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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

VASANT
ANANDRAO
IDHOL

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APPEAL NO.370 OF 2019
IN
SUIT NO.894 OF 1986

1. Sanjeev Builders Private Limited,
a Company incorporated under the
Companies Act (I of 1986) and having its
Registered Office at Mittal Towers "A" Wing,
3rd Floor, Nariman Point, Bombay – 400 021.

2. Vineet Builders Private Limited,
a Company incorporated under the
Companies Act (I of 1986) and having its
Registered Office at Mittal Towers "A" Wing,
3rd Floor, Nariman Point, Bombay – 400 021. ...Appellants

Versus

Life Insurance Corporation of India,
Established under the provisions of Life
Insurance Corporation Act (XXXI) of 1956
and having its Central Office at Yogakshema,
Jeevan Bima Marg, Bombay 400 021
and having its Western Zonal Office at
Jeevan Kendra, Jamshedji Tata Road,
Churchgate, Bombay – 400 020. ...Respondent

WITH
NOTICE OF MOTION NO.680 OF 2019
IN
APPEAL NO.370 OF 2019
IN
SUIT NO.894 OF 1986

1.	Sanjeev Builders Private Limited, a Company incorporated under the Companies Act (I of 1986) and having its	
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	Registered Office at Mittal Towers “A” Wing, 3 rd Floor, Nariman Point, Bombay – 400 021.	
2.	Vineet Builders Private Limited, a Company incorporated under the Companies Act (I of 1986) and having its Registered Office at Mittal Towers “A” Wing, 3 rd Floor, Nariman Point, Bombay – 400 021.	...Applicants / ...Appellants / ...Original ...Plaintiffs
<u>IN THE MATTER BETWEEN :</u>		
1.	Sanjeev Builders Private Limited, a Company incorporated under the Companies Act (I of 1986) and having its Registered Office at Mittal Towers “A” Wing, 3 rd Floor, Nariman Point, Bombay – 400 021.	...Appellants
2.	Vineet Builders Private Limited, a Company incorporated under the Companies Act (I of 1986) and having its Registered Office at Mittal Towers “A” Wing, 3 rd Floor, Nariman Point, Bombay – 400 021.	
Versus		
	Life Insurance Corporation of India, Established under the provisions of Life Insurance Corporation Act (XXXI) of 1956 and having its Central Office at Yogakshema, Jeevan Bima Marg, Bombay 400 021 and having its Western Zonal Office at Jeevan Kendra, Jamshedji Tata Road, Churchgate, Bombay – 400 020.	...Respondent

Dr.Birendra Saraf, Senior Counsel with Ms.Aakansha Patil i/b
M/s.Narayan & Narayan for the Appellants / Applicants.

Ms.Snehal Paranjape with Mr.J.P. Kapadia, Mr.O. Mohandas,
Ms.Maitri Yadav i/b M/s.Little & Co. for the Respondent.

**CORAM : R.D. DHANUKA &
KAMAL KHATA, JJ.**
DATE : 7TH SEPTEMBER, 2022.

Oral Judgment (Per R.D.Dhanuka, J.) :-

1. Admit. Ms.Paranjape, learned counsel waives service for the respondent. By consent of parties, the appeal is heard finally.

2. By this appeal, the appellants (original plaintiffs) have impugned the order dated 10th April, 2019 passed by the learned Single Judge by which the learned Judge has redacted material portion of the examination in chief of the appellants' witness no.1. (Hereinafter the parties are referred to as per their original status in the plaint).

3. The respondent was the original defendant before the Trial Court. Some of the relevant facts for the purpose of deciding the appeal are as under :

4. On 24th April, 1986, the plaintiffs filed a suit bearing No.894 of 1986 in this Court *inter-alia* praying for specific performance of the Agreement for Sale dated 8th June, 1979. It is the case of the plaintiffs that during the pendency of the suit on 24th August, 1987 another Agreement for Sale was executed between the plaintiff no.1 and Kedia Construction Company Limited. The plaintiffs accordingly filed a Chamber Summons *inter-alia* praying for impleadment of the said Kedia Construction Company Limited as a party (defendant) to the said suit. On 16th April, 2014, a learned Single Judge of this Court allowed the said chamber summons filed by the plaintiffs for impleadment of the said Kedia Construction Company Limited. Being aggrieved by the said order dated 16th April, 2014, the defendant filed an appeal bearing Appeal No.258 of 2014. By an

order dated 22nd August, 2014, a Division Bench of this Court dismissed the said Appeal No.258 of 2014 filed by the defendant.

