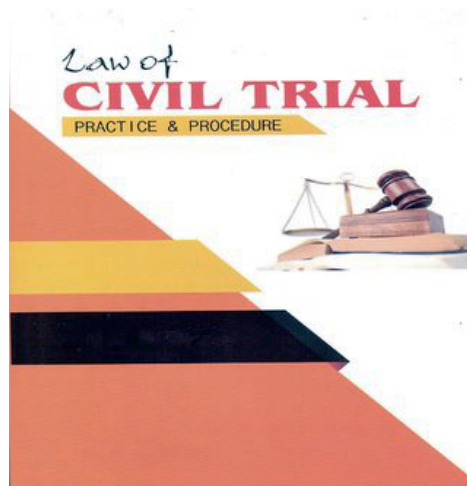


LAW OF CIVIL TRIAL



Zafar Iqbal Kalanauri¹

Institution of Suit and its Essentials: Portrayal of the Principles and Procedural Rules under the Code of Civil Procedure, 1908

The basic aim of a legal system of a country is to impose duty to respect the legal rights conferred upon the members of the society. The person making a breach of that duty is said to have done the wrongful act. On the basis of nature and gravity of such wrongful acts, those are separated under two categories: Public Wrong and Private Wrong. Public wrong is deemed to be committed against the society and the Private wrong, against individuals. The gravity of the former is greater than that of the latter. The first category is termed under the Law as 'crime' governed by the Criminal Laws (Substantive and Procedural) and the second category, as 'civil wrong' governed by the Civil Laws. Under the Criminal Law the action is taken by the state in its name and the accused has to pay fine to the State's fund and is punished by imprisonment or sentenced to death and in such cases the proceeding is started either by lodging the FIR or by lodging complaints (in case of Complaint cases) as provided by the Criminal Procedure Code, 1973. In case of civil wrong, the remedy is the compensation either liquidated or unliquidated damages; the remedial measures ensured to the people is based on the Latin maxims *damnum sine injuria* (damage without injury), *injuria sine damnum* (injury without damage) and *ubi jus ibi remedium*. According to the first two maxims if the legal right of a person is violated he will get the remedy, even in case where no actual damage is caused to him; but where he has no legal right, then if any actual damage is caused to him, he cannot be entitled to get the remedy. The *ubi jus, ibi idem remedium* (where there is a right there is a remedy), speaks of the remedial measure available in the formerly mentioned cases. Such remedial measures are enforced through the institution of suit. The Code of Civil Procedure, 1908 is the procedural or the adjective law of Pakistan

