A.Nos.2277 & 2278 of 2021
in C.S.Nos.556 & 650 of 2019
(Commercial Suits)

N.ANAND VENKATESH,J.

The issues involved in both the applications filed separately in the above two suits are interlinked, and the dispute is amongst the same parties. Hence, they are taken up together, heard and disposed of through this common order.

2.For the purpose of clarity in identifying the parties, the status of the parties as arrayed in C.S. No.650 of 2019 will be adopted in describing them in the present applications.

3.Both the applications have been filed by the plaintiff for summary judgment under Order XIII-A of the Code of Civil Procedure, 1908 ("C.P.C."), wherein the plaintiff has sought the dismissal of the suit filed by the defendants in C.S. No.556 of 2019 and for decreeing the suit in C.S. No.650 of 2019.

4.The plaintiff has filed C.S. No.650 of 2019 on the ground that the defendants had sought a term loan from the plaintiff for expanding their business and had entered into various agreements with the plaintiff and that out of the total sanctioned loan amount of Rs.20/- Crores, a sum of Rs.6/- Crores was disbursed to the defendants and that the defendants apart from committing a breach of certain important terms and conditions of the agreement, also defaulted in the repayment of the loan amount disbursed by the plaintiff and thereafter, the plaintiff terminated the Facility Agreement through a letter dated 17.8.2019 and cancelled the unutilised facility limit of Rs.14/- Crores and that the defendants failed and neglected to repay the amount and also unilaterally terminated the Facility Agreement and as a result of the same, the plaintiff has filed the suit for recovery of money from the defendants.

5.The defendants have filed the suit in C.S. No.556 of 2019 against the plaintiff on the ground that the plaintiff was committing breach of their obligations under the agreement by making irregular disbursement of funds and thereby, the defendants were not able to fulfill their commitment with their customers and borrowers and as a result had suffered a huge loss and that the plaintiff who was supposed to disburse the entire amount of Rs.20/- Crores by 15th August 2019, was able to disburse only a sum of Rs.6/- Crores and that when the defendants were repeatedly asking the plaintiff to fulfill their obligations, the plaintiff started coming up with an untenable stand against the defendants to cover up their default and that the plaintiff started adopting certain high handed measures to spoil the name of the defendants and the defendants left with no other option proceeded to terminate the Facility contract and NACH Mandate on 17.8.2019 and the defendants have filed the suit against the plaintiff seeking for the relief of declaration, permanent injunction and for damages.

6.The pleadings were complete in both the suits. Several applications were filed in both the suits, and various orders have been passed in those applications. Certain important orders that were passed during the pendency of the suits will be referred to in this order. Ultimately, the plaintiff who had filed these applications for summary judgment has come up with a categorical stand that the entire case is borne out by documents and no oral evidence will be required in the present case and that the suit can be decided based on those documents since there is no dispute on the documents that are relied upon by both the sides in the present case and it only involves the interpretation of the documents and taking note of the various orders passed by this court and the conduct of the parties. According to the plaintiff, with the available materials, there is no real prospect for the defendants to succeed in the claim made by them, and the claim made by the plaintiff can be decided with the available materials. As a result, the plaintiff has filed the above applications seeking summary judgment.

7.Heard the learned counsel for the applicant and the learned counsel appearing on behalf of the respondents.

8.The plaintiff is a Non-Banking Financial Company (NBFC) engaged in the business of providing financial solutions to their clients by offering custom made financial services, including loans and advances. The first defendant is also a Non-Banking Financial Company (NBFC), and they cater to the needs of SMEs and MSMEs. In short, the plaintiff is a Middle-Level Financier, and the first defendant is a Micro-Level Financier. The second and third defendants are the Directors of the first defendant company, and they are also the guarantors for the loan facility extended to the first defendant Company.

9.The defendants had approached the plaintiff for financial assistance by way of a term loan facility for the purpose of expanding their lending business. Based on the information furnished and the documents submitted by the defendants, the plaintiff agreed to extend financial assistance.

10.The plaintiff sanctioned a term loan facility for a total sum of Rs.20/- Crores to the first defendant, and the parties entered into the following agreements, and certain documents were also executed by the defendants, and they are listed hereunder:

i. *Sanction Letter for Term Loan dated 15.05.2019 executed by the 1st Respondent and Applicant.*
ii. *Facility Letter dated 15.05.2019 executed by the 1st Respondent and the Applicant.*
iii. *Standard Terms and Conditions (For Term Loan) executed on 15.05.2019 between the 1st Respondent and Applicant.*
iv. *Unattested Deed of Hypothecation dated 15.05.2019 executed between the 1st Respondent and Applicant.*
v. *Irrevocable and Unconditional Personal Guarantee dated 15.05.2019 executed by the 2nd and 3rd Respondents.*
vi. *Letter of Continuity executed by the 1st Respondent.*
vii. *Demand Promissory Note by the 1st Respondent.*

11.A few relevant clauses in the Facility Letter dated 15.05.2019 are extracted hereunder:

6	*FACILITY*	*:*	*The facility offered by the Lender to the Borrower comprises of an INR denominated term loan a facility up to INR 20,00,00,000 (Indian Rupee Twenty Crore) ("Facility")*
7	*FACILITY LIMIT*	*:*	*INR 20,00,00,000 (Indian Rupee Twenty Crore)* *The aggregate amount availed by the Borrower under the Facility cannot exceed the Facility Limit.*
8	*AVAILABILITY DATE*	*:*	*The Borrower may avail the entire Facility in single drawdown prior to 3 months from the Effective Date.* *No availment of the Facility will be permitted to be made by the Borrower after 3 months from the Effective Date.*
13	*SECURITY*	*:*	*The Facility, and all interest, additional/default interest, further interest, liquidated damages, indemnification payments, fees, costs, expenses and other monies owing by, and all other present and future obligations an liabilities shall be secured by the following ("Security"):* *a. A first ranking exclusive and continuing charges by way of hypothecation over certain identified receivables of the Borrower (the "Portfolio");* *b. A Demand Promissory Note and a*

			Letter of Continuity; and *The assets mentioned in this Paragraph 13 shall be collectively referred to as the "**Secured Assets**".*
14	*GUARANTEE*	*:*	*a. The Facility, and all interest, additional/default interest, further interest, liquidated damages, indemnification payments, fees, costs, expenses and other monies owing by, and all other present and future obligations and liabilities shall be guaranteed by an unconditional and an irrevocable personal guarantee provided by Promoter ("Guarantors") on the terms and conditions contained in the Guarantee.* *b. If, at any time until the Final Settlement Date, the Borrower of the Guarantors obtains a facility guaranteed by any Promoter, then the Borrower will ensure and will ensure and procure that the Guarantors, shall, obtain a guarantee in a form and manner acceptable to the lender in respect of the Facilities.*
15	*SECURITY COVER*	*:*	*a. The Borrower shall maintain a security cover of 1.1x (One Decimal Point One times) ("Security Cover") of the value of the Outstanding Due Amounts under the Facility at all times until the Final Settlement Date. The Borrower shall not, under any circumstance, transfer, sell, assign or*

			create any encumbrances over or assign the Portfolio or the Secured Assets in favor of any third party without the prior written consent of the Lender. *b. The Security Cover shall be met only with such assets which do not have any principal, interest, additional interest, fee or any other expected payments overdue more than 90 days ("Performing Loans"). The Borrower shall replace all such assets constituting the Portfolio/Secured Assets that are non standard with Performing Loans which meet the eligibility criteria for Secured Assets provided hereunder.*
16	*SECURITY TIMELINES*	*:*	*All Security Interest over the Secured Assets will be created and perfected in a favor of the Lender, to its satisfaction, prior to any Drawdown under the Facility.*
18	*CONDITIONS PRECEDENT*	*:*	*The Borrower shall comply with all Conditions Precedent stipulated under Clause 7 of the Standard Terms.*
19	*CONDITIONS SUBSEQUENT*	*:*	*The Borrower will comply with the following conditions:* *a. Within 30 (Thirty) days of the execution of the relevant documents in respect of the Security, the Borrower and each of the relevant Security Providers shall have filed the requisite forms with the registrar of companies and/or any depository or any*

