The 1865 entry cannot be read in that way merely because the names of the owners were then given in greater detail than in the previous settlement record, and plaintiffs have not proved execution of a fresh deed.

It is admitted that both the parties are relatives and that the plaintiffs' predecessors in 1850 (or earlier) left the village and settled in another village some five miles away, where they acquired a large ownership holding: from what the parties say I have no doubt that the alleged mortgage in dispute was really a part of the general distribution of family land effected in the early days of British rule, and that there has never been any intention of disturbing this arrangement for at least 60 years. Plaintiffs cannot now demand that their status as mortgagors should be recognized any longer.

The appeal is dismissed with costs to the defendants.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1914 Lahore 465

KENSINGTON, J.

Emperor

v.

Muhammad Din—Accused.

Criminal Revn. No. 616 of 1913, Decided on 17th May 1913, from order of Sess. Judge, Sialkot, D/- 15th March 1913.

(a) Workmen's Breach of Contract Act (13 of 1859), S. 1—Contract of service for more than three years cannot be enforced even for limited period.

A contract of service entered into for more than three years cannot be enforced even for a limited period under Act 13 of 1859. The general provision of law is that a man cannot be treated as a criminal for not performing a contract which could not be enforced against him by a civil process. [P 467 C 1]

(b) Workmen's Breach of Contract Act (13 of 1859), S. 1—Contract of agreeing to repay initial loan out of wages is not affected by Act.

Where the accused in proceedings under Act 13 of 1859 entered into a contract whereby he agreed to repay the initial loan or advance out of wages earned.

Held: that the agreement was quite different from a contract contemplated by the Act: 3 *All.* 744; 6 *Bom.* 368 and 5 *I. C.* 914, *Ref.* [P 467 C 2]

(c) Workmen's Breach of Contract Act (13 of 1859)—Contract by workmen providing definite penalty for breach—Act is inapplicable.

Where a contract by a workman provides a definite penalty for breach, the employer cannot, under any circumstances, adopt the remedy by proceeding in terms of Act 13 of 1859. [P 468 C 1]

Gokal Chand Narang — for the Crown.

Muhammad Iqbal—for Accused.

Facts.—Jhanda Singh, proprietor of a factory, known as the Victoria Sports Works, Sialkot, complains that on 19th April 1910, the accused accepted an advance of Rs. 59 from him and promised to work for five years as a ball-maker in the factory and so executed an agreement but on 17th October 1912, he left away the work; Rs. 58-14-0 out of the advance money is due from him.

The accused pleads that the terms of the agreement were not recorded with his knowledge. The complainant gets work done in contravention of the stipulations in the agreement. He deducts wages. He dishonours and beats the accused and gets work beyond his power. He bids him to sew with twine of swine bristles.

The accused was directed by Sheikh Miran Bakhsh, exercising the powers of a Magistrate of the First Class, in the Sialkot District, by order dated 21st January 1913, under Ss. 1 and 2, Act 13 of 1859 to work under the respondent till 15th April 1915.

The proceedings are forwarded for revision on the following:

Grounds.—It appears to me that I must refer these six applications for revision to the Chief Court as they raise several questions under Act 13 of 1859. The facts in each case differ in detail, but certain features are common to all of them.

In the first place the petitioners all entered into contracts of personal service for more than three years, viz., for five years. It is not suggested that they entered into indentures of apprenticeship and as a contract for personal service or: "a contract, the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date,"

cannot be enforced by civil action under S. 21 (g), Specific Relief Act, I think the present contracts were, on the face of them, invalid and not enforceable after three years from the date of execution in each case. The Honorary Magistrate has directed petitioners to complete their five years' term of service, but, in my opinion, each term ought to be reduced

by two years in any event. It could hardly be held that a contract not enforceable at civil law could be enforced by a criminal prosecution. The workman in refusing to carry out such a contract would have the "lawful excuse" that his contract was an illegal one and void under S. 21, Specific Relief Act.

There is authority for this view in *Queen-Empress* v. *Rajab* (1) where the English case of *Banks* v. *Crossland* (2) is referred to.

This point was not raised by petitioner's counsel.

The next point is the principal one raised by petitioner's counsel. The petitioners have one and all entered into a contract whereby they agree to repay the initial loan or advance out of wages earned. In form, then, the loans made to them were secured on their future wages and not directly advances made on account of work which they had contracted to perform. Still in substance I can see no practical difference between a contract to work and repay an advance in cash out of the wages earned and a contract also to work and repay an advance in kind, i. e., by the labour of services rendered. And on the whole, this appears to be the view of the authorities cited, viz., *Tangi Joghi* v. *Hall* (3) and *Queen-Empress* v. *Tulukanam* (4), but I can find no ruling on the precise point raised. None of the cases now involved resemble the one reported in the foot-note to p. 133 of *I. L. R. Mad.* Vol. 7. The advances made were to be repaid out of the wages earned apparently as might be agreed upon by the parties from time to time. The employer might possibly have deducted all the wages earned in any one month in liquidation of the advance, or the petitioners might have insisted on repaying all the advances out of their wages. In either case the advance being wholly paid off no proceeding under the Act would then have lain, though the employer might have a civil remedy. But in no case was the advance fully repaid or exacted.