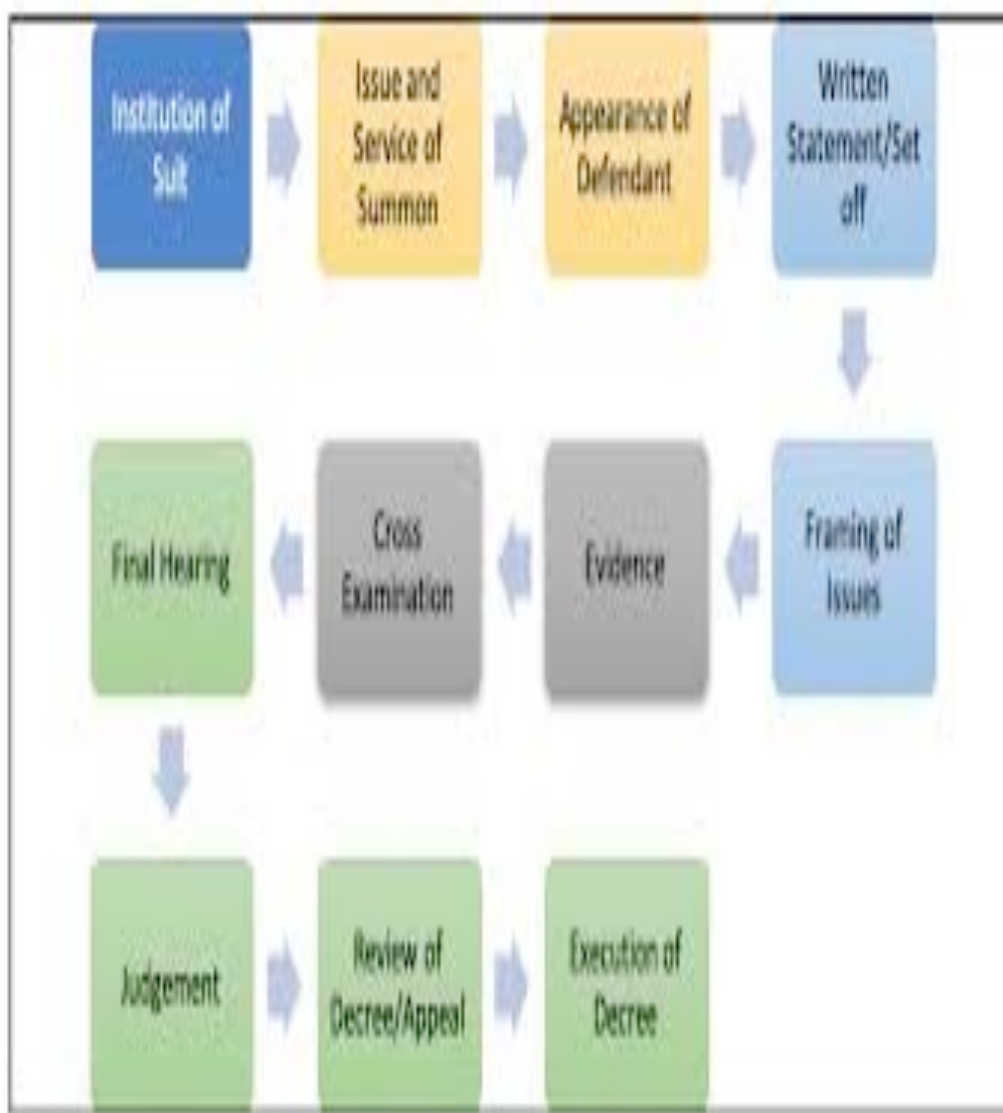
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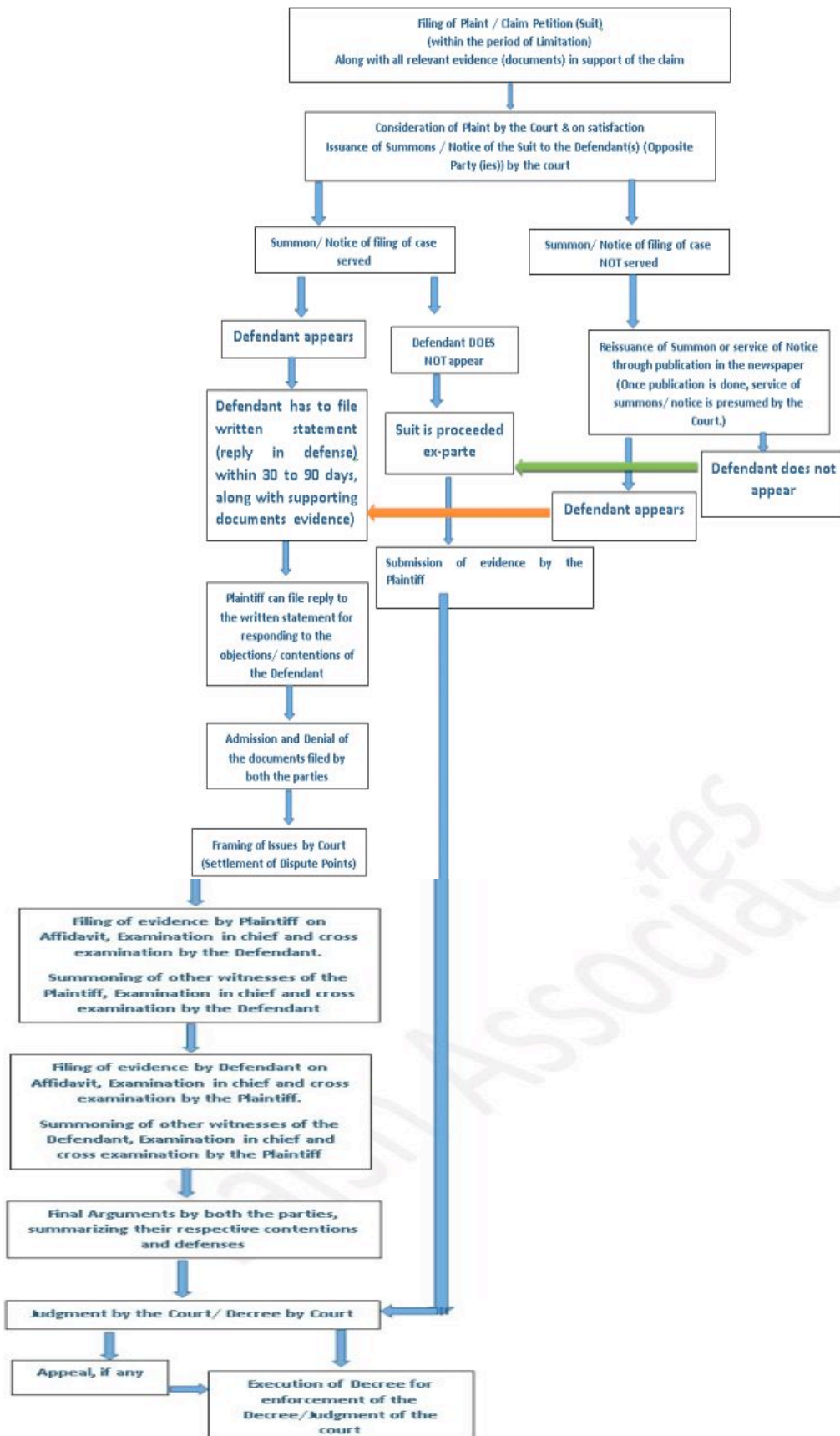
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in civil matters. Sections 26 and Sections 35-35B read with Orders I (Parties to the Suit), II (Framing of the Suit), IV (Institution of the Suit), VI (Pleadings) and VII (Plaint) provide the procedural principles and rules regarding institution of suits.

The word 'suit' has wider application. There is a little difference between the suits under the CPC 1908 and the other civil suits. This is under the CPC that a suit is instituted by the presentation of the plaint which has particular format and in other suits like the Ejectment petition, the same is instituted by mere presentation of the petition. It should be mentioned that 'suit' is different from the 'writs'. Suit is instituted to enforce the legal rights (not the political and religious) only; but the 'writs' are concerned with the enforcement of the Fundamental Rights guaranteed by the Constitution. Only the High Courts and the Supreme Court have the Writ jurisdiction governed by the Constitution. This article seeks to explore the process of institution of suits and its essentials which are governed by the CPC 1908.

