HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
…

OWP No. 1959/2015

Reserved On: 13-02-2024
Pronounced On: 29.02.2024

1. Custodian Evacuee Property, J&K (Kashmir Division) at Srinagar.

…..Petitioner(s)

Through: Mr. G. J. Bala, Advocate.

Vs.

1. State of J&K Special Tribunal at Srinagar through its Registrar.
2. Habib Dar S/O Rahim Dar R/O Malpora, Tehsil Baramulla.

…..Respondent(s)

Through: Mr. Nazim Khan, Advocate.

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CORAM: HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. Custodian, Evacuee Property, J&K, Kashmir, the petitioner, has invoked extraordinary writ jurisdiction vested in this Court by Article 226 of the Constitution of India for seeking a writ of certiorari for quashing and setting-aside the Order dated 6th August 2015 passed by J&K Special Tribunal at Srinagar ["*Tribunal*"] in a File no.STS/2372/2008 (Revision Petition) titled *Habib Dar v. Custodian Evacuee Property, Kashmir, Srinagar*.

2. Before adverting to the grounds of challenge urged by learned counsel for petitioner, it would be appropriate to give few material facts to put the matter in proper perspective.

3. Assistant Custodian (Tehsildar) Baramulla, in the year 1963, notified land measuring 24 Kanals 06 Marlas falling under Khewat no.24, situate in Village Malpora Tehsil Baramulla ["*subject land*"] as Evacuee Property under Section 6 of The J&K State Evacuees (Administration of Property) Act, Svt 2006 (1949 A.D.) ["*Act of 1949*"] and as a result whereof the owner of subject land, namely, Subhan Wani, was entered as Evacuee. On the request of respondent no.2, who claimed to be adopted son of evacuee, Subhan Wani, the subject land was allotted in his favour in the year 1963 itself.

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4. The entire allotted land remained under cultivating possession of respondent no.2 till the year 1983, when he converted some portion of subject land into an orchard. Conversion of subject land into orchard was reported by District Field Inspector, Baramulla to the petitioner, who, on taking cognizance of violation committed by respondent no.2, summoned records from the office of Assistant Custodian, Baramulla and thereafter kept the orchard land measuring 17 Kanals 16 Marlas on superdari. Rest of the land continued to be under occupation/possession of respondent No.2.

5. Respondent no.2, as it appears, made an application in the year 1985 under Section 8 of the Act of 1949, before the Custodian, Kashmir (petitioner) claiming to be an as adopted son of evacuee-Subhan Wani. It was maintained by respondent no.2 that evacuee Subhan Wani had not migrated to Pakistan but died in the year 1948 at Malpora, Baramulla. In his capacity as an adopted son of evacuee-Subhan Wani, the respondent No.2

requested that subject-land be de-notified and possession thereof be restored in his favour. To bolster his claim, respondent no.2 produced an adoption deed purportedly executed by evacuee - Subhan Wani, in his favour on 29 Phogan 2003 Bikrami (corresponding to the year 1946 A.D.). The Custodian, Kashmir, vide Order dated 1^{0th} April 1999 rejected the application of respondent no.2.

6. Respondent no.2, feeling aggrieved by the order of Custodian Kashmir dated 10th April 1999, challenged it in an Appeal before Custodian General, J&K. Vide Order dated 25th July 2002, the Custodian General allowed the appeal of respondent no.2, set-aside the order, and remanded the matter to Custodian, Kashmir, with a direction that he would summon both the parties and interested persons, if any, and provide them adequate opportunity of hearing and thereafter dispose of application for restoration of land strictly in accordance with provisions of law. The remand order was passed by the Custodian General on the ground that respondent no.2 had not been allowed by the Custodian to adduce evidence to establish his claim and, therefore, condemned unheard.

