

**A PERSPECTIVE ON RAMESH CHANDRA BASAK & OTHERS -Vs-  
DEO NARAYAN PRASAD & OTHERS, 1984 GHC 37.**

**By**

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**The classic dissent of Lord Atkin, one of the greatest Judges of England, in *Liversidge Vs Anderson* (1941) 3 All England Reporter 338 some thirty eight years later was judicially acclaimed by Lord Diplock in *RV IRC ex parte Rossminster* (1980) A.C. 952 in the following words :**

*“ For my part I think the time has come to acknowledge openly that the majority of this House in *Liversidge Vs Anderson* were expediently and at that time perhaps, excusably wrong and the dissenting judgment of Lord Atkin was right.”*

**In a recent judgment of the Gauhati High Court dated 20.01.2004 reported in 2004 (1) GLT 117, *West Bengal State Waevers' Co-operative Society Ltd. And others Vs Bibha Basu Choudhury and Others, Ramesh Chandra Basak, 1984 GHC 37* (herein after referred to as “Basak”) has found mention. That is how the writer reached Basak. The minority judgment in Basak appeared to the writer to lay down better**

law. That is why this, a statement in support of the minority in Basak, came to be written.

### **THE FACTS OF BASAK**

On 25.09.1961 Kokaram Basak filed a suit for possession of a room occupied by Deo Narayan Prasad and others. Twin grounds of eviction pleaded in the plaint are (1) that the defendants defaulted in payment of the rent for the period between July-August 1960 to August-September 1961 and (2) that the entire building containing the suit room needed repair. Kokaram having died during the pendency of the suit Ramesh Chandra Basak and others, the legal representatives of the deceased plaintiff, were substituted in his place. This suit for possession by evicting the defendants being Title Suit No. 100/1961 ended in a decree for eviction passed on 28.02.1963 by the Munsiff, Dhubri. However, Deo Narayan Prasad and others succeeded in the resultant Title Appeal being Title Appeal No. 6 of 1963 and the suit was dismissed by Judgment dated 13.12.1972 by the Assistant District Judge, Goalpara. Eventually this Landlord -tenant suit reached the High Court in second Appeal No. 90 of 1973, appellants being the heirs of Kokaram. On an interpretation of section 9 of the Act against the Landlord the Second Appeal was held to be incompetent but leave was granted under Clause 15 of the Letters Patent. Thus was born the Letters Patent Appeal No. 11 /1976. This appeal was heard by a

**Division Bench and on a difference of opinion between the two Judges a reference was made to a third Judge to answer the following question :**

*“ Whether in the facts and circumstances of the case, a second Appeal is competent, in view of section 9 of the Assam Rent Control Act, 1955.”*

**The third Judge answered the reference in the negative.**

**Thus of the three judgments in the L.P.A 11 of 1976, two judgments laid down that no Second Appeal is competent against a decree in a suit for eviction of a tenant by a Landlord in view of the provisions of section 9 of the Act. The minority Judgment lays down that a Second Appeal is competent.**

### **The law before Basak**

**The Rent Control Law began in the State of Assam on 9<sup>th</sup> February, 1944 when the Governor promulgated the Assam Urban Areas Rent Control Order, 1943 in exercise of powers under Rule 81 of the Defence of India Rules. Next Assam Urban Areas Rent Control Order, 1945 was issued under the same powers. Paragraph 6 of that Order with changes here and there has been reflected in the respective provision of the Assam Urban Area Rent Control Act of 1946, 1949, 1955, 1961, 1966 and the current one of 1972 ( *these will be referred hereinafter respectively as Act of 1946, 1949 etc.*) **Section 9 of the Act of****

**1955 with which the L.P.A 11 of 1976 was concerned was in the Rent Control Act, 1946 as under :-**

**“ Appeal-** *A Landlord or a tenant aggrieved by any decision or Order of the Court under the provisions of section 4(1), 5, 6, and 8(2) of this Act shall have a right of appeal against the same as if such decisions or Orders were a decree in a suit for ejection of the tenant from the house.”*

