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the appointment of receiver, and submit his name with the grounds for the nomination to the District Court. We may point out that under section 503 (*d*) power may be granted for the disposal of the rents and profits in such a way as to ensure a proper allowance to the defendant for such objects as the Court may think fit. Costs to be costs in the suit.

Order reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SHITAWA (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* BHIMAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

1899.
July 3.

Evidence—Commissioner appointed to prepare a map—Civil Procedure Code (Act XIV of 1882), *Sec.* 392—*Statements of village officers made to such commissioner and recorded by him—Practice.*

In a suit as to a right of way a commissioner was appointed under section 392 of the Civil Procedure Code to prepare a map of the locality in question.

Held, that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, varying the decree of Ráo Sáheb N. B. Muzumdar, Subordinate Judge of Gadag.

The plaintiff sued for a declaration that certain land belonged to him and also for an injunction restraining the defendants from interfering with a certain right of way which he claimed. In the course of the proceedings, a commissioner was appointed under section 392 of the Civil Procedure Code (Act XIV of 1882) for the purpose of making a map of the locality showing the land in dispute and the direction of the right of way claimed by the plaintiff. The Subordinate Judge allowed the plaintiff's claim to the land, but refused the injunction prayed for.

On appeal by the plaintiff the Judge granted the injunction, holding that the right of way was proved. He based his decision on certain statements made to the commissioner appointed under section 392. In his judgment he said:—

* Second Appeal, No. 340 of 1898.

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"What has induced me to take plaintiff's view of the case is Exhibit 11, the statements to the commissioner appointed to make the map. The patil and kulkarni and five other persons have signed and given a statement to the commissioner that the land is Government land which defendants are misappropriating by using it as a dung-heap, and that they have no right over it. This statement appears to me as good as the seven separate depositions on oath. Under the Civil Procedure Code, section 399, the commissioner is a Civil Court, and the witnesses were bound to answer truly whether an oath was administered or not; and under section 393 the report of the commissioner and the evidence taken by him are evidence in the suit and form part of the record. The commissioner's report on the back of Exhibit 9 does not express any opinion on the merits.

"This evidence is not alluded to in the judgment, and is, I think, the strongest evidence in the case."

Defendant No. 1 preferred a second appeal.

S. S. Patkar (for *D. P. Kirloskar*) appeared for the appellant (defendant No. 1):—The Judge has based his decision on the record of the statements made by persons who were questioned by the commissioner on the spot as to the right of way. The provisions of the Evidence Act (I of 1872) are applicable to commissions—Ameerali's Law of Evidence, p. 13. We had no opportunity of cross-examining the persons whose statements were recorded—Ameerali's Law of Evidence, p. 259. The commissioner was appointed only for the purpose of making the map and not to take evidence—*Buroda Churn Bose* v. *Ajoodhya Ram*[1]; *Shadhoo Singh* v. *Ramanoograha Lall*[2]; *Bindabun Chunder Sirkar* v. *Nobin Chunder Biswas*[3]; *Doorga Churn Surmah* v. *Neem Chand Surmah*[4]; *Bustee Sahoo* v. *Jeo Narain Singh* ; *Sangili* v. *Mookan*[6]. It was for the Court to take evidence, and this duty could not be delegated to a commissioner.

Balaji A. Bhagvat, for the respondent (plaintiff):—The statements referred to were signed by the village officers. Under section 393 of the Civil Procedure Code, the report of the commissioner and the evidence taken by him are evidence and form part of the record. The Judge has found as a fact, after considering the evidence in the case, that the plaintiff had a right of way which the defendants were not entitled to interrupt.

(1) (1875) 23 Cal. W. R., 287.
(2) (1868) 9 Cal. W. R., 83.
(3) (1872) 17 Cal. W. R., 282.
(4) (1875) 24 Cal. W. R., 203.
(5) (1875) 24 Cal. W. R., 338.
(6) (1892) 16 Mad., 350.

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ants and ss, J. :—In this case the commissioner was appointed of ~~s~~ to draw a map showing the houses of the parties and the way claimed by the plaintiff as well as that mentioned by the defendants, and no power was given to him to take evidence. Therefore the panchnáma or statement of the opinions of the village officers and other persons, recorded by him as to the vahivat or use of the way, was not evidence, and ought not to have been looked at by the Judge. In any case evidence in proof or disproof of the second issue ought to have been considered by the Judge, and not by the commissioner. We ask the Judge of the lower appellate Court to record a fresh finding on his second issue, based on the evidence on the record, and certify it to this Court within two months.

