CHAPTER V

STATUS OF MUSLIM WOMEN UNDER THE CUSTOMARY LAW OF JAMMU AND KASHMIR
Chapter V

Status of Muslim Women under Customary Law of Jammu and Kashmir

5.1. Introduction

Islam has provided many rights to women under Islamic Law for the enhancement of their socio-economic status but in spite of that the practical situation in the Muslim society is totally contrary to that what is given in law. Women are often deprived of their rights and one can clearly witness that Muslim women are much more ignorant of their rights and thus, are living a miserable life almost everywhere. In India also, the position of women in their socio-economic matters is not good and they are living under continuous subjugation in the hands of men. Being a part of India, the State of Jammu and Kashmir does not hold any exceptional place in the same regard and women there also are socio-economically backward. Jammu and Kashmir being a Muslim majority State of India does not have any exception in matters of socio-economic status of Muslim women. The main reason behind this poor socio-economic status of women in Jammu and Kashmir is the recognition of customary law which was applicable to the people of Jammu and Kashmir including Muslims also until 2007. Theses customs were un-Islamic in nature and were totally discriminatory against women in terms of their socio-economic rights provided to them under Islamic Law. Until 2007, Islamic Law was not fully applicable to the Muslims of Jammu and Kashmir and they had the choice of being governed either by the customary laws or Islamic Law in their personal matters. These customs were fully recognised under the Sri Pratap Jammu and Kashmir Laws (Consolidation) Act. The judicial attitude towards these customs was also very much objectionable as it has never tried to interfere with the un-Islamic character of such customs whenever any matter came before the courts. In 2007, the Jammu and Kashmir Muslim Personal Law (Shariat) Application Act was passed by the Jammu and Kashmir Legislature after which the law that is be applicable to Muslim parties in their personal matters shall be the principles of Islamic Law. In this chapter, a detailed study of the customary law that was applicable to the Muslims of Jammu and Kashmir has been made and also the discriminatory character of these customs especially towards women has been highlighted by the researcher.
5.2. Historical Background

The State of Jammu and Kashmir is situated in the extreme North of the Indian Sub-Continent, between 32.17 degrees and 36.58 degrees North latitude and 73.26 degrees and 80.30 degrees East longitude. The State is divided into three geographical areas known as ‘provinces’- 1) Jammu Province, 2) Kashmir Province and 3) Ladakh Province. The State mainly consists of the inhabitants of four principle religions of the world- Islam, Hinduism, Sikhism and Buddhism. Christians are also present but form a very small proportion of the State population. The Muslims form the absolute religious majority of the total population of the State but it is impossible to prove with evidence that when did Muslims first enter into the State. Historians, however, agree on the point that Islam got introduced into the State through various missionaries who came to preach the same in Kashmir Valley in and after 1300 A.D.

The first among such a missionary was Babul Shah, whose record can be found in the History of Islam in Kashmir. Babul Shah succeeded in converting Rinchan Shah, who was a Buddhist ruler of Kashmir, to Islam. Soon after the conversion of Rinchan Shah, his brother-in-law and Commander-in-Chief and other high officials also converted to Islam. After that, some of his followers too followed him and converted to Islam. In this way, Rinchan Shah became the first Muslim ruler of the State of Jammu and Kashmir. Justice Hakim Imtiyaz narrates a very interesting story behind the conversion of Rinchan Shah to Islam which is given below:

“After assuming the power, Rinchan Shah turned his attention towards the religious matters due to his dissatisfaction with his faith that he followed i.e., Buddhism. For the purpose of his satisfaction, he made the study of many religious faiths but none could inspire him. And one day, when he woke up early in the morning, he saw Babul Shah offering prayer near his castle. He called him and enquired about his name and his faith. Babul Shah explained the principles of Islam to Rinchan Shah which appealed him as these principles were new to him. He then embraced Islam and changed his name by adopting Sultan Sadur-ud-Din as Muslim name.”

Sultan Sadur-ud-Din could rule over Kashmir for two and a half year only and after his death, Udayana Deva married his widow and became the ruler by assuming power in his hands. But immediately after that, a Turki named Urwan invaded Kashmir and Udayana Deva had to flee away. His wife Kuta Rani collected some army and sent them to face Urwan under the command of Shah Mir, who was a minister in Sadur-ud-Din’s regime. The army sent by Kuta Rani defeated Urwan and consequently, Kuta Devi assumed power in her hands in the name

---

of her husband and ruled Kashmir for fifteen years after that. She was the last Hindu ruler in Kashmir Valley.\(^2\)

After the death of Kuta Rani, Shah Mir took over the throne and in this way, he became the founder of Shah Mir dynasty\(^3\) in Kashmir and assumed the name Shams-ud-Din for himself. Shah Mir became the first ruler to introduce Islamic Law in Kashmir by making it the law of the land. Hindu Law, customs and usages, which were applicable in Kashmir before the rule of Shah Mir, were repealed by him and in their place the traditional Islamic Law was made applicable. The role of Syeds, who came as missionaries in the Valley of Kashmir for propagation of Islam, was great in the implementation of Islamic Law in the Valley. One such instance is that Mir Syed Ali Hamadani, a great missionary, persuaded Sultan Qutb-ud-Din to implement Islamic Law in Kashmir and at his instance, the Sultan divorced one of his wives who were real sisters to each other.\(^4\) The Sultan officially banned the custom of ‘*sati*’\(^5\) in the Valley of Kashmir. No direct legislation was enacted, however, to apply Islamic Law in the Valley and the legal principles found in the Holy *Qur’an* and Traditions of the Holy Prophet (PBUH) were applied usually. But sometimes, the express provisions of the Islamic Law were superseded by ordinances and directives issued by the Sultan. For example, the women of ill-character were barred by law promulgated by the Sultan Ala-ud-Din from inheriting property from their husbands. The law which was applicable was generally that of *Hanafi* School of Islamic Law.\(^6\)

After Shah Mirs, came the Chaks in the year 1555 A.D. and only five Chaks ruled Kashmir in 31 years. During the reign of Chaks, Islamic Law remained the basic law of the land and *Hanafi* law was applied to *Sunnis* and *Shia* law to the *Shias*. Chak Rule was ended by the rule of Mughals in 1588 when Akbar attacked and conquered Kashmir. In this way, Kashmir became the part of Mughal India. Mughals ruled Kashmir for about 166 years. Mughals applied Islamic Law in the ‘*Subah* of Kashmir’ the same way as they applied it in the rest of India.\(^7\) But sometimes, the ruler replaced Islamic Law by issuing *farmans*. One such example is the promulgation of the order by Akbar prohibiting the marriages between the cousins and near relations. Akbar fixed the age of marriage for boys at sixteen and for girls, the age fixed

\(^2\) *Id.* at 87.
\(^3\) The first Muslim Dynasty who ruled Kashmir from 1339-1555 A.D.
\(^4\) Under Islamic Law, marriage with two women who are real sisters to each other is void.
\(^5\) ‘*Sati*’ is a Hindu practice whereby a widow immolates herself on the funeral pyre of her husband; now abolished in India.
\(^7\) Satyaprakasa Sangara, *Crime and Punishments in Mughal India* 10-21 (Sterling Publishers, New Delhi, 1967).
was fourteen years. Later on, one more farman was issued by him under which he banned polygamy for Muslims unless a man is childless. Also, he promulgated the order for those whose wives were elder to them for twelve years or more, to leave them. These farmans were apparently opposed to Islamic Law. Jahangir, however, implemented strict Hanafi law by putting an end to some of the common anti-Islamic practices like ‘sati’.  

After the Mughals, came the Afghans in 1752 A.D. who ruled Kashmir for 67 years. During their rule, Kashmir Valley mainly remained in the unrest and lawlessness and therefore, Islamic Law, as applied by Mughals, continued to remain in force. In the year 1819, Ranjit Singh of Punjab became successful in setting up his rule here by invading Kashmir. Thus, the five century old (1320-1819 A.D.), Muslim Rule came to an end in the Valley of Kashmir and Sikh rule started. Sikh rulers ruled over through governors, most of whom were army men. They started interfering with the Islamic Laws and traditions, e.g., call to Muslim prayers (azan) was banned and the mosques including the Jamia Masjid were closed down and capital punishment was laid down for the cow slaughter in the State.  

After the Sikhs, Dogras came into power in 1846 A.D. when East India Company sold the Valley to Maharaja Gulab Singh-the founder of the Dogra dynasty- for an amount of Rupees Seventy Five lakhs. On 9th of November, 1846, Maharaja Gulab Singh got the possession of Kashmir province with the assistance of the forces lent by East India Company. Dogra rulers tried to govern Muslims by applying Islamic Law in their personal matters and the first attempt in this regard was made in the year 1872 A.D. with the promulgation of Jammu and Kashmir Laws Consolidation Regulation, 1872. This regulation was later enacted by Maharaja Pratap Singh as the Shri Pratap Jammu and Kashmir Laws (Consolidation) Act, 1977 Svt. Section 4(d) of the said Act provided that:

“In questions regarding succession, inheritance, special property of females, betrothals, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, waqfs, partitions, caste or religious usages or institutions, 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’.  

Notes:
8 Ibid.
9 Pir Hassan Shah (ed.), Tarikh-i-Hasan 413 (Research and Publication Department Srinagar, 1954).
10 Supra Note 1 at 87-88.
Section 5 of the same Act, further, laid down:

“All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity and good conscience or have been or shall be declared to be void by any competent authority.”

The *Shri Pratap Jammu and Kashmir Laws (Consolidation) Act, 1977 Svt.* was, at first instance, enacted for a term of two years and from time to time, its enforcement was extended. Finally, on 13th of April, 1924, the order was made under the State Council Resolution No. 1 (dated April 8, 1925) for its enforcement without any limit of time.

The customs that were followed by Muslims in the State of Jammu and Kashmir had, however, no record anywhere and thus, were in the scattered form. In order to maintain a record of those and also making their applicability easier and more convenient through the judicial process, the Maharaja appointed various Settlement Officers to compile and prepare a record of all the customs that were applicable to the Muslims of their respective areas. In the Valley of Kashmir, Pandit Sant Ram Dogra was appointed for this purpose. He was the Settlement Officer in the Valley and his appointment was made by an order dated 12th Maghar, 1972 by putting him on special duty for the above-mentioned purpose. The said order runs as under:

> “Under His Highness Command (vide Chief Minister’s letter No. 1876 dated August 12 1915) Pandit Sant Ram Dogra, Assistant Settlement Officer, Kashmir, has been appointed Special Officer to compile *Riwaj-i-Aam* (General Custom) in Kashmir, and it was complained the *Zamindars* do not respond to the summons issued to them. Therefore, as recommended by the Department, His Highness (vide Chief Minister’s letter No. 4707 dated October 29, 1915) has sanctioned that the said Special Officer shall be competent to fine up to the sum of Rs. 10 any person who does not respond to the summons issued by him.”

For District Poonch, the customs were compiled by Lala Makhan Lal Sahib in the year 1966 Svt. which got published later on under the supervision of the Chief Revenue Officer of Poonch in Sawan, 2000 Svt. under the title ‘*Qanoon Riwaj-i-Aam- Ilaqa Poonch- Kashmir*’. This book was compiled in Urdu language and is in the question-answer form. Similarly, the customs of Gilgit were compiled by Sardar Thakar Singh in the year 1975 (Svt. 1918-19) who was the Settlement Officer for Gilgit District. The same was compiled under the title

---

14 *Supra* Note 1 at 99-100.
`Code of Tribal Custom in the Gilgit District` which also contains a note made by Wazir-i-Wazarat of Gilgit District, M. Mohammad Abdullah. The *Code of Tribal Customs of Ladakh* was composed by Thakhar Singh in the year 1968 Svt.\(^\text{16}\)

After independence of India from the British Empire, the State of Jammu and Kashmir was given a special status under Article 370 of the Indian Constitution under which the State is allowed to have its own constitution and other laws\(^\text{17}\) and Central laws are not applicable to it. Therefore, even after independence, the *Constitution of Jammu and Kashmir, 1956* has maintained the laws existing at the date of its introduction and therefore, saved the *Laws of Consolidation Act* under Section 102 of the *Constitution of Jammu and Kashmir* which provides as under:

“Subject to the provision of this constitution and to the provisions of any law for the time being in force the jurisdiction of and the law administered in the High Court and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of this constitution.”\(^\text{18}\)

Similarly, Section 157 of the *Constitution of Jammu and Kashmir* provides:

“All the laws in force in the State immediately before the commencement of this Constitution shall continue in force until altered or repealed or amended by competent authority.”\(^\text{19}\)

In this way, the customary law got its legal sanction under Section 4(d) and Section 5 of *Shri Pratap Jammu and Kashmir Laws (Consolidation) Act, 1977 Svt.* in the State and continued to be applied to Muslims in Jammu and Kashmir in the codified form.

**5.3. Position after the Laws Consolidation Act**

As mentioned above in Section 4(d) of *Shri Pratap Jammu and Kashmir Laws (Consolidation) Act, 1977 Svt.*\(^\text{20}\) that where the parties are Muslims, Islamic Law shall remain the rule of decision in personal matters such as marriage, dower, divorce, maintenance, inheritance, adoption, etc., but the Act also provides two exceptions, which if satisfied the

\(^{16}\) Supra Note 1 at 107.
\(^{17}\) P.M. Bakshi, *Constitution of India* 337-338 (Universal law Publishing Co. New Delhi, 2012).
\(^{19}\) Id. at 340.
\(^{20}\) Act No. IV of 1977 (1920 A.D.).
court, it shall not apply Islamic Law to the parties even if they are Muslims. These exceptions are:

a) Where the personal law has been altered or abolished by any enactment; and
b) Where the personal law has been modified by any valid custom.

Various laws have been enacted since the enforcement of the *Laws Consolidation Act*, which modified, abrogated or reformed the Muslim Personal Law in the State. One such enactment is the *Jammu and Kashmir Muslim Dower Act, 1977 Svt.* which has modified the Islamic Law relating to dower of Muslim women. This Act authorises the court to reduce the amount of dower, if the court is satisfied that the amount is unreasonable with reference to the means of the husband. The traditional Islamic Law in this regard provides that the amount of dower once fixed can be increased where it is too less in the opinion of the court but it cannot be reduced in any case. The wife, under Islamic Law, is entitled to recover the whole amount of dower from her husband if the same has not been paid by the husband. But the courts in Jammu and Kashmir, if satisfied that the amount of dower fixed at the time of marriage is excessive than the husband’s paying capacity, may reduce the same to a reasonable amount.