**In the Act of 1949 the Section remained intact. In the Act of 1955 by which Basak was governed in section 9 as above the words “and such appellate Court’s decision shall be final” were added. In the Acts of 1961, 1966 and the current one of 1972 this section became section 8 and in place of Section 4(1), 5, 6 and 8(2) of 1946 Act only section 4,5 and 7(2) were substituted in the body of the Section 9 as above. Thus in the cases decided under Acts of 1946 and 1949 no question arose about incompetency of Second appeals against a decree for eviction of tenant. Even in the Full Bench decision in a second appeal Kalikumar – Vs- Makhanlal A.I.R. 1969 Assam and Nagaland 66, a case decided under the provisions of the Act of 1955, no one questioned the competency of a second appeal. The scope of Section 9 of the Act of 1955 with the added words bestowing finality to the appellate decision came up for consideration in relation to an Order of fixation of fair rent**

under Section 4(1) of the Act of 1955 in Civil Revision No. 127/74. Next it came up in relation to a decree in ejectment in Second Appeal No. 90/73 decided on 09.09.1976 where a single Judge held that second appeal is not competent. This second appeal resulted in Basak. The first two Judgments in Basak are dated 13.04.1979 and the third Judgment dated 30.10.1979 concurring with the first Judgment became the law holding that no second appeal lies from an appellate decree in ejectment of tenant under the Urban Area Rent Control Act. The second Judgment is the minority Judgment in Basak.

### **The Law after Basak**

Faced with Basak parties aggrieved by decrees in Suits for eviction of tenant resorted to the provisions of section 115 of the Code of Civil Procedure against the appellate decree for recovery of possession of a house. The remedy of Civil Revision and not a second appeal held the field from 30.10.1979 till 20.01.2004 when Bibha Basu (Supra) was decided. Bibha Basu ( Supra) held that even Civil Revision is not maintainable. Unlike Basak the legal fraternity could not accept Bibha Basu (Supra) and issue was joined in Ranjit Kumar Dey and others –Vs- Krishna Gopal Agarwalla and others 2004 (1) GLT 719 where by a Judgment dated 23.03.2004, the question,

“ Whether the decision or Order passed in appeal under section 8 of the Assam Urban Areas Rent

**Control Act, 1972 is revisable by the High Court under section 115 CPC, or section 8 of the Act, 1972 completely debars the revisional jurisdiction of the High Court to entertain the revision against the decision or Order passed by the Appeal Court under section 8 of the Act, 1972.”**

**Was referred for decision to a Larger Bench.**

### **Analysis of Basak**

**Including the Judgment in SA 90 of 1973 out of which Basak arose there are four judgments in the case. The three Judgments in Basak will hereinafter be referred as the first Judgment, the minority judgment and the third judgment. It will be useful to begin with the judgment in SA 90 of 1973. The reasoning in the judgment began with the reading of portions of section 6 and 9 of the Act of 1955. Section 6 was not quoted in full. What was thought to be the relevant portion of section 6 of the Act of 1955 was only quoted. The quotation contained section 6(1) and only proviso (c) and (e) to the section. Thus since the grounds for eviction at (c) and (e) of the proviso to section 6(1) were pleaded in the suit it was held that the suit was brought under the provisions of the Act of 1955. The similar provisions of all the subsequent Acts that is the Act of 1961, 1966 and of 1972 were also noticed. Then it was concluded as follows :**

**“ Thus it is seen that the decisions of the appellate Court against an Order relating to eviction of the tenant has been made final ever since the 1955 Act came into force.”**

