LETTERS PATENT APPEAL.

Before Guha and Bartley JJ.

LALIT MOHAN SHAHA

v.

DEBENDRA NATH THAKUR.*

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Mar. 17, 18, 25.

Pathway—Village hâlot—*Public pathway and boat passage —Public road over private lands—Union Board, Power of, to control* hâlot—*Obstructions to* hâlot *pursuant to resolution of Union Board —Obstruction to public use—Bengal Village Self-Government Act (Beng. V of 1919), s. 31.*

Section 31 of the Bengal Village Self-Government Act does not authorise the Union Board to have control of a public road passing over private lands and it cannot exercise any of the powers under that section in respect of such road.

Khowaz Ali v. *Sayed Mia* (1) followed.

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The material facts of the case and arguments in the appeal are sufficiently set out in the judgment.

Sarat Chandra Basak, Senior Government pleader, *Gopal Chandra Das* and *Bhuban Mohan Shaha* for the appellants.

Atul Chandra Gupta, *Bhagirath Chandra Das*, *Ramendra Nath Ray Chaudhuri* and *Beereshwar Chatterji* (for Deputy Registrar) for the respondents.

Cur. adv. vult.

The judgment of the Court was as follows :—

The plaintiffs in the suit, in which this appeal has arisen, suing as representatives of the public under O. I, r. 8 of the Code of Civil Procedure, prayed for possession of what was mentioned as a public *hâlot*, on removal of obstruction therefrom and for permanent injunction.

*Letters Patent Appeal, No. 11 of 1935, in Appeal from Appellate Decree, No. 1189 of 1932.

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The case of the plaintiffs was that the *hâlot* described in the plaint and which was the subject of the litigation was a public pathway in dry season and a public boat passage during the rainy season; that the defendants had in collusion with one another totally obstructed the boat passage and made the same unfit for use as a pathway in dry season, and that the public had been inconvenienced by the obstruction thus caused. The defendant No. 1 was the president of the Bhagyakul Union Board, and represented the Board as such, and he supported the defendants Nos. 2, 3 and 4, who filed written statements and pleaded that earth was raised on the part of the *hâlot* mentioned in the plaint, in accordance with the resolution of the Union Board passed on the application of the defendants for the improvement of the *hâlot*. The fact that boat passage of the public through the *hâlot* was discontinued, as asserted by the plaintiffs, was not controverted. The case of the defendants was that the members of the public could use the *hâlot* as a pathway in dry season, that so far as passage of boats was concerned, boats could easily pass through the northern portion of the *hâlot* in question. According to the defendants the suit was not maintainable inasmuch as the action of the Union Board which was sought to be challenged was legal and *bona fide* in the discharge of their duties.

As it would appear from the judgment of the trial Court, the defendants 1 to 4 admitted the *hâlot* in suit to be a public *hâlot*; it was further admitted that the boat passage had been totally obstructed by the raising of earth in front of the *bârhis* of the defendants Nos. 2 to 6. The *hâlot*, before the obstruction complained of, was used as a footpath during the dry season, and as a boat passage in the rainy season, by the public. The Munsif noticed the position, which was beyond the pale of controversy, that, in the part of the country in which the *hâlot* in question was situate, most of the big *hâlots* were used as boat passages in the rainy season; and has observed that the power of the Union Board to improve the public

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hâlot used both as pathway and boat passage by the public, consistently with its user, could not be denied. It has to be noticed that, according to the learned Munsif, the disputed *hâlot* was a waterway in the rainy season, and public pathway during the dry season and that the action of the Union Board was not legal and *bona fide*. The trial Court, on the conclusions arrived at by it, on the interpretation of the provisions of the Village Self-Government Act, 1919, and on the materials placed on record, passed a decree in favour of the plaintiffs. The plaintiffs were held entitled to get possession of the disputed *hâlot* after removal of all obstructions therefrom. The *hâlot* in suit was declared to be a public *hâlot* for foot-path during dry season and for waterway in the rainy season, for all purposes as alleged in the plaint.

On appeal by the contesting defendants, the decree of the trial Court was affirmed by the learned Subordinate Judge in the Court of appeal below. On the evidence in the case, the Court of appeal below held that, at least for three months in a year, the *hâlot* was used as a boat passage. The user was from time immemorial, and the plaintiffs and the public had acquired a right to use the *hâlot* as a boat-passage during the rainy season. The finding on evidence, arrived by the lower appellate Court was also to the effect that the boat-passage would entirely disappear by the raising of the *hâlot* in the manner mentioned in the plaint. The Subordinate Judge has referred to acquisition of easement by the plaintiffs and of giving up of that right, so far as the user of the *hâlot* as a boat-passage was concerned; and gave his decision that the Union Board had no power to close the waterway. In the concluding part of the judgment, the Subordinate Judge has held that s. 31 of the Village Self-Government Act did not apply to the *hâlot* in suit, inasmuch as the *hâlot* was the private property of the plaintiffs and some of the defendants.

