

(1964) 12 OHC CK 0015
In the Orissa High Court
Case No : First Appeal No. 51 of 1962

Padmanava Singh Deo

APPELLANT

Vs

Smt. Rajkishori Devi and Others

RESPONDENT

Date of Decision : 22-12-1964

Acts Referred:

Limitation Act, 1908 — Article 131

Orissa Estates Abolition Act, 1951 — Section 18(1) , 39

Citation : AIR 1965 Ori 138 : (1965) 31 CLT 951

Hon'ble Judges : S. Barman, J;G.K. Misra, J

Bench : Division Bench

Advocate : R.C. Misra, P.V. Ramdas and G. Narasimham, for the Appellant; B. Mohapatra, R.K. Mohapatra and S.B. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—The following genealogy would show the relationship of the parties--

BRAJAKISHORE _____ |
_____ | | Brojeswari Devi D.2 Rajkishori Devi D.1
| _____ | _____ | | Padmanava Singh Deo Ananta
Narayan D.3 (Plaintiff) | _____ | _____ | |
Khirode Kumari D.4 Roma Kumari D.5

Brajakishore, the last holder of the impartible estate of Dharakote died on 3-10-1938. Plaintiff and defendant No. 3 are his sons through defendant-2. Defendant-1 is the step-mother of plaintiff and defendant-3 Defendants 4 and 5 are the daughters of the plaintiff and were born in 1947 and 1948 respectively. Till then the Court of Wards was in charge of the management of the estates. The Court of Wards fixed the maintenance of defendant-1 at Rs. 200/- by an order dated 1-12-1939. This rate was enhanced Rs. 300/- on 21-3-1941 and to Rs. 350/- on 4-1-1945. Plaintiff continued to pay at the rate of Rs. 350/- per month till June 1948. Thereafter he reduced the rate to Rs. 325/-per month and sent a notice to defendant-1 to that effect. Despite the reduction, he continued

to pay her at the rate of Rs. 225/- per month till December 1950 out of grace.

Defendant-1 did not accept the reduction but received the amount as part payment towards her claim. She filed money suit No. 134 of 1950 in the Court of the Subordinate Judge, Barhampur for recovery of arrears of maintenance of Rupees 8746/12 at the rate of Rs. 350/- per month after deducting the part payments. Plaintiff, as the sole defendant, contested the suit that she was not entitled to more than Rs. 42/- per month towards her maintenance. The Subordinate Judge decreed the suit with an observation that it was open to the defendant in that suit to bring a separate suit for reduction of the rate of maintenance. The plaintiff filed F. A. 72/1953 which was dismissed on 28-4-1959 with the following observations--

"The order of the Court of Wards dated 4-1-45 is undoubtedly an instrument in writing and the appellant by his own conduct in continuing to pay maintenance at the rate of Rs. 350/-, even after he succeeded to the estate on 8-10-46, has in substance entered, into an implied contract. If subsequently he wanted the amount of maintenance to be varied on account of any special reasons mentioned in Section 14 of that Act, he should have either filed a separate suit for that purpose or in the alternative he should have raised specific issue in the present litigation and asked, for addition of necessary parties for the decision of that issue".

During the pendency of the previous first appeal, the impartible estate of Dharakote vested in the State of Orissa on 1-6-1953 under the Orissa Estates Abolition Act, No. 1 of 1952 (hereinafter to be referred to as Orissa Act). Defendant-1 preferred a claim before the Claims Officer u/s 18 (1) (b) of the Orissa Act for recovery of the past and future maintenance and the case is pending in the Court of the Addl. District Judge, Berhampur. Plaintiff's case is that the income of the estate substantially diminished from October, 1946 and definitely from June 1948 on account of the introduction of (i) Tenants Protection Act, 1948, (ii) Impending settlement of cash rent under the Madras Estates Land (Orissa Amendment) Act, 1947; (III) Agricultural Income Tax Act, and (iv) The Orissa Forests Reservation Act, 1948. There was also an agreement between the zamindars and ralyats in Ganjam district for fixation of rent at a reduced rate on the average income of ten years prior to 1939. Besides the reduction in the net income of the estate, defendants 4 and 5 were born in 1947 and 1948 respectively and were also entitled to maintenance out of the income of the estate. From 1949-50 onwards there was a deficit.

