

**(1976) 07 CAL CK 0026**

**Calcutta High Court**

**Case No:** Civil Rule No. 4419 of 1974

F. Cohen

APPELLANT

Vs

W.W. Gayraud

RESPONDENT

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**Date of Decision:** July 9, 1976

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151, 152
- West Bengal Premises Tenancy Act, 1956 - Section 29(5)
- West Bengal Premises Tenancy Rules, 1958 - Rule 10

**Citation:** (1977) 1 ILR (Cal) 286

**Hon'ble Judges:** S.K. Datta, J

**Bench:** Single Bench

**Advocate:** Saktinath Mukherjee, for the Appellant; Dwijendra Prosad Bagchi, for the Respondent

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**Judgement**

S.K. Datta, J.

The Rule was obtained by the landlord opposite party in connection with a proceeding for fixation of rent instituted by two joint tenants before the Rent Controller, Calcutta. It appears that there was an inspection of comparable units as cited by both the parties by the Inspector and the Inspector duly filed his report. The case came up for hearing on December 7, 1973, when both the parties were present and hearing was adjourned to December 10, 1973; on that date the opposite party No. 2 was present but the landlord, the Petitioner before me, was not present and her lawyer also was not there. The hearing commenced ex parte and the evidence was adduced on behalf of the tenant and the case was fixed on January 17, 1974 and thereafter to February 18, 1974, for orders. The learned Rent Controller after considering the evidence adduced by the tenant by order of the said date fixed the rent of the disputed premises at Rs. 150 per month with effect from April 1, 1971, in place of contractual rent of Rs. 300 per month. The Rent Controller also directed adjustment of the excess rent paid.

2. On April 1, 1974, the landlord filed an application praying For rehearing of the case after setting aside the ex parte order. It was stated in the petition that the hearing of the case was fixed on December 10, 1973, which fact was known to the landlord's constituted Attorney. As the landlord's Attorney did not have any information from his lawyer since that date, he came to enquire about it in the first week of March following when his Advocate stated that he could not attend the Court on December 10, 1973 and was not in a position to say what happened to the case. Thereafter, the land lord's Attorney made enquiries, caused searches to be made and for the first time on March 9, 1974, came to know that by the ex parte order of February 18,1974, the case was disposed of. It was stated that the landlord's constituted Attorney could not attend the Court due to his pre-occupation on December 10,1973 and his Advocate also did not appear and as such she could not be represented on the said date of hearing and the same was ultimately heard ex parte. On these facts the landlord wanted to have the ex parte order of February 18,1974, set aside and for a rehearing of the case. The learned Rent Controller, after considering the application, was of the opinion that sufficient cause has not been made out to establish that the learned Advocate for the landlord was prevented from appearing when the case was called on for hearing on December 10,1973. The application for "restoration" was, accordingly, rejected by order dated August 7, 1974.

3. The landlord thereafter moved this Court by an application under Article 227 praying for setting aside both the orders, namely, orders dated February 18 and August 7,1974. Mr. Saktinath Mukherjee, learned Advocate appearing for the landlord, the Petitioner before me, submitted that in the facts and circumstances of the case the learned Rent Controller should have allowed the application for restoration and the case should have been fixed for hearing on merits in presence of the parties. He further submitted that the ex parte order on February 18,1974, suffered from further infirmity, even though the proceeding was heard ex parte. The learned Rent Controller did not take for his consideration the comparable premises shown to the Inspector by his client and the Inspector's report was also on record which was admissible in evidence as held in [Mafazzal Hossain and Others Vs. Mt. Ayesha Bibi](#) .

4. Mr. Bagchi, learned Advocate appearing for the tenant-opposite party has submitted, firstly, that the application for revision is not maintainable as an appeal is provided in respect of the impugned order under the Code of Civil Procedure. It appears, however, that u/s 29(5) the Rent Controller is deemed to be a Court for the purpose of Section 151 or 152 or Order 47 of the Code of Civil Procedure. Under Rule 10 of the West Bengal Premises Tenancy Rules it has been provided that in making enquiries the Controller shall follow, as far as may be, the procedure laid down in the CPC for trial of suits and for recording the memorandum of substance of evidence and reasons for its finding as in cases in which the appeal lies. These provisions do not mean or imply that the provisions of the CPC relating to appeals

are applicable to the Premises Tenancy Act. There is no statutory appeal against an order relating to an application, for restoration of a proceeding, u/s 151. I, accordingly, hold that this application before me is otherwise maintainable in law.

5. There is another fact which has to be considered. It is the admitted position that one of the joint tenants, namely, the opposite party No. 1 died on October 25, 1972, when the proceeding was pending before the Rent Controller. It appears that an application was filed soon thereafter stating the above position and it was also stated that the opposite party No. 1 died leaving the opposite party No. 2 the other joint tenant as the only heiress. This fact was lost sight of by the Rent Controller and he proceeded as if both the opposite parties were, before him. All the proceedings, after the date of death as aforesaid, may otherwise be invalid in law, but in view of the fact that the opposite party No. 2, who is on record, is the only heir left by her husband, opposite party No. 1, his estate has been sufficiently and completely represented by the opposite party No. 2. In that view of the matter I do not think that the proceedings suffered from any infirmity as now contended. The learned Rent Controller's order, however, should be corrected in respect of the cause title striking out the name of the opposite party No. 1 with all consequential modifications.

6. The other question, that in the order of February 18, 1974, no consideration was given to the Inspector's report in respect of the comparable premises cited by the landlord remains to be examined. It would appear that no evidence was adduced to prove the rate of rent is a vital factor for determination of average rate of rent of the comparable unit. In absence of such evidence the Rent Controller was justified to ignore the Inspector's report in so far as it related to the premises cited by the landlord.

7. About the inability of the landlord's Advocate to attend the Court on December 10, 1973 I agree that no cause has even been attempted to be made out in the petition u/s 151. The explanation of her Attorney is also unacceptable as in the circumstances as alleged steps should have been taken for adjournment of hearing.

8. As all the contentions raised on behalf of the Petitioner fail this Rule is discharged subject to the modification to the cause title and otherwise as indicated above.

9. There will be no order as to costs.