. Since the People's Jute Mills Ltd. has accepted the said judgment, it is difficult to say that it possessed any enforceable right in the disputed property after such acceptance. Because in pursuance to the provisions of Article 4 and 5 of the P.O. No.16 of 1972 the lease hold right of People's Jute Mills Ltd. has been vested to the Government. In order to maintain writ petition, the writ petitioner must show the existence of his legal or fundamental right in the matter and further that by the action or inaction of the government or its local authorities, such right has been infringed. The Government, writ respondent of the said writ petition, has not been impleaded as party in the

instant writ petition. There is no scope to ignore and reopen the decided issue of the Writ Petition No.137 of 1996 in this appeal since the same was disposed of after contest on merits and by a speaking judgment on the points raised in presence of the Government. The findings and conclusion arrived at in the said judgment is binding upon this appellant as well as the Government.

Mr. Syed Amirul Islam in his submissions stated that inclusion of the disputed property in the list of abandoned property was illegal in view of fact that People's Jute Mills Limited was nationalized under the provision of P.O.27 of 1972 and, thus, the property, in question, became the property of Bangladesh Jute Mills Corporation and the appellant is a concern of Bangladesh Jute Mills Corporation as per provision of Article 4 of P.O.27 of 1972. Article 4 of P.O.27 of 1972 provides that all such shares and other proprietary interests in each of the scheduled industrial enterprises, and all such industrial enterprises placed under a Corporation by, or by an order under clause 1 of Article 10 and all shares and proprietary and other interests, as have not already vested in the Government by or under any law for the time being in force,

(underlined by us) shall, by virtue of this Article and without any further proceeding or formality, stand vested in, and allotted to, the Government free of any trust, mortgage, charge, lien, interest or other encumbrance whatsoever-

(a) in the case of a scheduled industrial enterprise, on the commencement of this Order; and

(b) in the case of an industrial enterprise placed under a Corporation by order under clause (1) of Article 10, on the date on which it is so placed;

and subject to the provisions of clause (2), the Government shall, as from such commencement or date, be the sole shareholder in, or owner of, such industrial enterprises. From first schedule of the P.O.27 of 1972 it appears that the name of People's Jute Mills Limited has been enlisted in serial No.47. It is the submission of Mr. Islam that article 3 of P.O.27 of 1972 provides that the provisions of this Order and any rule or regulation made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. In view of non-obstante clause as provided in Article 3 of P.O.27 of 1972 the provision of the said law shall prevail and effective. But is

to be borne in mind that article 4(1) of P.O.27 of 1972 provides that such shares and other proprietary interests of the scheduled enterprises....., "as have not already vested in the Government by or under any law for the time being in force (underlined by us) shall stand vested in, and allotted to the Government". P.O.27 of 1973 was published in the official gazette on 26.03.1972 and article 1(3) of this P.O. provides that it shall come into force at once. Before enforcement of P.O.27 of 1972, P.O.16 of 1972 came into operation on 28.02.1972 and it was provided in Article 4 of P.O.16 of 1972 that on the commencement of the Order, all abandoned properties in Bangladesh shall vest in the Government. From Annexure-E letter dated 22.05.1973 issued by A.P. Branch of Public Works Division of Ministry of Public Works, Letter dated 19.04.1992 written by the Minister concerned and the judgment of Writ Petition No.137 of 1996 proved that the disputed property was declared abandoned property. That is, before vesting the disputed property in the Government under P.O.27 of 1972, the same was vested in the Government under P.O.16 of 1972.

However, without entering into the controversy which one shall prevail over another, one thing is

clear that the Government acquired the lease hold right of the property which the People's Jute Mills Limited had as lessee of the RAJUK before enforcement of P.O.16 of 1972 or P.O.27 of 1972. That is, the status of the Government is a lessee and not the lessor. Since the Government stepped into the shoes of the lessee either in view of provision of P.O.16 of 1972 or as per provision of 27 of 1972, the Government is the proper authority to protect its lease hold right. But neither the Government nor its representative came forward to challenge the order of cancellation of lease.

Two or more departments of the Government should not litigate in a Court of law except in an exceptional circumstances. Such litigations may affect the public interest. We hope that public sector corporations will refrain from raising needless objections, fighting needless litigations and adopting needless postures.

Considering the nature of litigation between different government departments, highly placed officers of the Government constituted by it having no personal interest in the dispute should have taken fair and honest decision in this regard. In *Roberson V. Minister of Pensions* 1 K.B. 227 Lord Denning observed that if a government department in its dealings with a subject takes it

upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be exacted to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it finds the Crown also; and as the Crown is bound, so are the other departments, for they also are but agents of the Crown.

In the instant writ petition Government has not been impleaded as party. Admittedly the disputed land has been enlisted as abandoned property and simultaneously, People's Jute Mills Ltd. was nationalised under P.O. No.27 of 1972. Government's stand was required to be brought on record in view of peculiar facts and circumstances of the case, and in view of the fact that the Government stepped into the shoes of lessee as well as it is also the supervisory authority upon all of its all instrumentalities.

