
(2004) 11 J&K CK 0006
In the Jammu And Kashmir High Court
Case No : C.S.A. No. 24 of 1989

Yaqoob Laway and Others

APPELLANT

Vs

Gulla and Another

RESPONDENT

Date of Decision : 29-11-2004

Acts Referred:

Evidence Act, 1872 — Section 50

Penal Code, 1860 (IPC) — Section 494, 495, 497, 498

Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1977 — Section 4

Citation : (2005) 3 JKJ 122

Hon'ble Judges : Hakim Imtiyaz Hussain, J

Bench : Single Bench

Advocate : Z.A. Shah, for the Appellant; G.Q. Bhat, for the Respondent

Final Decision : Allowed

Judgement

Hakim Imtiyaz Hussain, J.—This Civil Second Appeal is directed against the judgement and decree dated 31.12.1988 passed by the

District Judge, Anantnag in Civil First Appeal against the judgement and decree passed by the Sub-Judge, Kulgam dated 28.2.1986 in COS titled

Gulla v. Yaqoob Laway and Ors.

2. The matter relates to adoption under customary law. The parties are Muslims and the dispute between them is on the landed property left by

one Ismail Laway of village Hanand, Tehsil Kulgam.

3. Gulla (Pisar parwarda) - contesting respondent No. 1 (hereinafter referred to as the plaintiff) filed a suit for declaration against Yaqoob Pisar

Ismail Laway and others in the court of Sub-Judge, Kulgam on 08.11.1974. The plaintiff alleged that he was the adopted son of one Ismail Laway

while as Yaqoob - appellant No. 1 and Mst. Hajira and others- appellant nos. 2 to

4 and proforma respondent No. 2 (hereinafter referred to as the defendant) were the issues of said Ismail Laway. Yaqoob was his son and the other defendants were his daughters. According to the plaintiff deceased Ismail Laway left landed property at village Hanand under Khewat Nos. 40/40 and 41/41 and trees under Khewat No. 18. He claimed that he was entitled to inherit alongwith the defendants was pisar parwarda of Ismail Laway and sought declaration for the same. The defendants denied his claim that he was the adopted son of Ismail Laway and asserted that the plaintiff had no right to inherit any portion of the property left by their father. In 1985 the plaintiff amended his suit and incorporated the relief of joint possession to the extent of half of the land left by Ismail Laway on the ground that he and Yaqoob Pisar Ismail Laway were only entitled to inherit the land left by Ismail Laway as rest of the defendants, who were daughters of Ismail Laway, had been married outside their house, as such under custom they were not entitled to any share in the property left by their father.

4. The trial court on the pleadings of the parties raised as many as seven issues in the case and after taking evidence of the parties ultimately decreed the suit on 28.2.1986. The trial court held as under:-

Since court has recorded finding in favour of the plaintiff in respect of issue nos. 1,2 and 3, the necessary corollary which follows there from is that plaintiffs suit is entitled to be decreed in its entirety. It is an admitted position in the case that plaintiff is in actual possession of six kanals of land out of total estate of deceased left by Ismail Laway. Accordingly, a declaratory decree is passed in favour of the plaintiff and against the defendants whereby the plaintiff is declared to be pisar parwarda of deceased Ismail Laway and as such he alongwith defendant No. 1 Yaqoob Laway is entitled to + share each as owners in the estate left by deceased Ismail Laway comprised under khewat nos. 40/40,41/41 and 42/42 and trees standing the suit land under Khewat no; 18 a village Hanand Tehsil Kulgam. Also a decree for joint possession to the extent of one half share is passed in favour of the plaintiff and against the defendant in respect of the suit land. In the circumstances of the case there shall be no order to costs. File to go the records.

5. Issue No. 1 which related to the factum of adoption of the plaintiff was main

issue in the case. While adjudicating upon the issue the trial court found that although the plaintiff had not led unimpeachable evidence on the factum of adoption but he has succeeded in proving that he had all along been treated as a member of the family and hence by applying the doctrine of estoppel by conduct the defendants cannot be permitted to challenge the status of the petitioner as pizar parwarda. The trial court in this behalf observed as under:-

...In the instant case it is an admitted position that there is a custom prevalent in the village by virtue of which a person can be taken into adoption.

