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were not charged under that section. I am unable to agree with this contention. It is true that Darab and Taqi were charged with an offence different from the offence with which the other accused were charged, but the offences alleged to have been committed by all the applicants were committed in the course of the same transaction, viz., in the course of gaming and, therefore, in view of the provisions of clause (d) of section 239 of the Code of Criminal Procedure all the applicants could be jointly tried. In support of his contention the learned counsel for the applicants has relied on the cases of *Malkhan v. Emperor* (1) and *Emperor v. Fazal Din* (2). With all respect I am unable to agree with those decisions. No reason has been assigned by the learned Judge who decided those cases for holding that the offence of keeping a common gaming house and the offence of gaming cannot be committed in the course of the same transaction.

In my judgement the decision of the courts below is perfectly correct and I dismiss this application.

Application dismissed.

Before Mr. Justice Iqbal Ahmad.

HAFIZ-UD-DIN v. LABORDE.*

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August, 4.

Criminal Procedure Code, sections 144 and 561A—Emergency order—Wrongful use of section to procure the delivery of property by the person in possession to the claimant.

Section 144 of the Code of Criminal Procedure cannot legally be used simply to procure the transfer of property and documents from the person in possession to the claimant because, in the opinion of the court, the claimant is entitled to their possession and when, as a matter of fact, it has been so used, section 561A of the Code enables the court, if it so thinks fit, to direct that the property and documents in ques-

*Criminal Reference No. 369 of 1927.

(1) (1909) 5 Indian Cases, 720.

(2) (1914) 27 Indian Cases, 844.

tion be retransferred. *Bhaganathi Servai v. Valayee* (1) and *Chandra Nath Mukerji v. Emperor* (2), referred to.

THIS was a reference from the Sessions Judge of Meerut under section 438 of the Code of Criminal Procedure, recommending that an order passed by a Sub-Divisional Magistrate under section 144 of the Code directing Hafiz-ud-din, applicant, to deliver the register and the goods of the Asiatic Petroleum Co., opposite party, that were in his possession, to the latter, be set aside and that the opposite party be ordered to hand back the register and the goods to the applicant.

The facts that led to the present reference were as follows :—The applicant was for some time the agent of the Asiatic Petroleum Co., but his agency was terminated. Notwithstanding the termination of his agency, he refused to deliver back the register and goods of the Company. The opposite party then filed an application, under section 144 of the Code of Criminal Procedure, praying that the applicant be directed to deliver to the opposite party the register and goods in his possession. The learned Magistrate, after recording the statement of the opposite party's attorney, issued an order under section 144, directing the applicant to deliver all the things belonging to the Company that were in his possession to the attorney of the Company. The applicant was also required to show cause if he was dissatisfied with the order. The applicant challenged the order of the learned Magistrate on the ground that the order did not come within the purview of section 144 and was, therefore, not warranted by law. His contention did not find favour with the learned Magistrate and, accordingly, he made his previous order absolute.

The applicant filed an application in revision against the order of the learned Magistrate in the Court of the Sessions Judge, who made the present reference.

(1) (1916) 33 Indian Cases, 830.

(2) (1918) 47 Indian Cases, 803.

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Mr. *Syed Muhammad Husain*, for the applicant.

Munshi *Hazari Lal Kapur*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Walliullah*), for the Crown.

THE judgement of the Court (IQBAL AHMAD, J.), after setting out the facts as above, thus continued :—

In my judgement the order of the learned Magistrate cannot be supported and ought to be set aside.

As is clear from the language of section 144, action under that section can only be taken when “immediate prevention or speedy remedy is desirable” with a view “to prevent obstruction, annoyance or injury. . . to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray”. In short, proceedings under the section may be taken only in *urgent* cases of nuisance or apprehended danger, and the existence of these circumstances is a condition precedent to an action under the section. It is the urgency of the case that vests the Magistrate with jurisdiction to exercise the extraordinary powers conferred by the section. It is further incumbent on the Magistrate to state in his order the materials upon which his opinion as regards the existence of an emergency is based. It is further provided that the order passed under the section is to remain in force only for a period of two months from the making thereof, unless the Local Government, by notification in the official Gazette, otherwise directs. These provisions show that the scope of the section is very limited, and the powers vested in the Magistrate by that section ought to be sparingly exercised, and proceedings under the section should not be taken unless all the requirements of the section are strictly complied with. The section was never intended to vest a Magistrate with powers to decide disputes of a civil nature between private individuals and to usurp the

functions of a civil court. Civil courts and civil courts alone have been vested by the legislature with jurisdiction to decide disputes of a civil nature between private individuals and it is not permissible for a Magistrate, under the cover of an order under section 144, to dispossess a particular individual from certain property and to direct delivery of possession of that property by an order under section 144, when the object of the order is not to prevent obstruction, annoyance or injury, etc., "to any person lawfully employed".

In the present case it appears from the record that the applicant refused to deliver the goods of the Company in his possession till such time as his account was not settled with the Company in respect of the security given by him. This being so, the dispute between the parties was purely of a civil nature which was not within the competence of the Magistrate to decide. As pointed out by the learned Sessions Judge, the learned Magistrate has nowhere found that there was any necessity of an "immediate prevention or speedy remedy". The learned Magistrate based his order on the fact that there was an apprehended injury to the public, inasmuch as the retention of the goods of the Company by the applicant was calculated to cut short the supply of petrol, and this was likely to cause serious injury and annoyance to the public. The learned Magistrate nowhere says that there was any apprehended injury or nuisance to a "person lawfully employed". The assumption made by the learned Magistrate that the public was annoyed or injured by the act complained of, was not based on any evidence. It may very well be that the public was receiving the supply of petrol from other companies, and it did not matter to it whether or not the applicant restored possession of the goods to the opposite party. There is nothing on the record that there was any urgent case of nuisance or apprehended danger that called for the exercise of the

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extraordinary powers conferred by section 144, and, in my judgement, the order of the learned Magistrate was wholly without jurisdiction.

As already stated, it is provided by the section that the order is to remain in force only for a period of two months. This means that the order must not be in its nature irrevocable, and must be such that can be recalled on the expiry of two months. In the present case the order passed by the learned Magistrate directing delivery of the goods to the opposite party was unlimited in matter of time and, in my opinion, the learned Magistrate was not competent to pass such an order.

It remains to consider whether I have jurisdiction by setting aside the order of the learned Magistrate to direct that the register and the goods be re-delivered to the applicant. I think that section 561A of the Code empowers me, with a view to secure the ends of justice, to direct the opposite party to re-deliver the register and the goods to the applicant, and this must be done by the opposite party within a fortnight from the date that my order is communicated to the opposite party. The view that I take is in consonance with the view taken in the case of *Bhaganathi Servai v. Valayee* (1) and *Chandra Nath Mukerji v. Emperor* (2).

For the reasons given above I accept the reference, set aside the order passed by the learned Magistrate, and direct the opposite party to hand back the register and the goods to the applicant within two weeks from the date that this order is communicated to the opposite party. The learned Magistrate should take steps to communicate this order to the opposite party within a week from the date that the record is received back in his court.

(1) (1916) 33 Indian Cases, 830.

(2) (1918) 47 Indian Cases, 803.