PETITIONER:
MEETHIYAN SIDHIQU

Vs.

RESPONDENT:
MUHAMMED KUNJU PAREETH KUTTY & ORS.

DATE OF JUDGMENT: 02/01/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
G.B. PATTANAIK (J)

CITATION:
1996 AIR 1003 1996 SCC (7) 436
JT 1996 (1) 578 1996 SCALE (1)498

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Leave granted.

Heard counsel on both sides. The facts are not in dispute.

This appeal by special leave arises from the judgment and decree of the Kerala High Court passed on September 9, 1986 in Second Appeal No.296/82. Admittedly, the appellant is a purchaser of the property from the 1st respondent who was a minor at that time and the property was sold through his mother as guardian. The question raised in this caseis, whether the sale is valid and whether the appellant has perfected his title. Admittedly, the sale was effected in 1949. The trial Court and the appellate Court upheld the right of the respondent but the High Court reversed the same and held that since the sale by the mother as a guardian was void in law, the appellant could not get valid title. Parties are co-owners of the properties. One co-owner cannot claim prescriptive right against another co-owner and in view of the fact that the plea was not raised that he asserted adverse title, disclaiming the right under the sale deed and that the respondent had acquisced to it, the plea of adverse possession was not sustainable in law. The High Court decreed the suit of the respondent. Thus this appeal by special leave.

Shri Anam, learned counsel for the appellant has contended that since the father Mohammad Kunju died, the mother is the natural guardian and the sale made by her as guardian of the respondent, therefore, is not void. We find no force in the contention.

Mulla's "Principle of the Mohammadan Law" [Ninteenth Edition] by Justice M. Hidaytullah, former Chief Justice of this Court and Arshad Hidayatullah, deals with legal property guardians of a muslim minor in Section 359. In the order, only father, executor appointed by the father's will, father's father and the executor appointed by the will of

the father's father, are legal guardians of property. No other relation is entitled to be the guardian of the property of a minor as of right; not even the mother, brother or uncle but the father or the paternal grand-father of the minor may appoint the mother, brother or uncle or any other person as his executor or executrix of his will in which case they become legal guardian and have all the powers of the legal guardian as defined in Sections 362 and 366 of the above Principles. The Court may also appoint any one of them as guardian of the property of the minor in which case they will have all the powers of a guardian appointed by the court, as stated in Sections 363 to 367.

In Section 360, it is stated that in default of the legal guardians mentioned in Section 359, the duty of appointing the guardian for the protection and preservation of the minor's property falls on the Judge as representing the State. The Court may appoint any other person as guardian of the property of the minor. In so doing, the Court should be guided by all the powers in the circumstances to be for the welfare of the minor. The court may appoint mother as guardian of the property of the minor son in preference to his paternal uncle. The fact that the mother is a Pardanashin lady is no objection to her appointment. In Section 362, the legal guardian of the property of a minor has no power to sell the immovable property of the minor except in the cases [1] where he can obtain double its value; [2] where the minor has no other property and the sale is necessary for his maintenance; [3] where there are debts of the deceased, and no other means of paying them; [4] where there are legacies to be paid, and no other means of paying them; [5] where the expenses exceed the income of the property; [6] where the property is falling into decay; [7] when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

In Imambandi v. Mutsaddi [(1918) 45 I.A. 73] the Judicial Committee envisaged the grounds on which and the circumstances in which the property of a minor could be alienated by legal guardian.

Tyabji in his "Principles of Mohammadan Law" also has stated in Section 261 that neither mother, nor brother, nor the uncle can without the authority of the Court deal with the property of a minor. Asaf A.A. Fyzee in Section 34 has reiterated the same principles. In Venkama Naidu v. S.V. Chistry [AIR 1951 Mad. 399], the Madras High Court had held that after the father's death, the mother, as the guardian of the minor, has no power to execute a sale deed. Therefore, the sale deed executed by the mother was held to be void and inoperative under mohamaddan law.

In Mumammadan law by Syed Ameer Ali [Vol .2] also it is stated at page 500 that unless mother is appointed by the father as the guardian of his minor children's estate or is so appointed by the Judge, she has no power to intermeddle with their immovable property. All her dealings with the property are ipso facto void. In case the minor has no means of support except the property, she must apply to the court for sanction in order to deal with the property.

Father is the natural guardian and in his absence other legal guardians would be entitled to act. In their absence, property guardian appointed by the competent court would be competent to alienate property of the minor with the permission of the court. When a sale is to be made on behalf of the minor the necessary ingredients are that the sale must be for the benefit of the estate of minor and, therefore, the competent person entitled to alienate the

minor's property would be, subject to the above condition, either the natural guardian or the property guardian appointed by the Court. In this case after the demise of the father no property guardian was appointed. The mother, therefore, is not guardian for the alienation of the property of the minor. The sale made by the mother, therefore, is void.

The question then is: Whether the appellant has perfected his title by adverse possession. The High Court in the judgment has held that:

> "It is also true that the trial couet and the appellate court found that even after the date of Ext.B1 or A1 on 10.10.1949 the plaintiff or defendants 1 and 2 were not in possession. The exclusive possession of the 3rd defendant from 10.10.1949 or the non-participation of the income by the plaintiff by itself may not amount to adverse possession as between co-owners. So also the mere fact that the 3rd defendant who was in exclusive possession executed documents and put the transferees in possession of the property also will not prove ouster or adverse possession. As a matter of course plaintiff can not be fixed with knowledge of those documents simply because of the fact that they are registered documents. Registration of the documents by itself can not operate as notice to the plaintiff that third defendant was holding the property adverse to him and dealing with it as full owner. Knowledge ouster and exclusive possession with the requisite animus are facts to be alleged and proved by defendants 3 and 4 in O.S. 208/78 who pleaded adverse possession. There is no such plea and there is no such proof also. No such plea or proof is evident from the judgment of the courts below.
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> In order to constitute adverse possession the other co-owners out of possession must be proved to have had notice of the assertion of hostile title and exclusive possession ousting them with the requisite animus for the statutory period. It must be pleaded and proved. There is no such plea or proof and no such plea or proof could be found out from the judgments of the courts below also. As earlier stated the peculiar position of the 3rd defendant, the relationship, the dependency and illiteracy of defendants 1 and 2 and the minority of the plaintiff are all factors which indicate absence of knowledge on the part of the plaintiff regarding the animus, if any, entertained by the 3rd defendant. The courts below found adverse possession on insufficient pleadings and in the absence of legal evidence to that

effect. That generates a substantial question of law by which the finding has to be reversed and I do so. If so, defendants 3 and 4 in O.S. 208/78 could have only the position of co-owners and the plaintiff is entitled to partition and recovery of his share."

It is, therefore, clear from the above facts that unless there is a specific plea and proof that the appellant had disclaimed his right and asserted hostile title and possession to the knowledge of the respondent within the statutory period and the latter acquiesced to it, he cannot succeed to have it established that he perfected his right by prescripetion. The High Court has taken the fact that there is neither a plea nor proof in this behalf. We cannot find any infirmity in this finding. Under these ciurcumstances, the finding that the appellant has perfected his title by prescription is clearly illegal. In this case we are concerned only with the validity of the sale in respect of the share of the respondent-plaintiff and not of the share of the mother.

The appeal is accordingly dismissed and the judgment and decree of the High Court is upheld. No costs.