

N. Subramania Pillai - - - - - Appellant

v.

A. Dravlasundaram Pillai - - - - - Respondent

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL DELIVERED THE 22ND NOVEMBER, 1949

Present at the Hearing:

LORD GREENE

LORD OAKSEY

SIR JOHN BEAUMONT

[Delivered by SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Madras dated the 24th January 1945, reversing a decree dated the 25th August 1943, of the District Judge of Tinnevely which affirmed a judgment and decree dated the 26th September, 1942, of the Subordinate Judge of Tuticorin.

On the 29th April, 1934, one Kanakasabapathi Pillai (hereinafter called "the testator"), made a will whereby he appointed the appellant and the respondent executors to carry out the trusts of the will.

The testator was murdered on the 13th August, 1940, and disputes at once arose between the appellant, who was his nephew and heir, and the respondent, who was the brother of his second wife, as to the effect and validity of the will.

On the 31st October, 1940, the respondent filed the suit out of which this appeal arises in the court of the Subordinate Judge at Tuticorin, against the appellant to recover possession of the properties set out in schedules 1 to 4 and 6 of the plaint. Of the matters originally raised in the plaint and written statement, the only one which remains for decision by the Board is as to the true construction of the will of the testator. It is the case of the appellant that the trusts declared by the will wholly failed, and that the appellant is entitled to retain possession of the estate; it is the case of the respondent that certain of the trusts in favour of charity are valid as held by the High Court, and that he is entitled, as executor, to possession, or to share with the appellant in the possession, of the estate in order to carry out the trusts.

The clauses of the will relevant for the purposes of this appeal as officially translated are the following:

"2. As I am desirous of taking Saivite holy orders towards the end of my life and I am of the opinion that after my death my body

should be buried in a samadhi, and that at the place where the samadhi is made a matam should be built and a stone inscription bearing 'Kanakasabhpathi Samadhi Matam' should be prepared and set up in the front portion of the said Matam and that regular worship should be conducted permanently therein, I have set apart for charity most of the properties belonging to me as mentioned hereunder."

"7. I have endowed the properties set out in Schedule III other than items 16 and 17 thereof to the Samadhi Matam aforesaid and to the charities proposed to be administered in connection therewith namely poor feeding, Vinayakar and Nataraja flower garden and Thannirpandal (distribution of water and buttermilk), etc. I have also endowed the otti amounts due to me as described in Schedule IV and the properties described in Schedule V to the aforesaid charities themselves. I have endowed the movable properties set out in Schedule VII also to the charities aforesaid.

8. To take possession of the said properties to supervise them, to take possession of the produce, to pay the Government assessment, to conduct the charities, to realise the amounts due to pay off and discharge the debts payable, I have appointed as executors, (1) Subrahmanya Pillai, son of my senior brother S. P. Nayinar Pillai, residing at Maramangalam and (2) Draviyasundaram Pillai, son of Ayyanperumal Pillai and younger brother of my second wife, residing at Arumukhamangalam."

"16. In the thatched house situate in item 8 of Schedule III, I am conducting poor-feeding for the mendicants who come there. From and out of the funds aforesaid, the executors shall in the place where the thatched house is standing build for less than Rs. 4,000, a Matam facing east for the purpose of conducting the poor-feeding and one temple for installing Vinayakar and Nataraja, and with the funds now and then available they shall construct the building as required by Sastras with chunam and baked bricks, shall prepare the images of Vinayakar and Nataraja, shall install them, therein shall perform the Mandala pooja and conduct the Atta festival monthly festival and daily pooja; and besides this they shall carry on these charities permanently for ever. A person shall be appointed for preparing food in the poor-feeding Matam and the poor-feeding shall be conducted for the mendicants who come there without refusing food to anyone.

17. I have intended to construct a building in my lifetime itself in the south-west corner of the site as item 8 aforesaid adjoining the nanja land for keeping me in *Samadhi* (grave for interring the remains). If it is not completed, the executors shall, from and out of the properties aforesaid, spend to the extent of Rs. 300, shall keep me in samadhi in the said place and shall build the matam and shall inscribe on stone the words 'Kanakasabhpathi Samadhi Matam' and shall fix the stone in the front portion of the Matam; and the said stone with inscription shall be included in the construction of the building; and besides this a Sivalingam shall be installed in the said samadhi; and the mandala puja, the daily puja and also the yearly Guru puja shall be conducted permanently. For this purpose a person shall be appointed and the same shall be carried on. The poor-feeding of the mendicant with food served on leaves shall be conducted during the mandala puja and the yearly Guru puja.