Another such enactment which has modified Islamic Law relating to the status of Muslim women is the *Jammu and Kashmir Dissolution of Muslim Marriages Act, 1999 Svt.* Under the classic Islamic Law, a married Muslim woman’s renunciation of Islam as her faith, brings to an end her marriage tie with her husband automatically. But under the said Act, the renunciation of Islam by a married Muslim woman does not by itself dissolve her marriage with her husband. Another point of difference which is worth mentioning here is that under the *Dissolution of Muslim Marriages Act, 1939*, the wife, whose husband’s whereabouts are not known for four years, has the right to file a suit seeking a decree of divorce from the court but such a decree will not be enforceable until a period of six months. But under the *Jammu and Kashmir Dissolution of Muslim Marriages Act, 1999 Svt.*, if the woman is seeking

---

21 *Supra* Note 1 at 101.


26 *Section 4, The Jammu and Kashmir Dissolution of Muslim Marriage Act, 1999 (1942 A.D.)*.

27 *Section 2(i), The Jammu and Kashmir Dissolution of Muslim Marriage Act, 1999 (1942 A.D.)*.

28 *Section 2(i), The Dissolution of Muslim Marriage Act, 1939.*
divorce on the above-mentioned ground, then she will have to wait for a period of one year in order to have the enforcement of such a decree.\textsuperscript{29}

It has often been found from the decisions of the courts in the State of Jammu and Kashmir that although the \textit{Laws Consolidation Act} provided for the application of Islamic Law where the parties were Muslims but the customs had most of the time superseded the Muslim Personal Law and the parties had been governed by the customary laws even though some of these customs were in direct conflict with the well-established principles of Islamic Law. Therefore, it becomes very necessary here to study in detail some of these customs which were in contradiction with the Muslim Personal law but still in existence in the valley of Kashmir until 2007. These customs had been in clear violation of the constitutional guarantees enshrined in the \textit{Constitution of India} as well as the \textit{Constitution of Jammu and Kashmir}.

5.4. Status of Muslim Women under Customary Law in Matters of-

5.4.1. Marriage

As has already been mentioned in the previous chapter on ‘Social Status of Woman under \textit{Shari’ah}’ that marriage in Islam is neither purely a contract nor a sacrament, it is a combination of both. In the Valley of Kashmir also, the institution of marriage among Muslims held the same status under the customary law as under the \textit{Shari’ah}. In most of the matters relating to marriage, the principles of Islamic Law were applied except with certain exceptions by the people of few castes that were governed by their own customs in these matters until 2007. The basic requirement for the validity of marriage was \textit{ijab-o-qubool}. Generally, two witnesses were required to be present at the time of marriage for its validity but there were also some exceptions under which there were differences regarding the number of witnesses for marriage among the members of different castes under their customary laws. In case of the degrees of prohibited relationships for marriage, the Muslims of Kashmir Valley followed \textit{Shari’ah} rules and thus, a man might not marry his brother’s daughter, sister’s daughter, foster-sister’s daughter, mother, step-mother, mother-in-law, mother’s sister, father’s sister, and grand-mother. Also, the marriage with the divorced wife or widow of the adopted son was not customary. It will not be wrong to say that the common criterion for the legality of marriage in case of prohibited relationships was that the wife of

\textsuperscript{29} Section 2(i), \textit{The Jammu and Kashmir Dissolution of Muslim Marriage Act, 1999} (1942 A.D.).
the man should not be related to him with the tinge of milk in his veins.\textsuperscript{30} Also, the marriage of a man, at the same time, with two women was prohibited who were related to each other into such a degree of relationship that they could not have married each other if one of them had been a male.\textsuperscript{31}

Regarding the number of wives that a man might take into marriage at a time, generally the Muslims followed the custom of taking only one wife and the second marriage had been allowed to be taken, under the customary law of the Valley, only if the first wife was childless or cripple or failed to perform the religious duty of \textit{namaz} or was found to be addicted of adultery. But some Muslim tribes, like the \textit{Rajas} of Yaripura, are said to have followed the custom of taking two wives and the \textit{Bakkerwals} and \textit{Pakhliwals} used to marry mostly up to the legal number of wives allowed under Islamic Law i.e., four.\textsuperscript{32}

In matters of consent of the girl for marriage, the Muslims of Valley followed the custom that if the girl was an adult then her consent was required for the validity of marriage. If the girl happened to be a minor, then the consent of her guardian was necessary for the validity of marriage. Pandit Sant Ram Dogra claims that although Islamic Law allows two adult Muslims to enter into a valid marriage with each other with their own free consent but the customary law of Kashmir did not recognise such marriages as valid.\textsuperscript{33}

Thus, it can be said that though the Muslims of the Valley of Kashmir totally did not have their own separate customary laws in matter of marriage and mostly followed the principles of Islamic Law only, but still they deviated from the strict application of \textit{Shari’ah} in certain matters which were different from the traditional Islamic Law and had an adverse effect on the rights of women. This, in turn, also affected other rights of the women like in matters of dower, maintenance, inheritance, etc.

5.4.2. Divorce

The Muslims of the Valley of Kashmir generally follow \textit{Shari’ah} rules in matters of divorce. The kinds of divorce are the same as have been provided in the previous chapter of this research work. But there had been certain exceptions also under the customary law followed...

\textsuperscript{30} Sant Ram Dogra, \textit{Code of Tribal Customs}, Question No. 9 as provided by Syed Tassadque Hussain in \textit{Customary Law and Indian Constitution (With Sant Ram Dogra’s Code of Tribal Customs)} 136-137 (Rima Publishing House, New Delhi, 1987).

\textsuperscript{31} \textit{Id.} at 139, Question No. 12.

\textsuperscript{32} \textit{Id.} at 140, Question No. 15.

\textsuperscript{33} \textit{Id.} at 141, Question No. 17.
by the Muslims of the Valley e.g., the customary law provided, as given by Sant Ram Dogra in his ‘Code of Tribal Customs’, that the common grounds of divorce that were available to men for divorcing their wives were the following four:

i) Disobedience;

ii) Immorality;

iii) Change of religion; and

Certain Muslim tribes of Kashmir Valley, like the Bomba Rajas of Yaripura and Uttarmachhipura and the Shup-wattals of Kulgam District, did not recognise the change of religion as a sufficient ground for the annulment of marriage between the parties.34

iv) Contagious diseases.

The Shias of Pattan and the Sunni Muslims and Watals of Anantnag further added the following two more grounds for a valid divorce under which a wife could get a divorce from her husband:

i) Inconsistency of the ages of the parties to marriage; and

ii) Impotency of the husband.35

Sunni Muslims of Baramulla and Srinagar, Zamindars of Chharat and Sunni Muslims of Anantnag also recognised the impotency of the husband as a valid ground of divorce that was available to wife. Also, the Sunni Muslims of Baramulla held the view that impotency of the husband could be a valid ground for a wife to obtain divorce against her husband. But the Sunni Muslims of Srinagar considered that divorce becomes necessary in case of impotency of the husband. All the Muslims of the Valley except few tribes generally considered the following defects except blindness as a sufficient ground for the annulment of marriage where it had actually taken place:36

i) Incurable diseases;

ii) Leprosy;

iii) Insanity; or

iv) Crippleness.

34 Id. at 143, Question No. 20.
35 Ibid.
36 Id. at 137, Question No. 10.
Under Islamic Law, it is not required for a husband to assign the reasons for divorcing his wife and if he does so, the divorce takes place validly and effectively but some Muslims tribes of the Valley like the Zamindars followed the custom of assigning reason for divorcing their wives. Thus, when a Zamindar had to divorce his wife, he had to first give the reason in clear words for his act that why he was divorcing his wife, only then he could divorce his wife under the customary law.\textsuperscript{37}

Regarding the observation of the formalities of revocable and irrevocable divorce, Sant Ram Dogra has provided the following procedures:

1) A Muslim husband could divorce his wife with a revocable form of \textit{talaq} by uttering the words like:
   i) “\textit{Mojhhish chhiam}” which means that “You are just like my mother”;
   ii) “\textit{Bainihish chhiam}” meaning that “You resemble my sister”;
   iii) “\textit{Pirbaihish chhiam}” meaning thereby that “You are just like a Pir woman”;
   iv) And also the same way, the divorce could take place if the husband uttered the likeliness of the prohibited degrees of kindred for marriage to the wife.

2) Also, the husband could divorce his wife by saying once or even twice that the enjoyment of her body was unlawful for him.

The custom of divorcing wife irrevocably was followed in the following two ways by all the Muslims of Kashmir Valley except a few tribes:

1) A Sunni husband could divorce his wife by irrevocable \textit{talaq} by declaring the body of his wife as unlawful for enjoyment and that could be done only in conformity with the orders of four sects of Islam.

2) A Sunni husband could also divorce his wife by repeating triple \textit{talaq} against his wife and this was also customary form of divorce among the Zamindar tribe.\textsuperscript{38} It is noteworthy that even today also, triple \textit{talaq} is the most common form of divorcing one’s wife in the State of Jammu and Kashmir and majority of the cases of triple \textit{talaq} reported in India are from there only.

However, the Sunni Muslims of District Budgam added that for the validity of divorce, it is necessary that it had to be administered by the maulvi in presence of a witness. Also the Shias

\textsuperscript{37} \textit{Id.} at 143, Question No. 20.
\textsuperscript{38} \textit{Id.} at 143-144, Question No. 21.
of District Budgam and Pattan provided that in order to effect a valid divorce, it was essential that it must had been recited by an *alim* as an agent of the party to marriage and the *alim* then issued a receipt of the same which had to be attested by two justiciaries and also kept a register with him in which the entry of the divorce had to be made.\(^{39}\)

This was the position of divorce under the customary law as described by Sant Ram Dogra in his book *‘Code of Tribal Customs of Kashmir’* as were being followed by the Muslims of Kashmir Valley until 2007 when the *Jammu and Kashmir Muslim Personal Law (Shariat) Application Act*\(^{40}\) was enacted by the Legislative Assembly of the State under which all the customary laws stood repealed and whose practical application has been dealt in detail by the researcher in the next chapter of this research work. There is also in force the *Jammu and Kashmir Dissolution of Muslim Marriages Act*\(^{41}\) since the year 1999 (1942 A.D.) which provides grounds for the dissolution of marriage to Muslim women. Thus, it becomes crystal clear now that the law which is applicable to the Muslims in matters of divorce, at present, is the classic Islamic Law and not the customs.

As mentioned above, the cases of triple *talaq* are very frequently reported in the State of Jammu and Kashmir even today also but the judiciary has tried to stop this practice in its landmark judgment in the year 2012 in the case of *Mohammed Naseem Bhat v. Bilquees Akhter and other*\(^{42}\). In Naseem Bhat’s case, the Hon’ble High Court of Jammu and Kashmir got the opportunity to interpret the law relating to triple *talaq*. In this case, Hon’ble Justice Hasnain Masoodi held that a Muslim husband does not possess an absolute and unlimited power to divorce his wife under Islamic Law. After this judgment pronounced by Justice Masoodi in the above-mentioned case, the trial courts in Jammu and Kashmir started scrutinising the divorce pleas raised by Muslim men on the touchstone of the said judgment thus, virtually abolishing triple *talaq* in Jammu and Kashmir thereby. But two years later i.e., in the year 2014, the same court reversed its earlier judgment in the case of *Masrat Begum v. Abdul Rashid Khan*\(^{43}\). In this case, Hon’ble Justice Ali Mohammad Magray held that it is beyond the competence of the court to interpret the *Qur’an*ic verses or the precepts of the Traditions of the Holy Prophet (PBUH) without knowing the context in which they were

\(^{39}\) *Ibid.*

\(^{40}\) Act No. IV of 2007.

\(^{41}\) Act No. X of 1999.

\(^{42}\) 2012 (4) JKJ 318.

made and only the Islamic scholars with having full knowledge of religion can interpret the Qur’anic verses. This judgment has once again given Muslim men the absolute license of divorcing their wives at whim. Once again, women are at the receiving ends and they have been made to realise that they are not equal partners in marriage.

But once again in 2016, the High Court of Jammu and Kashmir has upheld its earlier judgment in a review petition filed by Retired Justice Bashir Ahmad Kirmani who had sought a review of the High Court in Naseem Bhat’s case saying that the said court interpreted out of context the verses of the Holy Qur’an and hadith. Justice Hasnain Masoodi said, by dismissing the review petition that the earlier judgment is in strict conformity with the law and a Muslim man cannot have unrestricted and unqualified powers of pronouncing divorce upon his wife under Islamic Law. He added that the Muslim husband’s power of pronouncing talaq is not unbridled but is subject to the limitations provided under Islamic Law itself. He also said that Islamic Law permits talaq only if all other efforts of reconciliation between the estranged spouses fail and therefore, if reconciliation becomes impossible, only then talaq must be pronounced and that too not in a whimsical or arbitrary manner. According to Justice Masoodi, Islam has given woman both- power and respect- but this is being ignored by the Muslim societies.

Further, answering the question regarding the jurisdiction of the court to decide the matter, Justice Masoodi said that the High Court of Jammu and Kashmir is a court of record having inherent and plenary powers under Section 94 of the Constitution of Jammu and Kashmir. The High Court has unlimited jurisdiction, including the power to determine its jurisdiction.44

The court has taken a very good step in curbing the social problem of triple talaq from the society and has also called upon social planners to come forward by stepping in and facilitating the constitution of a mechanism at the village and ward levels to help families that are plagued by marital discord and disharmony and help in resolving their disputes before the situation turns into an irretrievable condition.

5.4.3. Dower

Mahr (dower), as already defined in the previous chapter, is the amount of money or property which the wife is entitled to receive as a consideration from her husband at the time of

marriage. But the word ‘consideration’ used here is not to be understood in the same sense in which it is used in the Contract Act. Under Islamic Law, dower is an obligation that has been imposed upon the husband as a token of respect and love for his wife. The wife’s right to have dower from her husband is a fundamental feature of marriage under Islamic Law. This provision has been laid down as a means of reasonable restriction upon the husband’s unlimited power of dissolution of marriage. The amount of dower that is payable to the wife is generally divided into two types i.e., prompt dower (mahr-e-muajjil) and deferred dower (mahr-e-muwajal). Prompt dower becomes due immediately after a valid marriage takes place between the parties and becomes payable on demand of the wife. Deferred dower, on the other hand, becomes payable on the dissolution of marriage either by death of the husband or by divorce or on the expiration of the period fixed (if any) for the same at the time of marriage.\(^45\) In the Valley of Kashmir also, dower is considered the same way as it is considered under the classic Islamic Law.

