

(1976) 10 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Second Appeal No. 14 of 1974

Mst. Khatji	Vs	APPELLANT
Abdul Razak Sufi		RESPONDENT

Date of Decision : 15-10-1976

Acts Referred:

Bengal Civil Courts Act, 1871 — Section 2, 228, 24, 277
Constitution of India, 1950 — Article 25, 25(2), 26, 44
Criminal Procedure Code, 1973 (CrPC) — Section 488
Shariat Act, 1937 — Section 2, 6
Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1977 — Section 4(1)

Citation : (1976) 10 J&K CK 0002

Hon'ble Judges : M.R.A. Ansari, C.J

Bench : Single Bench

Advocate : S.T. Hussain, for the Appellant; M.L. Bhat, for the Respondent

Judgement

M.R.A. Ansari, C.J.—Mst. Khatji filed a suit in the court of the Munsiff Duru for a declaration that Abdul Razak Sufi was not the adopted

son (Pisar Parwarda) of Qadir Yatu, and for a permanent injunction restraining the said Abdul Razak Sufi from interfering with the possession of

the suit properties of the plaintiff. The learned Munsiff decreed the suit' in favour of the plaintiff. Abdul Razak Sufi preferred an appeal against the

judgment and decree of the learned Munsiff and the District Judge Anantnag reversed the judgment and decree of the learned Munsiff and allowed

the appeal. Mst. Khatji has now preferred this second appeal against the judgment and decree of the learned District Judge Anantnag.

2. Mst. Khatji (hereinafter referred to as the plaintiff) claimed in the suit that she was the daughter of Qadir Yatu and that the said Qadir Yatu had

performed her marriage with Samad Sufi, the second defendant in the suit and

that after the marriage both she and her husband were living in the house of Qadir Yatu and that the latter had made a declaration to the effect that she was his Khana Nashin daughter. It was also stated that Qadir had two other daughters, Fatima and Rahmati, and that after their marriage they were living with their respective husbands and that they were not declared by Qadir Yatu as his Khana Nashin daughters. She therefore claimed that by virtue of her being the only Khana Nashin daughter of Qadir Yatu, she was entitled under the custom governing the parties to inherit all the properties left by Qadir Yatu on his death. It was denied that Abdul Razak Sufi the first defendant had been adopted by Qadir Yatu as his Pesar Parwarda. The first defendant was, however, putting forward a false claim to a half share in the suit properties on the basis that he was the Pesar Parwarda of Qadir Yatu. The first defendant, it was alleged, had contrived to get false entries made in the revenue records to the effect that he was the Pesar Parwarda of Qadir Yatu and on the strength of these entries in the revenue records he was trying to interfere with the possession of the suit properties by the plaintiff.

3. The second defendant is the plaintiff's husband. He and defendants 3, 4 and 5 Mst. Fata, Mst. Rahmati and the husband of Mst. Fata, namely, Ahsan Bhat, did not contest the suit and in the written statements filed by them supported the plaintiff's case. The suit was however resisted by the first defendant. He denied that the plaintiff was the Khana Nashin daughter of Qadir Yatu. On the other hand it was claimed that the first defendant had been adopted by Qadir Yatu as his Pesar Parwarda and that as such he was the sole heir to all the properties left by Qadir Yatu to the exclusion of the plaintiff and the other daughters of Qadir, defendants 3 and 4, who had been married outside and were living with their respective husbands, and that as such neither the plaintiff nor defendants 3 and 4 were entitled to any share in the said properties.

4. The trial court framed as many as 11 issues but the material issues are as follows:

- (1) Whether defendant No. 1 under law or custom is the Pesar Parwarda of Qadir and hence his sole heir?
- (2) Whether by custom only Dukhtar Khana Nashin is entitled to inherit?
- (3) Whether the plaintiff is Dukhtar Khana Nashin of Qadir and sole heir?

(4) Whether the document dated 8-6-2008 and registered on 10-6-2008 executed by Qadir in favour of plaintiff is false and forged?

(5) Whether the will executed by Qadir in favour of defendant No. 1 is effective against the plaintiff and other defendants?

