it. When such is the case I do not see how there can be either an implied engagement or the acquisition of an easement. Nor is it a case of natural flow. It is a matter of water over-flowing from higher lands to lands lying lower down. The supply of water is precarious and, when, in the circumstances, the plaintiffs cannot be held to have obtained any prescriptive right, they cannot insist on its coming down in any sufficient quantity to enable them to raise crops or even on its coming down at all. It is not at all the case of water flowing naturally down a river or stream or any naturally formed watercourse. Mr. Varadachari has referred us to illustration (*j*) to section 7 of the Indian Easements Act but that does not seem to have any application to the circumstances of this case.

In my view the decision of the learned Judge under appeal is correct. These appeals must, therefore, be dismissed with costs.

BEASLEY C.J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Mockett.

IN RE NUKALA VENKATANANDAM AND TWO OTHERS (APPELLANTS), PETITIONERS.*

1932, October 5.

Court Fees Act (VII of 1870), sec. 7 (iv) (f)—Partnership—Accounts of—Appeal relating to—Valuation of, for purposes of court-fee—Appellant's right to give his own valuation—Amount ultimately found due to appellant larger than amount of valuation—Levying of additional court-fee in case of—Procedure for.

In an appeal relating to the accounts of a partnership the appellant, whether plaintiff or defendant, can give his own

* Civil Miscellaneous Petition No. 3403 of 1932.

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valuation under section 7 (iv) (*f*) of the Court Fees Act and pay court-fee on it. If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fee for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and not to issue the judgment and decree until he does so.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the value of the appeal (Appeal No. 156 of 1932 preferred to the High Court against the final decree, dated 22nd December 1931 in Original Suit No. 9 of 1922 on the file of the Court of the Subordinate Judge of Cocanada) at Rupees five thousand five hundred (Rs. 5,500) and to accept the court-fee of rupees four hundred and forty-seven and annas seven (Rs. 447-7-0) paid already as correct.

P. Somasundaram for petitioners.

K. Subba Rao for *Government Pleader* (*P. Venkataramana Rao*) for Government.

Cur. adv. vult.

ORDER.

RAMESAM J.

RAMESAM J.—The question arising for decision in the above civil miscellaneous petition relates to court-fees in a partnership suit. The facts of the case are as follows:—A suit was filed in the Subordinate Judge's Court of Cocanada for dissolution of partnership, for settlement of accounts and for recovery of such amounts as may be due to the plaintiffs. Under section 7 (iv) (*f*) of the Court Fees Act, the plaintiff tentatively valued his plaint at Rs. 7,500. A decree was passed on 22nd December 1931 under which defendants 3 to 5 were directed to pay certain sums of money with interest at six per cent from 1st April 1924. The defendants 3 to 5 filed the present appeal on 26th April

1932. In the memorandum of appeal the valuation is stated to be Rs. 12,770-6-0 and the court-fee thereon Rs. 847-7-0, but the court-fee actually paid was only Rs. 447-7-0. In the affidavit filed on behalf of the appellants it is stated that the valuation was calculated according to the old practice and was stated to be Rs. 12,770-6-0. But, as the first appellant had not the money with him at the time, it was filed on a court-fee of Rs. 447-7-0 with the idea of supplying the deficient court-fee afterwards. Both according to the affidavit and on the face of the appeal memorandum, the appeal was filed on the deficient court-fee and the office ought to have returned the papers for supplying the deficit; but by some oversight the office did not return the papers. The appeal was numbered as Appeal No. 156 of 1932. From one point of view it may well be said that the appellants may as well have kept quiet. But there is the apprehension that when the appeal comes on for hearing the matter will be noticed by the opposite side or by the Court and the appellants would naturally be called upon to supply the deficit court-fee. The first appellant therefore not wishing to wait until then and desiring to put the matter on a proper legal basis filed the present petition. He now wishes to revise the valuation in such a way that the court-fee already paid would be adequate until the hearing of the appeal. It may be that after the hearing of the appeal he may have to pay more court-fees if he succeeds in respect of an amount larger than the amount for which the court-fee he has now paid, namely Rs. 447-7-0, suffices, that is, Rs. 5,500. In the affidavit it is stated that they were expecting the papers to be returned so that they may correct the valuation and re-present the papers. But unfortunately the papers were not returned.

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If the only valuation which is possible for the appeal is Rs. 12,700, then, of course, he cannot do this. But it is contended on the footing of the Privy Council decision in *Faizullah Khan* v. *Mauladad Khan*(1) that even in an appeal relating to the accounts of a partnership a tentative valuation can be given by the appellant under section 7 (iv) (*f*) of the Court Fees Act. In that case the plaintiff filed a suit on a valuation of Rs. 3,000, but the first Court gave a decree against him for Rs. 19,991. The plaintiff filed an appeal in which he paid court-fees on the said sum of Rs. 19,991. But in the memorandum of appeal he prayed that the decree against him should not only be vacated but that he should also get a decree for Rs. 3,000. The Privy Council held that the amount actually paid is good enough for covering both the reliefs. In the judgment Lord SHAW said:

> "Their Lordships find no reason for treating that payment either as upon an under-value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other."