But under the customary law of Kashmir Valley, dower was generally paid by the husband on demand of the wife. The customary law of the Valley did not require that the dower should be money only, in fact, cows, sheep or ponies were also fixed as dower of the wife and were written-down in the nikah-nama itself and their issues were considered to be the property of the wife. On the death of the wife, her children used to inherit her property and the payment of mahr was made in that way only. In case, where the wife survived her husband, the whole of the landed property was entered in her name upon which she enjoyed usufructuary rights for life or till her remarriage.\(^46\)

Sant Ram Dogra has written that even if the wife was divorced on the ground of adultery, then also she was entitled to her deferred dower under the customary law of the Valley. But there was an exception with the Sunni Muslims of Districts Anantnag, Baramulla, Sopore and Srinagar and also the Gujars of Nunar who did not recognise the above custom of the payment of deferred dower to the wife who was divorced on the ground of adultery. Among the Sunni Muslims of Nunnar had the custom of remitting one-fourth of deferred dower on divorce by the adulterous wife in favour of the husband and the remaining three-fourths of the mahr, ponies and cattle had to be written-down in the mahr-nama. Among the Bakkerwals and other tribes of Pakhli, there was the custom of cancelation of mahr by forcibly transmitting the divorce into khula and an adulterous woman was never divorced.

\(^{45}\) Supra Note 1 at 219-224.

\(^{46}\) Supra Note 30 at 146, Question No. 24.
until she supplicated for *khula*. Among these tribes, the custom of paying *mahr* in the form of ornaments, clothes, etc. was prevalent. Among the *Gujjars*, generally no portion of *mahr* was kept in arrears and the same was used to be paid at the time of *nikah* only.

Among certain tribes like *Sayeds*, *Pirs* and *Babas* of Chharat, *Watals* and *Shup-watals* of District Kulgam and Nunnar, and the *Sunni* Muslims of Pattan had the custom of never paying deferred dower and wife generally remitted the same by gift.\(^{47}\)

Now the Muslims are governed by the *Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007*. Prior to the said Act, they were governed by the *Jammu and Kashmir Muslim Dower Act, 1977* (1920 A.D.) under which the traditional Islamic Law rules were applicable in cases of dower with certain modifications like the court’s authority to reduce the amount of dower if it is observed that the same had been fixed unreasonably and was beyond the paying capacity of the husband.\(^{48}\)

### 5.4.4. Special Property of Woman

In the Valley of Kashmir, there was the custom among certain tribes of limiting the woman’s right of enjoyment over her special property (if any). Generally, all the Muslims of Kashmir Valley, as claimed by Sant Ram Dogra, followed the custom that if a woman held any special property of her own independently, she had full right of its enjoyment and also, she had full powers over such property to gift either to her sons, or daughters, or to any other person of her family in whose favour she wanted to make such a gift. Her husband had no claim or powers over such special property of his wife during her life-time. And in case, the wife died childless and there arose any dispute with regard to such property, then the same had to be divided between the husband of the deceased woman and her brothers according to the *Shari’ah* rules, otherwise, in the absence of any dispute, it used to be given to the husband only.

But the *Dunga Hanz* tribe of Anantnag followed the custom of restricting such woman’s power of disposing-off her own special property by putting the condition that if the wife wanted to dispose-off her special property, then she could do so only with the consent of her husband. And if the husband had to dispose-off the property of his wife, then her consent was required only if the property that was meant to be disposed-off was acquired by her in lieu of

\(^{47}\) *Ibid.*

\(^{48}\) Act No. XLIV of 1977.
her dower at the time of marriage. But the Gujjars of Budgam followed the custom under which if a wife had to make a gift of her dower in favour of her husband, then her parents were to be summoned to bear witness to the same matter.\(^{49}\)

On the other hand, the Bomba Rajas of Uttarmachhipura had the custom under which the husband had full powers and rights over the special property of his wife. Even the dowry received by wife at the time of her marriage was considered as sankalp in the favour of her husband over which he enjoyed full rights.\(^{50}\) In this way, women of Kashmir Valley, in the past, had been exploited in many ways by restricting their rights over their own property and their husbands were at liberty to use or dispose-off the property upon which they had no right under Shari’ah.

5.5. Customary Institutions Governing Muslims of Jammu and Kashmir

Customs are not unknown to Islamic law as the Islamic Law by itself is a modification and improvement of the customs prevalent in the pre-Islamic Arabian society. But some of the customs which remained applicable to the Muslims of Jammu and Kashmir for a very long time were in direct conflict with the Shari’ah and still they remained in force until 2007. Some of such well-recognised un-Islamic customs were the institution of dukhtar-e-khana nashin, khana-damad and pisar-e-parwarda. These customs were not only unrecognised under the strict principles of Shari’ah but also affected the socio-economic rights of the concerned parties to a large extent. The following conditions had to be fulfilled for the application of the customary law by the courts:

- The primary rule was that a party was to be governed by his personal law in matters that had been mentioned in Section 4 of the Sri Partap Jammu and Kashmir Laws Consolidation Act.
- In case, where a party wanted to deviate from the personal law and governed by any specific custom, then the party alleging such a custom had to prove it. Where the party succeeded in proving his claim on the basis of a specific custom, then his claim had to be governed by that particular custom and not under the personal law.

\(^{49}\) Supra Note 30 at 218, Question No. 82.
\(^{50}\) Id. at 217, Question No. 81.
- As a general rule, there was no presumption in favour of a custom. The person pleading a specific custom had to establish both the validity and the factum of the custom pleaded.

- Where a party wanted to be governed by a specific custom applicable to his claim, then that custom had to be pleaded specifically. For establishing such a custom, the party had to provide the best possible evidence and also a high order was needed for the establishment of existence of such a custom that had been claimed in derogation with the personal law of the parties.

- In cases, where the parties alleged their claim to be based on the existence of a specific custom but failed to prove the same, then their claim had to be settled by applying their personal law in the same matter.

From the given conditions, that were precedent for the application of customary law, it is well established fact now that the customs were not applicable by themselves in matters before the courts and it was the responsibility of the parties, who wanted to be governed by a specific custom, to plead and prove the existence of that custom with cogent evidence. Thus, it is clear now that in the Valley of Kashmir, the Muslims had the option of being governed by the customs instead of the principles of Shari'ah, if they succeeded in establishing the validity of such customs. Most of these customs were in strict derogation with the principles of Islamic Law but still used to hold a good place since a long time of history in the Valley of Kashmir. Looking into the matter of fact that these customs were in contradiction to the provisions of the Islamic Law, especially in matters relating to the rights of women in maintenance and inheritance, the Jammu and Kashmir Legislature has repealed them and has made applicable the provisions of Islamic Law to the parties in their personal matters under the Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007. Though the customs are no more applicable in the Valley now but for the study of practical application of Islamic Law and the awareness of their rights (in personal matters) among the women of Kashmir, it becomes necessary to have an understanding of these un-Islamic customs and their effects on the rights of the parties. Therefore, a detailed study of some of such customs and their effects on the rights of the parties, especially women, has been provided below:

5.5.1. Institution of Dukhtar-e-Khana Nashin

In the Valley of Kashmir and District of Ladakh, there was a custom followed known as the institution of dukhtar-e-khana nashin. Under this institution, the husband was brought home
for a daughter by her father where he was desirous to keep his daughter in his own house even after her marriage. Usually, when a daughter is married, she has to follow her husband to his house and both live there but the institution of *dukhtar-e-khana nashin* was an exception to this general rule that was followed in Kashmir and District of Ladakh. This was a well-recognised institution in Kashmir and was followed by many families. The husband of such a daughter i.e., *dukhtar-e-khana nashin* was called as ‘*khana-damad*’ which will be discussed next along with his rights and duties. In the marriage of a *dukhtar-e-khana nashin* or *khana nashin dukhtar* (as is also called), it was the father of the girl who made all the arrangements for marriage and incurred all the expenses for the provisions made for both the daughter and her would-be husband and the son-in-law (*khana-damad*) had not to spend anything on the marriage. The son-in-law who was brought in home was treated as an equivalent to a son under this institution. Justice Imtiyaz Hussain, while referring to the meaning given to it in the case of *Sultan Loan v. Akbar Dar*, has quoted the institution of ‘*dukhtar-e-khana nashin*’ in the following words:

“The expression ‘*khana nashin*’ according to etymological meaning signifies nothing more than that the daughters continued to live in their father’s house in spite of their marriage. It seems to have become more or less a term of art well understood in Jammu and Kashmir State as implying something more than the meaning referred to when a daughter is spoken of as khana nashin, the conception seems to be that the father treated such daughter in all respects as a son.”

He further describes:

>“Dukhtar-e-khana nashin is an institution whereby a man who is desirous of keeping his daughter in his own house even after her marriage, associates with him in his life-time the husband of such a daughter, who resides with him, cultivates his lands for him, becomes a member of his family and eventually succeeds to him for a life interest.”

Nila Kanth Ganjoo has provided in his book ‘*A Digest of Customary Law of Kashmir: As at Present Judicially Ascertained and as Specified in the Rivaj-i-am*’ the reason behind the existence of the institution of *dukhtar-e-khana nashin* which is as follows:

“The whole reason of having a system of *khana nashin* daughter is to disallow all outside engrafting on a stock when male descendants have exhausted and to preserve the devolution of the property into the hands of a

---

51 Walter Roper Lawrence, *The Valley of Kashmir* 267 (Asian Educational Services, New Delhi, 2005).
53 3 J&K L.R. 189.
54 *Supra* Note 1 at 297.
But this contention of the author does not seem to be the only reason behind the recognition of the institution of *dukhtar-e-khana nashin* as there has been found many instances in the Valley who have kept their daughters as *khana nashin duktar* irrespective of the presence of sons in their families. Thus, it will not be true to say that the intention behind the keeping of daughter as *khana nashin dukhtar* was only to make sure that the property of the family should not go outside the one’s lineage. This, no doubt, may be the one and the main reason behind following the custom but there have been found many other instances also where fathers had kept their daughters as *khana nashin dukhtar* in their own home for other reasons like the refusal of the sons to stay with their fathers after marriage, or the father did not want to send his daughter to her husband’s house due to his love and affection for her. The custom of keeping *khana nashin dukhtar* was found mostly in peasants, illiterates, low castes and low income families and is prevalent today also at many places like District of Ladakh and other places in Kashmir Valley. But educated and elite class also retained this institution with certain exceptions, like when the father was sonless and no one was present in the family to look after the household or where the daughter suffered from some kind of physical defect, in such cases, father preferred to appoint his daughter as *khana nashin dukhtar*. But the peasants or other low income families chose to appoint their daughters as *khana nashin dukhtar* and preferred *khana-damad* to adoption. This institution is still prevalent among the Muslims of Valley in some Districts. During the research made by the researcher, at least seven to eight cases of such *dukhtar-e-khana nashin* have been found in Tehsil Bijbehara in District Anantnag, Mir Gund village in Tehsil Pattan of Baramulla District and Chanpura and Dadna villages in District Budgam.

There were no formalities laid down under the customary law of any tribe in Kashmir that had to be complied with or the ceremonies that had to be performed for the appointment of daughter as a *khana nashini* but the only requirement was that the daughter had to reside in her father’s house along with her husband from the day of her marriage only. But the mere fact that the son-in-law was residing in his father-in-law’s house along with his wife did not

---

make him \textit{khana-damad} and his wife the \textit{khana nashin dukhtar}. In such cases, intention of the father of making his daughter as \textit{dukhtar-e-khana nashin} was required to be proved and such proof had to contain the clear and the unequivocal intention of the father of such a daughter who claimed to be a \textit{khana nashin dukhtar}.\(^{58}\)

**Origin and Recognition of Institution of Dukhtar-e-Khana Nashin**

Regarding the origin of the institution of \textit{dukhtar-e-khana nashin}, N.K. Ganjoo contends that the said institution is of Hindu origin but this contention has been denied by later authors like Mohd. Altaf Hussain Ahangar, Walter R. Lawrence and Hakim Imtiyaz, in the books which they have authored. They claim that this particular institution that was prevalent in the Valley of Kashmir and Ladakh is of Muslim origin. Lawrence, on the other hand, has written about the origin of the institution of \textit{dukhtar-e-khana nashin} in Kashmir Valley in the following words:

\begin{quote}
“It was in Sikh times, when the Kashmiri Muslims were being compelled to forcibly labour and every Muslim of the Valley was required to place service of at least one member of his family at the disposal of government who were being sent to far off places like Ladakh, Baltistan and Gurez for carrying food provisions. This fact necessitated those Muslims who were not having any male issue to take a boy for their daughter as \textit{khana-damad}.\(^{59}\)
\end{quote}

In this way, the institution of \textit{dukhtar-e-khana nashin} came into existence in the Valley of Kashmir in order to meet certain temporal needs of the society especially Muslims but could not be done away because of the advantages that it provided to sonless fathers. With the passage of time it became a well-recognised custom for people of the Valley which was followed on a large scale by the Kashmiri Pandits and Sikhs also.

\textit{Dukhtar-e-khana nashin} had been a well-recognised institution under the customary law of Kashmir. Judiciary of the State of Jammu and Kashmir had also recognised this institution which can be witnessed from many of the judicial decisions in this regard. One such decision of the High Court of Jammu and Kashmir which recognised the institution of \textit{dukhtar-e-khana nashin} was given in the case of Rasheeda Akthar v. State Coram\(^{60}\) in which it was held by the court that the custom of bringing \textit{khana-damad} for \textit{khana nashin dukhtar} was well-recognised and was equally prevalent in the Valley of Kashmir.

\(^{58}\) Baggi v. Mamum, 31 PR. 1894.  
\(^{59}\) Supra Note 51 at 267.  
\(^{60}\) Decided by the High Court of Jammu and Kashmir on 7 October, 2005.
Further, the said institution was also recognised by the Jammu and Kashmir High Court in the case of *Amina Begum v. Ghulam Mohd.*\(^{61}\) where it was observed by the court that if a female had or had no rights as a daughter, it did not have reflection upon her rights in some other capacity namely as a sister or any other relation. When a daughter was spoken of as a *khana nashini*, the conception seemed to be that the father treated such daughter in all respects as a son and that by custom she was entitled in the matter of inheritance to occupy the same position as a son would have done.