From the consideration of evidence on record it is also proved that plaintiff was taken into adoption as pizar parwarda by deceased Ismail Laway.

It was not at all possible for the plaintiff to produce those persons in whose presence adoption had taken place because long period has elapsed

since then and those witnesses may not be available. Moreover in view of the overwhelming evidence to suggest that plaintiff was known to be the

adopted son of deceased Ismail Laway, that evidence being of a nature of general repute is admissible u/s 50 of the Evid. Act. Hence there is

preponderance of the evidence to establish conclusively that plaintiff was taken in adoption as pizar parwarda by deceased Ismail Laway when he

had no male issue of his own and defendant no; 1 was infact born after wards. Defendants have all alone been treating the plaintiff as pizar

parwarda of deceased Ismail Laway and now they cannot be permitted to resile from that stand so as to nonsuit him. In view of the custom

prevalent in the family under which non-resident daughters are disinherited to claim their fathers property the irresistible conclusion is that plaintiff as

pizar parwarda and defendant no; 1 as real son of deceased Ismail Laway are heirs of deceased Ismail Laway to the extent of half share each.

6. Being aggrieved by this judgment and decree of the trial court the defendants went in appeal against the same which was heard and disposed of

by the District Judge, Anantnag by means of the impugned judgment. The first appellate court like the trial court came to the conclusion that the

plaintiff had not produced any direct evidence with regard to the factum of adoption. But the court found that 'the plaintiff has kept plenty of

evidence on the file' that he was residing in the house of Ismail alongwith Mohammad Yaqoob. On the basis of such evidence the first appellate

court found that there was no ground to interfere with the judgment of the trial court. It, therefore, upheld the same. The first appellate court

observed as under:-

It is true the plaintiff has not produced any direct evidence with regard to the factum of adoption. In other words he plaintiff has not examined any

witness who would have come forward to state that Gulla was adopted by Ismail in his presence as his adopted son and the formalities necessary

for the adoption were all completed. There is no such evidence on the file. But at the same time, the plaintiff Gulla has been residing in the house of

Ismail along with Mohd. Yaqoob and is also in possession of a portion of landed property left behind by Ismail Laway. The witnesses of the

plaintiff have come forward to state hat they have seen the plaintiff living in the house of Ismail alongwith the defendants and that they also heard

that he was adopted son of Ismail but had not personal knowledge about the same.

The First Appellate Court further held:-

In these circumstances the judgment and decree passed by trial court can not be called into question and the same is confirmed and it is held that

the plaintiff/respondent No. 1 being the adopted son of Ismail Laway is entitled to properties in equal shares with the appellant Mohd. Yaqoob, his

real son. The appeal is accordingly dismissed with costs.

7. The present appeal has been filed against this finding of the 1st. Appellate Court on the ground that the two courts below have not adverted to

and appreciated properly the law contained in the Jammu and Kashmir Partap Consolidation of Laws Act, the pronouncements of this court as

well as the Board of Judicial Advisors and the Supreme Court. The appellant has further stated hat the two courts below have applied wrong tests

on the basis of conjectures and assumptions. The appellant has, therefore, prayed for getting aside the judgments and decree passed by the courts

below.

8. This Court on 12.2.2002 framed the following questions of law for consideration:-

(i) Can a civil court presume the existence of the custom of adoption among Muslims at village Hanand, Kulgam without any pleadings or proof in

its favour?

(ii) Does an order of mutation deprive a person from challenging the alleged adoption in a civil courts and does it confer any title or interest in

favour of a person who is noted as an adopted son by the Revenue Officer?

(iii) Can section 50 of the Evidence Act be pressed into service to prove the customary adoption in Kashmir valley,

(iv) Can a so called adopted son be entitled collaterally to the property of the daughters of the adopting person after their marriage in case their

father dies during their minority?

9. Heard Considered.

Q. No. 1:

Can a civil court presume the existence of the custom of adoption among Muslims at village Handnd-Kulgam without any pleadings or proof in its

favour?

Matters relating to inheritance in this State are governed by the provisions of Sri Partap Jammu & Kashmir Laws Consolidation Act, 1977 Svt.

which was enacted in the year 1920 A.D. Section 4(d) of the Act provides that, in questions regarding succession, inheritance, special property of

females, betrothals, marriatge, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, waqfs, partitions,

caste or religious usages or institution, the rule of decision is and shall be the Mohammadan Law where the parties are Mohammadan '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 or good conscience and has not been by this or any other enactment declared to be void by any

competent authority'.

