

(1961) 01 MAD CK 0021
In the Madras High Court
Case No : Appeal Suit No. 64 of 1957

Sri. Lakshmi Talkies

APPELLANT

Vs

W.M.S. Tampoe and Another

RESPONDENT

Date of Decision : 24-01-1961

Acts Referred:

Law of Property Act, 1925 — Section 136
Transfer of Property Act, 1882 — Section 130

Citation : (1961) ILR (Mad) 955

Hon'ble Judges : Kailasam, J; Jagadisan, J

Bench : Division Bench

Advocate : V.K. Thiruvengkatachari, General and K. Parasurama Ayyar, for the Appellant; K.S. Sankara Ayyar, V. Tyagarajan, T.A. Raghunathachari and R. Narayanan, for the Respondent

Final Decision : Allowed

Judgement

Jagadisan, J.—The Plaintiff in Original Suit No. 86 of 1955 on the file of the Court of the Subordinate Judge of Madurai sued to recover a sum of Rs. 15,869-11-0, from the four Defendants in the suit.

2. The Plaintiff is a registered firm of partnership styled as Sri Lakshmi Talkies, owning a cinema theatre at Madurai. The first Defendant started on a venture of producing a talkie film called Nam Kulandhai at a studio in Madras with an ambitious programme of engaging star artistes to act in the film. The first Defendant could not find the entire capital necessary for producing the film and had, therefore, to enter into several contracts with exhibitors and distributors of the film after its production as a means for raising funds. He was also obliged to find a financier to aid him in this venture and the second Defendant in the suit was the financier. The Plaintiff entered into an agreement for exhibiting the film at its theatre at Madurai with the first Defendant on certain terms and conditions, which will be referred to in detail hereinafter. As per such agreement the Plaintiff advanced large sums of money to the first Defendant. The third Defendant in the

suit was the agent of the first Defendant undertaking distribution rights of the film within certain territorial limits. The fourth Defendant was impleaded on the allegation that the third Defendant obtained the distribution rights on behalf of the fourth Defendant.

3. After this net work of agreements between the parties, the film, Nam Kulandai was produced and released for exhibition at Madurai in the theatre of the Plaintiff on 4th June 1955. Prior to its release at Madurai it was released at Madras on 27th May 1955. The hopes and expectations of the producer, the exhibitors and the distributors were belied and the picture was not given an enthusiastic reception by the cinema fans. The Plaintiff screened the picture at its theatre for four weeks and found to its dismay that any further run of the picture in its theatre will cause it great financial loss. The net collections made Plaintiff during the period of its run at its theatre amounted to Rs. 12,485-5-0, out of which the share payable to the producer as per the terms of the exhibition agreement came to Rs. 7,297-12-9. The Plaintiff had advanced a sum of Rupees 23,000, in all to Defendants 1 and 2. The Plaintiff did not hand over the producer's share of Rs. 7,297-12-9, to the first or the second Defendant but adjusted it towards the amount due to him. The Plaintiff handed over the film to the third Defendant on 2nd July 1955, and the third Defendant thereafter screened the picture at another talkie house at Madurai called Palani Talkies. According to the Plaintiff, its screening agreement with the first Defendant was put an end to with the consent of the first Defendant and the third Defendant on 2nd July 1955, and that the first Defendant promised to repay the balance due to the Plaintiff, after adjustment of the producer's share of the net collections of the film earned at the Plaintiff's theatre. The Plaintiff, therefore, claimed the sum of Rs. 15,702-3-3, arrived at by deducting from the advance amount of Rs. 23,000 the producer's share of Rs. 7,297-12-9 from Defendants 1 and 2 personally, and from all the Defendants jointly and severally out of the producer's share of the collections made and to be made by them in the screening of the film. The sum of Rs. 23,000, paid by the Plaintiff included a sum of Rs. 3,000, paid into the hands of the third Defendant for the repayment of which, however, Defendants 1 and 2 denied any liability. The Plaintiff, therefore, prayed in the alternative that in any event Defendants 3 and 4 must make good this sum of Rs. 3,000 personally.

4. All the Defendants resisted the suit and contended that the Plaintiff was not entitled to any relief. The first Defendant pleaded that under the terms of the exhibition agreement with the Plaintiff, the advance made by the Plaintiff could only be recouped by him by running the picture and by appropriating the producer's share from and out of the net collections and that the Plaintiff having failed to screen the picture, and having thereby committed breach of contract of the terms of the agreement had no cause of action to sue for the recovery of the money. The substance of the plea of the first Defendant was that the terms of the agreement between him and the Plaintiff operated as a bar to the maintainability of the suit.

5. The second Defendant contended that he was only a financier who helped the first Defendant with moneys under the terms of the financing agreement between him and the first Defendant, that he was not a party to the contract between the Plaintiff and the first Defendant and that the Plaintiff had no cause of action to sue him. The third and the fourth Defendants practically adopted the contentions of the first Defendant.