The present suit has been filed for reduction of the rate of maintenance from Rs. 350/- per month to about Rs. 42/- per month or to such other rate as the Court would deem proper under the altered circumstances, u/s 14(2) of the Impartible Estates Act (Madras Act II of 1904).

2. Defendants 2 and 3 did not contest. Defendants 4 and 5 filed written statement alleging that they are entitled to maintenance and marriage expenses

out of the compensation money payable to the plaintiff. Defendant No. 1 is the sole contestant assailing the plaintiff's claim for reduction of the rate of maintenance. Her main defence is that there was no, reduction in the net income of the estate and the plaintiff has failed to make out a case for reduction of the rate of maintenance. The Civil Court has no Jurisdiction, to entertain the suit which is barred also by limitation and res judicata. Other objections on questions of law would be examined in detail later on.

3. The learned Subordinate Judge recorded the following findings:--

(i) Plaintiff's claim for reduction of rate of maintenance from 1-6-48 to 20.12,50 is barred by res judicata.

(ii) The suit for reduction of rate of maintenance for any period anterior to the suit is maintainable.

(iii) The State of Orissa is not a necessary party.

(iv) Defendants 2 to 5 are not unnecessary parties.

(v) The suit is barred by limitation and Article 120 of the Limitation Act applies.

(vi) Section 39 of the Orissa Act ousts the jurisdiction of the Civil Court and the suit is not maintainable, and

(vii) The fall in the average net-income and the birth of defendants 4 and 5 are grounds for reduction of the rate of maintenance of Rs. 350/-by one third.

On the findings that the Civil Court has no Jurisdiction and that the suit is barred by limitation the learned Subordinate Judge dismissed the suit. The plaintiff has filed the first appeal.

4. Findings (iii) and (iv) have not been assailed by any of the parties. Mr. Misra assails findings (i), (v) and (vi). Mr. Mohapatra attacks findings (ii) and (vii). The learned Advocate for the parties also advanced some other contention relevant to some of these findings and these would be noticed in course of discussion.

5. I would first examine if the Civil Court has Jurisdiction to maintain the suit. The bar of jurisdiction is based on Section 39 of the Orissa Act. The relevant portions of the section are--

"No suit shall be brought in any civil court concerning any matter which is or has already been the subject of any application made or proceeding" taken under the said Chapters (Chapters II to VI)."

Section 18 (1) (b) falls within Chapter IV. It runs as--

"Every maintenance-holder in an estate succession to which is governed by the law of primogeniture, who is in receipt of a monetary allowance in lieu of maintenance, which is a charge on the estate or part thereof vested in the State Government u/s 3, may within the period specified in Clause (a) notify in the

prescribed manner to the Claims Officer in writing his claim for maintenance and the amount of allowance which he is entitled to receive thereafter.""

It is contended by Mr. Misra that defendant-1 is a maintenance holder in the Estate of Dharakote, succession to which is governed by the law of primogeniture and she was In receipt of monetary allowance in lieu of maintenance. In para 25 of the plaint it was admitted that after the vesting of the estate, the first defendant filed a claim case u/s 18 (1) (b) of the Orissa Act and that case is still pending in the Court of Addl. District Judge, Berhampur, who is the Claim Officer. The application (Ext. Y/1) also supports the admission in the plaint.

It is further contended by Mr. Misra that if the monetary allowance received by defendant-1 in lieu of maintenance is a charge on the estate of Dharakote or any part thereof, then the application u/s 18 (1) (b), pending in the Court of the Additional District Judge, Berhampur, would come within the mischief of Section 39 as it would concern a matter under Chapter IV which is already the subject-matter of an application or proceeding and that the Civil Court would have no jurisdiction to entertain the suit.