Issue sent down.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

1899.
July 5.

DAMODARBHAT AND OTHERS (ORIGINAL PLAINTIFFS, APPLICANTS), APPELLANTS, *v.* BHOGILAL KARSONDAS AND OTHERS (ORIGINAL DEFENDANTS, OPPONENTS), RESPONDENTS.*

Decree—Execution—Charity—Temple—Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—Removal of trustees—Practice—Civil Procedure Code (Act XIV of 1882), Secs. 539 and 260.

A decree was passed in a suit under section 539 of the Civil Procedure Code (Act XIV of 1882) settling a scheme of management of a certain temple. The scheme provided that the defendants and their heirs were, during their good conduct, to be retained as trustees and managers of the temple, and as such to maintain a proper system of worship, and to keep regular accounts, &c., &c. Subsequently plaintiffs applied for execution of the decree specifically setting forth various clauses of the scheme which had been infringed by the defendants. The plaintiffs prayed that the defendants should be removed from their office and that the decree be enforced by their imprisonment and the attachment of their property. The Judge dismissed the application on the ground that the defendants could not be removed from the managership in execution proceedings, the plaintiff's remedy lying in a regular suit.

Held, that, in order to obtain the removal of the trustees, the procedure would be to amend the scheme of management so as to include a provision for the removal of the trustees if necessary, and not to file a separate suit.

* Appeal, No. 30 of 1899.

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Held, also, that in so far as the decree ordered particular acts to be by the defendants in the management of the temple it might be enfor the imprisonment of the defendants or by the attachment of their property or by both.

APPEAL against the decision of T. D. Fry, District Judge o Ahmedabad.

By the decree passed in this suit on the 30th September, 1896 a scheme was settled for the management of the temple o Koteshvar Mahadev (see I. L. R., 22 Bom., 493). The following were the principal provisions of the scheme :—

"1. The defendants and their heirs shall, during their good conduct, be the trustees and managers of the temple of Koteshwar Mahadev at Ahmedabad and of the property belonging to the said temple.

"2. They shall, as Tapodhan Brahmins, be bound to maintain a proper system of worship. The doors of the temple shall be open daily from 7 A.M. till noon and from 2 to 9 P.M.

"3. The income of the temple consists of offerings made to the idol, of rents for temple buildings and temple lands, and of an annual cash allowance of two rupees from Government.

"4. The managers shall not allow persons of low caste to reside on the temple lands, either inside or outside the temple compound, and they shall not allow Kolis or Márwádis to reside within the temple compound.

"5. It shall be the duty of the managers to keep the compound and othe temple lands in a clean and sanitary condition, and to keep the temple buildings in repair so far as the funds permit.

"6. One-third of the rents shall be expended in repairing the temple, compound wall, and buildings belonging to the temple. Out of the remaining income of the temple, the managers shall defray the temple expenses and maintain themselves.

"7. The managers shall keep regular accounts of all rents and of expenditur on repairs. The accounts shall be submitted to the District Court annually within one month after the Diváli, and shall be examined by an auditor appointed by the Court at the cost of the managers. A copy of the accounts shall b supplied by the managers and shall be affixed to the notice-board of the District Court for the information of the public.

"These accounts shall be kept from the date of the High Court's decree.

"8. The scheme shall be subject to such modifications as may be made here after by the High Court on the application of the parties interested in the said temple."

In 1898 the plaintiffs applied for execution of the decree. They alleged specific instances of the misconduct of the defend-

ants and of the infringement of various clauses of the scheme of management. They prayed for the removal of the defendants from the management and for the attachment of their property and imprisonment.

The Judge dismissed the application, holding that, even if the plaintiffs had proved their allegations, the defendants could not be removed from their office in execution proceedings, and that the plaintiffs' remedy lay in a regular suit.

The plaintiffs appealed.

K. M. Ghodi for the appellants (plaintiffs-applicants) :—The Judge was wrong in rejecting our application for execution. He should have allowed execution of the decree in the usual way as prayed for. Section 260 of the Civil Procedure Code (Act XIV of 1882) is applicable, inasmuch as there was a wilful failure on the part of the defendants to carry out the provisions of the scheme—*Sha Karamchand* v. *Ghelabhai*[1]. See *Protap Chunder Doss* v. *Peary Chowdhrain*[2]. We have also presented an application to this Court for the amendment of the scheme.

