

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 30<sup>th</sup> September, 2019.

+ CS(COMM) 555/2019, IA No.13734/2019 (u/O XXXVIII R-5 r/w R-XXXIX R-1&2 CPC)

**FLOW COOL INDIA PVT. LTD.** ..... Plaintiff

Through: Mr. Ravi Gupta, Sr. Adv. with Mr. Naveen Sharma, Mr S.K.Sharma & Ms. Swati Bhushan Sharma, Advs.

Versus

**FLOW TECH AIR PVT. LTD. & ORS.** ..... Defendants

Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**IA No.13735/2019 (for exemption)**

1. Allowed, subject to just exceptions.
2. The application is disposed of.

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3. The plaintiff has instituted this suit for recovery of balance price due of cooling towers sold, supplied and delivered to defendant no.1, not only against the defendant no.1 but also against the defendants no.2 and 3 both described as Directors of the defendant no.1.

4. Ordinarily, the monies recoverable from a company, as the defendant no.1 is, would not be recoverable from the Directors of the company. To seek recovery, also from defendants no.2 and 3, the plaintiff in the plaint has

pleaded that the defendants no.2 and 3 had given their personal assurance to the plaintiff for the timely release of the amount due and had stood as guarantor for timely payment of the amount.

5. It is not clear from the pleadings, whether the defendants no.2 and 3 are claimed to have kept the plaintiff indemnified or furnished a guarantee. The two have different connotations under Section 124 and 126 of the Indian Contract Act, 1872.

6. No writing of defendants no. 2 and 3 to this effect is pleaded. The contract of indemnity or guarantee pleaded with defendants no.2 and 3 is thus verbal. However no particulars in this regard with respect to date, time, place etc. have been pleaded. Even if the contract of guarantee or indemnity can be verbal, on such vague pleas, a suit for recovery against defendants no.2 and 3 would not be available.

7. Though from a reading of the plaint, it appears that the claim subject matter of the suit is with respect to specific invoices but from the documents filed by the plaintiff, it appears that the claim is for the balance amount due at the foot of the account.

8. Such dichotomy cannot be permitted and if overlooked at this stage, is the root cause for the suits remaining pending endlessly. Moreover, the plaintiff has instituted this suit as a commercial suit. I have in *Vifor (International) Ltd. Vs Suven Life Sciences Ltd.* 2019 SCC OnLine Del 7514 observed that a change of attitude at the end of the advocates, is required to make the Commercial Courts Act, 2015 workable. Alas, none appears to be reading the judgments also.

9. The plaintiff has also sought the relief of mandatory injunction directing the defendants to maintain the suit amount in their account. Such relief of mandatory injunction also does not lie in law and the remedy is of attachment before judgment. Though a separate application therefor has been filed, but again without the requisite pleas thereunder or of any overt act.

10. All the aforesaid errors were pointed out to the senior counsel for the plaintiff in the morning and on request of the senior counsel for the plaintiff, the suit was passed over.

11. Now the counsel for the plaintiff withdraws the suit, needless to state with liberty to file afresh and also seeks refund of court fees paid.

12. No case for return of the plaint, which can be for filing in Court of appropriate pecuniary or territorial jurisdiction, is made out.

13. The proper course is to reject the plaint.

14. The plaint is accordingly rejected.

15. A certificate entitling the plaintiff to refund of court fees paid less Rs.20,000/- be issued and handed over to the counsel for the plaintiff.

16. Though not required, at the asking of the counsel for the plaintiff, it is clarified that the plaintiff shall be entitled to sue afresh on the same cause of action.

**RAJIV SAHAI ENDLAW, J**

**SEPTEMBER 30, 2019**  
‘gsr’