

# CHAPTER XI

## MATTERS ARISING PENDING SUIT

**150. *Ex-parte* applications for formal amendment of pleadings and other documents:**

- Applications for amendment of pleadings and other documents for the purpose of rectifying some clerical error or errors in names, dates or sums may be made in Chambers without giving notice to the opposite side.

**151. Amendment how to be made :-** If in any amendment the new matters does not exceed in any one place three folios, the original record shall be amended by an interlineation, or if the amendment be by omitting some original matter, the said matter shall be struck out of the record. In all other cases a new document shall be engrossed and annexed to the original. The first amendment shall be made or indicated in red ink and subsequent amendments shall be made or indicated in different coloured inks.

**152. Attestation of amendment: -** Any amendment made pursuant to an order shall be attested by the Prothonotary and Senior Master or Master and Assistant Prothonotary or any one of the Assistant Masters or Associates.

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**153. Postponement of suits by Prothonotary and Senior Master :-** The Prothonotary and Senior Master may, on the written application of the plaintiff or his Advocate on record, postpone the hearing of a suit, whether it be for final disposal, or for giving directions or otherwise :

- (a) if the writ of summons has not been served and the defendant or defendants has or have not appeared; or
- (b) if the plaintiff and the defendant or defendants or such of them as have been served or appeared consent thereto in writing; or
- (c) when the consent of the defendant or defendants or such of them as have been served or appeared cannot for good and sufficient cause be obtained, if the plaintiff undertakes to give notice of the postponement to such defendant or defendants;

Provided, however, that no postponement shall be granted in a suit which has been pending for more than twelve months. In such a case, the application shall be submitted for orders to the Judge in Chambers.

**154. Postponement of petitions etc. by Prothonotary and Senior Master:-** The provisions of Rule 153 shall, with any necessary modifications, apply to the hearing of

petitions, applications and all other matters, save and except that no postponement shall be granted by the Prothonotary and Senior Master in a petition to set aside an award, which has been pending for more than six months. In such a case, the application for postponement shall be submitted for orders to the Judge in Chambers.

**155. Postponement in peremptorily adjourned suits:-** No postponement shall be granted by the Prothonotary and Senior Master in any suit which has been peremptorily adjourned to any particular date by the Court, but the preceipe setting out the grounds for adjournment shall be submitted to the Judge who granted the peremptory date or in his absence to the Judge in Chambers.

**156. Application affecting the daily board of a Judge to be made to that Judge: -** An application which affects the state of the daily board of a particular Judge shall ordinarily be heard by that Judge.

**157. Directions to be given :-** When a suit appears on the board of the Judge in Chambers for directions, the Judge shall, for the speedy determination of the suit and the avoidance of multiplicity of interlocutory proceedings, give such directions with respect to pleadings, interrogatories, particulars, admission of facts and documents, examination of witnesses, discovery, inspection and production of documents, fixing a date for settling issues and for trial of any issues as preliminary issues, fixing a date for hearing of the suit and such other matters, as he may think fit.

**158. No affidavit to be made: -** No affidavit shall be made or used by any party when the suit is on board for directions, except by leave of the Judge.

**159. Duty to make all interlocutory applications when suit on board for directions :-** When a suit appears on the board of the Judge in Chambers for directions, the parties to the suit shall, so far as practicable, apply for any order or directions which they may desire as to any matter capable of being dealt with on an interlocutory chamber application in the suit and the party intending to so apply shall, not less than four days before the date on which the suit is due to be placed on board for directions, serve on the other parties a notice in writing specifying the orders and/or directions which he seeks.

**160. Subsequent application: -** If any party to a suit desires to apply for any order or directions after the first directions have been given by the Judge, he shall apply by Chamber Summons for such order or directions. If the Judge is of opinion that such application could properly have been made when the first directions were given, he may direct that the party applying shall in any event pay the costs of such application.

**161. Further written statement by leave may be field:-** Where a ground of defence arises after the defendant has filed his Written Statement the defendant may, within two weeks after such ground of defence has arisen, or at any subsequent time, by leave of the Court or the Judge in Chambers file a further Written Statement setting forth the same and in such case shall forthwith serve a copy thereof upon the plaintiff or his Advocate on record.