			Government Authority (to the extent applicable) for the purpose of creation of charge on the Secured Assets. *b. Within 30(Thirty) days of the date of the Drawdown, a certificate of the statutory auditor and/or independent chartered accountant confirming the use of the Facility.*
20	*FACILITY REPAYMENT DATE / REPAYMENT SCHEDULE*	*:*	*a. The Facility shall be repaid in 48 equal monthly installments commencing after from the first date of each Drawdown under the Facility.* *b. Except in case of the cancellation of the Facility by the Lender in accordance with this Facility Letter, all Outstanding Due Amounts under this Facility Agreement, including the Facility, along with all interest, fees, default interest, other costs and charges will be repaid in full to the satisfaction of the Lender on such dates (each, a "**Repayment Date**") as are provided under the repayment schedule contained under Schedule III of the Standard Terms ("**Repayment Schedule**").*
23	*FINANCIAL COVENANTS*	*:*	*The Borrower undertakes that until the Final Settlement Date, it will comply with the following financial covenants:* *a. **CRAR**: Until the Final Settlement Date, the Borrower shall maintain a Capital Adequacy Ratio of 15% (Fifteen) or such Capital Adequacy*

			Ratio as may be prescribed by the RBI from time to time, whichever is higher. *The Financial covenants will be tested on a quarterly basis and the Borrower will provide a certificate of its chartered accountant within 30 (Thirty) days of quarter and confirming the Borrower's compliance with the financial covenants provided herein based on the last declared audited financial statements of the Borrower.*
24	*END USE CERTIFICATE*	*:*	*The Borrower will provide the Lender a certificate from an independent chartered accountant within 30 (Thirty) days of each Drawdown date certifying/confirming that the proceeds of the Drawdown have been utilized by the Borrower solely for the purpose.*
26	*DRAWDOWN/ DISBURSEMENT CONDITIONS*	*:*	*Each Drawdown under the Facility shall be subject to the following conditions:* *a. Minimum drawdown amount INR 2,00,00,000 (Indian Rupee Two Crores)* *b. Delivery of an irrevocable notice of Drawdown by the Borrower to the Lender at least 2 (Two) Business Days prior to the Drawdown (or such shorter period as may be acceptable to the Lender), substantially in the form specified under Schedule II.* *c. Fulfillment of all conditions precedent*

			as prescribed in this Facility Agreement to the satisfaction of the Lender. *d. The making of the Drawdown is subject to the absolute discretion of the Lender.* *e. Compliance with such other condition that the Lender may stipulate from time to time and at the time of making the Drawdown.*
27	*RIGHT OF REVIEW*	*:*	*The Lender reserves the right to review the Facility or to grant or whether to continue with the providing of the Facility from time to time at its absolute discretion.* *Notwithstanding any other provisions in the Facility Agreement or any other Faiclity Document, the Lender shall have the right, with notice if so required, to the Borrower and without assigning any reason;* *a. to immediately vary, terminate, reduce, suspend or cancel the Facility or any unutilised portion of the Facility and/or to cease to make available any further utilization of the Facility, without prejudice to any other rights and remedies available to the lender under the Facility Document or applicable law; and/or* *b. to cancel, reject or refuse to provide Facility.*

29	*DEFAULT INTEREST RATE*	:	*a. If the Borrower fails to pay any amount due and payable pursuant to the Facility Agreement on the relevant Due Date, and if the Lender agrees that such non-payment does not constitute an Event of Default, then such overdue amounts will carry interest at 5% (Five Percent) per annum over and above the interest rate indicated pursuant to this Facility Letter, from the applicable Due Date until the date of payment (both before and after judgment) of such overdue amount along with any costs, charges and other amounts payable to the Lender.* *b. If an Event of Default occurs, the Borrower shall pay interest on any amount due and payable by the Borrower at the rate of 5% (Five Percent) per annum over and above the interest rate indicated pursuant to this Facility Letter, or any other rate as the Lender may from time to time notify to the Borrower. Such interest will accrue on a daily basis from the date of the occurrence of the Event of Default until the date of actual payment by the Borrower to the Lender of all amounts due and payable by the Borrower to the Lender ("**Default Interest**").* *c. The payment of default interest will not absolve the Borrower of any other obligations under the Facility Documents, including to make timely payments and/or in respect of such default or affect any of the other rights*

			of the Lender including in respect of the default. The payment of default interest is in addition to any of, and the Lender reserved of all, its rights under the Facility Documents.

12.Some of the relevant Clauses from the Standard Terms and Conditions are extracted hereunder:

6.REPRESENTATIONS AND WARRANTIES

The Borrower makes the following representations and warranties (on its behalf and on behalf of each of the Security Provider(s), if any) (to the extent applicable) and states that the same are true, correct, valid and subsisting in every respect as of the date of this Agreement, as of the date of each, disbursement by the Lender hereunder, as on each Due Date and as on each day until the Final Settlement Date:

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f. No Default or an Event of Default has occurred and is continuing or might reasonable be expected to result from the making of any drawing under the Facility, no event or circumstance is outstanding which has or might reasonably be expected to have a Material Adverse Effect, and no event *or circumstance is outstanding which constitutes a default under any other agreement binding upon it including any payment or other contractual obligations.*

7.CONDITIONS PRECEDENT AND CONDITIONS SUBSEQUENT

7.1 Before making the Drawdown under this Facility Agreement, the Borrower will provide the Lender the following documents and evidence:

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d. A certified true copy of the special resolutions passed in the meeting of the shareholders authorising the Borrower and the relevant Security provider to avail Facility and to create Security over their respective assets, in accordance with Section 180(1)(a) and 180(1)(c) (to the extent applicable) of the Companies Act OR a certificate of an independent (chartered accountant/company secretary confirming that the provisions of Section 180(1)(a) and 180(1)(c) of the Companies Act, 2013 are not applicable to the Borrower/relevant Security Provider.

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f. A certificate of an authorised signatory of the Borrower and each Security Provider certifying inter alia that:

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iv.confirming that no default or Event of Default has occurred or is continuing;

v.confirming that the Borrower and/or each Security Provider does not have any outstanding income tax claims;

7.3. Additionally, the Borrower will fulfill all conditions subsequent within the specified time period as stated in the Facility Letter, to the satisfaction of the Lender.

8.COVENANTS AND UNDERTAKINGS

8.1. The Borrower undertakes that until the Final Settlement Date:

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b. it will:

i. provide the Lender with such information relating to its business, finances, operation and management from time to time in such form as the Lender may require; and

c. it will promptly notify the Lender in writing if it becomes aware that any representation or warranty given by it in connection with the Facility has or will become incorrect or misleading (including by omission);

d. ...

e. it will notify the Lender in writing of any potential or actual Event of Default and any event or circumstance which constitutes a default under any other agreement binding upon it (and, in each case, the steps, if any, being taken to remedy it) promptly upon becoming aware of its occurrence;

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12.EVENTS OF DEFAULT

(a)Failure of the Borrower or any Security Provider (if applicable) to pay any Outstanding Due Amounts on any Due Date.

(b)Any change in Control or shareholding of the Borrower from that subsisting as on the date of this Agreement.

(c)Any change of its business outside from that which is permitted as a non-deposit accepting or holding non-banking financial company registered with the RBI.