6. The learned Subordinate Judge of Madurai who tried the suit found that the oral agreement pleaded by the Plaintiff terminating the contract with the first Defendant by mutual consent of parties was not true, and that the Plaintiff was disentitled to recover any sum of money from all or any of the Defendants as there was no specific clause in the exhibition agreement entitling the Plaintiff to recover any part of the advance made. With regard to the sum of Rs. 3,000, which the third Defendant had received and in respect of which Defendants 1 and 2 failed to give credit to the Plaintiff, the learned Subordinate Judge took the view that it was really an overpayment made by the Plaintiff in excess of the obligation undertaken under the exhibition agreement, and that the Plaintiff was entitled to recover that amount from the first Defendant. Accordingly the Plaintiff was granted a decree for recovery of a sum of Rs. 3,000 against the first Defendant with interest at six per cent thereon from 17th January 1955, the date of receipt of the amount by the third Defendant and proportionate costs. The rest of the Plaintiff's claim was dismissed with proportionate costs.

7. This appeal has been preferred by the Plaintiff impleading only Defendants 1 and 2 as party Respondents. Defendants 3 and 4 are not parties to this appeal. The question that arises for consideration is whether the Plaintiff is entitled to any relief against Defendants 1 and 2, and if so, for what amount.

8. The agreement between the Plaintiff and the first Defendant is exhibit A-I, dated 25th May 1954. The first Defendant is described in that agreement as producers and the Plaintiff as exhibitors. The agreement provided that the Plaintiff should run the picture for a minimum of fifty days irrespective of the quantum of collections and should continue to run the picture after fifty days till the collections fall below Rs. 2,500, nett per week. The Plaintiff undertook to pay the first Defendant sixty per cent of the nett collections for the first two weeks, fifty-five percent for the third week and fifty per cent for the fourth week and the subsequent weeks throughout the period of the run of the picture in its theatre. The Plaintiff agreed to advance a sum of Rs. 15,000 in all, of which a sum of Rs. 5,000, was to be paid on signing the agreement, Rs. 3,000, to be paid on or before 30th June 1954, and the balance of Rs. 7,000, to be paid one week in advance of the scheduled date of release of the film. The following clause, clause seven, provided for the liquidation and adjustment of the amounts advanced by the Plaintiff. That runs as follows:

That the producers agree that the amount received by them as deposit as per paragraph 6 shall be adjusted by the exhibitors from the share amounts payable to the producers from the commencement of the screening of the picture.

9. The first Defendant further agreed under that agreement that in the event of sale of the entire rights of the picture or transfer of distribution rights over the area including the city of Madurai such sale and transfer shall be subject to the Plaintiff's right to screen the picture at its theatre. The first Defendant also agreed not to release the picture in any other theatre at Madurai during the period of its first run at Madurai.

10. The Plaintiff paid a sum of Rs. 5,000, to the first Defendant, in pursuance of the agreement referred to, as evidenced by the receipt, exhibit A-2, dated 29th May 1954. A further sum of Rs. 3,000, was paid by the Plaintiff to the first Defendant on 29th June 1954, as evidenced by exhibit A-4. In between these two payments the first Defendant entered into an agreement with the third Defendant in regard to the distribution rights of the film in the territories of the districts of Madurai, Ramnad and Tirunelveli, and that agreement was exhibit A-44, dated 30th May 1954. It may be mentioned that this agreement, exhibit A-44, between Defendants 1 and 3 was subsequently modified as the parties entered into supplementary agreements, exhibit A-45, dated 10th January 1956, and exhibit B-4, dated 2nd June 1955. It is not necessary to refer to the terms of these agreements as they are not material and have no bearing on the question at issue between the parties in this suit.

11. Though the agreement, exhibit A-1, provided only for a payment of Rs. 15,000, as advance by the Plaintiff to the first Defendant it appears that the parties, the Plaintiff and the first Defendant agreed that a further sum of Rs. 5,000, should be paid as advance in the event of the first Defendant, being able to bring in the two star artistes, N.S. Krishnan and T.A. Mathuram for acting in the film. This oral agreement is referred to in the letters written by the first Defendant to the Plaintiff, exhibit A-8, dated 23rd October 1954, exhibit A-9, dated 10th November 1954, and exhibit A-10, dated 13th November 1954. The Plaintiff implemented that oral agreement also and paid a sum of Rs. 2,000, by cheque on Canara Bank, Madurai, as evidenced by the receipt, exhibit A-12, dated 29th November 1954 and another sum of Rs. 3,000 by a draft as evidenced by exhibit A-13 also of the same date. It is clear, therefore, that this additional payment of Rs. 5,000, was also of the same nature as the advance of Rs. 15,000, mentioned in exhibit A-1, and that the terms of exhibit A-1 would cover this sum of Rs. 5,000, as well.

