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In the Supreme Court Bangladesh
High Court Division
(Special Original Jurisdiction)

Writ Petition No. 6861 of 2007

In the matter of:

An application under Article 102 (2) of the
Constitution of the People's Republic of
Bangladesh.

-And-

In the matter of:

Bangladesh Ansar and Village Defence
Party.

..... Petitioner.

Vs.

Government of Bangladesh and others..

..... Respondents.

With

Writ Petition No. 9245 of 2008

In the matter of:

Bangladesh Environmental Lawyers
Association (BELA).

..... Petitioner.

Vs.

The Secretary, Ministry of Housing and
Public Works and others..

... Respondents.

Ms. Syeda Rizwana Hasan with

Mr. Minhazul Hoque Chowdhury with

Mr. Ali Mustafa Khan with

Mr. Sayed Ahamed Kabir, Advocates

... For the petitioner in Writ Petition
No. 9245 of 2008 and for the added
respondent No.7 in Writ Petition No.
6861 of 2007.

Mr. Monsurul Hoque Chowdhury with

Mr. Md. Abdur Rouf Sheikh, Advocate

..For the respondent No.7 in Writ
Petition No. 9245 of 2008 and for the
petitioner in Writ Petition No. 6861 of
2007.

Mr. Md. Shahjahan with

Mr. Jagadish Chandra Shaha, Advocates

..For the respondent No.5 in Writ
Petition No. 9245 of 2008.

Mr. Mahbubey Alam, Attorney General
with

Mr. Mokleshur Rahman, D.A.G with

Mr. Pratikar Chakam, D.A.G with

Ms. Suchira Hossain, A.A.G with

Ms. Samira Tarannum Rabeya, A.A.G

..For the respondent No.1 in
both Writ Petitions.

Present:

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice Md. Badruzzaman



Heard on 07.01.2018, 11.02.2018 and
31.05.2018.

Judgment on: 02.08.2018.

SHEIKH HASSAN ARIF, J

Since the questions of law and facts involved in the aforesaid two writ petitions are related to each other, they have been taken up together for hearing, and are now being disposed of by this common judgment.

Rule in Writ Petition No. 6861 of 2007 was issued at the instance of the Bangladesh Ansar and Village Party calling upon the respondents to show cause as to why the Memo No. *11/২ এইচ-৪৭/৯৫/৭৮৬ dated 05.08.1996 (annexure-F) issued by the respondent No.2 should not be declared to have been issued without lawful authority and is of no legal effect.

Rule in Writ Petition No. 9245 of 2008, at the instance of Bangladesh Environmental Lawyers Association (BELA), was issued calling upon the respondents to show cause as to why failure of respondent No.1-6 in discharging their public duties and statutory obligations as mandated by various laws to protect Khilgaon Shishu Park located in Khilgaon Chowdhury Para, Dhaka from illegal encroachment and occupation, and ongoing construction thereon by respondent No.7 (D.G. Ansar) threatening the greenery and environment of the City and the civic, environmental, recreational and aesthetic rights of the City dwellers as evident from Annexures-E, E-1 and E-2, should not be declared to be without lawful authority and are of no legal effect.

Facts, relevant for disposal of the Rules, are that the petitioner (BELA) in Writ Petition No.9245 of 2008 in an association of lawyers and environment activists which has been active since 1992 and, by its various sincere and devoted endeavors, it has protected public interests against environmental