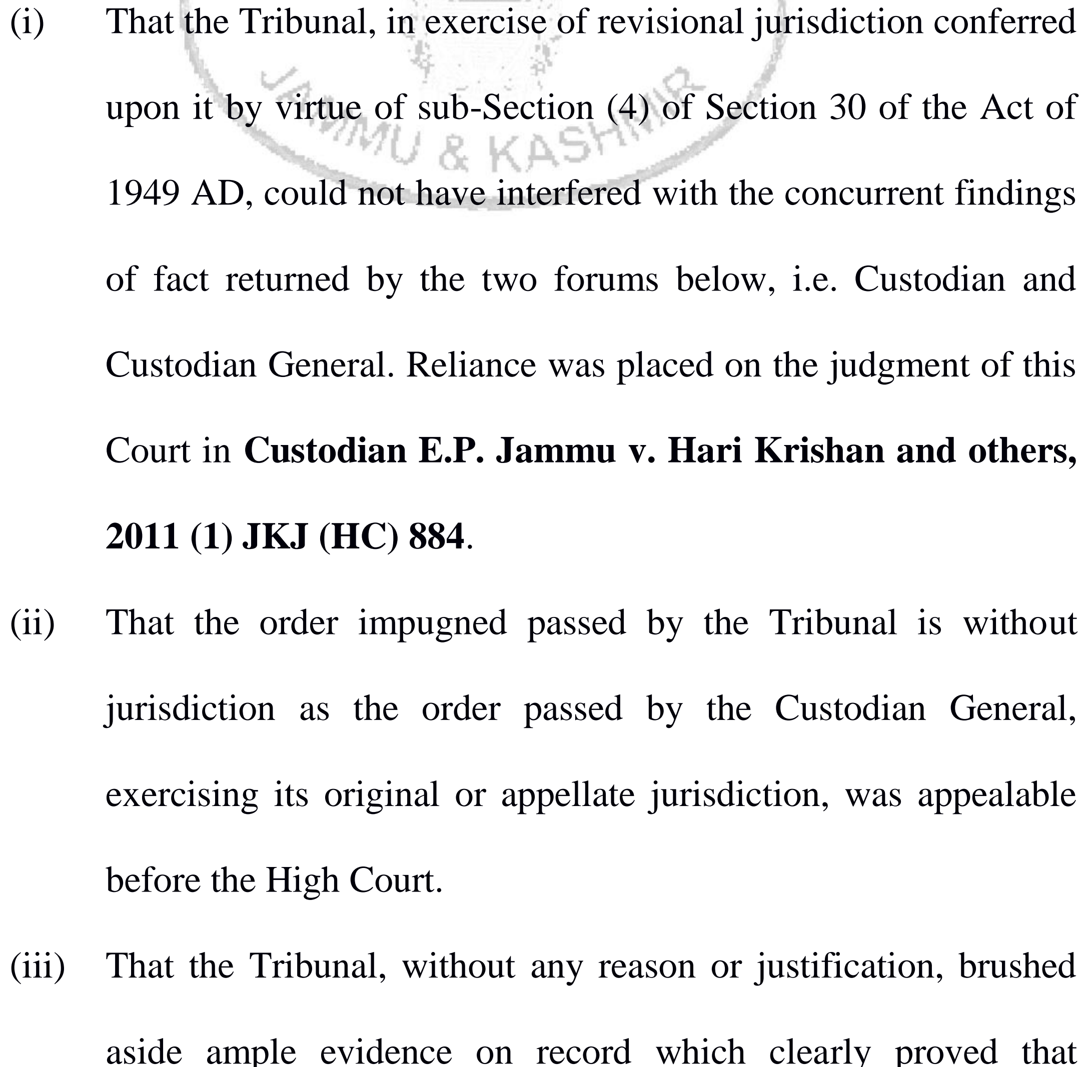
7. On remand, the Custodian, Kashmir, heard all the parties afresh and ultimately came to a conclusion that it was proved beyond any shadow of doubt that Subhan Wani had not died in Malpora, Baramulla, but had gone to Pakistan and that adoption under Muslim Personal Law was also not permissible. The Custodian, Kashmir, rejected the application under Section 8 of the Act vide order dated 27th September 2003.

8. Aggrieved, the respondent No.2 challenged the order of the Custodian Kashmir dated 27-09-2003 by way of an appeal before the Custodian General, J&K. However, the respondent No.2 could not succeed and his

appeal was dismissed by the Custodian General vide order dated 15-07-2008. Consequently, the order of the Assistant Custodian, Baramulla, dated 04-07-1963 and order dated 27-09-2003 passed by the Custodian, Kashmir, were upheld.