As to the meaning of the word "charge", used in Section 18 (1) (b), there was an elaborate examination of the relevant law and authorities in M. A. No. 55 of 1962(Ori), *Dewan Chitrabhanu Singh v. Balmukund Sing Roy*. It was held therein--

"Thus the test to determine whether a charge has been created or not is to find out if the petitioner has been given a right to payment of maintenance out of the Impartible estate."

The learned Advocate for both the parties have relied upon this decision as laying down the correct law. We endorse the reasonings given and the conclusion reached in that decision. It is un-necessary to repeat the discussion made therein.

6. Mr. Mohapatra contends that a statutory charge has been created u/s 9 of the Madras Impartible Estates Act, 1904 (hereinafter referred to as the Madras Act). The relevant portion is:--

"Where for the purpose of ascertaining the succession to an impartible estate, the estate has to be regarded as the property of a Joint Hindu family, the following¹ persons shall have a right of main, tenance out of the impartible estate and its income, namely,

XX XX XX

(b) the widow of any previous proprietor of the impartible estate so long as she does not remarry,

xx xx xx"

Thus a charge by operation of law has been created as defendant No. 1 has been

given a right of main tenance out of the impartible estate and its Income. Mr. Misra concedes that if Section 9 were alone without Section 13, a charge has been created by the operation of law. He, however, contends that Section 9 must be read along with Section 13 which lays down that--

"The award of maintenance u/s 9 may be declared a charge upon any portion of an Impartible estate or the income thereof."

His argument is that unless a charge is expressly declared upon the estate, Section 9 does not create a statutory charge. The expression "upon any portion of an impartible estate" is construed by him as meaning "either" the whole estate or any portion thereof". This construction is contrary to the plain meaning of the word "portion" used in Section 13.

Portion of an estate cannot mean the entire estate. In Webster dictionary, "portion" means "a part of the whole". In Chambers dictionary, one of the meanings of the word "portion" is part of an estate descending to an heir. In Oxford dictionary, "portion" means share, part of proportion. It would thus appear that "portion" can never mean "whole", Section 13 does not whittle down the construction to be put in Section 9 that a statutory charge has been created on the entire impartible estate in respect of the right of maintenance.

The same conclusion emerges from the language used in various sections of the statute itself. The definition of "estate" in the Madras Act has been given as follows:

"For the purpose of Clause (c) of Sub-section (2) of Section 4 and of Sub-section (3) of that Section, "estate" means:

- (1) any permanently settled estate, whether a Zamindari, Jagir, Mitta or Palaiaam:
- (2) any portion of such permanently settled estate which has been separately registered in the office of the Collector".

Thus a portion of the estate comes within the meaning of the estate, provided it has been separately registered in the office of the Collector and not otherwise. The difference between "whole" and "portion" of the estate has therefore been kept distinct in the statute. To the same effect Clauses (4) and (5) of the definition of "estate" indicate the distinction.

Section 4, Sub-section (2), Clause (c), Sub-clauses (i) and (Ii) indicates a class of permissible alienations. Sub-section (2) lays down :

"In particular and without prejudice to the generality of the foregoing provisions, the proprietor of an impartible estate is hereby expressly authorised--

X X X X X

(c) (i) to exchange the impartible estate or any part or parts thereof for an estate or estates or part or parts of an estate or estates; and

(ii) to sell the impartible estate or any part or parts thereof and acquire with proceeds of such sale an estate or estates or part or parts of an estate or estates.

These cases of permissible alienation clearly bring out the distinction between the estate and a part thereof. If a portion of an estate would mean the estate itself, the statute would not bring out the distinction between the two so meticulously in different sections. The contention of Mr. Misra that a I portion includes the whole must be rejected.

It is necessary to examine why Section 13 was enacted if a statutory charge is created on the entire estate by Section 9. The object seems to be that unless in certain cases the charge is limited to a portion of the estate, the charge-holder would be required to proceed against the entire estate in case of default on the part of the holder of the estate to discharge the obligation under the statute. A charge-holder cannot proceed against a portion of the estate unless it is specifically so declared u/s 13. We hold that a statutory charge has been created on the entire estate u/s 9 and no charge has been created in favour of defendant-1 on any portion of the estate u/s 13.