5. In support of her claim that she was recognised by Qadir Yatu as his Khana Nashin daughter, the plaintiff relied upon a registered document

dated 8/10-6-2008 (Bikarami) said to be executed by Qadir Yatu. This document was proved by the scribe as well as the attesting witnesses of

the document. This document has been marked as Ex. PA. It is not necessary to discuss the evidence in support of this document. Both the trial

court as well as the first appellate court have accepted this evidence and have held that this document was genuine and was in fact executed by

Qadir Yatu. The concurrent findings of both the courts below are binding on this Court in second appeal. As a matter of fact the learned Counsel

for the respondent Abdul Razak Sufi has not challenged the findings of the two courts below on this point. By virtue of this document as well as the

other evidence it is proved that the plaintiff is the Khana Nashin daughter of her father Qadir Yatu and as such she is entitled to inherit properties of

her father to the exclusion of his other daughters who were not made Khana Nashin daughters. Defendants 3 and 4 who are the other daughters of

Qadir Yatu have admitted the plaintiffs claim. Therefore if defendant No. 1, Abdul Razak Sufi, is not the Pesar Parwarda of Qadir Yatu, then he is

not entitled to any share in the suit properties and the plaintiff would be entitled to the Ownership and possession of the suit properties as the sole

heir of Qadir Yatu.

6. The controversy at this stage is whether the first defendant, Abdul Razak Sufi, is the Pesar Parwarda of Qadir Yatu and as such entitled to a

share in the suit properties. Mr. S.T. Hussain learned Counsel for the plaintiff appellant contests the claim of the first defendant on two grounds,

namely: (1) that the latter has not been proved to be the Pesar Parwarda of Qadir Yatu and (2) that even if he is proved to be so, his claim to the

suit properties which is based only upon local custom cannot be recognised by the court in view of the Mohammedan Law which governs all the

Muslims in India.

7. There is not much difficulty in dealing with the first ground urged by the

learned Counsel. Apart from the oral evidence adduced by the first defendant, his claim to be the Pesar Parwarda of Qadir Yatu is supported by the will dated 16-7-1956 which is also a registered document. The original document was said to be in possession of the plaintiff and in spite of notice being given to her to produce the original document, the plaintiff did not produce it and therefore the execution of the will was proved by secondary evidence, namely, a certified copy of the will. It was proved by Hasan Gani and Abdul Aziz who are both attestors to the will. Unfortunately the trial court did not mark this document as an exhibit, but the contents of this document have been spoken to by the two attesting witnesses mentioned above. This document must therefore be taken as having been duly proved. The genuineness of this document cannot be doubted in view of the fact that in this document not only has Qadir Yatu declared that he had adopted the first defendant as his Pesar Parwarda but has also declared that he had taken the plaintiff as his Khana Nashin daughter. The genuineness of this document is further proved by the fact that after the death of Qadir Yatu entries were made in the revenue records showing both the plaintiff as well as the first defendant as the heirs of Qadir Yatu, each being entitled to a half share. These entries were made at a time when the first defendant was still a minor. It is obvious that these entries were made on the basis of the will dated 16-7-1956 which should have been produced by the plaintiff herself before the revenue authorities. The learned trial court did not take into account the evidence of D.Ws. 3 to 5 on the ground that these witnesses had been examined after the evidence of the first defendant had been closed. It is no doubt true that after the evidence of the first defendant was taken his evidence was closed on the ground that he had not produced the other evidence in spite of several opportunities being given to him. It is also true that the revision petition filed by the first defendant against the order of the learned trial court closing his evidence was also dismissed by this Court. But in spite of this fact the trial court did permit the first defendant to adduce further evidence. Having permitted the first defendant to adduce the evidence of D.Ws. 3 to 6, the learned trial court was wrong in ignoring this evidence and also treating it as inadmissible. It would appear that after the revision petition filed by the first defendant had been rejected by this Court he had filed an

application before the trial court for permission to adduce additional evidence. It is always open to the trial court to permit a party to adduce

additional evidence even after closing his evidence if the court is satisfied that it is necessary in the interest of justice to permit a party to do so,

Even though it has permitted the first defendant to adduce additional evidence the trial court was wrong in not considering this evidence. The

evidence therefore proves that Qadir Yatu executed the will dated 16-7-1956 and that under this will he had declared that he had adopted the first

defendant as his Pesar Parwarda.

8. The existence of a custom which governed the parties by which a person who had no natural son could adopt another boy as his Pesar

Parwarda has not been denied by the plaintiff. As a matter of fact she herself has based her claim to the suit properties left by Qadir Yatu only on

the basis of a custom under which a Khana Nashin daughter would inherit all the properties of her father to the exclusion of the other heirs. The

plaintiff has denied the factum of the adoption of the first defendant as Pesar Parwarda by Qadir Yatu but has not denied the existence of such a

custom governing the parties. The first defendant so has not denied the existence of a custom (sic) which person could make one or more of (sic)

daughters at Khana Nashin daughters and (sic) which such Khana Nashin daughters inherit the properties of their father to the exclusion of the

other heirs. The first defendant (sic) only denied the factum that the plaintiff (sic) made the Khana Nashin daughter of Qadir Yatu. Therefore the

existence of a custom by which Qadir Yatu could adopt the first defendant as his Pesar Parwarda has been proved.