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anarchies and significantly contributed in promoting environmental justice through a series of persistent and well-designed activities. It may be noted at the outset that BELA has in the meantime become a house hold name in Bangladesh because of its contributions and endeavors for protecting environment. It is stated by BELA in this writ petition that the environment and ecology of Bangladesh, more particularly in the urban areas, are being continuously endangered and threatened by various activities originating from both private and public sectors. According to it, the City of Dhaka is no exception to this where the dwellers face horrible congestion and havoc of unplanned urbanization affecting their legitimate rights to healthy environment and enjoyment of the open spaces for fresh breath and natural panorama for physical, mental and spiritual well being. It is further stated that the Town Improvement Act, 1953 required the respondent No.1 (Government) to prepare Master Plan for the City of Dhaka for planned urbanization of the township. While preparing the Master Plan, it is stated, the said Act entrusted the respondent No.1 to make provisions for open spaces and provide the same for the enjoyment of the City dwellers. According to BELA, the Master Plan of the Dhaka City (1995-2005) titled the 'Dhaka Metropolitan Development Plan' as prepared by the respondent No.1 recommended some area for use as open spaces to be essentially free of structures in order to serve the purpose of visual relief and buffering from building and structural mess and, according to the said Master Plan, 'open space' includes parks, playgrounds, play fields, botanical gardens, fountains, reflecting pools and other bodies of water, walkways and non-buildable rights of the way. That, according to provisions under Section 73(2) of the Town improvement Act, 1953, the parks, udyans, playgrounds, gardens have been identified by the Master Plan as open spaces where a). no obstruction from its lowest level to the sky shall be created, b) it shall be



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at finish grade unless otherwise specified in the concerned chapter, C) it shall not be used for parking maneuvering of vehicles or storage of equipment etc. That the 'udyans' as identified in the Master Plan includes Sarwardi Udyan, Ramna Park, Shaheeed Anwar Park, Chandrima Uddyan etc. In addition, it is stated, the Dhaka City Corporation Ordinance, 1983 duly emphasized on the role of open spaces in the City and, accordingly, entrusted the respondent No.5-City Corporation with the responsibility of providing and maintaining open spaces, gardens and so on in the City. It is stated that though various playgrounds and parks are under management of Dhaka City Corporation, they are not properly maintained by the concerned authority.

It is stated that Khilgaon Shishu Park located in Khilgaon Chowdhury Para is specifically identified in the said Master Plan and the same is so earmarked specifically for the children's recreation, which is also considered as a public open space for the natural, civic and recreational activities of the people. That the dwellers of Khilgaon Chowdhury Para have long been demanding to develop the said park but got no positive response. That in the said master plan, the land appertaining to Khilgaon Rehabilitation Zone being C.S. Plot Number 182 (part) measuring an area of 0.3600 acres of land, C.S. plot number 183 (part) measuring an area of 0.0600 acres of land, C.S. plot number 189 (part) measuring an area of 0.0200 acres of land, C.S. plot number 191 (part) measuring an area of 0.0800 acres of land and C.S. plot number 192 (part) measuring an area of 0.1384 acres of land, in total 0.6584 acres of land in one compact block was specially kept and delineated only for the purpose of children's park for the inhabitants of Khilgaon Rehabilitation Zone-B, Dhaka. However, it has been reported in various newspapers that the said open space or park has become miserable because of lack of management and repair as has



happened in case of other Udyans, children parks etc. under the management and control of the concerned City Corporations. According to BELA, reports have been published in various newspapers regarding miserable conditions of open spaces as well as use of children's park in Kawran Bazar as vegetable wholesale market, park at Gulshan Section-1 as DCC Cleaners' Colony, Children's Park at Sayedabad as waste dumping spot, mini-bus stand, parking lot for trucks and rickshaw-vans, motor workshop and oil containers etc. According to BELA, even the Udyan, which are under the control of respondent No.2, are also in bad condition.

It is stated By BELA that considering the ever- tendency of encroachment of open spaces, parks etc. by the vested interested quarters, the Parliament has enacted মহানগরী, বিভাগীয় শহর ও জেলা শহরের পৌর এলাকাসহ দেশের সকল পৌর এলাকার খেলার মাঠ, উন্মুক্ত স্থান, উদ্যান এবং প্রাকৃতিক জলাধার সংরক্ষণ আইন, ২০০০ (hereinafter called 'Open Space Protection Act, 2000') and thereby prevented encroachment of open spaces, garden, playgrounds etc. making violation of the provisions of the said Act punishable even by imprisonments. That, according to Section 2 of the said Open Space Protection Act, 2000, "garden" includes open spaces, play ground etc., and by Section 5, prohibitions have been imposed against changing nature and character of such open spaces. It is stated that, in breach of the statutory responsibilities, the respondents initially allotted the said Khilgaon Shisu Park in favour of Ansar and Village Defense Party Officers Mess and Rest House etc. vide memo dated 21.10.1987 issued by respondent No.1. However, because of serious protests from the inhabitants of the locality and environment activists, the said allotment was subsequently cancelled on 05.08.1996 (impugned in writ petition No. 6861 of 2007) pursuant to recommendation of Land Allocation Committee of Khilgaon Rehabilitation Area in its meeting held on



