



SELANGOR APPEAL BOARD LAW REPORTS

[Section 36, Town and Country Planning Act, 1976 (Act 172)]

Volume 4, Issue 1 [SABLR/4/1/2014, Ogos 2014]

Tetuan Tristar Award Sdn. Bhd. V. MPAJ

Tetuan Community Excel Services V. MBPJ

*Published By State of Selangor
Selangor State Town And Country Planning Department and Selangor Appeal Board
Ogos 2014*





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HIGHLIGHTS

Tetuan Tristar Award Sdn. Bhd. V. MPAJ

Tetuan Community Excel Services V. MBPJ

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Editorial

Y.Bhg. Dato' Abu Bakar b. Awang

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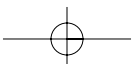
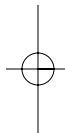
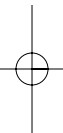
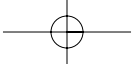
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AWARDS REPORTED

FILE NO	PARTIES
LR. SEL. (288)MPAJ/03/2012	Tetuan Tristar Award Sdn. Bhd. V. MPAJ
LR. SEL. (248)MBPJ/11/2011	Tetuan Community Excel Services V. MBPJ



LEMBAGA RAYUAN NEGERI SELANGOR

RAYUAN NO: LR.SEL(288)MPAJ/03/2012

Di Antara

TETUAN TRISTAR AWARD SDN. BHD. - PERAYU

Dan

MAJLIS PERBANDRAN AMPANG JAYA - RESPONDEN

PER: RAYUAN TERHADAP PENOLAKAN KEBENARAN MERANCANG TETUAN TRISTAR AWARD SDN. BHD. BAGI TUJUAN SERAH BALIK TANAH DAN BERIMILIK SEMULA DI BAWAH SEKSYEN 204B KTN DARIPADA BANGUNAN PERNIAGAAN (REKREASI SWASTA) KEPADA PLOT BANGUNAN PERNIAGAAN KOMPLEKS REKREASI DAN RUMAH KELAB 5 TINGKAT DAN KEMUDAHANNYA SERTA PLOT BANGUNAN PERNIAGAAN TERDIRI DARIPADA 1 BLOK BANGUNAN PANGSAPURI PERKHIDMATAN DAN SOHO 20-28 TINGKAT DAN 1 BLOK SOHO 15 TINGKAT (SEMUANYA DI ATAS 5-7 TINGKAT PODIUM TLK DAN KEMUDAHAN) DI ATAS LOT PT 4612 (16838) (K-KLUB SEDIADA) SELANGOR DARUL EHSAN DALAM MUKIM HULU KELANG, DAERAH GOMBAK.

Ahli Lembaga Rayuan

Dato Abu Bakar Bin Awang - Pengerusi
Datin Teh Zawahir Bt Abdul Malek - Ahli
Ho Khong Ming - Ahli

Pendaftar

En. Saifuddin B. Marsuk

ALASAN KEPUTUSAN

1. THE APPEAL

This is an appeal against the refusal of a planning permission by the Respondent, the Majlis Perbandaran Ampang Jaya on an application by *Tetuan Tristar Award Sdn. Bhd.* the appellant the appeal is "*Rayuan Terhadap Penolakan Kebenaran Merancang oleh Tetuan Tristar Award Sdn. Bhd. Bagi Tujuan Serah Balik Tanah Dan Bermilik Semula Di Bawah Seksyen 204B KTN Daripada Bangunan Perniagaan (Rekreasi Swasta) Kepada Plot Bangunan Perniagaan Kompleks Rekreasi Dan Rumah Kelab 5 Tingkat Dan Kemudahannya Serta Plot Bangunan Perniagaan Terdiri Daripada 1 Blok Bangunan Pangsapuri Perkhidmatan Dan Soho 20-28 Tingkat Dan 1 Blok SOHO 15 Tingkat (Semuanya Di Atas 5-7 Tingkat Podium TLK Dan Kemudahan) Di Atas Lot PT 4612 (16838) (K-Klub Sediada) Selangor Darul Ehsan Dalam Mukim Hulu Kelang, Daerah Gombak*".

