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**(2013) 04 RAJ CK 0062**

**In the Rajasthan High Court**

**Case No :** Civil Miscellaneous Petition No. 1137 of 2012

Mohani Devi

APPELLANT

Vs

Bena Ram and Others

RESPONDENT

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**Date of Decision :** 27-04-2013

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 107, 96

**Citation :** (2013) 3 WLN 1

**Hon'ble Judges :** Arun Bhansali, J

**Bench :** Single Bench

**Advocate :** O.P. Mehta, for the Appellant; L.R. Upadhyaya, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Arun Bhansali, J.—With the consent of the parties, the appeal has been finally heard. The appellant is aggrieved against the judgment and decree dated 26.03.2012 passed by the Court of Additional District Judge, Sojat, District Pali, whereby, the appeal preferred by the defendants under Sec. 96 read with Order XLI, Rule 1 and Section 107 CPC against order dated 03.08.2011 passed by the trial Court has been allowed and the plaint has been ordered to be returned under Order VII, Rule 10 CPC for presenting the same before the Court of competent jurisdiction.

2. The facts in brief are that the appellant filed a suit for permanent and mandatory injunction relating to suit land against the respondent-defendants. The defendants besides raising defence on merit, also raised objection about maintainability of the suit before the Civil Court and it was submitted that the nature of land being agriculture, the suit was only maintainable before the Revenue Court.

3. The trial Court framed several issues including issue Nos. 5 and 6 regarding maintainability of suit and jurisdiction of Court respectively and after hearing the parties on the said issues by its order dated 03.08.2011 ordered as under:-

4. Surprisingly, instead of challenging the said order dated 03.08.2011 by way of any other appropriate proceedings, the defendants chose to file first appeal under Sec. 96 read with Order XLI, Rule 1 and Section 107 CPC before the Additional District Judge, Sojat.

5. An objection was promptly raised by the plaintiff that the appeal was not maintainable as under Sec. 96 the appeal is maintainable only against a judgment and decree and the trial Court has merely postponed the decision on two issues, against which, the appeal was not maintainable.

6. The trial Court took into consideration the said objection and dealt with the same as under:-

7. Thereafter, the trial Court passed the judgment and decree dated 26.03.2012 as indicated hereinbefore.

8. In the considered opinion of this Court, the consideration of the first appellate Court on the maintainability of the appeal while passing the judgment and decree is clearly erroneous and the same cannot be sustained. Mere postponement of a decision on the issue cannot and does not give rise to a decree so as to make that order amenable to first appellate jurisdiction under Sec. 96 CPC. The first appellate Court has held that as the order has been passed qua the issues relating to jurisdiction, the appeal would be maintainable. It is apparent that the first appellate Court has not even cared to look into the basic requirements of Section % and has recorded absolutely frivolous reasons for upholding the maintainability of the appeal. In that view of the matter, the appeal is allowed, the judgment and decree passed by the first appellate Court is quashed and set aside. The suit is restored back to the file of Civil Judge (Junior Division), Sojat for dealing the matter from the stage of its order dated 03.08.2011 onwards. Parties are directed to appear before the Court of Civil Judge (Junior Division), Sojat on 13.05.2013. No costs.