APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar.

1913. September 10.

Re KAMAKSHAMMA, ACCUSED (IN SESSIONS CASE No. 51 OF 1913 ON THE FILE OF THE COURT OF THE ADDITIONAL SESSIONS JUDGE, BELLARY), PETITIONER.*

Judgment, not pronounced—Record lost—Procedure.

Where in a criminal case the accused was convicted and sentenced, the records in the case being at the time lost,

Held, that it was unnecessary for the High Court to order a retrial especially in the absence of an appeal by the accused person.

There is no provision of law which enacts that unless all the records of a case are in the court-house at the time of conviction and sentence, the conviction and sentence are void and should be quashed or that the Sessions Judge's trial has been held or the sentence passed without jurisdiction.

Where a judgment has been lost the appropriate course is for the Sessions Judge to rewrite it from memory, and from the materials before him and place it on record.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code (Act V of 1898) by B. C. SMITH, the Additional Sessions Judge of Bellary, in his letter, dated 18th August 1913, in Sessions Case No. 51 of 1913.

The accused was tried by the Additional Sessions Judge, Bellary, and convicted by him of an offence under section 381, Indian Penal Code (Act XLV of 1860), and sentenced to eighteen months' rigorous imprisonment. The Additional Sessions Judge, when bringing the records to the court, lost them on the way. But as he thought they were sure to be found out by the peons he sent them at once to look for them, and pronounced the sentence. The records were not found. And this was a reference from the Additional Sessions Judge to the High Court requesting that the conviction and sentence might be set aside and the case ordered to be retried.

The Public Prosecutor for the Government.

The accused not represented.

SADASIVA AYYAR, J.

ORDER.—There seems to be no provision of law which empowers the High Court to quash the conviction and sentence by a Sessions Judge and order a new trial because some of the

* Criminal Revision Case No. 524 of 1913 (Referred Case No. 76 of 1913).

material records of the sessions trial have been lost. If the convicted prisoner appeals, then, it will be time enough to interfere if necessary. There is no provision of law (so far as I know), which enacts that, unless all the records of a case are in the court-house at the time of convicting and sentencing, the conviction and sentence are void, and should be quashed or that the Sessions Judge's trial has been held without jurisdiction or the sentence was passed without jurisdiction. If the convicted prisoner is satisfied, that justice has been meted out to her, there is no ground for interference of this Court. Section 366 of the Criminal Procedure Code only imposes the condition that the judgment should be pronounced in open court and imposes a few other conditions, but such conditions do not include the condition that the record should not have been lost or that if only a portion of the judgment (that relating to the conviction and sentence alone) is pronounced, the conviction is illegal. In Re *Venkataramanayya*(1), it was held that the omission to read a portion of the judgment was a mere irregularity covered by section 537. In *Queen-Empress* v. *Chendu Kalya*(2), the learned Judges refused to interfere, on the District Magistrate's reference, where a Magistrate had not written any judgment at all, but had convicted and sentenced five accused persons who had not themselves chosen to appeal. That High Court afterwards interfered on the application of one of the five accused persons (see *Queen-Empress* v. *Kanthia Girdharia*(3). I think the more appropriate course for the learned Additional Sessions Judge is to re-write the judgment from memory and from the materials before *him and place* it on the record. Section 537-A, Criminal Procedure Code, cures all omissions in proceedings, and the omission to pronounce the judgment before convicting and sentencing is also cured under the new Code, though it might be different if no judgment had been written. In *Narsingh Narain Singh* v. *Harkhu Singh*(4), it was held that where a judgment has been lost, it was open to the Judge to re-write from memory the substance of it. In *Raj Gir Sahaya* v. *Iswardhari Singh*(5) authorities are quoted for the proposition that "a Court has

(1) (1898) 2 Weir's Cr. R., 711 at p. 712. (2) (1899) 1 Bom. L.R., 117 at p. 118,
(3) (1899) 1 Bom. L.R., 161. (4) (1908) 8 C.L.J., 521.
(5) (1910) 11 C.L.J., 243 at p. 248.

Re KAMAKSHAMMA.

SADASIVA AYYAR, J.

an inherent power in the case of loss or destruction of a judicial record to restore such record," and it was held in that case that execution might issue even before the reconstruction of the record. According to Black on Judgments (volume I, section 125). "The power of supplying a new record, where the original has been lost or destroyed, is one which pertains to courts of general jurisdiction independent of legislation."

Even if I am wrong in my opinion that the learned Additional Sessions Judge is entitled to replace the lost judgment by a new judgment and that the conviction and sentence passed by him without pronouncing the whole of the written judgment do not make them void, I think (as I said already) that it is more advisable to wait till an appeal is preferred against the conviction and the sentence by the accused in the case before the High Court takes any action.

Let the records be returned.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

1913. August 5, 6, and 26 and September 10, 11 and 12.

NAVAJEE AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE ADMINISTRATOR-GENERAL OF MADRAS AND EIGHT OTHERS (DEFENDANTS, NOS. 1 TO 6 AND LEGAL REPRESENTATIVE OF SEVENTH DEFENDANT), RESPONDENTS.*

Administrator-General's Act (II of 1874), ss. 28, 34 and 35—Civil Procedure Code (Act V of 1908), O. XX, r. 13—Suit to recover assets improperly paid by the Administrator-General—Not a suit for administration by Court—Priority of creditors—Construction of instrument of agreement—Creditor to be paid out of cheques or monies received from a third party for work done by the creditor—Charge on such cheques or monies received after Letters of Administration granted—"Specific fund" meaning of—Equitable assignment—"Payment out of a fund" and "payment when a fund is received", difference between.

Section 28 of the Administrator-General's Act (II of 1874) directs the Administrator-General to distribute the assets and contains a provision that

---

* Original Side Appeal No. 31 of 1910.