18. The executors shall in the poor-feeding matam aforesaid make arrangements for the supply of buttermilk from the 15th Panguni to the 15th of Vaikasi (about 1st April to 1st June) from and out of the funds aforesaid and shall appoint a person to supply buttermilk to the persons who go over there and shall thus make arrangements for the supply of buttermilk and shall conduct the charity permanently."

At the trial the learned Subordinate Judge held that the testator did not become Yatra Sanyasi before his death ; that he was not given Samadhi burial ; that there was no samadhi matam when the will came into operation on the death of the testator ; that any such form of burial had become impossible and that the dharmams failed with the main purpose of the will. Accordingly the learned Judge dismissed the suit with costs.

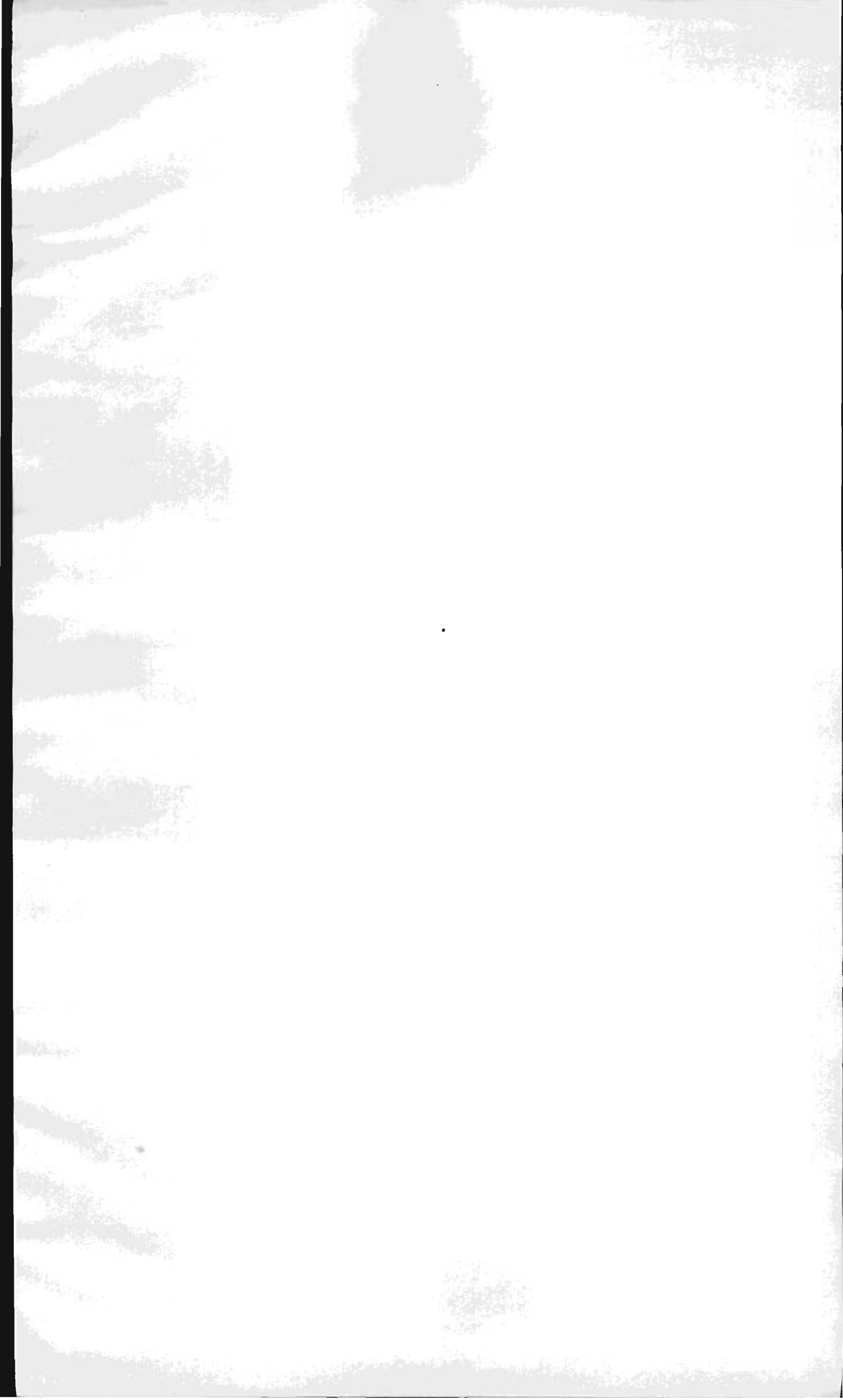
In appeal the District Judge at Tinnevely took the same view. He held that the intention of the testator as disclosed in clauses 2 and 7 of the will was to provide for the burial of his body in a samadhi with a stone or matam erected thereon and that the directions for dharmams in the later clauses of the will were all part of the testator's scheme for keeping alive his memory and did not disclose any independent charitable intent ; that the testator during his lifetime did not become a Yatra Sanyasi ; had taken no steps to carry into effect the intentions disclosed in his will, and that he did not receive a samadhi burial. Accordingly the learned Judge held that all the trusts of the will failed.

