

Customary Practices and Women's Right to Inherit in Kashmir: An Analysis

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ABSTRACT

Customary practices in Kashmir occupied inheritance matters on large scale as compared to other matters of family system. The general rule of inheritance under the customary law in the valley was that succession first goes to the direct male lineal descendants of the last owner to the exclusion of female descendants, "excepting in the case of daughters who have been married at home by their fathers in their lifetime". The customary practices were discriminatory in nature regarding females and major impediment in the economic and social empowerment of women. This paper is an attempt to make an analysis of customary practices vis-à-vis inheritance in Kashmir and its impact on women's right and the role of law, justice and social change.

Key Words : Khana-nashin, Laws Consolidation Regulations, Khana-berun

INTRODUCTION

Inheritance is one of the critical as well as important components of any family system in the world. The question of inheriting the property or succeeding the owner of the property is one such issue which has often raised challenges and differences not only within the family setups but has also raised issues in a given legal setup viz. domicile, nationality, status and capacity of the parties. Since inheritance is part of family system and falls in the domain of Personal laws, therefore, in every community it has been regarded as one of the emphasized branches. Inheritance is a process of devolving estate and property of deceased among his or her legal heirs and for that rules, procedures and quantum are prescribed in every community or legal system. For example in Muslim Personal law, inheritance is governed by Shariah Law as laid down in Quran and expounded by Prophet SAW which is further delineated by different schools of Islamic Jurisprudence. This law has been given great emphasis in Islam. Similarly Hindu Law in India prescribes such rules of inheritance in Hindu Succession Act, 1956. It is

also worthwhile to mention that customary practices largely dominated the inheritance matters in many areas of the world. Arabs were governed by customary practices for centuries not only in the matters of inheritance but also in other areas of their societal life, like marriage, divorce, rituals, rules of war, business, etc. Even in India, the personal law of Hindus codified in 1955-56 is actually the recognition of customary law by legislature, embodied in judicial decisions and even in this codified law various provisions are to make room for customs governing various communities from different parts of India.

Customary Practices in Kashmir:

Kashmir also witnessed huge impact of customary practices on various social and familial domains since centuries. The impact can be gauged by this fact that these practices assumed the status of law in the region and such customs rooted in the society took the shape of law viz customary law. The law reflected the social, political, cultural and economic conditions of the area. People of the area both Hindu as well as Muslim

community regarded such practices as very dear and sacrosanct to them. The scattering form of such practices led to the compilation and record of customs during the reign of Mahraja Pratab Singh under the supervision of Settlement Officers in various parts of the State. In 1915 Kashmir witnessed such compilation through the efforts of Pandit Sant Ram Dogra, an Assistant Settlement officer Kashmir was appointed as a Special officer to compile these customs (Riwaje-aam). After touring the different parts of the valley and making enquiries regarding succession and inheritance, family relations, gift, pre-emption etc., he compiled this 'Code of Tribal Customs in Kashmir' incorporating therein the custom observed by the inhabitants of the Valley.¹

Customary Practices as Customary Law:

The Muslim Personal Law (Shairat) Application Act, 1937 which abolished the legal authority of custom among the Muslims of British India, did not extent to the erstwhile State of J & K and consequently customs continued to govern its Muslims in all such matters. The revenue as well as civil courts in the Valley had invariably relied on this 'code' for their decisions. The decisions of the highest revenue and civil courts in the State dealing mainly with Muslim succession, marriage etc. was mainly on the findings of these compilations. The Hindus were governed by laws based on ancient texts in which women's share of property was considerably limited. At certain levels customary laws also prevailed till the Hindu laws were codified.

Since Muslim Personal Law was not applicable in J&K in its entirety therefore, only such parts of it were applied by the courts which related to the matters mentioned in the Laws Consolidation Act and which had not been abrogated by the various enactments or customs. Jammu and Kashmir Laws Consolidation Regulations, 1872 which was later enacted as Sri Pratab Jammu and Kashmir Laws Consolidation Act, (1977 Samvat Vikrami) 1920 A.D. Provides that the Law of Shariah, will apply to Muslims only in the following matters:²

- (i) Marriage, divorce, dower, adoption, guardianship, minority, bastardy, and female

relation,

- (ii) Succession, inheritance and special property of females and partitions,
- (iii) Gifts, waqfs, wills, legacies and;
- (iv) Caste or religious usages.

However, the above rule laid down in sec. 4(d) was subject to two exceptions regarding the application of Personal law *i.e.* the Courts cannot apply such personal law where:

- a. Any enactment has altered or abolished the Personal law;
- b. Any valid custom had modified the Personal law.