The application by the Appellant was received by the Respondent in June 2012. Form C2, the refusal of planning permission, was issued on 6th September 2012. The appeal to the Appeal Board was filed on 14th September 2012. There is a history of applications and rejections for the development of the said site but it should not prejudice the current appeal.

2. GROUNDS OF REFUSAL OF PLANNING PERMISSION

The grounds of refusal are:

- (1) *Syarat nyata tanah bagi tapak cadangan adalah kawasan rekreasi. Oleh yang demikian jenis perniagaan yang hendak dilaksanakan hendaklah yang berkaitan dengan rekreasi seperti pembangunan sediada di atas tapak sekarang iaitu rumah kelab selaras dengan Seksyen 108 Kanun Tanah Negara.*
- (2) *Mengikut pelan pertapakan Taman Melawati (Pelan Bil. B 11/6419F/PD bertarikh 12 November 1993) tapak cadangan merupakan sebahagian daripada tapak yang diluluskan untuk tujuan pusat rekreasi seluas 7.0 ekar)*
- (3) *Penduduk di kawasan sekitar tidak menyokong cadangan pembangunan perniagaan yang terdiri daripada pembangunan SOHO dan Pangsapuri Perkhidmatan dan hanya menyokong tapak dikekalkan untuk pembangunan rumah kelab dan tujuan rekreasi sahaja.*

3. GROUNDS OF APPEAL

The Appellant cites the following grounds for his appeal:

- (1) The Appellant has expended more than 50 million ringgit in purchasing the land and on expenses relating to the application.
- (2) The present site is occupied by a recreational club. Its facilities are dilapidated and the club is not able to function fully and may likely to discontinue its operation.
- (3) Having examined the Local Plan gazetted on 26th May 2011, the Appellant purchased the land with a view to developing it, taking into consideration the views of surrounding residents.
- (4) It should be stressed that the Appellant is providing the club with a new recreational complex with a 5-storey clubhouse, and only a part of the site is used for the SOHO and service apartments project.
- (5) Many of the objectors reside far from the site and, in accepting their objections, the Respondent is in violation of the provisions of the law.
- (6) Several objectors give the same address. There is, therefore, "duplicity" (do you mean "duplication"?)
- (7) The objection from the Residents' Association Taman Melawati is not supported by a resolution of the Association.
- (8) Objections in respect of an earlier application have been included, which should not be included.
- (9) At the "Taklimat Projek" session on 3rd August 2012, attended by about 50 persons, 40 persons were in support of the application.
- (10) It should be stressed that the site is zoned for commercial and services, and the proposal of the Appellant is within the permissible use class.

4. ISSUES WITHIN THE APPLICATION

The application is in fact 4 separable applications, namely:

- (1) Application for sub-division of Lot P.T. No. 4612 into 2 separate lots.
- (2) Application for conversion of one portion of the said lot from "recreation" to "commercial", and retention of one portion of the said lot as "recreation".
- (3) Application for planning permission for the development of a 5-storey clubhouse on the portion of the sub-divided lot to be retained as "recreation".
- (4) Application for planning permission for the development of service apartments and SOHO on the portion of the sub-divided lot to be converted to "commercial".

The Respondent is the proper authority to approve applications (3) and (4) but not (1) and (2). The proper authority for the approval of applications (1) and (2) is the State Authority, with the District Land Office to receive and process the application. (The National Land Code provides for the two processes to be carried out simultaneously as a single process of surrender and re-alienation.) However, the recommendation or comments of the Respondent will be critical to the State Authority in its decision on applications (1) and (2). (It will be the duty and function of the processing authority to refer to the Respondent for comments.)

By combining the applications the Appellant has "forced" the Respondent to consider the issues involved in, particularly, application (4) as the determining issues for the entire application. In considering application (4) the Respondent, as a responsible planning authority, is required to consider, besides the provisions of the Local Plan, matters that are technical (height of buildings, density, traffic generation, parking, circulation, etc.) and social (Section 22(2)(c) - the objections of neighbouring land owners and residents), whereas the issues involved in applications (1) and (2) are issues of law (compliance with the NLC and conformity with the zoning of the Local Plan). It is not good "strategy" on the part of the Applicant/Appellant to mix up the issues. Unlike issues of law, technical issues are "negotiable". An offer to reduce the height, density and components of the development may make the application more acceptable to the residents and, therefore, to the Respondent. For one part of the application, or one out of the four separable applications, at least, discussion between Appellant/Applicant and Respondent has not been exhausted.