(1) [1881-82] 6 Bom. 368.
(2) [1875] 44 L. J. M. C. 8 = 10 Q. B. 97=32 L. T. 226=23 W. R. 414.
(3) [1900] 23 Mad. 203=1 Weir 687.
(4) [1884] 7 Mad. 131=1 Weir 685.

But in the cases* of Muhammad Din, son of Allah Bakhsh, Muhammad Din, son of Nizam Din, Nur Muhammad, son of Fazal, and Feroz Din, the complainant agreed to pay a monthly wage, and he has deducted a proportionate share of that wage for Sundays, on the ground that his factory is closed on Sundays by order of the Collector. It is however admitted on his behalf that the Collector's order was passed before any of these contracts were made. This being so, it ought to be held that complainant agreed to pay these four petitioners a monthly wage for every month's work, excluding Sundays, because he knew that they would not be allowed to work on Sundays. The agreements do not provide for any deduction on account of the compulsory closing of the factory on Sundays. It is admitted for complainant that deductions from the wages paid were made on account of Sundays.

I recommend then that the Honorary Magistrate's orders in Revision Cases, Nos. 19, 20, 21 and 24 be set aside. And in Cases Nos. 22 and 23 I recommend that the periods for which petitioners have been ordered to work be reduced by two years.

The petitioner's counsel urges that the restrictions on trade are invalid, but as the Honorary Magistrate imposed no penalty on that ground, so that point need not be considered.

Complainant's counsel questions the competency of the Chief Court to revise any order under Act 13 of 1859, but the High Courts have revised various orders under the Act.

The petitioner, Fateh Din, did not get his whole advance of Rs. 30 in cash, but partly in kind, as he received a tennis bat, value Rs. 13 in part payment of the advance. There is no Truck Act in India, and I cannot see how this fact is relevant. He purchased a bat for Rs. 13 out of the Rs. 30 advanced.

The separate note on each case shows the terms of each contract.

Order.—There are before me six separate cases reported by the Sessions Judge of Sialkot for revision of orders passed by an Honorary Magistrate of the First Class under Ss. 2 and 3, Act 13 of 1859

* Case Revision No. 381-20.
" " No. 389-19.
" " No. 383-24.
" " No. 386-21.

(breaches of contracts by artificers, etc.,). These revisions cover the cases of six workmen employed by a factory on various dates between March 1910 and April 1911 to work under contracts, professing to be framed under Act 13 of 1859. The ages of the men at the time of contract varied from 19 to 42. They contracted to work for five years at specified rates of daily or monthly wages, and in each case it was provided that the factory advanced sums of from Rs. 10 to Rs. 59 to be recovered from the wages.

The six petitioners have left the factory on various dates between August and November 1912, and on applications to a Magistrate they have been directed to continue working for the factory for the remainder of the terms of five years expiring on certain dates in 1915 and 1916, the petitioners being further directed, under S. 3 of the Act, to furnish security for due performance of the orders.

The learned Sessions Judge has pointed out one fatal defect which invalidates all these contracts. By S. 21 (g), Specific Relief Act, no contract can be specifically enforced the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date. There is a similar limitation to three years in the somewhat analogous case covered by S. 492, I. P. C. The Sessions Judge seems to have been of opinion that this initial difficulty can be got over by requiring the petitioners to continue working under their contracts for the period of three years but it does not appear to me that this is a sound view of the law. The general provision of law is that a man cannot be treated as a criminal for not performing a contract which could not be enforced against him by a civil process. The whole of these contracts now in question appear to me to be absolutely unenforceable by a civil process even up to the limit of three years. The law says that the contracts cannot be specifically enforced at all, and I am inclined to say that neither the civil nor the criminal Courts would have any discretion to enforce them for some limited period.

The Sessions Judge has further found that in the case of four of the petitioners to whom monthly wages were guaranteed by the contracts, there has been a flagrant breach of contract by the factory in deducting one-seventh of these wages on account of closure of the factory on Sundays. In these four cases he has recommended that the Magistrate's orders be altogether set aside. In the remaining two cases, where the contract provided for daily wages at fixed rates he has recommended that the Magistrate's order should be modified by the limitation of the period for which the petitioners have to work for the factory to three years. For the reason already given I do not think that it is possible to make any distinction between these two classes of cases.