5. Being aggrieved by the said order dated 22nd August, 2014, defendant herein preferred a Special Leave Petition (Civil) No.614 of 2015 before the Hon'ble Supreme Court. By an order dated 24th October, 2014, the Hon'ble Supreme Court has set aside the orders passed by this Court allowing the amendment to the plaint and the impleadment of the said Kedia Construction Company Limited.

6. The defendant filed the written statement to the suit filed by the plaintiffs. On 14th January, 2014, the plaintiffs filed an affidavit of evidence of their witness no.1 in lieu of examination in chief of Mr.J.P. Kedia along with compilation of documents. On 10th April, 2019, learned Single Judge of this Court on oral objection of the counsel for the defendant redacted the portions of the affidavit in lieu of examination filed by witness no.1 of the plaintiffs at the stage of considering admissibility of the documents. Being aggrieved by the said order dated 10th April, 2019, the plaintiffs preferred this appeal.

7. Dr.Saraf, learned senior counsel for the plaintiffs invited our attention to the averments made by the plaintiffs in the plaint and more particularly in paragraph 11 stating that in part performance of the said agreement, the plaintiffs had paid an aggregate amount of Rs.4,52,778/- being 25% of the purchase price under the said agreement for sale. The plaintiffs averred that under the said agreement for sale, they have duly performed and carried out their part of the agreement for sale. The plaintiffs averred that they were always ready and willing and are ready and willing to perform and

carry out their part of performance of the agreement. It is averred by the plaintiffs that the delay in completion was caused by the defendant itself and due to the pendency of the writ petition and the injunction order dated 14th October, 1980 passed therein.

8. Learned senior counsel for the plaintiffs invited our attention towards the deposition of the plaintiffs in paragraphs 6 to 14 made in the affidavit in lieu of the examination in chief filed by the witness no.1. He submits that the plaintiffs had always been and continued to be ready and willing to perform their part of the obligation under the said agreement. The paragraphs of the affidavit that sought to be struck off / redacted by a learned Single Judge pertain to the sister concern of the plaintiffs i.e. Nitin Castings where monies are available for making payment. The said affidavit had been brought on record by the plaintiffs to *bonafide* establish “readiness” i.e. their financial capacity to pay amounts due under the said agreement. He relied upon section 16(c) of the Specific Relief Act, 1963.

9. It is submitted by the learned senior counsel that the source of funding to prove “readiness” to perform in order to complete the agreement is not required to be specifically pleaded. He also relied upon the Order VI Rule 2 and Rule 4 read with Forms 47 and 48 of Appendix A of the Code of Civil Procedure, 1908 in support of the submission that these provisions only require the plaintiffs to aver continuous readiness and willingness, which is to be followed by evidence or proof of the same. It is submitted that the question of source of funding lies properly in the realm of evidence and is not required to form part of pleading.

10. It is submitted by the learned senior counsel that the learned Single Judge has entered into arena of merits by deciding the quality of evidence being advanced by the appellants at the stage of tendering affidavit of evidence on the threshold of trial which is not permissible. Learned Single Judge ought to have appreciated that evidentiary value and sufficiency of evidence can be considered only after recording of evidence and not at the stage of tendering affidavit of evidence.

11. It is submitted by the learned senior counsel that the plaintiffs have specifically pleaded in the plaint that the plaintiffs are ready and willing to complete their obligation under the said agreement. The affidavit of evidence tendered by witness no.1 of the plaintiffs is in furtherance of the said pleading and not improvement of the case. The learned Single Judge has eventually foreclosed the vital evidence from coming to light in the trial proceedings.