9. A revision petition was preferred by respondent No.2 before the Tribunal to seek quashment and setting aside of order of the Custodian General dated 15-07-2008. The Tribunal accepted the revision petition and vide order impugned dated 06-08-2015 set aside the orders of the Custodian General and the Custodian Kashmir. It is this order of the Tribunal dated 06-08-2015 which is called in question in this writ petition.

10. The grounds of challenge which were vehemently argued by Mr. G. J. Bala, learned counsel appearing for the petitioner, are summarized hereunder:-



(i) That the Tribunal, in exercise of revisional jurisdiction conferred upon it by virtue of sub-Section (4) of Section 30 of the Act of 1949 AD, could not have interfered with the concurrent findings of fact returned by the two forums below, i.e. Custodian and Custodian General. Reliance was placed on the judgment of this Court in **Custodian E.P. Jammu v. Hari Krishan and others, 2011 (1) JKJ (HC) 884**.

(ii) That the order impugned passed by the Tribunal is without jurisdiction as the order passed by the Custodian General, exercising its original or appellate jurisdiction, was appealable before the High Court.

(iii) That the Tribunal, without any reason or justification, brushed aside ample evidence on record which clearly proved that

Subhan Wani had migrated to Pakistan before 1947 raids and had not returned thereafter. The statements of the witnesses, including Habibullah Shiekh clearly substantiate the fact that Subhan Wani had migrated to Pakistan in the year 1947 when he was 50 years old.

(iv) That the Tribunal also failed to appreciate that a certificate purportedly issued by Police Station Shreeri, Gantamullah on 03-08-2000, indicating the date of death of Subhan Wani as 11-03-1948 in Malpora Baramulla, was an afterthought piece of evidence manufactured in the year 2000 itself. It is submitted that had there been any truth as to the death of Subhan Wani having taken place at Malpora Baramulla, than there was no reason or justification to with-hold such information from the forums below at the earliest when the application for de-notification was preferred by respondent No.2.

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(v) That, on the basis of the report of the Naib Tehsildar Settlement, Baramulla to the extent that Subhan Wani had gone to Pakistan, the subject property left behind by him was, on enquiry, declared as evacuee property. It is only after the subject property had been so declared and Subhan Wani entered in the records as an evacuee, the application filed by respondent No.2 before the Assistant Custodian, Baramulla, for allotment of the subject land was accepted and a formal allotment in favour of respondent No.2 was made. The Tribunal did not take note of the fact that alongside the application for allotment, the respondent No.2 got the statements of his father and one Fateh Rather, Numberdar of

the Village, recorded. The respondent No.2 also got his own statement recorded in support of the application. The respondent No.2 as well as two witnesses in their statements clearly deposed that respondent No.2 was an adopted son of Subhan Wani, who had left for Pakistan prior to 1947 raids. It was also stated by all the three that the whereabouts of Subhan Wani were not known after his crossing over to other side of the border.

(vi) That the Tribunal also failed to appreciate that respondent No.2, who had accepted the position in the year 1963 that Subhan Wani had migrated to Pakistan prior to 1947 raids and thereafter his whereabouts were not known, took a U-turn in the year 1985 when he, for the first time, set up title to the subject property on the ground that Subhan Wani had died in Malpora Baramulla and, therefore, his property was erroneously recorded as evacuee property. The respondent No.2 was thus guilty of approbating and reprobating, which is not permissible in law.

(vii) That the Tribunal has also failed to appreciate that the application filed by respondent No.2 in the year 1985 i.e. after 22 years of the notification of the subject property as evacuee property under Section 6, was barred by limitation.