**162. Plaintiff's confession of such defence and procedure thereon :-** Whenever any defendant in his written statement or any further Written Statement alleges any grounds of defence which have arisen after the commencement of the suit, the plaintiff may file a confession of such defence in Form No. 19 and, if such defence is an answer to the whole suit may thereupon apply to the Judge in Chambers for leave to withdraw the suit and for a decree for his costs of the suit or further Written Statement, as the case may be.

**163. Prothonotary and Senior Master may draw up order for dismissal or withdrawal of suit:-** When a suit has been settled or compromised before the hearing, the Prothonotary and Senior Master may, on the application of precept of a party to the suit or his Advocate on record and with the consent of the other parties thereto or their Advocates on record pass an order for the dismissal or unconditional withdrawal of the suit with such provisions as to costs as may have been agreed upon (Form No.20)

## **Discovery and Inspection**

**164. Agent may make affidavit of documents when a party is not residing in Greater Bombay:-** Where the transactions which form the subject-matter of a suit have been carried on wholly or principally in Greater Bombay and any party is not residing in Greater Bombay at the time an affidavit of documents is required to be filed, such affidavit may be made on behalf of such absent party by his agent in Greater Bombay. For the purpose of this rule, a resident partner in Greater Bombay shall be the agent of his non-resident partner.

**165. Procedure where the affidavit is required to be made by absent party personally :-** If in the case provided for by the last preceding rule any party desires to have such affidavit made by all or any of the absent parties personally, he shall be at liberty to apply on summons for an order to that effect to the Judge in Chambers, setting forth the grounds for making such order, and the Judge after hearing the opposite party may make such order; but the party obtaining it shall, before serving the same, deposit a sum of rupees one hundred in Court for the cost of the opposite party of such order and affidavit which costs shall be dealt with by the Judge who tries the case.

**166. Copies of photographs if relied on, to be furnished to the other side on payment of charges:-** When photographs are annexed as exhibits to a pleading or when photographs are disclosed and relied on, the party seeking to use them shall, on request, furnish a sufficient number of copies of such photographs to the other side on payment of a due proportion of the photographer's charges properly incurred.

**167. Notice of application for interrogatories: -** No application for an order for delivering interrogatories shall be heard without giving previous notice of the same to the other side.

**168. Service of the order for discovery: -** The party seeking discovery shall serve a copy of the order or of the minutes of the order for discovery with his interrogatories

upon the other side and the time for answering or making discovery shall in all cases commence from the date of such service:

Provided such service shall not be necessary on a party appearing when the order was passed and in such case the time shall commence from the date of the Order.

**169. Service on Advocate of order for interrogatories or discovery or inspection: -**

Service of an order for interrogatories or discovery or inspection made against any party or his Advocate on record or the presence of the Advocate for such party when the order is passed, shall be sufficient to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

**170. Liability of the Advocate to pay costs for neglect:-**

If an Advocate upon whom an order for interrogatories or discovery or inspection is served under the last preceding rule, neglects without reasonable excuse to give notice thereof to his client, he shall be liable to pay the costs occasioned by his neglect or such part thereof as the Court may think fit.

**171. Discovery against Sheriff:-**

In any suit against or by the Sheriff in respect of any matters connected with the execution of his office, the Court or the Judge in Chamber may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

**172. Effect of non-disclosure of documents :-**

No documentary evidence in the possession or power of any party, which should have been but has not been disclosed in the affidavit of documents, or which is required to be disclosed in a supplementary affidavit of documents and has not been disclosed shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the Court for the non-disclosure thereof; and the Court receiving any such evidence shall record the reasons for so doing.

**173. Removal of suits and matters from the lists of References to the Commissioner and placing them on board for directions:-**

(i) Where a suit or matter is referred to the Commissioner for the purpose of taking an account, the party having the carriage of the proceedings shall file a certified copy of the decree or order of reference in the office of the Commissioner within ten days from the date of the sealing of the decree or order and shall inform the Prothonotary and Senior Master of his having done so. If such intimation is not given to the Prothonotary and Senior Master within the said period of ten days, the Prothonotary and Senior Master shall, unless otherwise ordered, remove the suit or matter from the list maintained by his office of matters referred to the Commissioner.

(ii) Suits and matters which the Commissioner has certified for non-prosecution or for refusal or neglect of a party to do or perform any act which he was directed to do or perform and suits and matters which have been settled or otherwise concluded and suits and matters in which reports have been made disposing of the case shall also be removed from the said list maintained by the office of the Prothonotary and Senior Master.