There appears to me to be a still further difficulty in the way of the respondent, owner of the factory. I do not think it possible to distinguish the present cases from that discussed in *Ganeshi Lal* v. *Shugan Chand* (5), in which it was ruled that similar orders by a Magistrate must be set aside as ultra vires and bad in law. It is true that in the present cases there is a contract provision that the petty sums advanced at the time of contract by way of loan shall be recovered from wages earned, and in this respect it is urged that the ruling of *Ganeshi Lal* v. *Shugan Chand* (5) does not apply. The distinction appears to me to be superficial and to not really touch the merits of the question under consideration. The petty advances originally made were clearly by way of loan. In the case of each petitioner a running account has been kept up showing repayments made and further advances given from time to time with the net result that in four of these cases there is a balance shown as still due to the factory. However ingeniously the terms of the contract may have been framed, I cannot treat these advances as anything more than loans subject to the condition that the borrowers should work for the factory and not transfer their services elsewhere until the money had been repaid. As pointed out in *Ram Prasad* v. *Dirgpal* (6), this was something quite different from any contract contemplated by Act 13 of 1859 and a similar ruling of *Queen-Empress* v. *Rajab* (1) has been also referred to in *Ganeshi Lal* v. *Shugan Chand* (5). I do not think

(5) [1910] 9 P. R. 1910 Cr. 5 I. C. 914.
(6) [1881] 3 All. 744.

it possible to say that either the original advances or any subsequent advances by the employer in the present cases from time to time represent advances on account of any work which has been contracted to be performed.

A still further difficulty has been pointed out by counsel for the petitioners that in all the present contracts there is a distinct provision of a penalty to be recovered by the employer in case of breach of the contract by the workmen concerned. The penalty may be unenforceable by a civil suit owing to the fact that the contracts themselves cannot be specifically enforced, but as these contracts prescribe a definite penalty for breach, I am inclined to the opinion that the employer could not, under any circumstances, adopt an alternative remedy by proceeding in terms of Act 13 of 1859.

For all these reasons the revisions must be allowed and the Magistrate's orders requiring the petitioners to continue working for the factory for further periods are accordingly set aside.

R.M./R.K. *Revision allowed.*

A. I. R. 1914 Lahore 468

RATTIGAN AND SCOTT-SMITH, JJ.

Mahomed Khan — Plaintiff — Appellant.

v.

Dalel and *others*—Defendants—Respondents.

Second Appeal No. 467 of 1912, Decided on 12th February 1914, from decree of Divl. Judge, Attock, D/- 9th November 1911.

Custom (Punjab)—Alienation — Ancestral property — Father's powers of disposition held restricted in Awan of Talagang Tahsil.

An Awan of the Talagang Tahsil, who has sons living, has not unlimited powers when dealing with ancestral property. [P 469 C 1]

Jalal Din—for Appellant.

Badr Din—for Respondents.

Judgment.—One Dalel, an Awan of the Talagang Tahsil, which now forms part of the Attock District, but was formerly within the Jhelum District, on 27th June 1899, by registered deed, sold certain lands in Mauza Dher Wand in the said tahsil to one Gul Sher, for an alleged consideration of Rs. 1,500. In the present suit, one of the two sons of Dalel, the said vendor, prays for a declaration that the said sale was without consideration and for no necessary purpose and is therefore not binding upon him as the next heir of the vendor.

The Subordinate Judge found (1) that out of the alleged consideration, Rupees 1,250, the price of 12 camels had not been proved, (2) that necessity for the sale had not been established, and (3) that defendants had failed to prove that an Awan of the Talagang Tahsil, who had sons living, was, by custom, competent to alienate his ancestral land except for necessity. He further found that the suit, which was instituted on 19th August 1910, was within time and that it had not been established that plaintiff, who was a minor at the date of sale and only 19 years of age in 1911, had done anything to estop himself from claiming the relief now sought. He accordingly granted him the declaration for which he prayed.

Defendant appealed to the Divisional Judge, who found that consideration had been proved in full, that there was no necesity for the sale, but that plaintiff's suit must nevertheless fail inasmuch as an Awan of Talagang Tahsil has by custom power to dispose of ancestral land even in the presence of sons at his will and without necessity. He further held that the suit was brought in collusion with the vendor and that it would be inequitable to grant plaintiff the relief claimed, as parts of the land sold have in the meantime been alienated to third persons. He therefore dismissed plaintiff's suit with costs.

Plaintiff applied to this Court under Cl. (b), S. 70 (1), Punjab Courts Act, as amended by Act 25 of 1899, for revision of the Divisional Judge's decree and his application was admitted thereunder as a further appeal. We must therefore accept the findings of fact in this case and hold (in concurrence with the Courts below) that defendant has failed to prove that the sale in his favour was for necessary purposes. In the circumstances the ordinary rule of custom, as propounded in the Full Bench ruling reported as *Gujar* v. *Sham Das* (1), must apply and the sale be held to be ineffective against plaintiff unless the defendant can satisfy us that the vendor had an unrestricted power of disposition of his ancestral holding, or that the suit is time barred or that there are circum-

(1) [1887] 107 P. R. 1887.