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reversed in favour of the plaintiffs and against the defendants third and fourth parties. In my opinion the objection raised by the defendants-appellants is sound and this is not a case in which this Court will be justified in acting under Order XLI, rule 33, and reversing a portion of the decree, in so far as it is in favour of the defendants third and fourth parties, and against the plaintiffs.

The result is that with the slight modification as regards the defendant no. 58, as stated above, this appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Wort and James, JJ.

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Evidence Act, 1872 (*Act I of* 1872), *section* 13—"*right*", *meaning of.*

The word "right" as used in section 13 of the Evidence Act, 1872, means incorporeal right as distinct from ownership of property.

Gujja Lall v. *Fateh Lall*(1), followed.

Appeal by the objectors.

The facts of the case material to this report are set out in the judgment of Wort, J.

* Appeal from Original Decree no. 21 of 1930, from a decision of J. G. Shearer, Esq., I.C.S., District Judge of Patna, dated the 3rd August, 1929.

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P. R. Das and *Brij Kishore Prasad*, for the appellants.

Sir Sultan Ahmad (with him *N. K. Prasad* and *S. K. Mazumdar*), for the respondent.

WORT, J.—Having listened to the argument which is just concluded, I come to a very clear decision in this case. The matter to be determined arises in an appeal from the decision of the learned District Judge in a reference under section 30 of the Land Acquisition Act.

There appears to have been a plot no. 69 which the Government sought to acquire under the Act, the plot being situate in Patna City. On one corner of the plot it is admitted that a temple for worship was built. On representations made to the authorities that part of the plot upon which the temple was built was excluded from the acquisition, but there remained the other part of the plot .030 acres in extent which in fact was acquired. Compensation was made to the extent of Rs. 1,825, and it is with regard to that compensation that this dispute arises. On the one hand Ram Kishun and others purporting to represent the Hindu community claimed the sum as trust money: on the other hand Niranjan Pande claimed the compensation as being given in respect of property which was his own personal property under a deed of gift by his uncle dated the 10th August, 1925. There is no dispute in the case that the uncle of Niranjan Pande, one Makund Pande, was the shebait of the temple of which I have spoken, and the real dispute in the case is whether there was a dedication not only of the temple itself for public worship but whether the whole plot no. 69 was likewise dedicated to the public uses. The evidence in the case is of an equivocal character. There is no deed of dedication in respect of the temple itself and had we to determine the question of whether there had been a dedication of the temple we might find ourselves in very

considerable difficulty; but that there was a public dedication of the temple there can, in the circumstances of the case, be no dispute. As regards the remainder of the plot, as I have already stated, the evidence which has been adduced on both sides is of an equivocal character. It is true that some witnesses came to state that they had subscribed sums of money for the purpose of building a temple and for general purposes of the dedication. But that evidence, accepted as it is by the learned District Judge, does not dispose of the question as to what was the extent of the dedication. I should have stated that this plot, if my memory serves me, was surrounded by a wall. There were two rooms inside the courtyard, there was a verandah, there was a door leading from the street into the temple and from the temple into the courtyard. In the verandah of the two rooms was installed the idol of Mahabirji. So far as the evidence with regard to this idol is concerned, it is stated on the one hand that the Hindu community worshipped the idol and had access to the verandah as of right: on the other, it is contended that—and there is evidence to that effect—the access of the public for the purpose of worship of that idol was allowed only by the leave and license of the shebait. There is also evidence that the womenfolk of the shebait, that is, the womenfolk of the original shebait Makund Pande, lived in one of the rooms of which I have made mention, and as far as the evidence goes it seems to show that they lived there until those rooms were demolished and that part of the plot had been acquired by the public authorities. There is also evidence that in the other room the food for the gods or idol was kept. The parties to this dispute rely on that evidence each for his own purpose. On the one hand, it is contended by the shebait Niranjan Pande that the fact that the womenfolk remain in one of the rooms shows that it was not dedicated for the use of public worship: on the other, it is contended by Mr. P. R. Das on behalf of his client representing the Hindu community that the

