

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Heaton.

DOSSIBAI FRAMJI MARKER (ORIGINAL DEFENDANT), APPLICANT, v.
COOVERBAI HORMUSJI MARKER (ORIGINAL PLAINTIFF),
OPPONENT.*

1908
July 21.

*Presidency Small Cause Court Act (XV of 1882), section 19 (k)—
Annuity payable under a will—Assent of executors—Suit to recover
arrears—Presidency Small Cause Court—Jurisdiction.*

A suit to recover arrears of an annuity payable under a will and assented to by executors is cognizable by the Presidency Small Cause Court. Such a suit is a suit for money had and received by the defendant for the use of the plaintiff and it does not fall under section 19 (k) of the Presidency Small Cause Court Act (XV of 1882).

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of M. H. Hakim, one of the Judges in the Presidency Small Cause Court at Bombay.

One Framji Kavasji Marker died after having made a will, dated the 7th September 1889. One of the clauses of the will provided as follows:—

To my executors to be invested in 4 per cent. Government Promissory Loan Notes out of the interest on which they shall pay to the widow of my late brother Hormusji Kavasji Marker during her life Rs. 25 per month and after her death to be divided equally between her children and the children of my said brother by his first wife living at the death of the said widow Rs. 7,500.

According to the said provision the executors paid the legacy to Cooverbai, widow of the testator's deceased brother, for a period of fifteen years and subsequently they having failed to pay it to her, she filed a suit, No. 16330 of 1907, against them in the Presidency Small Cause Court at Bombay for the recovery of arrears due from the 1st June 1905 to the 31st July 1907.

The defendants, executors contended that the Court had no jurisdiction to entertain and try the suit under section 19 (k) of the Presidency Small Cause Courts' Act (XV of 1882), as the suit was one to enforce a trust.

* Application No. 49 of 1908 under extraordinary jurisdiction.

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The Court passed a decree in plaintiff's favour for Rs. 810.

One of the defendants applied to the High Court under its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging that the Presidency Small Cause Court had no jurisdiction over the subject-matter of the suit. A rule *nisi* was issued calling on the plaintiff to show cause why the decree should not be set aside.

Binning (with *Edgelow, Gulabchand, Wadia and Co.*) appeared for the applicant (defendant) in support of the rule.

G. S. Rao appeared for the opponent (plaintiff) to show cause.

SCOTT, C. J. :—In this case the defendants, who were executors under the will of a Parsi gentleman named Framji Kavasji Marker, have assented to a certain annuity payable to the plaintiff and have paid it for a period of fifteen years after the testator's death.

Then for the period between the 1st of June 1905 and 31st July 1907, they did not pay. She accordingly sued them in the Presidency Small Cause Court for the arrears of annuity.

It is contended before us that the Small Cause Court had no jurisdiction to try the suit by reason of the prohibition contained in section 19 (*k*) of Act XV of 1882, which removes from the jurisdiction of that Court suits to enforce a trust.

We are of opinion that this is a suit in the nature of a suit in trover such as that which was the subject of discussion in *Williams v. Lee* ⁽¹⁾, or a suit for money had and received by the defendant for the use of the plaintiff, and we do not think it is a suit of the nature contemplated in clause (*k*) of section 19.

We, therefore, dismiss the application.

Application dismissed.

G. S. R.

(1) (1745) 3 Atk. 223.