Stages of Civil Suit





The importance of the art of pleadings is insufficiently realised in this Country. It is at least as important as any other part of the duties of an advocate. Moreover; it demands a high degree of skill and final form of any pleading should be settled only by the advocates who have the necessary skill and experience. Deplorable consequences flow if there is departure from proper principles of pleadings and therefore it is the duty of both judges and lawyers to see that the pleadings are properly framed. According to Civil Procedure Code the pleading is defined as the 'Plaint' and the 'Written Statement'. In the proceedings before the Civil Courts, it may include a petition whereby the proceedings are initiated under any law for the time being in force and reply thereto by the respondent whether in the form of affidavit or otherwise. The sole object of the pleading is that each side may be fully alive to the questions that about to be argued in order that may have an opportunity of bringing forward such evidence that may be appropriate. If the pleadings are not clear then the parties might not get the relief entitled or might not put forward the defense and therefore the same might result in miscarriage of justice.

For a lawyer, arguably more than for any other profession, words are the dominant tool of the trade. A lawyer can do nothing of consequence without using words. Surgeons, architects, surveyors, accountants, soldiers and police officers can carry out their professional functions to a greater or lesser extent without the use of words. But virtually everything a lawyer does involves speaking or writing. A lawyer's performance will be judged almost exclusively on how well he or she speaks or writes. A lawyer is a specialist no matter what kind of practice he has he would be presumed specialist in advocacy. In the provision of written advice and in drafting. All these skills are dependent on the word skills of the lawyer. A lawyer is supposed to be and is expert in the use of words and the use of language. A lawyer will be offering services and charging a fee for which he would undertake to speak or write better than those paying him could have spoken or written.

'Suit': Meaning within the purview of the Civil Procedure Code, 1908: The term 'suit' has not been defined in the Civil Procedure Code, 1908. According to Chamber's 20th Century Dictionary (7th Edition, 2014)., it is a generic term of comprehensive signification referring to any proceeding by one person or persons against another or others in a court of law wherein the plaintiff pursues the remedy which the law affords him for the redress of any injury or enforcement of a right, whether at law or in equity. In the Black's Law Dictionary (11th Edition, 2019) this term is defined as the proceeding initiated by a party or parties against another in the court of law. According to some other views, 'suit' includes appellate proceeding also; but it does not include an execution proceeding. Ordinarily, suit under the CPC is a civil proceeding instituted by the presentation of a plaint.

1. Procedure for Filing a Suit/Case

There is a detailed procedure laid down, for filing a civil case. If the procedure is not followed, then the registry or court has a right to dismiss the suit. Suit (statement of claim) by the plaintiff. Based on all documents relevant to the case, (copies or original) documents are either attached with the suit or relied upon along with Fard Pata (address of the plaintiff(s)), Fard-e-Dastawaizat (list of documents), Fard-e-Inhesar (list of reliance), list of legal heirs of the plaintiff (s), Fard Talbana (court fee for issuance of summons/notices to the defendants), notices and summons and Wakalat Nama (Power of Attorney). Along with lifa-e-Dastawaizat is filed before the Senior Civil Judge who allocates these suits to different Civil Judges

according to their jurisdiction and work load. Summons are issued which are brought to the defendant(s) by the Piadas (Notice servers). The Written Statement on behalf of the defendant(s) based on all relevant documents to the case together with all the civil forms mentioned above is filed. Issues are framed. List of witnesses is filed. Evidence is recorded first by the plaintiff, then by the defendant(s) and finally evidence in rebuttal by the plaintiff. Witnesses can be summoned by intervention of the court, a special commission for local examination and investigation might be set up. Expert witnesses can also be summoned for seeking their expert opinion. Arguments by the Lawyers. Decision (Judgment & Decree) by the Court. Execution of the Judgment.

The Procedure is as follows:

- Filing of Suit/Plaint
- Vakalatnama
- Court Fees
- How Proceedings Are Conducted
- Written Statement
- Replication by Plaintiff
- Filing of Other Documents
- Framing of Issues/List of Witness
- Final Hearing
- Appeal, Reference and Review
- Limitation
- Filing of Suit/Plaint

1. In layman's language plaintiff is the written complaint/allegation.
2. One who files it is known as "Plaintiff" and against whom it is filed is known as "Defendant"
3. The plaint has to be filed within the time limit prescribed in the Limitation Act, and should be typed copy, in double line space.
4. Name of the Court, Nature of Complaint, Names and Address of parties to be suit has to be clearly mentioned.
5. Plaint should also contain verification from plaintiff, stating that, contents of the plaint are true and correct

Vakalatnama

1. A person/party filing a case, May also represent their own case personally in any court.
2. However, due to lack of knowledge of Law and Technical Procedures, Lawyers are engaged to report the interest of parties.
3. " Vakalatnama", is a document, by which the party filing the case authorises the Advocate to represent on their behalf?
4. On General Terms, a Vakalatnama may contain the following terms:
 - The client will not hold the Advocate responsible for any decision.
 - The client shall bear all the costs and/expenses incurred during the proceedings.
 - The advocate shall have right to retain the documents, unless complete fees are paid.
 - The client is free to disengage the Advocate at any stage of the Proceedings.

- The Advocate shall have all the right to take decisions on his own in the court of Law, during the hearing, to the best interest of client.
5. Vakalatnama is affixed on the last page of plaint/suit and is kept alongwith court records.
 6. It requires, a court Fee of 2 Rupees to be affixed on the Vakalatnama.
 7. Plaint should also have the requisite court fees attached to it. Court fees are some nominal percentage of the value of the claim or value of the suit. The requisite amount of Court and stamp fees is different for every suit, and is mentioned in the "Court Fees Stamp Act."