20.05.1996. Not only that, it is stated, the Ministry of Housing and Public Works directed the Member Secretary, Khilgaon Rehabilitation Area Land Allocation Committee and executive engineer, Public Works Division-4, Dhaka to handover the said Shishu Park in favour of the Dhaka City Corporation to develop a full fledged children park thereon. According to BELA, such direction was never implemented, rather the said Shishu Park was again allotted in favour of one Shobujmoti Trust by allotment letter dated 12.07.2000 for setting up a hospital thereon, which was subsequently cancelled because of protests by the inhabitants and environment activists. That a resident of Malibag Chowdhury Para, Police Station Khilgaon, Dhaka filed Writ Petition No.3326 of 2001 challenging the said allotment dated 12.07.2000 in favour of Shobujmoti Trust and obtained Rule and ad-interim order of injunction. Subsequently, it is stated, one Mr. Md. Saber Hossain Chowdhury filed Writ Petition No. 12 of 2005 challenging the order of cancellation of the said allotment vide cancellation dated 25.11.2004 and obtained a rule and order of stay. However, the Rules issued in the said writ petitions were discharged vide orders dated 10.03.2008 and 26.08.2008 respectively as being non-maintainable on the ground that the lands in question were already allotted and leased out in favour of respondent No.7. It is stated by BELA that while the said order of stay was operative in the said writ petitions, hundreds of Ansar and Village Defense Party Members, under the command of respondent No.7, forcefully encroached upon the said Shisu Park and took it under their illegal occupation encircling the same by C.I. sheet fencing in gross violation of law and in contumacious disregard of the interim orders of the High Court Division. It is further stated that the said Shishu Park is now under such illegal occupation of the said respondent No.7 and that respondent Nos. 1-6 have so far done nothing to evict such illegal occupant though the lease granted in their favour has in



the meantime been cancelled by the concerned authority vide memo dated 05.08.1996 as issued by the respondent No. 1. That after about 9/10 years of such cancellation, the respondent No. 7- (Ansar) moved Writ Petition No.6861 of 2007 and obtained Rule therein (which is now being disposed of analogously). It is stated that the Ansar members are now continuing with their illegal construction on the said land and, under such circumstances, BELA has come up with an application seeking injunction, whereupon this Court, vide order dated 11.03.2009, directed the respondent No.7 not to undertake any further construction on the said land till disposal of the Rule.

Apart from above, the respondent No.7-D.G Ansar has also obtained Rule in Writ Petition No. 6861 of 2007 contending that the allotment of the said land was lawfully given in favour of Ansar and, accordingly, registered lease deed was executed. However, subsequently, the said allotment was cancelled by respondent No.1 vide impugned memo dated 05.08.1996 on the recommendation of the Khilgaon Rehabilitation Land Allotment Committee without assigning any reason and without issuing any prior show cause notice and, accordingly, directed the concerned Executive Engineer (respondent No.3) to handover the said land in favour of City Corporation for construction of Shishu Park. It is contended by DG Ansar in the said writ petition that since physical possession has been handed over in favour of Ansar and long term registered lease deed has been executed, the same cannot be cancelled in such a manner.

By filing affidavit-in-opposition in Writ Petition No.9245 of 2008, respondent No.1-the government admits that the land in question was in fact shown in the master plan as Shishu Park and play ground and that though the said land was once allotted in favour of Ansar, after considering all situations and opinion of the people of Khilgaon, government decided to cancel the

said lease and, accordingly, the same was cancelled on 05.08.1996 and that the said land was subsequently handed over to the Dhaka City Corporation to look after the same. It is further contended by this respondent that subsequently though the said land was again allotted in favour of one Shobujmoti Trust on 12.07.2000, the same was again cancelled by the authority and the writ petition filed in favour of the Shobujmoti Trust also became unsuccessful against such cancellation. It is further contended by this respondent that in order to resolve the dispute among the parties, the Land Allocation Committee of Khilgaon Rehabilitation Project held meeting for several times in which it was decided that as per the Master Plan of the Dhaka City, the Shishu Park should be restored in the said land and since then this respondent has been trying to recover the said land from respondent No. 7-DG, Ansar but due to pendency of the instant writ petitions, the respondent No.1 failed to do so.