11. *Per contra*, Mr. Nazim Khan, learned counsel appearing for respondent No.2 vehemently submitted that the order of the Assistant Custodian, Baramulla, notifying the subject property as evacuee property on the ground that Subhan Wani had crossed over to Pakistan, was without enquiry required to be conducted before issuance of the notification under

Section 6 of the Act of 1949. He submits that the respondent No.2 was adopted son of Subhan Wani who never migrated to Pakistan. He would argue that, after the death of Subhan Wani, which took place in the year 1948 at Malpora Baramulla, the respondent No.2 being the only surviving legal heir, was entitled to inherit the subject land. The Tribunal has correctly appreciated the position of law and come to a just conclusion that the orders passed by the Custodian and Custodian General were not sustainable in law. He would urge this Court not to interfere with the order of the Tribunal by entering into re-appreciation of evidence on record. He submits that the Tribunal has rightly concluded that since the notification under Section 6 was not in accordance with law and nullity in the eye of law, as such, the Act of 1949 was not applicable.

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12. Having heard the learned counsel for the parties and perused the material placed on record, I am of the considered view that the order impugned passed by the Tribunal is not sustainable for more than one reason.

13. Indisputably, the subject property belonged to one Subhan Wani, a resident of Malpora, Baramulla. On the basis of a report submitted by the Naib tehsildar Settlement, Baramulla that Subhan Wani had crossed over to Pakistan prior to 1947 raids and had not returned, the Assistant Custodian, Baramulla, in the exercise of powers conferred upon him under Section 6 of the Act of 1949, notified the subject land as evacuee property which had vested in the Custodian in terms of Section 5 of the Act of 1949. Claimably, respondent No.2 was of the age of five years at the time when Subhan Wani migrated to Pakistan. The subject property, as is apparent from reading of orders passed by the Custodian, Custodian General and the Special Tribunal, was notified as evacuee property in the year 1963. It is not in dispute that in

the year 1963 the respondent No.2 was major and was well aware that the property left behind by Subhan Wani in village Malpora, Baramulla, had been notified as evacuee property on the ground of Subhan Wani having crossed over to Pakistan.

14. The respondent No.2, who was in actual physical possession of the subject land, made an application to the Assistant Custodian, Baramulla, for issuance of formal order of allotment in his favour. In the application filed by him, which was supported by his own statement and the statement of his father and Numberdar Fateh Rather, the respondent No.2 clearly acknowledged the fact that Subhan Wani had migrated to Pakistan prior to 1947 raids and had not returned. He also acknowledged the fact that the property had been notified as evacuee property by the Assistant Custodian, Baramulla, by issuing a notification under Section 6 of the Act of 1949. It is on the basis of this acknowledgement of fact, the respondent No.2 applied for allotment. He had supported his claim for allotment on the basis of an adoption deed executed by Subhan Wani in his favour on 29th Phogan 2003 BK which corresponds to year 1946 AD.

15. The respondent No.2, after having been allotted the subject land, enjoyed usufructs thereof till the year 1985, when, on the report made by District Field Inspector, Baramulla that respondent No.2 had converted 17 kanal and 16 marlas of the subject land into an orchard, the Assistant Custodian, Baramulla, after summoning the record and verifying the veracity of the report, took over the possession of 17 kanal and 16 marlas of the land and placed it on superdari. The rest of the land, however, remained under the possession of respondent No.2.

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16. As can be seen from the record, the respondent No.2 made an application in the year 1985, purportedly under Section 8 of the Act of 1949 before the Custodian Kashmir for restoration of the subject land left behind by Subhan Wani, the adoptive father of the respondent No.2. It is for the first time an entirely new case was set up by respondent No.2, in that, he claimed that Subhan Wani had not migrated to Pakistan but died in the year 1948 at Malpora, Baramulla. To lend credence to his story, the respondent No.2 not only produced adoption deed dated 29 Phogan 2003 BK but also got new witnesses recorded in his favour. The matter was considered by the Custodian Kashmir, who, upon appreciation of facts and evidence brought on record by respondent No.2, came to the conclusion that the application filed by respondent No.2 under Section 8 of the Act of 1949 was barred by limitation. The Custodian opined that in view of the settled legal position, an application under Section 8 for restoration of possession was required to be filed within 12 years of the notification of the land as evacuee property. The Custodian, as is apparent from his order dated 27-09-2003 did not go into the merits of the claim made by respondent No.2.