The Appeal Board is not a supervising administrative body to direct the Respondent to reconsider the application based on what the Board may think is a better format for decision making. The Board will consider the decision of the Respondent as it stands. It is for the Applicant/Appellant to provide the Respondent with a clear and clean set of issues or sets of issues to make its decisions.

As things are, the Respondent's grounds for rejecting application (4), including oral reasons given at the hearing, become its grounds for rejecting the whole application. The Board cannot fault the Respondent for exercising its responsibility to protect the environment of the residents.

The Board advises the Appellant to reconsider his application and resubmit it in packages with homogeneous issues to enable the Respondent to respond in a more rational and focused manner.

5. RESPONSE OF THE BOARD TO THE GROUNDS OF REJECTION AND THE GROUNDS OF APPEAL

Some of the grounds of rejection may be pertinent to one level of the application but not to another. Similarly, some of the grounds of appeal may be pertinent to one level of the application but not to another. The Board, therefore, takes a broad view of the Appeal, and will not respond to either the grounds of rejection or to the grounds of appeal one by one. It will, however, comment on those grounds of rejection or those grounds of appeal where the comments may, in the view of the Board, provide guidance for future action by either the Respondent or the Appellant.

5.1 USE CONDITION OF THE LAND TITLE

The Appeal Board is aware that there is a general perception that the use condition entered into a land title prevails over land use zoning in a Local Plan. This arises from a casual reading of s. 108 of the National Land Code 1965, viz.:

Where any land affected by any by-law of, or restriction imposed by, any local authority or planning authority becomes subject by virtue of this Act to any condition which is inconsistent therewith, the condition shall prevail, and the by-law or restriction shall, to the extent of the inconsistency, cease to apply to the land.

This perception, or misconception, may have been disseminated and popularised by the opinions expressed by various land officers and town planners, eminent and unknown. The Board, therefore, directs the Respondent and the Appellant to refer to the **LEMBAGA RAYUAN NEGERI SELANGOR case LR SEL. (256) MBPJ/05/2012 (The Ordinary Company Sdn. Bhd v. Majlis Bandaraya Petaling Jaya)** (September 2012).

In the said case the Appeal Board has determined that the wording of s. 108 of the NLC - "*any by-law of, or restriction imposed by, any local authority or planning authority*" - does not mean the Local Plan or any of the statutory public plans introduced by the Town and Country Planning Act 1976, cannot be applied to any of the said plans, and, therefore, does not provide for the land condition on land titles to override the land use zoning of a Local Plan.

The Board is further of the opinion that, where there is a variance between the use condition in a land title and the land use zoning in a Local Plan, it may be incumbent on the affected land owner to apply for conversion of his land title to conform to the Local Plan. The Respondent should note that the Local Plan MPAJ zones lot PT 4612 (16838) as "commercial", not "recreation".

5.2 ORIGINAL LAYOUT PLAN FOR TAMAN MELAWATI

The Local Plan should incorporate the contents of any previously existing approved plan, with or without changes. The Local Plan MPAJ is, therefore, deemed to have incorporated the contents of the Layout Plan for Taman Melawati. Upon the coming into effect of a Local Plan all previously existing approved plans are automatically abrogated.

5.3 OBJECTIONS

The calling for objections from owners of neighbouring lands is in accordance with s.21(6):

If the proposed development is located in an area in respect of which no local plan exists for the time being, then, upon receipt of an application for planning permission the local planning authority shall, by notice in writing served on the owners of the neighbouring lands inform them of their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.

As a Local Plan exists, at the relevant time and for the area within which the Appellant's application is located, the action of the Respondent is not a requirement. Nevertheless, the Board does not view the action of the Respondent as *ultra vires* but only as supererogatory. The action is not discouraged as it promotes good governance and is a practical means to arrive at a consensus of what a liveable neighbourhood environment should be. Nevertheless, the Respondent is required to observe strict adherence to the matter of *locus standi* as provided by the Act, however restrictive it may be felt to be. Proper registration and recording of participants should also be conducted. There is of course no restriction on the number and origins of the people who may wish to attend the consequent public hearing as observers.