**The conclusion as above was reached without any analysis of the nature of the decision or Order under the four sections namely Section 4, 5, 6 and 8(2) of the Act of 1955. It may be seen that section 4 of the Act 1955 deals with fixation of fair rent. Either the landlord or the tenant may apply to the Court for such fixation. The Court after holding an enquiry makes a decision as to fair rent of the house. Section 5 deals with re-fixation of the fair rent on an application by the Landlord on the ground of addition, improvement or alteration made to the house at the expense of the landlord. The Court holds an enquiry upon notice to tenant and makes a decision re-fixing the fair rent. Leaving aside section 6 for the moment one finds that under section 8(2) the Court on an application of the tenant and upon notice to the LandLord directs the Landlord to make repairs and/or restore essential services and supplies. Thus the Court makes decisions under section 4 and 5 of the Act and passes an Order under section 8 of the Act. Civil Revision No. 127/74 which was later reported as Nirod Bhusan Dey Vs Jatindra Mohan Raha Choudhury and others 1977 ALR 100 relied on in SA 90 of 1973 and also in two out of the three Judgments in Basak deals with a decision of fixation of fair rent under Section 4 of the Act of 1966, a**

decision deemed to be a decree because of the legal fiction enacted in section 9 of the Act of 1955 and in the subsequent Acts.

A.I.R. 1965 S.C 1442, a case dealing with interpretation of section 39 and section 43 of the Delhi Rent Control Act, 1958 was then relied on and used to interpret the meaning of the word “final” in section 9 of the Act of 1955. The opening portion of paragraph (17) of the said Supreme Court Judgment was quoted in SA 90 of 1973. But the sentence next following the quotation from the Judgment seems to clinch the matter so far as interpretation of the word “ final” is concerned. The sentence is the following :

“It is true that the expression “final” may have a restrictive meaning in other contexts, but in S.43 of the Act such a restrictive meaning cannot be given.....”

Thus context of the word “final” in section 9 of the Act of 1955 is very much material. There is an assumption in the Judgment that a decree in a suit for possession on the grounds mentioned in section 6 of the Act of 1955 is within the decision or Order specified in Section 9 of the Act of 1955 and section 8 of the subsequent Acts. It was further held that these provisions of the Rent Acts are the “ Special or Local Law” within section 4(1) of the Code of Civil Procedure and is the “any other law” within section 100 of the Code of Civil Procedure.

The first Judgment in Basak began with an excerpt from Civil Revision No. 127/74 which is Nirod Bhusan (Supra). As indicated



already Nirod Bhusan (Supra) being a case of an Order under section 4 of the Act of 1966 for fixation of rent and such Order being a deemed decree cannot be equated with a real decree in a suit for eviction. But no such distinction was made. In the excerpt quoted it was pointed out that by adding the group of words at the end of section 9 of the Act of 1955, the legislature wanted to state their intention in express terms either to discontinue the provisions for second appeal or to nullify the effect of Malchand Agarwalla Vs Santolal Agarwalla, A.I.R 1954 Assam 177. The first Judgment in Basak expressed fullest support to the conclusion in the SA 90 of 1973. The Judgment quoted what was considered to be the “material portion’ of section 6 of the Act of 1955. Only section 6(1) and proviso (c) found mention as material portion. Since Basak originated in a suit for ejection the first Judgment proceeded as follows :

“ In the instant case the landlord’s case was that he bonafide required the house for the purpose of repair, while the defendants denied the bonafide requirement of the Landlord. When a decision is given by the trial Court on the point it would be a decision under section 6. A decision under section 6 has been made appealable.”