The Court Fees Act 1870 is a fiscal statute. Its primary object is to protect the State Revenue. Its purpose is not to arm the litigant with the weapon to have litigation dismissed on the technical ground of non or short payment of Court. Since the Court Fee Act is a fiscal statute therefore like other fiscal laws it is to be construed strictly and in favour of the subject. Under the Act sections 3 and 4 are the charging sections and the court fees is levied under them at rates provided in section 7 and the schedule.

Selected Sections of Court Fees Act 1870

Section 7: Section 7 provides the calculation of Court to be levied in various suits. The following are some of the types of suits provided in section 7:

TYPE OF SUIT	COURT FEE PAYABLE
1. Money Suit	According to the amount claimed
2. Suit for maintenance	According to the subject matter
3. Suit for movable Property	According to the market value the movable property
4. Suit for movable property	Where no market value, according to the value made by the plaintiff
5. Suit to enforce right in the joint family	According to the value made by the plaintiff
6. Suit for declaration and Consequential relief	Do
7. Suit for injunction	Do
8. Suit for Accounts	Do
9. Suit for possession	According to the value of the subject matter
10. Suit for pre-emption	According to the value of the land
11. Suit for redemption or foreclosure	According to the principal money

Section 12

The decision regarding the valuation made by the litigant for the purpose of computation of Court Fees in a suit or appeal is to be decided by the court in which the proceedings are initiated.

Section 13 & 14

Refund of Court Fee paid in Appeal or review in certain cases

Section 25 & 26 All fees referred charged under the Court Fees Act are to be collected by stamps which could be impressed or adhesive or partly impressed or partly adhesive

Section 28

No document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped.

The implication of wrong valuation or non or under payment of Court Fee-Order 7 Rule 11 CPC.

Suits Valuation Act, 1887

The purpose of the Act is to lay down the rules for determining the jurisdiction of the court, according to the value of the matter.

Sections 8 and 9

The Value of the suit for the purpose of Court Fee and jurisdiction is the same in cases other than falling under Sections 7 v, vi and ix of the Court Fees Act. Where High Court is of the view that valuation of the case other than Section 7 v, vi, ix and x ibid is not proper it can fix the value.

Section 11 Section 11 lays down the procedure where objection is taken in appeal or revision that a suit or appeal was not properly valued for jurisdictional purpose.

Finally, a date shall be given to the plaintiff, for first hearing. On such hearing, the court will decide whether the proceedings should continue or not. If it decides, that the case no merits, then it will dismiss it there itself, without calling opposite party. If it decides otherwise, then proceedings shall be

2.How Proceedings Are Conducted

- a) On the first day of hearing. For which a date shall be given to the plaintiff, for first hearing. On such hearing, the court will decide whether the proceedings should continue or not. If it decides, that the case no merits, then it will dismiss it there itself, without calling opposite party. If it decides otherwise, then proceedings shall begin if the court thinks there are merits in the case, it will issue notice to the opposite party, to submit their arguments, and fix a date.
- b) On issuance of notice to the opposite party, the plaintiff is required to do the following:
 - File requisite amount of procedure fee in the court.
 - File 2 copies of plaint alongwith all the filed documents for each defendant in the court, i.e. if there are 3 defendants, 6 copies has to be filed.
- c) Of, the 2 copies for each defendant, one shall be sent by Register/post/courier, and one by Ordinary post.
- d) Such filing should be done within 7 days, from date of order/notice.

Written Statement

- a) When the notice has been issued to the defendant, he is required to appear on the date mentioned in the notice.
- b) Before such date, the defendant is required to file his "written statement", i.e. his defence against the allegation raised by plaintiff, within 30 days from date of service of notice, or within such time as given by court
- c) The written statement should specifically deny the allegations, which defendant thinks are false. Any allegation not specifically denied is deemed to be admitted.
- d) The written statement should also contain verification from the Defendant, stating that, the contents of written statement are true and correct.
- e) The time period of 30 days, for filing a Written Statement, can be extended to 90 days after seeking permission of the court.

Replication by Plaintiff

- a) "Replication" is a reply, filed by the plaintiff, against the "written statement" of Defendant, if permitted by the court.
- b) "Replication" should also specifically deny the allegations raised by the Defendant in written statement. Anything not denied is deemed to be accepted.
- c) Replication should also contain, a " verification" from the plaintiff, stating that contents of "Replication" are true and correct.
- d) Once Replication is filed, pleadings are stated to be complete.

Filing of Other Documents

1. Once, the pleadings are complete, then both the parties are given opportunity to produce and file documents, on which they rely, and to substantiate their claims.
2. Any document not filed or produced cannot be relied upon, during final arguments.
3. Filing of Documents is not sufficient. They should be admitted and taken on record.
In brief, the procedure is as follows:
 - a) Documents filed by one party may be admitted by opposite party.
 - b) If they are denied by opposite party, then they can be admitted by the witness produced by party whose documents are denied.
 - c) Once the document has been admitted it shall form a part of the record of court, and all the details of suit such as name of parties, title of suit etc, shall be inscribed on the document. (O13 R49 7)
 - d) Documents, which are rejected i.e. not admitted, are returned to the respective parties.
 - e) It is necessary that document should be filed in "original", and a spare copy should be given to the opposite party.