12. There was delay in the production of the film. The third Defendant wrote to the Plaintiff a letter, exhibit A-17, dated 27th December 1954, stating that the picture will be complete by 8th January 1955. On 17th January 1955, the third Defendant got a sum of Rs. 3,000, from the Plaintiff by cheque on Canara Bank, Ltd. He passed the receipt, exhibit A-19, in which it was recited that the sum of Rs. 3,000, was received by the third Defendant towards the deposit account of the film Nam Kulandhai. The Plaintiff naturally treated this payment of Rs. 3,000, as partial discharge of its obligations undertaken under exhibit A-1. It must be remembered that the Plaintiff had paid to the first Defendant a sum of Rs.

13,000, in all, when he paid Rs. 3,000, to the third Defendant as per exhibit A-19. The Plaintiff had, therefore, to pay only a balance of Rs. 4,000, before obtaining the positive of the film for being screened at its theatre. The Plaintiff wrote exhibit A-25, dated 22nd May 1955 to the first Defendant who was having his head office at Madras enclosing a cheque for Rs. 4,000, on the Canara Bank, Ltd., Madurai, and requesting to be forwarded with the print of the picture. The Plaintiff stated in that letter that the picture was to be released at its theatre on 27th May 1955.

13. The second Defendant, the financier, had everything under his control and the first Defendant could not, therefore, do anything without the consent or the approval of the second Defendant. The Plaintiff was unable to obtain the film for being screened and he, therefore, sent his representative to Madras to contact Defendants 1 and 2 and to negotiate for the delivery of the film. The second Defendant failed to acknowledge credit for the sum of Rs. 3,000, which the Plaintiff had admittedly paid to the third Defendant and insisted upon payment of Rs. 7,000, before the release of the picture. The Plaintiff in his anxiety to get the film in respect of which he had already made huge advances had no option but to yield to the demands of the second Defendant. The Plaintiff obtained a bank draft for Rs. 7,000, on 3rd June 1955, on the Canara Bank, Ltd., Madras, in its own name and endorsed it in favour of the second Defendant and handed over the draft to the second Defendant's representative one S.P. Ganapathi. This is evidenced by the letter of the third Defendant to the second Defendant, exhibit B-1, dated 3rd June 1955. The Plaintiff actually screened the picture at its theatre on and from 4th June 1955.

14. The Plaintiff returned the film to the third Defendant on 2nd July 1955. On behalf of the Plaintiff, an assistant employed in the firm gave evidence as P.W. 1. He deposed that the first Defendant came to Madurai on 27th June 1955, that the collections were below one hundred rupees per day, that he met the first Defendant and informed him of the low collections, and that the first Defendant agreed that the screening of the picture may be stopped by the end of the fourth week if there was no improvement in collections. P.W. 1 further deposed that the first Defendant directed the film to be handed over at the end of the fourth week to the third Defendant, and that the first Defendant undertook to pay the balance that may be due to the Plaintiff. It is common ground that the third Defendant actually took delivery of the film on 2nd July 1955, and thereafter exhibited it in Palani Talkies at Madurai. The first Defendant gave evidence as D.W. 1 and he denied having met P.W. 1 or the managing partner of the Plaintiff's firm, Anantaraman, on 27th June 1955 at Madurai, though he admitted having visited Madurai on that date. His evidence in regard to this matter was as follows:

I visited Madurai on 27th June 1955. I did not meet P.W. 1 or Anantaram on 27th June 1955 at Madurai. I did not agree with them to stop the running of the picture at the end of the fourth week. The third Defendant intimated me a few days after the return of the film that the Plaintiff returned the film and that he

took it under protest.

15. He deposed that the third Defendant wrote a post card to him in this connection after taking delivery but no such post card was produced into Court. He admitted that he did not write to the Plaintiff protesting against the unlawful termination of the contract by suddenly handing over the film to the third Defendant. He explained his omission in not raising any protest by stating that the third Defendant had already protested at the time when he took delivery of the film by his not signing the last day's collection list on 2nd July 1955. It is true that the third Defendant did not sign in the daily collection book on 2nd July 1955, though he had signed the previous collection lists.

16. The learned Subordinate Judge seems to think that P.W. 1 admitted in the witness box that the third Defendant refused to sign the daily collection book on 2nd July 1955. The answer given by P.W. 1 in cross-examination by the third Defendant is as follows:

The third Defendant did not sign in the daily collection book on 2nd July 1955. Our clerk handed over the film in the office of the third Defendant.