**This would mean that leaving the suit behind the decision on an issue like above can be taken to the appellate Court. Such an appeal will not be countenanced by any provision of the code of Civil Procedure. The Court being the ordinary Court of Civil jurisdiction code of Civil Procedure will govern the suit and the appeal.**

**In the third Judgment the “ relevant extracts” of the provisions of section 6 of the Act of 1955 have been extracted. One such extract is the provisions of section 6(3) quoted in full. Even a portion of that section has been underlined for emphasis. However instead of uncovering the meaning of the word “decision or order” under section 6 the discussion assumed that Order for recovery of possession mentioned in section 6(1) is such a decision or order and that the deeming provision contained in section 6(3) has made such an Order a decree.**

**A close reading of the entire provisions of section 6 more particularly of the provisions of sub-section 3 of that section would show that on an application by a tenant evicted on the ground indicated in proviso (c) to Section 6(1) the Court can pass a direction ordering restoration of possession of the house to such a tenant. By the legal fiction enacted towards the end of sub-section 3 of section 6 such an Order will be treated as a decree under the Code of Civil Procedure. The deeming provision that is the legal fiction is applicable only to sub-section (3) and cannot be applied to sub-section (1) of section 6 of the Act of 1955. Thus an Order of restoration of possession to the evicted**

tenant within sub-section (3) of section 6 is the Order or decision under section 6 mentioned in section 9 of the Act of 1955.

Orders or decisions under section 4,5,6 (3) and 8(2) as indicated above would not have been appealable under the Code of Civil Procedure if the provisions of section 9 and the legal fiction enacted thereunder were not there. The legal fiction, it is trite to say, has to be carried to its logical consequences. So carried the deemed decrees under section 4,5,6 and 8(2) of the Act made appealable by virtue of the provisions of section 9 would result in a second appeal permitted by section 100 of the Code of Civil Procedure. That is what Malchand (Supra) decided. Malchand (Supra) and Nirod Bhusan (Supra) dealt with deemed decrees and had nothing to say about a real “decree in a suit for ejection of a tenant from the house”. Thus whatever was said regarding the intention of Legislature in amending Section 9 by adding the words “and such appellate Court’s decision shall be final” would have to be restricted to the deemed decrees and not real decrees. In other words Malchand (Supra) interpreting Section 9 without the additional words as above provided for a second appeal even for the deemed decrees. Legislature intervened to nullify the effect of Malchand (Supra) to that extent. The intention was to make appellate Orders under Section 9 final with regard only to the deemed decrees and not with regard to real decrees in a suit for eviction.

The word “Order” in section 6(1) of the Act of 1946, 1949 and 1955 and in Section 5(1) of the Act of 1961, 1966 and 1972 needs

now to be understood. The word "Order" appears not to have been properly interpreted in all the three Judgments so far discussed. It has already been indicated earlier that Rent Control began in Assam during the second World War. Indeed, it also began in different States in India during the same period. Most States took away the jurisdiction of ordinary Civil Courts and created a Rent Control Authority or the Rent Controller. Before such authority the lis is initiated by a petition and the lis is ended by an Order on that petition. A historical look back at the Assam Urban Areas Rent Control Order, 1943 would show that in it there was no provision for protection from eviction. By an Order dated 08.05.1944 the said Rent Control Order was modified to say that " no Landlord shall unreasonably evict a tenant so long as the latter pays rent to the full extent..... etc. It further provided that " if any dispute arises as to what constitutes unreasonable eviction the question will be decided by the Deputy Commissioner of the District, whose decision shall be final".

This little history shows that like in other States initially a Rent Controller in the person of the Deputy Commissioner was constituted and not a Civil Court as now to deal with rent control. Thus in 1944 in Assam like in other States Rent Control began with provisions for a Controller and the proceedings before him ended with an Order. The word "Order" stuck with the bureaucracy in the Legislative Department. It is common knowledge that Status quo is the normal rule with the draftsman. As a result though unlike in other

States in Assam there is no Rent Controller since 1946 and ordinary Civil Courts were vested with full jurisdiction the word "Order" in Section 6 and in section 5 of the subsequent Acts remaind. The words "Order or Decree", "Made or Executed", 'Suit or Proceeding" in Section 6 and in Section5 of the subsequent Acts understood in the above historical light would mean that it is firstly the non-existent Rent Controller who is prohibited from making or executing an Order for the recovery of possession of any house in a proceeding before him. Secondly the Court is prohibited from making or executing a decree for the recovery of possession in a suit instituted in the Court.