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fact that the idol was kept in one of the rooms shows that it was property dedicated for the use of public worship. Another fact which was the fact relied upon by the appellant was that there was a door leading to the temple from the courtyard. Now, in my judgment, as I have already indicated, this evidence does not assist the Court in coming to any definite conclusion with regard to the matter. The fact that the food for the idol was kept in one of the rooms is not inconsistent with the fact that it was the personal property of the shebait; it is consistent with the state of affairs in which the bhog or food was kept in a convenient place. On the other hand, the fact that the womenfolk of the shebait lived in the other room is also equivocal. So long as they were there and so long as their presence did not interfere with the purpose of the trust, if trust there was, it could not be said that that conclusively proved that the property was the personal property of the shebait. Now, I have already mentioned the contention of one of the parties that the public worshipped the idol Mahabirji which was inside the house. One of the witnesses Durga Charan Dass proves that and states that offerings were made by the public: but until it can be determined whether this access by the public was by the leave and license of the shebait or whether it was as of right, the evidence suffers, in my judgment, the same fate as the other items of evidence to which I have already referred. In that state of facts we have three documents which were produced in the case and relied on by the respective parties. On the 10th August, 1925, Makund Pande, the uncle of the present shebait, made a Tamliknama in favour of his nephew of the residential house on this plot 69. One of the recitals in the deed is this:

"Be it known that in the residential house of me the executant situate in mahalla Muradpur, one of the quarters of Patna, there is a temple in which the idol of Sri Radha Krishnaji is installed and I, the executant, perform pujapath (worship) of and render service to the said idols."

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This document is produced in support of Niranjan Pande's case. It is stated that it is consistent only with the fact that he had a personal right over this property and that it had nothing to do with any dedication for the purpose of the worship of this temple. I have very grave doubts, in the first place, whether the document is admissible in evidence at all. It would be clearly admissible and relevant if there were recitals which could be used against the persons who were parties to the deed. But I assume that it is used under the 7th clause of section 32 of the Evidence Act together with the 2nd clause of section 13 of the Evidence Act, section 13, clause (*b*) reading

> "Particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from."

I assume, although it has not been argued before us, that it was used under that section for showing the assertion of Niranjan Pande's right to this property. I hold rather strong views about this section. The view taken in the leading case of *Gujja Lall* v. *Fateh Lall*(1) in my judgment is the true view to be taken of section 13. That case takes the view that when the word 'right' is used in section 13 of the Evidence Act it means "incorporeal" right and cannot possibly refer to any question of ownership of property in contradistinction to, as I say, incorporeal rights. The deed was used here not to show that there was any dedication but to show in other words that Makund Pande and his nephew in turn had a right of ownership, in fact had the ownership in their personal capacity to this property. But assuming that the document is admissible, it is quite consistent with the case which is set up by the appellants in this case: in other words, it is not inconsistent with there having been a dedication to public uses of this property. It is the kind of document that one would expect to find where, as in this case, Makund Pande was fearful that after his death there might be some question as

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to the right of Niranjan Pande to the shebaitship; and in addition to that there is the recital, to which I have already made reference, that the temple is situate in the residential house which is conveyed by this deed. It is unnecessary to reiterate the fact that it is not now disputed or could not be disputed that there was a public dedication of the temple. In addition to this somewhat ambiguous document there were two petitions, one by Makund Pande to the Chairman of the Patna City Municipality on the 5th March, 1921. This petition was presented to the Municipality not more than two years, probably less than two years, after the dedication, if a dedication in fact took place. In paragraph 4 of that petition is this statement:

"That as the said holding is exclusively used for religious purposes such as worship of Sri Radha Krishna, Debi Astaphna in Asin and Rath Jatra in Asarh, it should be exempted from all taxation."