To avoid confusion, a word is necessary to explain the view of this Court expressed In M. A. 10 of 1962 (Orissa), Subarnarekha Mani Devi v. Ramkrushna Deo. In that case their Lordships held:

"Unless the maintenance-holder's right to claim maintenance is made a charge on the estate prior to the date of vesting, his right to apply under that Act does not arise".

That case related to the maintenance of a married daughter who was not a person having a right of maintenance out of the impartible estate and its income u/s 9. The question of existence of a statutory charge under that Section did not arise for consideration before their Lordships, The married daughter was entitled to maintenance in that case u/s 12 which lays down:

"Nothing contained in this Act shall affect the right to maintenance out of an impartible estate and income thereof, of any other relations of the proprietor or any previous proprietor under any law or custom for the time being in force."

The appellant in that case claimed maintenance not u/s 9 but on the basis of custom which was declared to be valid u/s 12. The statutory charge created u/s 9 had no application to such a case. The observations of their Lordships, must therefore, be confined to a claim of maintenance by custom u/s 12.

7. on the aforesaid finding that the receipt of monetary allowance by defendant-1 in lieu of maintenance Is a charge on the estate of Dharakote, concerning which an application is pending before the Claims Officer, Section 39 of the Orissa Act is a bar to the present suit. The Civil Court has no jurisdiction to entertain the suit.

8. The next point for consideration is whether the suit is barred by limitation. The learned Subordinate Judge held that the suit was barred by limitation under

Article 120, Limitation Act. It is contended by Mr. Misra that Article 131 governs the case. No reliance has been placed on Article 131 in the Court below. For proper appreciation both these articles may be noticed.

Art. 120

Suit for which no period of limitation is provided elsewhere in this Schedule.

6 years

When the right to sue accrues.

Art. 181

To establish a periodically recurring right.

12 years

When the plaintiff is first refused the enjoyment of the right.

It is conceded by Mr. Misra that if Article 131 does not apply, only the residuary Article 120 would have application and the suit would be barred by limitation.

The suit is for reducing the rate of maintenance from Rs. 350/- per month to about Rs. 42/-per month, or to such other rate as the Court thinks proper under the altered circumstances. It is u/s 14 of the Madras Act which runs as follows :

Section 14. (1) Any decree for maintenance passed under this Act may be varied by the court, if any of the facts and circumstances referred to in Section 10 have undergone a material change.

(2) Where the rate of maintenance periodically payable to any person mentioned in Section 9 out of an impartible estate has been fixed by a decree or order of court, family arrangement, award or other instrument in writing, whether before or after the commencement of the Madras Impartible Estates (Second Amendment) Act, 1934, it shall be lawful for the court to reduce such, rate of maintenance in order to provide maintenance for new claimants and to adjust it within the limits specified in Sub-section (2) of Section 10,

The rate of maintenance can be reduced in order to provide maintenance for new claimants and to adjust it within the limits specified in Section 10 (2) which prescribes that the Court shall fix the amount of such maintenance that the total amount payable out of the estate by way of maintenance to the relations mentioned in Section 9 shall not exceed one-fourth of the net income. Thus the maximum maintenance that can be granted out of the income of the estate shall not exceed one-fifth. This does not, however, mean that one-fifth of the income must be awarded towards maintenance in fixing the amount of maintenance, the Court shall have regard to the considerations mentioned in Section 10 (1), which are--

(i) the net income of the estate:

- (ii) the number of persons to be maintained out of the estate;
- (iii) the nearness of relationship of the person claiming to be maintained.
- (iv) the other sources of income of the claimant; and
- (v) the circumstances of the family of the claimant.

Plaintiff's suit for reduction of the rate of maintenance of defendant-1 is based on the fall of income of the estate and" the birth of two daughters to him who are entitled to maintenance u/s 9.