Framing of Issues/List of Witness

- a) "ISSUES" are framed by the court, on the basis of which arguments and examination of witness takes place.
- b) Issues are framed, keeping in view the disputes in the suit, and the parties are not allowed to go outside the purview of "Issues".
- c) Issues may be of: A) Fact or B) Law
- d) While passing final order, the court will deal with each issue separately, and pass judgement on each issue.

List of Witness

- a) Whichever witness, the parties wish to produce, and to be examined, has to be produced before the court.
- b) Both the parties to the suit shall file a list of witness within 15 days from the date on which issues were framed or within such other period as the court may prescribe.
- c) The parties may either call the witness on its own, or ask the court to send summons to them.
- d) In case court send summons to witness then the party calling for such witness has to deposit money ' with the Court for their expenses, known as "Diet Money".
- e) A person, who does not appear before the court, if he is required by the court to do so, then the court may impose fine and penalty on him.
- f) Finally, on the date, the witness will be examined by both the parties.
 - Examination by party of it's own witness is called "Examination-in-chief"
 - Examination by party of other party's witness is called "cross Examination".
 - Whatever, has to be deposed in " Examination-in-chief", can also be filed by way of an Affidavit.
 - Once, the Examination and Cross- Examination of witness is over, and also the admission and denial of documents, then the court will fix a date for final hearing.

Final Hearing

- a) On the day fixed for final hearing, the arguments shall take place.
- b) The arguments should strictly be confined to the issues framed.
- c) Before the final Arguments, the parties with the permission of Court, can amend their pleadings.
- d) Whatever is not contained in the pleadings, the court may refuse to listen.
- e) Finally, the court shall pass a "final Order", either on the day of hearing itself, or some other day fixed by the court.

Certified Copy of Order

- a) Certified copy of order, mean, the final Judgment & Decree of court, and having the seal and stamp of court.
- b) Certified copy of Judgment & Decree are required to filed, in case of execution of the order, or in case of Appeal.
- c) Certified copy can be applied by making an application to the Registry/Copying agency of concerned Court, alongwith nominal court fees.
- d) In case of "urgent requirement some additional amount has to be deposited.
"Urgent order" can be obtained within a week, and the normal might take 15 days.

Appeal, Reference and Review

When an order is passed against a party to the suit, it is not that it has no further remedy.

Such party can further initiate the proceedings, by way of:

1. Appeal,
2. Reference, or
3. Review.

In brief, the technicalities and difference between these are as follows:

Appeal

Appeal from Original Decrees

(Sec.96)-In general, an appeal lies from any decree passed by the court.

(Sec.96) When a decree has been passed against the Defendant as "Ex-Parte", i.e. without his appearance,

(Sec.96) When an appeal is headed by two or more judges, then the majority decision shall prevail.

In case there is no majority, then the decree of lower court shall be confirmed.

In case, the number of judges in the court, where appeal is filed is more, than the number of judges who dispute on a point of law, such dispute can be referred to one or more judges.

Procedure for Appeal from Original Decrees (Order 41)

- a) The appeal shall be filed in the form prescribed, signed by the appellant, alongwith a true certified copy of the order.
- b) The appeal shall contain the grounds of objection under distinct heads, and such grounds shall be numbered consecutively.
- c) If the appeal is against a decree for payment of money, the court may require the appellant to deposit the disputed amount or furnish any other security.
- d) A ground/objection which has not been mentioned in the appeal, cannot be taken up for arguments, without the permission of court.
- e) Similarly, any point of act which was not taken up by the Appellant, in lower court, cannot be taken up in appeal lies only against only those points which have been decided by the court rightly or wrongly.

Limitation

- a) For every appeal, there is a limited period, within which appeal should be filed. Such a limitation is provided under the Limitation Act, 1908.
- b) For appeal, in case of a decree passed by lower court in civil suit, the limitation is:
 - Appeal to High Court- 90 days from the date of decree or order.
 - Appeal to any other court- 30 days from the date of Decree or order.
- c) In case there are more than one plaintiffs or defendants, then any one of them can file on appeal against all of them respectively.
- d) Merely because an appeal is filed, does not mean that the order or decree of lower court is stayed. In case of temporary stay of decree or order, it has to be specifically asked, and stay will operate only if court grants it.
- e) In case of execution of decree, the court, which passed the decree, can itself stay the execution for time being on sufficient reasons shown.
- f) The court may require the appellant to deposit some sort of security.
- g) The appellate court may, on the day fixed for hearing the appellant dismiss the appeal, or issue notice to the opposite party to appear on next day.
- h) If on the first day of hearing, appellate court issues summons to the opposite party, then:
 - It shall fix a date for next hearing, and such date shall be published in the court house.
 - Notice shall also be sent to the lower court, whose decree or order has been appealed.
 - To appellant is required to file " Process Fee " which is very nominal in amount, and on such filing, the notice shall also be sent to opposite party.
 - In case of appeal, the one who files the appeal is known as appellant, and against whom it is filed, is known as "Respondent".