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17. The appeal, which was preferred by respondent No.2 before the Custodian General against the order of Custodian dated 27th September 2003 was dismissed by the Custodian General vide his order dated 15-07-2008. The Custodian General not only concurred with the view of the Custodian that application under Section 8 was barred by limitation but also addressed the controversy on merits. The Custodian General strongly replied upon the statement of respondent No. 2, his father Rahim Dar and Fateh Shiekh, Numberdar, which were recorded by the Assistant Custodian in the year 1963

when an application filed by respondent No.2 dated 10-07-1963 for allotment of the subject land was taken up for consideration.

18. The Tribunal, in the order impugned, has not adverted to what happened in the year 1963 when an application came to be filed by the respondent No.2 for allotment of the land and was persuaded to hold that Subhan Wani was not an evacuee on the basis of some statements recorded in the year 1985 and the death certificate issued by the Police Station concerned, certifying the death of Subhan Wani having taken place in Malpora, Baramulla, on 11-03-1948.

19. When the impugned order is tested in the context of admitted facts and the attending circumstances explained above, it is clearly discernible that respondent No.2 has tried to blow hot and cold in same breath. In the year 1963 when he moved an application for allotment of the subject land, he clearly acknowledged the fact that Subhan Wani had Crossed over to Pakistan in the year 1947 and his property vested in the Custodian. He was also aware that the Assistant Custodian, Baramulla, acting in the exercise of powers vested in him under Section 6, had notified the subject property as evacuee property, which fact was also clearly borne out from the revenue records.

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20. Acknowledging the aforesaid fact and accepting the position as it was recorded in the revenue records, the respondent No.2 made the application. As noted above, the respondent No.2 not only presented an adoption deed executed by Subhan Wani but also got his statement as well as the statements of two witnesses recorded in support of his claim. In his own statement recorded before the Assistant Custodian, Baramulla, the respondent No. 2 has acknowledged the fact that Subhan Wani had migrated to Pakistan in the

year 1947 and had not returned thereafter. He got the allotment of the subject land made in his favour and enjoyed the possession to its entirety till the year 1985 when a portion of the subject land, which had been converted by respondent No.2 as Orchard in violation of the allotment, was taken over by the Department of Custodian.

21. It is during this period, the respondent No.2 came up with a new story and staked the claim to the subject land by asserting before the Custodian that Subhan Wani had never migrated to Pakistan but died in village Malpora, Baramulla, in the year 1948. He did record statement of few witnesses in support but could not produce any death certificate. It was in the year 2000 he got the entry of death of Subhan Wani made in the records of Police Station and simultaneously got a certificate of death in respect of Subhan Wani issued from the SHO Police Station Sheeri, Gantamulla. It is, however, not explaned by respondent No.2 anywhere in any proceedings as to why the death of Subhan Wani, if it had taken place at Malpora Baramulla in the year 1948, was not reported to Police till the year 2000. It is thus evident that the record in the Police Station was manuplated and certificate of death of Subhan Wani was got issued to substantiate the claim laid by the respondent No.2 before the Custodian. The Custodian General has, therefore, rightly not accepted the claim of the respondent No.2, the statements of few witnesses recorded in support thereof notwithstanding.

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<u>Doctrine of Approbate and Reapprobate</u>:

22. The Tribunal has failed to appreciate that in the given facts and circumstances of the case the doctrine of approbate and reprobate was clearly attracted. The doctrine stems from principles of equity and estoppel and may be understood as species of estoppel. In common parlance, estoppel means