9. In examining the applicability of Article 131 to this case, the first point for consideration is whether what the plaintiff claims in the suit is a right and, if so, whether it is a periodically recurring right. Mr. Mohapatra contends on the authority of *Khandrav Baburao v. Ramji Jiwanji* 1 Bom LR 373 that the Article has no application to a case of reduction of liability. The observations in the judgment of Tyabji, J. are to the effect--

"That Article (meaning 131) deals with a periodically recurring right and not with a periodically recurring liability."

The plaintiffs in that suit prayed for refund of the enhanced rents paid by them and for a declaration of their right to hold the land on payment of lump sum of Rs. 47/- per year. The observation that the right in Article 131 does not refer to the liability supports Mr. Mohapatra's contention. We are, however, unable to accept this dictum as laying down the correct law. Rights and obligations are correlative. Right certainly is not a liability. To that extent the dictum is correct and no exception can be taken to it. But extinction or reduction of liability may amount to creation of right. If Rs. 350/- payable to defendant-1 is reduced to a lesser sum, plaintiff definitely derives a benefit and corresponding right is created in him to the extent of reduction. Plaintiff's claim for reduction of the quantum of maintenance payable to defendant-1 constitutes a right, and it has received statutory recognition u/s 14 of the Madras Act, We accordingly hold that the plaintiff's claim in the suit constitutes a right.

The further point for consideration is whether that right is a periodically recurring right. "Recur" means "to happen at a stated interval" (Chambers) or "happening again and again" (Ramnath Iyer). Recurring right must be compared and contrasted with a constant and continuous right. The right u/s 14 for reduction is not a constant and continuous right. It would accrue only on certain conditions being fulfilled, that is, on the birth of new claimants and other considerations mentioned in Section 10 (1). The birth of new claimants is an uncertain factor. There may not be further birth at all. So also the factor of the fall in the income of the estate. The right in the plaintiff is not a vested right which continues every day. Such a right might emerge when the conditions arise. It is a recurring right. It was contended that accrual of such a right depends upon the emergence of certain contingency which might not happen. That would not prevent it from being a recurring right. The distinction between a vested and contingent right

cannot be a true criticism to judge where it is a recurring right or not. We are of the view that when the conditions under the statute are fulfilled, the right recurs and it is a recurring right.

The next question is whether the right is at periodically recurring right. "Periodically" means-"at regular recurring intervals" (Oxford), or "occurring at regular intervals" (Chambers). Thus unless the right occurs at regular, fixed or specified intervals, It cannot be a periodically recurring right. The period may not be strictly mathematical. For instance, a particular right may accrue after five years, then after ten years and then after fifteen, years, and yet It would be periodical. But where the time regarding the accrual of the-right is unspecified and cannot be forecast or fixed, the right cannot be said to be a periodically recurring right. The right may arise perpetually at specified intervals or after a number of years and cease thereafter. So also the amount accruing under the right would, be immaterial in interpreting the expression. The amount may be fixed or variable. If the right to receive an amount accrues periodically, it would be a periodically recurring right whether that amount is fixed or variable (see *Manmohan Das and Others Vs. Bahauddin and Others*, . Plaintiff's right cannot be said to be a periodically recurring right and Article 131 can have no application. It is also contended that the plaintiff was not refused the enjoyment of the rights as enjoined in the 3rd column of the Article. The refusal need not be confined to actual enjoyment but extends to refusal of the claim when it is intended to be exercised,

10. Mr. Misra placed reliance on *Brij Behari Singh and Others Vs. Sheo Sankar Jha and Others*, which lays down that a suit for enhancement of rent of the holding of an occupancy tenant, who has been wrongly entered in the record-of-rights as a raiyat on a fixed rate, is governed by Article 131. Their Lordships observed--

"The next question is whether the suit for enhancement is in time. The answer must be in the affirmative for article 131, Limitation Act, governs the case. The claim to enhanced rent is recurring cause of action and limitation runs from the date of refusal."

