

Pathmanabha Chettiar Vs. Mrs. Mercy Williams and ors.

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Court : Chennai

Decided On : Oct-23-1899

Reported in : (1900)10MLJ10

Appellant : Pathmanabha Chettiar

Respondent : Mrs. Mercy Williams and ors.

Judgement :

Subrahmania Aiyar, J.

1. Under the will of the late Thomas Edmonds, the house--plaint item No. 2 which is the only property in dispute in this appeal, should be taken to have been devised by the testator to his children, eleven in number. The plaintiffs, who are two of the eleven children, became, therefore, on their father's death, entitled each to her share. Assuming for the present that the transactions, under which the sixth defendant (the appellant) claims the property in question, are, as contended on behalf of the plaintiffs, not binding on any of the devisees, the plaintiffs cannot get relief beyond the extend of their interest: They have certainly no right to ask for possession of more than their shares should they seek any possession. It is clear, therefore, that the decree of the Lower-Court, which awards possession of the whole property to the plaintiffs on behalf of themselves and the other devisees, cannot, as it stands, be sustained.

2. The question for consideration is whether the plaintiffs cannot recover even their shares. Before proceeding to consider this question, it should be stated it was assumed in the Lower Court that the 1st defendant, though appointed only as an administrator, had by his conduct constituted himself a trustee. the learned Vakil for the sixth defendant urged here strongly that even on that assumption the frame of the plaint was quite wrong and the proper course for the plaintiffs was to bring a general administration suit.

3. Now, in the first place, it is scarcely necessary to say that the plaintiff's asking for larger relief than they are entitled to, does not warrant the dismissal of the suit altogether. The wishes of the parties must not be confounded with their rights and because they fail to prove all they wish there seems no reason for denying them the rights which they establish (per Fulton, J. in *Mohidin v. Shivlingappa* I.L.R. 23 B. 670 and, in the second place, it is difficult to see why the plaintiffs should be confined to that form of suit This view is supported by law as laid down in *Lynd v. Blanshard* 4 Haree. 9 at 28 which, in principle, is equally applicable to this country. The observations of the Vice-Chancellor Sir James Wigram, bearing on the point under consideration, are as follow:'It is difficult to lay down any general rule as to the frame of a suit by a cestui que trust, in respect of claim? against strangers, as debtors, or liable to the trust, by reason of the misconduct of the trustees, or parties to whom the stranger is primarily liable. There are apparently three forms of suit applicable to such cases, according to circumstances, First, the cestui que trust may not be entitled, or at least not able usefully, to do more than compel his trustees to allow him to sue the third party at law, as in the case of a claim for unliquidated damages, and no collusion between the debtor and the trustee. Secondly, the relief against the third party may be such as a Court of equity will administer, and the cestui que trust may be entitled to sue the trustees and the third party jointly,, but be bound to confine his suit to that specific matter, in respect of which alone the third party is liable, and not at liberty to make it part of a suit for the general administration of the trust, as in *Salvidge v. Hyde* Jac. 151 and *Pearse v. Hewitt* 3 Myl. 1 Cr. 85. Thirdly there are cases in which the third party, against whom a limited demand is made,..may properly be made a party to a suit for the general administration of a trust, with which, except in respect of that limited demand, he has no concern; *Attorney-General v. Cra-dock* 7 Sim. 471. 'It

will be seen that the present case falls within the second class of forms mentioned in the above extract. And in such a form of suit there does not seem to be anything to prevent the plaintiffs from suing for possession of their respective shares alone, or the Court from granting a decree for such shares even though they have asked for more, provided their right to relief against the defendant is established and their shares ascertained and complete relief can be given to them without prejudice to the rights of others.