(iii) Suits and matters which are removed from such list under sub-rule(i) or which are removed on the ground that the Commissioner has certified them for non-prosecution or for refusal or neglect of a party to do or perform the required act shall be set down for directions before the Judge in Chambers. The Prothonotary and Senior Master shall notify on his notice board the date on which the suit or matter is to be set-down and he shall do so at least eight days before such date. If a party has appeared in person, the Prothonotary and Senior Master shall give notice of the date to such party by sending letter to him by post under certificate of posting.

The Judge may give such directions as he may deem fit.

**174. Application for examination of witness under Order 18, rule 16 or section 76, or Order 26, Rules 1 and 4 of the Code of Civil Procedure:-** When a party to a suit applies for an order for the examination of a witness under Order XVIII rule 16 or for the issue of a Commission under section 76 or Order XXVI, rules 1 and 4 of the Code of Civil Procedure, he shall give notice of the application to the other party or parties. The application shall be made to the Judge in Chambers.

**\*174A.** On receipt of the examination in Chief, of the witness on affidavit with documents under Order 18, Rules 4 (Amendment Act, 2002 of the Code of Civil Procedure), the Court may appoint a Commissioner from the Panel of Advocates prepared by the High Court of Judicature at Bombay for recording cross-examination or re-examination of the witnesses, as the case may be.

**\*174B(i).** The Panel of the Commissioner shall be formed of Retired Judges and from the Members of the Bar, practicing in the High Court at Bombay having minimum 3 years practice as an Advocate, having ability to record the evidence and willing to be appointed on the panel.

(ii) The panel of the Commissioner shall be prepared by the Prothonotary and Senior Master, in the month of April, after every 2 years or as per the directions of the Hon'ble the Chief Justice.

(iii) Where the Commissioner appointed under Rule 174-A dies or retires, leaving commission work incomplete, the Court may appoint another person from the Panel of Advocates, to carry out incomplete commission work.

\***174C.** The commissioner appointed under Rule 174A would be entitled to remuneration at the rate of Rs. \$[ 3000 ] per hour, subject to minimum of Rs \$[ 3000 ]  
# [ and maximum of Rs.10,000 ] a day or such other rate as the Hon'ble Court may direct.

§ Substituted by Notification No. G/Amend/1208/A, dated 06-11-2020,

# Inserted by Notification No. G/Amend/1208/A, dated 06-11-2020

\***174D.** If the remuneration of the Commissioner is fixed on per hour basis, after evaluating probably hours to be consumed for recording evidence and the approximate remuneration of the Commissioner, the parties to the proceeding shall deposit, it in the Court. Both the parties shall deposit the amount of remuneration 50 per cent each within a week from the date of order.

\***174E.** The Commission charges deposited by the parties as per the order of the Court under Rule 174D shall be the costs in the cause.

\***174F.** The Commissioner appointed as per Rule 174A shall have power to administer Oath and all the other powers under Order XVIII of the Code of Civil Procedure.

\***174G.** The Commissioner to fix date, time and place of the Commission work in consultation with parties to the proceedings or as per the order of the Court.

\* Rules 174A to 174G inserted by Notification No. G/Amend/16577, dated 23.11.2006, See 2006 M.G.G. Pt. IV-C, Pg. 117.

**175. Examination of witness under Order 18, Rule 16 or Order 26, Rule 1 of the Code of Civil Procedure:-** The examination of a witness under order XVIII, Rule 16 or Order XXVI, Rule 1 of the Code of Civil Procedure shall be deemed to be a *quasi-judicial* act and shall, unless otherwise ordered, be taken by the Prothonotary and Senior Master or such officer in his office as he may appoint.

**176. Procedure when evidence is to be taken on interrogatories :-** If an order is made on the application of a party for the issue of a commission under section 76 or Order XXVI, Rule 4 of the Code of Civil Procedure and the opposite party joins in the said commission and the evidence is to be taken on interrogatories, each party shall file his interrogatories-in-chief with the Prothonotary and Senior Master and deliver a copy thereof to the opposite party within a fortnight from the granting of such order. In all such cases, cross-interrogatories shall be filed within ten days from the service of the copy of the interrogatories-in-chief and re-interrogatories within six days from the service

of the cross-interrogatories; in default of such filing, the commission may be issued, but in any of the above cases of cross or re-interrogatories, application may be made to the Judge in Chambers to enlarge the time.