It is to be noticed that this decision is wholly bereft of discussion. It completely overlooks to refer to the word "periodically". Even assuming that the claim to enhanced rent is a periodically recurring right, it can be supported on the theory that under the tenancy laws the landlord is entitled to enhance the rent at the end of the agricultural year after certain period. The right to enhance is in the landlord after expiry of a specified period. *Sheopratap Dubey and Others Vs. Lala Sheogulam Lal*, merely followed this decision without giving reasons.

In *Bhargavendra Singh v. Union of India* AIR 3962 MP 257 the plaintiff was an adopted son of a Ruler. His cash allowance for maintenance was fixed at Rs. 650/- per month, on 1-5-1949 it was increased to Rs. 750/- per month. On 28-10-49 the allowance was reduced to Rs. 530/-The suit was brought claiming

that reduction of the allowance was illegal and ultra vires. Their Lordships held that the payment of cash grant monthly was undoubtedly a periodically recurring right. That decision is clearly distinguishable and the element of "periodically" is absent in the present case.

Though we are unable to agree with a part of the view in 1 Bom LR 373 that reduction of liability may not be a right, we are inclined to agree with, the further observation expressed therein that the declaration of the right to hold the land on payment of lump sum of Rs. 47/- was not a periodically recurring right. In the same manner *M. Achamma v. Narayanasawmy Naidu* ILR 33 Mad 171 and *Secy. of State v. Janakiramayya* AIR 1924 Mad 534 are distinguishable.

11. There was serious controversy at the bar as to whether Article 131 covers not only relief as to the establishment of a periodically recurring right but also the relief for recovery of arrears under the right already established. Mr. Misra placed reliance on *K. K. Lewis v. Emperor* AIR 1914 Mad 277 saying that it covers both the cases. Other High Courts have not accepted this view as correct (see *Sri Sri Baidyanath Jiu Vs. Har Dutt Dwari and Others*, ; *Babu Ramji Das Vs. Rai Mahamaya Prasad Singh Bahadur and Others*, ; *Maharaja Bahadur Ram Ranbijaya Prasad Singh Vs. Madho Prasad Singh and Others*, ; *Janardan Trimbak Gadre Vs. Dinkar Hari Rajguru*, ; *Hakim Hidayat Ullah and Others Vs. B. Gokul Chand and Another* ; *Bhalchandra Trimbak v. Dattatraya Jaikrishna*, Am 1948 Nag 397 and *Manmohan Das and Others Vs. Bahauddin and Others*, . We are inclined to accept the majority view laying down that it is confined only to the establishment of a periodically recurring right and the relief for recovery of arrears is not governed by this Article. We are also of opinion that where a person, whose right to an annuity has been denied, has taken no action for more than 12 years since the denial or repudiation, he cannot enforce his right after the lapse of many years beyond the expiry of the period of limitation fixed under Article 131.

These questions, however, were wholly academic in this case. There is no relief for refund of excess maintenance paid. The suit is merely confined to the relief of reducing the right of maintenance within 12 years of the denial. Defendant-1 refused to take the reduced maintenance in 1948 and the suit was filed in 1959. If this sole relief comes within the purview of article 131, the suit would be within time. But as we have already held, plaintiff's right is not a periodically recurring right and Article 131 has no application and the suit is barred by limitation.

12. It was contended by Mr. Mohapatra on the basis of AIR 1948 44 (Nagpur) , which was a suit for reduction of the amount fixed in a maintenance decree on the ground of altered circumstances, that the decree-holder had a right to the amount fixed in the decree till the date of the suit which was filed to bring about the variation and that in such, a case there can be no retrospective variation either up or down. The reduction can only take effect from the date of the suit in other words, the contention is that the plaintiffs claim for reduction of the amount of maintenance can be decreed only from the date of the suit and not for

the period anterior to that. Plaintiffs' claim being for a period upto 1-6-1953, the suit is liable to be dismissed. The aforesaid Nagpur decision was considered in *Sankaranarayana Iyer v. Lakshmi Ammal* AIR 1960 Mad 294 and was dissented from with the following observations--

"It is undoubtedly true that the rate determined by the decree must prevail unless it is varied, but this does not necessarily imply that the Court has no power to vary that rate from a period anterior to the date of the suit brought for the variation. That would entirely depend upon the time from which changed circumstances have prevailed, reasonableness of the claim of maintenance holder to an enhanced allowance, the existence or absence of specific demand and denial or refusal etc. It is one thing to state that the parties are governed by rate until a variation is effected, and quite another to confine the power of court to determine the period for which right to enhance maintenance should prevail."