4. In this view it is necessary, first, to determine whether the first plaintiff is in any way precluded from receiving her share, which must be taken to be one-eleventh, as there is nothing to show that, owing to anything that occurred subsequent to the father's death, she has a right to more. Now, if the decree passed on the compromise, which was entered into in December 1890 in Original Suit No. 21 of 1889 between the first and the fifth defendants in the present suit, and the sale held in execution of that decree were, as urged for the 6th defendant, binding on the first plaintiff, this suit must fail even in regard to her share. But, in the first place, she was not impleaded in the said suit and she had no hand in the compromise. She is, therefore, not affected thereby as a direct party thereto would be. Was she, however, bound in the sense that the charge, which was created by the compromise and on account of which the property was sold, was a charge that the first defendant could make even as an administrator? Of course, an administrator could not bind parties interested in the estate by a charge if the party taking it has notice that it is for a purpose unconnected with the performance of the duties of administrator—Williams on Executors and Administrators 9th Edition, p. 803 note. How does the matter stand on the facts here? The creditor of the second plaintiff who, in O.S. No. 204 of 1880 in the Trichinopoly District Munsif's Court, caused that plaintiff's interest in the property in question to be sold for a debt due by her, was undoubtedly entitled to, do so. None of the ten devisees other than the said plaintiff or the first defendant as an administrator being responsible for the abovementioned debt, the sale on account of it did not, in the slightest degree, touch any right in the property possessed by those devisees or the first defendant as an administrator. The first defendant in the last mentioned capacity had thus absolutely no business to take proceedings to set aside the sale of the second plaintiff's interest and the charge created by the compromise entered into in

proceedings taken for that purpose, and in consideration of the sale being set aside must be held to be a charge to the knowledge of the 5th defendant foreign to the purposes of the administration and, consequently, not binding on the first plaintiff. Nor can the 6th, defendant support the sale, made in pursuance of the compromise, on the ground that he is a bona fide purchaser. For he was not such a purchaser, having had clear notice of the facts which show that the charge was not created for the purpose of administration. With reference to the mortgage of 1891 set up by the 6th defendant it is not necessary to consider whether the first plaintiff was bound thereby, inasmuch as, assuming that she was, the whole of the principle and the interest payable under the mortgage have been liquidated by the usufruct received by the mortgagee as found by the District Judge, the correctness of whose finding on the point there is no reason to doubt. It is scarcely necessary to say that any enquiry as to the bona fides of the plaintiffs is quite immaterial as was pointed out in *Dance v. Goldingham* by James, L.J., who observed thus: 'The plaintiff is entitled to have her rights and equities enforced in this Court, and what may have been the motives inducing the plaintiff to put the Court in question we cannot inquire into. We have only to inquire, in the administration of Justice in this Court, whether the plaintiff has the right claimed, and whether the defendants are under the liability which is alleged.' ' In other words, in granting or refusing relief to a plaintiff what the Court has to consider are:

(1) Has the plaintiff an interest in the subject-matter of the suit

(2) Has he a title to sue in respect of it?

(3) Has he a right to call upon the defendants to, answer, his claim?

(4) Can complete relief be given without prejudice to the right of others As will be seen from what has been said, all these conditions are satisfied in the present instance. It follows, therefore, that the 1st plaintiff is not precluded from recovering her eleventh share.

5. Turning next to the second plaintiff's case it must be held to be different. For her interest was long ago sold in execution of the decree against Her and so far as she is concerned the sale was never set aside. It is true that, as between the first

defendant and the 5th defendant, it was by the compromise agreed that the sale was to be treated as set aside. But since the 2nd plaintiff was not a party to the compromise, I cannot see how she is entitled to claim any benefit thereunder. If this opinion is correct, it does not at all follow, as urged on behalf of this plaintiff that the fact that the 5th defendant has not appealed against the District Judge's decree in the present case gives her a right to her share. For, at the date of the institution of this suit in 1897, the said defendant did not possess any interest whatever in the disputed property so as to be bound by the decree therein, inasmuch as, at the sale held in 1890, the property passed as against the 5th defendant to the 6th defendant. The latter was thus the only party against whom a decree in respect of this property could be legally passed in this suit, and therefore, the only party who was entitled to appeal about it and who could be affected by failing to do so. But supposing for argument the 2nd plaintiff is entitled to rely on the compromise as setting aside the sale of her interest as the District Judge thought she was, she cannot certainly be allowed to take advantage of the arrangement only so far as it related to the renunciation By the 5th defendant of 'his right under the court-sale which validly transferred to him all her interest in the proprty but repudiate the remainder of the arrangement which was the consideration for such renunciation. If she can. rely on the compromise at all she must take it as a whole and then it must be held that she is bound by the sale which was made in accordance with the terms of the compromise.

6. In my opinion possession of one eleventh share in item 2 and in the sum of Rs. 518 should be awarded to the 1st plaintiff, the 1st plaintiff receiving from the 6th defendant c6sts throughout in so far as she has succeeded, she as well as the 2nd plaintiff paying the said defendant costs throughout in so far as he has succeeded, and both the plaintiffs and the property decreed to the 1st plaintiff being liable for the whole of the court-fees due to the Government. I would modify the lower Court's decree accordingly.