9. This leads me to a consideration of the second ground on which the first defendant's claim has been challenged, namely, that this custom is

opposed to the Mohammedan Law and that therefore such a custom should not be recognized by the courts. It is no doubt true that adoption is

not recognized by the Mohammedan Law and the adopted son or daughter does not under the Mohammedan Law of inheritance get any share in

the property of the adoptive father and his property devolves on his legal heirs, i.e. the sharers the residuaries and the distant kindred according to

the rules governing intestate succession. The contention of the learned Counsel is that the custom of Pesar Parwarda is not only not recognized by

the Muhammedan Law but is opposed to the Muhammedan Law of Inheritance and hence such a custom should not be given effect to by the

Courts. This point undoubtedly presents some difficulty and the arguments advanced by the learned Counsel in support of this point deserve

serious consideration especially as there is no direct decision on this point and the question can be said to be *res Integra*.

10. In support of this contention the learned Counsel has invoked Article 25 of the Constitution of India which reads as follows:

Freedom of conscience and free profession, practice and propagation of religion
(1) Subject to public order, morality and health and to the other

provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

According to the learned Counsel the fundamental right enjoyed by a Muslim was not restricted to the practice and propagation of his religion in

the narrow sense namely, offering worship etc. but that it included other aspects of his religion, such as marriage, divorce, inheritance etc.

According to the learned Counsel Islam governs every aspect of the life of a Muslim and does not make any distinction between what may be

called as purely religious activities and secular activities. He seeks support for this proposition from certain observations of Mahmood, J. in a Full

Bench decision of the Allahabad High Court in *Govind Dayal v. Inayatullah*, reported in ILR (1885) All 775. That was a case of pre-emption

where the pre-emptor and the vendor were Muslims and the vendees were Hindus. The following question was under consideration of the Full

Bench:

In a case of pre-emption, where the pre-emptor and vendor are Muhammedans and the vendee a non-Muhammedan is the Muhammedan Law of

Pre-emption to be applied to the matter, in advertence to the terms of Section 24 of Act VI of 1871?

Act VI referred to is the Bengal Civil Courts Act (VI of 1871) and Section 24 of the said Act provides as follows:

Where in any suit or proceeding it is necessary for any court under this Act to decide any question regarding succession, inheritance, marriage or

caste, or any religious usage or institution, the Muhammadan Law in cases where the parties are Muhommadans and the Hindu law in cases where

the parties are Hindu, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not provided for by the former part of this section, or by any of her law for the time being in force, the Court shall act according to justice, equity and good conscience.

The Full Bench answered the question in the affirmative and it did so on the basis that preemption was a religious usage or institution within the meaning of Section 24 of Act VI of 1871. The observations of Mahmood, J. on which reliance is placed are as follows:

It is to be remembered that Hindu and Muhammadan Laws are so intimately connected with religion that they can hardly be dissevered from it. As long as the religions last the laws founded on them last. and again:

I may observe that pre-emption is closely connected with the Muhammedan Law of inheritance. That law was founded by the prophet upon republican principles at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that upon the death of an owner his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs unless that consent is given after the owner's death, when the reason is not that the testator had power to defeat the law of inheritance, but that the heirs, having become owners of the property, could deal with it as they liked, and could therefore ratify the act of their ancestry. No Muhammedan is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property.

11. It has to be remembered firstly that the above observations were made while considering the question whether pre-emption was a religious usage or institution within the meaning of Section 24 of Act VI of 1871, and Section 24 itself provides that such religious usage or institution was subject to legislative enactment altering or abolishing such usage or institution. In the case before the Allahabad High Court there was no legislative enactment altering or abolishing the religious usage or the institution of pre-

emption amongst Muslims. Secondly the Mohammedan Law of Pre-emption is not applicable to Muslims of India as a whole. The law of pre-emption is not applicable to the Muslims of South India, i.e. of Madras and Andhra Pradesh States. (Vide Mulla's Muhammedan Law 16th edn. Section 277, page 225). Even in other parts of the country, the law of pre-emption is applied to Muslims as well as to non-Muslims only by virtue of special enactments as well as of local custom (Vide Mulla's Muhammedan Law 16th edn. Section 228, page 226). Therefore the observations of Mahmood, J. (supra) cannot be understood as being of universal application but must be understood as being subject to legislative enactment or local custom.

