

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR**

**WRIT PETITION NO.6212 OF 2018**  
(NEVILLE D'SOUZA...VS..M/S. ATLANTA LIMITED & ANR.)

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Office Notes, Office Memoranda of Coram,  
appearances, Court's orders of directions  
and Registrar's orders  
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Court's or Judge's orders

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Shri R.S.Charpe, Advocate for Petitioner.  
Shri R.R.Deo, Adv. h/f. Shri A.A.Naik, Advocate for Respondents.

**CORAM : ANIL S. KILOR, J.**  
**DATED : JUNE 12, 2023.**

1. Heard.
2. In this Writ Petition the order dated 10<sup>th</sup> July 2018 passed by 6<sup>th</sup> Joint Civil Judge Senior Division, Nagpur, rejecting the application for amendment of the plaint filed under Order VI Rule 17 of the Code of Civil Procedure is under challenge.
3. Admittedly, the application for amendment was filed after the cross-examination of the witness of the plaintiff has been concluded on 17/04/2017. The matter is of the year 2010.
4. In compliance with the proviso to Rule 17 of Order VI of the Code of Civil Procedure it is the case of the petitioner that Advocate was changed and new Advocate has filed Vakalatnama on 27/09/2017 and thereafter he found that earlier Advocate did not collect

the written statement and the copy of the written statement was lying on the record. He, therefore, collected it and after going through the same he thought it necessary to amend the plaint and accordingly on 30/10/2017 the application for amendment was filed. Another justification was that one part of the proposed amendment is necessary to give bifurcation about how much amount was paid and how much amount is outstanding.

5. The learned counsel for the petitioner submits that the impugned order was passed only on the ground that the application was moved after commencement of the trial and the suit is of the year 2010 and needs to be decided expeditiously. He submits that the amendment to the plaint is necessary and some of the facts have already been stated in the evidence but the pleadings in respect of the same are not made in the plaint. He, therefore, submits that as the amendment is required and since the requirement of proviso to Rule 17 of Order VI of the Code of Civil Procedure is complied with the application ought to have been allowed by the learned trial Court.

6. Shri Deo, learned counsel for the respondents submits that no proper explanation has been given by the petitioner as regards due diligence. He submits that there is difference between due diligence and negligence. It is submitted that it is not the case of the petitioner that the

proposed amendment relates to the subsequent events or facts, which were informed to the earlier counsel but he did not incorporate it and it was realised first time after the change of the counsel. It is therefore, submitted that it is not the case of due diligence but it is the case of negligence and therefore, justification given by the petitioner cannot be considered. For this purpose, he has placed reliance on the judgment of the coordinate Bench of this Court in the case of *Jayashree ..vs.. Bhaurao*, reported in **2014(4) Mh.L.J. 168**.

7. In light of the rival contentions of the parties, I have perused the record and the impugned order.

8. There is no dispute that the application was moved after commencement of the trial. It is not the case of the plaintiff that the facts stated in the proposed amendment were not in his knowledge or though those were in his knowledge and informed to the earlier counsel to be incorporated in the plaint, he failed to do so and therefore, the application for amendment was moved after change of lawyer.

9. This Court in the case of *Jayashree ..vs.. Bhaurao* (supra) has discussed the difference between 'due diligence' and 'ignorance' or 'negligence'. The relevant para No.9 reads thus:

*“9. In the judgment delivered in W.P. No. 722/2012 and connected matters on 25-09-2013, after taking into consideration the various decisions of the Apex Court and of this Court, the law on due diligence has been summarized in paragraph 87 as under;*

*“87. The law on “due diligence” developed till this date is summarized as under :*

*(a) “Due diligence” means careful and persistent application and effort. It means the diligence as a prudent man would exercise in the conduct of his own affairs. Unless the party takes prompt steps, mere action cannot be accepted after the commencement of the trial. The due diligence determines the scope of party's constructive knowledge of the claim. It is a kind of reasonable investigation, which is necessary before claiming the relief.*

*(b) The due diligence is distinct from ignorance. In spite of knowledge, ignorance by a party or an Advocate cannot be a matter of due diligence. The neglect to perform an action, which one has an obligation to do, cannot be called as a mistake.*

*(c) The degree of prejudice to the other side by an amendment after the commencement of the trial is greater than one at pretrial stage.*

*(d) Without recording finding on the question of due diligence, the Court shall not get jurisdiction either to allow or disallow an amendment in the pleadings after the commencement of the trial.*

*(e) The Court while allowing an amendment must record a finding that in spite of due diligence, the party could not have raised the matter before the commencement of the trial or that the events sought to be brought on record by way of an amendment have occurred subsequent to the commencement of trial.*

*(f) The facts and grounds in the application for amendment must be clearly stated to bring out a case that the delay caused was beyond the control and diligence of the party proposing amendment.*

*(g) Where a party had acted with due diligence or not, would depend upon the facts and circumstances of the case and no hard and fast rule or strait-jacket formula can be laid down.”*

10. Thus, considering the above observations that due diligence means careful and persistent application and effort. It further means diligence as a prudent man would exercise in the conduct of his own affairs. Whereas, in spite of knowledge ignorance by a party or an Advocate cannot be a matter of due diligence.

11. In the present matter, from the above referred facts, it is apparent that despite knowledge it is the ignorance and negligence on the part of the plaintiff to incorporate the relevant facts in the plaint and therefore, it cannot be said that despite of 'due diligence' the plaintiff could not have raised the matter before commencement of trial.

12. In the circumstances, in absence of any compliance of the proviso to Rule 17 of Order VI of the Code of Civil Procedure, as regards the question of due diligence, the application for amendment cannot be allowed. Hence, I do not find any error committed by the learned trial Court in rejecting the application.

Accordingly, the Writ Petition is **dismissed**.  
No order as to costs.