O'Farrell, J.

The two plaintiffs who bring this suit is forma pauperis are daughters of one Thomas Edmonds who died in 1866. He left a will (Exhibit A) dated 6th January

1864. . One of the provisions of the will directed that his three houses in the Military Cantonment of Trichinopoly and other specified house property be kept in trust and the rents realised therefrom be divided equally among the whole of my children and their heirs respectively for their support and maintenance.' One of these houses is item 2, which is alone in dispute in this appeal. The 5th defendant brought a suit against the 2nd plaintiff, got a decree and brought to sale her right, title and interest in the property. The 1st defendant (who with the 2nd defendant it must be taken had succeeded to the position of the original executors under the will) filed a suit against the 5th defendant to set aside the sale. It ended in a compromise, evidenced by Exhibit III, whereby the 1st defendant (who was also a beneficiary under the will) agreed to pay Rs. 600 and the 5th defendant to cancel the sale. In the event of the Rs. 600 not being paid it was agreed that the 5th defendant should execute the decree against 'the plaint mentioned property' which appears to mean the houses themselves. The money was not paid and item 2 {inter alia) was brought to sale and purchased by the 6th defendant, who is the appellant in the present appeal. The sale appears to have taken place about 1890.

7. The present suit was brought by the two plaintiffs for a declaration that the properties are trust properties and for recovery of possession on the ground that the compromise and the sales thereunder are 'illegal and improper, being contrary to the directions of the will and the trust and, therefore, not binding on the plaintiffs'. (See paragraph 11 of the plaint.) It will be noted here that these plaintiffs do not say that the compromise was effected without their knowledge or consent or that of the other beneficiaries, nor is there any evidence that it was so. They seek to succeed on the bare allegation that the compromise was contrary to the directions of the will and the nature of the trust. The plaintiffs further allege that of the other beneficiaries who seem to have been originally nine in number (though even here there is a doubt whether on the true construction of the will, one of the sons was not entirely disinherited) the whereabouts of one is not known, and the rest have refused to join in the suit, and have, therefore, been 'made defendants.

8. The District judge has given the plaintiffs a decree as prayed and the 6th defendant appeals. Before entering into the questions arising in the appeal, I may briefly dispose of one point. In the Court below a contention was raised by the 6th

defendant that the trust was invalid as offending against the law of perpetuities. The District Judge decided against this contention on the ground that under the principle embodied 'fa Section 84, Succession Act, the provision in the will amounted to an absolute bequest of the corpus in favour of the children, Neither party-for obvious reasons now desires to contest this view and it may be adopted for the purposes of this appeal. I may also in passing mention that though the Succession Act does not apply to the present case (the will having been executed in 1864) yet reference has been made to that Act and the Trusts Act as embodying general principles in force prior to the passing of those enactments. It is in this sense that any reference to the acts in the judgment must be understood.

9. The first question that arises in the appeal is whether the suit, so far as it is a suit for possession of the trust properties and not of the plaintiff's share therein will lie at all. It is contended and I think rightly that the property itself is vested in the trustees who alone can sue for its recovery. The right of the beneficiaries is to have the trust administered and the trustees if necessary removed and fresh trustees appointed. The District Judge's view appears to be that the 1st defendant committed a breach of trust that the 6th and 7th defendants purchased the property knowing of that breach; and that, therefore, they became trustees themselves. Even if so, that will not give the 1st and 2nd plaintiffs a right to sue for possession of all the property on behalf of themselves and the other legatees. The District Judge refers to Section 56 of the Trusts Act where numerous beneficiaries if all of one mind may require the trustees to transfer the trust property to them. That provision is clearly inapplicable here. The beneficiaries are not all of one mind, and they have not required the defendants to make over the property to them. At the most the beneficiaries other than the plaintiffs and the 1st defendant are indifferent. Why should the plaintiffs benefit by such indifference rather than the purchaser The plaintiffs may be entitled to sue for possession of their shares of the property. I do not think they are entitled to that relief in this suit (even if the 2nd plaintiff be not bound by the sale, a point I shall afterwards consider). In *Lund v. Blanshard* I.L.R. 23 B. 670 the Vice-Chancellor no doubt observed that a cestuique trust may be entitled to sue the trustees and the third party jointly: but be added-what is in point here-that he was bound to confine his suit to the specific matter in respect of which the third party was liable-labile, I take it, to the plaintiff,