that one cannot recant one's word and deny something accepted earlier. The doctrine originates from the latin maxim "*quod approbo non reprobo*", which translates into "that which I approve, I cannot disapprove". In short, it means that if a person takes two contradictory stands in the same case, it is often practised and said that he or she must not be heard. After ascertaining or acknowledging one right, stand or position, the person in question cannot later choose the other one to gain benefit from both. The doctrine has came up for consideration before Hon'ble the Supreme Court in umpteen cases and a glance at some of these judgments would demonstrate that the doctrine has firm foundation in our jurisprudence. A person who tries to blow hot and cold in the same breath is not heard by the Court. In the case of **Bhagwat Sharan v. Purushottam, (2020) 6 SCC 387**, Hon'ble the Supreme Court has held that where a person claims that the property has been bequeathed to him, accepts the Will and takes the benefit of the same, he cannot later on be allowed to turn around and urge that the Will is not valid and that the entire property is a joint family property. There are numerous other judgments from Hon'ble the Supreme Court affirming the applicability of doctrine as part of our jurisprudence, however, with a view to jettison the volume of the judgment, I have chosen not to refer to these judgments. Suffice it to say that the doctrine is clearly attracted in the instant Case and the respondent No.2, having taken the benefit of allotment on the basis of his acknowledgement of the fact that Subhan Wani had migrated to Pakistan and not returned thereafter, cannot be permitted to take a U-turn and claim that he never crossed over the border to Pakistan but died in Malpora, Baramulla.

Limitation:

23. That, as is rightly held by the Custodian and the Custodian General, the application under Section 8 was clearly barred by limitation. Sub-Section (1) and (2) of Section 8, which deals with limitation reads thus:-

> " 8. (1) "Any person claiming any right to, or interest in, any property, which has been notified under section 6 as evacuee property, or in respect of which a demand requiring surrender of possession has been made by the Custodian, may prefer a claim to the Custodian on the ground -
>
> (a) the property is not evacuee property; or
>
> (b) his interest in the property has not been affected by the provision of this Act.
>
> (2) Any claim under sub-section (1) shall be preferred by an application made within thirty days from the date on which the notification was issued or the demand requiring surrender of possession was made by the Custodian:
>
> Provided that the Custodian may, for sufficient reasons to be recorded, entertain the application even if it is made after the expiry of the aforesaid period."

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24. From reading of the relevant extract of Section 8 reproduced above, it is evident that a claim under sub-Section (1) is required to be preferred by the person claiming any right or interest in any property notified under Section 6 as evacuee property within a period of 30 days from the date on which such notification was issued or the demand requiring surrendering of possession was made by the Custodian. It is true that the Custodian may, for sufficient reasons to be recorded, entertain such application even if it is made after the expiry of 30 days. As is authoritatively held by Hon'ble the Supreme Court in **Ghulam Qadir v. Special Tribunal, (2002) 1 SCC 33**, the extended period of entertainment of such an application under Section 8 would be

reasonable period depending upon the facts and circumstances of the each case and in no case such period can be extended beyond 12 years. The Supreme Court has referred to Section 28 of the Limitation Act, which completely extinguishes the rights of the owner of the property and debars him from seeking relief in respect to that property including its possession in view of Article 142 of the Schedule of the Jammu and Kashmir Limitation Act, totally forbidding the enforcement of the claim, if any.

25. In the instant case, the notification under Section 6 was issued in the year 1963 to the knowledge of the respondent No.2, when he, upon notification of the property as evacuee, applied for allotment of the subject land. He filed an application under Section 8 for restoration of possession only in the year 1985 i.e. after 22 years of the issuance of notification under Section 6. The application was clearly barred by limitation. The Custodian Kashmir And the Custodian General, J&K, both took a right decision and held the application filed by the respondent No.2 barred by limitation. Para 52 of the judgment in **Ghulam Qadir** *(supra)* is relevant for our purpose and is, therefore, reproduced hereunder:-

> "52. Let us examine the legal aspect of the matter and thereafter its effect on the claim preferred by Sardar Begum. It is not disputed that the Act was enacted to provide for the administration of evacuee properties left over by the evacuees who, on account of outburst of communal riots, were forced to migrate either to Pakistan or to Pakistan Occupied area of the Jammu & Kashmir. The Act envisaged that because of disturbances and holocaust of communal riots some properties may have wrongly been declared as evacuee properties under the Act. Realising such a situation, Section 8 was