12. If, according to Mahmood, J. Pre-emption is closely connected with the law of inheritance, then what applies to pre-emption would also apply to inheritance. In other words the law of inheritance is also not of universal application but may be modified by legislative enactments or by local custom.

13. Further the Muhammedan Law of pre-emption was held by the Allahabad High Court to be applicable to Muslims only by virtue of a statute namely Section 24 of Act VI of 1871 and not because such law was applicable to Muslims as a corollary to the practice of their religion by the Muslims as contended by the learned Counsel. The same is the position with regard to the other branches of the Muhammedan Law such as marriage, divorce, inheritance, gifts, etc. As observed by Mulla in the very first section of his classic book:

1. Administration of Mahomedan Law. The Mahomedan Law is applied by Courts in India to Mahomedans not in all, but in some matters only.

The power of courts to apply Mahomedan Law to Mahomedans is derived from and regulated partly by Statutes of the Imperial Parliament read

with Article 225 of the Constitution of India but mostly by Indian legislation.

The position is again reiterated in Section 2 which reads as follows:

As regards India, the rules of Mohamedan Law fall under three divisions namely:

(i) those which have been expressly directed by the legislature to be applied to Mohammedans such as rules of Succession and inheritance;

(ii) those which are applied to Mohammedans as a matter of justice, equity and good conscience, such as the rules of the Mahomedan Law of

Pre-emption;

(iii) those which are not applied at all, though the parties are Mahomedans, such as the Mahomedan Criminal Law and the Mohomedan Law of

Evidence.

The only parts of Mahomedan law that are applied by courts in India to Mohamedans are those mentioned in Clauses (i) and (ii). In other respects, the Mohamedans in India are governed by the general law of India.

The rules of Muhammedan Law that have been expressly directed to be applied to Muslims are those rules which are enumerated in Section 2 of

the Shariat Act (XXVI of 1937) which reads as follows:

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession,

special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law,

marriage, dissolution of marriage, including talaq, illa, zihar, lian khula adn Mubara' at, maintenance, dower, guardianship gifts, trust and trust

properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where

the parties are Muslims shall be the Muslim Personal Law (Shariat).

It is to be noted that the rules of Muhammedan Law enumerated in Section 2 of the Shariat Act (Supra) are not applicable to 'questions relating to

agricltural lands' and such questions have to be decided according to the custom or usage which may even be contrary to the rules of

Muhammedan Law. It has also to be noted that the Shariat Act would be applicable only as against custom or usage which is contrary to the

provisions of the said Act, but that the Shariat Act does not purport to override other statutes which may be contrary to the provisions of the

Shariat Act. In other words, even after the passing of the Shariat Act, any legislative enactment which was in existence prior to the passing of the

Shariat Act or which might come into existence subsequent thereto would be applicable to Muslims even though such a legislative enactment may

be contrary to the provisions of the Shariat Act. For instance, as observed by the editor of the 16th edition at page 5 of the Mulla's Muhammedan

Law, namely, Hidayatullah, J. as he then was:

On the other hand as the Act does not by implication repeal any Act not specified in Section 6, it will not affect the rule of succession by

primogeniture enacted for some talukdari and zemindari estates. Nor will the Act affect the custom of succession to the office of Mutawalli of a

wakf or Sajjadanashin of a Khanka, for Charitable and religious institutions are excluded from its scope, now will it affect the operation of the

provisions of Section 488 of the Code of Criminal Procedure with regard to maintenance.

The Muhammedan Law is therefore made applicable to Muslims in India only by virtue of a legislative enactment, namely the Shariat Act, 1937,

and not as contended by the learned Counsel because the Muslims have a right to practise their religion. The Shariat Act, however, is not

applicable to the State of Jammu and Kashmir and therefore the Muslims of this State cannot claim that the Muhammedan Law of inheritance

should be applied to them by virtue of the Shariat Act. On the other hand the Muslims of this State can base their claim for the application of the

Muhammedan Law of inheritance only by virtue of a legislative enactment, namely, the Sri Pratap Jammu and Kashmir Laws Consolidation Act,

1977 (Act No. IV of 1977). The relevant portion of this Act is Section 4(1) (d) which reads as follows:

The laws administered and to be administered by the Civil and Criminal Courts of the State of Jammu and Kashmir are and shall be as follows:

(d) in question regarding succession, inheritance, special property of females, betrothals marriage, divorce, dower, adoption, guardianship,

minority, bastardy, family relations, wills, legacies, gifts, waqf, partitions, castes or any religious usage or institution, the rule of decision is and shall

be:

the Muhammedan Law in cases where the parties are Mohammedans and the Hindu Law in cases where the parties are Hindus, except in so far as

such law has been, by this or any other enactment, altered or abolished or has been modified by any custom applicable to the parties concerned

which is not contrary to Justice, equity and good conscience and has not been by this or any other enactment, altered or abolished, and has not

been declared to be void by any competent authority.