He would scarcely be competent to sue in respect of the shares of other cestui que trust who did not desire to join. Much less would he be entitled to sue on behalf of a trustee who was also a cestui que trust (as is the 1st defendant here) and was a party to the alleged breach of trust on which the suit was founded. See *Parnell v. Hingston* I.L.R. 23 B. 670. To put it shortly, no relief is sought in the present suit against the 1st defendant; on the contrary, it is sought to recover the whole property on his behalf as well as on behalf of the other beneficiaries; the case is, therefore, not within the observations in *Lund v. Blanshard* 4 Hare 9 at 28. I do not see how the present suit can be treated now as a suit to recover the plaintiffs' share of the property-whatever that may be-from the defendants including the 1st defendant. That it appears to me, is to change the character of the suit altogether. The plaintiffs have not asked for any such relief nor can their Vakil tell us what share they are entitled to. It was perhaps originally according to the allegations in the plaint two-elevenths, but, at the present day, may be more. Another reason why they are not entitled to any indulgence is that if (as I shall afterwards show) the 2nd plaintiff has no right to object to the compromise of the suit when confined to the 1st plaintiff's one-eleventh (or even one-tenth) share would be within the cognizance of a District Munsif. Again, it is suggested by the respondent's Vakil that this suit may be treated as an administration suit and the plaintiffs themselves or any persons whom the Court thinks fit appointed as trustees. I do not think this would be a proper course. There is no prayer for the removal of the 1st defendant and he is, I think, evidently colluding with the plaintiffs. Nor would the plaintiffs themselves, being paupars, be proper persons to be appointed trustees.

10. Again, I am by no means satisfied that the compromise was either illegal or a breach of trust. The 1st defendant was entitled to act independently of the 2nd (see Section 271, Succession Act, 1 Williams on Duty of Executors, 9th Edition, p. 816) and one objection taken to the compromise, therefore, fails. Next, I think it dear that 2nd plaintiff cannot dispute the validity of the compromise. Although she was no party to the suit (nor could she be, as the administrator alone was entitled to sue) she could hardly have been unaware of it. She has carefully abstained from alleging that she was not aware of her brother's acts. Nor has the 1st defendant alleged it either in his written statement or in his evidence as plaintiff's

2nd witness. All this is very significant. The 2nd plaintiff has been benefited by the compromise, the decree against her having become inoperative. I do not think it lies in her mouth now to repudiate the acts of the 1st defendant. Her share, at any rate, is clearly bound. As for the other beneficiaries the case is not so clear. But if they were competent to sanction the compromise and did agree to it or subsequently ratify it there would be no breach of trust at all. There is no direct evidence, but it is significant that none of them except the plaintiffs have thought fit to raise any objections to the sales. The plaintiffs' suit was brought only eight years after the sales and there is no explanation for the delay. This apparent acquiescence for so long a period might fairly raise a presumption (which is not in any way rebutted), that the beneficiaries were all assenting parties to the acts of the 1st defendant. There is nothing to show that the debt on which the 2nd plaintiff was sued was not contracted for the benefit of the family. If it were for her sole benefit, why did the 1st defendant agree that his share of the property should be bound. We know nothing of these transactions. It has not been either alleged or proved-as I have before pointed out-that the 1st defendant effected the compromise behind the back of the beneficiaries. Why should we, when so little is known of the transactions and where, the mala fides of the suit is manifest, go out of our way to presume a breach of trust, and grant the 1st plaintiff relief that she has ' not asked for the exact extent of which she cannot, even now define. If she had gone into the witness-box and sworn that the 1st defendant defrauded her, it might be a different matter. In the absence of positive evidence of this character, fraud should not, I think, be presumed, especially where there is so much apparent acquiescence on the part of those alleged to have been defrauded. I have already indicated my opinion that the 1st defendant is colluding with the plaintiffs; and that is the reason why no exception is made by the latter which would be prejudicial to his interests, and why no evidence is forthcoming as to the nature of the transactions which resulted in the compromised decree. Bad faith is, of course, no reason why a plaintiff should be deprived of any right he may be entitled to claim in a suit properly instituted-but it is I think an element in, determining whether he shall be allowed (if that can be done) to alter the character of his suit, or be awarded reliefs he has not merely not claimed but-as it appears to medesignedly abstained from claiming.