Also, in the case of *Mukti v. Aziz*, the High Court of the State of Jammu and Kashmir recognised the institution of *khana nashin dukhtar* in the following words while dealing with the question of appointment of a daughter as *khana nashin dukhtar*:

> “Regarding the persons who can confer status of *khana nashini* on a daughter, there has been some controversy in judicial circles for a considerable time. Generally, the custom as construed by courts from time to time barring some exceptions, established it beyond doubt that it is “the father and father alone who can make his daughter *khana nashin*. He can do so even on her remarriage too.”\(^{62}\)

Apart from the recognition by the judiciary, the institution of *dukhtar-e-khana nashin* had also been recognised by the following Statutes and rules:

2. *Jammu and Kashmir Agrarian Reforms Act, 1976*\(^{64}\) and
3. *Revenue Department Standing Order No. 23A.*\(^{65}\)

Justice Hakim Imtiyaz claims that although the institution of *dukhtar-e-khana nashin* was a custom that was contrary to justice, equity and good conscience, still it could not be prohibited because it was too deep-rooted in the society.\(^{66}\) It was not just that the appointment of *khana nashin dukhtar* had become a custom for the people of Kashmir with the purpose of providing parents with the help and care of their daughter and son-in-law in their old age but it had also affected the rights of the parties provided under *Shari‘ah* to a greater extent in matters of maintenance of wife, restitution of conjugal rights of the husband and the wife and

---

\(^{61}\) 7 J&K L.R. 139.
\(^{62}\) *Supra* Note 57 at 157.
\(^{63}\) Section 68.
\(^{64}\) Section 2 (12).
\(^{65}\) Rule 64 (b).
\(^{66}\) *Supra* Note 1 at 297.
most of all, the system of inheritance (especially women’s right to inheritance) which have been discussed in detail later, in this chapter only.

**Person Authorised to make Appointment of Khanan Nashin Dukhtar**

The question that who could appoint a daughter as *khana nashin dukhtar* under the customary law of Kashmir Valley had come for consideration before the High Court of Jammu and Kashmir in many cases. There is a custom recognised of same nature like that of *dukhtar-e-khana nashin* prevalent in the State of Punjab which is known as the institution of ‘ghar jamai’ where a sonless father brings home his son-in-law who stays along with his wife in the house of his father-in-law. For bringing home a *ghar jamai*, it is necessary that the father must not have a son living. But unlike the State of Punjab, it was not essential that the father who appointed his daughter as a *khana nashini* had to be sonless. This question came before the Jammu and Kashmir High Court in the case of *Rasool v. Ahmad Rather* where the father had appointed his daughter Mst. Jani as a *khana nashin dukhtar* in spite of the fact that he had two sons also. In this case, the appointment of the daughter as *dukhtar-e-khana nashin* made by her father was challenged before the court and thus, also her share in the same capacity in the deceased’s property. The court upheld the appointment of Mst. Jani as the *khana nashin dukhtar* and she succeeded to one-third property of her father even in the presence of her two brothers.

The same way, it was also not necessary that the appointment of the daughter as a *khana nashini* could be confined to one daughter only and other daughters could not be made *khana nashin* daughters. It was held by the High Court of Jammu and Kashmir in the case of *Farzi v. Mohi-ud-Din* that both the daughters viz., Mst. Zebi and Khatji were khana nashin daughters and not merely one of them only i.e., Mst. Zebi or Khatji were so.

Regarding the persons who were eligible to make an appointment of *dukhtar-e-khana nashin* under the customary law of the State, there had always been some controversies for a considerable time among the various judicial decisions of the courts. It was held in the case

---

68 Decided by the Court on 14 Asuj, 1991 B under Civil 2nd Appeal No. 152 of 1991 B (Unreported).
69 *Supra* Note 57 at 156-157.
70 Decided by the Jammu and Kashmir High Court on 30 Katik, 1992B under the Civil 1St Appeal No. 61 of 1992B.
71 *Supra* Note 57 at 157.
of Mukti v. Aziz\textsuperscript{72} that it was an established view that only father and father alone could appoint his daughter as a \textit{khana nashin dukhtar}.

On the question that whether a daughter could be made a \textit{khana nashini} after the death of the father had come for consideration many times before the courts of Jammu and Kashmir. Earlier, in the case of Mohamad v. Mukhti\textsuperscript{73}, the court held that a daughter could not be appointed as a \textit{khana nashin dukhtar} after the death of the father and thus, the question of his intention even by producing some kind of oral or written documents did not arise at all. But later on, the same court decided that if the father, in his life time, had the intention of doing so, then after the death of the father, his intention of making a daughter as \textit{dukhar-e-khana nashin} could be brought into action but strict proof of the intention was required to be brought before the court for proving such an appointment. Thus, in the case of Ramzan Ghani v. Zena Bibi\textsuperscript{74}, it was held that the daughter could not be appointed as a \textit{khana nashin dukhtar} as there was no will or direction made on the part of the father. The decision of the revenue court in this case implies thus, that if the father had made a will or issued any specific direction for making his daughter as \textit{khana nashini}, the same could be appointed as \textit{dukhtar-e-khana nashin} by anyone else who had a right to give in marriage such a daughter of the deceased after his death.\textsuperscript{75}

\textbf{Mother’s Right to Appoint her Daughter as Khana Nashini}

In the State of Punjab, it is a well-recognised law that if the husband has authorised his widow to appoint their daughter as \textit{khana nashini} and bring home any particular person as \textit{ghar jamai}, then she can do so validly.\textsuperscript{76} But in the case of Saja v. Ahad Sheikh\textsuperscript{77}, the contention that the mother could validly make the appointment of \textit{khana-nashin daughter} under the customary law of Kashmir, if she was required to do so by a direction of her deceased husband was rejected by the Full Bench of Jammu and Kashmir High Court. The court held that there had been neither the evidence of requisite standard nor any authoritative judicial decision in the same regard.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{72} Decided by the High Court of Jammu and Kashmir on 19 Har, 1996B.
\item \textsuperscript{73} Decided by the Revenue Court on 24 Asuj, 1991B.
\item \textsuperscript{74} Decided by the Revenue Court on 10 October 1934.
\item \textsuperscript{75} Supra Note 55 at 144.
\item \textsuperscript{76} Alam Bi v. Lathua (1920) 1 lah. 245.
\item \textsuperscript{77} (1950) 9 J&K L.R. 195.
\item \textsuperscript{78} Supra Note 57 at 158.
\end{itemize}
It was in the case of *Khatji v. Nabir*\(^{79}\) that the mother’s right to make a valid appointment of her daughter as a *khana nashin dukhtar* under the customary law of Kashmir was recognised by His Majesty, Maharaja Bahadur in his capacity as the highest Revenue Officer of the Dogra Regime in the State of Jammu and Kashmir then. His Majesty observed in the same case, while rejecting the decisions of the Governor and the Revenue Courts:

“There was no proof that a custom existed by which father alone can make his daughter as khana nashin dukhtar and even if it exists, cannot be accepted for minor daughters who are entitled to consideration and would never become khana nashin daughters.”\(^{80}\)

Thus, the mother got the right to appoint her daughter as a *khana nashini* but only if her husband was not alive at the time of her marriage and therefore, the mother could not do so during the life-time of her husband. In this way, claims N.K. Ganjoo, the mother’s right to make the appointment of her daughter(s) as *dukhtar-e-khana nashin* got recognised but could not survive for a long time.\(^{81}\) The later decisions of both, the civil courts as well the revenue courts, showed greater disregard to the decision of His Majesty, Maharaja Bahadur in Khatji’s case and held in the case of *Sona Khan v. Rajab Parry*\(^{82}\) that even the case where the remarriage of the daughter took place and in her first marriage, she was made *dukhtar-e-khana nashin* by her father, mother had no right to appoint such a daughter as a *khana nashini* on her remarriage.\(^{83}\)

The controversy regarding the mother’s right to make an appointment of her daughter as a *khana nashin dukhtar* was finally settled down by the Full Bench of Jammu and Kashmir High Court in the case of *Saja v. Ahad Sheikh*,\(^{84}\) when it held that it was the father and father only who could bring a *khana-damad* into the family for his daughter and thus, make her a *dukhtar-e-khana nashin*. Thus, it becomes crystal clear in the light of the above decisions of the courts in Jammu and Kashmir that under the customary law of the State, only the father had the right to appoint her daughter as *dukhtar-e-khana nashin* and mother had no right in this regard after the death of her husband even if the husband had authorised her to do so.

---

\(^{79}\) His Highness order dated 15 April, 1937.
\(^{80}\) *Supra* Note 57 at 160.
\(^{81}\) *Supra* Note 55 at 116.
\(^{82}\) Decided by the High Court of Judicature on 9 Asuj, 2002B under the Civil 2\(^{nd}\) Appeal No. 9 2002B
\(^{83}\) *Supra* Note 1 at 302.
\(^{84}\) (1950) 9 J&K L.R. 195.
Maintenance of Dukhtar-e-Khana Nashin

Under Islamic Law, the maintenance of wife is wholly the responsibility of the husband. Irrespective of the fact of the poor financial condition or low earning capacity of the husband, he has to provide maintenance for his wife with the basic necessities of life that are required for the existence of a human being like the food, clothing, shelter and medicine. The husband’s right to maintain his wife under Islamic Law is so absolute that if the husband fails to provide maintenance to his wife for a period of two years, then the wife has the right to obtain a decree of dissolution of marriage from the court of law on this ground. Islamic Law provides that after marriage, the wife moves into the husband’s house and thus, all her rights to maintenance from her parents come to an end during the subsistence of her marriage with her husband. After marriage, it is the responsibility of the husband to provide maintenance for his wife.

But under the customary law of Jammu and Kashmir, when a daughter got married but stayed in her parental house along with her husband instead of moving into the latter’s house, she became dukhtar-e-khana nashin and her husband was known as khana-damad. Justice Hakim Imtiyaz has written in his book ‘Muslim Law and Custom’ that under the institution of khanadamadi which was prevalent in the Valley of Kashmir, when a man chose to become khana-damad he, in fact, put himself under the customary obligation of living in his father-in-law’s house permanently because that solved many of the problems of the wife’s parental family. He put himself in a position of enjoying some amenities himself and thus, he did not have to bother for his wife’s maintenance during the period for which he stayed in the in-law’s house. But, in case, the khana-damad left the house of his in-laws and chose to stay away from the wife, then he had to provide maintenance to his wife. And if he failed to provide the same to his wife continuously for a period of two years, in spite of her demand then the wife i.e., dukhtar-e-khana nashin had the right to seek divorce against her husband in the court of law on this ground only if she was ready to live with him in his parental house or wherever he asked her to live with him.\(^\text{85}\) In this regard, it was held by the High Court of Jammu and Kashmir in the case of Rasool Soofi v. Mst. Asha Bibi\(^\text{86}\) that where the khana-damad did not continue to live in khanadamadi, and asked his wife to accompany him for

\(^{85}\) Supra Note 1 at 261.
\(^{86}\) 1936 P.L.R. J&K 104.
living in his house with him and the wife refused to stay there, then the wife had no claim for maintenance allowance from her husband.

5.5.2. **Institution of Khana-Damadi (gari peth zamatur)**

Muslims, in the Valley of Kashmir, preferably marry their daughters to their near relations. After marriage the father sends his daughter to her husband’s house where she has to live for the rest of her life. But where this was not possible, the girl’s father used to bring home some man and married his daughter to him and kept both, his daughter and her husband, in his house. Such son-in-law was known as khana-damad into such a family. A khana-damad was usually brought home where the father had no male issue and he asked some man from his own tribe to give him a son whom he brought home and kept him there and after a certain period, if he was satisfied, married that boy to his daughter and made him his khana-damad. Khana-damad had to stay in his father-in-law’s house for the rest of his life. Khana-damad was generally brought home where the father-in-law had no heir as the females were not considered as heirs under the customary law of Kashmir. Under the institution of khana-damad, the father-in-law treated his son-in-law as his own son. To bring khana-damad for his daughter was a more economical marriage for the father than to marry his daughter outside the home. Here, the father bore all the expenses and the son-in-law had not to spend on the marriage. After the marriage, the father-in-law used to give his son-in-law gift deed of some movable or immovable property after a proper assessment. After the death of the father-in-law, the property devolved upon the daughter of the deceased and not upon the khana-damad but in practice, it was the khana-damad who exercised full control over the estate.87

Thus, it can be said that khana-damad or resident son-in-law was a man who was married to the daughter of a proprietor and lived in his father-in-law’s house instead of taking his wife to his own house and also performed services of his father-in-law and helped him in managing his property.88 But it was necessary for the validity of marriage of the proprietor’s daughter with the man who was to be taken into khanadamadi that there did not exist any of the prohibitions that have been recognised by Islamic Law in relation to marriage.89

---

88 Nabia v. Fatta, 2 P.R. 1901.
89 Supra Note 55 at 112.
institution of *khana-damad* in the Valley but had just tolerated it. He provides, further, the following Kashmiri proverb to support his claim:

*“Gari pett zamatur, bara pett hoen”*\(^90\)

The above proverb means that son-in-law who lived with his father-in-law was like a dog at the cuter door. This saying shows the status of a *khana-damad* in his father-in-law’s house. The reason that the society had tolerated the institution of *khana-damad* was because of the advantages that the *khana nashin* daughter’s family used to get from the *khana-damad* e.g., the father-in-law got a boy who worked for him like a son and secondly, as already mentioned above, the expenses of the betrothal and marriage were very little. This institution was generally practised by the peasant families of the Valley. They married their daughters at a very young age and if a father had to make his daughter a *khana nashin dukhtar*, he used to bring home some boy of young age who stayed into the family and worked over there like a son. If the man who brought the boy into the family found the work, character and conduct of the boy as satisfactory, he made the boy his *khana-damad* otherwise not.\(^91\) Lawrence, according to Mohd. Altaf Hussain Ahangar, stands witness to the social status of *khana-damad* in the following words:

> “When a man’s daughter is three years old… he takes a boy into his house as *khana-damad* and this boy until he marries the daughter of the house, has to work like a drudge. The system of *khanadamadi* is said to have become common in Sikh times and if forced labour was wanted for transport, the unfortunate *khana-damad* was always sent. If he came back alive, he won his bride. If he died, it did not matter as the son of the house, at any rate, escaped… Some men are very unscrupulous in the matter of *khanadamadi* and turn boys out of their house on small pretext and give their daughter, to a stranger, but as rule, the boy who has worked out his term of probation gets his bride.”\(^92\)

This shows the position of a *khana-damad* in father-in-law’s house. From the above statement of Lawrence, it can be very clearly understood that it was the father-in-law who used to get most of the advantages and the status of *khana-damad* was not much better into his father-in-law’s house. He had to work like a slave before his marriage with the man’s daughter who brought him into the family and still no guarantee that he would get his bride or not, as the man could turn him out on any pretext if he was not satisfied with his work or character. Even if he got his bride, he had to perform the household work and help the father-

\(^{90}\) *Supra* Note 57 at 175.
\(^{91}\) *Supra* Note 1 at 207.
\(^{92}\) *Supra* Note 51 at 267 as cited by *Supra* Note 57 at 176.
in-law in the cultivation of land also. In short, the status of a *khana-damad* was no better than a slave who had no say and choice in his own matters until he lived in the father-in-law’s house.

