

**(1998) 01 PAT CK 0008**  
**In the Patna High Court**  
**Case No : Civil Revision No. 679 of 1996**

Kedar Jha and Others

APPELLANT

Vs

Shyam Bihari Mishra and Others

RESPONDENT

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**Date of Decision :** 23-01-1998

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 4(4)  
Limitation Act, 1963 — Section 5

**Citation :** (1998) 3 BLJR 1862

**Hon'ble Judges :** M.Y. Eqbal, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

M.Y. Eqbal, J.—This civil revision application is directed against the order dated 16.2.96 passed by Subjudge-III, Darbhanga in Title Suit No. 79/77 whereby and whereunder while allowing the application filed by defendant Nos. 2 to 4 dismissed the suit having been abated as a whole under the provisions of Order XXXII Rule 4(4) of the Code of Civil Procedure.

2. The plaintiff/petitioners filed the aforementioned suit for declaration of their right title and interest as occupancy raiyat over the suit land making out a case that the suit plot was settled sometime in the year 1919 in favour of the father of plaintiff No. 1 and the petitioners' ancestors had been coming in possession of portion of the suit land. The plaintiffs further case was that after the abolition of Zamindari petitioners became the raiyat of the State of Bihar and have been coming in possession of the suit land for many decades. It was alleged that some of the co-sharers of the Tauzi in question got a partition suit 16/95 filed in the Court of Sub-judge, Darbhanga in which a preliminary decree was passed in respect of the properties including the suit land without impleading the plaintiffs as party. It appears that the original defendant No. 1 died and after his death his daughter Smt. Siyabati Devi was substituted. Smt. Siya Devi also died on 27.1.1986. Since then no steps for substituting her heirs and legal representative

was taken by the plaintiffs. The defendant Nos. 2 to 4 filed petition for dismissal of the suit as being abated. However, the plaintiffs filed an application making prayer that the plaintiffs may be exempted from substitution of the legal heirs of Smt. Siya Devi on the ground that despite service of summons she neither appeared nor contested the suit by filing written statement. The plaintiffs have also filed another petitioner under Order XXII Rule 4(4) of the CPC and u/s 5 of the Limitation Act stating Inter alia, that Smt. Siya Devi was living with her husband in the village Newtoli and was not in visiting terms with her maternal place and her death was not communicated to anybody. The petition was opposed by the defendants No. 2 to 4 and a prayer was made for dismissal of the suit as being abated.

3. The learned Court below after hearing the parties allowed the petition filed by defendant Nos. 2 to 4 and held that the suit being abated as a whole.

4. I have heard learned Counsel appearing for the parties" and I have also perused the orders passed by the Court below. After going through the matter I am satisfied that there is not positive evidence that summons of the suit was duly served on the deceased defendant Smt. Siyabati Devi, the question, therefore, of examining the plaintiff from taking steps for substitution under the provisions of Order XXXII, Rule 4(4) of the CPC does not arise. The learned Counsel appearing for the plaintiff/petitioner submitted that a separate petition was filed by the plaintiff but the Court below has not passed any order on that application rather considering the application filed by the defendant Nos. 2 to 4 dismissed the suit being abated as a whole. The submission made by the learned Counsel appears to be convincing. If such an application was filed the Court below ought to have considered that application also. It further appears that the Court below took the view that no evidence was led by the plaintiffs on the fact whether summons was served on Siyabati Devi. Be that as it may, the Court below was not correct in law in dismissing the suit being abated as a whole without considering the question whether in absence of the deceased defendant effective decree could be passed. I am further of the view that the Court below should not have been very harsh in the matter of condoning the delay and for setting aside the abatement as a whole. The impugned order will cause injustice to the plaintiffs.

5. Having regard to the facts and circumstances of the case, this civil revision application is allowed and the impugned order passed by the Court below is set aside. The Court below is directed to take into consideration the application filed by the plaintiffs for setting aside the abatement of the suit and pass appropriate order in accordance with law. Learned Counsel appearing for the defendants/opposite party submitted that even after the death of Smt. Siyabati Devi so many defendants have died and no steps have been taken for their substitution as yet. It is made clear that this order will not come in the way of the Court below in passing appropriate order in the suit on account of non-substitution of the heirs of the other defendants who have already died.