11. I would, therefore, hold that the suit in its present form is unsustainable, the plaintiffs not being entitled to possession of the entire property, or to a mere declaration when they can get no substantial relief. The 2nd plaintiff, in my opinion, is absolutely estopped from questioning the validity of the sales. The 1st plaintiff may possibly be entitled to relief as regards her share, in a suit properly framed for the purpose, if she can explain her long inaction and show that she did not assent to the compromise entered into by the 1st defendant. In the view I take, it is not necessary to consider the question arising as to the mortgage. I would allow the appeal and dismiss the plaintiffs' suit with costs throughout so far as regards the 6th defendant, and item 2 in the plaint.

Boddam, J.

I am of opinion that this appeal should be allowed.

12. In 1866, one Thomas Edmonds died leaving by his will certain properties in trust for his eleven children. No trustees were named in the will but probate was taken out by the executors appointed by the will. The executors were the husbands of the two plaintiffs. Of the executors one died and the other was convicted and sent to jail for some offence. Afterwards in 1877, the 1st and 2nd defendants and Caroline Edmonds, three of the children of Thomas Edmonds deceased, were granted letters of administration to the estate of Thomas Edmonds deceased with the will annexed. In 1880 a suit was brought by the 5th defendant against the 2nd plaintiff and a money decree obtained against her in Original Suit No. 204 of 1880 on the file of the District Munsif of Trichinopoly. In execution of that decree, either the trust property, or the interest of the 2nd defendant in the trust property, was sold and the 5th defendant became the purchaser and interfered with the trust property. In 1899, the 1st defendant (who was apparently the only administrator who acted) brought a suit against the 5th defendant and the 2nd plaintiff to establish his right as administrator to the plaintiff-mentioned property (apparently the whole of the trust property) and to set aside the auction sale thereof, and on the 8th December 1890, a decree was passed in pursuance of a razinamah entered into between the 1st defendant and the 5th defendant, the 2nd plaintiff's name being struck out of the suit at the request of the

1st defendant. The razinamah decree provided that the 1st defendant should pay the 5th defendant Rs. 600 through the Court within the 31st March 1891 and in default the 5th defendant should be at liberty to execute the decree against the plaint-mention property and collect the said sum of Rs. 600 with interest at 1/2 per cent. per mensem and that all the rights that had accrued to the 5th defendant by virtue of 'the execution proceedings and the sale held in O.S. No. 204 of 1880 on the file of the Trichi-nopoly District Munsif should thereby be cancelled.

13. The 1st defendant made default in payment of the Rs. 600 and the 5th defendant in execution of the decree brought the whole of the trust property to sale. Part of it was purchased by the 6th defendant and the rest by the 7th defendant. As, however, the 6th defendant is the only appellant we have only to consider the rights ' of the parties with respect to the part purchased by him, viz. item 2 in the plaint schedule. In 1897 the two plaintiffs brought this suit against two of the administrators, sons of Thomas Edmonds deceased (the third apparently being dead though nothing is said about him in the plaint), two grand-children of Thomas Edmonds deceased, the 5th defendant (who was plaintiff in O.S. No. 204 of 1880 on the file of the Trichinopoly District munsif and defendant in O.S. No. 21 of 1889 and who in execution, of the decree therein brought to sale the trust property) and against the 6th and 7th defendants who were purchasers of the trust property in execution of that suit. They claim a declaration that the plaint property is trust property and that the alienations are not valid and finding upon the plaintiffs and ask for a decree for possession on behalf of themselves and other legatees. They alleged in their plaint that Thomas Edmonds left eleven children: that they (the two plaintiffs) and the 1st and 2nd defendants are his sole surviving children and that two of his children who are dead left one child each respectively whose names are put in as defendants but of whom they say their whereabouts are unknown. They say nothing about any other children of Thomas Edmonds. They make no allegation of breach of trust by the defendants 1 and 2 and make no claim for their discharge from the trust or for the appointment of any trustees and beyond the general statement in the plaint as to the surviving children and the fact that two deceased children left each a child, make no attempt to trace or join the representatives of any of the remaining children of Thomas Edmonds.

14. Now, the first question I have thought it proper to consider is one that goes to the root of the case, apart from any question of the form of action, viz., whether the alienations are binding upon the plaintiffs, and I am of opinion that they are binding and, therefore, that neither of the plaintiffs have any cause of action.

