In my opinion, the suit has been rightly decreed and I would dismiss the appeal with costs.

BHIDE J.

BHIDE J.—I concur.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Bhide.

ROOP CHAND (PLAINTIFF) Appellant

versus

SARDAR KHAN AND OTHERS (DEFENDANTS) Respondents.

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Feb. 15.

Civil Appeal No. 31 of 1924.

Civil Procedure Code, Act V of 1908, Order XXII, Rule 4—Abatement—suit against several defendants including a dead person—order dismissing the suit—whether amounts to a decree—Dismissal of the suit—Propriety of—proper order in such a case—abatement—question of—whether arises—where defendant dead at the time of institution of suit.

In a suit for a declaration that he was not a *malik qabza* but was entitled to a share in the *shamilat deh*, the plaintiff impleaded 1,288 persons as defendants. On 4th December, 1923, it was pointed out to the Court that defendant No. 25 had died, about sixteen months before the institution of the suit. The Court thereupon held that the "suit should abate" and later, on 6th December, the Court passed an order stating that the word "abate" had been incorrectly used in the order of the 4th December, 1923, in lieu of "dismissal" and that what it had intended to do was to "dismiss the suit", the usual decree sheet being directed to be prepared accordingly. In appeal against that decree a preliminary objection was raised that the appeal was incompetent as the order of 4th December did not amount to a decree and that of the 6th December did not really decide any matter in controversy between the parties.

Held, that the order passed by the Court on the 4th December, as explained by the order of the 6th December,

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amounted to a decree as it clearly determined the rights of the parties.

Held further, that in a case like the present no question of abatement arose within the meaning of Order XXII as the defendant was not alive at the time of the institution of the suit and the proper order for the Court to pass is to strike off the name of the dead person from the record and then to see whether the suit can or cannot proceed against the other defendants because of the non-joinder of the representatives of the deceased.

Pala Mal-Narain Mal v. *Fauja Singh* (1), referred to.

Veerappa Chetty v. *Tindal Ponnen* (2), distinguished.

First appeal from the decree of Mehta *Dwarka Nath, Senior Subordinate Judge, Mianwali, dated the 4th/6th December, 1923, ordering that the plaintiff's suit be dismissed.*

SHEO NARAIN and NANAK CHAND, for Appellant.

RAM CHAND MANCHANDA, G. C. NARANG and S. L. LAUL, for Respondents.

The judgment of the Court was delivered by :—

TEK CHAND J.—In proceedings before revenue officers for partition of the *Shamilat deh* of *mauza* Harnoli, district Mianwali, the plaintiff claimed a share proportionate to his *khewat* holding. The revenue officers disallowed the claim, holding that he was a *malik qabza* and not entitled to any share in the *shamilat deh*. On the 24th October, 1923, the plaintiff instituted the present suit in the civil Court for a declaration that he was not a *malik qabza* but was entitled to a share in the *shamilat deh*. In this suit he impleaded 1,288 persons as defendants. The case came up for hearing before the Senior Subordinate Judge, Mianwali, on the 4th December 1923, when it was pointed out that Zaman Khan, defendant No. 25,

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had died on the 27th July, 1922, *i.e.*, about sixteen months before the institution of the suit. On this, the Court, following a decision of the Madras High Court reported as *Veerappa Chetty* v. *Tindal Ponnen* (1) held that " the suit should abate ", and that as it was being " dismissed for a defect, parties should bear their own costs ". The next day, on the 5th December, 1923, some of the defendants filed an application that the documents which the plaintiff had filed in Court with the plaint should not be allowed to be taken away from the record, as the order of the 4th December, 1923, was appealable and the documents should be kept in Court till the expiry of limitation for the institution of the appeal. On this the learned Subordinate Judge passed an order on the 6th December, 1923, stating that the word " abate " had been incorrectly used in the order of the 4th December, 1923, in lieu of " dismissal " and that what he had actually announced to the parties in open Court and what he really intended to do was to " dismiss the suit ". He accordingly directed that the usual decree sheet should be prepared and the documents filed by the plaintiff with the plaint be not returned till the expiry of limitation for filing the appeal.

