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ed by the Act to dispose of within the meaning of section 158 (1) and it is therefore a matter in which a Civil Court's jurisdiction is barred.

For the above reasons I would dismiss the appeal with costs.

HILTON J.

ADDISON J.

ADDISON J.—I agree.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Harrison and Dalip Singh JJ.

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Nov. 28.

WALAYAT SHAH AND ANOTHER (DEFENDANTS) Appellants

versus

MUHAMMAD HUSSAIN AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 538 of 1926.

Custom—Succession—Sayads—*of* Chak *Abdul Khaliq, Tahsil and District Jhelum—whether father competent to make an unequal distribution of his ancestral property among his sons.*

Held that the defendants, on whom *onus* rested in face of the entry in the *Riwaj-i-am* of the Jhelum District, had succeeded in proving that a *Sayad* of *Chak* Abdul Khaliq, Tahsil and District Jhelum, can by custom make an unequal dis tribution of his ancestral property among his sons, by making a gift in favour of certain sons.

But that he cannot do this if the result of such a gift is inequitable and amounts practically to disinheriting the other sons.

Shershah v. *Jafarshah* (1), referred to.

Second appeal from the decree of Mian *Ahsan-ul-Haq, District Judge, Jhelum, dated the 8th December, 1925, reversing that of* Sheikh *Abdul Rahman,*

(1) 51 P. R. 1883.

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Subordinate Judge, 4th Class, Jhelum, dated the 18th March, 1925, and decreeing the plaintiffs' suit.

DURGA DAS and SHAMAIR CHAND, for Appellants.

J. N. AGGARWAL and J. L. KAPUR, for Respondents.

DALIP SINGH J.

DALIP SINGH J.—The plaintiffs in this case sued for joint possession of one-third of certain land and one-third of certain occupancy land, as given in the plaint, situate in the area of *Chak* Abdul Khaliq and Chhamula and one-third of some other occupancy land in the area of Khana Boki, *Tahsil* Jhelum, on the allegation that one Muhammad Ali Shah was the last male owner of the land. He was father of plaintiffs Nos. 1 and 2, and defendants Nos. 1 and 2, grandfather of plaintiff No. 3 and father-in-law of defendant No. 3. He had made a gift of certain land, which was ancestral, in favour of defendants Nos. 1 and 2 by means of a registered deed, dated the 31st July, 1923. He had since died, and the plaintiffs sued for joint possession on the ground that the gift was invalid, Muhammad Ali Shah having no right to make such a gift. It was alleged that defendant No. 3 had no interest in the property.

The defendants contended that the gift of land had been validly made in favour of defendants Nos. 1 and 2. They did not admit that the land was ancestral and contended that, at any rate, the donor had full power to make such a gift, and the plaintiffs, not having been disinherited, had no claim in law.

Issues were framed, and the trial Court held that the land was ancestral, that defendant No. 3 had no right in the land, and that the donor had the right to make the gift in question and, therefore, dismissed the plaintiffs' suit with costs.

On appeal the learned District Judge held that the *riwaj-i-am* of the district was in favour of the

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plaintiffs, and that the defendants had not discharged the *onus* which lay on them and the donor had no right to make the gift. He, therefore, accepted the appeal and, reversing the order of the lower Court, awarded the plaintiffs a decree with costs throughout. A certificate of appeal was granted on the question of custom, namely, whether a *Sayad* of *Chak* Abdul Khaliq could make an unequal distribution of his ancestral property among his sons by making a gift in favour of certain sons?

The defendants contended, firstly, that, on the findings and allegations of the plaintiffs themselves, the plaintiffs' right is to 3/10ths and not to 3/9ths of the land, because it has been held that defendant No. 3, *Mussammat* Fazal Begam, the widow of a predeceased son of Muhammad Ali Shah, has no right in the property. The learned counsel for the plaintiffs-respondents has nothing to say against this contention. The real dispute centres in the question of the right of a *Sayad* of this particular village to make an unequal distribution of ancestral property among his sons. It is true that the *Riwaj-i-am*, as it stands at present, is against any such right, see page 62, Question 95, of Talbot's *Riwaj-i-am* of the Jhelum district. On the other hand, no instance has been cited in support, and the defendants-appellants contend that the slight *onus* cast upon them by the *Riwaj-i-am* has been rebutted by the previous *Riwaj-i-am* of 1880, printed at page 134 of the paper book. This *Riwaj-i-am* is undoubtedly in favour of the defendants-appellants' claim. No instances again are cited in the *Riwaj-i-am*, but the defendants-appellants contend that that *Riwaj-i-am* is of the particular village in question and more weight should be attached to it

than to the general *Riwaj-i-am* of the district as given in the 1900 Manual. They, further, contend that the *Riwaj-i-ams* of the neighbouring districts are in their favour. These *Riwaj-i-ams* are printed at pages 135 and 137 of the paper book and they show that in Attock and Rawalpindi, with the exception of certain tribes, the *Sayads* and other Muhammadan tribes of those districts have power to make an unequal distribution among their sons. The *Riwaj-i-am* of Shahpur, another neighbouring district, is also in favour of the defendants-appellants. The *Riwaj-i-am* of Gujrat is against them. But curiously enough the only instance directly in point comes from the village of Moinuddinpur in *Tahsil* Gujrat where a *Sayad*, Ahmad Shah, made a gift of a portion of his property in favour of one son. A suit was brought by the other son but was dismissed. This judgment is printed at pages 69 and 70 of the paper book and in it another instance of *Sayads* of Madina in *Tahsil* Gujrat is also given. This case is reported as *Shershah* v. *Jafarshah* (1). In that case the *onus* having been cast on the persons contending against the gift, it was held that the gift not being contrary to Muhammadan Law had not been shown to be invalid and was, therefore, upheld. The question, therefore, resolves itself into this. Is the present *Riwaj-i-am* in the Jhelum district, which is unsupported by any instances, rebutted by the previous *Riwaj-i-am*, by the fact that the *Riwaj-i-ams* of the neighbouring districts are in favour of the contention of the defendants-appellants and by the fact that the one district whose *Riwaj-i-am* favours the plaintiffs-respondents shows a case where a gift was made and upheld so

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far as *Sayads* are concerned?. In my opinion, bearing in mind that the West Punjab is more under the influence of Muhammadan Law than the Central Punjab, and that the burden of the issue, which rests on the defendants-appellants, undoubtedly is slight, the *Riwaj-i-am* has been rebutted, and I would hold that a *Sayad* of *Chak* Abdul Khaliq has power to make an unequal distribution of the ancestral property in the presence of sons by making a gift of a portion to a particular son. It is clear, however, that he cannot do this if the result of such a gift is inequitable and amounts practically to disinheriting the other sons. From this point of view the case has not been fully considered.

I would, therefore, accept the appeal and remand the case under Order 41, rule 25, for decision on the question whether the gift in question is equitable or inequitable in the circumstances of the case and does or does not amount to disinheriting the plaintiffs-respondents. The trial Court will allow both parties to lead evidence on the point and record that evidence together with its opinion and send it to the District Judge who will also record his opinion and forward the report to this Court within three months. It is pointed out that the share of the plaintiffs in any case cannot be more than 3/10ths as opposed to the 3/9ths claimed. Costs will abide the event.

HARRISON J. HARRISON J.—I agree.

A. N. C.

Appeal accepted.
Case remanded.