Thus, the provision provides that Law of Sharia will apply to Muslims in the following matters: -

(a) marriage, divorce, dower, adoption, guardianship, minority, bastardy and female relation,

(b) succession, inheritance and special property of females and partition.

(c) Gifts, waqfs, wills, legacies, and

(d) Caste or religious usages.

There are, however, two exceptions to the rule laid down by Section 4(d) of the

Law consolidation Act regarding the application of Personal Law

i.e. the Courts cannot apply such law where:-

(a) any enactment has altered or abolished the Personal Law; or

(b) any valid custom has modified the Personal Law.

10. The Indian Shariat Act 1937, which applies Muslim Personal Law to the Muslims in rest of the country, is not applicable to the State of Jammu

and Kashmir. On the other hand, the Muslims of the State can base their claim for the application of the Muslim Law only by virtue of the

provisions of Sri Partap Jammu and Kashmir Laws Consolidation Act. The object of the Act was to recognize Personal Law of the parties as rule

of decision in cases pertaining to family relations and of landed property. Section 4 of the Act, as said above, makes it clear that the primary rule of

decision in all cases (where the matters referred to in the Section are involved) shall be Muslim Law (where the parties are Muslims) unless they

prove that they are governed by custom and that the custom abrogates their Personal Law. The Board of Judicial Advisors as well as this Court in

catena of authorities laid down that in the matters of inheritance it is the Personal Law which is to apply to the parties and that there is no

presumption in favour of custom. Custom can apply only when it is specifically pleaded and proved by the party alleging it.

11. In *Mst. Sadroo v. Bell Ram*, 2 J&K LR 311, it was held by the Division Bench that Section 4 of the Jammu and Kashmir Laws Consolidation

Act specifically lays down that the presumption in matters of inheritance is in favour of the Personal Law that is to say the parties will be presumed

to be governed by Personal Law unless they prove that they are governed by custom and that custom abrogates their Personal Law. When a

person pleads custom and basis his claim upon it, it is incumbent upon him to prove that custom by clear and reliable evidence. There is no

presumption in favour of custom. It is not correct to say that even parties are agriculturists, they live in a village and the property is agricultural land,

the primary presumption that parties are governed by their Personal Law is very much weakened.

12. In *Akbar Rather v. Azizi*, 4 J&K LR 264 it was laid down by the Division Bench that:-

It has been laid down quite clearly a number of times that ordinarily parties are

governed by their Personal Law and that only exceptions are those in which one or the other party proves successfully that Personal Law is abrogated by such customs as are found to be prevailing in the valley.

13. Again in *Romella v. Bhagat Ram* 6 J&K LR 17 it was observed that in this State the authority is furnished by the Sri Partap Jammu and

Kashmir Laws Consolidation Act, 1977 which shows that ordinary Hindu Law should prevail where the parties are Hindus, unless it is proved that

it has been modified by custom applicable to the parties concerned. It is for the plaintiff to prove the custom specifically.

14. The Board of Judicial Advisors which was having appellate jurisdiction over the High Court, too adopted the same view. In *Din Mohammad v.*

Karim Bibi 3 J&K LR 122 (Board) it was observed by the Board that, it is of the utmost importance that a custom relied on by a party in

modification of Personal Law to which prima facie every family is subject should be specifically pleaded. It is a well established rule of law that the

Personal Law or the propositus is superseded only to the extent the custom is established by evidence and that a custom which is in derogation of

the Personal Law should be specifically pleaded and the evidence adduced in support of it should be strictly construed, it is only where a custom is

established to be ancient, uniform and unambiguous that the personal law can be superseded by it.

15. Again in *Mirza Bahadur Ali v. Ch. Sundar Das* 4 J&K LR 144 it was held by the Board of Judicial Advisors, that, if a person relies upon a

family, tribal or local custom in derogation of general law in support of his case, he must give full particulars of the custom in his pleadings and if

judgments and decrees and documents exist in proof of a custom, these are best proof of the custom and the person relying on the custom should

produce and exhibit them and oral evidence can not be proper substitute of documents.