Under this enactment therefore the Muhammedan Law is applicable to the

Muslims of this State subject to the custom applicable to the parties modifying the principles of Muhammedan Law.

14. This would be the position before the Constitution of India came into force. The question for consideration is whether the position is different after the coming into force of the Constitution. In other words the question is whether Article 25 of the Constitution of India guarantees that in the matter of inheritance it is the Muhammedan law that should be applied or whether it is such law as modified by any legislative enactment or by custom that can be applied. As already stated there is no direct decision on this point, but the learned Counsel for the appellant has referred to a number of decisions which according to him lay down the principles in support of his contention.

15. The first decision cited by him is *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, . This was a case in which by virtue of the Bombay Public Trusts Act (29 of 1950) the Manager of a Jain temple and the trustees of the Parsee Panchayat Funds and properties were required to get the trust properties registered and also to pay contribution to the Commissioner appointed under the said Act. The validity of the Act was challenged on the ground that it violated Articles 25 and 26 of the Constitution of India. In the course of the judgment, the Supreme Court made the following observations which are relied upon by the learned Counsel for the appellant:

Thus subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people.

Then again:

Religious practices or performances of acts in pursuance of religious belief are as

much a part of religion as faith or belief in particular doctrines.

Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular

manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure

of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential

parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of

administering the trust estate.

It may, however, be noticed that the Supreme Court while explaining the scope of the rights enjoyed by citizens to practise and propagate their

religion, however recognized the right of the State to place restrictions on the enjoyment of such rights as envisaged under Clause (2) of Article 25

of the Constitution. It may also be noticed that the Supreme Court did not strike down the entire Act which was impugned in this case namely, the

Bombay Public Trusts Act, 1950, but only held certain provisions of the Act to be violative of Articles 25 and 26.

16. The next case cited is in re Kerala Education Bill 1957 AIR 1958 SC 956. In this case a reference to the Supreme Court was made by the

President of India for its opinion regarding the validity of the Kerala Education Bills, 1957. The question involved in this case was whether the Bill

was violative of Article 30(1) of the Constitution under which the members of the minority community were given the right to establish and

administer educational institutions of their choice. The Supreme Court only made a passing reference to Article 25 of the Constitution and

observed that Article 30(1) belongs to the same category as Articles 25, 26 and 29 and confers on minorities, religious or linguistic, the right to

establish and maintain their own educational institutions without any interference or hindrance from the State. In other words, the minorities should

have the right to live and should be allowed by the State to live, their own cultural life as regards religion or language.

17. The next case cited was Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay, . In this case the validity of the Bombay Prevention

of Excommunication Act (42 of 1949) was challenged on the ground that the

provisions of the said Act infringed Articles 25 and 26 of the Constitution. The head of the Dawoodj Bohra Community had, in exercise of his religious rights as Dai-ul-Mutlaq, excommunicated certain persons from the community and the Bombay legislature had passed the said Act for the purpose of declaring that such excommunication was illegal. The validity of the Act was upheld by the Bombay High Court, but the Supreme Court struck down the Act as violative of Articles 25 and 26 of the Constitution. The following observations in the majority judgment in that case are relevant:

The contents of Articles 25 and 26 of the Constitution came up for consideration before this Court in *The Commissioner, Hindu Religious*

Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., . Mahant Sri Jagannath Ramanuj Das and Another Vs. The State

of Orissa and Another, ; Sri Venkataramana Devaru and Others Vs. The State of Mysore and Others, ; The Durgah Committee, Ajmer and

Another Vs. Syed Hussain Ali and Others, and several other decisions and the main principles underlying these provisions have by these decisions

been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to

acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are

integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with

reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

Here again the Supreme Court while upholding the right of the head of the Dawoodi Bohra Community to excommunicate the members of the

community held that this right was not absolute and that it was subject to exceptions mentioned in Article 25(2). It was held that the Bombay Act

did not come within the scope of such exceptions.