17. It may be possible to infer from the evidence on record that the third Defendant refused to sign the collection book on 2nd July 1955, from the fact of his not having signed it on 2nd July 1955, taken along with the circumstances of his having signed the book on earlier occasions. It must, however, be noted that the third Defendant has discreetly avoided the witness box. The evidence of the first Defendant as to the circumstances under which the third Defendant came to be in possession of the film can at best be only in the nature of hearsay. It is not suggested that there is any collusion between the Plaintiff and the third Defendant. The written statement filed by the third Defendant is in no way less emphatic than that filed by the first Defendant in resisting the Plaintiff's claim. Defendants 1 and 3 were represented by the same learned Counsel during the trial of the suit. From the non-examination of the third Defendant as a witness the inference is irresistible that he was unwilling to controvert the evidence given by P.W. 1. We accept the evidence of P.W. 1 which remained uncontradicted, the evidence of the first Defendant being hearsay and as such being inadmissible. The Plaintiff was, therefore, not in breach of the terms of the agreement, exhibit A-1, in not screening the picture for the minimum period of fifty days provided for in the agreement. The first Defendant took delivery of the film through his agent, the third Defendant, from the Plaintiff on 2nd July 1955, possibly in the hope that the run of the picture in another theatre might earn him more money than what the Plaintiff was able to do during the run for the first four weeks. The agreement, exhibit A-1 was, therefore, put an end to by consent of parties on 2nd July 1955, subject to the rights and obligations which had already accrued in the matter.

18. We shall first discuss the question whether, on the above facts, the first Defendant is liable to return the sum of Rs. 15,869-11-0 claimed by the Plaintiff.

There is no express provision in exhibit A-1 entitling the Plaintiff to claim back the advance amount. The Plaintiff had the right to adjust the producer's share of the collections towards the advances made, so long as the picture was run. If the Plaintiff had screened the film strictly in accordance with the terms of exhibit A-1, that is, screened it for fifty days irrespective of the collections, and thereafter continued it till the collections fell below Rs. 2,500 net per week, and found at the time of ceasing to screen the picture that in spite of the adjustment made there was still a balance due to it by way of refund of advance, it cannot seriously be doubted that the Plaintiff will be entitled to claim back that amount. In fact so much is conceded by the learned Counsel appearing for the first Defendant.

19. The contention raised on behalf of the first Defendant however is that the Plaintiff committed a breach of the terms of exhibit A-1 in abruptly ceasing to run the picture at the end of four weeks, and that the advance made by the Plaintiff was in the nature of deposit for security towards the due performance of the contract under exhibit A-1 and that, therefore, the Plaintiff's claim should fail. Though the expression deposit is used in exhibit A-1 in describing the advance amount paid by the Plaintiff, and though the receipts, exhibits A-2 and A-4 and other receipts also describe the various amounts received as deposit, it cannot be said that the parties intended the amount as security for due observance of the terms of the contract by the Plaintiff. We have to look at the substance of the transaction, and to ascertain the real intention of the parties in the matter of payment and receipt of the advance amounts and should not be misguided to hold, from the use of the expression deposit that the Plaintiff offered the amount as security for the proper performance of the contract. The very fact that the Plaintiff was entitled to adjust the producer's share of the collection towards the amount paid by him from the very commencement of the picture in their theatre will dispel all idea of the advance being either in the nature of deposit or earnest money for the faithful discharge or performance of the contract.

20. The contention of the first Defendant that the absence of any specific provision in exhibit A-1 entitling the Plaintiff to recover the advance amounts in any contingency and the specific mode of discharge and the repayment of the advance amount by adjustment out of the producer's share of the net collections operate as a bar to the Plaintiff's claim cannot be sustained. The Plaintiff had undoubtedly the right to bring about a liquidation of the advance amounts paid in the manner prescribed by the terms of the agreement. But that does not exclude the Plaintiff's right to claim the advance amount if the mode of discharge prescribed under the agreement becomes impossible of performance or becomes unavailable by reason of subsequent events. The advance amount is certainly repayable by the first Defendant as so much is implicit in the terms of the agreement itself. EARL Jowitt in his Law Dictionary has given the following meaning to the word advance at page 68:

Money paid before it is due; a loan.

21. It depends upon the circumstances of each case and the terms of the contract between the parties whether an advance payment made by one to the other is in the nature of a loan or not. If the advance is repayable it certainly has an element of loan in its composition. In a recent decision of this Court reported in K.M. Mohamad Abdul Kadir Rowther Vs. S. Muthiah Chettiar, , a contract between two distributors of films containing terms similar to those found in exhibit A-1 came in for consideration. In that case the Appellant undertook to exploit a picture called Vikatayogi in respect of which the Respondent held distributing rights. Under the terms of the agreement between the Appellant and the Respondent, the Appellant was to pay the Respondent a sum of Rs. 15,000, as advance and that the Appellant was to have rights over the picture by way of distribution for a period of four and a half years. The agreement also enabled the Appellant to recover the advance of Rs. 15,000, from the share of the amounts payable to the Respondent. After the expiry of the period the Appellant found that only a part, of the sum of Rs. 15,000, stood discharged or adjusted. There was no provision in the agreement between parties as to what should happen if the net realisations during the contract period fell short of the sum of Rs. 15,000. The question was whether a promise to pay that amount by the Respondent to the Appellant could be implied. Ramachandra Ayyar J., who delivered the judgment of the Bench was of the opinion that the advance of Rs. 15,000 cannot be said to be by way of loan but the learned Judge held that it was possible to spell out an implied promise to pay. At page 17 the learned Judge observed as follows:

We have already referred to the intention of the parties as disclosed in exhibit A-2 that the sum of Rs. 15,000 was to be recovered. Clause 6 of the agreement, in our opinion, was intended to create a right to lien or set off over the 87 1/2 per cent of the collection which otherwise would have to be paid over to the Respondent. It purported to provide only an additional right and cannot be held to exclude an obligation to pay back the advance, or such portion thereof as remained unpaid after the period of the contract was over. We are, therefore, of the opinion that in the circumstances of the case the maxim (*expressio unis est exclusio alterius*) cannot apply, and that the parties intended to adjust the advance sum of Rs. 15,000, at the end of the contract period, that an obligation to pay the unadjusted portion of the advance amount which remained due at the termination of the contract should be implied on the terms of the document, and that the Appellant would be entitled to recover the amount due.

22. Adopting the reasoning of the learned Judge with respect, we are of opinion that a promise to repay the advance amount in full or in part, according to the circumstances, by the first Defendant to the Plaintiff can well be implied, as such an implied promise is implicit in the terms of the agreement. We are also of opinion that the advance of Rs. 15,000, must be deemed to be in the nature of a loan transaction as the payment of the advance amount in various instalments amounted to a debt in presenti on the respective dates of such advancement though not repayable at once but only in future. The conception

Delitum in prcsenti and solvendim in futwro is not unknown to law.

23. We have held that the Plaintiff did not commit a breach of the terms of exhibit A-1 in returning the film on 2nd July 1955, as that was done by mutual consent and agreement between the parties in rescission of the contract between them. The contention on behalf of the first Defendant that the Plaintiff is under any disability to sue for the recovery of the money by reason of breach of contract on their part must, therefore, fail. But we are unable to see how, even if it can be said that the Plaintiff was in breach, that would in any way be fatal to the maintainability of the suit claim. The consequence of any breach of contract on the part of the Plaintiff, if any, can only expose the partners to a claim or recovery of damages against them by the first Defendant. It cannot take away their right to recover money repayable to them. It may be that the first Defendant might put forward a plea of set off or of counter-claim against the Plaintiff for damages for alleged breach of contract. If the first Defendant cannot pursue a counter-claim in this suit, it was open to him to have filed a separate suit for recovery of damages. But under no circumstances can the first Defendant resist the claim of the Plaintiff for recovery of the advance amount by pleading a breach of contract on the part of the Plaintiff. It is only necessary to refer to the decision of the Judicial Committee in *Muralidhar Chatterji v. International Film Company, Ltd.* ILR (1943) 2 Cal. 213 (P.C.) Sir George Rankin delivering the judgment of the Board observed thus at page 224:

The fact that a party to a contract is in default affords good reason why he should pay damages, but further exaction is not justified by his default. Where a payment has been made under a contract which has-for whatever reason-become void the duty of restitution would seem to emerge. A cross claim for damages stands upon an independent footing, though it arises out of the same contract and can be set off.

Again at page 225:

On general principles they may set off such damages as they have sustained, but the Act requires that they give back whatever they received under the contract.

24. In our judgment, the Plaintiff has made out a case for recovery of the suit amount from the first Defendant as the cause of action of the Plaintiff against the first Defendant is well-founded in law and on facts.

25. The next question that has to be considered is whether the second Defendant is answerable to the Plaintiff's claim. The agreement between the second and the first Defendants, is exhibit B-8, dated 28th October 1954. The first Defendant is described as the borrower and the second Defendant as the financier therein. Under the terms of that agreement, the second Defendant undertook to finance the further production of the picture, which was incomplete at that time by lending a sum of Rs. 2,50,000. It is not necessary to refer to all the terms and conditions therein embodied. Clause 21 is the material clause which needs to be referred to. It is as follows:

Without prejudice to the generality of the foregoing, in respect of the agreements deposited with the financiers, dated 26th September 1954, 30th May 1954, 11th March 1953, 8th March 1954, 9th August 1954 and 29th September 1954 and entered into by the borrower with Messrs. Prema Films, R. Krishnamurthi, Messrs. Murugan Talkies, Ltd., K.S. Gopalakrishnan, proprietor of OM Films, E.M. Gopalakrishna Kone and Subbu and Co., respectively the borrower doth hereby constitute and appoint the financiers as an agent entitled to enforce the performance of the terms of the said agreements with irrevocable authorization to receive moneys on account and on behalf of the borrower from the respective parties.