incorporated entitling persons claiming any right to or interest in any notified evacuee property to prefer claim to the Custodian on the ground that property was not an evacuee property or the applicant's interested in property had not been affected by the provisions of the Act. Under sub-section (2) of Section 8 of the Act such a claim was required to be preferred by an application within 30 days from the date on which the notification was issued or demand requiring surrender of possession was made by the custodian. The words "claim shall be preferred by an application within 30 days" unequivocally indicate that the provision was mandatory so far as the period of limitation for preferring the claim was concerned. However, the proviso to the aforesaid sub-section authorised the custodian to entertain the application after the expiry of the period but only for sufficient reasons required to be recorded (Emphasis supplied). In the instant case such an application was filed by Sardar Begum only in the month of December, 1958, admittedly, after about 9 years of the promulgation of the Act. It does not appear as to whether Sardar Begum had also filed an application for condoning the delay or the custodian had recorded sufficient reasons thereof as mandated by the first proviso to Section 8(2) of the Act. Otherwise also the power to condone the delay contemplated under the proviso to sub-section (2) of Section 8 cannot he held to mean to condone any delay at any time without recording sufficient reasons. The extended period for entertainment of an application under the Section would be a reasonable period depending upon the facts and circumstances of each case. In no case such a period can be extended beyond 12 years, the time provided under Section 28 of the Limitation Act totally extinguishing the rights of the owner in the property and debarring him from seeking a relief with respect to that property including its possession

> in view of Article 142 of the Schedule of Jammu & Kashmir Limitation Act totally forbidding the enforcement of claim and the remedy, if any."

26. With a view to overcoming the issue of limitation, the Tribunal has, in order impugned, held that since Section 6 notification is nullity having been issued without requisite enquiry, as such, the Act of 1949 was not applicable. In the opinion of the Tribunal, the subject property was not an evacuee property so as to attract the applicability of the Act. The view of the Tribunal clearely proceeds on a false premise. Section 6, as it is, does not call for holding any elaborate enquiry. It only provides for notifying the property as evacuee which by operation of law and by virtue of Section 5 stands automatically vested in the Custodian on migration of its owner to Pakistan. Section 8 affords a remedy to a person which disputes the vesting of property in Custodian under Section 5 and its notification under Section 6 of the Act of 1949. It is only when such remedy by way of an application under Section 8 is availed, the Custodian is required to conduct a detailed enquiry to determine as to whether the property is rightly notified as "Evacuee Property". Simultaneously it would also adjudicate the right of the person to claim restoration of such property. The person invoking Section 8 for de-notification of the property and its restoration in his favour must comply with the provisions of Section 8 and approach the Custodian within the prescribed limitation.

Adoption under Muslim Law:

27. There is another aspect which is not gone into by the authorities under the Act of 1949 nor was the same agitated before the Tribunal. The issue

pertains to the validity of the adoption under the Muslim Personal Law. A quick reference to Sri Pratap Jammu and Kashmir Laws (Consolidation) Act, 1977, would demonstrate that in cases where the parties are Mohammadans, Mohammedan Law and in cases where the parties are Hindu, the Hindu law shall be applicable, insofar as such law has been by the Consolidation Act of 1977 or any other enactment, altered or abolished or has been modified by any custom applicable to the parties concerned. Such custom must not be contrary to justice, equity and good conscience and has not been altered or abolished by any enactment having the force of law and has not been declared to be void by any competent authority. Section 4 of the Consolidation Act of 1977 substantiates this position and is thus set out below:-

> "4. Laws in force.—(1) The laws administered and to be administered by the Civil and Criminal Courts of the State of Jammu and Kashmir are and shall, be as follows:–
>
> [(a) The Acts for the time being in force in Jammu and Kashmir State ;]
>
> [(b) Orders, Hidayats, Ailans, Notifications, Ishtihars, Circulars, Robkars, Irshads, Yadashts, State Council Resolution, Rules, Proclamations and Ordinances issued, passed, published or made by or under the authority of His Highness or by any other competent authority empowered to make and promulgate laws for the time being ;]
>
> (c) the rules having the force of law made and promulgated under the provisions of any Act or law for the time being in force in the State of Jammu and Kashmir;
>
> (d) in question regarding succession, inheritance, special property of females, betrothals, marriage, divorce, dower, adoption, guardianship, minority bastardy, family relations, wills, legacies, gifts, waqf, partitions, castes or any religious usage or institution, the rules of decision is and shall be—
>
> the Mohammedan Law in cases where the parties are Mohammedans and the Hindu Law in cases where the parties are Hindus, except insofar as such law has been, by