16. In *Dewan Jewan Nath Madan v. Rasul Gadoo* 5 J&K LR 111 it was held by the Board that the general principle is that 'the ordinary law

regulates everything beyond custom. Not only each custom but each alleged separate incident of a custom must be proved to exist as customary

law. Every separate departure from the ordinary law has to be supported by evidence of a binding custom'.

17. In *Lassi Ganai v. Reshi Mir* 8 KLR 117 the Board went to the extent of holding that if a person fails to establish a custom under which he claimed, he is entitled to fall back upon the Personal Law and claim a share under his Personal Law. It was further held that when it is said in regard to a certain controversy relating to inheritance that parties are governed by custom it cannot be understood to imply that customary law applicable to the family is a complete code of the rules of inheritance to the total exclusion of the Personal Law. The custom supersedes the Personal Law so far it is established but as regards matters outside such custom the Personal Law must prevail.

18. In *Ahad Lone v. Azizi* 9 KLR 118 the Board observed:-

It is a well established rule of law and it was so held by this Board in *Dewan Jewan Nath Madan v. Rasul Gadoo* relying on 29 Cal 828 P. C. and 31C 207 that a custom supersedes the ordinary law so far as it is proved and everything beyond the proved custom must be governed by such law.

19. Similarly in *Ramzan v. Khatiji*, 9 J&K LR 123, it was held by the Board of Judicial Advisors that a custom supersedes the Personal Law so far as it is established but as regards matters outside such established custom the Personal Law must prevail, it is to be remembered that in the absence of proof to the contrary the presumption is that a person is governed by his or her personal law in the matters relating to succession, inheritance, marriage, guardianship, etc. and the administration of law in such matters, is enjoined by Section 4 of Sri Partap Jammu and Kashmir Laws Consolidation Act (IV of 1977). It follows that the very best possible evidence and that of a high order is needed to establish the existence of a custom in derogation of the Personal Law of the parties to a litigation. The more abnormal the custom pleaded the heavier is the burden on the party alleging the same and it is not permissible to infer the existence of such a custom simply on the basis of the existence of some other analogous custom which is not in conformity with the Personal Law of the parties.

20. The Division Bench of the High Court of Jammu and Kashmir reiterated its earlier view and held in *Sawannal v. Mst. Bikhu* 12 K LR 108, that unlike the neighboring provinces of the Punjab the presumption here is that the people of this place are governed by their Personal Law unless

modified by custom.

21. Again in *Lala v. Rasul* AIR 1957 J&K 3 Kilam J, observed: ""Mohammadans according to the Law in force in Kashmir State, have to be

governed by Mohammadan Law unless relevant provisions of the Mohamadan Law are modified or abrogated by custom. It would therefore, lie

very heavily upon a person who pleads a custom in derogation of the Mohammadan Law to prove its existence.

22. In *Mst. Khatooni v. Lassa and Ors.* AIR 1959 J&K 52 it was held that a drastic custom which seriously derogates from the Personal Law of

the parties cannot be lightly inferred or held to exist, where a custom is not so well established as to have the force of law it will have to be

specifically pleaded and established if it is alleged in any particular case.

23. In *Gani Dar v. Raji* A.I.R 1961 JK 31 it was held that u/s 4 of the Sri Partap, J&K Laws Consolidation Act in question regarding succession,

inheritance etc, the Mohammadan Law is to govern where the parties are Mohammadan except in so far as such law has been modified by a

custom applicable to the parties concerned. If either party sets up custom as a rule of decision it lies upon him to prove the custom which he seeks

to apply.

24. Bhat in case *Shibu v. Padu* A.I.R 1967 J&K 81 adopting the same view, observed that custom is a deviation from the ordinary law and any

party setting up this deviation from the ordinary law has to prove the deviation. Under the Sri Partap Laws Consolidation Act, it is the Personal

Law of the parties which governs succession unless a custom to the contrary is proved. If no custom is proved the ordinary law will govern the

case.

25. All these authorities of the Board of Judicial Advisors and the High Court of Jammu and Kashmir lay down that the Personal Law is the

governing rule and it is only when a party alleges and proves a custom, that the custom can be taken as the governing rule but everything beyond

the proved custom must be governed by the Personal Law.