The institution of *khanadamadi* was different in the Valley of Kashmir from its adjoining State of Punjab in two ways:

1) In Punjab, a man can be made *khana-damad* only after the marriage of the daughter with him. He comes to live into the father-in-law’s house only after a valid marriage takes place with the daughter of the man supposed to be his would-be father-in-law. But in the Valley of Kashmir, the man who wanted to make his daughter a *khana-nashin dukhtar* used to bring home some boy of very young age from his near relations and such boy stayed at the would-be father-in-law’s house and worked over there. If the man was satisfied with his work, then he married his daughter with the boy otherwise turned him out of the family if he did not want to do so. Thus, under the customary law of the Valley, *khana-damad* used to get appointed even before his marriage took place with the appointor’s daughter.

2) The institution of *khanadamadi* in the State of Punjab requires that the appointor must be sonless if he wants to bring home *ghar jamai* for his daughter. But in Kashmir Valley, this was not a pre-condition for the appointment of *khana-damad*. Thus, a father could bring home some boy and appoint him as his *khana-damad* even if he had a son or sons living and in this way, raised the status of the daughter to that of a son.  

### Islamic Basis of the Institution of *Khanadamadi*

Under the institution of *khanadamadi*, the condition is imposed in the marriage contract by the father-in-law upon his son-in-law that he will reside with his wife in her father’s house. The institution of *khanadamadi* is even recognised by Islamic Law also and its *Shari’ah* basis can be traced from the following saying of Hazrat Imam Jafar-as-Sadiq (a.s.) as quoted by Tyabji:

> “If a man marries a woman and there is a stipulation for her residence amongst her (own) people or in a specified country, such a stipulation is permissible to them. And every stipulation is permissible among Muslims unless it legalizes what is forbidden or forbids what is permissible.”

---

93 *Rasool v. Ahmad Rather*, decided as Civil 2nd Appeal No. 152 of 1991 BK on 14 Asuj, 1991 BK.
Tyabji, further, writes in this regard:

“An agreement that the wife shall reside in any particular place does not infringe either any specific rule of law or public policy even assuming that it may occasionally deprive the husband of the wife’s society; though presumably in such a stipulation it is implied that for the time being the husband too should live with the wife’s parents.”

Thus, it can be concluded from the above statement of Tyabji and also from the saying of Imam Jafar-as-Sadiq (a.s.) that the institution of khanadamadi is well-recognised by Islamic Law also and there is nothing in this regard which is prohibited under Shari’ah. Thus, under Shari’ah, a stipulation can be validly entered into the marriage contract itself that the wife shall reside with her parents in their house even after the marriage and shall not accompany the husband to his house. An agreement entered into at the time of marriage that the husband shall have to reside with the wife at her parental house after their marriage is also valid under Islamic Law and the husband shall be obliged under law to fulfil such a stipulation.

It generally happened in the Kashmir Valley under the institution of khanadamadi that the agreement under which the husband had to reside with his wife at her parental house was entered into either before or after the nikah ceremony along with some other conditions. If the conditions were not against the spirit of Islamic Law or opposed to public policy, it was regarded as incumbent upon the khana-damad to fulfil those stipulations made in the agreement. Dealing with a case of the condition stipulated in the marriage contract that the husband would divorce his wife if he declined to stay with the wife at her parental house as khana-damad, Justice Jalal-ud-Din held in Mohd. Khan v. Mst. Shahmali94:

“I am in agreement with the learned Appellate Court that the condition as laid down in the agreement is not opposed to the Muslim Law or public policy and the violation of this condition would entitle the wife to claim separation from her husband.”

He, further, held in the same case:

“In my opinion, a pre-nuptial agreement according to which the husband undertakes to pay the amount of marriage expenses incurred by his father-in-law in case he leaves the parental house of his wife is not opposed to public policy of the village-folk who usually bring khana-damad for the daughters and keep sons-in-law in their houses. When a villager brings a khana-damad for his daughter, he has to undergo expenses for the marriage. The husband has almost to incur nothing. It is the father-in-law who has to make provisions for everything both for his son-in-law and for daughter kept at home. In fact, the khana-damad is brought as a son in the house.

94 AIR 1972 J&K 8.
Should the son-in-law repudiate his khanadamadi and decide subsequently to leave parents’ house of his wife and to take his wife along with him or runs away from there without any reason and does not maintain his wife and perform the matrimonial rights, he upsets the whole arrangements of the family and of the house. On the happening of such a contingency and in such a situation which is vexing both for his father-in-law and for his wife, if he is called upon to pay the specified amount (which, however, must be reasonable according to the paying capacity) undertaken by him to pay, can it be said that the terms of such pre-nuptial agreement are void and unenforceable and the clause relating to its enforcement is unconscionable or opposed to public policy? In my opinion, it is not.”

It becomes clear, thus, from the views of Justice Jalal-ud-Din held in the above-mentioned case that any stipulation that is not against the Islamic Law or opposed to public policy could be validly entered into between the khana-damad and his father-in-law and khana-damad was bound to fulfil those obligations of the agreement. But the conditions could not be such which were beyond the fulfilling capacity of the son-in-law. Therefore, both the Islamic Law and the judicial system recognised the institution of khanadamadi completely unless it was based upon any condition that was against the Shari’ah or was opposed to public policy.

**Person Authorised to Appoint Khana-Damad**

The question that who could make the appointment of khana-damad in the family had always been brought before the courts in the Valley of Kashmir and there had always been the conflicting decisions in cases on this point. In some cases, it was held that the mother of the girl could also bring home a boy and appoint him as khana-damad, if her deceased husband had asked her to do so but she was not authorised to take such a step on her own i.e., making the appointment of khana-damad during the life-time of her husband. But the controversy was finally settled down by the full bench of Hon’ble High Court of Jammu and Kashmir in the case of Saja v. Ahad Sheikh when it held that it was the father and father alone who could make the appointment of khana-damad and the mother had no such right, neither in the life-time of the father nor after his death.

**Khana-Damad’s Right to Restitution of Conjugal Rights and Liability of Maintenance of Wife**

As mentioned earlier also that when the husband agreed to become a khana-damad, he put an obligation upon himself that he would live with his wife in her parental house. In that case, he

---

95 Supra Note 1 at 208-209.
96 9 J&K L.R. 195.
was obliged to live in his father-in-law’s house and he could not refuse afterwards from staying with wife in her parental house. But if he chose to do so and ran away from the wife’s parental house and asked her to accompany him to his own house or any other place where he was going to stay, then the question arose that whether he could bring a suit in the court of law for the restitution of conjugal rights against his wife or not? The same question came before the High Court of Jammu and Kashmir for consideration in the case of *Rasool Sofi v. Asha Bibi* in which the husband refused to stay with his wife in her father’s house and filed petition for the restitution of conjugal rights against her. The court held in that case:

“The custom of *khana nashin* son-in-law is recognised custom in the State and incidence attached thereto also shall be recognised. We give no positive finding on the subject but it is possible that on a case arising in this State of restitution of conjugal rights the woman may refuse conjugal association with her husband on the ground that the marriage was held on the footing of his promising to be a *khana nashin damad* and on his breaking the promise, he was not entitled to compel her to leave her father’s house.”

Thus, the court refused to grant the decree of restitution of conjugal rights to the husband against his wife on the ground of breaking his promise to live with her in her parental house.

It can be said that if the *khana-damad* left his father-in-law’s house without any just and reasonable cause, then he could not bring a suit against his wife for the restitution of his conjugal rights as it was he who was at fault and had broken the promise made at the time of marriage and hence, the wife could not be compelled to stay with him without her consent at a place other than her parental house.

The decision of the court given in the above-mentioned case of *Rasool Sofi v. Asha Bibi* got further support from a subsequent case of *Abdul Ahad v. Raja*, in which a division bench, consisting of Chief Justice Ghose and Justice Masud Hasan, held that *khana-damad* could not compel his wife against her wishes to leave her parental house and stay with him at a place where he wanted her to stay and if he did anything of like nature, no suit could lie against the wife for the restitution of his conjugal rights.

The view taken by the High Court of Jammu and Kashmir in the above two cases got changed in the case of *Jani v. Mohd. Khan* where the same court constituting a full bench

---

97 *Abdul Ahad v. Raja*, Civil 2nd Appeal No. 201 & 204 of 2003.
98 38 P.L.R. J&K 104.
99 *Supra* Note 1 at 293-294.
100 38 P.L.R. J&K 104.
101 Civil 2nd Appeal No. 201 & 204 of 2003.
102 AIR 1971 J&K 40.
upheld the husband’s claim for the restitution of his conjugal rights against his wife. In this case, while commenting on Abdul Ahad’s case, the Jammu and Kashmir High Court held:

“On a careful analysis and perusal of these observations, we do not consider this judgment as an authority for the general proposition that no suit in any circumstances lies for the restitution of conjugal rights at the instance of khana-damad. the Division Bench has rightly pointed out that the Muslim law has been abrogated only to the extent so far as custom imposes an obligation on the husband to live with his wife, but if the wife without any lawful excuse refuses to perform her marital obligations in her father’s house, a suit for restitution of conjugal rights would certainly lie to enforce these obligations outside the house of the father of the wife.”

Thus, it becomes crystal clear in the light of the above decisions of the Jammu and Kashmir High Court that where the khana-damad left the house of his father-in-law without any reason then he could not bring any suit for the restitution of his conjugal rights against his wife who refused to leave her parental house. But if the khana-damad had a genuine reason to leave his father-in-law’s house and asked his wife to come with him to reside at another place with him and she refused to accompany her husband to his place without any just and reasonable excuse, then the husband could file a suit against her for the restitution of his conjugal rights and the court had to grant the decree regarding the same in his favour.

Regarding the khana-damad’s liability for the maintenance of his wife, it has already been provided earlier that if the husband refused to live in the wife’s parental house then he was liable to maintain his wife there if she did not agree to stay with him at his place. But if the khana-damad left his father-in-law’s house on the basis of some just cause and asked the wife to come along with him to reside at a place where he was residing and the wife refused to do the same without any reasonable excuse, then in such a situation, khana-damad was not responsible for her maintenance until and unless she agreed to come and stay with him at his place of residence.

5.5.3. Institution of Pisar-e-Parwarda (Adopted Son)

Islamic Law has forbidden adoption which was a common practice in the pre-Islamic Arabian society. Adoption, in pre-Islamic Arabia, was prevalent in three different forms:

i) An Arab used adoption, sometimes, to legitimate his own son from a slave girl;

\[103^{\text{Supra Note 1 at 294.}}\]
ii) Adoption was employed to refuge the man from another tribe by the member of the tribe which received him, sometimes; and

iii) Sometimes, a man would adopt a slave of Arab race enslaved to him by the fortune of war and then he was so attached to the enslaved man that he would not only set him free but also treated him as his son.\textsuperscript{104}

In verse No. 4 and 5 of Surah-e-Ahzaab, Almighty Allah has strictly prohibited the creation of any biological relationship artificially through adoption. The said verses lay down the following in this regard:

\begin{quote}
“...And He has not made your adopted sons your (true) sons. This is (merely) your saying by your mouths, but Allah says the truth, and He guides to the (right) way.”\textsuperscript{105}

“Call them (adopted sons) by (the names of) their (real) fathers; it is more just in the sight of Allah...”\textsuperscript{106}
\end{quote}

Thus, Islamic Law prohibits the artificial creation of biological relationship of father and son, between two persons through adoption as this may affect the rights of other relations for the purpose of marriage, inheritance, etc. Islam is not against the care of protection of children but it only attempts to protect the rights of the persons who are biologically related to the adopter.

Adoption, under Islamic Law, is totally prohibited but under the customary law of the State of Jammu and Kashmir, it had been legalised in a modified form of the institution of \textit{pisar-e-parwarda}. Under the institution of \textit{pisar-e-parwarda}, a Muslim adopted another person and appointed him as his heir that created only a personal relationship between the adopter and the adoptee. In this way, the Muslim practice of adoption under the customs of Kashmir was different from the practice of adoption under Hindu Law. Under Hindu Law, the virtual transplantation of the child takes place from one family to another along with which are conferred also all the rights and obligations that a real son carries. But under the customary law, adoption only implied the appointment of an heir to the property, usually in the cases of issueless couples.\textsuperscript{107} In this way, the concept of adoption which was in existence in the State

\textsuperscript{105} \textit{Holy Qur’an}, XXXIII:4.
\textsuperscript{106} \textit{Holy Qur’an}, XXXIII:5.
\textsuperscript{107} Ghani Bhat v. Aziz Wani, Civil 2\textsuperscript{nd} Appeal No. 53 of 1970 (decided by the High Court of Jammu and Kashmir on 27\textsuperscript{th} July, 1971) (Unreported).
of Jammu and Kashmir was not in consonance with the Muslim practice of adoption (i.e., *kafala*)\(^{108}\) existing worldwide.