The main contesting respondent, namely the respondent No.7 in Writ Petition No.9245 of 2008 (petitioner in Writ Petition No. 6861 of 2007) initially by filing affidavit-in-opposition on 09.02.2012 has admitted that the land in question has been shown in the master plan as Shishu Park. It was contended by this respondent that since the same was never used as such but was used by public as dumping place, it was decided to lease out the same in favour of the Ansar for better utilization of the land. However, by filing supplementary-affidavit dated 11.10.2017, this respondent has changed its previous stand. Now it is claiming that the said Shishu Part is situated in another area, though they have not specifically stated as to how the same is located in another area. By filing supplementary-affidavit-in-opposition dated 25.03.2009, the DG-Ansar has annexed some photographs (Annexure-3 series) showing that they have constructed some



structures and one Tin-Shed Barak on the said land for the living of the Ansar members. Therefore, it is contended by DG-Ansar that since the Rules in two earlier writ petitions in respect of the said land have in the meantime discharged in favour of Ansar on the ground that registered lease agreement has been executed in its favour, the Rule in Writ Petition No. 9245 of 2008 should also be discharged and that the Rule in Writ Petition No.6861 of 2007 should be made absolute thereby declaring the cancellation of lease as without lawful authority.

Ms. Syeda Rizwana Hasan, learned advocate appearing for BELA in both the writ petitions, submits that even the government, by affidavit-in-opposition, has admitted that the land in question has been described or shown as open space and Shishu Park in the master plan. Therefore, according to her, learned advocate for DG-Ansar cannot now create confusion about real location of the said Shishu Park. Learned advocate then submits that it has time and again been decided by this Court that the open space mentioned in the master plan for a particular purpose cannot be changed without amending the master plan itself. In this regard, learned advocate has referred to **Sharif Nurul Ambia vs DC, 58 DLR (AD)-253, RAJUK vs Mohshinul Islam, 53 DLR (AD)-79 and M Saleem Ullah vs Bangladesh, 55 DLR-1**. Learned advocate then submits that if the very allotment of the land in question is contrary to the master plan, the same is void ab-initio. Thus, she submits, since the land in question was allotted in favour of Ansar evidently in violation of the master plan and relevant provisions of law, the same was void ab-initio as the concerned authority did not have any jurisdiction/authority to allot the same in favour of Ansar. This being so, according to her, the said allotment as well as the lease deed executed thereupon need not be cancelled formally. According to her, a



void act remains void even if it is not cancelled formally. In support of such submissions, she refers to a decision of this Court in **Begum Khaleda Zia vs Bangladesh, 63 DLR-385**. Further drawing this Court's attention to the specific provisions, namely Sections 2, 3, 4 and 5 of the Open Space Protection Act, 2000, she submits that it is apparent from the definition of উদ্যান and 'open space' as defined by Clause 'Ka' and 'Kha' of Section 2 therein that the Shishu Park in question comes under the said definition and as such the same cannot be converted into anything without prior going through the rigorous procedure of amendment of master plan. According to her, admittedly, master plan has not been amended and as such the concerned authorities have committed gross illegality in violation of Section 5 of the said Open Space Protection Act, 2000 and as such became liable to punishment under Section 8 therein. Learned advocate further argues that even the Ansar did not pay the installments of the lease money as per the allotment letter and as such the lease granted in favour of the Ansar was lawfully cancelled.

As against above submissions, Mr. Pratikar Chakma, learned Deputy Attorney General appearing for respondent No.1, submits that the government admits that the land in question has in fact been shown in the master plan as Shishu Park and as such the government has taken steps for restoring the said Shishu Park by cancelling the lease granted in favour of the Ansar (Respondent No.7). Therefore, according to him, the government has lawfully cancelled the lease as that is the mandate of law.