> this or any other enactment, altered or abolished or has been modified by any custom applicable to the parties concerned which is not contrary to justice, equity and good conscience and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority ;
>
> (e) in questions relating to the Law of Torts, the State Courts shall follow, as far as practicable, the 2[Indian Law].
>
> (2) In cases not otherwise specially provided for, the Courts shall act according to justice, equity and good conscience."
>
> (**Emphasis supplied**)

28. It is thus abundantly clear that prior to formal application of Shariat Law in the State of Jammu and Kashmir in respect of succession, inheritance, property, marriage, divorce, dower, adoption, guardianship etc. etc. Mohammedans were governed by Muslim Personal Law unless such law had been altered or abolished by any enactment in force or had been modified by any custom applicable to the parties. It is thus axiomatic that prior to the enforcement of Shariat Law in the State of Jammu and Kashmir, Mohammedans were, in respect of the aforementioned matters, governed by Muslim Law as modified by custom, if any, prevalent among the parties. As per the Muslim Law (Shariat Law), adoption is not permissible amongst the Muslims. However, by virtue of the provisions of the Consolidation Act of 1977 promulgated by his highness the Maharaja of the State, adoption amongst the Muslims was permissible where it was so permitted by a custom prevalent among the parties. To prove that customary adoption was available, a party claiming such custom was not only required to establish the custom having the force of law but was also obliged to show that such custom was not contrary to justice, equity and good conscience and that the same had not been declared to be void by any competent authority or by any law for the time being in force. The position, however, changed with the coming into the

force of the Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007. Section 2 of the Act of 2007 reads thus:-

> "2. Application of personal law to Muslims.— Notwithstanding any customs or usages to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lain, khula and mubarrat, dower, guardianship, gifts, trusts and trust properties, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

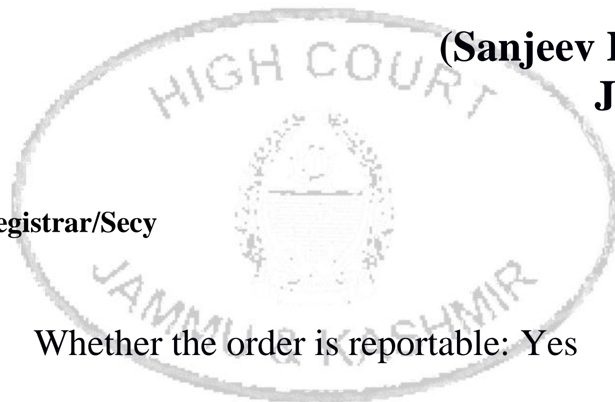
29. In view of the clear and categoric provision of Section 2 of the Act of 2007, all questions regarding interstate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage etc. etc. are now governed by the Muslim Personal Law (Shariat), custom and usage to the contrary notwithstanding. It is thus clear that after the promulgation of the Act of 2007, the customary adoption is no longer permissible under the Muslim Personal Law.

30. From the aforesaid discussion, it is axiomatic that in the year 1948, customary adoption was though permissible, yet it was for the person claiming such adoption to plead and prove that such custom was prevalent in the area and had been in practice from time immemorial. The adoption deed placed on record by respondent No.2 does not indicate that any such custom, permitting Muslims to go for adoption, was prevalent in the area amongst the Muslims. The Adoption Deed relied upon by the respondent No.2 was thus

not a legal document capable of conferring upon the respondent No.2 a right to inherit the property of Subhan Wani.

31. I am aware that this issue was not raised by the writ petitioner before any of the forums below, yet having regard to the importance of the issue, I have digressed a little bit to set the issue at rest.

32. For the reasons given above, I find merit in this petition. The same is, accordingly, allowed. The impugned order dated 06-08-2015 passed by the Special Tribunal is set aside and the order of the Custodian General dated 15-07-2008 is up-held and shall be given effect to.



(Sanjeev Kumar)
Judge

SRINAGAR
29.02.2024
Anil Raina, Addl. Registrar/Secy

Whether the order is reportable: Yes