Although adoption was a well-recognised custom among the Muslims of Jammu and Kashmir but still the *pisar-e-parwarda* (as the adopted son was called)\(^{109}\) carried the rights in the inheritance of the property of the adopter only if there was the execution of a deed which could be either a gift deed or a will, otherwise he had no claim in the property of his adoptive father. Apart from this, certain formalities were required to be completed between the adoptive and the natural father of *pisar-e-parwarda*, in execution of the registered ‘adoption deed’.\(^{110}\) The adoption in Jammu and Kashmir was entailed only through the performance of proper ceremonies; however, those ceremonies were merely recommendatory as has been ruled out by the Supreme Court.\(^{111}\)

Tahir Mahmood, while commenting on the judgment of Jammu and Kashmir High Court in the case of *Khatji v. Abdul Razak*\(^{112}\) on the validity of the custom of adoption under Article 25 of the *Indian Constitution* quotes the following words of Chief Justice M.R.A. Ansari which are given below:

> “Even if adoption is not recognized by the Muhammadan Law and even though the Muhammadan 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. In spite of Art. 25 of the Constitution, 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 Art. 25(2) it would be open to the legislature to modify the personal law for the purpose 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 reform...’ 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. The rights conferred under Art. 25 are subject to the Directive Principles contained in Part IV such as Art. 44 which envisages the enactment of a uniform civil code.”\(^{113}\)

\(^{108}\) *Supra* Note 1 at 278.


\(^{112}\) 7 J&K 44.

The Supreme Court, while dealing with the validity of the institution of *pisar-e-parwarda*, in the case of *Khatji v. Abdul Razaq Sofi*\(^{114}\) also held further by laying down that the *Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1977 Svt.*\(^{115}\) was within the competence of the legislature under Article 25(2)(a)\(^{116}\) of the Constitution thus, the recognition of the custom of *pisar-e-parwarda* by the courts by virtue of Article 25 was totally valid.\(^{117}\)

For the validity of adoption deed, its registration was a pre-requisite otherwise it was inadmissible in evidence if it had not been properly registered under Section 17(3)\(^{118}\) of the *Registration Act, 1908*.\(^{119}\) Section 17(3) of the Registration Act made the registration of adoption deed compulsory.

**Proof of Adoption**

The burden of proof of adoption was on the person who was claiming such a title (i.e., *pisar-e-parwarda* here).\(^{120}\) Where an adopted son had succeeded to the estate of his adoptive father and had enjoyed the same till his death and all the documents had been framed accordingly i.e., on the basis of adoption without any controversy, in such a case, much value had to be given to the fact if direct evidence was lacking and person claiming adoption could be treated as a validly adopted son.\(^{121}\)

The fact of adoption could also be proved or disproved from the entries maintained on the conduct book or entries made in the application forms for admission in the High School and also entries in the progress reports as these were maintained by the authorities under the rules of the education department and therefore, were relevant as an evidence before the court of law.\(^{122}\) The Jammu and Kashmir High Court held that where a will recited that a person had been adopted as a son and therefore, he would be entitled to inherit the property of the

\(^{114}\) AIR 1977 J&K 44.
\(^{115}\) Act No. IV of 1977 (1920 A.D.).
\(^{116}\) Article 25(2)(a) of the *Indian Constitution* provides:
(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice."
\(^{117}\) Supra Note 1 at 279.
\(^{118}\) Section 17, Sub-section (3) of the *Registration Act*, lays down: Documents of which registration is compulsory-
“(3) Authorities to adopt a son, executed after the 1st day of January 1872, and not conferred by a will, shall also be registered”.
\(^{120}\) Debi Prasad v. Tribeni Devi, AIR 1970 SC 1286.
\(^{121}\) Rup Narain v. Mst. Gopal Devi (1909) 36 Ind App 103 (P.C.).
testator after his death, such a document was not a will that bequeathed property in the favour of the adopted son but only a recitation of the fact of the adoption and the will was to be made on its basis.\textsuperscript{123}

The Jammu and Kashmir High Court also held in the case of \textit{Mohd. Ismail v. Noor-ud-Din}\textsuperscript{124} that where a person claimed title over the disputed property of the deceased Muslim as being his adopted son (\textit{pisar-e-parwarda}) but failed to prove the fact of a valid adoption under the customary law, then he could not succeed in his claim in an alternative plea made by him on the basis of a will executed by the adoptive father in his favour as a \textit{pisar-e-parwarda}. The court held further that where the main plea had failed, no remedy lied in the alternative plea made on the basis of main plea, as the will was made on the basis of reciting him as a \textit{pisar-e-parwarda} and the property was given to him in that capacity only and therefore, the will was not an independent document. As his status and capacity as a \textit{pisar-e-parwarda} was not proved, thus, he could not get anything on the basis of will.\textsuperscript{125}

**Presumption of Adoption**

Where a person had been accepted and treated as an adopted son by the adoptee for a number of years, then presumption lied in the favour of a valid adoption and also that everything necessary in this regard (i.e., adoption) had been done. Therefore, too strict proof of the details of the ceremonies of adoption could not be demanded after a long period of time.\textsuperscript{126} Jammu and Kashmir High Court, in the case of \textit{Punjab Singh and Others v. Teju},\textsuperscript{127} held that if anyone wanted to challenge the fact of adoption then he could do so within a reasonable time-period. Thus, an adoption could not be challenged after the death of the parties if not challenged during the life time of the adopter or the adoptee.\textsuperscript{128}

**Person Entitled to Adopt under the Customary Law**

According to the Sant Ram Dogra’s \textit{Code of Tribal Customs}, any person, whether married or bachelor, infirm or impotent, could validly adopt a son if he had no son and thus, he could
appoint his adopted son as his heir. As has already been mentioned earlier that an adoption under customary law was different from the one made under the Hindu law, therefore, adoption under the customs of Kashmir aimed at only having a substitute of the adoptee in the village community if such a custom was followed in his family. Hence, any sonless Muslim male could adopt a son under the customary law of Kashmir. Also a man, whose real son was a leper or insane or had renounced the world or had been lost, could make a valid adoption under the customary law. A man was also allowed under the customary law to adopt a son if his own natural son had converted to another religion.

**Appointment of Heir by a Woman**

There seems to be no authority of the High Court of Jammu and Kashmir on the question of appointment/adoption of an heir made by a woman. But no such custom existed whereby a woman was prohibited by the customary law to make an adoption. Sant Ram Dogra is of the view that the instances of an adoption by a wife made during the life time of her husband were very rare. Also, she could not adopt a son if she had her own son living and thus, could validly adopt only if she had no son. A widow who herself had a limited interest in the property of her deceased husband also could not make a valid adoption/appointment of an heir for herself.

Therefore, it appears from the above-mentioned discussion that a childless widow could make a valid appointment of an heir for herself if she had a property to pass it on to her heir. But there was a restriction upon the same and that was if she intended to appoint an heir, she had to obtain the consent of the relatives of her husband and if the boy whom she was intending to adopt belonged to the same family as her deceased husband, then she had to seek permission of her husband during his life time.

But the Sunni Muslims of Achhbal and Handwara, Watals of Handwara and Budgam, Sunni Muslims and Watals of Nunar and the Shias of Nunar, Budgam and Srinagar held the view that a woman could not adopt a son in the life-time of her husband but after his death, she could make an adoption of a son even without the permission of her deceased husband and

---

129 Supra Note 15 at 200-201, Question No. 75(d).
130 Supra Note 1 at 283.
131 Supra Note 30 at 200, Question No. 75(b).
132 Supra Note 1 at 283.
133 Supra Note 30 at 66-67.
134 Gaffar v. Ramzan (decided by the Revenue Minister of Jammu and Kashmir on July 9, 1938) (Unreported).
his relatives. The Sunni Muslims of Baramulla held that a widow could adopt a son only if the relatives of her deceased husband agreed to the same and otherwise not. On the other hand, the Shias and Gujjars of Pattan were of the view that a widow could make an adoption of a son only from the agnates of her deceased husband and thus, the adopted son had to be of the same tribe as was the widow’s deceased husband. While the Gujjars, Bakkerwals and Pakhli tribes of Nunar stressed that the widow could adopt only from the agnates of her deceased husband.\textsuperscript{135}

**Person Eligible to be Adopted under the Customary Law**

Under the Customary Law of Kashmir, any person who was sane could be validly adopted. There was no such requirement of adopter being from among the near relations of the adoptee or from the same tribe, as the main aim of adoption under the customs was to appoint an heir who had to associate with the adoptee in his family affairs and agricultural pursuits and not to derive any spiritual benefits unlike Hindu law.\textsuperscript{136}

Under the customary law, a man could validly give his son and his brother in adoption to another person. Generally an eldest son or an only son could also be given in adoption by his father but the Sunnis of Baramulla made an exception to this rule and according to them, the only son of a person could not be given in adoption while the Muslims of Sopore were of the view that an eldest son could not be given in adoption.\textsuperscript{137}

**Adoption of a Daughter under the Customary Law**

The adoption/appointment of a daughter as an heir (i.e., dukhtar-e-parwarda) under the customary law of Kashmir was very rare. In the case of *Nadira v. Ghani Bhat and Others*,\textsuperscript{138} the High Court of Jammu and Kashmir had refused to recognise such a custom. Therefore, if anyone relied upon the existence of such a custom then he had to specially allege and prove the existence of such custom in his family with positive evidence.\textsuperscript{139}

\textsuperscript{135} Supra Note 30 at 202-203, Question No. 75(e).
\textsuperscript{136} Supra Note 134.
\textsuperscript{137} Supra Note 30 at 204, Question No. 75(f).
\textsuperscript{138} Civil 2nd Appeal of 16th Pooh 2005 (decided by the High Court of Jammu and Kashmir on 1st of June, 1949).
\textsuperscript{139} Mst. Khatiji v. Nur Dar (decided by the Revenue Minister of Jammu and Kashmir on August 8, 1943).
Adoption of Two Persons under the Customary Law

The customary law of Jammu and Kashmir did not recognise the appointment of a second heir in the lifetime of the first one. In this regard, the High Court of Jammu and Kashmir held in the case of *Dina Nath v. Mohan Lal*\(^{140}\) that where a widow appointed a second heir to the property of her deceased husband while the first appointed son was alive, the estate passed on to the first son and the second son had no claim over the estate of the deceased. Therefore, the first adopted son could hold the right to claim the property of his deceased adoptive father adversely not only to the adoptive mother but also to the second adopted son.\(^{141}\)

As the purpose behind the institution of adoption was only to make the appointment of heir and creation of personal relationship between the adopter and the adoptee and thus, it affected the rights of other heirs under the Islamic scheme of inheritance. Not only the institution of *pisar-e-parwarda* but also the institutions of *khana-damad* and *dukhtar-e-khana nashin* affected the hereditary rights of heirs recognised under the Islamic system of inheritance up to a great extent. Therefore, a detailed study of the system of inheritance under the customary law of Kashmir Valley and the effects of the institutional heirs on the right of inheritance of other heirs that have been recognised under Islamic law of inheritance becomes very necessary at this point which is as follows under the next heading.

5.6. Inheritance under Customary Law

Unlike the Islamic Law of inheritance which classifies the heirs into *Qur’anic* sharers and residuaries, the customary law of Kashmir Valley generally divided heirs into the following two categories:

1) Familial Heirs; and

2) Institutional Heirs.

Familial heirs were generally those heirs who succeed the deceased person as a matter of right under the customary law while the institutional heirs were those heirs who had no right in the property of the deceased as a matter of right but succeeded only because of the reason that the deceased person, during his life-time, appointed and recognised them as his heirs.

\(^{140}\) (decided by the High Court of Jammu and Kashmir on 20th of Katik, 1981 Bk.).

\(^{141}\) Supra Note 1 at 285.
after his death and thus, conferred upon them the customary status of being his heirs. These heirs included the *khana nashin dukhtar, khana-damad* and *pisar-e-parwarda*.

### 5.6.1. Familial Heirs

Familial heirs were further divided into: a) Primary heirs, and b) Secondary heirs.

**a) Primary Heirs**

Customary law of the Valley of Kashmir recognised two primary heirs who were never excluded from inheriting the property of their deceased relation. They always inherited in the property of their deceased relation and could not be excluded by the presence of any other relation of the deceased. The primary heirs under the customary law were:

1. Sons and male agnatic descendants (h.l.s.); and
2. Unmarried daughters.

Mohd. Altaf Hussain Ahangar claims that there was no priority by the virtue of age or any other factor among the primary heirs of the deceased and all the sons of the deceased including the male agnatic descendants stood on parity so do the unmarried daughters.  

**i) Sons and Male Agnatic Descendants**

Under customary law of the Valley, sons were the first and foremost heirs who were entitled to inherit a share in the property of their deceased father and excluded all the other relations of the deceased except his unmarried daughters. Where the deceased person left behind more than one wife and each wife had sons living, then under the customary law, all the sons of different wives inherited equal share in the property of their deceased father. This rule is called as *pagwand*. In some cases, the sons of each widow of the deceased person were treated as a group and property was distributed among different groups equally. This rule is called as *chundawand*. In the Valley, there are some tribes who followed both, the *pagwand* as well as the *chundawand*, rules of the distribution of the deceased father’s

---

142 *Supra* Note 57 at 95-96.
143 The term ‘*Pagwand*’ is a derivative of the word ‘*Pag*’ which means turban and represents the system of distribution of share in the property per son.
144 The term ‘*Chundawand*’ means the ‘head-hairs of a woman’ and represents the system of inheritance where the distribution of property is based on the number of mothers instead of the sons. Here shares are distributed among different widows and then it is divided equally among their sons in each group.
property among his sons e.g., Bomba Rajas of Yaripura and Uttarmachhipura held that if the mothers of the sons were from the same family, the custom of chundawand was to prevail but if they were from the different families then the custom of pagwand was to be followed. Step-sons had no share in the property of their deceased step-father.\textsuperscript{145}

Generally, the caste of the mother i.e., whether low or high, was not paid any regard under the customary law but there are few tribes like the Sayeds of Distict Kulgam who followed the custom that if a Sayed married a Watal woman, her children could not have any share in the inheritance of their deceased father. The same way, the Gujjars of District Kulgam, and Nandimarg followed the custom of excommunication of the person from the community who married a Janjua woman and his sons by her could not inherit from their father. Rajas of Tral, Bomba Rajas of Yaripura and Uttarmachhipura and the Dunga Hanz of Khanabal also took into consideration the caste of the mother while distributing the share of deceased father’s property among his sons. Among the Rajas of Baltistan, it was customary that the son of the deceased from a low caste was entitled to get maintenance only and no share of inheritance in the deceased father’s property.\textsuperscript{146}

Some Muslim tribes of the Valley like the Gujjars of Nandmarg, Avantipura, Kulgam, Baramulla and Sopore, Zamindars of Tral, Shias of Pattan, Sripratapsinghpura and Nunar, Rajputs of Deosar and Rajas of Yaripura and Uttarmachhipura followed the rule of primogeniture.\textsuperscript{147}

There was customary among some tribes in the Kashmir Valley where the father could, during his life-time or after his death, nominate a particular son to take a larger share than the other and real sons got lesser shares than the nominated son. These tribes include the Gujjars of Tral, Kund-Nandimarg and Nunnar, Sunni Muslims and Watal of Achchabal and Shias of Pattan. While the Sunni Muslims and Watal of Anantnag and Bijbehara held the view that the verbal gifts or nominations made by the father in favour of a particular son to take a larger share in the property of deceased father could not be acted upon. On the other hand, the Sunni Muslims of Baramulla held the view that the father could make the share inherited by his son smaller or larger in his life-time but after the death of the father, whole of the property was to be distributed equally among his sons. The Shias and the Sunnis of Srinagar followed that a

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{145} Supra Note 30 at 162-163, Question No. 41.
\item\textsuperscript{146} Id. at 163-164, Question No. 42.
\item\textsuperscript{147} Id. at 164-165, Question No. 43.
\end{itemize}
\end{footnotesize}
father was at liberty to bequeath any portion of his property up to the prescribed limit of one-third to any of his sons, but any bequest that exceeded the prescribed limit of one-third of property was void.  

