

Before Mr. Justice R. C. Mitter and Mr. Justice Maclean.

THE EMPRESS *v.* MOHIM CHUNDER RAI AND ANOTHER.*

1878
May 10.

Assessors—Trial by Jury of a case properly triable with Assessors—Appeal on facts—Act VIII of 1871, s. 80—Criminal Procedure Code (Act X of 1872), s. 233.

Per MACLEAN, J. (MITTER, J., dubitante).—The trial by a jury of an offence triable with assessors is not invalid on that ground, but an accused who would have been entitled to an appeal on the facts, if the case had been tried with assessors, is not debarred from that right merely by the fact that the trial by jury is not invalid.

IN this case the petitioners, who had been charged with an offence under s. 80 of Act VIII of 1871, had been tried by the Sessions Judge of the 24-Pargannas with the aid of a jury, and convicted.

Baboo *Boido Nath Dutt*, for the petitioners, contended, among other things, that the petitioners having been tried and convicted of an offence to which trial by jury had not been made applicable by the Government notification of January 1862 (*Calcutta Gazette*), and who ought, therefore, to have been tried by the Judge with the aid of assessors, such trial and conviction was, under the circumstances, invalid, and, if not, the accused were entitled to an appeal upon facts in the same way as they would have been if their trial had been conducted in the manner prescribed by law.

The Government Pleader Baboo *Juggadanund Mookerjee*, *contra*.

The following judgments were delivered by the Court, which, however, confirmed the sentences passed upon the prisoners, being of opinion that the lower Court's decision upon the facts was correct.

* Criminal Appeal, No. 182 of 1878, against the order of W. H. Veraer, Esq., Officiating Additional Sessions Judge, 24-Pargannas, dated the 14th February 1878.

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MACLEAN, J.—The appellants have been convicted by the Sessions Court of the 24-Pargannas of an offence under the Registration Act, VIII of 1871, and as the trial was held with a jury, the petition of appeal filed on 13th April was directed to show certain errors of law, such as defects in the Judge's charge to the jury. By a subsequent petition of 17th April, the prisoners claim to be heard against the conviction on questions of fact as well as law, as the offence of which they have been convicted is not one of those to which trial by jury has been made applicable by the Government notification of January 1862 (*Calcutta Gazette*, 8th January 1862, p. 87).

It has been contended before us by the Government Pleader that the Sessions Judge was competent to try the prisoners with a jury notwithstanding that the offence charged is not included in the Government notification referred to, and therefore the prisoners are not entitled to appeal against their conviction except upon matter of law; but it is not necessary for the purposes of this appeal to decide that question. The trial by a jury of an offence triable with assessors is not invalid on that ground (s. 233, Criminal Procedure Code—Explanation); but it appears to me that the prisoners, who would have been entitled to an appeal on the facts, if the case had been tried with assessors, are not debarred from that merely by the fact that their trial by jury is not invalid. An error of procedure not affecting the merits of the case ought not to affect the prisoner's right of appeal.

Dealing, however, with this appeal as an appeal upon the facts, I consider the conviction of the prisoners a proper one, and I would dismiss the appeal.

MITTER, J.—I concur; but I do not desire to express any opinion as to whether the prisoners are entitled to appeal on questions of fact. But assuming that they have this right, I concur with my learned colleague that the conviction of the prisoners is fully supported by the evidence. We accordingly dismiss the appeal.

Appeal dismissed.