The presumption in the specified matters was in favor of the Muslim personal law of the parties' *i.e.* the parties were presumed to be governed by personal laws, the rule of decision was the Muslim law where the parties were Muslims except in so far as such law (Muslim law) had been altered or abolished by this or any other enactment, or had been modified by any custom applicable to the parties concerned. Thus the customs enjoyed overriding effect on the personal laws in case of modification, abolition and alteration.

Judicial approach in determining the status of customary laws in J&K:

The approach of courts in Jammu and Kashmir also has favored customs and maintained their precedence over Muslim Personal law even though personal law of the parties was the first rule of decision subject to certain exceptions.

In *Akhar Rather v. Azizi*,³ It was held that ordinarily the parties are governed by their personal laws and the only exception 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 *Ahad Lone v Azizi*,⁴ a custom superseding the ordinary law was held well established rule so far as it is proved and everything beyond the proved custom must be governed by such law- Not only each custom but alleged separate incident of a custom must be proved to exist as customary law". (Elaborate)

In *Abdullah v. Mst. Fazi*,⁵ The matter was before

1. Molvi Akbar v Mohd. Akhoon AIR 1972 JK 105.

2. Section 4(d) of the Act, of 1977 Svt. (1920 AD)

3. 8J. & K. L.R. 264).

4. 8J. & K. L.R. 118).

5. Revision petition No. 10), dated 18th Har 2007 (Samvat) decided on 18th Assuj 2007 (Samvat)

the revenue court which held that "inheritance to landed estate in Kashmir Province is governed by custom and not by the *Shariat*".

In *Mst, Khitiooni v. Mst. Khurshi*,⁶ the court held that "in matters of succession to agricultural property among Muslims, customary law applies and not the *Shariat*".

Customary Inheritance in Kashmir: Impact on Women's' Rights:

The general rule of inheritance under the customary law in the valley was that succession first goes to the direct male lineal descendants of the last owner to the exclusion of female descendants, "excepting in the case of daughters who have been married at home by their fathers in their lifetime". Other rules of customary inheritance are:

- A daughter ordinarily had no share in the presence of sons except unmarried daughters.
- A sister could get no share in the presence of brothers.
- A widow could get only a life interest in the property.
- Khana-Berun Daughter would not inherit.
- Khana- Nashin Daughter would inherit.
- In case of death of Muslim agriculturist leaving sons and married daughters, the sons exclude such daughters unless it was proved that such daughter or daughters were made dukhtar khana nashin by their fathers.
- Khana nashin daughters of father used to inherit equal to sons' share in presence of son while all other heirs stand excluded. However such *khana nashin* daughter did not inherit absolutely. In case she had no son then such property would revert back to her father's male relation.
- Under customary law a daughter married outside her father's house would lose her right altogether.
- Under customary law, whenever a female governed by customary law inherits any property from a male, she holds it for life time irrespective of she being a widow, unmarried daughter, or khana-Nishin, mother etc.
- This means so long she is alive, she is owner

and she can enjoy the estate with limited alienation right. After her death the property does not devolve on her heirs but on heirs of the person from whom she got it.

Shariat Act 2007: A Change:

Section 2 of the Jammu and Kashmir Shariat Application Act, 2007 gives MPL overriding effect on Customary law and practices in familial matters and more importantly in intestate succession and in matters of inheritance.

Section 3 of the Act states that the provisions of the Sri Pratab Jammu and Kashmir Laws Consolidation Act, Samvat 1977 (1920 A.D.) shall be repealed in so far as they are inconsistent with the provisions of this Act. This means by this enactment the customs which were being followed by the Muslims particularly the agriculturist class in the State, were abrogated in so far as they are inconsistent with the provisions of this Act.

Thus customary laws governing Muslims in Jammu and Kashmir stands repealed after the enactment of Shariat Act, 2007. Before the act, the application of Muslim Personal law was not only limited to certain matters but also subject to overriding effect of customs by virtue of Sri Pratab Jammu and Kashmir Laws Consolidation Act, (1977 Samvat Vikrami).

Conclusion:

The customary practices were discriminatory in nature regarding females and major impediment in the economic and social empowerment of women. These customary practices had its roots embedded in the landlordism, feudalistic rule and the socio-economic structure of the time. The main source of income was attached with agricultural activities. The land owning class or landlords exploited the labour class or serfs and land tillers by paying them meagerly. All rights in the lands and other property were vested in the landlords and the laws were formulated to protect these rights. In this scenario men were in a dominant position to usurp property rights of women. The enactment of Shariat Act 2007 and extension of 1937 Act after abrogation of Article 370 is reflection Law Justice and Social Change in the context of Inheritance Rights of Women in Kashmir from Customary Law to Just Law.

6. Revision petition No. 86 dated 28th *Jeth* 2007 (*Samvat*)