Institution of Suit:

The Provisions under the Civil Procedure Code, 1908:

Section 26(1), CPC says that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Sub-section (2) provides that in every plaint, facts shall be proved by affidavit. The procedural framework relating to the institution of a suit is given below:

- a) Preparing the plaint
- b) Choosing the proper place of suing
- c) Presentation of the plaint

A brief concept of the relevant provisions of CPC 1908 regarding the essentials of institution of suit are:

- a) Parties to the suit (Order 1)
- b) Framing of the Suit (Order 2)
- c) Institution of Suit (Section 26 and Order 4)
- d) Costs (Sections 35 -35B)

Institution of Suit at a Glance:

The Provisions under the CPC

3.1.1. Preparation of the Plaint:

‘Plaint’ is not defined in this Code. It may, however, be described as ‘a private memorial tendered to a Court in which the person sets forth his cause of action, the exhibition of an action in writing’. Order 7 is related to the format of Plaint. According to Rule 1 the particulars to be contained in a plaint are:

- a) the name of the Court in which the suit is brought;
- b) the name, description and place of residence of the plaintiff;
- c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- e) the facts constituting the cause of action and when it arose;
- f) the facts showing that the Court has jurisdiction;
- g) the relief which the plaintiff claims;
- h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- i) a statement of value of the subject matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

Other rules regarding the contents of a plaint:

- a) In money suits the plaintiff shall state the precise amount of amount claimed (Rule 2).
- b) Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers (Rule 3).
- c) Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it (Rule 4).
- d) The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff’s demand (Rule 5).

e) Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed (Rule 6).

f) Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement (Rule 7).

g) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly (Rule 8).

h) Where the Court orders that the summons be served on the defendants in the manner provided in rule 9 of Order V, it will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants within seven days from the date of such order along with requisite fee for service of summons on the defendants (Rule 9).

3.1.2. Return of Plaint:

Rule 10 (1) says, 'Subject to the provisions of rule 10A, the plaint shall at any stage of the suit be returned to be presented to the court in which the suit should have been instituted.

3.1.3. Rejection of Plaint:

According to Rule 11 the plaint shall be rejected in the following cases:

- a) where it does not disclose a cause of action;
- b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
- c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;
- d) where the suit appears from the statement in the plaint to be barred by any law;
- e) where it is not filed in duplicate;
- f) where the plaintiff fails to comply with the provision of Rule 9.

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.

According to Rule 12 where a plaint is rejected, the Judge shall record an Order to that effect with the reasons for order. Rule 13 clarifies that the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

3.1.4. Amendment of Pleading of the plaintiff (Plaint):

The Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just (Rule 17, Order 6).

3.2. Choosing the proper place of suing:

A defect of jurisdiction goes to the root of the matter and strikes at the authority of a court to pass a decree. A decree passed by the Court in such cases is a coram non iudice. So, choosing the proper court is the next which depends on the contents of the plaint. Section 9 of CPC has declared that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The jurisdiction of a court is decided by the legislature; parties by the framing of the plaint cannot interfere into the extent of this jurisdiction. They can choose one of some of the courts having same jurisdiction. The Plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen.

3.3. Presentation of the Plaint: Commencement of the Suit:

Section 26 and Order 4 contain the provisions relating to the institution of a suit. Rule 1 of Order 4 goes as:

(1) Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Order VI and VII, so far as they are applicable.

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).

Section 26 provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Order 4 Rule 1 lays down the procedure for institution of suit; but does not speak of any 'other manner' for the purpose. The amendment makes it clear that unless the plaint is filed in duplicate it will be deemed to be incomplete. Sub-rule (3) has been inserted in order to curtail unnecessary adjournments for due compliance of the provisions of sub-rules (1) and (2) after the filing of the plaint.

(4) The plaint may be presented either by the affected person himself, or by his advocate or by his recognised agent or by any person duly authorised by him. A proceeding which does not commence with a plaint is not a suit within the meaning of Section 26 and Rule 1 of Order

3.4. Time and Place of Presentation.

Generally, the presentation of a plaint must be on a working day and during the office hours. However, there is no rule that such presentation must be made either at a particular place or at a particular time. A judge, therefore, may accept a plaint at his residence or at any other place even after office hours, though he is not bound to accept it. But if not too convenient, the judge must accept the plaint, if it is the last day of limitation. Thereafter, the particulars of a suit will be entered by the court in a book kept for the said purpose, called the Register of Civil Suits. After the presentation, the plaint will be scrutinised by the Ahlmad. If there are defects, the plaintiff or his advocate will remove them. Thereafter the suit will be numbered.

3.5. Registration of Suits:

Rule 2 of Order 4 provides that the Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

4. Essentials of the Institution of Suits: There are four essentials of a suit:

- a) Opposing parties, i.e., parties to the suit;
- b) Subject-matter in dispute;
- c) Cause of action; and

d) Relief

Parties to suit: Order 1:

In a civil suit, the presence of both the plaintiff, who files the suit, and the defendant, who is sued, is necessary. In each case there are two categories; first one is the necessary party and the other is proper party. A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding. Where the number of plaintiff/defendant is one, no dispute arises regarding their representation; but some uniform rules become mandatory if this number crosses this limit. Order 1 contains these rules. These are enumerated below.

Joinder of parties: Rules 1, 2, 3, 3A:

All persons may be joined in one suit as plaintiffs or defendants as the case may be, where- a. Any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in/ against such persons, whether jointly or severally or in the alternative; and b. If such persons brought separate suits, any common question of law or fact would arise (Rules 1, 3).

Example: Where A assaults B, the latter may sue A for tort, as individually affects him. The question of joinder of parties arises only when an act is done by two or more persons or it affects two or more persons. Thus, if A assaults B and C, or A and B assaults C or A and B assaults C and D, the question of joinder of parties arises.

The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes (Rule 6). When the plaintiff is in doubt regarding the joinder of persons from whom he is entitled to obtain redress, he may join two or more such defendants (Rule 7). It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him (Rule 5). As per Rule 12(1), where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. Sub-rule (2) says, the authority shall be in writing signed by the party giving it and shall be filed in court.