12. It is submitted by the learned senior counsel that the depositions in the affidavit of evidence was not beyond the pleadings in the suit. The depositions in the affidavit of evidence is to prove the ability of the plaintiffs to perform the said agreement.

13. Learned senior counsel invited our attention to the issues framed by the learned Single Judge on 29th October, 2018 and recast on 10th April, 2019 and more particularly the issue VI) “ Whether the plaintiffs prove that they are entitled to specific performance of the said agreement ?”

14. Learned senior counsel for the plaintiffs in support of his

contentions placed reliance on the following judgments :

- i). Judgment delivered by the Full Bench of this Court in case of **Hemendra Rasiklal Ghia vs. Subodh Mody, 2008 (6) Mh.L.J. 886.**
- ii). Judgment of this Court in case of **Harakchand Gulabchand Dhoka vs. Kashinath Narsingh Marathe, 2010 SCC OnLine Bom.78.**
- iii). Judgment of the Privy Council in case of **Bank of India Limited and others vs. A.H. Chinoy & M/s.Chinoy & Company 1949 SCC OnLine PC 81,**
- iv). Judgment of the Hon'ble Supreme Court in case of **Sukhbir Singh & Ors. vs. Brij Pal Singh & Ors., (1997) 2 SCC 200,**
- v) Judgment of the Hon'ble Supreme Court in the case of **N.P. Thirugnanam (Dead) by LRs. v. Dr. R. Jagan Mohan Rao & Ors.,**
- vi) Judgment of the Hon'ble Supreme Court in the case of **Motilal Jain v. Smt. Ramdasi Devi & Ors.**
- vii) Judgment of the Hon'ble Supreme Court in **M/s. J.P. Builders & Anr. v. A. Ramadas Rao & Anr.**
- viii) Judgment of the High Court of Delhi in the case of **S.K. Mittal v. Kalinga Estate (P) Ltd. & Ors.**
- ix) Judgment of the Hon'ble Supreme Court in the case of **His**

Holiness Acharya Swamiganesh v. Shri Sita Ram Thapar

x) Judgment of this Court in the case of **Cesar Rego Fernandes & Ors. v. Angela Ninette Oliveira**, and

xi) Judgment of this Court in the case of **Harish Loyalka & Anr. v. Dileep Nevatia & Ors.**

15. Ms.Snehal Paranjape, learned counsel for the respondent on the other hand submits that the learned Single Judge has rightly recorded a finding that the deposition in paragraphs 6 to 14 in the affidavit in lieu of the examination in chief is materially different from the plaint. She submits that the entire evidence forming part of paragraphs 6 to 14 fell out of the realm of admissibility of evidence because it was a testimony without support of the pleading. She submitted that the plaintiffs cannot be allowed to lead evidence beyond the averments made in the pleadings. Ms.Paranjape, learned counsel placed reliance on the judgment delivered by a learned Single Judge of this Court on 4th February, 2019 in Writ Petition No.6164 of 2018 in case of **Sultan Suleman Qureshi vs. Anisa Rafiq Charolia & Ors.**

16. Learned counsel for the respondent placed reliance on section 136 of the Indian Evidence Act and submitted that under the said provision, a Trial Judge is empowered to ask a party proposing to give evidence in what manner the alleged fact, if proved, would be relevant while admitting the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise. She submitted that the learned Single Judge in the said judgment noted that no amount of

evidence is admissible which is beyond the pleadings of the parties.

17. Dr.Saraf, learned senior counsel for the plaintiffs distinguished the said judgment delivered by the learned Single Judge of this Court in case of **Sultan Suleman Qureshi** (supra) on the ground that the said judgment was delivered by the learned Single Judge in the writ petition arising out of the order passed by the Small Causes Court in the Rent Act in a suit for eviction. He submitted that the principles laid down by the learned Single Judge would not apply in case of the pleadings and evidence in a suit for specific performance.