The last case cited is *Seshammal and Others, Vs. State of Tamil Nadu, .* In this case certain provisions of the Tamil Nadu Hindu Religious and

Charitable Endowments Act (22 of 1959) were challenged on the ground that they violated Articles 25 and 26 of the Constitution. Under the

provisions of the said Act the Archaka of the temple was appointed by the

Government which was challenged by the hereditary Archakas of the temple on the ground that it infringed the right of the temple under Articles 25 and 26 of the Constitution. The Supreme Court upheld the validity of the impugned provisions of the Tamil Nadu Act, but while doing so certain observations were made which are sought to be relied upon by the learned Counsel. After referring to its earlier decisions on the point the Supreme Court explained the principles underlying Articles 25 and 26 of the Constitution in the following words:

The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrines of a particular religion and include practices which are regarded by the community as a part of its religion.

18. What emerges from the principles enunciated by the several decisions cited above is that the right which is guaranteed to citizens by Article 25 of the Constitution to practise and propagate their religion is not an absolute right in the sense that this right cannot be modified by legislative enactment but that these rights are subject to legislative enactment which come within the scope of Article 25(2) of the Constitution. Therefore even if adoption is not recognized by the Muhammedan Law and even though the Mohammedan Law of inheritance may be considered as an integral part of the religion of the Muslims, yet the legislature will be competent to modify such law. As already noticed the Shariat Act itself by which the Muhammedan Law of inheritance is made applicable to Muslims, excludes from its operation questions relating to agricultural lands. Then in spite of Article 25 of the Constitution of India, it would be open to the legislature to modify the personal law to the extent that such law is repugnant to public order, morality and health. Further under Article 25(2) it would be open to the legislature to modify the personal law for the purpose of 'regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice' or for the purpose of 'providing for social welfare and refrm.' For instance, in my view,

there would be no legal impediment for a legislature to pass an enactment giving equal rights to women in the matter of inheritance or divorce. Such a legislation would come within the scope of Article 25(2)(b) of the Constitution. Further the rights conferred under Article 25 are subject to the Directive Principles contained in Part IV of the Constitution of India such as Article 44 which envisages the enactment by the legislature of a uniform civil code which would be applicable to all the citizens of India and which would necessarily modify the personal law of the citizens.

19. In the State of Jammu & Kashmir, the existence of local custom modifying the Muhammedan Law of adoption and inheritance has been recognized. In *Mohd. Akbar v. Mohd. Akhnoon* AIR 1972 J & K 105 (FB) a Full Bench of this Court has recognized the existence of several customs amongst Kashmir Muslims such as the right of a Muslim widow to inherit the estate of her deceased husband during her lifetime or till her remarriage to the exclusion of all other heirs. The right of a Khana Nashin daughter to inherit the properties of her deceased father to the exclusion of other daughters who are not Khana Nashin and the right of an adopted son (Pisar Parwarda) also inheriting a share in the properties of his adoptive father were also recognized as valid customs. These customs have been justified by the Full Bench of this Court on the ground that such customs avoid fragmentation of agricultural lands and for maintaining the agricultural economy of the State. By virtue of Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1977 such customs have been stamped with the character of law and such a law would be within the competence of the legislature under Article 25(2) of the Constitution, as such a law regulates the economic activity of the citizen which may be associated with his religious practice. Therefore the said Act is not violative of Article 25 of the Constitution and the courts are not precluded from recognizing the custom of a Pisar Parwarda by virtue of that Article.

20. By reason of being the Pisar Parwarda of Qadir Yatu, the respondent is entitled to a share in the properties along with the appellant who is the Khana Nashin daughter of Qadir Yatu. The learned first appellate Court has held that the respondent is entitled to a half share in the properties of Qadir Yatu. The share has been determined on the basis that Mst. Khatji was the only Khana Nashin daughter of Qadir Yatu. But according to the

document on which the respondent bases his claim as the Pesar Parwarda of Qadir Yatu, the latter had recognized two of his daughters as Khana

Nashin daughters, namely, the appellant and Mst. Fata. Therefore the respondent is not entitled to a half share in the suit properties but only to a

1/3rd share and the appellant and Mst. Fata are each entitled to a 1/3rd share. But since Mst. Fata did not claim any share in the suit properties,

her share will also be taken by the appellant.

21. The judgment and decree of the first appellate court is modified to this extent, but subject to this modification this second appeal is dismissed.

There shall be no order as to costs.