26. R. Krishnamurthy therein referred to is the third Defendant in the suit. The agreement, dated 30th May 1954, referred to is exhibit R-44 in the case. There is no reference to exhibit A-1 as such in that agreement. Exhibit A-44 refers to exhibit A-1 and provides that the third Defendant should hand over to the first Defendant all deposits received from the exhibitors including the deposit received from the Plaintiff. We have already mentioned that between the first and the third Defendant there were two agreements subsequent to 30th May 1944, exhibits A-45 and B-4. Exhibits A-45 and B-4 contain an endorsement made on behalf of the second Defendant as follows:

Agreed and confirmed sans recourse.

27. The learned Advocate-General appearing on behalf of the Plaintiff contended that by exhibit B-8, the first Defendant assigned his rights under exhibit A-1 in favour of the second Defendant inasmuch as the second Defendant was appointed irrevocably as the agent on behalf of the first Defendant to enforce the terms of the agreements referred to, one of which was exhibit A-44. We shall assume for the purpose of this argument that the second Defendant was constituted as agent of the first Defendant to collect moneys due to the first Defendant from the Plaintiff under exhibit A-1. We shall also assume that such agency was an agency coupled with interest as the second Defendant as financier had advanced large sums of moneys and was entitled to recoup the advances so made by collecting the monies due to his debtor, the first Defendant, from third parties. Exhibit B-8 can, if at all, be construed as an assignment of a chose in action enabling the second Defendant, the assignee, to collect the debt due to the assignor from third parties. The learned Advocate-General relied upon the maxim,

He who derives the advantage ought to sustain the burden (*Qui sentit commodum sentire debet et onus*).

and quoted the following observation at page 484 in Broom's Legal Maxims:

Again, it is a very general and comprehensive rule, which falls within the scope of the maxim under consideration, that the assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the assignor. If, moreover, a person accepts anything which he knows to be subject to a duty or

charge, it may be rational to conclude that he means to take such duty or charge upon himself, and the law may imply a promise to perform that he has so taken upon himself.

28. The last portion of this quotation is taken, as indicated by the footnote, from a passage in the judgment of Bosanquh J. in *Lucas and Ors. v. Nockells* 1833 I.C. and F.R. 438 at page 457, quoting from Abbot on Shipping, page 286, fifth edition. Legal maxims serve to focus attention on the first principles of law, but being only of general application have to be applied with caution to the particular facts and circumstances arising in each case. As Lopes L.J., observed in *Colquhoun Brooks* (1888) 21 Q.B.D. 52, 65, in dealing with another legal maxim:

Maxims may often be a valuable servant but a dangerous master to abide by in all circumstances.

29. The learned Advocate-General contended that the second Defendant as an assignee of a chose in action, which he became by virtue of the operation of exhibit B-8 can only have taken the assignment subject to the equities which the debtor might have against the first Defendant, the assignor. We shall now refer to the decisions relied upon by the learned Advocate-General.

30. The first decision is the one in *Government of Newfoundland v. Newfoundland Railway Company* (1888) 13 A.C. 199. In that case by a contract in the year 1881, the company, the Plaintiff in the suit, covenanted to complete a railway in five years and thereafter to maintain and continuously operate the same. In consideration of this, the Government of Newfoundland covenanted to pay the company an annual subsidy for thirty-five years; such subsidy to attach in proportionate parts and form part of the assets of the company. The company completed a portion of the line and received from the Government on the completion of each five-mile section certain half-yearly payments in respect of the proportionate part of the subsidy. Thereafter the contract was broken by the company and the Government refused further payments. The company had assigned its right in respect of a portion of the construction of the railway line. A suit was filed by the company and its assignees to enforce the terms of the agreement. One of the questions that arose for consideration was whether the Government was entitled to set off as against the company's suit claim, a counter-claim for unliquidated damages for the company's breach of the contract, in not completing the line. The Judicial Committee held that the Government were so entitled. It was also held that the set-off claimed by the Government can be availed of against the assignee of the company as the claim and counter-claim had their origin in the same portion of the same contract, At page "212, Lord Hobhouse observed thus:

The two claims under consideration have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company.

It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefits, wholly discharged of any counterclaim by the other party in respect of the rest of the contract, which may lie burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another.

31. The assignee in the case before the Judicial Committee was an assignee of a part of the contract. That is a feature which has got to be noticed and that feature loomed large before the learned Law Lords in arriving at the decision.

