

**Hari Mati Dasi Vs. Hari Dasi Dasi**

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**SooperKanoon Citation :** [sooperkanoon.com/860717](http://sooperkanoon.com/860717)

**Court :** Kolkata

**Decided On :** Mar-17-1925

**Reported in :** AIR1925Cal991

**Appellant :** Hari Mati Dasi

**Respondent :** Hari Dasi Dasi

**Judgement :**

1. This is a Reference under Section 438 of the Criminal Procedure Code by the Districts Magistrate of Howrah recommending that an order passed by the Deputy Magistrate under Section 147 (2) of the Code be set aside.

2. The facts are that the first party complained that the second party raised a wall on her own land blocking the windows in the house of the first party and thereby shut out light and air from the western room in that house. The Deputy Magistrate found that the first party was enjoying the right of access to light and air through the windows in question for the last two years, and as the putting up of the wall by the second party was admitted, he held that it was not necessary for him to discuss the evidence in the case. The only point that he considered to be important was whether there was likelihood of a breach of the peace and he held tinder the circumstances, although there was no direct evidence in support of his finding, that there was likelihood of a breach of the peace. In conclusion he made an order to this effect: ' I, therefore, direct that the second party Hari Dasi Dasi do demolish the new wall within the period of one month from this date and that she

shall not put up another wall blocking the windows in the north wall of Hari Mati's house till she has been adjudged by a competent Court to have the right to do so.' The learned Magistrate does not find that the first) party had acquired a right of easement under the law to light and air over the land of the second party through the windows in dispute.

3. The question, however, is whether having regard to the provisions of Section 147 (2), Criminal Procedure Code, the Magistrate had jurisdiction to order the second party to demolish the wall which she has raised on her own land. The learned vakil for the first party contends that in view of certain rulings of this Court the Magistrate had such jurisdiction, and it is sufficient for us to refer only to the first of the cases cited, Pashupati Nath Bose v. Nando Lal Bose (1900) 28 Cal. 734 in support of his contention. In that case it was held that an order directing that an obstruction to the right of taking water by one of the parties by the erection of a bandh should be removed was within the competency of the Magistrate having regard to the words in Section 147 of the Code of 1898, that the Magistrate could 'direct that such things shall not be done.' There is some divergence of judicial opinion on the question to which it is unnecessary to refer, as Section 147 has been amended by Act XVIII of 1923, and the language has been altered. We have to construe the section as it now stands. Sub-section (2) of Section 147 runs thus: 'If it appears to such Magistrate that such right exists he may make an order prohibiting any interference with the exercise of such right.' It appears to us that those words do not give the Magistrate any power of directing one of the parties to do a positive act by way of mandatory injunction as has been done in this case by directing the second party to demolish the wall that has been built by her. It seems that the power given to a Magistrate under Sub-section (2) of Section 147, is analogous to the power of a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but that this sub-section does not authorize the Magistrate to make an order in the nature of a mandatory injunction directing a party to perform a certain act. The order of the Magistrate under that section may be declared to be erroneous by a Civil Court. Sub-section (4) of Section 147 Criminal Procedure Code, runs thus: 'An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction.' If we are to hold that the Magistrate has the jurisdiction to pass an order by way of mandatory

injunction the party against whom such an order is made would be driven to the Civil Court for establishing the right that he is not bound to perform the act directed by the Magistrate. In the present case if the order of the Magistrate were to stand the second party would have to bring a suit for a declaration that she has the right to rebuild the wall after demolishing it in obedience to the order of the Magistrate, which would be a suit of a somewhat novel character in which even if successful the plaintiff can get no relief for the loss caused by the demolition. A Civil Court grants a mandatory injunction with great care and caution and we think that it was never intended that a Magistrate should exercise' the power of making such an order by a summary procedure. We may also refer in this connection to Form No. 24 in the 5th Schedule of the Code which gives a form of the order under Section 147, Criminal Procedure Code, which merely contains a direction that) the person against whom the order is made shall not do certain things. We are, therefore, of opinion that this change in the wording of Section 147 was made with a view to make it clear that the Magistrate has only the power to issue a prohibitory order restraining any person from doing any act interfering with the right of another when the Magistrate finds that it exists and we hold that the Magistrate has no jurisdiction to direct the 2nd party to demolish the wall. On these grounds we accept the Reference and direct that the order passed by the Deputy Magistrate, dated the 12th December, 1921, be set aside.