15. Whatever may have been the exact legal rights obtained by the 5th defendant in execution of his decree in O.S. No. 204 of 1880 on the file of the Trichinopoly District Munsif's Court, it is not disputed that the 1st and 2nd defts. (and possibly Catherine Caroline Edmonds if she was then alive-though it is probable that she was not then alive) as administrators were the trustees and as such the trust property was vested in them alone (see para. 6 of the plaint). They, therefore, were the proper persons to take legal steps against any one who interfered with the execution of the trusts or with the trust property. The 2nd defendant was, as he says in his written statement, a young man and engaged elsewhere and did not interfere in the management of the trust estate but left it to the 1st defendant, and, as I have said above, Catherine Caroline Edmonds was apparently dead. The 1st defendant, therefore, was both in law (See. 271, Succession Act and 1 Williams on Executors, 816) and with the sanction, tacit it may be, out nevertheless with the sanction of the other trustee or trustees as well as of the *cesui que trvstents* one of whom was made a party defendant and raised no objection on the score of parties-not only justified but legally bound in pursuance of his duty as trustee to sue the 5th defendant when the right of the trustess to administer the trust property was called into question. His action, therefore, O.S. No. 2'i of 1889, cannot be impugned, for it is obvious that the trust properties were the 'plaint-mentioned properties' as the right to execution under the decree was confined to the 'plaint-mentioned properties' and it is not suggested that execution of that decree went against any properties other than the plaint-mentioned properties, with the result that the 6th and 7th defendants became purchasers of the whole of the trust property.

16. It appears clear, therefore, to me that rightly or wrongly the 5th defendant had obtained possession of the whole of (he trust properties and that the action of the 1st defendant in suing him in O.S. No. 21 of 1889 was proper and bound all the *cesuis quo trustent* who were interested as legatees in that propety and not only

the 2nd plaintiff who was a party to it.

17. Again, just as a trustee can sue for the trust property so also he has power to compromise his suit and thereby bind the cestui que trustents provided that he does not thereby become a party to a fraud but acts for the interests of the beneficiaries. Nothing of the kind is suggested here; but on the other hand, having regard to the fact that the 2nd plaintiff was obviously a consenting party to the decree (as evidenced by her consenting without complaint to having her name removed from the suit at the time the compromise was entered into) and is now a co-plaintiff, 10 years afterwards with the only other surviving child of the testator except the trustees, defendants 1 and 2 and that the plaintiffs do not complain of any breach of trust or devastavit by the trustees, it must be assumed that at that time it was considered by all that the compromise was for the benefit of the trust estate. That being so, the alienations that have taken place under the decree passed in pursuance of that compromise are binding upon the estate and upon all the beneficiaries though it may be that the beneficiaries might perhaps in certain events have a cause of action against the trustee, 1st defendant, for not paying the Rs. 600. That, however, is not the case of the plaintiffs. The plaintiffs are not entitled, therefore, in my opinion to the declaration they seek, much less to the remedy they ask for.

18. I am, moreover, of opinion that the suit in its' present form cannot be sustained. The plaintiffs are two out of eleven beneficiaries. They are not entitled to possession either of the whole or of any part of the property unless all the beneficiaries are before the Court and are of one mind. They can only be entitled to have the trusts carried out and this the suit does not ask for and moreover in such a suit all the beneficiaries must be before the Court in order that the shares of each may be determined. Until the trustees are removed the property vests in them and they alone are entitled to possession on behalf of the beneficiaries unless all the beneficiaries are of one mind and present before the Court it cannot be assumed that all the beneficiaries are before the court when the plaintiff allege that they were eleven in number and the representatives of five of those eleven are not even named and it is not asserted that the two grand-children who are before the court are the sole legal personal representatives of their parents. In my

opinion the District Judge in para. 11 of his judgment has misunderstood the contention. The plaintiffs in their plaint say that Thomas Edmonds left eleven children and it lies upon the plaintiffs to show that all the parties are before the Court, particularly where the question is whether the suit can be considered to be a suit of a nature different to that which it bears upon the face of it. The property is vested in the trustees until they are removed and there is a proper suit by all the beneficiaries for possession to be transferred to them. In the absence of any of the beneficiaries or in the absence of proof that they are all of one mind the suit cannot be successful. Moreover, the plaintiffs' allegations in para. 14 of the plaint show that the beneficiaries are not all of one mind.

19. I am, therefore, of opinion that the suit in its present form is unsustainable. I would, therefore, allow the appeal of the 6th defendant with costs throughout. The plaintiffs must pay the institution fee in respect of item 2 in the plaint schedule and the property in this appeal throughout.

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