The Board is aware that there are misgivings with regards to s. 21(6), as well as s. 21(7) in which "neighbouring lands" is defined.

With s. 21(6) the misgiving is that, the moment a Local Plan comes into effect, the Local Planning Authority is freed from a mandatory requirement for consultations with residents and land owners with regards to an application for a development in their area. Presumably the legislators were influenced by the fact that such mandatory consultation is already provided for at the Draft Local Plan stage and a similar opportunity with regards to every particular application would be duplication. In reality there is no duplication. At the Draft Local Plan stage the issues are broad issues, such as zoning. Citizens responding to the Draft Local Plan zoning proposals are not expected to imagine and anticipate the hypothetical developments that may be involved and to debate on such hypothetical developments. A commercial zone is a rather vague concept and does not necessarily elicit much reaction. (A case in point is the very current Appeal itself. There is no record of the same residents objecting to the present application having made a similar objection at the Draft Local Plan stage to the proposal to change the zoning of the club site from recreation to commercial!)

At the stage of the individual development application there is a vast difference between a *kedai runcit* and a hypermarket - both falling within the same use class of commercial, or between a cake shop and a coffin shop! (For this reason the Board commends those local planning authorities that take the supererogatory step to provide for consultations with neighbouring residents.)

With s. 21(7) the misgiving is the restrictive meaning of "the owners of the neighbouring lands", and, therefore, of *locus standi* - a narrowness that may prevent a resident within sight, sound and smell of a development from exercising any right to object to it!

However, until the legislative branch of Government chooses to review these provisions, the local planning authorities and the Appeal Board must abide by them.

5.4 EXPENSES OF THE APPELLANT ON THE DEVELOPMENT

The money the Appellant has expended on the development is not a matter to be considered in a planning appeal. Indeed, it may prejudice the minds of the Appeal Board as it may indicate a speculative venture, when speculative land purchases are widely believed to be a cause of inflated housing prices. Besides, the Appellant, as a developer and business person, must be familiar with the dictum of *caveat emptor*.

5.5 SUPPORT OF CLUB MEMBERS

The support letters from club members are suspect as they are beneficiaries of the development, even if some of them may qualify as land owners of neighbouring lands.

6. ORDER

Since the components of the application are intricately tied together, the Board accepts that the rejection of one component of the application by the Respondent results in the rejection of the whole application.

The Board, therefore, confirms the decision of the Respondent and dismisses the Appeal.

The Board, however, advises the Appellant that he may resubmit his application, in separate applications, or separate packages of applications, that are homogeneous in issues, and separately to the different appropriate authorities, and in proper sequence of decisions required.

No cost is ordered.

**Bertempat di SHAH ALAM
Pada 05 Disember 2012**

Dato' Abu Bakar b. Awang
Pengerusi,
Lembaga Rayuan Negeri Selangor

Saya setuju dengan keputusan dan perintah ini

Ho Khong Ming
Ahli Lembaga Rayuan Negeri Selangor

Saya setuju dengan keputusan dan perintah ini

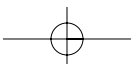
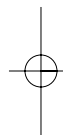
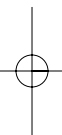
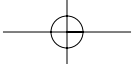
Datin Teh Zawahir bt. Abdul Malek
Ahli Lembaga Rayuan Negeri Selangor

Bagi Pihak Perayu

- *Pn. Chang Kah Ling
Tetuan Tristar Award Sdn. Bhd*

Bagi Pihak Responden

- *En. Johari b. Atli
Pn. Zuraina bt. Said
Pn. Rohana bt. Mohd. Nor
Pn. Tg. Norhani bt. Tg. Hamzah
Majlis Perbandaran Ampang Jaya*



LEMBAGA RAYUAN NEGERI SELANGOR
RAYUAN NO: LR.SEL.(248)MBPJ/11/2011

Di Antara

TETUAN COMMUNITY EXCEL SERVICES - PERAYU

Dan

MAJLIS BANDARAYA PETALING JAYA - RESPONDEN

PER: RAYUAN TERHADAP PENOLAKAN KEBENARAN MERANCANG BAGI TUJUAN MEMBUAT PERUBAHAN MATAN DALAM PENGGUNAAN BANGUNAN DARIPADA 'KEDIAMAN' KEPADA 'PUSAT RAWATAN DAN PEMULIHAN DADAH PERSENDIRIAN' DI PREMIS NO. 568, JALAN 17/18, SEKSYEN 17, MUKIM PETALING DAERAH PETALING UNTUK TETUAN COMMUNITY EXCEL SERVICES.