26. In *Mohd. Akbar Bhat v. Mohd. Akhoun* AIR 1972 J&K 105 however, the Full Bench of Jammu and Kashmir, observed:

(T) here is no uniformity in the pronouncements of this court on the question whether succession to landed property should be on the basis of

custom of Personal Law of the parties. the trend of decisions up to the time Board of Judicial Advisors took up these questions was to rely upon

Pandit Sant Ram Dogra's book and apply the custom as held by him to be established in the Valley of Kashmir. At the present moment, the least

that can be said is that there is conflict and confusion on this matter. (We) would, however, suggest that the Legislature of the State take an early

opportunity to clearly expressing itself by means of proper enactments whether in matter relating to succession and other matters which come up

before the courts of law from day to day to day Personal Law of the parties should be made applicable to customs and if so what should be that

custom in a particular matter.

27. Immediately after the Full Bench verdict in Mohd. Akbar's case, the Division Bench of Jammu and Kashmir made the following observation in

Mumtaz Begum v. S, Amman Ullah Khan AIR 1973 J&K 28:

The burden to prove custom in derogation of Personal Law is on the party who alleges it. The practice which developed into a customary usage in

derogation of the Personal Law of the parties must be proved to have been exercised not merely by virtue of an agreement between the parties,

but as of right. The evidence must show that a claim was made by any of the heirs but such was the force of the usage and the custom that the

claim was denied and the custom prevailed.

28. Again in Khatji v. Abdul Razak Sofi it was observed that the Muslims of this State can base their claim for the application of the Mohammadan

Law of inheritance only by virtue of a legislative enactment, namely Sri Partap Jammu and Kashmir Laws Consolidation Act. Under this enactment

the Mohammadan Law is applicable to the Muslims of this State subject to the custom applicable to the parties modifying the principles of

Mohammadan Law.

29. The position, which emerges from all these judicial pronouncements, may be summarized thus:

a. The primary rule is that a party is governed by his Personal Law in matters mentioned in Section 4 of the Sri Partap Jammu and Kashmir Laws

Consolidation Act.

b. If a party wants to deviate from the personal law and basis its claim on a specific custom, the party alleging such custom has to prove it and on

such proof the custom and not the Personal Law will be the governing rule.

c. There is no presumption in favour of the application of custom.

d. The custom is to be pleaded specifically and very best possible evidence and that of a high order is needed to establish the existence of a

custom in derogation of the Personal Law of the parties.

e. If the parties alleging the custom fails to prove the custom the Personal Law of the party will apply.

30. In view of this settled law a civil court cannot presume the existence of any custom including the custom of adoption among- the Muslims. The

party who basis his claim on a custom must specifically plead it and, thereafter, by cogent evidence prove such custom. There can be no inference

for the existence of a custom and it is only when such a custom is specifically pleaded and cogently proved that the civil court can ignore the

Personal Law of the parties and take cognizance of such a custom and decide the case on the basis of it. Person pleading custom must establish

both the validity and factum of the custom pleaded. The question is, therefore, replied accordingly.

31. Q.No. 2.

Does an order of mutation deprive a person from challenging the alleged adoption in a civil court and does it confer any title or interest in favour of

a person who is noted as an adopted son by the Revenue Officer?

32. It is settled law that mutation can confer no title or interest. Mutation may be a proof of possession of the property but not a proof of title to the

property. In *Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others*, , the Apex Court relying on *Nirman Singh v. Rudra Partab*

Narain Singh AIR 1926 PC 100 Nageshwar Baksh Singh v. Mt. Ganesha AIR 1920 PC 46 AIR 1948 210 (Privy Council) , *Penumarthy Veera*

Panasa Ramanna Vs. Penumarthy Sambamoorthy and Others, , *Mohinder Singh Vs. State of Punjab and Others*, and *Vatticherukuru Village*

Panchayat v. Nori Venkatarama Deekshithulu AIR 1991 SC 1303 held that mutation of name in revenue record is not evidence of title. Similarly in

State of Himachal Pradesh Vs. Keshav Ram and others, , it was held that an entry in the Revenue papers by no stretch of imagination can form the

basis for declaration of title.

33. Islam expressly prohibits adoption. The Holy Quran has declared as under:

Nor hath He made your adopted sons your (true) sons. This (s) your saying in your mouths : but God speaketh the truth, and He directeth the

(right) way. Call (such as are adopted) the sons of their (real) fathers : this (will be) more just in the sight of God.