REASONS AND CONCLUSION :

18. We have heard the learned counsel for the parties at length and have considered the rival submissions. A perusal of the plaint indicates that the plaintiffs have prayed for an order and decree for specific performance of the agreement for sale dated 8th June, 1979 and to convey the suit property to the plaintiff no.1 and for other reliefs. A perusal of the averments made in paragraph 11 of the plaint clearly indicates that the plaintiffs have averred that they were always and still are ready and willing to perform and carry out their part of performance of the agreement for sale. It is the case of the plaintiffs that in the plaint, it is averred that in part performance of the said agreement, the plaintiffs had paid an aggregate sum of Rs.4,52,778/- being 25% of the purchase price under the said agreement for sale. It is however, averred that the plaintiffs have duly performed and carried out their part of the obligation under the said agreement for sale.

19. In the written statement filed by the defendant in

paragraph 16, the defendant has denied the averments of the plaintiffs that the plaintiffs were ever ready or willing to perform or carry out their part of the said agreement for sale as alleged or otherwise or at all.

20. The witness no.1 of the plaintiffs in the affidavit of evidence in lieu of examination in chief on 14th January, 2019 is a former Director of the plaintiff no.1 and was 86 years old when the said affidavit of evidence in lieu of examination in chief was filed. In paragraphs 6 to 14 of the affidavit of evidence in lieu of examination in chief, the said witness has given a deposition about the availability of funds with the plaintiffs to show that the plaintiffs were always ready and willing to perform their obligation under the said agreement independently.

21. The plaintiffs had sought to bring certain facts on record by seeking amendment to the plaint by filing Chamber Summons and also to implead Kedia Construction Company Limited as the plaintiff no.3. The learned Single Judge of this Court allowed the said Chamber Summons. The appeal filed by the defendant was dismissed by a Division Bench of this Court. The Supreme Court has reversed the orders passed by the learned Single Judge and also the Division Bench.

22. Learned Single Judge of this court in the impugned order has observed that the narrative is a materially different from the plaint. In paragraph 10 of the impugned order. Learned Single Judge has made various observations about sufficiency of evidence led in the said deposition of witness no.1 of the plaintiffs and held that the

plaintiffs were seeking to improve their case. Learned Single Judge accordingly has redacted the entire deposition in paragraphs 6 to 14 as inadmissible except the third sentence in paragraph 10, which has been retained i.e. "Thereafter, in view of and for the sake of convenience, the transaction was agreed to be completed in the name of plaintiff no.2, which, at the relevant time was also a Company where the Kedia Family and the Parsrampurja jointly held stakes".

23. A Full Bench of this Court in **Hemendra Rasiklal Ghia** (supra) has held that by way of exception, the objections relating to the admissibility of document requiring resolution of complex issues, having effect of arresting progress of the matter, or if the admissibility of the evidence is dependent on the receipt of further defence, then, in such cases the Trial Court can, in the interest of justice, defer the issue of deciding admissibility of the document. It is held that the cases; wherein Court Commissioner is appointed to record cross-examination, the Court may decide the question of admissibility of document or proof of such document before the matter is sent for recording of evidence to the Commissioner in the form of cross-examination or re-examination or, in a given case, the Court may decide that question at a subsequent stage.

24. Referring to the judgment in the case of **Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd.** this Court observed that the Supreme Court has clearly ruled that if any objections is to be taken of to the statement made in the affidavit, then such objection should always be taken before the Court in writing and the attention of the witness should always be drawn while

cross-examining him. This Court observed that in other words, it is not necessary to decide the objections relating to admissibility or relevancy of evidence contained in the affidavit filed under Order XVIII Rule 4 of the CPC as they arise. The determination or decision thereon can be deferred to a later stage of the suit. However, final decision must be recorded before the Court proceeds to judgment. This Court further observed that the irrelevant evidence brought on record can always be excluded as the question of admissibility of evidence is a question of law. Even the objection that a piece of evidence which was considered by the judgment was irrelevant can be taken up for first time in appeal.

25. This Court held that different cases will have different facts. Each case must be dealt with on its own facts. The Courts trying the suit or proceedings involving peculiar facts do have a discretion to work out its own procedure and determine the stage of deciding the admissibility of the documents for the reasons to be recorded. It advances the cause of justice without causing prejudice to the rights of either of the parties.