(d)Breach of any provisions, or failure to fulfill any obligations, undertakings, covenant (including financial covenants) under any Facility Document, of or by the Borrower or any Security Provider (if applicable)

(e)Any representation or warranty or information or statement made or provided or deemed to be made by or an behalf of the Borrower or any Security Provider (if applicable) under the Facility Documents or under a security document in respect of the security or for the purpose of obtaining a Facility being incorrect in any respect as to the date on which it is made, or there being any change in the position as set out in such representation of warranty.

(f) The Borrower, any of the Security providers (if applicable) or any member of the Group:

i. fails to discharge any indebtedness which has become due and payable.

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(z) Security

i. Any security is not created and perfected or any guarantee is not provided within the timelines specified under this Agreement and the other Facility Documents.

ii. ...

iii. ...

iv. Any Facility Document creating Security is assigned or otherwise transferred, amended or terminated, repudiated or revoked by any Security provider without the approval of the Lender.

v. *The Security Cover required is not duly maintained by the Borrower.*

13.CONSEQUENCES OF EVENT OF DEFAULT

13.1 If one or more of the events specified in Clause 13.1 occur(s), then the Lender may, in its discretion, that is, without requiring any consent or confirmation of the Company, hereto by a notice in writing to the Company initiate the following course of action:

a) *declare the commitments to be canceled or suspended and/or place the Facility on demand or declare all amounts payable by the Borrower in respect of the Facility to be due and payable immediately;*

13.2 On intimation of, or or service of any such notice of, cancellation or repudiation of the Facility pursuant to this Clause 13, the Facility will become due and repayable by the Borrower to the Lender along with all amounts, costs, charges, interest, default interests, fees etc., on the date specified by the Lender for such repayment. The intimation of, or service of, cancellation or repudiation by the Lender to the Borrower is final, non negotiable, and binding on the Borrower. Any cancellation or repudiation will not affect the validity of any Facility Document or discharge the liability of any party (other than the Lender) to the Facility Document, including without limitation, any security created pursuant to the Facility Documents (if any).

SCHEDULE I which provides for definitions of the terms used in the agreement, defines the term "Default" as follows:

"Default" Means any event, act, omission or condition which is or which amounts to non-compliance of any of the obligations under the Agreement or any other Facility Document and which with notice, lapse of time or both or the fulfillment of any other requirement provided for in this Agreement of any other Facility Document would become an Event of Default.

12.The learned counsel for the plaintiff made the following submissions:

? The Facility Agreement stipulates that the facility limit is up to a maximum of Rs.20/- Crores, and the disbursement will be subject to the terms and conditions of the Facility Agreement. Therefore, the entire Rs.20/- Croresneed not necessarily be disbursed to the defendants.

? The first defendant, for the purpose of availing the facility, should register the charge with the Registrar of Companies within 30 days from the date of execution of the document and this condition was never fulfilled by the first defendant.

? The plaintiff took into consideration the dire need for money for the defendants and hence disbursed a sum of Rs.6/- Crores. During this time, in spite of the several remainders, the defendants failed to register the charge and were responding evasively.

? The defendants are liable to repay back the loan amount as per the schedule of each of the drawdown requests, and they were required to make the payment through the National Automated Clearing House (NACH) Mandate created specifically for this purpose. The first defendant was defaulting the payment of the instalment to the extent of utilising the subsequent disbursement of the amount for the repayment of the amount in default. This resulted in the plaintiff doubting the conduct of the defendants.

? The plaintiff, therefore, reviewed the accounts of the first defendant and found that the first defendant had misrepresented at the time of entering into the Facility

Agreement as if there is no default in repaying the loan to any of its lenders and whereas it was found that the first defendant has in fact committed default in servicing the loans that were availed from M/s.TATA Capital, M/s.IDFC First Bank Limited, M/s.AU Small Finance Bank Limited, M/s.UGRO Capital Limited etc. On assessment of all these facts, the plaintiff found that the defendants' debt exposure to the other lenders was approximately 55% of the total debt exposure and that the first defendant will not be in a position to honour their repayment obligations.

? The defendants, apart from committing default in repayment of the loan, also failed to provide the Utilisation Certificate from the Chartered Accountant as mandated under the Facility Letter. The first defendant also evaded and refused to provide an audit of their books. Therefore, the defendants are attempting to defraud the plaintiff and deprive the plaintiff of their legitimate dues.

? Due to the various defaults committed by the defendants, the plaintiff was constrained to recall the facility on 18.9.2019 and invoked the unconditional and irrevocable personal guarantee. The plaintiff is therefore entitled to the recovery of the total outstanding under the facility documents.

? The defendants are attempting to project as if the plaintiff was facing a cash crunch and this allegation made by the defendants is totally false. To substantiate this submission, the learned counsel relied upon the Chartered Accountant Certificate issued by the statutory Auditor on 30.10.2019, wherein it is seen that for the period from January 2019 to August 2019, the plaintiff has disbursed nearly Rs.893/- Crores.

? The conduct of the defendants was also pointed out by the learned counsel for the plaintiff, and it was submitted that the directions given in the OSA for repayment of the EMIs were never complied with, and the defendants also failed to furnish security in spite of specific directions issued by this Court.

13.Per Contra, the learned counsel for the defendants made the following submissions:

? The Facility Agreement specifically provided that there was a confirmed sanction for Rs.20/- Crores from the plaintiff within a drawdown period of three months, and based on this commitment, the defendants had created third party obligations in order to meet their loan disbursements needs of their customers.

? The Facility Agreement specifically provided that the entire facility limit of Rs.20/- Crores will be drawdown within a period of 3 months from the effective date, and hence, this amount should have been paid by 15.8.2019. This amount can be paid in as a single drawdown or in instalments with a minimum drawdown of Rs.2/- Crores towards each instalment. Neither of these conditions was satisfied by the plaintiff.

? The learned counsel for the defendants by pointing to the communications between the parties on 16.5.2019, 20.5.2019, 24.5.2019, 04.6.2019, 07.6.2019, 08.6.2019, 21.6.2019, 22.7.2019, 06.8.2019 and 13.8.2019 submitted that the plaintiff was in fact facing a cash crunch and was able to disburse only a sum of Rs.6/- Crores within the stipulated period and thereby, the plaintiff committed default of their obligations. This resulted in a serious problem for the first defendant to run their business and fulfil their obligations with their customers.

? The defendants are bound to register the charge only after the disbursement of the entire Rs.20/- Crores by the plaintiff, and there is no question of registering the charge even before the plaintiff fulfilled the obligation. That apart, a charge cannot be registered for Rs.20/- Crores when the plaintiff had only disbursed Rs.6/- Crores.

? The plaintiff, in order to cover up their default, is coming up with some oblique grounds, and they proceeded to unilaterally cancel the Facility Agreement on 17.8.2019, which is illegal and hence has been put to challenge in the present suit.

? The first defendant Company had no other option except to terminate the Facility Agreement and all other loan documents, including the NACH Mandate on 17.8.2019.

? The first defendant has suffered huge losses, and the same will be established at the time of trial, and hence the repayment to be made to the plaintiff for the amounts disbursed should be adjusted/set off from the damages payable to the first defendant. Therefore, the plaintiff is not entitled to a summary judgment.

? The so-called default to the other lenders that are pointed out by the plaintiff is also a matter for trial, and those defaults cannot be decided in a summary fashion.

? The plaintiff is sufficiently secured since there is a security cover of 1.1x (One Decimal Point One times) of security cover available for the value of the outstanding dues. To substantiate the same, the learned counsel for the defendants relied upon the Affidavit of Compliance dated

25.10.2021, which was filed after the orders were passed in some of the applications filed by the plaintiff on 22.9.2021.

14.This Court has carefully considered the submissions made on either side and also the materials available on record.

