
(1952) 10 RAJ CK 0005

In the Rajasthan High Court

Case No : CWrit Application No's. 50 and 361 of 1952

Madanlal Kapur

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 22-10-1952

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(6)

Rajasthan Dramatic Performances and Entertainments Ordinance, 1949 — Section 11, 3, 4, 6, 8

Citation : AIR 1953 Raj 162 : (1953) RLW 311

Hon'ble Judges : Ranawat, J; Dave, J

Bench : Division Bench

Advocate : R.K. Rastogi, for the Appellant; C.B. Bhargava, Dy. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

Ranawat, J.—These are two applications by Madanlal Kapur under Article 226 of the Constitution of India, one of them is directed against the District Magistrate of Kotah and others, and the other against the District Magistrate of Jaipur.

2. The facts leading to both these applications are to a very large extent similar and this is why we are disposing them together by one judgment.

3. In Writ application No. 50 of 1952 the petitioner has also impleaded along with the District Magistrate of Kotah the State of Rajasthan and the Superintendent of Police, Kotah, as the opposite parties. In the other application, he has however contended himself by impleading the District Magistrate of Jaipur only. His case in petition No. 50 is that he wanted to run a variety show and to organise certain games along with it at Kotah for profit, to which the public was to be allowed access. He commenced the show on the 21st of April 1952 at Kotah under the name of Jai Hind Variety Show and two items of his performance were of shooting by pistol from a distance of 12 ft. at numbers or colours marked on a board. The persons who attempted to undertake pistol shooting were given the

choice of selecting the number or colour of target and if they successfully took the target they were paid double the amount deposited by them as a fee. It is said he also started the same type of show at Baran on or about the 1-4-1952 but the District Magistrate of Kota-h passed an order on 23-4-1952 prohibiting the performance of the game of pistol shooting at Earan without first allowing any opportunity to the petitioner of being heard. The petitioner came to know about the existence of that order only when the order was served upon him on 26-4-1952. Similarly on 28-4-1952 it is said the District Magistrate of Kotah prohibited him from performing the games of pistol shooting at Kotah on the ground that these games depraved and corrupted the persons present at the Show. The performances of the petitioner were stopped by the police under the aforesaid orders of the District Magistrate. It is claimed that Sections 3, 4, 6 and 8 of the Rajasthan Dramatic Performances and Entertainments Ordinance 1949 (29 of 1949), hereinafter referred to as the Ordinance, are inconsistent with the provisions of Article 19(g) of the Constitution of India. Under the Ordinance there is no provision for allowing an opportunity to the person against whom an order u/s 3 is made of representing his case before an impartial tribunal or authority. It was, therefore, prayed that the provisions of the Ordinance in question as contained in Sections 3, 4, 6 and 8 be declared ultra vires of the Constitution and the opposite parties be restrained by an appropriate writ or direction from interfering with the performance of the games by the petitioner both at Kotah and Baran or elsewhere.

4. In the other case, which is against the District Magistrate of Jaipur, as yet no order has been made restraining the petitioner from performing arty games but he has simply been served with a notice to show cause why an order u/s 3 of the Ordinance be not made against him restraining him from performing the games of Pistol shooting.

5. In the case against the District Magistrate of Kotah no reply has been filed on behalf of any one of the opposite parties, whereas a reply has been filed by the District Magistrate of Jaipur in the other case. It was stated that a notice was served on the petitioner asking him to show cause why an order u/s 3 of the Ordinance be not made against him and it was stated that a number of verbal complaints and representations on behalf of the citizens of Jaipur were received by the District Magistrate to the effect that the petitioner was having certain games of pistol shooting which were merely games of chance and were likely to deprave and corrupt persons, which led the aforesaid authority to issue a notice against the petitioner. The petitioner appeared before the opposite party on 17-9-1952 and the proceedings are still pending before the opposite party. The application for issue of a writ in this case is claimed to be premature and not maintainable on this ground. It is also claimed that the action of the authority u/s 3 of the Ordinance is an executive one and is not judicial or quasi-judicial, and as such writ of prohibition lies against an order u/s 3 of the Ordinance. It is further claimed that the provisions of Sections 4, 6 and 8 of the Ordinance have been enacted to provide for public safety, public peace, public morals, and in the

interest of the general public and are within the scope of reasonable restrictions on the fundamental rights guaranteed by Article 19(g) of the Constitution. It is also said that as Section 3 deals with the control of emergent situations, giving of a notice or hearing a party before the making of any order would defeat the very purpose of the Ordinance.