Mr. Abdur Rouf Sheikh, learned advocate appearing for the DG, Ansar (Petitioner in writ petition No. 6861 of 2007 and respondent No. 7 in Writ Petition No. 9245 of 2008), submits that the registered lease deed given in favour of the respondent No.7 having not been cancelled in accordance



with law, the impugned cancellation memo dated 05.08.1996 (Annexure-F in Writ Petition No. 6861 of 2007) should be declared to be without lawful authority and is of no legal effect. He further submits that on the strength of the said lease deed, this respondent (Ansar) has already made various constructions on the land in question and the members of Ansar are now residing therein. Therefore, according to him, if any adverse order is passed by this Court in these writ petitions, the Ansar battalion will be affected prejudicially and it will be difficult for the Ansar to find an alternative place for constructing of another barrack for the members of Ansar. Learned advocate further submits that the land in question is not in fact Shishu Park as shown in the master plan, rather the Shishu Park or open space shown in the master plan is located in another area. However, in the course of submissions, learned advocate has failed to substantiate this submission as regards different location of the said Shishu Park in particular when the government itself has admitted by swearing affidavit that the land in question is in fact shown in the master plan as Shishu Park.

Since the respondents have not questioned the locus standi of BELA in moving this writ petition, we do not need to discuss the same particularly when BELA has in the meantime become renowned organization in this country advocating the cause of environment and in series of writ Petitions it has been declared by the Court that it has locus standi to move this kind of writ petitions [see Dr. Mohiuddin Farooque v. Bangladesh, (1997) 49 DLR (AD) 1].

As regards exact location of the Shishu Park in question, we have examined the relevant affidavits of the parties and statements made therein. We have also examined the copy of the Layout Plan under the master plan as annexed to the Writ Petition No.9245 of 2008 as Annexure-



C. It appears from various letters of the respondent No.1 as well as the Khilgaon Rehabilitation Land Allotment Committee that in fact the land in question is the said Shishu Park. It appears from the said Layout Plan (Annexure-C in W.P. No. 9245 of 2008) as well as various letters of respondent No.1 and the specific statement of the respondent No.1 in the affidavit-in-opposition that the land in question in fact is shown in the layout plan as Shishu Park. Though respondent No.7 initially by filing affidavit-in-opposition admitted that position, for the reasons best known to them, they have subsequently changed their standing and has been saying that the Shishu Park shown in the said Layout plan is located in a different area. However, they have miserably failed to substantiate such submissions or statements. Not only that, on several occasions, respondent No.7 has sought adjournments from this Court mainly on the ground that they have been trying to find an alternative space for establishing a Shishu Park so that they can stay in the land in question. Even Mr. Mahbubey Alam, learned Attorney General, has sought adjournments by referring to various letters issued by the respondent No.1 wherein it has been directly or indirectly stated that the land in question is the said Shishu Park and that the Government and the Ansar authority have been trying to find an alternative space for establishing a Shishu Park so that the Ansar can remain in the land in question. Even in a handy-letter dated 22.05.2018 issued by the Bangladesh Ansar, as given by the learned Attorney General, it has been stated that they have been trying to negotiate with BELA as regards finding an alternative space for establishing Shishu Park. Mr. Mahbubey Alam, learned Attorney General, himself has today given before this Court a memo dated 01.08.2018 issued by the Public Works Ministry wherein it has been stated that the Ministry is also looking for an alternative space for constructing Shishu Park in the same neighbourhood. Therefore,



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these series of papers, map and specific statements in the affidavit by the concerned parties leave no doubt that the land in question is in fact shown in the said Layout under master plan as designated and/or earmarked for Shishu Park. Therefore, there is no confusion that these writ petitions are concerned with the same open space which has been shown in the master plan as Shishu Park.