Misjoinder and non-joinder: Rules 9 and 13:

As per Rule 9 no suit can be defeated by reason of the misjoinder and non-joinder of parties unless such party is a necessary party. Rule 13 says that all objections regarding the misjoinder and non-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement.

Representative Suits: Rule 8:

1. Meaning: In a suit if there are numerous persons having the same interest in one suit one or more of such persons may, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested; such a suit is called the 'representative suit'.
2. Object: To facilitate the decision of questions in which a large number of persons are interested without recourse to the ordinary procedure.

3. Conditions: As per Rule 8(1), Where there are numerous persons having the same interest in one suit:
 - a) one or more of such persons may, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;
 - b) the court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.
4. Formalities to be followed:
 - a) In such case, the permission of the Court must be obtained [sub-rule (1)].
 - b) The plaint must show that the suit is representative in character.
 - c) The court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct [sub-rule (2)].
 - d) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the court to be made a party to such suit [sub-rule (3)].
 - e) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3) of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the court has given, at the plaintiff's expenses notice to all persons so interested in the manner specified in sub-rule (2) [sub-rule (4)].
 - f) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit [sub-rule (5)].
 - g) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be [sub-rule (6)].
 - h) For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be [Explanation].

Power of the Court to order separate trials:

Where it appears to the Court that any such joinder may embarrass or delay the trial, the Court may order separate trials or make such other order as may be expedient in the interest of justice (Rules 2, 3A).

Power of the Court to give judgment in case of joinder of parties: Rule 4:

Judgment may be given without any amendment:

- a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;
- b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Special Powers of the Court: Rule 10, 10A, 11:

- a) While trying a suit, the court may, if satisfied that a person or body of persons is interested in any question of law which is directly and substantially in issue in the suit and that it is necessary in the public interest to allow that person or body of persons to

present his or its opinion that question of law, permit that person or body of persons to present such opinion and to take such part in the proceedings of the suit as the court may specify (Rule 8A).

- b) The Court may make corrections to the pleadings of both parties if it seems to be wrong before the Court (rule 10).
- c) The court may, in its discretion, request any pleader to address it as to any interest which is likely to be affected by its decision on any matter in issue in any suit or proceeding if the party having interest which is likely to be so affected is not represented by any pleader (Rule 10A).
- d) The Court may give the conduct of a suit to such persons as it deems proper (Rule 11).

4.2. Subject-matter in dispute:

‘Subject-matter’ means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. This term includes the course of action. According to sub-rules (4) and (5) of Rule 1, where the court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. Where the plaintiff (a) abandons any suit or part of claim under sub-rule (1), or (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

Examples:

- a) Where the suit is instituted for the recovery of immovable property with or without rent, the subject-matter is that immovable property.
- b) Where the suit is instituted for the compensation for wrong done to one movable property, the subject-matter is that movable property.

4.3. Cause of action: Order 2, Rules 3, 6 and 7:

Cause of action may be defined as ‘a bundle of essential facts, which is necessary for the plaintiff to prove before he can succeed.’ A cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. Every fact constituting the cause of action should be set out in clear terms. A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. If a plaint does not disclose a cause of action, the Court will reject that plaint.

Joinder of Causes of Action:

Order 2, Rule 3 provides for the joinder of cause of action. According to this Rule, save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant(s), may jointly unite such causes of action in the same suit.

Power of the Court:

Where it appears to the Court that the joinder of causes of action in ne suit may embarrass or delay the trial or is otherwise in convenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice (Rule 6).

Objections as to misjoinder:

All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

4.4. Relief: Order II, Rules 1-2, 4-5:

Relief is the legal remedy for wrong. According to Rule 1 of Order 2 every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Rule 2 provides for the following conditions to be complied with:

- a) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
- b) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
- c) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Object of this Rule:

This rule is based on the cardinal principle that a defendant should not be vexed twice for the same cause. The object of this salutary rule is doubtless to prevent multiplicity of suits. Conditions for the application of this Rule:

- a) The second suit must be in respect of the same cause of action as that on which the previous suit was based.
- b) In respect of that cause of action, the plaintiff was entitled to more than one relief. iii. Being thus entitled to more than one relief, the plaintiff without the leave of the Court omitted to sue for the relief for which the second suit has been filed. Such leave need not be express and it may be inferred from the circumstances of the case. It can be obtained at any stage. The question whether leave should be granted, depends on the circumstances of each case.

Illustrations:

1. A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907. ii. A advances loan of Rs.2200 to B. To bring the suit within the jurisdiction of Court X, A sues B for Rs. 2000. A cannot afterwards sue for Rs. 200. Rules 4 and 5 provide for the joinder of claims. Rule 4 states that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except-

- a) claims for mesne profit or arrear of rent in respect of the property claimed or any part thereof;
- b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- c) claims in which the relief sought is based on the same cause of action.

Rule 5 provides that no claim by or against an executor, administrator or heirs, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or the defendant sues or is sued as executor, administrator or heirs or are such as he was entitled to or liable for jointly with the deceased person whom he represents.

5. Institution of Special Suits:

There are some special suits in which the process of instituting the same differ a little from the general suits. Some important ones are mentioned below.

5.1. Suits by or against the Government:

Sections 79-82: In such case the authority to be named as plaintiff or defendant, as the case may be, shall be in the case of Central Government, the Union of India and in the case of a State Government, the State.

5.2. Suits by or against military or naval men or airmen:

Order 28: In such case if such officer actually serving under the Government cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorise any person to sue or defend in his stead. The authority shall be in writing and shall be signed by the officer in accordance with Rule 2.