6. The learned counsel for the petitioner has concentrated in his argument on two points, namely (1) that as no opportunity of making any representation is contemplated under the Ordinance either before or after the making of the order u/s 3, the restriction put on the fundamental rights of the petitioner under Article 19(g) is unreasonable, and (2) that the language of Sub-Clause (c) of Section 3 of the Ordinance is vague and is not capable of being enforced on that account.

7. In support of these points, the learned counsel of the petitioner has cited the cases of -- Dr. N.B. Khare Vs. The State of Delhi, -- Janab Tozammal Khundel Sahaji Vs. Joint Secretary to the Government of West Bengal, ; -- "Ismail and Another Vs. State of Orissa, -- V.G. Row Vs. The State of Madras, ; -- " In Re: Shantabai Rani Benoor, ; -- "Jayantilal Laxmishankar v. State of Saurashtra" AIR 1952 Sau 59 (S. B.) (F); Except the "Madras case, (D)", and the "Saurashtra case, (F)", the other cases are relating to the fundamental rights of personal liberty. The "Madras case, (D)", is regarding fundamental rights of association and the "Saurashtra case, (F)", is about the fundamental rights guaranteed under els. (f) and (g) of Article 19 of the Constitution. In all these cases, the scope of reasonable restrictions under Article 19 of the Constitution has been examined. In reply the learned Government Advocate has urged that the petition is premature in so far as the Jaipur case is concerned. It is also argued that the petitioner can ignore the prohibitive order of the District Magistrate of Kotah, and run the risk of giving his performance to face a trial for an offence under Sections 4 and 6 of the Ordinance, when at the trial it will be open to the petitioner to challenge the illegality and the validity of the orders u/s 3 of the Ordinance. In this way it is said that an opportunity will be available to the petitioner to agitate in a court of law the question regarding the illegality and the propriety of the orders u/s 3 of the Ordinance. The objection regarding there being no opportunity of making representation is met by the other side by saying that the opportunity will be available at the time of the trial for the offences of contravention of the orders under S, 3 of the Ordinance. It is also contended that in emergent cases it is not possible and it is not in the interest of the general-public that before making an order u/s 3 a person against whom an order is made should be allowed an opportunity of making a representation.

8. The objection of the opposite party that the petition is premature in the case against the District Magistrate of Jaipur cannot be of avail to the opposite party, because an action under the ordinance is contemplated by the District Magistrate and the petitioner apprehends an order against him. He is already faced with an order by the District Magistrate of Kotah and it is not unreasonable for him to think that a similar order will be flung in his face. Under these circumstances, if

the petition in the case of the District Magistrate of Jaipur is not decided along with the other case it will only mean multiplicity of cases. We are, therefore, inclined to think that the same decision which will be given in the other case against the District Magistrate of Kotah would govern the Jaipur case as well.

9. Article 19(1)(g) of the Constitution of India lays down that

"All citizens shall have the right (g) to practise any profession, or to carry on any occupation, trade or business".

By Clause (6) of Article 19 of the Constitution the following restrictions have been put on the fundamental rights guaranteed by Article 19(1) of the Constitution:

"Nothing in Sub-Clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business".

It is not disputed by the opposite party that the performance of Variety show or games by the petitioner are in the nature of an occupation, trade or business.

10. The relevant provisions of the Ordinance are as follows:

"3. "power to prohibit certain dramatic" "performances and entertainments: Whenever the District Magistrate is of opinion that any play, pantomime, or other drama or entertainment or any part thereof performed or held in a public place is

(a) of a scandalous or defamatory nature;

(b) likely to excite feelings or disaffection to the Government; or

(c) likely to deprave and corrupt persons present at the performance or entertainment; or

(d) of a dangerous character, likely to endanger human life or to cause injury to any person present thereat,

such Magistrate may by order prohibit the performance or entertainment or any part thereof. 4. "Power to serve order of prohibition."