The customary law of the Valley of Kashmir recognised the rule of representation among all the male agnatic descendants of the deceased person. This rule existed among the Zamindars to the full extent. Sant Ram Dogra has written in his ‘Code of Tribal Customs’ in this regard:

“For where there are male descendants, who do not stand in the same degree of kindred to the deceased, and the person through whom the remote descendants are connected with the deceased is dead, the remote descendants succeed with the nearer descendants.”

But some tribes, like the Shias of Pattan, all Muslim tribes of Anantnag and Bijbehara, Towns-people of Baramulla and Sopore, other Pakhli tribes of Nunar, and all the Muslim tribes of Srinagar city followed Shari’ah in this matter. These tribes held the view that the remote descendants got excluded from inheritance in presence of the nearer ones, but the remote descendants could only inherit by gift, either oral or in writing.

The recorded customs of the Valley mention that among the male agnatic descendants, the partition of the estate was generally made per capita and not per stripes, but N.K. Ganjoo claims that the rule of partition in practice was that every branch took per stripes as regards every other branch but the members of each branch took per capita as regards each other.

ii) Unmarried Daughters

Unmarried daughters, like the sons or male agnatic descendants, were also the primary heirs of their father. If there was only one unmarried daughter then she took the whole property of her deceased father till her marriage or death. But the Rajas of Yaripura and Uttarmachhipyra held the view that the daughter had no right to the inheritance of property of the deceased father and thus, the heritage of the deceased father’s property never went to daughter. This shows that the unmarried daughter could get life interest only in the property of her deceased father and when she got married and left the parental house (i.e., she was not appointed as a khana nashin dukhtar by her father), the property reverted back to the male agnatic

148 Id. at 165-166, Question No. 44.
149 Id. at 167-168, Question No. 46.
150 Ibid.
151 Id. at 168, Question No. 47.
152 Supra Note 55 at 236.
descendants of the deceased. The reversion of the property to the male agnatic descendants of the father on the marriage or death of the daughter of the deceased implies that the estate was non-transferable. When an unmarried daughter inherited the property of her deceased father, she was entitled to claim partition against the other heirs of the deceased (if any). There was exception to this provision among the Gujjars of Budgam who held the view that unmarried daughter could not claim partition. When unmarried daughter succeeded the inheritance of property of her deceased father, she excluded her berun-khana sisters from inheriting the same.\(^\text{153}\)

A married daughter inherited the property of her deceased father only if she had been made dukhtar-e-khana nashin which will be discussed ahead in detail.

**b) Secondary Heirs**

Secondary heirs of the deceased included the following categories:

i) Widows and son’s widows;

ii) Mother and son’s widows;

iii) Agnates, how remote so ever (excluding sons and male agnatic descendants, h.l.s.);

iv) Khana-berun daughters; and

v) Sisters.

i) **Widows and Son’s Widows**

Widows of the deceased and his son’s widows inherited simultaneously in the absence of primary heirs and shared equally among themselves the estate of the deceased till their death or remarriage. Where a widow or son’s widow either died or remarried, the surviving widows and son’s widows got a right of survivorship in the property till their death or remarriage.\(^\text{154}\)

If the widow of the deceased survived along with a daughter, then the whole property devolved upon the daughter of the deceased if she was a khana nashin dukhtar and the widow was entitled to claim her dower only on its demand. Where the widow got survived with the brothers of the deceased or their descendants, the uncles or their descendants, or great uncles or their descendants, the widow was entitled to a life-interest only in the property of her

\(^\text{153}\) Supra Note 57101-103.

\(^\text{154}\) Supra Note 30 at 170, Question No. 50.
deceased husband till her death or remarriage and upon the death or remarriage of such a widow, the property reverted back to the agnates of the deceased husband. But the Shias of Pattan and Sripratapsinghpura Tehsil followed on this point that on the death of the husband, the widow got her one-eighth share in the property of the deceased husband and also the mahr out of the same and the remaining property devolved upon the daughters of the deceased. In their absence, the brothers or their descendants inherited along with the other Shar‘ai heirs but not in the landed property. If there was a khana nashin daughter of the deceased, then she and her husband i.e., khana-damad inherited the same being their landed property. On this point, the Gujjars and Bakkerwals of Nunar held the view that daughters inherited property of their deceased father only after the agnates.\textsuperscript{155} The widow got usufructuary right in the property of her deceased husband till her life or remarriage and thus, she had no right to transfer the property to any other person except her daughters, sons or khana-damad.\textsuperscript{156}

The general rule was that the widows with sons got a life-interest in the property of the deceased husband till her death or remarriage but a sonless widow could get dower or a plot of land for life-time only and she had no right to the alienation of the same.\textsuperscript{157} If there were more widows of the deceased, they inherited equal shares and generally no distinction was made regarding their families. But the Pir, Babas and Sayeds of Budgam held that widows’ share be proportional to their dowers.\textsuperscript{158}

\textbf{ii) Mother and Son’s Widows}

Under the customary law of the Valley, if the deceased died without leaving behind any primary heir or widow, then his mother and son’s widows shared the property equally among themselves till death or remarriage. On their death or remarriage, the heritage reverted back in the favour of the agnates of the deceased.\textsuperscript{159} According to the Code of Tribal Customs, the mother of the deceased and his son’s widows inherited his property simultaneously.

\textsuperscript{155} \textit{Id.} at 169-170, Question No. 49.
\textsuperscript{156} \textit{Id.} at 176, Question No. 55.
\textsuperscript{157} \textit{Id.} at 172, Question No. 51.
\textsuperscript{158} \textit{Id.} at 175, Question No. 54.
\textsuperscript{159} \textit{Id.} at 174, Question No. 53.
iii) **Agnates**

The term ‘agnate’ can be defined as the person who are descendants of the common ancestor, or relatives whose relationship is traced exclusively through males, or one’s relatives on one’s father’s side. The *Jammu and Kashmir Hindu Succession Act* defines ‘agnate’ as a relation who is related to the other by blood or adoption wholly through males.\(^{160}\) Under the customary law, the following are the agnatic heirs of the deceased:

- a) Male agnatic descendants (e.g., son, son’s son);
- b) Female agnatic descendants (e.g., daughter, son’s daughter);
- c) Male agnatic collaterals (e.g., father’s father’s son, father’s son);
- d) Female agnatic collaterals (e.g., father’s father’s daughter); and
- e) One male ascendant (i.e., father).

There are conflicting views in the *Code of Tribal Customs* regarding the hereditary right of the agnates. But an analysis of the Code shows that the agnates inherited in the absence of the primary and secondary heirs.\(^{161}\) The Code further provides that all the agnates (whether near or remote) inherited simultaneously under the customary law and not to the exclusion of each other.

iv) **Khana-Berun Daughters**

*Khana-berun* daughters means those daughters who have been married and stay with their husbands either in their in-laws’ house or some other place where the husband is residing but not in their parental house like those of *khana nashin* daughters. *Khana-berun* daughters were not heirs under the customary law Kashmir. Time and again, Sant Ram Dogra’s *Code of Tribal Custom* has provided that the daughters could be heirs in the property of their deceased father only if they had been made the *dukhtar-e-khana nashin* by their father in his life-time. Thus, the customary law made daughters as heirs only when they resided in their father’s house along with their husbands. But the mere residence of the daughter did not make her heir in the deceased father’s property if she had not been appointed as a *khana nashini* by her father.

---

\(^{160}\) Section 3 (1) (a) of *Jammu and Kashmir Hindu Succession Act, 1956* as cited by *Supra* Note 57 at 119.

\(^{161}\) *Supra* Note 57 at 121-123.
v) Sisters

Sisters have been mentioned nowhere in the *Code of Tribal Custom* as the customary heirs. Only one reference to the sisters has come in question in the whole Code where it has been given that sisters inherited the property of the deceased along with their brothers only where they had been kept at home as *khana nashin* daughters. Thus, it becomes clear that they inherited the property of their deceased father along with their brothers if they had been made *khana nashin dukhtar* by the deceased and not as sisters.162 It should be noted that the words used in the Code are ‘along with their brothers’ and not ‘from their brothers’. Thus, it is clear that sisters could not inherit the property of their brother as they were not the customary heirs.

5.6.2. Institutional Heirs

As already mentioned above, institutional heirs were not the customary heirs. They inherited because they had been accorded the customary status upon them by the deceased during his life-time and not by the virtue of any inheritance rights under the customary law. These heirs were the product of institutionalization.163

The category of institutional heirs consisted of the following three heirs:

i) *Dukhtar-e-khana nashin*;

ii) *Khana-damad*; and

iii) *Pisar-e-parwarda*.

A. Hereditary Rights of Dukhtar-e-Khana Nashin

It has already been mentioned many times earlier that under the customary law of the Valley, a daughter could inherit only if she was made a *duktar-e-khana nashin* and resided with her husband in her father’s house.164 The daughter who stays away from the father’s house after her marriage i.e., lives with her husband in his own house is termed as ‘*khana-berun dukhtar*’. A *khana-berun* daughter never inherited the property of her deceased father in any

162 Rasool v. Ahmad Rather 37 PLR J&K 38.
163 Supra Note 57 at 95.
164 Supra Note 30 at 180, Question No. 58.
circumstance under the customary law of Kashmir. Under the customary law, the status of a *khana nashin dukhtar* was that of a son. Thus, she inherited the property of her deceased father like that of a son of the deceased. If there was a son living of the deceased person, then his *khana nashin* daughter inherited equal share with her brother as a sharer and not as a residuary, the half of her brother’s share as is the case under Islamic Law. After the death of the father, a *duktar-e-khana nashin* was equally entitled to the inheritance of his property as the unmarried daughter, son or an adopted son were and thus, she could not be prevented from inheriting her share in the property of the deceased father in any case.

If the deceased left behind a *khana nashin* daughter and his widow then in that case, the whole property devolved upon the *khana nashin* daughter and the widow had no claim upon the property of her deceased husband under the customary law. If the deceased left behind many daughters, then only the *khana nashin* daughter could inherit her deceased father’s property thus, excluding her other *khana-berun* sisters. If there were two or more *khana nashin* daughters left behind by the deceased, then all of them inherited an equal share in their deceased father’s property. A *khana nashin dukhtar* was entitled to the inheritance of all kinds of properties of her deceased father whether it was movable or immovable property or ancestral or self-acquired. For the purpose of inheritance, a *duktar-e-khana nashin* was treated as a male lineal descendant of her deceased father and therefore, she could claim the partition of the property of her father like that of a son of the deceased.

There were some exceptions also among the customs followed by different tribes to this general rule of succession of *khana nashin* daughter’s right in her deceased father’s property. Some examples of such an exception are like the *Gujjars* and *Bakkerwals* of Nunar followed the custom of excluding daughters in the presence of agnates. They held the view that if a daughter was made a *khana nashini* by her father during his life-time and thus, resided in her father’s house with her husband and also performed the house-hold work, only then she was entitled to inherit a share in her deceased father’s property and that too only movable property. Thus, among the said tribe, a *khana nashin* daughter could not inherit a share in her father’s landed property. On the other hand, the tribes of *Pakhli* followed the custom of excluding daughters from inheritance if there was any male lineal descendant of the deceased living. The daughter was entitled to maintenance only in the presence of the male lineal

---

165 Rasool Lone v. Rehmati (1945) 4 J&K L.R. 257.
166 Supra Note 57 at 164.
167 Supra Note 55 at 126.
descendants and in their absence inherited along with other agnates according to the Shari’ah
and got full power of disposition of her share at her own will.\textsuperscript{169} The Zamindars of Pattan
gave a share to the khana-berun daughters in the movable property of the deceased.\textsuperscript{170}

**Nature of Khana Nashin Daughter’s Interest in the Inherited Property**

Pandit Sant Ram Dogra, in his ‘*Code of Tribal Customs of Kashmir*’, has described the
general rule followed by all the Muslim tribes of the Valley except a few regarding the nature
of dukhtar-e-khana nashin’s interest in the property that she inherited from her deceased
father in the following words:

“\textquote{The nature of interest of a daughter, who resides at her father’s home with
her husband, is life interest only in the property inherited by her. This
property goes to her sons, if there be any; if she be sonless, the inheritance
lapses to the agnates of her father. The husband does never get a share
unless the men concerned in the case, would assign to him a share by deed.
A daughter is in no way, entitled to alienate her property to anyone but to
her own children. She can alienate her movable property by sale, gift,
mortgage, or bequest.}”\textsuperscript{171}

Thus, it is evident from the above that a khana nashin daughter succeeded only to a life
interest in the property of her deceased father and after her death, the property passed-on to
her son(s) if she had any. If she died sonless, the property reverted back to the heirs of her
deceased father i.e., agnates of her father. During her life-time, the khana nashin daughter
was entitled to full enjoyment of the property inherited by her from her deceased father the
way she liked it, but she could not alienate the immovable property except to her own
children only. But as long as the dukhtar-e-khana nashin was alive, she represented the estate
inherited by her from her deceased as a full owner of the same, without anyone having a
vested right in the said property.\textsuperscript{172} Regarding the movable property, the Code provides that
she could alienate it the way she wanted to do, like she could sell it or mortgage or bequest it
or even give it to anyone she liked by way of gift. The Code further provides that the husband
of dukhtar-e-khana nashin had no right to inheritance in the property of his deceased wife
unless the men concerned assigned a share in his favour by entering into a deed in the same
regard.