Admittedly, the People's Jute Mills Ltd. did not make any construction in the disputed plot as per terms and conditions provided in the lease deed. Accordingly, bringing allegation of non-compliance of the terms and conditions of the lease deed, the lessor RAJUK cancelled the lease. The decision of cancellation of lease was duly

published in the 'daily Inquilab' in its issue dated 20.03.1992. It is the case of the writ petitioner that Abdul Aziz, Driver of BJMC was in possession of the disputed plot. Abdul Aziz was not representative of People's Jute Mills Ltd. No material was produced to prove that Abdul Aziz was driver of the BJMC. After cancellation of lease, the RAJUK divided the plot into 4 small plots and leased out the same to 4 different persons by issuing tender notice. The writ petitioner did not challenge the said tender notice and subsequent lease.

In this case, the main grievance of the writ petitioner appellant was that the lessor RAJUK while cancelling the lease hold right of People's Jute Mills Ltd. had not issued any notice giving it an opportunity of being heard. Notice was issued in the name of S.S. Jute Mills Ltd., Khalishpur, Khulna on 18.03.1992 (annexure-C) and no notice was issued and served upon People's Jute Mills Ltd. but from the material on record it appears that the same was published in the Daily Inquilab in its issue dated 20.03.1992. We have already found that it is admitted that no construction was made in disputed land as per clause 4 and 5 of the lease deed. No where in the writ petition, the appellant claimed that any

construction was ever made in the disputed plot by the People's Jute Mills Ltd. In the case of Aligarh Muslim University Vs. Mansoor Ali Khan reported in AIR 2000 SC page 2783 the question of "hearing would make no difference" was brought into consideration of the Supreme Court of India. In that case, since Mansoor Ali Khan remained absent for more than five years, the post was deemed to have been vacated. Mansoor Ali challenged the order being violative of natural justice as no opportunity of hearing was afforded before taking action. Though the Court held that the rules of natural justice were violated, it refused to set aside the order on the ground that no prejudice was caused to him. Referring to several cases, considering theory of "useless" or "empty" formality, and noting "admitted or undisputed" facts, the Court held that the only conclusion which could be drawn was that had Mansoor Ali been given a notice it "would not have made any difference" and thus, no prejudice had been caused to him. It was observed:

"As pointed recently in M.C. Mehta Vs. Union of India (1999 (6) SCC 237:1999 AIR SCW 2754:(AIR 1999 SC 2583), there can be certain situations in which an order passed in violation of natural

justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in [Gadde Venkateswara Rao vs. Government of Andhra Pradesh](#) [1965 (2) SCR 172 : (AIR 1966 SC 828)], it is not necessary to quash the order merely because of violation of principles of natural justice.

In M.C.Mehta it was pointed out that at one time, it was held in Ridge vs. Baldwin (1964) AC 40 that breach of principles of natural justice was in itself treated as prejudice and that no other 'defacto' prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In S.L. Kapoor Vs. Jagmohan (1980) 4SCC 379: (AIR 1981 SC 136), Chinnappa Reddy, J. followed Ridge vs. Baldwin and set aside the order of supercession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice

though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

Chinnappa Reddy, J. in S.L.Kapoor's case, (AIR 1981 SC 136) laid two exceptions (at p.395 of SCC):(at pp.147 and 148 of AIR) namely, "if upon admitted or indisputable facts only one conclusion was possible", then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi Vs. State Bank of India (1984) 1 SCC 43:(AIR 1984 SC 273: 1983Lab 1C 1680), Sabyasachi Mukherji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed: quoting Wade Administrative Law, (5th Ed.PP.472-475) as follows: (para 31)

"....it is not possible to lay down rigid rules as to when principles of natural justice are to apply, nor as their scope and extentThere must have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth".

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala Vs. S.K. Sharma (1996) 3 SCC 364:(1996 AIR SCW 1740:AIR 1996 SC 1669). In that case, the principle of 'prejudice' has been further elaborated. The same principle has been reiterated again in Rajendra Singh Vs. State of M.P. (1996) 5 SCC 450):(1996 AIR SCW 3424:AIR 1996 SC 2736).

The 'useless formality' theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above,- there has been considerable debate of the application of that theory in other cases. The divergent views expressed in

regard to this theory have been elaborately considered by this Court in M.C. Mehta referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, De. Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the Court will be prejudging the issue. Some others have said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case."

In the cited case it was finally held that no prejudice has been caused to the appellant for want of notice.

In the present case, we have already held that the People's Jute Mills Ltd. has accepted the judgment and order of the Writ Petition No.137 of 1996, in which, it has been decided that disputed property is abandoned property. It is also admitted that the original allottee People's Jute Mills Ltd. did not make any construction in the

disputed land before its dispossession inasmuch as lease was cancelled after 24 years of allotment.

However, we may add a word of caution. Care should have been taken by RAJUK before cancellation of the lease by serving previous notice to the lessee Peoples Jute Mills Limited/ Bangladesh Jute Mills Corporation/ Government.

That is why, we have taken pains to examine in depth whether the case fits into the exception.

Another aspect is that the People's Jute Mills Ltd. has not yet prayed any relief against subsequent lease deeds executed in favour of added respondents and also it did not make any prayer for recovery of possession of the disputed land though admittedly it was dispossessed in 1992.

Considering the facts, circumstances and discussion made above, we do not find any substance in the appeal.

Thus, the appeal is dismissed.

C.J.

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The 26th February, 2019.

M.N.S./words-4992 /