A copy of any such order may be served on any person about to take part in the performance or entertainment so prohibited, or on the owner or occupier of any house, room or place in which such performance or entertainment is intended to take place, and any person on whom such copy is served and who does or willingly permits any act in disobedience to such order shall be punished with

imprisonment for a term which may extend to three months, or with fine or with both. G. "Penalty for disobeying prohibition", whoever, after the notification of such order

(a) takes part in the performance or entertainment prohibited thereby, or in any performance or entertainment substantially the same as the performance or entertainment so prohibited, or

(b) in any manner assists in conducting any such performance or entertainment; or

(c) is in wilful disobedience to such order present as a spectator during the whole or any part of any such performance or entertainment; or

(d) being the owner or occupier, or having the use of, any house, room or place, opens, keeps or uses the same for any such performance or entertainment or permits the same to be opened, kept or used for any such performance or entertainment,

shall be punishable with imprisonment for a term which may extend to three months, or with fine, or with both. 8. "Power to grant warrant to police to enter and arrest & seize". If any District Magistrate has reason to believe that any house, room or place is used, or is about to be used, for any performance or entertainment prohibited under this Ordinance he may, by his warrant, authorise any officer of police to enter with such assistance as may be requisite, by night or day, and by force if necessary, any such house, room or place, and to take into custody all persons, whom he finds therein, and to seize all scenery, dresses, animals, and the like found therein and reasonably suspected to have been used, or to be intended to be used, for the purpose of such performance or entertainment".

11. It would be noticed that Section 3 of the Ordinance gives an authority to the District Magistrate to make an order prohibiting the performance or entertainment or any part thereof, if in the opinion of that officer that performance or entertainment or any part of it is scandalous, defamatory, corrupt, depraving, etc., as provided in the four sub-els, of the section. u/s 4 of the Ordinance the method of service of the order is given. Similarly by Section 5 of the Ordinance power to notify has been given. Section 6 gives the penalties for disobedience of such orders as are made under the provisions of the Ordinance. Section 7 authorises the District Magistrate to call for information in order to form an opinion regarding the nature of the performance or entertainment. Section 8 of the Ordinance authorises the District Magistrate to issue warrants to the police to enter certain premises and to arrest certain persons and to seize property in order to enforce the prohibitory order. Section 9 of the Ordinance says that a prosecution under the ordinance shall not be a bar to further prosecution u/s 124A or Section 294 of the Penal Code. Section 10 of the Ordinance makes a provision for issue of licenses for dramatic performances or entertainment within certain specified areas, and Section 11 authorises the

Government to make rules for carrying into effect the provisions of the Ordinance. Section 12 is about the exclusion of certain performances and entertainments from the scope of the Ordinance. Sections 13, 14 and 15 relate to the questions of delegation of power, repeal and saving and interpretation. A survey of the provisions of this Ordinance makes it clear that there is no provision in this Ordinance under which a person against whom an order is made u/s 3 may represent his objections against the order to the authority concealed. The case of the opposite party is that it is not necessary that such an opportunity should be allowed to a person against whom an order u/s 3 is made, because the situation which is to be met by the provisions of Section 3 is in most cases to be considered to be of emergent nature.

In view of Article 19(g) of the Constitution and rule (6) of that Article it is necessary to examine whether the restrictions placed by Section 3 of the Ordinance are reasonable in the meaning of Clause (6) of Article 19 of the Constitution of India. If the restrictions imposed by Section 3 are considered to be reasonable the provisions of the Ordinance would not be hit by Article 19 of the Constitution otherwise, such portions of the Ordinance, which are found to suffer with the fault of unreasonable restrictions shall be void according to Article 13(1) of the Constitution to the extent of inconsistencies with the provisions of the Constitution. The language of cls. (5) and (6) of Article 19 so far as the question which is involved in this case is concerned is exactly the same. In other words, the first portion of Clause (6) is worded in exactly the same language as appears in Clause (5) of Article 19. Clause (5) of Article 19 has been discussed by their Lordships of the Supreme Court in -- "Dr. N. B. Khare v. The State of Delhi", (A), and the comments of their Lordships in that decision are of great help in this case, even though this is a case under Clause (6) of Article 19 of the Constitution of India, because the language of Clauses (5) and (6) in Article 19 is the same in so far as this point is concerned. In his judgment His Lordship Kania C. J. has observed that