Lallubhai A. Shah for respondents Nos. 1 and 2 (defendants Nos. 1 and 2) :—We are not the managing trustees and, therefore, cannot be held liable for any alleged misconduct on the part of those in actual charge of the temple. The case of *Sha Karamchand* v. *Ghelabhai*[3] was decided on a preliminary point, and the question whether or not section 260 of the Civil Procedure Code applies to such a case was neither argued nor decided. Section 260 is not applicable, and the provisions of the scheme cannot be carried out by holding the trustees liable under the section. The only remedy open to the plaintiffs is to get the defaulting trustees removed from their office by filing a regular suit. The plaintiffs cannot move under section 244 of the Civil Procedure Code.

M. K. Mehta for respondent No. 3 (defendant No. 3) :—Section 260 of the Civil Procedure Code cannot apply unless the defendant is given an opportunity to carry out the provisions of the scheme.

(1) (1893) 19 Bom., 34. (2) (1881) 8 Cal., 174.
(3) (1893) 19 Bom., 34.

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CANDY, J.:—In this case the plaintiffs applied to execut decree which was passed in a suit under section 539 of the C Procedure Code. The decree settled "a scheme for the m agement" of a certain temple at Ahmedabad, and the ter of the scheme in eight clauses will be found at pages 495-6 the 22nd Volume of the Indian Law Reports, Bombay Se Briefly, defendants and their heirs were, during their good duct, to be retained as the trustees and managers of the tem and as such to maintain a proper system of worship, not to low persons of low caste to reside on the temple lands, to k the compound, &c., clean, and the temple buildings in repair, keep regular accounts from the date of the decree, which shou be submitted annually to the District Court within one mon after each Diváli, an auditor being appointed by the Court examine the same. The High Court decree settling the abo scheme was dated 30th September, 1896.

The present application for execution of the decree was ma by the plaintiffs on 27th June, 1898. They specifically we through the clauses of the "scheme" and averred that defen ants were not maintaining a proper system of worship, we allowing persons of low caste to reside on the temple lan were not keeping the compound clean or the buildings in repa were not keeping proper accounts, and so forth. In some the clauses of the application for execution, plaintiffs praye that defendants be removed from their office: in some the prayed that the terms of the decree might be enforced by prisonment of the defendants and attachment of their prope The District Judge, without considering the application in tail, dismissed it on the ground that even if the applic proved their allegations, he did not consider that the defe ants could be removed in execution proceedings, the plainti remedy lying in a regular suit.

The District Judge is possibly right in holding that as scheme is at present framed, there is no provision for remov the defendants for proved misconduct. They are by the sch appointed trustees and managers "during their good condu they are directed to perform certain acts, but no provisi made for their removal in case of their proved disobedien

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the orders of the Court as contained in the decree. We doubt whether the proper course, in order to remove the trustees, if necessary, is for the plaintiffs to bring a fresh suit under section 539: the more convenient and obvious procedure is for the scheme to be amended so as to include in it a provision for the removal of the trustees, if necessary. Clause 8 allows of applications to be made to the High Court for the modification of the present scheme, and Civil Application No. 91 of 1899 is at present on our board for disposal. It is an application purporting to be made by the plaintiffs in accordance with clause of the scheme asking for such modifications therein as will insure the defendants performing the duties enjoined on them by the decree.

But this does not fully meet the present application for execution. The District Judge is mistaken in supposing that the plaintiffs simply ask for the removal of the defendants: they ask, for instance, that according to clause 7 of the scheme, regular accounts should be kept, submitted and audited. We are unable to hold that section 260 would not apply to such an application. It is clear that the decree has been made against defendants for the performance of a particular act: if they have had an opportunity of performing that act, and have wilfully failed to do so, the decree may be enforced by their imprisonment or by the attachment of their property or by both. We do not see how the District Judge can refuse to call on defendants to produce the accounts which the High Court ordered should be kept from 30th September, 1896, and should be submitted within a certain time every year and should be audited. If the defendants—or such of them as are responsible for the accounts from 30th September 1896—wilfully fail to produce those accounts, we do not see why they should not be held to be in contempt of the Court's orders.

For these reasons, without expressing any opinion on the merits of the plaintiffs' various allegations in their application, we reverse the order of the District Judge and remand the application to him to be dealt with according to law. He will deal with the matter of costs, including costs of this appeal.

Order reversed and application remanded.