The view apparently taken by their Lordships is that the appellant can pay court-fee on a notional valuation as in the first Court. Even if some of the sums in respect of which he was appealing are definite amounts, the actual court-fee he pays should be supposed to cover any actual sums decreed and any uncertain sums in respect of which relief is sought. That this is

(1) (1929) I.L.R. 10 Lah. 737 (P.C.).

the view taken by their Lordships is clear from the observations of Lord TOMLIN in the course of the argument reported in *Faizullah Khan* v. *Mauladad Khan*(1), and quoted by PAGE C.J. in *C. K. Ummar* v. *C. K. Ali Ummar*(2) as follows :—

"In section 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course if the appellant recovers more, he pays the extra fee under section 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount. In suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover. The Legislature, therefore, leaves it open to him to estimate the amount. That is the scheme of the Act."

According to the view of the Privy Council, the appellant, whether plaintiff or defendant, can give some valuation and one cannot complain that the amount in the memorandum is not the proper amount, the reason being that in suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover, and they apply this principle to appeals also. The question that arises is, if appellants can file their appeals on any valuation they like and pay court-fees on it and the whole case can be heard on such payment, and if, as the result of the hearing of the appeal, they can succeed for a much larger amount than the amount for which they paid court-fees, can it not be said that the Crown has been deprived of the court-fee properly due and, if so, how is this amount to be recovered. Lord TOMLIN referred to section 11 of the Act, but it seems to me that section 11 may not give adequate remedy to the Crown, for section 11 refers to execution and, before the decree-holder seeks execution,

(1) (1924) 31 Bom. L.R. 841, 842 (P.C.).
(2) (1931) I.L.R. 9 Rang. 165, 168 (F.B.).

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he must pay the court-fee. But suppose the party settled the matter privately and the decree-holder had not to seek execution, would not the Crown be deprived of the proper court-fees in such a case? Section 11 no doubt furnishes one method but, for the protection of the interests of the Crown, it is necessary to indicate what the proper practice should be. If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fees for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and only then the judgment should be delivered and the decree should be allowed to be drawn up. I think this protects the Crown's interests properly. Under section 149 of the Code of Civil Procedure the Court has got the power to direct the payment of court-fees at any stage of the case and this is expressly relied on by Lord SHAW at page 743 in *Faizullah Khan* v. *Mauladad Khan*(1). In the present appeal the appellant does not want any refund of his court-fee. He simply wants permission to re-state his valuation tentatively at Rs. 5,500 so that the court-fee actually paid may be enough and so that no objection can be taken to the hearing of the appeal afterwards. He himself would have done this, if the appeal papers had been returned; but they were not. In the view taken in the Privy Council decision we direct the valuation to be amended tentatively at Rs. 5,500, but, as already mentioned, it must be understood that when the appeal is heard and he succeeds to a larger amount, unless the court-fee is paid, the judgment and decree ought not to be issued.

In view of the decision of the Privy Council no purpose is served by referring to the earlier decisions.

(1) (1929) I.L.R. 10 Lah. 737 (P.C.).

In the case of appeals against a preliminary decree only, the Madras High Court held that where a defendant appeals he should pay on the tentative valuation of the plaintiff in the first Court, but the Privy Council decision seems to imply that the defendant can give his own tentative valuation in appeal. This is the way how the Privy Council decision with Lord TOMLIN'S observations are construed by PAGE C.J. in *C. K. Ummar* v. *C. K. Ali Ummar*(1) and I agree with his view. He points out that the same view was taken by the Allahabad High Court in *Chunni Lal* v. *Sheo Charan Lal, Lalman*(2), but that was before the Privy Council decision. It is unnecessary to refer to the decision of RANKIN C.J. in *Kantichandra Tarafdar* v. *Radharaman Sarkar*(3) in which no reference was made to the Privy Council decision nor could it be, for the report could not have reached India at the time the case was heard. I may add that an appellant, whether defendant or plaintiff, is in the position of a plaintiff in appeal at least in suits for taking accounts of a partnership and in partition suits. In such suits it has been held that every party is in the position of a plaintiff—vide *Tirumedi Adeyya* v. *Cheluhuin Venkatregadu*(4) and *Ramamurthi* v. *Surampalli Reddy* (5). In the first of the above cases the defendant actually paid court-fee on the footing that his position is analogous to that of the plaintiff. In the latter case it was observed that the effect of the plaintiff being allowed to withdraw was to allow defendants 8 to 10 to become plaintiffs in his stead.

The valuation of the appeal *for the present* will be regarded as Rs. 5,500.

MOCKETT J.—I agree.

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(1) (1931) I.L.R. 9 Rang. 165 (F.B.). (2) (1925) I.L.R. 47 All. 756.
(3) (1929) I.L.R. 57 Calc. 463. (4) (1914) M.W.N. 155.
(5) (1920) 12 L.W. 563.