"Clause (5) must be given its full meaning. The question which the court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause. The Court, on either interpretation will be entitled to consider whether the restrictions on the right to move throughout India i.e., both as regards the territory and the duration are reasonable or not. The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the court the question of reasonableness of the procedural part of the law." (p. 214)

12. In that case the word "may" appearing in Section 6 of the impugned Act was construed to have the force of the word "shall" and in this view of the provisions of law the restriction was held to be reasonable, because there was a provision for giving an opportunity to the person against whom the order was made for making a representation for the consideration of the Advisory Board which was to be constituted under the provisions of that Act. In the minority judgment of Mukherjee J. this point has been considered more fully and the majority judgment also does not express any contrary opinion in this connection. The following observations of Mukherjee J., therefore, can be taken to enunciate the principles which govern the law on this point:

"The question of reasonableness of the restrictions imposed by a law may arise as much from the substantive part of the law as from its procedural portion. Thus although I agree with the learned Attorney-General that the word "reasonable" in Clause (5) of Article 19 goes with "restrictions" and not with "law" I cannot accept his suggestion as regards the proper way of determining the reasonableness of the restrictions which a legislation might impose upon the exercise of the right of free movement.

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It is not disputed that under Clause (5) of Article 19, the reasonableness of a challenged legislation has to be determined by a court and the court decides such matters by applying some- objective standard which is said to be the standard of an average prudent man".

13. In -- "Ismail v. State of Orissa", (C), it is observed by Ray C. J., as follows:

"The essentials of procedure, in the minimum are essentials of notice, opportunities to be heard and a tribunal. Essential of notice requires to apprise the victim of the nature of the cause against him in order to afford him sufficient opportunity to prepare and to make his answer. Opportunity to be heard is the second essential of procedure established by law. To condemn without hearing is repugnant to natural justice. Any procedure which does not guard against this requirement is no procedure by law. The essentials of such opportunities do not, however, consist in any particular form or method of hearing. All that is required is a reasonable opportunity to be heard. The opportunity does not guarantee a person a right to an appeal, one hearing is all that is required. Tribunal as the third essential of procedure does not necessarily mean a judicial tribunal. Any impartial tribunal will meet the requirement".

14. In -- "Tozammel v. Joint Secy, to the Government of West Bengal", (B), it has been observed as given below:

"On an examination of the relevant provisions of the impugned Act it is patent that the legislature has merely made provisions authorising certain officials to restrict the movement of the person concerned. There is no provision or indication as to how and if at all, the person affected may take necessary steps

for having the order passed on him reviewed. The fact that an aggrieved person may move the court under Article 226 of the Constitution will not in our opinion be sufficient to regard provisions restricting fundamental rights being reasonable. The restrictive provision itself should *prima facie* indicate whether such restriction is reasonable or not.

The absence of the particular provision or other may not be sufficient to declare whether a provision restricting the liberty of movement is reasonable or otherwise. We have to consider all the points taken together and assess the cumulative effect of all those particulars".

Further on, in the same judgment it has been observed as follows:

The right of hearing before condemnation is admitted to be a component of the rights which taken together constitute rights of natural justice, though that does not mean that an interim *ex parte* order cannot be passed restricting the movements of a person. But unless he is given an opportunity of being heard by a properly constituted body even after such an interim order, the order restricting the fundamental rights must be declared to be unreasonable".