26. Insofar as the issue relating to the objection of the admissibility or relevancy of evidence contained in the affidavit of evidence filed under Order XVIII Rule 4 of Civil Procedure Code is concerned, the Full Bench after adverting to the judgment of the Supreme Court in case of **Ameer Trading Corporation Limited vs. Shapoorji Data Processing Limited (2004) 1 SCC 702**, in which it was held that if any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the Court in

writing and in any event, the attention of the witness can always be drawn while cross-examining. The defendant would not be prejudiced in any manner whatsoever, if examination in chief is taken on an affidavit and in the event he desires to cross-examine the said witness, he would be permitted to do so in open Court.

27. It is held that it is not necessary to decide the objections relating to the admissibility or relevancy of the evidence contained in the affidavit filed under Order XVIII Rule 4 of Civil Procedure Code as they arise. The determination or decision thereon can be deferred to a later stage of the suit. However, the final decision must be recorded before the Court proceeds to judgment. The relevant evidence brought on record can always be excluded as the question of admissibility of evidence is a question of law. This Court also held that even the objection that a piece of evidence which was considered by the judgment was irrelevant can be taken up for first time in appeal. In our view, the principles laid down by the Full Bench of this Court in case of **Hemendra Rasiklal Ghia** (supra) apply to the facts of this case. We are respectfully bound by the said principles laid down by the Full Bench of this Court in the said judgment.

28. The Hon'ble Supreme Court in the case of **N.P. Thirugnanam** (supra) has held that Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him, other than those terms, the performance of which has been prevented or waived by the defendant. The Supreme Court held that in order to adjudge whether the plaintiff is ready and willing to perform his part of the contract, the

court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. It was observed in the said judgment that the Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The Supreme Court in this case, also observed that if the plaintiff fails to either aver or prove his continuous readiness and willingness to perform his part of the contract, he must fail and in order to adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances.

29. In the present case, the plaintiff has already averred that he was ready and willing to perform his part of the obligation and by filing affidavit of evidence, he sought to prove that he was ready and willing to perform his part of the contract.

30. The Hon'ble Supreme Court in the case of **Motilal Jain** (supra), whilst relying the judgment in the case of **R.C. Chandiok v. Chuni Lal Sabharwal** held that readiness and willingness could not be treated as a straitjacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. The Supreme Court whilst relying upon the judgment in the case of a three-Judge Bench of the Supreme Court in the case of **Syed Dastagir v. T.R. Gopalakrishna Setty** held that in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science, but an expression through words to place fact and law of

one's case for a relief. The Supreme Court held that “.... *Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'readiness and willingness' has to be in spirit and substance and not in letter and form*”. The Supreme Court held that, it is thus clear that the averment of readiness and willingness in the plaint is not a mathematical formula, which should only be in specific words. If the averments in the plaint, as a whole, do clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligation under the contract, which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale.

31. The facts of the present case and the averments made in the plaint clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligation under the contract. In our view, the plaintiff would not have to aver the entire evidence as to how the plaintiff was ready and willing to perform his part of the contract. The averments in the plaint of the present case would suffice for the plaintiff to give evidence to show how he is willing to perform his part of the contract.

32. The judgment in the case of **J.P. Builders** (supra), also follows the ratio laid down in **Motilal Jain** (supra). The case of J.P. Builders

(supra) brings out the distinction between the 'readiness' and 'willingness' and holds that whilst former refers to financial capacity the latter refers to the conduct of the plaintiff wanting performance.

33. In the judgment of **S.K. Mittal** (supra), the Delhi High Court has held that the requirement of readiness and willingness is not a ritualistic incantation of what is prescribed under the Act, but determines the claimant's ability to perform the contract.

34. In the judgment of **Cesar Rego Fernandes** (supra), this Court held that if there is any statement in the affidavit, which according to the opposing party, is beyond the pleadings, then it is always open to such a party to put this to the witness in his cross-examination. It further held that it is also open to the court to consider the relevance and weightage to be given to any such statement in the examination-in-chief when there is no foundation laid in the pleadings. It concluded its observation by stating that it would, however, not be correct to strike out paras in the affidavit itself. Such an application could not be supported by any provision of C.P.C. We confirm the views of this Court in the judgment of **Cesar Rego Fernandes** (supra).