Against the orders passed by the learned Senior Subordinate Judge on the 4th and 6th December, 1923, the plaintiff has preferred a first appeal to this Court. Mr. Ram Chand Manchanda for the respondents has raised a preliminary objection that the appeal is incompetent, as the order of the 4th December, 1923, did not amount to a " decree " and that of the 6th December, 1923, did not really decide any matter in controversy between the parties, but was merely

(1) (1908) I. L. R. 31 Mad. 86.

explanatory of the former order and was passed under a misapprehension of the law. In our opinion, this preliminary objection is devoid of all force. The order passed by the Court on the 4th December, 1923, as explained by it in its order of the 6th December, 1923, clearly determined the rights of the parties to the suit and amounts to a " decree". The suit was dismissed and a decree formally passed. An appeal, therefore, lay to this Court.

On the merits, the order of the lower Court holding that the suit " abated " against Zaman Khan and should be dismissed against the surviving defendants is obviously wrong. It is admitted by the plaintiff-appellant that Zaman Khan had died long before the suit was instituted, and that he was impleaded as a defendant by mistake. But the learned Subordinate Judge is wrong in supposing that the suit would " abate " as against him. A suit or appeal " abates " under Order XXII, rule 4, against a defendant or respondent if he was alive at the time when the suit or appeal was instituted and has since died. Mr. Ram Chand Manchanda for the respondents concedes that the case of a person who had died before the institution of the suit or the appeal and who was erroneously impleaded as a party does not fall within the purview of Order XXII, Civil Procedure Code, and that in such circumstances no question of " abatement " arises. In such a case the suit cannot proceed against the dead person and the proper order for the Court to pass is to strike off his name from the record and then to see whether the suit can or cannot proceed against the other defendants because of non-joinder of the representatives of the deceased. If the deceased was a mere *pro-forma* party, the suit might proceed against the other defend-

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ants in the ordinary way. If, however, the deceased was a necessary party, the Court should see whether amendment of the plaint can be allowed to bring his heirs on the record, and if this cannot be allowed, it should determine whether the suit can proceed against the other defendants. It cannot dismiss the suit forthwith without examining this aspect of the case. As pointed out by Campbell J. in *Pala Mal-Narain Mal* v. *Fauja Singh* (1), where a suit is brought against two defendants, one of whom happens to be dead at the time of the suit, the Court ought not to dismiss it against the other defendant but should strike off the name of the former under Order I, rule 10, and proceed against the other defendant.

The learned Subordinate Judge has relied on *Veerappa Chetty* v. *Tindal Ponnen* (2), but in that case the suit had been brought against one defendant only who had admittedly died before the institution of the suit. The sole defendant on the record being a dead person, there was really no suit properly constituted and it was held that there was nothing in the Civil Procedure Code to authorise a Court to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even though the suit had been instituted *bona-fide* and in ignorance of the death of the defendant. The position, however, is quite different where the deceased person is not the sole defendant, but is one out of a large number of defendants.

We are, therefore, of opinion that the order passed by the lower Court connot be sustained. We accordingly accept the appeal, set aside the Judgment and decree of the lower Court and remand the

(1) (1925) 89 I. C. 661. (2) (1908) I. L. R. 31 Mad. 86.

case under Order XLI, rule 23, Civil Procedure Code, for disposal in accordance with law. Court-fee on appeal shall be refunded and other costs shall be costs in the cause.

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Appeal accepted,
Case remanded.

APPELLATE CRIMINAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Agha Haidar.

DULA SINGH AND ANOTHER, Appellants

versus

THE CROWN, Respondent.

1928

Feb. 15.

Criminal Appeal No. 397 of 1927.

Explosive Substances Act, VI of 1908, sections 4, 5: Bombs found in joint family house—possession—presumption—rebuttal of—" unlawfully and maliciously"—meaning of—possession with knowledge—necessary.

Two bombs were found in the ceiling of a thatched shed situate in the courtyard of a residential house. The house belonged to a joint family composed of D. and his nephews S. and C. and several other persons—D. and S. were both convicted of offences under section 4 of the Explosive Substances Act—D. as head of the family and S. as senior member present at the time of the recovery. Admittedly D. was not at the house at the time of recovery and had been absent from the village for two days.

Held, that the word " unlawfully " in section 4 of the Act signifies " not for a lawful object", and the word "maliciously " means and implies an intention to do an act, which is wrongful, to the detriment of another person.

Mogul Steamship Co., Ltd., v. *McGregor* (1), per Bowen L. J., referred to.

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(1) (1889) 23 Q. B. D. 598.