15. In -- "*V. G. Row v. The State of Madras*", (D) dealing with the question of reasonable restrictions on the exercise of the fundamental rights the Court has observed that "What restrictions are reasonable is for the Court to decide. There can be no absolute standard of reasonableness. In deciding on the reasonableness of the restrictions, it is not possible to think only in the abstract. Several circumstances must be taken into consideration, in particular, the purpose of the Act, the conditions prevailing in the country at the time, the duration of the restriction, its extent and nature. Further, in deciding on the reasonableness or otherwise of the restrictions imposed by law, the substantive as well as the procedural provisions of the law should be examined.

16. In -- "*Jayantilal Laxmishankar v. The State of Saurashtra*", (F) which is a case relating to Article 19(g) of the Constitution of India, it has been observed that it cannot be laid down as an inflexible rule that every law which gives authority to the executive to encroach on a fundamental right must necessarily give an opportunity to the person concerned to be heard before any order is made to his prejudice, the question will depend on the nature of the legislation and the extent to which the fundamental right is contravened. A legislation providing for an emergency like a sudden outburst of an epidemic or a natural calamity like an earthquake or a flood may defeat its purpose, if it lays down an elaborate enquiry with opportunity of being heard as a pre-requisite to take action in the interest of the general public. On the other hand, where there is no compelling necessity to act urgently, the legislation should ordinarily prescribe a procedure observing the principles of natural justice which require that a person should not be condemned or deprived of his rights without an opportunity of being heard.

17. It would be evident from the study of the aforesaid rulings that what is

reasonable in the meaning of Clause (6) of Article 19 of the Constitution of India has to be decided by a court of law and in doing so the court has got to see both the substantive as well as the procedural aspects of the question.

18. The first point raised by the petitioner relates to the procedural side. The essential requirements of procedure ordinarily are:

- (1) that a notice should be given to the person against whom an order is made,
- (2) that an opportunity should be allowed to him to make a representation,
- (3) that there should be some authority or tribunal to consider the representation, if any, made by the person against whom an order is made. There may be cases of emergency where it may not be possible to give notice to a person before making an order against him, for instance in case of an epidemic, earthquake, flood etc, it may not be possible under the circumstances of the case to give notice. The reasonableness of the situation in such cases would require that action is promptly taken without waiting to give a notice to a person against whom the order is made.

Coming to the present case, the argument of the learned Government Advocate may not be without force that an order u/s 3 of the Ordinance may be necessary without first giving notice to the person against whom such an order is made but in such cases after an order is made a notice can certainly be given to the person against whom the order is made to make a representation against the order. It is true that the emergency may call for an immediate action but after such an action is taken there appears no reason why the person against whom the orders in these cases are made should, be deprived of an opportunity of making his representation to enable him to show that the act complained of did not fall within the provisions contained in Section 3 of the Ordinance or that the requirements of the law were not fulfilled. The learned Government Advocate has not been able to show why such an opportunity cannot be given to a person against whom an order u/s 3 is made. We, therefore, think that it is reasonable that a notice should be given to a person against whom an order u/s 3 is made before or in emergent cases at least after the order is made against him to enable him to make his representation. Secondly, it should not be difficult for the authority making the order to hear the representation of the person against whom an action u/s 3 is taken. It is not necessary that there should be a judicial tribunal to hear the representation. Any impartial authority, whether it is executive or judicial, might hear the representation. There is absolutely no provision in the Ordinance to enable a person against whom an action u/s 3 is taken to make a representation. It may be that the authors of the impugned piece of legislation left it for the Government to frame rules of procedure u/s 11 of the Ordinance and if rules are made providing for issue of a notice before or after the making of an order u/s 3 to the person against whom action is taken to enable him to make a representation to such authority as may be constituted under the rules to hear it, the substantive provisions of Section 3 may be capable

of being acted upon, without bringing its provisions into conflict with the provision of Article 19 of the Constitution of India. Unless such a provision is made, it cannot be said that the restrictions imposed by Section 3 of the Ordinance on the fundamental rights of a citizen guaranteed by Article 19(g) of the Constitution are reasonable.