35. This Court in the case of **Harish Loyalka** (supra) has taken a view that as regards items that are relevant and to the personal knowledge of the witness, must be retained. These are his testimony and he will need to be cross-examined on these matters. The statements that are only possibly relevant, whether based on his personal knowledge or otherwise, are also matters that must be retained, for the issue of relevancy is always subject to final argument

at the final hearing of the suit.

36. In the present case, the evidence led through the affidavit of the plaintiff's witness was information to his personal knowledge and therefore this Court rightly held that it had to be retained. In our view, the learned Single Judge has overlooked this aspect, which is construed in the above judgment. We are also of the view that this witness's testimony would require cross-examination and the defendants/opposing party would be free to disprove the case sought to be made out by the plaintiff in his affidavit of evidence.

37. We are also in agreement with the view taken by this Court that the issue of relevancy of the evidence so led, would be subject to the final argument taken up at the final hearing of the suit. We are, therefore, of the view that the evidence of the witness cannot be struck out at this stage.

38. The Supreme Court in case of **Sukhbir Singh & Ors.** (supra) has dealt with the proceedings arising out of the suit for specific performance and has dealt with the requirement of the pleadings under Order VI and Appendix A in such a suit for specific performance. The Supreme Court held that in substance the plaintiffs had pleaded in the plaint that they had been and were still willing to perform their part of agreement and the defendant did not have notice in that behalf. The Supreme Court held that the averments made in the plaint were in substance as per Forms 47 and 48 prescribed in Appendix A of the Civil Procedure Code as amended by the High Court. What requires to be considered is whether the essential facts constituting the ingredients in section 16 (1) (c) of the Specific Relief

Act were pleaded and that found mentioned in the said forms do in substance point to those facts. The procedure is handmade to the substantive rights of the parties. The Supreme Court held that it would, therefore be clear from a perusal of the pleadings and the forms that the averments are consistence with the forms.

39. The Supreme Court held that the law is not in doubt and it is not a condition that the respondent should have ready cash with him. It is sufficient for the plaintiffs to establish that they had capacity to pay the sale consideration. It is not necessary that they should always carry money with them from the date of the suit till the date of the decree. The principles laid down by the Supreme Court in the case of **Sukhbir Singh & Ors.** (supra) would apply to the facts of this case. We are respectfully bound by the principles laid down by the Supreme Court in the said judgment.

40. A perusal of the Form 47 forming part of Appendix A, First Schedule which is the form in respect of the suit for specific performance indicates that it has to be confirmed that the plaintiffs have been and still are ready and willing to perform the agreement on their part of which the defendant had noticed. In the facts of this case, paragraph 11 of the plaint, the plaintiff has already made such averments which are in substance as per Forms 47 and 48 as prescribed in Appendix A of the Code of Civil Procedure.

41. Order VI Rule 2 provides that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are

to be proved. Under Order VI Rule 4 it is provided that “particulars to be given where necessary. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

42. In our view, the pleadings as required under Order VI, Rule 4, Rule 2 read with Forms 47 and 48 of Appendix A of the Code of Civil Procedure, 1908 are found in paragraph 11 of the plaint. The plaintiffs are not required to place on record in the pleading itself the source of funding to prove the case of readiness and willingness on the part of the plaintiffs to perform their part of obligation under the said agreement. The question of source of funding is in the realm of evidence and is not required to be part of pleading. The evidence is not required to be pleaded in the plaint.

43. A perusal of the order passed by the learned Single Judge indicates that substantial portion of the affidavit in lieu of examination in chief in paragraphs 6 to 14 has been redacted on the ground that the amendment sought to be inserted in the plaint has been set aside by the Supreme Court. It is held that such averments could not have been inserted in the affidavit in lieu of examination in chief by this method. In our view, this observation of the learned Single Judge has no co-relation or bearing to lead evidence on the issue of readiness and willingness of the plaintiffs in conformity with the specific pleading of readiness and willingness in compliance with the provisions of Order VI, Rule 4 and Rule 2 read with Forms 47 and

48 of the Appendix A of the Code of Civil Procedure, 1908.