The contesting defendants appealed to this Court from the decision of the Subordinate Judge; and the

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concurrent decisions of the trial Court and the Court of appeal below were reversed by our learned brother Mr. Justice R. C. Mitter. This appeal under s. 15 of the Letters Patent is by the plaintiffs in the suit.

The learned Judge of this Court has rightly held that there was confusion of ideas, so far as the Subordinate Judge was concerned, in identifying easement with a public right of passage, concepts which were inconsistent. The learned Judge has dealt with the provisions of the Bengal Village Self-Government Act bearing upon the facts of the case before us, and has given his decision based on certain observations contained in the judgment of Brett L.J. in the case of *Caverdale* v. *Charlton* (1) in which s. 149 of the Public Healths Act (38 & 39 Vict. c. 55), was interpreted. In that provision of the English statute, the words "shall vest" and "be under control" were used together, in connection with vesting and control of streets within urban districts; and, in our opinion, the observations to which reference has been made are not of any assistance for the purpose of a decision in the case before us. The words "vest" and "control" have been used in the Bengal Village Self-Government Act in connection with two different state of things, as mentioned in the two different and separate provisions contained in s. 19 and s. 31 of the Act. The works constructed by the Union Board were to vest in the board under s. 19; the Union Board was given the control of roads not being private property, under s. 31 of the Act. On the facts found in the case before us that the *hâlot* in question was private property of the plaintiffs and some of the defendants, the question of application of s. 31 of the Bengal Village Self-Government Act could not rise; and we have no hesitation on the facts found, in coming to the conclusion that the decision of this Court in the case of *Khowaz Ali* v. *Sayed Mia* (2), a decision with which our learned brother R. C. Mitter J. has expressed dissent, is right. On

(1) (1878) 4 Q. B. D. 104. (2) (1931) 36 C. W. N. 119.

the fact found by the Court of appeal below that the *hâlot* in question is private property, the proprietary rights being with the plaintiffs and some of the defendants, the Union Board had no authority to exercise control over the same purporting to act under s. 31, of the Bengal Village Self-Government Act. It may be mentioned that Mr. Gupta, the learned advocate for the respondents before us, did not rely on the observations of Brett L. J. in *Caverdale's* case (1), in support of the decision against which this appeal was directed. In our judgment the observation of Brett L. J. in *Caverdale's* case (1) can have no application to the facts of the case before us, and the operation of s. 31 was excluded on the facts found.

The above decision arrived at by us concludes the question argued in this appeal, arising upon the judgment of our learned brother Mr. Justice Mitter, in favour of the appellants before us. There is, however, another aspect of the case before us, which cannot be ignored. Even on the assumption that s. 31 of the Bengal Village Self-Government Act applied to the case, and that the Union Board had the control and power to make improvement in regard to the *hâlot* in question, there can, in our judgment, be no question that the control and the power to make improvement could be exercised only in a manner consistent with the rights of user, so far as the members of the public were concerned. As has been indicated by the trial Court and by the Court of appeal below, and as has been pointed out above, with reference to the judgments of those Courts, the public had acquired a right to use the *hâlot* as a boat passage during the rainy season; this passage of boats was totally obstructed by raising of earth as sanctioned by the resolution of the Union Board. On this aspect of the case before us, the decision must be, that the right of the public to use the *hâlot* as a boat-passage during the rainy season could not be interfered with by the Union Board purporting to act

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under the provisions contained in s. 31 of the Bengal Village Self-Government Act, on the footing that the said provision of the law was applicable to the case of the *hâlot* in question. The *hâlot* was a public *hâlot* in the sense that it was a public pathway during the dry season, and was a public passage for boats during the rainy season. It may be mentioned that the boat-passage in the case before us could not be denominated a waterway as contemplated by s. 31 of the Bengal Village Self-Government Act, as has been done by the trial Court in its judgment.

The result of the conclusions we have arrived at, as mentioned above, is that the appeals must be allowed.

The decision of our learned brother Mr. Justice R. C. Mitter is set aside, and the decree of the Court of first instance passed in favour of the plaintiffs appellants, which was affirmed by the Subordinate Judge in the Court of appeal below, is restored. The plaintiffs appellants are entitled to get their costs in all the Courts.

Appeal allowed.

G. K. D.