Now, the question is, when a particular area has been shown in the master plan as Shishu Park, whether the same can be changed or the same can be handed over in favour of an authority to change the nature and character of the same. Admittedly, the land in question has been allotted in favour of Ansar. Photographs, as annexed to the supplementary affidavit in opposition of respondent No.7, shows that the Ansar have erected some primary structures on the said land which include a Tin Shed Barak for the Ansar Members. Therefore, there is no doubt that the Shishu Park has in the meantime been converted into something else. Thus, it appears, from the very beginning, the said Shishu Park area has been allotted either in favour of Ansar or one Shobujmoti Trust in order to change the nature and character of the said land. When it was attempted to be allotted in favour of Shobujmoti Trust, the intention was to construct a hospital on the said land. Before that, when it was allotted in favour of Ansar, it was allotted for construction of Barak or rest house for the Ansar. Therefore, evidently, the very allotment in favour of Ansar was given for changing the nature and character of the said land contrary to the master plan, which is clearly prohibited by the Town Improvement Act itself. Not only that, the parliament has in the meantime enacted the said Open Space Protection Act, 2000 wherein such conversion of open space or Shishu Park contrary to the master plan has been made a punishable offence. By virtue of Section 3 of the said Open Space Protection Act, 2000, the said Act has been given

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overriding effect over any other provisions of law. Therefore, since the very allotment of the said land in favour of the Ansar was without jurisdiction, namely that the respondent No.1 did not have any authority to allot the said land in favour of Ansar, the same was void ab-initio, i.e. the same was void from the very beginning. Therefore, in view of our above cited decision in **Begum Khaleda Zia vs Bangladesh, 63 DLR-385**, even a subsequent registered sale deed after such void allotment cannot save the same and as such for cancellation of such allotment, the concerned authority does not need to take steps for formal cancellation of the lease deed through Civil Court. A void act remains always void even if the same is protected by a registered deed. This being the mandate of this Court in the said case, we do not find any substance in the submissions of the learned advocate for Ansar to the effect that the registered lease deed has not been cancelled lawfully.

Apart from above, since admittedly the said land has been allotted in favour of Ansar for changing the nature and character of the same, the same is clear violation of the relevant provisions of the Town Improvement Act, 1953 as well as the said Open Space Protection Act, 2000 which has even made such attempts to be punishable by imprisonment. Therefore, we are of the view that, since respondent No.1-government has finally realized the illegality or mistake committed by it by such allotments or lease deed in favour of Ansar and is now trying to rectify such illegality, this Court should not disturb the same. Rather, this Court, in line with our earlier decisions in **Sharif Nurul Ambia vs DC, 58 DLR (AD)-253, RAJUK vs Mohshinul Islam, 53 DLR (AD)-79 and M Saleem Ullah vs Bangladesh, 55 DLR-1**, should direct the concerned authorities including respondent No.1 and respondent No.5 to restore the said Shishu Park to its original position as



well as to develop it to a modern Shishu Park accessible by all children. Respondent No.1 and Ansar authority should also take necessary steps for vacating the said land immediately and handover the same in favour of Dhaka (North) City Corporation (respondent No.5) to develop the said space into a modern Shishu Park having all facilities for the children of this country and must keep it open to all children. Accordingly, we find merit in the Rule issued in Writ Petition No.9245 of 2008. At the same time, we do not find any merit in the Rule issued in Writ Petition No. 6861 of 2007.

In the result, the Rule in Writ Petition No. 9245 of 2008 is made absolute. On the other hand, the Rule in Writ Petition No.6861 of 2007 is discharged. The respondent No.1 (Secretary, Ministry of Housing and Public Works), respondent No.5 and respondent No. 7 are directed to vacate the said land within a period of 90(ninety) days from receipt of the copy of this judgment and handover the possession and control of the same in favour of respondent No.5-Dhaka (North) City Corporation. Thereupon, Dhaka (North) City Corporation shall construct and maintain a modern Shishu Park thereon having all facilities and greenery, which will be used by all the children of Bangladesh. The respondent No.5 is also directed to complete such construction of modern Shishu Park thereon within a period of 1(one) year from the said handing over of the possession.

S. H. Arif
(Sheikh Hassan Arif, J)

I agree

M. B. Zaman
(Md. Badruzzaman, J)
প্রত্যয়িত অবিকল প্রতিলিপি

[Signature]

28-10-18

সহকারী রেজিস্ট্রার

বাংলাদেশ সুপ্রীম কোর্ট, হাইকোর্ট বিভাগ
(১৮ ৭২ ইং সনের ১নং অফিসের)
৭৬ ধারানগরে কামড়া গ্রাম

Typed by: A. Razi: 28.10.2018.

Read by :

Exam by :

Readied by :

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[Signature]
28-10-18

29-10-18

[Signature]
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