Lembaga Rayuan

Dato' Abu Bakar b. Awang - Pengerusi
Datin Teh Zawahir bt. Abd. Malek - Ahli Panel
Pn. Hjh. Norasiah bt. Yahya - Ahli Panel

Pendaftar

En. Saifuddin B. Marsuk

ALASAN KEPUTUSAN

Pihak Perayu (Tetuan Community Excel Services) telah mengemukakan permohonan Kebenaran Merancang pada 19 November 2010 bagi tujuan membuat perubahan matan dalam penggunaan bangunan daripada kediaman kepada Pusat Rawatan dan Pemulihan Dadah Persendirian di premis No 568, Jalan 17/18, Seksyen 17 Mukim Petaling, Daerah Petaling.

Pada 18 Mei 2011 Mesyuarat Jawatankuasa Pembangunan Mampan telah menolak permohonan Pihak Perayu dengan alasan permohonan ini melanggar penggunaan Zon Guna Tanah yang termaktub di dalam Rancangan Tempatan RTPJ1 Pengubahan (1) dan kerana adanya bantahan pemunya tanah berjiran.

Pada 5 Oktober 2011 Pihak Responden telah mengeluarkan Borang C(2) Penolakan Kebenaran Merancang mengikut Kaedah-Kaedah Kawalan Perancangan (Am) (Negeri Selangor) 2001 kepada Pihak Perayu.

Dalam menolak permohonan pihak Perayu, pihak Responden telah merujuk kepada RTPJ1 Pengubahan (1) yang hanya membenarkan aktiviti yang tersenarai di dalam Garis Panduan Pembangunan itu sahaja dan tindakannya itu adalah selaras dengan Seksyen 18(1) Akta Perancangan Bandar dan Desa 1976 iaitu melarang Perayu dan Responden sendiri daripada menggunakan atau membenarkan digunakan sesuatu tanah atau bangunan melainkan dengan Menurut Rancangan Tempatan.

Pihak Responden juga telah mengambilkira bantahan-bantahan daripada pemilik tanah berjiran sepertimana yang diperuntukkan oleh Seksyen 21(8) Akta Perancangan Bandar dan Desa 1976 (Akta 172). Pihak Responden telah mengambilkira daripada peruntukkan Akta itu siapa yang mempunyai *Locus Standi* untuk membantah permohonan pihak perayu.

Dalam seksyen ini, "tanah berjiran" ertinya

- (a) Tanah yang bersempadan dengan tanah yang dimaksudkan oleh sesuatu permohonan di bawah seksyen ini;
- (b) Tanah yang dipisahkan daripada tanah yang dimaksudkan oleh sesuatu permohonan yang dibuat di bawah seksyen ini oleh mana-mana jalan, lorong, parit atau tanah rizab yang lebarnya tidak melebihi 20 meter dan yang akan bersempadan dengan tanah yang dimaksudkan oleh permohonan itu jika tidak kerana dipisahkan oleh jalan, lorong, parit atau tanah rizab itu;

- (c) Tanah yang terletak dalam jarak 200meter dari sempadan tanah yang dimaksudkan oleh permohonan itu ialah jalan mati yang digunakan oleh pemunya-pemunya tanah itu dan pemunya-pemunya tanah yang dimaksudkan oleh permohonan itu.

Pada 15 Disember 2011, pihak Perayu telah mengemukakan rayuan kepada Lembaga Rayuan Negeri Selangor menurut Seksyen 23(1) AKta Perancangan Bandar dan Desa 1976 dan peruntukan Kaedah-Kaedah Lembaga Rayuan 1999 di dalam Jadual Borang A, Kaedah 4(2)(a).