Hold Prophet Mohammad (p.b.u.h) too has by his actions made it clear that Islam does not recognize adoption. It is reported that the Prophet of

Islam (PBUH) married Zaynab, the divorcee of Zaid bin Usama. Zaid was no much loved by the Hold Prophet that the people considered him as

the Prophet's adopted son. When this fact came to the knowledge of the Holy Prophet, he married the divorcee of Zaid thereby conveying that

neither had he adopted Zaid nor adoption creates any relationship.

34. Even Sant Ram Dogra in his Code of Tribal Customs has mentioned this fact. He states:

Adoption is of the Hindu origin, and has been maintained among the Mohammadans in the valley in spite of all the bigoted attacks against this

institution for the past six hundred years. The Zamin-dars of the valley still think an adoption son as good an heir as a real son. No gifts are ever

announced in their favour, as they inherit their adoptive father's property as real sons would do, without any gifts or wills in their favour which some

learned Maulvis desire to be made in all such cases to legalise the inheritance by the Shariat as well. It is only of late that men of the towns and the

city go against this old custom on the ground of its having already been discarded by the Prophet in Zaid's case (Quran 39, iv, Palmer's

Translation).

They say that an adoption son may be taken by a sonless man, but he cannot inherit his property, unless the adoptive father gives it to him by gift or

will, strictly in accordance with the orders of the Shariat.

Among the Shias and Sunnis, adoptions are generally made at an age when boys are a year or two old, so that they may become attached to their

adoptive parents.

35. Even if a person proves his status as an adopted son under custom he cannot inherit his adopted father as by mere being an adopted son he

does not become a heir to his adoptive father. The heirs are specifically mentioned in the Holy Quran and the adopted son being alien to Muslim

Law of inheritance does not find place anywhere. There is no custom either recorded in the Code of Tribal Custom or any other such document as

to what is the share of an adopted son under custom. Even there is no decided case on such point nor is it clear as to how an adopted son will

inherit in presence of other recognized heirs under Muslim Law of inheritance. A pizar parwarda (adopted son) is entitled to inherit his adoptive

father only if he has got a deed in his favour. Generally this deed is in the shape of a gift deed or will. When a person establishes his status as

adopted son under custom, he does not ipso facto get a claim over the property left by his adoptive father. If he approaches a court to get his

share in such property, courts should not get impressed or swayed by his status as an adopted son, he can succeed only when he shows a deed in

his favour. Such a deed should not be mere an adoption deed or a document acknowledging his status as such but it should specifically contain

recitals transferring whole or any portion of the property left by the Adoptive father. Such a deed should be a valid deed in terms of the Transfer of

Property Act and the Registration Act.

36. When the adoption is not proved or there is no deed giving the person so adopted right to inherit, mere mutation in favour of the adopted son

cannot confer any right over such a person and an order of mutation cannot deprive a person from challenging the alleged adoption before a civil

court. In this behalf reference may also be made to Rule 64(a) of Standing Order No. 23 (a) which reads as under:

If the adoption is by a registered deed the mutation should be entered in the name of the adopted son, otherwise mutation will be entered in favour

of the heir of the deceased who hold the possession of the land. But if the adopted son is in cultivating possession of the land and the deed of

adoption is unregistered deed, then according to circular No. 1 of 19th Assu 1953 the name of the adopted son can be entered in the mutation.

37. This rule also shows that when the adoption is by a registered deed only then the mutation can be entered in the name of the adopted son,

otherwise mutation will be entered in favour of the heir of the deceased who hold the possession of the land. If the adopted son, otherwise

mutation will be entered in favour of the heir of the deceased who hold the possession of the land. If the adopted son is in cultivating possession of

the land and the adoption deed is there but the same is unregistered, then, according to Circular No. 1 of 19th Assuj 1953, the name of adopted son can be entered in the mutation. This rule, therefore, specifically shows that in any event there must be a deed whether registered or unregistered. When it is a registered deed the mutation can be entered in the name of adopted son. If it is an unregistered deed the mutation can be entered if the adopted son is in cultivating possession. Under such circumstances, if there is no deed even a mutation cannot be effected. This fact point out to the only conclusion that even the mutation can be effected only if there is a deed and that the order of mutation itself, in absence of any deed, cannot confer any title on the person. The question is decided, accordingly.