15.Before this Court goes into the facts of the case in order to decide the above applications, it is important to bear in mind the scope of Order XIII-A of C.P.C., which enables a commercial division to pronounce summary judgment without recording oral evidence in commercial disputes.

16.There are two jurisdictional requirements that must be cumulatively satisfied before the commercial division renders a summary judgment in favour of the plaintiff or the defendants, as the case may be. The two requirements are:

(a) The plaintiff has no real prospect of succeeding on the claim, or the defendant has no real prospect of successfully defending the claim, as the case may be; and

(b) There is no other compelling reason why the claim should not be disposed of before recording oral evidence.

It is clear from a reading of Rule 3 of Order XIII-A, C.P.C. that the Court retains the discretion to withhold summary judgment in appropriate cases and direct the parties to lead oral evidence.

17.The Division Bench of this court in ***Syrma Technology Private Limited* vs. *Powerwave Technologies Sweden AD (in Bankruptcy)*** reported in ***2020 (4) CTC 513*** interpreted the twin requirements and held as follows:

6.Order XIII-A :

6.1.Order XIII-A speaks of summary judgment. As we are aware, the Act itself gives a clear cut mechanism to achieve quicker and speedy justice. Therefore, this provision is meant to give much faster decision than the one contemplated otherwise under the Act. This is obviously an *exception. Therefore, the Court is expected to exercise the power sparingly, with caution. Sufficient safeguards have been given under the order itself and thus, eschewing an oral evidence has to be done subject to the other components of the provision.*

6.2.When once Court proceeds further and gives a judgment under this order, there is no question of examining witnesses. We may remind ourselves that chief examination is being done only through the proof affidavit. In that *scenario, the consideration of subsequent development which might require oral evidence may not be possible. There is also a possibility of a witness coming out with truth, though pleadings and documentary evidence may indicate otherwise. An oral testimony can also explain the documentary evidence and the circumstances which brought them.*

7.Order XIII-A Rule 2:

Now let us consider the provisions governing the summary judgment. Order XIII-A Rule 2 lays emphasis on the stage at which an application may be made. This provision makes it clear that an application may be filed for summary judgment at any time after summons has been served on http://www.judis.nic.in O.S.A.NO.345 OF 2019 the defendant. This has to be read along with the proviso. The proviso says that no application in summary judgment may be made after the issues are framed. Thus, if one reads the provision as a whole, what emerges is that an application may not be filed after framing of the issues. The first part speaks of the entitlement to file an application and the second is the outer limit. Though the legislation uses the words 'may' one has to see the preceding words 'no application for summary judgment'. The power being discretionary, any exercise has to be before framing of issues. Reason is, once issues are framed and taken note of to be answered, regular trial is the way out.

8.Order XIII-A Rule 3 :

It deals with the grounds for summary judgment. Here *again there are two elements, which are to be kept in mind. One the real prospect of succeeding on the claim or defending and the other the existence of any* *other compelling reason. Order XIII-A Rule 3(a) is applicable to the applicant, who can either be the plaintiff or the defendant. He has to satisfy the Court with respect to the non existence of the real prospect. Thereafter, the respondent in the application has to convince the Court on the existence of any other compelling reason. These two factors will have to be considered by the Court. Once the Court considers that there is no real prospect of succeeding or defending the claim and there is no other compelling reason as to why the claim could not be disposed of before recording of the oral evidence, it may proceed thereafter and render a summary judgment after assessing the materials placed.*

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13. Thus, to conclude, we are of the view that when an application is filed under Order XIII-A, a Court is expected to keep in mind the provisions contained in Order XIII-A Rules 6 and 7 before considering a summary judgment under Order XIII-A Rule 3. We are conscious that Order XIII-A Rule 6 also speaks of a judgment on the claim both part or full. Order XIII-A Rule 7 read with other modes mentioned under Order XIII-A Rule 6 act as contraceptive to grant of summary judgment under Order XIII-A Rule 3.

14.We have already discussed the scope and ambit of Order XIII-A. Thus, we do not wish to repeat it except by holding that there is a remarkable difference in the word appears as mentioned under Order XIIIA Rules 7 and 3, which uses the words 'considers'. Further more, the Order XIII-A Rule 6 gives discretion to the Court. Therefore, looking from any perspective, it is not necessary that the Court will have to decide only two issues on an application filed under Order XIII-A viz., to allow it or *O.S.A.NO.345 OF 2019 dismiss it, while we hold that at the time of considering the application the Court can go into the merits of the case, which is exactly the object of the provision. However, the Court has to keep in mind the import of Order XIIIA Rule 6. It has to necessarily record a finding that it is proceeding under Order XIII-A Rule 3 instead of exercising its discretion otherwise provided under Order XIII-A Rule 6. Thus such a discretion when exercised has to be in tune with Order XIII-A Rule 6. While exercising such a power, it appears to the Court that it would come under the purview of Order XIII-A Rule 7, it should pass a conditional order. However, if it considers that an applicant has got no real prospect of succeeding and there is no other compelling reason, then it can proceed to give a summary judgment. There is a mandated difference between the word appears and considers. One is cursory and the other a bit more adjudicatory. The later requires more application of mind. Stage to "consider" follows "to appear".*

18.It is clear from the above judgment that the burden of satisfying the Court on the first ground lies with the applicant whereas, the burden of satisfying the Court on the existence of compelling reasons is on the respondent to the application for summary judgment. The grant of summary judgment being discretionary, it would appear that the court would be perfectly justified in declining to exercise the jurisdiction if the Court finds that the claim is not entirely free from doubt warranting a deeper examination in a trial.

19.The principles governing the exercise of jurisdiction to grant or withhold a summary judgment are succinctly set out in the following passage of the Chancery Division of the High Court of England and Wales in ***Easyair Limited (Trading as Open Air) vs Opal Telecom Limited*** reported in ***[2009] EWHC 339 (Ch)*** as follows:

i. *"The court must consider whether the claimant has a realistic" as opposed to a "fanciful" prospect of success: Swain v. Hillman [2001] 2 All ER 91.*

ii. *A "realistic" claim is one that carries some degree of* *conviction. This means a claim that is more than merely arguable ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8].*

iii. *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*

iv. *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the Court. In some casesit may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents; ED & F Man Liquid Products v Patel at [10]*

v. *However, in reaching its conclusion the Court must take in to account not only th evidence actually place before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

i. *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the* *time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case. Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63.*

ii. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to agree that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI

Chemicals & Polymers Ltd v TTE Training Ltd [20076] EWCA Civ 725."

20.The Delhi High Court in ***Su-Kam Power Systems Ltd*** **vs.*Kunwer Sachdev and Another*** reported in ***2019 SCC online Del 10764*** formulated the following test at Paragraph No.52 of the judgment and the same is extracted hereunder:

> *52. Consequently, this Court is of the opinion that there will be 'no real prospect of successfully defending the claim' when the Court is able to reach a fair and just determination on the merits of the application for summary judgment. This will be the case when the process allows the court to make the necessary finding of fact, apply the law to the facts, and the same is a proportionate, more expeditious and less expensive means to achieve a fair and just result.*

21.Rule 6 of Order XIII-A, C.P.C. enumerates an illustrative list of orders that the Court may pass while hearing an application for summary judgment. Thus, the discretion of the Court, while considering an application under Order XIII-A,C.P.C, is not restricted to either dismissing or allowing it. The use of the word "*may*" also points out that the range of orders set out in this Rule are not exhaustive. The Court has to record reasons for adopting any of the courses that are set out in Rule 6. Courses specifically enumerated under Rule 6 that the Court may adopt are:

a) Judgment on the claim

b) A conditional order in accordance with Rule 7

c) Dismissing the application

d) Dismissing a part of the claim and a judgment on the part of the claim not dismissed.

e) Striking out the pleadings (either in whole or in part)

f) Further directions to proceed for case management under XV-A.