ALASAN-ALASAN PENOLAKAN OLEH PIHAK RESPONDEN

Pihak Responden menegaskan bahawa Pihak Perayu perlu mematuhi Seksyen 18(1) Akta Parancangan Bandar dan Desa 1976 yang menyatakan:

"tiada seorang pun boleh menggunakan atau membenar digunakan sesuatu tanah atau bangunan melainkan dengan menurut rancangan tempatan"

Pihak Responden menambah bahawa peruntukan Seksyen 18(1) Akta Perancangan Bandar dan Desa 1976 perlu dipatuhi oleh pihak Perayu dan dalam konteks ini RTPJ1 Pengubahan (1) juga.

Pihak Responden telah mengambilkira beberapa isu sebelum mempertimbangkan keputusan penolakan disampaikan kepada Pihak Perayu pada 5 Oktober 2011 di dalam Borang C(2):

- (a) Kandungan RTPJ1 Pengubahan 1 di dalam Bahagian Garis Panduan Kawalan Pembangunan yang diwartakan pada 14 Jun 2007, No Warta 1542 yang merangkumi kawasan Seksyen 17 di mana lokasi premis yang dipohon pihak Perayu berada.
- (b) Garis Panduan Kawalan Pembangunan yang menyatakan hanya Perubahan Matan Penggunaan Bangunan yang tersenarai sahaja dapat dipertimbangkan untuk kelulusan.

- (c) Senarainya adalah seperti berikut:
- i. Tadika
 - ii. Taska
 - iii. Pejabat Pengurusan yang berkaitan dengan NGO
 - iv. Bilik Perabot Antik
 - v. Bilik Pemeran hiasan dalaman
 - vi. Pejabat Persendirian
 - vii. Tempat Penyelidikan Persendirian
 - viii. Asrama (di kawasan tertentu sahaja)
 - ix. Klinik (bukan untuk haiwan)

Pihak Responden telah mengambilkira bantahan pemilik tanah berjiran serta maklumbalas daripada Majlis Pendengaran Bantahan yang diadakan pada 10 Februari 2011 dan 12 Mac 2011. Pihak Responden telah mengambil langkah yang perlu dengan mengadakan Majlis Pendengaran Bantahan disebabkan adanya bantahan yang keras oleh pemilik tanah berjiran.

Proses bantahan pendengaran dibuat untuk permohonan pihak Perayu adalah disebabkan pihak Responden tidak mempunyai garis panduan yang terpakai terhadap permohonan pihak Perayu kerana aktiviti yang dipohon ini memang tidak tersenarai pun di dalam Bahagian Garis Panduan Kawalan Pembangunan RTPJ1 Pengubahan (1)!

Pihak Responden menegaskan bahawa pusat rawatan pemulihan dadah adalah amat tidak sesuai di dalam kawasan perumahan dan sebab itulah ia tidak tersenarai di dalam Garis Panduan Kawalan Pembangunan di dalam RTPJ1 Pengubahan (1)

Oleh yang demikian, pihak Responden menghujah bahawa Pihak Lembaga Rayuan perlu menitikberatkan Seksyen 18(1) Akta Perancangan Bandar dan Desa 1976 kerana ia memperuntukkan bahawa tiada sesiapa pun boleh menggunakan dan membenarkan digunakan tanah tanpa mengikut Akta dan "Rancangan Tempatan" serta RTPJ1 Pengubahan 1.

KEPUTUSAN/ PERINTAH

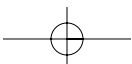
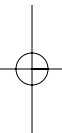
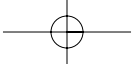
Tindakan Pihak Responden menolak permohonan Pihak Perayu adalah betul dan tepat kerana aktiviti yang dicadangkan itu tidak termasuk dalam senarai aktiviti yang dibenarkan. Oleh yang demikian, Rayuan ini hendaklah ditolak dan keputusan pihak Responden dikekalkan. Walau bagaimanapun tiada perintah kos dikenakan ke atas pihak Perayu.

Bertempat di Shah Alam
Bertarikh 19 November 2013

Dato' Azmeer bin Rashid
Ahli Lembaga Rayuan Negeri Selangor.

Bagi Pihak Perayu
Bagi Pihak Responden

- *Tetuan Community Excel Services*
- *Encik Mohd. Yusof Che Aziz*
Encik Norhisyam b. Hj. Mat
Majlis Bandaraya Petaling Jaya



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