In second appeal to the High Court at Madras, that court held that the trusts in clause 17 of the will related merely to the burial place of the testator, that they disclosed no general charitable intent which could attract the cy-pres doctrine and that such trusts having become impossible of performance failed. But the court held that the trusts in clauses 16 and 18, that is trusts for feeding the poor and erecting a temple for the two named idols, were independent charitable trusts of a public nature to which effect should be given. They remitted the case to the Subordinate Judge to work out the rights of the parties in the light of the judgment.

A criticism of the judgment of the High Court which at once arises is that the learned Judges ignored clause 7 of the will, a clause which, in their Lordships' view, provides a clue to the whole will. By that clause the testator stated that he had endowed the properties set out in Schedule III "to the Samadhi Matam aforesaid". This reference relates back to clause 2 and identifies the samadhi referred to as the testator's own burial place. Directions for giving effect to this part of clause 7, in the event which happened of the testator not having completed in his lifetime the samadhi matam, are given in clause 17 of the will. Clause 7 then stated that in addition to the samadhi matam the testator had endowed the charities proposed to be administered in connection therewith namely, poor-feeding, Vinayakar and Nataraja flower garden, and Thannirpandal (distribution of water and butter), etc., and that he had endowed the moveable properties set out in clause 7 also to the charities aforesaid. Directions relating to these charities are given in clauses 16 and 18 of the will. It is clear, their Lordships think, that the directions embody a single scheme. The testator contemplated that he would be buried as a Sanyasi in a samadhi matam, and in connection therewith, and with a view to keeping his memory alive and enhancing his own posthumous reputation, the testator provided for feeding the poor and for erecting a temple for the idols, which would have the effect of attracting pilgrims. It is important to notice that the erection of the matam for the feeding of the poor and the erection of the temple for the installation of the idols under clause 16, were to be on the same item of land as the burial place, and that under clause 17, feeding of the poor was to be conducted during the daily pujas to be performed in connection with the burial place. If the provisions in clauses 16 and 18 stood alone, they might amount to a good charitable bequest, but they do not stand alone. Their Lordships can find no indication that the testator intended to establish any charity apart from the ceremonies to be conducted at his own burial place. As the testator never became a Yatra Sanyasi and was not buried in a samadhi matam, it became impossible to give effect to the scheme of the will, and all the trusts failed. Their Lordships are in agreement with the views of the learned Subordinate Judge and the learned District Judge rather than with those of the learned Judges of the High Court.

The learned Subordinate Judge dismissed the suit with costs. Their Lordships think that in some form or other the parties were bound to come to the court; they could not as executors have ignored the trusts in the will on their own authority, and their Lordships think that the costs of the hearing should come out of the estate of the testator.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, that the decree of the High Court of Madras dated 24th January 1945 be set aside, and the order of the Subordinate Judge of Tuticorin dated 26th September 1942 be restored except the direction for payment of costs, and the order of the District Judge of Tinnevely dated 25th August 1943 be restored. The costs of both parties of the trial will come out of the testator's estate. The respondents must pay the costs of the appeal to the District Judge and to the High Court and of the appeal to His Majesty.



In the Privy Council

N. SUBRAMANIA PILLAI

v.

A. DRAVIASUNDARAM PILLAI

DELIVERED BY SIR JOHN BEAUMONT

Printed by His Majesty's Stationery Office Press,
DRURY LANE, W.C.2.
1949