22.The learned counsel for the defendants while making his submissions also specifically relied upon Rule 7 of Order XIII-A,C.P.C which enables the Court to make a conditional order. The learned counsel submitted that a conditional order was already passed by this Court on 22.9.2021 directing the defendants to furnish security for the suit claim, and the same has been complied by filing an Affidavit of Compliance, and therefore, a summary judgment need not be passed in the present case and the parties can be directed to go for a trial more particularly since the defendants will have to establish the loss sustained by them in order to claim damages against the plaintiff.

23.Under Order XIII-A Rule 7,C.P.C where it appears to the Court that the claim or defence may succeed, but it is improbable that it shall, the Court may make a conditional order as set forth in Rule 6(1)(b). The crucial point here is that the threshold for the grant of a summary judgment approximates near a probability, whereas the threshold for a conditional order is that a case does not measure up to the level of a probability but goes no more than being possible. The difference between a possibility and a probability has been explained by the Division Bench of this Court in ***Statevs. Somasundaram*** reported in ***AIR 1959 MAD 323***, to the effect that "a thing is possible when it may happen; likely when the chances are in favour of its happening, and probable when the chances are strongly in its favour".

24.This provision has a dual advantage. It removes the incentive to contest the case as a device to delay the final resolution of the dispute, and it provides the claimant with security in case the judgment is eventually in his favour. Where, therefore, a case lies in a grey area between a possibility and a probability, the most appropriate course for the court is to pass a conditional order of the nature set out in Rule 7, C.P.C. This Rule confers powers on a commercial division, of the widest amplitude, to ensure that the rights of the parties before it is fully protected at all stages. While passing a conditional order, the commercial division can also specify the consequences for default in compliance which will also include passing a final judgment against the defaulting party.

25.Keeping the above in mind, this Court will now go into the merits of the case and see if the facts of the present case satisfy the requirements of Order XIII-A, C.P.C. This Court will also examine the nature of the order that could be passed in the facts of the present case in line with the requirements of Order XIII-A, C.P.C.

26.This Court will now take up the application filed in C.S. No.650 of 2019. This suit has been filed by the plaintiff for recovery of money from the defendants towards the amounts due and payable for the disbursement made by the plaintiff under the Facility Letter dated 15.5.2019. In this suit, there is absolutely no dispute with regard to the fact that a sum of Rs.6/- Crores was disbursed by the plaintiff in favour of the first defendant in six tranches on 17.5.2019, 27.5.2019, 07.6.2019, 10.06.2019, 29.07.2019 and 03.8.2019, respectively. It is also an admitted fact that these amounts were paid as per the drawdown requests made by the first defendant. The disbursement of the amounts is also sufficiently substantiated through the materials available on record. The defendants do not even deny the fact that they have received a sum of Rs.6/- Crores from the plaintiff under the Facility Agreement. If in the present case, no suit had been filed on the side of the defendants in C.S. No.556 of 2019, there would have been absolutely no difficulty for this Court to pass a summary judgment in C.S. No.650 of 2019, since the defendants will not have a real prospect of successfully defending the claim made by the plaintiff and there will be no other compelling reasons for this Court to record oral evidence in deciding the claim made by the plaintiff. In other words, the fate of the case will not be altered even if oral evidence is let in.

27.The real challenge comes in only because of the claim made by the defendants in C.S. No.556 of 2019. In fact, C.S. No.650 of 2019 is more in the nature of a cross suit. Hence, the nature of the order that could be passed in Application No.2278 of 2021 will depend upon the decision that is going to be taken in Application No.2277 of 2021 in C.S. No.556 of 2019. Therefore, without further ado, this Court will straight away get into the claims made by the defendants in C.S. No.556 of 2019.

28.The specific case of the defendants is that they are also a Non-Banking Financial Company (NBFC), and they are at the level of Micro-Level Financiers who cater to the needs of SMEs and MSMEs. Hence, they make their commitments to their customers/borrowers based on the financial facilities which they avail from large financial institutions and Middle-Level Financiers such as the plaintiff. In the present case, the Facility Agreement contemplated that the plaintiff will extend a term loan facility of Rs.20/- Crores to the first defendant. This amount was the facility limit fixed under the agreement. The manner in which the first defendant will drawdown the amount and the disbursement conditions are provided under Columns 25 and 26 of the Facility Agreement. The entire drawdown must be done by the borrower within a period of three months from the effective date, i.e., on or before 15.8.2019. Availingthe facility will not be permitted beyond three months from the effective date. The minimum drawdown that was contemplated under the agreement was Rs.2/- Crores for every tranche. The agreement also specifically provided for the repayment schedule under Column 20 of the agreement read with Clause 4 and Schedule III of the Standard Terms and Conditions. It is made very clear under the agreement that the drawdown under the facility will be allowed only if the first defendant fulfils all the conditions precedent as prescribed under the Facility Agreement to the satisfaction of the plaintiff. Clause 13 of the Terms and Conditions also specifically provides that if one or more of the events specified in Clause 13.1 occurs, it is left open to the plaintiff, in its discretion, to cancel or suspend the commitments from the side of the plaintiff and direct the defendants to repay back the entire amounts payable immediately. The term “default” has been defined, and it includes any act, omission or condition which is or which amounts to non-compliance of any of the obligations under the agreement. The events of defaults are also provided under Clause 12 of the Terms and Conditions.

29.The plaintiff has pointed out mainly three defaults on the side of the defendants, which according to the plaintiff, justified the decision taken by the plaintiff to terminate the Facility Agreement through the impugned communication dated 17.8.2019. The three main defaults, according to the plaintiff, are; a) non-filing of Form No.CHG-1 to register the charge created with the Registrar of Companies as required under Section 77 of the Companies Act, 2013. This default is in contravention of Column 19 of the Facility Letter and Clause 12(z) of the Standard Terms and Conditions. (b) the defendants had knowingly misrepresented that there is no default or an event of default has occurred and is continuing due to the non-payment of the amount to other lenders. This default falls under Class 12(f) of the terms and conditions and (c) non-payment of the dues for the disbursement made by the plaintiff within the time stipulated under the Facility Agreement read with the Standard Terms and Conditions.

30.Apart from the above three major defaults pointed out by the plaintiff, they are further pointing out other defaults such as non-furnishing of the Chartered Accountant's Certificate, non-cooperation in the audit of the books of accounts of the borrowers etc., It is under these circumstances, the plaintiff proceeded to exercise its right under Column 27 of the Facility Letter and cancelled the unutilised facility limit of Rs.14/- Crores and terminated the agreement.

31.The learned counsel for the plaintiff, in order to substantiate the first ground of major default, relied upon Column 19 of the Facility Letter, which provided that the first defendant within thirty days of the execution of the relevant documents should file the requisite forms with the Registrar of Companies and register the charge. It is admitted that the charge was never registered. The learned counsel for the plaintiff also relied upon the email communications dated 27.6.2019 and 12.8.2019, wherein the defendants were repeatedly asked to register the charge. The learned counsel submitted that even though the registration of charge was shown as a condition subsequent under the Facility Letter, the same has to be fulfilled within the time stipulated, failing which it becomes an event of default under Clause 12(z) of the terms and conditions.