**177. Preparation etc. of commission :-** The commission shall be prepared by the Prothonotary and Senior Master, who shall seal the same and annex thereto the interrogatories, cross-interrogatories and re-interrogatories, if any, and shall forward it in a sealed envelope to the Commissioner therein named, with a direction that the same be returned to him when executed. (Form No. 24)

**178. Deposit of fees of the Commissioner:** - Whenever a commission is to be sent outside the local limits of the High Court, the Advocate on record at whose instance the commission is issued shall deposit within the Prothonotary and Senior Master of rupees two hundred as an advance towards the payment of the fees of the Commissioner in question, and undertake at the same time to pay a further sum in case the fees of the Commissioner exceed the amount deposited.

**179. Procedure in examination of witness :-** The Officer taking an examination under the preceding rules shall have regard to the provisions of the Indian Evidence Act and shall, in case the Advocate examining the witness presses any question which such officer shall have disallowed, record such question and the answer thereto, but the same shall not be admitted as evidence unless the Judge before whom the deposition is put in evidence shall so direct, Where dates according to a calendar other than the Gregorian calendar are mentioned, the officer shall add thereto the corresponding dates according to the Gregorian calendar.

**180. Deposition of witness to be read over to and signed by him :-** After the deposition of any witness shall have been taken down and before it is signed by him it shall be distinctly read over and, when necessary, translated to the witness in order that mistakes or omissions may be rectified or supplied. The deposition shall be signed by the witness and left with the Officer, who shall subscribed thereto his name and date of the examination.

**181. Order necessary for summons to witness outside local limits:-** No summons to give evidence or produce documents shall be issued by the Prothonotary and Senior Master to compel the attendance, as witness, of any person resident, and at the time residing, beyond the local limits of the High Court, unless so directed by an order of the Court or of a Judge in Chambers.

**182. Order necessary for production of public documents :-** (a) No summons letter of request for the production of a public document shall be issued by the Prothonotary and Senior Master, unless so directed by an order of the Court or of a Judge in Chambers.

(b) A letter of request may be substituted for a witness summons where the person summoned to give evidence or to produce documents is, in the opinion of the Prothonotary and Senior Master, of a rank entitling him to such mark of consideration.

**183. Payment of expenses and allowances to witness :-** Every person summoned to give evidence shall have tendered to him with the summons a reasonable sum for his travelling and other incidental expenses for going to and returning from the Court House and an allowance at the rates hereunder mentioned for the first day's attendance, and shall, if obliged to attend for more than one day, be entitled, before giving his evidence, to claim from the party by whom he shall have been summoned an allowance at the said rates for each additional day that he may be required to attend.

Class of Witness	Travelling Allowance	Allowance	Local Conveyance Allowance
<p><b>Class I</b></p> <p>Professional men of high position, Members of parliament and of the State Legislature, large land owners and owners of big business organizations, and Class I Government Officials who are required to attend in their private capacity.</p>	<p>First Class Rail or Steamer Fare</p>	<p>Rs. 20 per day</p>	<p>Actual taxi or horse carriage fare each way. From the place where he is put up to the place where he is required to give evidence, if he is put up within a radius of 8 Kms from the place where he is required to give evidence, and if put up beyond 8 Kms. First class local rail fare each way.</p>
<p><b>Class II</b></p> <p>Members of Local Bodies, ordinary professional and business men, land owners, other than small farmers employee in business organizations, Corporations and local bodies and Class II Government Officials who are</p>	<p>Second Class Rail or Steamer Fare</p>	<p>Rs. 12 per day</p>	<p>Actual taxi or horse carriage fare each way, from the place where he is put up to the place where he is required to give evidence, if he is put up within a radius of 8 Kms. From the place where he is required to give evidence, and if put up beyond 8 Kms. First class local rail fare each way.</p>

required to attend the Court in their private capacity.			
<p><b>Class III</b></p> <p>Artisans, Clerks, small land owners, village officers, and employees in lower grades of Corporations, local bodies and business organizations and Class III Government Servants who are required to attend the Courts in their private capacity.</p>	Second Class Rail or Steamer Fare	Rs. 8 per day	Actual bus or Second Class local rail fare each way.
<p><b>Class IV</b></p> <p>Labourers, petty shop keepers, peddlers and persons other than those in the above classes and Class IV Government Servants who are required to attend the Court in their private capacity.</p>	Second Class Rail or Steamer Fare	Rs. 4 per day	Actual bus or Second class local rail fare each way.