In the three Judgments discussed so far the counsels appear not to have attempted any incursion into legal history as above and the result is reflected in the three judgments.

In the minority judgment in Basak para 15 contains the most potent argument in favour of competency of a second appeal in a suit for recovery of possession of a house in Urban area. The para explains the legal fiction enacted in section 9 of the Act of 1955, after underlining the portion containing the legal fiction thus :-

“ From a perusal of the aforesaid provision and laying emphasis on the underlined words, it is clear that a decree in a suit for ejection is clearly by implication kept out of operation of section 9 of the Act.”

**One can only add that what is really a decree need not be, even, cannot be imagined to be a decree. As the phrase itself indicates a legal fiction operates on an imaginary state of affairs / things and not on a real state of affairs/things. It is unfortunate that such a potent reasoning available to the counsel arguing before the third Judge in Basak appears not to have been utilized.**

**In the minority Judgment it has further been laid down that “clearly, there is no Order to be made under sub-section (1) or Sub-section (2) of section 6 of the Act” It proceeds further to conclude that under those sub-sections there is no question of any Order or decision to come within the purview of section 9 of the Act. It was further held that the suit for recovery of possession of a house by evicting the tenant is a suit under the general law. It may be mentioned that section 6 of the Act of 1955 need not be read like section 6 and section 34 of the Specific Relief Act, 1963 whereunder filing of a suit has been provided for.**

**The reasons given in favour of the appellant in the minority Judgment apparently were not sufficiently pressed during the hearing resulting in the third Judgment which eventually became the law and continues to be the law till to-day.**

**The apparent confusion created by mention of section 6 in section 9 of the Act of 1955 could have been dispelled by placing The Meghalaya Urban Areas Rent Control Act, 1972 and the Mizoram Urban Areas Control Act, 1974 which are statutes in pari materia. Section 8 of**

both these Acts contain the provision for Appeal similar to section 9 of the Assam Act of 1955 with the difference that these provisions pinpoint the decisions under section 5 ( Section 6 here) to be those under 5(3) and 5(4) only which are section 6(3) and 6(4) applicable in Basak.

Arguments advanced by learned counsel for the appellant based on the principle of Stare Decisis did not find favour in the first and the third Judgment because no binding decisions could be produced by the learned counsel. It is surprising that even the Full Bench decision Kali Kumar Sen and another -Vs- Makhanlal Biswas and another AIR 1969 Assam and Nagaland 66, wherein the names of the two of the learned counsels arguing Basak appear, was not placed. This Full Bench decision is a decision in a second appeal, arising from a decree for eviction in a suit between Landlord and tenant governed like Basak by the 1955 Rent Control Act. However before the Full Bench none raised the question of competence or otherwise of the second appeal.

Quoting section 100 of the Code of Civil Procedure the first and the third Judgment found that the Rent Control Act, 1955 is the "any other law" mentioned in section 100 of the Code and the Act barred a second appeal. Reading section 4 and 100 of the Code together the minority Judgment answered the above by holding that the Act of 1955 must clearly express the bar and such clear expression is absent in section 9 of the 1955 Act. One would only add that not only there is no clear expression of a bar there appears in Section 9 properly read, a

**clear intention of the Legislature supporting competency of a second appeal against the appellate decree in a suit for eviction of a tenant. Intention is to bar second appeal against deemed decrees only.**

### **THE CONCLUSION**

**The minority Judgment in Basak holds that a second appeal, in the circumstances, is competent. It took thirty-eight years to acclaim judicially Lord Atkin's dissenting Judgment in Liversidge (Supra). It is only twenty-five years since Basak was decided. Could Ranjit Kumar Dey (Supra) do to the minority in Basak what Rossminster (Supra) did to the minority in Liversidge -Vs- Anderson (Supra)? Only time can tell.**