32.The learned counsel for the plaintiff in order to substantiate the second ground of major default committed by the defendants viz., non-servicing of the facility availed from other lenders, relied upon Paragraph Nos.35 and 36 of the affidavit filed in support of Application No.2277 of 2021 and also relied upon the communication from CIBIL dated 24.9.2019 which showed that the first defendant is in default in payment of the dues to M/s.TATA Capital. The learned counsel for the plaintiff placed reliance upon yet another mail communication dated 04.10.2019 from M/s. IDFC FIRST Bank indicating that the first defendant is due and payable a sum of Rs.28/- Crores and has been classified as an NPA on 26.9.2019. By pointing out this communication, the learned counsel submitted that the first defendant was in default with M/s. IDFC FIRST Bank at least from 29.6.2019, since the first defendant has been classified as NPA as of 26.9.2019. This vital fact was never revealed by the first defendant, and it was suppressed while making the request for drawdown in the months of July and August 2019.

33.Insofar as the third major ground of default on the side of the defendants with regard to the non-payment of the dues to the plaintiff, apart from the fact that the defendants have not repaid the amounts disbursed to them under the Facility Agreement as per the schedule, the learned counsel for the plaintiff also drew the attention of this Court to the conduct of the defendants by pointing out to certain orders passed by this Court earlier when the above suits were pending.

(a) Order passed on 16.12.2019, which is extracted as follows:

Suit and counter suit with multiple applications for various interim relief have been filed.

2. Heard the learned counsels for the respective parties.

3. After hearing the learned counsels for some time, this Court is of the opinion that the following interim order is necessary in the light of the facts and circumstances.

4. The defendants in C.S.No.650 of 2019 have borrowed loan of Rs.6 crores from the plaintiff. Defendant stopped paying EMI from the month of September 2019. However for the reasons stated in their counter suit [C.S.No.556/2019] claim damages against the plaintiff in C.S.No.650/2019. Therefore, as an interim measure the defendant in C.S.No.650 of 2019 is directed to deposit EMI arrears in a separate account on or before 20.01.2020. The respondents 2 and 3 shall file their affidavit of undertaking that they will not sell the shares which they hold in the 1st defendant's company.

5. Call the matter on 21.01.2020.

(b) Order passed on 21.1.2020 which is extracted as follows:

This application is filed seeking to appoint a receiver for receiving the amounts due and payable under the book debts specifically charged/disclosed by the respondents, *vide, their email dated 03.08.2019 maintain accounts and deposit the same in this Court.*

2.After hearing both the parties, this Court on 16.12.2019 has passed the following conditional order:

> *2. Heard the learned counsels for the respective parties.*
>
> *3. After hearing the learned counsels for some time, this Court is of the opinion that the following interim order is necessary in the light of the facts and circumstances.*
>
> *4. The defendants in C.S.No.650 of 2019 have borrowed loan of Rs.6 crores from the plaintiff. Defendant stopped paying EMI from the month of September 2019. However for the reasons stated in their counter suit [C.S.No.556/2019] claim damages against the plaintiff in C.S.No.650/2019. Therefore, as an interim measure the defendant in C.S.No.650 of 2019 is directed to deposit EMI arrears in a separate account on or before 20.01.2020. The respondents 2 and 3 shall file their affidavit of undertaking that they will not sell the shares which they hold in the 1st defendant's company.*

3. Today, it is reported that the above conditional order is not complied by the respondents/defendants. It is also stated by the learned counsel on record appearing for *the respondents Mr.Krishna Ravindran, that he has given consent for change of counsel.*

4. Mr.Raj Jhabaka, learned counsel represents that he has been instructed to file vakalat on behalf of the respondents.

5. The conduct of the respondents clearly indicates that there is no intention of complying the above conditional order, but to change counsel and drag. Therefore, this Court is of the view that unless and until the rights of the applicant/plaintiff is protected by way of interim order, it is impossible for him to realise the suit claim. Hence, Ms.C.N.G.Niraimathi, (M.S.986/1990), having office at No.307, New Additional Law Chamber, High Court Buildings, Chennai-104(Mobile No.98404 28905) is appointed as a Receiver to administer the financial affairs of the 1st respondent's company and maintain the accounts. The Receiver shall be entitled to receive the amounts due and payable under the book debts specifically charged disclosed by the respondents vide, their email dated 03.08.2019, maintain accounts and deposit the same in the suit account in C.S.No.650 of 2019. Accordingly, this application is ordered.

6. The initial remuneration for the learned Advocate Receiver shall be Rs.50,000/- (Rupees fifty thousand only) per month.

7. List the case on 21.02.2020.

(c) Order passed in OSA. No.234 of 2020 dated 28.10.2020 extracted as follows:

We have elaborately heard Mr.R.Parthasarathy, learned counsel appearing on behalf of the appellants and Mr.AR.L.Sundaresan, learned Senior Counsel appearing on behalf of the learned counsel on record for the sole respondent/caveator.

2. In our prima facie view, we find that there are no good grounds to interfere with the interim directions issued by the learned Single Judge appointing a Receiver to administer the affairs of the appellants. In fact, the Receiver had already visited the business premises of the appellants twice at Mumbai and submitted certain reports. We also find from the order dated 07.7.2020, the parties were directed to go for trial. This was followed by further directions issued on 20.7.2020, 07.8.2020 and 03.9.2020, which directions/ observations we find to be more appropriate and reasonable considering the nature of dispute between the parties.

3. We have made our prima facie observation that the equated monthly instalments payable on a loan availed cannot be put on hold at the instance of the appellants on *the facts and circumstances pleaded in this appeal. It is no doubt true that the appellants filed a separate suit to declare the action initiated by them vide letter dated 17.8.2019 terminating the facility agreement as valid and for consequential damages, which is also pending and certain interim observations were made in the applications filed in the said suit. De hors all these issues, the larger question would be as to whether these proceedings can impact the payment of equated monthly instalments. Prima facie, in our view, this cannot stall the payment of equated monthly instalment, which needs to be honoured by the appellants.*

4. The learned counsel for the appellants seeks time to get necessary instructions in the matter. Office to list the matter under the caption 'for admission' on 06.11.2020.

and (d) Order passed in OSA No.234 of 2020 dated 17.3.2021 extracted as follows:

Learned counsel appearing for the appellant submitted that even on the earlier occasion, the learned senior counsel appearing for them have desired the matter to be heard by way of physical hearing.

2.Learned counsel for the respondent would submit that the appeal may be heard at an early date. It is further *submitted that on account of the pendency of the appeal, the appellant is not cooperating in the disposal of the matter pending before the learned Single Bench.*

3.In reply, the learned counsel for the appellant submitted that it is not as if the appellant was not cooperating in disposal of the matter pending before the learned Single Bench, but only on account of the pendency of this appeal.

4.When we heard the appeal for admission on 10.11.2020, we passed the following order:

> *"We have heard Mr.Sathish Parasaran, learned Senior counsel appearing for Mr.Raj Kumar Jhabak, learned counsel for the appellant and Mr.AR.L.Sundaresan, learned Senior counsel for the respondent.*
>
> *2.On 28.10.2020, we heard Mr.R.Parthasarathy, learned counsel appearing on behalf of Mr.Raj Kumar Jhabak and learned Senior counsel for the respondent for a considerable length of time and passed the following order:*
>
> *"We have elaborately heard Mr.R.Parthasarathy, learned counsel appearing on behalf of the appellants and Mr.AR.L.Sundaresan, learned Senior counsel appearing on behalf of the learned counsel on*

record for the sole respondent/caveator.

2.In our prima facie view, we find that there are no good grounds to interfere with the interim directions issued by the learned Single Judge appointing a Receiver to administer the affairs of the appellants. In fact, the Receiver had already visited the business premises of the appellants twice at Mumbai and submitted certain reports. We also find from the order dated 07.7.2020, the parties were directed to go for trial. This was followed by further directions, which directions/observations we find to be more appropriate and reasonable considering the nature of dispute between the parties.