The District Magistrate of Jaipur has followed the correct procedure in giving a notice to the petitioner before making an order against him. But this is only because the particular officer chose to proceed in accordance with the natural principles of justice. As there is no provision in the law itself, it is open to an officer to proceed to make an order u/s 3 against a person without giving any notice, whether before or after the making of an order u/s 3 and without allowing him an opportunity to make a representation. This being so, the restriction put on the fundamental rights of a citizen guaranteed by Article 19(g) of the Constitution in the present case cannot be regarded as reasonable. The essential minimum requirements of natural justice do not find a place in the impugned Ordinance. Consequently, so long as no procedure is prescribed under the rules, the provisions of Section 3 are incapable of being enforced. The argument of the learned Government Advocate that the petitioner would get an opportunity to make his representation at the time he would be prosecuted for contravention of the provisions of the impugned Ordinance does not appear to be proper, because even without prosecuting a person for contravening an order u/s 3 it is open to the District Magistrate u/s 8 of the ordinance to enforce the prohibitory order. The person against whom an order u/s 3 is made, therefore, may not be prosecuted at all and he may not get an opportunity to agitate the validity of an order in a court of law and he may be stopped from carrying on his trade or profession. It cannot, therefore, be said that an opportunity would be allowed to a person to question the validity of the order at the time of the trial for contraventions of the prohibitory order. In conclusion it may be remarked that so long as proper procedure is not prescribed by the rules u/s 11 of the Ordinance, Section 3 of the Ordinance cannot be made use of without contravening the provisions of Article 19(g) and Clause (6) of the Constitution. It should not be difficult for the Government to make rules u/s 11 of the Ordinance to bring the provisions of the Ordinance within the reasonable limits prescribed by Clause (6) of Article 19 of the Constitution.

19. The second point raised by the petitioner relates to the substantive side of the law. It is contended that the language of Section 3 is vague. Emphasis is laid on the meaning of the words "deprave" and "corrupt" and it is urged that the meaning of these words is elastic and it may mean different standards of morality and ethics in view of different persons. The dictionary meaning of the terms "deprave" and "corrupt" is very clear and there can be no difficulty in apprehending what is meant by these two terms. Both these terms are well understood by every one and there can be no uncertainty about their meaning. The standards of morality and ethics may vary with the different standards of societies but on the whole it is not difficult to apprehend the ordinary standards

of the society. The words should therefore be understood having regard to the ordinary moral standards of the society. Taking this view as the basis for understanding these terms, it cannot be said that these terms are incapable of correctly laying down the idea which is behind the objects of the impugned Act. In our opinion, both these terms are very clear and they cannot be said to be vague. The decision in --saurashtra case (F)", which has been cited on this point does not apply to these terms. In that case the question was about the standard of agricultural efficiency and as the law did not lay down any such standard the provision of the law was considered to be vague. In the present case the terms "corrupt" and "deprave" do not suffer with any such vagueness,

20. The conclusion is that so long as no procedure is prescribed by rules u/s 11 of the Ordinance regarding issue of notice, an opportunity of making a representation to an authority or a tribunal to consider it, the provisions of Sections 3, 4, 6 and 8 of the Ordinance cannot be regarded as enforceable, because they do not come within the limits of reasonableness of Clause (6) of Article 19 of the Constitution. Sections 3, 4, 6, 8 of the Ordinance, therefore, without the provision of such procedure, become inconsistent with Article 19 of the Constitution. Section 3 of the Ordinance, as it now stands, imposes an unreasonable restriction on the right of a citizen guaranteed by Article 19(g) of the Constitution, not because it differs with any unreasonableness relating to its substantive provisions, but because no reasonable procedure has yet been made by the Government under its rule-making powers.

21. Both these applications are allowed and a direction is ordered to issue against the District Magistrate of Jaipur restraining him from taking any steps of making an order u/s 3 of the Ordinance unless proper rules u/s 11 of the Ordinance, are framed in order to bring the provisions of the Ordinance in conformity with the requirements of Article 19(g) and Clause (6) of the Constitution of India, The order of the District Magistrate, Kotah, is quashed and a similar direction be issued to him.

22. The petitioner shall get costs of this petition in the case against the District Magistrate of Kotah. The counsel's fee is fixed at Rs. 150/-. As regards the other case of the petitioner against the District Magistrate of Jaipur, there will be no order as to costs.