32. The next decision referred to by the learned Advocate-General was the one in *Lawrence v. Hayes* (1927) 2 K.B. 111. In that case the owner of a business sold it to the Defendant on terms of payment by instalments, and then assigned the benefit of the agreement to the Plaintiff. Before notice of the assignment was given to the Defendant, the latter obtained judgment for a sum of money against the assignor as damages for breach of warranty on the above sale. The Plaintiff, the assignee, sued the Defendant for payment of instalments due under the assigned agreement, and the Defendant claimed to set off the amount covered by the judgment which he had obtained against the assignor. The Plaintiff contended that the Defendant's right to damages in respect of the breach of warranty had merged in the judgment, and that the latter could not be set off against the claim. It was held that the set off was valid. The principle of the decision in *Government of Newfoundland v. Newfoundland Railway Company* (1888) 13 A.C. 199 was referred to and followed with approval.

33. The principle of law which emerges from the above citations is this. Where the subject-matter of an assignment is itself of a composite character, partly consisting of a benefit and partly of an obligation inextricably mixed up with the benefit, and the two are not severable the assignee cannot sift the benefit alone from the obligation and appropriate it to himself avoiding the obligation. This is really the doctrine of approbate, and reprobate which holds that if a person chooses to take the benefit conferred under an instrument he should likewise discharge the obligation or bear the onus which such instrument imposes. Chitty in his book on Law of Contracts, twentieth edition, page 446, sums up the legal position governing assignments u/s 136 of the Law of Property Act, 1925, as follows:

Assignments under the statute are expressly stated to be subject to any equities having priority over the rights thus transferred. Thus where a claim arises out of the contract under which the debt arises and the claim affects the value or amount of the contract which one of the parties has purported to assign for value, then if the assignee subsequently sues, the other party to the contract may set up that claim by way of defence against the assignee as cancelling or

diminishing the amount to which the assignee asserts his rights under the assignment. It must, however, be a claim which has accrued before notice of assignment and which arises out of the contract itself, as for example calls on shares set off against money due on debentures in a company.

Cheshire in his Law of Contracts, fifth edition, sets out the legal position thus at page 428:

Even unliquidated damages may by way of counter-claim be set off by the debtor against the assignee, provided that they flow out of and are inseparably connected with the contract which has created the subject matter of the assignment. Thus if a builder assigns to the Plaintiff money that will be due from the Defendant upon completion of a building, the Defendant may set off against the claim of the Plaintiff any damage caused to him by the delay or by the defective work of the builder. But nothing in the nature of a personal claim against the assignor can be used to defeat the assignee.

34. It is well settled that an assignee takes subject to all the equities that the debtor may plead or could have pleaded against the assignor. The equities that the debtor may plead against the assignee as a defence to the assignee's action against him must, however, be the equities that have matured at the time of notice to the debtor of the assignment. In *Mangles v. Dixon and Ors.* (1852) 3 H.L.C. 702, 735, Lord St. Leonards observed thus:

The authorities upon this subject, as to his liabilities, show that if a man does take an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands.

35. In *Roxburghe v. Cox* (1881) 17 Ch. D. 520, an army officer assigned to the Duke of Roxborough the money that would accrue to him from the sale of his commission. This money amounting to Rs. 3,000 was paid on 6th December, to the credit of his account with his bankers, Messrs. Cox. On that date, his account was overdrawn to the extent of Rs. 647. On December 19th, the duke gave notice of assignment to Messrs. Cox. It was held that Messrs. Cox could set off the debt of Rs. 467 against the right of the Duke to the sum of 3,000. James L.J., observed thus:

Now an assignee of a chose in action... takes subject to all rights of a set-off and other defences which were available against the assignor, subject only to this exception that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the solo exception.

36. Under the Indian Law, Section 130 of the Transfer of Property Act, provides the rule for transfer of actionable claims. The proviso to Clause (1) of that section is as follows:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such

instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as Against such transfer.

This proviso in effect restricts the rights of the assignee as being subject to the equities of the debtor against the assignor.