*Note 1.* – If there is rail as well as steamer communication between both the places for the whole of the distance, the cheaper of the two modes of travel will be admissible for traveling allowance.

*Note 2.* – If there is rail communication only for part of the distance and steamer communication for the rest, travel by rail and steamer for the parts for which they are respectively available shall be admissible for traveling allowance.

*Note 3.* – If in addition to traveling by rail and/or steamer a witness is required to travel by bus also, the actual bus fare paid for such part of the journey shall also be admissible for traveling allowance.

*Note 4.* – Allowance shall be payable, irrespective of the distance traveled, for the actual time required for the journey each way, and also for the time taken in giving evidence and for the time of detention necessary for the purpose of giving evidence. A part of the day shall be counted as equal to day.

*Note 5.* – Local conveyance allowance shall be admissible for each day that the witness is required to attend the Court at Bombay and shall be payable only if the party calling the witness does not provide conveyance to the witness.

*Note 6.* – The Prothonotary and Senior Master shall decide to which class a witness belongs or which of the alternative modes of traveling should be allowed in particular case. A witness dissatisfied by his decision may request that a reference be made to the Judge and upon such request the question shall be referred to the Judge. The Judge thereupon shall give such directions as he thinks just and proper in the case.

*Note 7.* – In the case of Experts and professional persons and in case in which the Judge thinks special rates should be awarded, the Judge may award higher rates of allowance than provided for in this scale.

*Note 8.* – In cases not fully or clearly covered by this scale or in cases where the Judge thinks special considerations should prevail the Judge shall award such amounts for traveling allowance, allowance and local conveyance allowance as he deems proper.

**184. When witness disentitled to payment of expenses and allowances :-** Any person who shall refuse to state to the Advocate on record of the party summoning him, or to his clerk, the substance of the evidence he can give shall not be entitled to the expenses and allowance mentioned in the last preceding rule without an order of the Court.

**185. Enforcement of payment of expenses and allowances:** - Witnesses who have not been paid their expenses and/or allowances as provided by rule 183 may apply to the Court or to the Judge in Chambers at any time in person for an order for payment of such expenses and/or allowances.

**186. Duration of Advocate's retainer:** - An Advocate on the record of a suit or matter shall continue to represent his client until an order of discharge is obtained or until all proceedings in the suit or matter are ended so far as regards the client.

All proceedings referred to in Order III, rule 4(3) of the Code of Civil Procedure shall be deemed to be proceedings in the suit or matter.

### ***Change and Discharge of Advocate***

**187. Client's application for discharge or change of his advocate:-** When a party applies for an order for discharge or for change of his Advocate on record in a suit, matter or appeal, he shall unless otherwise ordered, give two clear days notice of his application to such Advocate and the facts of such notice having been served shall be stated in the affidavit in support of the order.

**188. Advocate's application for his discharge:-** When an Advocate on record in a suit, matter or appeal applies for an order for his discharge, he shall, unless otherwise ordered, give two clear days' notice of his application to his client and the fact of such notice having been served shall be stated in the affidavit in support of the order.

**189. Responsibility of Advocate for payment of fees :-** An Advocate on the record of a suit or matter shall be responsible for court fees and/or fees chargeable under the rules of the High Court until an order for his discharge is obtained.

**# 189A.** For the purpose of Chapter VI, IX, X and XI of the High Court Original Side Rules, in addition to the other modes of service prescribed under the said Chapters, urgent notice/order/process may be served by Fax, Speed Post or Courier with acknowledgment, wherever such facility is available, at the cost of the parties. Such service shall be treated as good service upon production of the original Fax notice/order/process along with the activity report or acknowledgment in token of service of the notice/order/process by speed post or by Courier. Such acknowledgment purporting to be signed by the Defendant or an endorsement by Postal servant or Courier Agent that the Defendant refused service shall be deemed to be prima facie proof of service.

# Inserted by G.N.No. G/Amend/2404, dated 1.3.2001, See 2001 M.G.G. Pt. IV-C, Pg. 37.

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