44. The pleadings of the plaintiffs in the suit for specific performance are in conformity with the Order VI Rule 4 and Rule 2 read with Forms 47 and 48. The plaintiffs were not required to make evidence forming part of the plaint to prove the averments of readiness and willingness. The learned Single Judge could not have redacted the averments forming part of the affidavit in lieu of examination in chief to prove the pleading of the plaintiffs that they were always ready and willing and ready and willing to perform their part of obligation under the said agreement. Learned Single Judge has entered the arena of deciding evidentiary value of the deposition made by the plaintiffs in the affidavit in lieu of examination in chief at the stage of the witness tendering the evidence and has redacted substantial part of evidence.

45. Learned Single Judge could not have shut off the plaintiffs' right to lead evidence at this stage in view of the plaintiffs already having pleaded sufficiently as required under Order VI Rule 4 and Rule 2 of the Appendix A of the Code of Civil Procedure, 1908 and more particularly in the suit for specific performance.

46. The Trial Judge can always look into the sufficiency of evidence at the stage of oral argument after evidence of both the parties is concluded. The witness in this case is already 90 years old. Learned Single Judge ought to have considered this aspect also while redacting substantial part of evidence.

47. Insofar as the judgment of the learned Single Judge in

case of **Sultan Suleman Qureshi** (supra) relied upon by the learned counsel for the defendant is concerned, a perusal of the said judgment indicates that the Trial Judge in the said judgment was considering a suit for recovery of possession and had considered the averments made in the written statement whereby the defendant admitted that the plaintiff was the owner and landlord of the property in dispute. There was no dispute of their relationship as landlord and tenant i.e. between the plaintiff and the defendant. However, in the affidavit in lieu of examination in chief of the defendant, the witness of the defendant had deposed totally contrary to the admission made in the written statement.

48. Learned Single Judge of this Court in the said judgment in the case **Sultan Suleman Qureshi** (supra) accordingly compared the written statement filed by the defendant with the examination in chief of the defendant and held that in the examination in chief, the defendant had deposed contrary to the averments in the written statement. With these facts at hand, the learned Trial Court had redacted some portion of the evidence of the defendant.

49. The principles laid down by the learned Single Judge of this Court in the said judgment (one of us R.D. Dhanuka, J.) in case of **Mahabanoo Navroz Kotwal** (supra) had considered the issue in the testamentary matter where the facts were totally different, and thus principles in the said judgment cannot be extended to the facts of this case as in a suit for specific performance. The pleadings in the suit for specific performance has to be in accordance with Orders VI Rule 2 and Rule 4 read with Forms 47 and 48 of Appendix A of the Code of Civil Procedure, 1908. The judgment of this Court in case of

Suleman Qureshi (supra) and **Mahabanoo Navroz Kotwal** (supra) would not apply to the facts of this case and would not advance the case of the defendant.

50 We accordingly pass the following order :-

a). The impugned order dated 10th April, 2019 passed in Suit No.894 of 1986 is set aside.

b). Learned Single Judge is directed to take affidavit in lieu of examination in chief of Jagdish Prakash Kedia dated 14th January, 2019 on record as evidence subject to the right of the defendant to cross-examine the witness. Efficiency and relevancy of the deposition made in the affidavit in lieu of examination in chief shall be considered by the learned Single Judge after conclusion of the entire evidence of the parties and before pronouncing the judgment.

c). The Appeal No.370 of 2019 is allowed in aforesaid terms. There shall be no order as to costs.

d). Considering the advance age of the plaintiffs, learned Single Judge to expedite recording of evidence of the witness no.1 of the plaintiffs and shall make an endeavour to record evidence of the witness no.1 within three months from the date of the parties producing a copy of this order.

e). The parties are directed to co-operate with each other in recording evidence of the witness no.1 of the plaintiffs expeditiously. Parties to act on the authenticated copy of this order.

f). Oral application made by Ms.Paranjape, learned counsel for the defendant for stay of the operation of this order is rejected.

(KAMAL KHATA, J.)

(R.D. DHANUKA, J.)