5.3. Suits by or against minors and persons of unsound mind:

Order 32: Such suits can be said to have been instituted in the name of the minor or the person of unsound mind by a person who in such suit shall be called the next friend of the minor or the person of unsound mind when a plaint is presented and not when a guardian ad litem is appointed.

5.4. Suits by indigent persons: Order 33:

In such case the person claiming himself as indigent must apply to the Court for the permission in order to sue as an indigent person. 5.5. Suit against dead person: According to one view, a suit against a dead person (dead at the time of institution of the suit) is non est and of no legal effect. The other view is such suit is not void ab initio and can be continued against the legal representatives of the defendant if they have been brought on record in accordance with the law.

6. Interpleader Suit and General Suits: A Comparative Approach:

Section 88 and Order 35 are related to the Interpleader Suits. Section 88 defines it and Order 35 gives the description of procedural formalities.

Interpleader Suit and General Suit

- a) In such suit the real dispute is not between the plaintiff and the defendant but between the defendants who interplead against the ordinary suit.
- b) In general suits or ordinary the real dispute is between the plaintiff and the defendant.
- c) If two or more persons adversely claiming some debt, sum of money or other property movable or immovable in dispute, from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant, may file an interpleader suit.
- d) In ordinary suit the plaintiff claims the relief or compensation from the defendant. The defendant can also apply for set-off and/or counter-claim.

- e) In order to institute such suit there must be some debt, sum of money or other property movable or immovable.
- f) An ordinary suit can be instituted in the cases other than those where some debt, sum of money or other property movable or immovable is related.
- g) The Court may exempt the plaintiff from the suit if all liabilities have already been discharged by the plaintiff and may proceed to try the suit in the ordinary manner regarding the determination of the actual owner of the property in dispute.
- h) In such suits neither the plaintiff nor the defendant can be exempted from the suit before the final order is passed.

7. Bar of Suits:

Sections 10, 11 and 12 provide certain limitation. The provisions of Sections 10 (Stay of suit / res sub judice) and 11 (res judicata) clarify that in these cases institution of suit is not barred; but the trial is barred by law. Section 12 puts a bar on the institution of suits in cases, where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies. 8.

8. Costs: Section 35-35B:

As per Section 35 (1) subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. Section 35A empowers the Court in imposing compensatory costs in case of false or vexatious claims or defences. Under Section 35 B the Court possesses the power to impose cost for causing delay.

9. Interpretation of the Provisions regarding the Procedure of Institution of Suits:

The provisions regarding the institution of suit are framed in a way which in accordance with the 'literal rule of interpretation' indicates strict adherence to such rules by the plaintiff; but the question may arise whether a plaint should be dismissed if the plaintiff fails to comply with all such strict rules. It depends on two matters

(i) the nature of such failure and (ii) the intention of the plaintiff. If the failure is too minor or of such a nature which cannot prejudice the other party and the course of justice then the Court may allow the amendment to the plaint/pleading. If the failure is not based on an unfair intention the Court may either make some corrections or may order to make those corrections by the plaintiff. The principle behind such views is that the rules of procedure are intended to be a handmaid to the administration of justice and they must be construed liberally and in such manner as to render the enforcement of substantive rights effective.

Conclusion:

There are so many major and minor principles of the institution of suits. The general principles, which can be extracted from the above discussion, are: *First*, a suit under the CPC 1908 can be instituted only by the presentation of a plaint in duplicate whose facts are to be proved by an affidavit. *Second*, Section 26 contains the principle behind the institution of suit and Order I, II, IV, VI and VII are related to the procedural formalities. *Third*, the stages of institution of suit are: i) preparation of the plaint, ii) choosing proper place of suing, and iii) presentation of plaint. *Fourth*, the plaint must be prepared in accordance with the rules of Order VII. *Fifth*, the essentials of institution of suit are: i) parties to the suit, ii) subject-

matter, iii) cause of action, and iv) relief. *Sixth*, in a suit the joinder of parties may be allowed by the Court if those are connected with the same transaction and the same question of law. *Seventh*, in case of every suit there are necessary parties and proper parties. Non-joinder and mis-joinder of necessary parties affect the course of justice. *Eighth*, in a suit if there are numerous persons having the same interest in one suit one or more of such persons may, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested; such a suit is called the 'representative suit'. Rule 8 of Order 1 deals with the procedural formalities of such suit. *Ninth*, every suit shall be as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent litigation concerning them. *Tenth*, on the basis of the subject-matter in dispute in a suit, the jurisdiction of civil Courts varies. *Eleventh*, a cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. *Twelfth*, joinder of several causes of action can be permitted if the circumstantial facts allow the same. *Thirteenth*, the claim of the plaintiff can be adjusted to the set-off and counter-claim of the defendant. Fourteenth, where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. The discussion on the institution of suit under the CPC and its essentials proves that the procedural formalities have been made with much complexity to ensure proper justice and to restrain vexatious and false suits in the course of administration of justice; but these complexities sometimes causes delay in the disposal of some cases. Thus, too much adherence to the procedural formalities makes the Courts over-burdened with a huge number of cases. So, the Civil Procedure Code has incorporated Section 89 for the settlement of certain disputes outside the Court through arbitration, conciliation and mediation to avoid unnecessary delay in the disposal of civil cases and to make balance between the number of suits instituted and disposed of, the Alternative Dispute Resolutions are in practice in Pakistan simultaneously with the general Civil Suits.