Now, it must have been clear to Makund Pande the petitioner that when he claimed exemption from Municipal taxes, which exemption might be given under the procedure set out in section 93 of the Bihar and Orissa Municipal Act of 1922, that exemption could be given only in the case where the place of worship was a public place of worship and that matter is not seriously disputed before us. Again on the 9th February, 1928, when this land acquisition was taking place Niranjan Pande the respondent to this appeal also presented a petition to the Land Acquisition Deputy Collector of Patna in paragraph 1 of which he states:

"That the holding no. 69 is a temple and a public place of worship, where the idols of Sri Jagernathji, Sri Radha Krishnaji and Sri Mahabirji are installed and as such is exempt from payment of taxes."

There is no dispute that what the petitioner was representing was that the whole of this plot was the subject-matter of a public dedication. That is the effect of the petition. Now, we are invited by Sir Sultan Ahmad to treat these petitions in a similar way to that which the learned District Judge treated

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them. It seems to have been argued before him that these petitions acted as an estoppel. Having come to a perfectly correct decision on that matter the learned District Judge seems to think that the matter is disposed of. He comes to the decision that it is not an estoppel and, if I may so, the learned District Judge was right, but I also hold that that does not dispose of the matter, and, speaking for myself, I do not propose to treat the matter in the way that the learned Judge has done. Having disposed of the question of estoppel he declined further to consider the petitions. Whether the argument was confined to that point in the court below I do not know but it may well have been. It is obvious that the petitions cannot be held to be an estoppel under section 115 of the Evidence Act but they are statements as to matters made by persons as to which, if anybody should have knowledge, it was they. If anybody, to repeat myself, could know whether a dedication of the whole of plot 69 had taken place or not, it was these persons, Makund Pande on the one hand, and Niranjan on the other. It is said in this case that without there being a proof of the formalities of dedication the Court is not in a position to hold that a dedication took place. There seems to be two answers to that question, one is the authority of the Judicial Committee of the Privy Council in the case of *Pujari Lakshmana Goundan* v. *Subramania Ayyar*(1) and the other seems to be this, that we are not here determining whether in this case the dedication has been made out but we are here to determine whether at some previous time a dedication in fact took place. The witness who could speak to this fact may not have been called, but we still have to determine this question whether in or about the year 1919 a dedication in fact took place of this plot 69. We have here these two petitioners, one making a representation to the Municipality which can be interpreted in only one way and that is that the dedication had at some former time in fact taken place, and the other making a representation to the like effect to the Land Acquisition authorities. Sir

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Sultan Ahmad, as I have already stated, invites us to say that these are merely lies on the part of these petitioners and that he is now entitled to explain them. The learned District Judge has dealt with them by holding that the petition cannot operate in itself as a deed of endowment. That, if I may say so, is perfectly obvious; but we have the statements of two persons who must have known the true state of affairs and the representations were made at a time when no dispute such as the dispute before us now was going on. In my judgment, it seems to me that on the state of the evidence all that we can do is to hold that what the petitioners themselves represented was in fact the true case. That being so, it seems to me that the decision of the learned District Judge on this point is wrong and must be set aside.

The appeal must, therefore, be allowed with costs. The proper order, in my judgment, to make in this case is to send the matter back to the learned District Judge to deal with the compensation of Rs. 1,825 under section 32 of the Land Acquisition Act of 1894.

There is a deficit court-fee of Rs. 150 payable by the appellant. This has been deposited. Let it be accepted.

JAMES, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Fazl Ali and Scroope, JJ.

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ZAHIRUDDIN MOHAMMAD

v.

BUDHI BIBI.*

Malicious prosecution—suit for damages—order for issue of process recorded by magistrate—process not actually issued —plaintiff, whether has cause of action.

* Circuit Court, Cuttack. Appeal from Original Decree no. 14 of 1930, from a decision of B. Harihar Charan, Subordinate Judge of Cuttack, dated the 20th August, 1930.