**FORM OF FIRST APPEAL**

IN THE COURT OF THE DISTRICT JUDGE....................

Civil Appeal No..................... of 19....................

C. D............................................... Defendant/Appellant

*versus*

C. F................................................ Plaintiff/Respondent

**GROUNDS OF APPEAL**

The abovenamed appellant files the appeal under section 96 C. P. C. against the decree dated.................... of.................... Addl. Civil Judge.................... in original Suit No..................... of 19........................................ v..................... and sets forth the following grounds of appeal which is valued at Rs.....................

1. Because the plaintiff failed to prove his readyness and willingness to have the sale deed executed within time. The view of the court below to the contrary is wrong.

2. Because it has been fully established on record that it was the plaintiff who committed the breach and not the defendant. The view of the court below to the contrary is erroneous.

3. Because no notice was served on the defendant by the plaintiff before the period fixed for the execution of the sale-deed. The finding of the court below to the contrary is incorrect.

4. Because both parties having entered into evidence regarding the service of notice the question of raising presumption of due service under section 114 of the Evidence Act did not arise. The view of the court below to the contrary is incorrect.

5. Because it has been fully proved that the evidence of the Postman was not worth relying in face of statement of.................... The court below has wrongly rejected the statement of.................... on absolutely untenable grounds.

6. Because the court below has misconstrued the legal position and has erred at wrong conclusions.

7. Because from the agreement the intention of the parties are clear that they wanted to pay and receive damages in case of breach by either of them and that is why an equal sum was mentioned in the agreement. The view of the court below that it was *in personum* is not justified.

8. Because the rulings cited upon by the court below are not applicable to the facts of the case and are distinguishable.

9. Because the suit for specific performance of the contract in any case has been wrongly decreed. The plaintiff was not legally entitled to enforce the agreement.

10. Because the plaintiff has been disentitled to claim specific performance of the contract by claiming damages for the breach. The court below did not consider this aspect of the case.

11. Because the judgment of the court below is bad in law and on facts and deserves to be set aside.

It is, therefore, prayed that the appeal be allowed with costs, and the suit of the plaintiff be dismissed with costs.

Counsel for Appellant

**CASE LAW**

***Section 96***

**WHETHER ORIGINAL DECREE MERGES WITH THE APPELLATE DECREE? — (YES) — EVEN IF TRIAL COURT’S JUDGMENT WAS UNDER UNAMENDED LAW.**

That a change in the law during the pendency of an appeal has to be taken into account and will govern the right of the parties was laid down by this Court in *Ram Sarup v. Munshi*1*,* which was followed by this court in *Mula* v. *Godhii*2*.* We may point out that in *Dayawati* v. *Inderjit*3this court observed:

(1) If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the Court of first instance.

(2) Reference may also be made to the decision of this Court in *Amarjit Kaur* v. *Pritam Singh*4*,* where effect was given to a change in the law during the pendency of an appeal, relying on the proposition formulated as long ago as *Krishnama Chariar* v. *Mangammal*5by Bhashyam Ayyangar, J., that the hearing of an appeal was, under the processual law of this country, in the nature of a re-hearing of the suit. In *Amarjit Kaur Case*6*,* this Court referred also to *Lachmeshwar Prasad Shukul* v. *Keshwar lal Chaudhuri*7*,* in which the Federal Court had laid down that once a decree passed by a Court had been appealed against the matter became *sub judice* again and thereafter the appellate Court acquired seisin of the whole case, except that for certain purposes, for example, execution, the decree was regarded as final and the Court below retained jurisdiction.8

**APPEAL AGAINST ORDER FOR COSTS.**

An appeal against an order of costs is tenable only if the order n is arbitrarily made without taking into consideration all the relevant circumstances.9

**APPEAL AGAINST ORDER UNDER SECTION 47.**

An order striking off execution terminating the execution proceedings is one under Section 47 and as such is appealable.10

**POWERS OF APPELLATE COURT.**

The appellate Court has power to apply proper article of limitation even though it was not suggested in the lower Court.11

The amount of damages is a matter discretionary with the trial Court primarily, but, however, the Court of Appeal may interfere when the trial Court proceeded on a wholly erroneous estimate or the amount awarded is inordinately low or inordinately high.12

**MESNE PROFITS: RELEVANT DATE TO START WITH.**

The period for which the rule permits a decree for mesne profits to be passed commences on the date of the suit is instituted. The question which remains to be answered is as to when this period comes to an end, that is what is the meaning of the expression ‘the date of the decree’. It is firmly established that a decree passed by the trial Court merges in the decree of the appellate Court and it is only the decree of the appellate Court which is operative.13

**APPEAL AGAINST *EX-PARTE* DECREE: POWERS OF APPELLATE COURT.**

The appellate Court has power to examine the question as to whether the trial Court was not right in proceeding to decide the case *ex parte*.14

**FINDING OF FACT.**

Finding of fact recorded by trial Court on appraisal of oral evidence should not be dislodged by appellate court unless exceptional circumstances has been pointed out.15

**INTERLOCUTORY ORDER**

Section 94 of Civil PC authorises court to prevent the ends of justice being defeated in accordance with rules made to pass such interlocutory orders as defined under Section 94 CPC.16

1. (1963) 3 S.C.R. 858: A.I.R. 1963 S.C. 553.

2. (1970) 2 S.C.R. 129: (1969) 2 S.C.C. 653: A.I.R. 1971 S.C. 89.

3. (1966) 3 S.C.R. 275: A.I.R. 1966 S.C. 1423: (1966) 2 S.C.J. 784.

4. (1975) 1 S.C.R. 605: (1974) 2 S.C.C. 363: A.I.R. 1974 S.C. 2068.

5. I.L.R. (1902) 26 Mad. 91 (F.B.).

6. (1975) 1 S.C.R. 605: (1974) 2 S.C.C. 363: A.I.R. 1974 S.C. 2068.

7. 1940 F. C. R. 84: A.I.R. 1941 F. C. 5: 191 I. C. 659.

8. Lakshmi Narayan Guin and others v. Niranjan Modak, A.I.R. 1985 S.C. 111l: 1985 (1) S.C.C. 270: 1985 (1) R. C. J. 152: 1985 (1) R. C. R. 27: 1985 R. L. R. 395: 1985 Guj. L. H. 257.

9. Devidayal (Sales) Pvt. Ltd. v. Maheshwar Mining and Trading Co. Pvt. Ltd., 1966 Mah. L. J. (Notes) 11.

10. Khem Chand v. Mohd. Mansoop, 1965 All. L. J. 370.

11. Commercial and Industrial Bank Ltd., Gunfoundry v. Kanakachalam, A.I.R. 1966 Andh. Pra. 246: (1964) 1 Andh. W. R. 352: (1964) 1 Com. L. J. 232.

12. Kumari Deepti v. Banwarilal, A.I.R. 1966 M. P. 239: 1966 M. P. L. J. 464: 1966 Jab. L. J. 178.

13. Brij Kumar Singh v. Kamala Singh, A.I.R. 1985 Pat 49.

14. Gangadhar Bhatt v. Srikant, A.I.R. 1981 Kant. 35: I.L.R. (1980) 2 Kant. 792: (1980) 1 Kant. L.J. 416.

15. Madhusudan Das v. Narayani Bai, A.I.R. 1983 S.C. 114.

16. Dr. D. Krithiveni v. P. Shivaram, 2001 (3) CCC 448 (Ker. ).