We accept the Madras view as laying down the correct law. Mr. Mohapatra, however, contended that both these cases were on general Hindu Law and the principle has no application to a suit u/s 14 (2). We find no force in this contention. In principle it makes no difference whether it was under the general Hindu Law or under the Statute. The statute imposes no such ban, Mr. Mohapatra's contention is also opposed to common-sense. Take for instance a case where all the conditions for reduction of maintenance emerge and the plaintiff files the suit within the period of limitation. If the contention is accepted, the claim till the date of suit must be rejected which, in essence, means that the plaintiff must file the suit on the very day the cause of action accrues. Such a contention is wholly unacceptable.

13. On the merits the learned Subordinate Judge recorded a finding to the effect--

"The difference in the average net income and the birth of defendants 4 and 5 in the family may be taken as ground for slight modification in the rate of maintenance and to allow a proportionate reduction of one-third of the present rate."

The materials on the basis of which this conclusion was reached are fully discussed in para 15 of the Judgment under Issue No. 8. No criticism was levelled, against this portion of the judgment as making wrong calculation or assessment of evidence regarding fall in the income or necessity for reduction on account of birth of defendants 4 and 5. We accordingly upheld the finding of the learned Judge on merits regarding the quantum.

Mr. Mohapatra, however, contended that the necessary averment u/s 14 (2) of the Madras Act were absent from the plaint. In other words, the plaint did not state as to the quantum necessary for providing maintenance for the new claimants, defendants 4 and 5, who are admittedly residing with the plaintiff. It also did not state that in making such provision, the plaintiff shall have to pay the total maintenance to all the claimants u/s 5 beyond one-fifth of the total net-

income. There is some force in the contention of Mr. Mohapatra. The total net-income was mentioned in the plaint. There is no lacuna in not indicating as to what constitutes one-fifth of the total net income. Plaintiff should have further categorically stated as to how adjustment was necessary u/s 14 (2) keeping in view the provisions of Sections 9 and 10. Evidence was, however, led on the averments in the plaint and the defendant-1 had full notice as to in what circumstances plaintiff claimed reduction of rate of maintenance. We are not inclined to Interfere with the finding of the trial court on merits, particularly when defendant-1 did not choose to adduce any evidence on her part. We are not impressed that any prejudice has been caused.

14. The only other point for consideration is whether the plaintiffs claim for reduction of the rate of maintenance from 1-6-1948 to 20.12.1950 is barred by res judicata. In First Appeal No. 17 of 1952 the High Court granted a decree for maintenance at the rate of Rs. 350/-, per month from 1-6-1948 to 20-12-50. In this suit there is no prayer to reduce the quantum of maintenance granted in that decree. In that first appeal there is an observation that it was open to the plaintiff to file a suit for reduction of the rate of maintenance. In view of the decree the plaintiff should have asked for a relief in this suit to reduce the rate of maintenance already decreed on payment of ad valorem court-fees, if the suit would have been properly constituted on payment of proper court-fees, there would have been no res judicata in view of the observation in that first appeal. But as the proper relief has not been sought on payment of necessary court-fees, the decree in the previous suit constitutes res judicata in respect of the relief for reduction of rate of maintenance from 1-6-1948 to 20-12-1950.

15. Mr. Mohapatra raised a new contention that Section 48 of the Orissa Act repealed the Madras Act and that Section 49 of the Orissa Act does not save the operation of any of the rights under the Madras Act, and that, as such, the suit u/s 14 (2) is not maintainable. In view of our finding that the suit is not cognizable by Civil Court and it is barred by limitation, we express no view on this contention.

16. In the result, the appeal fails and is dismissed. In the circumstances, parties to bear their own costs of this appeal.

Barman, J

17. I agree.