38. Q.No. 3

Can section 50 of the Evidence Act be pressed into service to prove the customary adoption in Kashmir valley?

Section 50 of the Evidence Act provides as under:-

Opinion on relationship, when relevant - When the Court has to form an opinion as to the relationship of one person to another, the opinion,

expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of

knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian

Divorcee Act, 1869 (4 of 1869), or in prosecutions u/s 494, 495, 497 or 498 of the Indian Penal Code, 1860 (45 of 1860).

39. In the circumstance of the case, Section 50 of the Evidence Act cannot be pressed into service to prove the customary adoption in Kashmir. I

have reproduced the authorities of this Court as well as the Board of Judicial Advisors on this question and the only conclusion one can draw from

these authorities is that the party alleging the custom must prove by satisfactory evidence the custom so alleged. There is no presumption in favour

of custom and support from Section 50 of the Evidence Act cannot be taken to establish a custom. The presumption in the matters of inheritance is

in favour of Personal Law. The customs cannot be extended by analogy. It is a question of fact and the burden of proof is always on the party who

relies on it who has to prove it by positive evidence.

40. Q.No. 4

Can a so called adopted son be entitled collaterally to the property of the daughters of the adopting person after their marriage in case their father dies during their minority?

Rights of an adopted son with regard to inheritance are discussed in Question 75(J) and (K) of Sant Ram Dogra's Tribal Custom. There is no

custom found that an adopted son can inherit from other heirs of his adoptive father. This makes it abundantly clear that such a custom as gives a

right to an adopted son to succeed to the collaterals of his adoptive father is not conceived by the Customs. Once it is laid down that an adopted

son can inherit even his adoptive father only when there is a deed in his favour, it cannot be said that such a son has got any right to inherit, other

heirs of his adoptive father. Adoption under custom, when proved, creates a personal relationship between adoptive father and the adopted son.

There is no transplantation of the appointed heir, from his natural family into the family of his adoptive father. He cannot be a heir to the daughters

of the adoptive father married outside their house nor can he extend his right to usurp the due share of other shares or residuaries.

41. In view of this fact the question is decided, accordingly.

42. We will now come to the facts of the present case. In the present case both the courts below have given a finding that there is no evidence on

the part of plaintiff that he was the adopted son of the deceased Ismail Laway. Both the courts below have found that the plaintiff was residing in

the house of the deceased since long. From this fact the courts have presumed that he was the adopted of Ismail Laway. In view of the law laid

down by this Court as well as by the Board of Judicial Advisors and also in view of the provisions of Sri Partap Jammu and Kashmir Laws

Consolidation Act, this could not have been done. Since there can be no presumption in favour of such custom, both the courts below have erred

and have patently come to a wrong conclusion by raising presumption in favour of the custom. There is no deed in favour of the plaintiff by Ismail

Laway giving him any portion of his property, as such, he cannot inherit the property left by Ismail Laway.

43. In view of these facts I allow this appeal and set aside the judgement and decree passed by the triad court, upheld by the First Appellate

Court.

44. There shall be no order as to costs. Prepare decree sheet. Registry to take follows up action.

45. Before concluding it may be mentioned here that customary law prevalent in the State has resulted in chaos and often gives rise to endless

litigation and causes delay in the disposal of cases. Present case is a glaring example. There is no authentic record of customs. Code of Tribal

Custom has become outdated now. Some of the customs contained in it have become obsolete. It does not contain certain important incidents of

customs recorded and some of the customs recorded are, on the face of it, unreasonable. Even the Full Bench of this Court has in Mohd. Akbar

Bhat v. Mohd. Akhoon AIR 1972 J&K 105 expressed that there is conflict and confusion in this matter'. The Court suggested that the legislature

of the State should take an early opportunity of clearly expressing itself by means of proper enactment, whether in matters relating to succession

and other matters which came up before the court of law from day to day Personal Law of the parties should be made applicable or custom and if

so what should be that custom in a particular matter. It appears the State Legislature has not shown any response to the suggestion of the court.

But since the problem is persisting one, it is the high time the Legislature of the State may take note of the suggestions of the Full Court.

Order accordingly.