3.We have made our prima facie observation that the equated monthly instalments payable on a loan availed cannot be put on hold at the instance of the appellants on the facts and circumstances pleaded in this appeal. It is no doubt true that the appellants filed a separate suit to declare the action initiated by them vide letter dated 17.8.2019 terminating the facility agreement as valid and for consequential damages, which is also pending and certain interim observations were made in the applications filed in the said suit. Dehors all these issues, the larger question *would be as to whether these proceedings can impact the payment of equated monthly instalments. Prima facie, in our view, this cannot stall the payment of equated monthly instalment, which needs to be honoured by the appellants.*

4.The learned counsel for the appellants seeks time to get necessary instructions in the matter. Office to list the matter under the caption 'for admission' on 06.11.2020."

3.Today, we have heard Mr.Sathish Parasaran, learned Senior counsel, who submitted that his endeavour is not to re-argue the matter, but to demonstrate before this Court that the securities of the appellant are in the form of books debts and immovable properties are also available.

4.Furthermore, the learned Senior counsel submitted that the Receiver has commenced her work and more than three reports have been submitted and such position may not be disturbed, but the appellant should be in a position to recover the outstandings and also service the loan. However, there is an interim order granted by the Debt Recovery Tribunal, freezing the appellant's account. As observed by us on 28.10.2020, we are not satisfied that the *appellant had made out a prima facie case for entertaining the appeal. However, the learned Senior counsel wishes to place some records certain additional facts.*

5.As observed supra, we are not inclined to interfere with the impugned order at this juncture and we will hear the learned Senior counsel for the appellant on a later date. List this matter after three weeks."

5.Thereafter, the matter has been adjourned from time to time at the instance of the learned counsel appearing for the appellant. We make it clear that the pendency of this appeal will not be a hindrance for the learned Single Bench to proceed with the matter.

6.List the matter on 21.04.2021.

34.The learned counsel for the plaintiff submitted that there is absolutely no justification on the part of the defendants in not complying with the interim orders passed by this Court directing them to pay the EMIs due and payable by them. It is submitted that the default in non-payment of the dues is only aggregated by the subsequent conduct of the defendants.

35.The learned counsel for the plaintiff further submitted that the defendants did not produce the Certificate of the Chartered Accountant and have not permitted the audit of the books of accounts, and thereby, the first defendant has misused the amount disbursed by the plaintiff and siphoned the funds. It was further stated that the defendants failed to furnish security in spite of repeated directions issued by this Court. To substantiate this submission, the learned counsel relied upon the earlier order passed by this Court on 22.9.2021 while disposing of several applications and the relevant portions are extracted hereunder:

> *15.Considering the rival submissions and pleadings, this Court finds that the defendants herein have no merit to defend the applications filed by the applicant/plaintiff. The appointment of Receiver vide order dated 21.01.2020 shall continue. The Advocate Receiver* ***Ms.C.N.G.Niraimathi, (M.S.986/1990) having office at No.307, New Additional Law Chamber, High Court Building, Chennai 104(Mobile No.98404 28905)*** *is directed to file a consolidated report to the Court on or before 08.10.2021.*
>
> *16.By order dated 12.11.2019, the respondents/defendants were directed to file an affidavit disclosing the list of assets and receivables. Thereafter, having failed to file the list of receivable, this Court appointed an Advocate Receiver on 21.01.2020 as prayed in A.No.8513 of 2019. At the request of the defendants to*

receive alternate receivables subsituting the earlier receivables, this Court by order dated 21.02.2020 permitted the defendants to furnish viable alternate receivables, pursuant to the modification sought by the defendants in A.No.559 of 2020 in C.S.No.650 of 2019. Thereafter, without any progress, the defendants have approached the Division Bench of this Court in O.S.A.No.234 of 2020. In the said circumstances, this Court passes the following orders in the respective applications.

O.A.No.1011 of 2019: *The defendants 2 and 3 are restrained from creating charge or alienating or transferring the shares held by the defendants 2 and 3 in the 1st defendant/respondent company.*

A.No.8514 of 2019: *The respondents/defendants are directed to disclose the movables and immovable properties as on the date of recall of the facility availed by the first respondent.*

A.No.8515 of 2019: *The respondents/defendants are directed jointly and severally to furnish the security to the tune of Rs.6,19,65,257.93 being the balance loan amount together with interest cost charges and expenses, since the security sofar furnished appears to be inadequate.*

A.No.9671 of 2019 *is filed by the respondents to take appropriate action against the respondents for prejury. On perusing the averments in this application, though this Court finds element of prejury for taking necessary action,* *considering the other attending circumstances and facts if the defendants honestly comply the orders passed today, the Court will not take serious note about the averments made in the application for perjury action. Accordingly, this application is closed for the present.*

The reasons stated above is applicable to ***A.Nos.2093 and 2094 of 2020*** *filed to take action against the defendants for contempt and to initiate proceedings for perjury. Therefore, these two applications are also closed for the present.*

In the result,

1.O.A.No.1011 of 2019 is allowed. No order as to costs.

2.A.No.8514 of 2019 is allowed. No order as to costs.

3.A.No.8515 of 2019 is allowed. No order as to costs.

4.A.No.9671 of 2019 is closed for the present. No order as to costs.

5.A.Nos.2093 and 2094 of 2020 are closed for the present. No order as to costs.

6.A.No.8513 of 2019 and A.No.2092 of 2020 and A.No.559 of 2020 are adjourned to 08.10.2021. Advocate Receiver is directed to file consolidated report by then.

36.The learned counsel submitted that in spite of the specific directions issued in Application No.8515 of 2019, the defendants have filed an Affidavit of Compliance which is not in accordance with the Original Side Rules, and the defendants are evading even from providing security for the suit claim. Therefore, the learned counsel submitted that there is no real prospect for the defendants to succeed in their suit, and there are no compelling reasons to direct the parties to adduce oral evidence and hence, sought for the dismissal of the suit in C.S. No.556 of 2019.

37.The learned counsel for the defendants submitted that insofar as the first ground of default pointed out by the plaintiff is concerned, the registration of the charge is a condition subsequent, and it will be done only if the entire Rs.20/- Crores is disbursed by the plaintiff. The learned counsel submitted that the relevant forms were kept ready, and the plaintiff was also informed that it would be registered after the entire amount is disbursed under the Facility Agreement. Since the entire amount was not disbursed, there was no question of registering the charge before ROC.

38.Insofar as the second and third grounds of default pointed out by the learned counsel for the plaintiff are concerned, it was submitted that the plaintiff, in order to cover up their default in not disbursing the amount as per the agreement due to the cash crunch suffered by them, is inventing certain grounds as if the first defendant has defaulted in payment of certain dues to other lenders. The learned counsel submitted that how far those claims are enforceable against the defendants is a matter to be decided in trial, and the same cannot be done in this summary judgment application. It was further submitted that insofar as the amount claimed by the plaintiff as due and payable for the disbursement made is concerned, it has to wait till the claim for damages is decided in C.S. No.556 of 2019, and the damages should be set-off/adjusted from the claim made by the plaintiff.

39.The learned counsel for the plaintiff submitted that the Facility Agreement was terminated by the plaintiff only to overcome their deficiencies which resulted in the first defendant sustaining huge losses, and those losses will have to be compensated by the plaintiff. To determine the losses sustained by the defendants, oral evidence has to be necessarily let in, and therefore, the same cannot be decided in this application for summary judgment.

40. Based on the above submissions made by the learned counsel

appearing on either side and the materials available on record, this Court has to assess as to whether the defendants have a real prospect in succeeding in the claim made by them in C.S. No.556 of 2019 and if there is any compelling reason to send the parties to record oral evidence. For this purpose, this Court must assess if the defendants have a realistic prospect of success. In other words, this Court must see if there is any probability (as distinguished from a mere possibility) of the fate of the case of the defendants being altered by letting in oral evidence. In order to decide this, there should be a compelling reason for this Court to refuse a summary judgment.