37. Exhibit B-18, the agreement between the first and the second Defendant, which is relied upon by the Plaintiff as a deed of assignment in favour of the second Defendant of the first Defendant's rights under exhibit A-1 was on 20th October 1954. On that date the film, Nam Kulandhai was still in the stage of production and the Plaintiff did not of course acquire any right for repayment of the advance amounts paid by him under exhibit A-1. By that time only a sum of Rs. 8,000 had been paid by the Plaintiff. The approximate date when the Plaintiff became aware and was put on notice of the agreement, exhibit B-8, is important, in determining the equities available to the Plaintiff as against the second Defendant. P.W. 1 deposed that he came to know of the agreement between the first and the second Defendants only at the time when he saw exhibit A-16 which is a copy of the daily Dinamani, dated 26th December 1954. No doubt P.W. 1 also deposed that on 27th June 1955, he was not aware that the second Defendant had acquired the rights in the film. He admitted that he added the second Defendant as a party to this suit by reason of the publication in exhibit A-16, that the rights in the film were transferred by the first Defendant to the second Defendant. It seems to us that the Plaintiff must have come to know atleast on the date of exhibit A-16, of the interests of the second Defendant in the film. Before the date of the publication in exhibit A-16, the Plaintiff had paid in all a sum of Rs. 13,000, to the first Defendant as per the terms of exhibit A-1. The producer's share of the collection realised by the Plaintiff from screening the picture from 4th June 1955, to 1st July 1955, namely, the sum of Rs. 7,297-12-9, must be deemed to have been adjusted only towards this sum of Rs. 13,000, as the presumption of law always is that the creditor adjusts all repayments of debt chronologically in accordance with the dates of the incurring of the obligation. It is, therefore, not possible for the Plaintiff to hold the second Defendant liable for the entire amount of Rs. 15,969-11-0 claimed in the plaint. The second Defendant can, if at all, be made liable only for the sum of Rs. 13,000, minus the sum of Rs. 1,297-12-9. On the date of exhibit B-8, or even on the date of exhibit A-16, the first Defendant was not liable to repay to the Plaintiff any portion of the advance amount till then received by him. It cannot, therefore, be said that the second Defendant by entering into the financing arrangement as embodied in exhibit B-8 became the assignee from the first Defendant of any future obligation on the part of the first Defendant to repay the advance amount to the Plaintiff.

38. We are of opinion that exhibit B-8, even if it can be said to operate as an assignment in favour of the second Defendant of the first Defendant's rights

under exhibit A-1, cannot avail the Plaintiff to sue the second Defendant for recovery of all or any portion of the suit amount. The principle of law that the assignee of a chose in action takes the assignment subject to the equities in favour of the debtor as existing on the date of the notice of the assignment to the debtor can at best only provide a defence to the debtor in an action by the assignee against him for recovery of the money. It is doubtful whether the debtor can in some contingency sue to recover any sum of money from the assignee though such claim may spring out of the equities which he may have had against the assignor.

39. The benefit of a contract can be assigned but not the burden. The promisor under a contract cannot shift the burden of his obligations to another without a novation. The substitution of one debtor by another debtor without the knowledge of the creditor may perhaps lead the creditor to seek his remedy against an insolvent debtor. The law, therefore, does not recognise an assignment of a liability pure and simple without a novation or without a fresh contract between the original parties to the contract and the assignee. The first Defendant cannot be said to have assigned by means of exhibit B-8 his liability of the implied promise to pay the Plaintiff arising out of exhibit A-1.

40. Sir William Anson in his Law of Contracts, twenty-first edition, at page 363 has observed thus:

A promisor cannot assign his liabilities under a contract; or, conversely, a promisee cannot be compelled, by the promisor or by a third party, to accept any but the promisor as the person liable to him on the promise. The rule is based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract.

There is no plea in this case of a novation by which the contract between the Plaintiff and the first Defendant under exhibit A-1 became substituted by a fresh contract between the Plaintiff and the second Defendant.

41. In *Jaffar Meher Ali v. Budge Budge Jute Mills Co.* ILR 1006 Cal. 702, 707 Sale J., observed thus:

... the rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchaser of goods as distinguished from the liability there under may be assigned, understanding by the term benefit the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby. This rule is, however, subject to two qualifications: first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and next that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it.

With respect we agree with this observation.

42. We are unable to uphold the contention of the learned Advocate-General that

the second Defendant incurred any liability by reason of exhibit B-8, either on the footing that he was an assignee of a benefit of the first Defendant's rights under exhibit A-1, and that, therefore, he cannot retain the benefit without becoming burdened with the obligation arising out of exhibit A-1, or on the footing that he became an agent coupled with interest. On a proper construction of the terms of exhibit B-8, it must be held that the second Defendant was only a financier who lent money to the first Defendant for the production of the picture and that the amounts realised by him from the Plaintiff only represented adjustments towards the money due to him from the first Defendant, Whatever rights the Plaintiff may have against the first Defendant arising out of the contract, exhibit A-1, the character of the moneys in the hands of the second Defendant was certainly not that of the Plaintiff's moneys remaining with the second Defendant. In the hands of the second Defendant, those moneys were nothing but realizations made by the second Defendant towards the moneys lent by him to the first Defendant. It follows that the decree of the Court below dismissing the suit against the second Defendant must stand.

43. As we have held that the first Defendant is liable to the Plaintiff for the suit claim, the decree of the Court below will be modified. There will be a decree for the recovery of the sum of Rs. 15,702-3-3 in favour of the Plaintiff as prayed for in the plaint against the first Defendant with interest thereon at six per cent per annum from the date of plaint. The appeal is allowed and the judgment and decree of the Court below are modified accordingly. The parties to this appeal will bear their respective costs both here and in the Court below.