\textsuperscript{169} Supra Note 30 at 180-181, Question No. 58.
\textsuperscript{170} Id. at 181, Question No. 59.
\textsuperscript{171} Id. at 184, Question No. 62.
\textsuperscript{172} Supra Note 57 at 166.
Heirs of Dukhtar-e-Khana Nashin

As mentioned above that dukhtar-e-khana nashin held a life interest only in the property inherited by her from her deceased father which she could not alienate to anyone except her children. The property of dukhtar-e-khnana nashin was inherited by her heirs after her death but if she had no heirs living, the property reverted back to the agnates of her deceased father. Regarding the heirs of khana nashin daughter, the Code is not clear as at some places it provides that only the sons of the dukhtar-e-khana nashin could be her heirs while at other places, it provides that the daughters and the sons of khana nashin daughter were her heirs. But from Rule 64 of the Standing Order No. 23-A, as provided by Mohd. Altaf Hussain Ahangar in his book ‘Customary Succession among Muslims’, the following conclusion can be drawn regarding the heirs of a dukhtar-e-khana nashin:173

a) Sons of a khana nashin daughter were her primary heirs;
b) If there was an appointed khana nashin daughter of the deceased khana nashin daughter, then she was also equally entitled to a share in the property of her deceased mother along with her brother but a khana-berun daughter was excluded from inheriting the property of her deceased mother;
c) If dukhtar-e-khana nashin died sonless leaving behind her husband, he held a life-interest in the property of his deceased wife till his death or remarriage, if the concerned men agreed to the same by a deed in the same regard;
d) Where dukhtar-e-khana nashin died sonless, and had no appointed khana nashin daughter of her left behind, and also the men concerned did not agree to the succession of her husband to the property, or if they had agreed but the husband of khana nashin daughter died or remarried, then her property devolved upon the agnates of her deceased father upon her death.174

i) Hereditary Rights of Khana-Damad

Khana-damad is the person who stays with his wife in his father-in-law’s house after his marriage for the rest of his life and thus, leaves his own house. Now the question arises that what is his position in matters of inheritance of property i.e., from where he is to inherit property i.e., the family which he has left or the family he has moved with? In order to

173 Id. at 168-169.
174 Supra Note 30 at 191-192, Question No. 70.
answer the same question, the hereditary rights of a khana-damad have been discussed under the following two headings for convenience:

a) Hereditary Rights in the Appointor’s Family

The customary law of the Valley did not make a khana-damad an heir in the property of his deceased father-in-law but if the father-in-law, during his life-time, had made a deed in this regard in his favour then certainly he had a share in his father-in-law’s property. The answer to question number 62 of the ‘Code of Tribal Customs of Kashmir’ provides that khana-damad could not get a share in the property of his wife unless the men concerned (i.e., father-in-law) allotted him a share by a deed. While answer to question number 70, on the other hand, provides that when a khana nashin daughter died holding property in her own right, her husband (i.e., khana-damad) succeeded to such property. It also provides that the interest that the khana-damad could get in his wife’s deceased property was for life only if he did not remarry. Thus, when khana-damad died or remarried another woman, the property inherited by him from his deceased wife went back to the agnates of his father-in-law.\(^\text{175}\)

But the Gujjars of Kand and Nandimarg followed the custom of excluding khana-damad from inheriting property of his deceased wife if she had a daughter living and thus, she inherited the property of her mother and khana-damad had no share in such a property of his deceased wife. The Muslims of Sopore, according to the Code, also excluded khana-damad from succeeding to the property of his deceased wife and where the khana-nashin daughter died childless, her property reverted back to the givers and not to her husband. On the other hand, the Muslims of Srinagar held the view that if the khana nashin dukhtar died childless and she had no heirs in her own family, then kahana-damad succeeded to half of her property. The Gujjars of Chharat and Muslims of Achhabal followed the custom of granting half of khana-nashin dukhtar’s mahr to khana-damad after her death.\(^\text{176}\)

Thus, the Code fails to provide a clear-cut rule of customary law regarding the khana-damad’s right to inheritance in the property of his deceased wife. At some places, it provides that he was not entitled to any share after the death of his wife unless the concerned men gave him a share by a deed, while on the other hand, it provides at another place that khana-damad was entitled to inherit the property of his deceased wife till life or remarriage. Therefore, the

---

\(^{175}\) Ibid.
\(^{176}\) Ibid.
position of *khana-damad'*s hereditary rights in the property of his deceased wife under the customary law is not clear. But usually the custom that was followed in the Valley of Kashmir was that a *khana-damad* could succeed to the property of his wife after her death and enjoy the same till his death and after his death, the property was inherited by the agnates of his father-in-law and not the heirs of *khana-damad*. Where *khana nashin dukhtar* died in the life-time of her father, then *khana-damad* if inherited any property, he did so as the husband of deceased *khana nashin* daughter and not as son-in-law.\(^{177}\) Thus, *khana-damad* could succeed to the property of his deceased wife but could not claim a share in the property of his father-in-law unless the father-in-law had not executed a deed of gift in his favour.

Lawrence has written in his book *‘The Valley of Kashmir’* regarding the hereditary right of *khana-damad* in the family of his appointor:

> “It frequently happens that when a boy is taken into the house (as *khana-damad*), a deed of gift is executed, and in this case, if the boy leaves the house, the property covered by the deed of gift remains with the boy. Probably, if the boy brought an action to recover his bride he would succeed, but he would not be able to obtain any property with her unless there was a deed of gift.”\(^{178}\)

Thus, from the above discussion it can be summarized that *khana-damad* could hold a life interest in the property of his deceased wife but not in his father-in-law’s property unless he was given a share by a gift deed in his favour. Since, he had to take up residence with his wife in the house of his father-in-law, if he left the father-in-law’s house, then he could not succeed in his claim.

**b) Hereditary Rights in the Natural Family**

Under the customary law of Kashmir Valley, *khana-damad* could inherit property from his natural parents only if his brothers or *khana nashin* sister (if any) did not object to the same. Otherwise, he lost his right to inheritance in his own natural family. Unlike Kashmir, *ghar jamai* in the State of Punjab does not lose his right to inheritance in his natural family merely because he has chosen to stay in his father-in-law’s house for the rest of his life. Thus, he retains his hereditary rights even after becoming *ghar jamai* in his wife’s parental house. But in the Valley of Kashmir, it was custom that when a man chose to become a *khana-damad* in

---

177 Satar v. Noora, Decided on 28 Sawan, 1996B.
178 Supra Note 51 at 267.
his father-in-law’s house, he ceased to have connections with his parental family.\textsuperscript{179} Therefore, he was not allowed under customary law to inherit from his parental family. He could inherit only with the condition that his brothers did not object to his inheritance in his deceased father’s property. Even if his brothers did not object to his inheritance and \textit{khana-damad} inherited property from his deceased father, he was not to abandon his belongings and holdings permanently.\textsuperscript{180}

\textbf{ii) Hereditary Rights of Pisar-e-Parwarda}

Under the customary law, the adoption of a son (\textit{pisar-e-parwarda}) was solely based on the notion of the appointment of an heir to the adoptive father’s property. But the mere proof of mutation in his favour was not sufficient to inherit the property of his adoptive father. The adopted son had to prove a deed of adoption that gave him the right to inherit the property of his adoptive father. Therefore, a \textit{pisar-e-parwarda} was entitled to the inheritance of the property of his deceased adoptive father only if he had got a deed in this regard in his favour. Generally, when a son was adopted in the Valley under customary law, the adoptive father executed a deed which was in the shape of a gift deed or will which entitled the adopted son to inherit his property after his death. Such a deed of adoption was compulsorily registerable under Section 17 of the \textit{Jammu and Kashmir Registration Act} and thus, any deed of adoption that was not properly registered under the said Act was not admissible as an evidence in the court of law and the person claiming adoption was not entitled to inheritance in the property of the deceased.\textsuperscript{181} The Hon’ble Jammu and Kashmir High Court held in the case of \textit{Yaqoob Laway and Ors. v. Gulla and Anr.:}\textsuperscript{182}

\begin{quote}
“Even if a person proves his status as an adopted son under custom he cannot inherit his adoptive father as by mere being an adopted son he does not become an heir to his adoptive father. The heirs are specifically mentioned in the Holy \textit{Qur’an} and the adopted son being alien to Muslim Law of inheritance does not find place anywhere. There is no custom either recorded in the \textit{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 Islamic Law of inheritance. A \textit{pisar-e-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
\end{quote}

\begin{flushleft}
\textsuperscript{179} \textit{Ahad Bhat v. Ali Bhat}, Decided on 19 Bahadoon, 1995B.
\textsuperscript{180} \textit{Supra} Note 55 at 138.
\textsuperscript{181} P.L.R. (J&K Rulings) 49 (1979-1991) as cited by \textit{Supra} Note 1 at 279-280.
\textsuperscript{182} 2005 (3) JKJ 122.
\end{flushleft}
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.”183

Thus, it is clear that a pisar-e-parwarda could inherit the property of his adoptive father if a deed in this regard had been executed in his favour which was generally done at the time of adoption only. An adoption once made, under the customary law of the Valley, could not be subsequently revoked except on the grounds of disobedience, misconduct or neglect on the part of pisar-e-parwarda to support his adoptive father. Other than these grounds, neither the adopted son nor the adoptive father could relinquish their status of being father and son to each other through adoption.184 If any son was born to the adoptive father of pisar-e-parwarda subsequent to his adoption, then his adoption did not become ineffective and thus, he did not lose his right in the inheritance of his adoptive father’s property. Generally, in such a case, he would inherit equal share along with the natural sons of the deceased but according to the custom followed by the Sunni Muslims of Srinagar, only the natural sons of the deceased were entitled to inheritance and the adopted son could inherit only if the adoptive father had made a gift or tamlik in his favour otherwise not.185

Regarding the hereditary rights of pisar-e-parwarda in the property of his natural father, Pandit Sant Ram Dogra has written:

“An adopted son inherits only his adoptive father generally, but he can inherit his natural father also with the consent of his brothers or nephews.”186

This shows that a pisar-e-parwarda lost his right to inheritance in the property of his natural father on adoption. But if his brothers or nephews agreed, he could inherit a share in his natural father’s property but could not claim the same as a matter of right. This was a general rule that was followed by Muslims in Kashmir but there were certain exceptions too among certain tribes where an adopted son was allowed to succeed to the property of his natural father also along with the property of adoptive father. Theses exceptions includes the Sunni

183 Yaqoob Laway and Ors. v. Gulla and Anr. 2005 (3) JKJ 122.
184 Supra Note 57 at 208.
185 Supra Note 30 at 210, Question No. 75(k).
186 Id. at 209, Question No. 75(j).
Muslims of Kulgam, Pattan, Baramulla, Sopore and Budgam, Zamindars of Kund and all the Muslim tribes of Handwara who held the view that a pisar-e-parwarda could inherit the property of his natural father also if the latter had no other heirs left behind. On the other hand, the Sunni Muslims of Tral, Shias and Gujjars of Pattan and Budgam, Muslims of Srinagar and Khanabal, Towns-people of Sopore and other tribes of Pakhli were of the view that an adopted son could succeed to the property of his natural father along with the other sons of the deceased and if the deceased had no other son and grandson, then the whole of his property was be inherited by his son given in adoption.187

Unlike a dukhtar-e-khana nashin or khana-damad who held only a life interest in the property of the deceased under customary law, an adopted son was the owner of the inherited property and thus, had got full right of the disposition of the inherited property whether from his adoptive father or the natural father. After the death of pisar-e-parwarda, the property was to be devolved upon his heirs and did not revert back to the heirs of the adoptive father like in the case of a khana nashin daughter. Therefore, after his death, the property was inherited by the sons and khana nashin daughters (if any) of pisar-e-parwarda.

5.7. Conclusion

Jammu and Kashmir has the unique distinction of being predominantly a Muslim majority State of the Indian union. More than two-third population of the State follows Islam but Islam was not its religion in the beginning and was introduced by the Muslim missionaries in the State. These Muslim missionaries include Babul Shah, Shah Hamdan, Shamsuddin Iraqi, etc. who brought the light of Islam to the Valley of Kashmir many years ago. Islam, thus, has been the predominant faith in the Valley of Kashmir for several hundred years. But in spite of that, until the year 2007, Islamic Law was not applicable to the Muslims of Jammu and Kashmir in the strict sense and they had a choice of being governed either by the principles of Islamic Law or the customary law of the State. The Act passed by the Dogra rulers gave them the option of being governed by their customs in their personal matters like marriage, divorce, dower, inheritance, etc. the customs followed by the Muslims of Jammu and Kashmir were totally against the principles of Islamic Law but still they were being applied by the courts for the reason that Sri Pratap Jammu and Kashmir Consolidation of Laws Act, 1977 Svt. gave them legal recognition and thus the courts had no other option but to apply

187 Ibid.
them where the parties were successful in proving their customs. Thus, the Consolidation of Laws Act placed customs above the Islamic Law.

Thus, in the State of Jammu and Kashmir, there had been the customs of *khana-damad, pisar-e-parwarda, dukhtar-e-khana nashin, berun-khan dukhtar*, agnatic succession, exclusion of females from inheritance, etc. each of which had no place in the traditional Islamic Law and therefore they conflicted with the settled interpretation of the principles of Islamic Law. The customs were in clear evidence discriminatory against women. But in 2007, the legislature of Jammu and Kashmir passed the *Jammu and Kashmir Muslim Personal Law (Shariat) Application Bill* after which it became an enacted legislation of the State. This is undoubtedly a landmark achievement in the history of application of Islamic Law to the Muslims of Jammu and Kashmir after which customs stand repealed and Islamic Law shall be applied by the courts to all the Muslims of the State without any discrimination. In this way, the long journey of women subjugation has come to an end in the State of Jammu and Kashmir and now they are being able to enforce their rights which have been granted to them by Islam in their personal matters.