41.The plaintiff has taken a stand that the credit facility was "upto" Rs.20/- Crores, and it is not necessary that the entire Rs.20/- Crores must be disbursed. This has been stoutly denied by the defendants on the ground that the facility limit under Column 7 of the Facility Letter is Rs.20/- Crores. There is no requirement to delve deeper into this issue since Column 26 of the Facility Letter specifically lays down that each drawdown under the facility will be subject to the fulfilment of all conditions precedent as prescribed in the Facility Agreement, to the satisfaction of the plaintiff. If this condition is not satisfied, the plaintiff will have the right to cancel/suspend the facility and insist on the repayment of the amount due and payable till the date of termination under Clause 13 of the Terms and Conditions. A careful reading of the various communications that took place between the parties on 16.5.2019, 20.5.2019, 24.5.2019, 04.6.2019, 07.6.2019, 08.6.2019, 21.6.2019, 22.7.2019, 06.8.2019 and 13.8.2019 shows that the plaintiff had disbursed only a sum of Rs.6/- Crores within the three months of drawdown period from 15.5.2019 to 15.8.2019. In fact, in the communication dated 06.8.2019, the plaintiff had given a schedule for the disbursement of the balance Rs.14/- Crores from 16.8.2019 to 31.10.2019. This was pursuant to the request made by the first defendant to come up with a definite schedule for payment of the balance amount. It is thereafter, on 17.8.2019, the plaintiff terminated the agreement on the ground of default on the part of the defendants.

42.In this case, admittedly, the charge was not registered in accordance with Column 19 of the Facility Letter read with Clause 7 of the Terms and Conditions. The registration of the charge has to take place within thirty days from the date of the execution of the relevant documents. The relevant documents were executed on 15.5.2019, and the registration of charge did not take place within thirty days thereafter.

43.The defendants were expected to specifically state if there is any other loan facility availed from other lenders that have become due and payable. This is specifically provided under Clause 8 of the Terms and Conditions. The plaintiff has given all the particulars of the amounts due and payable by the defendants to other lenders in Paragraph Nos.35 and 36 of the affidavit filed in support of the application. While dealing with these allegations, the defendants make a vague denial in their counter, and instead of specifically replying to those allegations, the defendants seem to be pointing out to the default on the side of the plaintiff in not disbursing the entire amount of Rs.20/- Crores. The defendants are under the impression that the default to other lenders pertains only as on the date of the Facility Agreement. However, under Clause 8 of the Terms and Conditions, they must notify the plaintiff, in writing,of every event of default and any event or circumstance which constitutes a default under any other agreement. Such default will have an impact on the further disbursement of the amount by the plaintiff. However, no such certificate was issued by the defendants, and materials have now been placed to show that there is default on the side of the defendants, and in one case, the first defendant has been declared NPA with effect from 26.9.2019.

44.Insofar as the third ground of default pointed out with regard to non-payment of the EMI under the agreement is concerned, there is absolutely no justification on the part of the defendants for not having paid the EMI. In fact, the default on the part of the defendants continued even after directions were issued by this Court to the defendants to pay the amount due and payable towards EMI, and the defendants failed to comply with those directions. This non-compliance on the part of the defendants adversely impacts their conduct. Orders passed by Court are meant to be complied with, and if it is not complied with, the defaulter must necessarily face the consequences.

45.In view of the above discussion, even if it is assumed that the plaintiff was facing a cash crunch and was not able to disburse the entire amount to the defendants within the drawdown period, the same cannot be set-off against the defaults committed by the defendants. As a consequence of the terms of the agreement and by virtue of committing such default of the same, the defendants became disentitled to claim any further disbursement from the plaintiff. Consequently, they will also not be entitled to claim for any damages from the plaintiff. The defendants, in order to justify their claim for damages, should establish that they have not committed any default on their part and in the absence of the same, they are duty-bound to repay the entire amount that was disbursed by the plaintiff.

46.The compelling reason attempted to be portrayed by the defendants for recording oral evidence is that they want to establish the loss suffered by them due to the non-disbursement of the amounts within stipulated time by the plaintiff and the cancellation of the Facility Agreement by the plaintiff through the letter dated 17.8.2019. To undertake this exercise, the defendants must first establish that they have not committed any default, and despite that, the amounts were not disbursed to them. The default on the side of the defendants started on the expiry of the 30th day from the date of the Facility Agreement when the first defendant failed to register the charge before the ROC. The subsequent default happened during June 2019 when they failed to inform/intimate the plaintiff about the default committed by them in repayment of dues to other lenders. The other major default committed by the first defendant was when the EMI was not paid within the time schedule prescribed under the agreement, the default of which continued even after directions were given by this Court. After committing all these defaults, the first defendant lost its right to claim any disbursement of amount. Under such circumstances, the defendants have failed to satisfy this Court on the existence of any compelling reasons for recording oral evidence to determine the damages since the defendants are not entitled to any damages.

47.In view of the default committed by the defendants, the plaintiff was completely justified in terminating the Facility Agreement since such a right was available under the agreement itself. As a result, there is no ground to interfere with the letter of termination dated 17.8.2019. Hence, the defendants will not be entitled to any of the consequential reliefs sought in the suit in C.S. No.556 of 2019.

48.Apart from committing default under the agreement, the conduct of the defendants during the pendency of the proceedings also warrants the attention of this Court. The orders that have been extracted *supra* show that the defendants were directed to disclose the list of assets and receivables by an order dated 12.11.2019, and they failed to file the list of receivables. This necessitated the appointment of an Advocate Receiver by an order dated 21.01.2020. Thereafter, the defendants wanted to receive alternate receivables by substituting the earlier receivables. This was also permitted by this Court. However, the defendants approached the Division Bench of this Court in OSA No.234 of 2020, and the various orders passed by the Division Bench shows that the appeal itself was filed with an intention to drag on the proceedings. Even thereafter, this Court passed an order on 22.9.2021 directing the defendants to furnish security to the tune of Rs.6,19,65,257.93/-. The defendants were supposed to furnish the security in a particular format under the Original Side Rules. Instead, the defendants have proceeded to file an Affidavit of Compliance, and it is not known how far the particulars given in the affidavit will satisfy the directions given by this Court in Application No.8515 of 2019. The appointment of the Advocate Receiver also did not yield any result, and the same is evident from the consolidated report filed by the Advocate Receiver on 27.10.2021. Due to certain allegations that were made against the Advocate Receiver, this Court was forced to suggest through an order dated 01.11.2021 to appoint a Party Receiver and to dispense with the services of the Advocate Receiver.

49.The conspectus of the above discussion clearly points out the fact that there is no real prospect for the defendants to succeed in their claim made in C.S. No.556 of 2019, and there is no compelling reason for this Court to direct the parties to let in oral evidence to pass a final judgment in the suit. In other words, the facts of the present case do not warrant a full trial for the just disposal of the case. The defence raised by the defendants and the grounds put forth by them in the suit filed by them is moonshine and fanciful. The contention raised by the learned counsel for the defendants to consider passing a conditional order under Rule 7 of Order XIII-A, C.P.C. is also not sustainable, since this Court finds that the facts of the present case do not lie in the grey area between a possibility and a probability and therefore, does not warrant passing a conditional order under Rule 7.

50. As a result, both the applications filed by the plaintiff are allowed. In view of the fact that this Court is going to impose cost in both the suits, no separate costs are awarded in these applications.

27.01.2022

speaking order/Non-speaking order **(1/3)**
Index : Yes
Internet : Yes
ssr

N.ANAND VENKATESH,J.

ssr

A.Nos.2277 & 2278 of 2021
in C.S.Nos.556 & 650 of 2019
(Commercial Suits)

27.01.2022

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