COMMISSIONER OF INCOME-TAX, MADHYA PRADESH, NAGPUR

v.

SETH GOVINDRAM SUGAR MILLS LTD.

March 26, 1965

[K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.]

Partnership Act (9 *of* 1932), *ss.* 31 *and* 42(c)—*Scope of—Two joint Hindu families—Partnership between—When possible—Income-tax Act* (11 *of* 1922), *s.* 164(1).

A joint Hindu family consisting of two branches owned a sugar mill. After partition, the two *kartas* entered into a partnership in 1943, to carry on the business of the sugar mill. The two partners represented the respective joint families, and the partnership deed provided that the death of any of the parties shall not dissolve the partnership and either the legal heir or the nominee of the deceased partner should take his place. One of the *kartas* died in 1945 leaving as members of his branch of the family, three widows and two minor sons. The other partner continued the business of the sugar mill in the firm name. For the assessment year 1950-51, the assessee (respondent-firm) applied for registration on the basis of the partnership agreement of 1943. The Income-tax Officer, Appellate Assistant Commissioner and the Tribunal held that there was no partnership between the members of the two families after the death of one of the *kartas*. On a reference to the High Court, it was held that the partnership business was carried on by the representatives of the two families after the death of one of the *kartas*.

In the appeal to this Court, on the question as to whether during the assessment year 1950-51, the assessee was a firm within the meaning of s. 16(1) of the Income-tax Act, 1922, or an association of persons,

HELD: The High Court was wrong in its finding. But, as a result of the concession by the appellant, that there was a partnership from 13th December 1949, when one of the minor sons had become a major, the status of the assessee was that of a firm for the assessment year 1950-51. [498B]

A joint Hindu family as such cannot be a partner of a firm, but it may through its *karta* enter into a partnership with the *karta* of another family. [495H]

Kshetra Mohan Sanyasi Charan Sadhukhan v. *Commissioner of Excess Profits Tax*, [1954] S.C.R. 268, followed.

A widow, though a member of a joint family, cannot become its manager. [495B]

Commissioner of Income-tax, C.P. & Berar v. *Seth Lakshmi Narayan Raghunathdas*, (1948) 16 I.T.R. 313 and *Pandurang Dakhe* v. *Pandurang Gorle*, I.L.R. [1947] Nag. 299, overruled.

Therefore, in the instant case, when one of the *kartas* died, the partnership had come to an end. There was no scope for applying s. 42(c) of the Partnership Act, 1932, because, the section is applicable only to a partnership with more than two partners. In such a case, if one of them dies, the firm is dissolved, but if there is a contract to

the contrary, the surviving partners will continue the firm. On the other hand, if there are only two partners and one of them dies, the firm automatically comes to an end and, thereafter, there is no partnership for a third party to be introduced. Section 31, which deals with the validity of a contract between the partners to introduce a third party into the partnership without the consent of all the existing partners, presupposes the subsistence of a partnership and does not apply to a partnership of two partners, which is dissolved by the death of one of them. [492E-H]

Hansraj Manot v. *Messrs. Gorak Nath Pandey*, (1961) 66 C.W.N 262, disapproved.

Further, there was no evidence that the representatives of the two families constituted a new partnership and carried on the business of the sugar mill before 13th December 1949, when, it was conceded a new partnership had come into existence.

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 38 and 39 of 1964.

Appeals from the judgment and order dated April 10, 1961 of the Madhya Pradesh High Court in Miscellaneous Civil Case No. 63 of 1961.

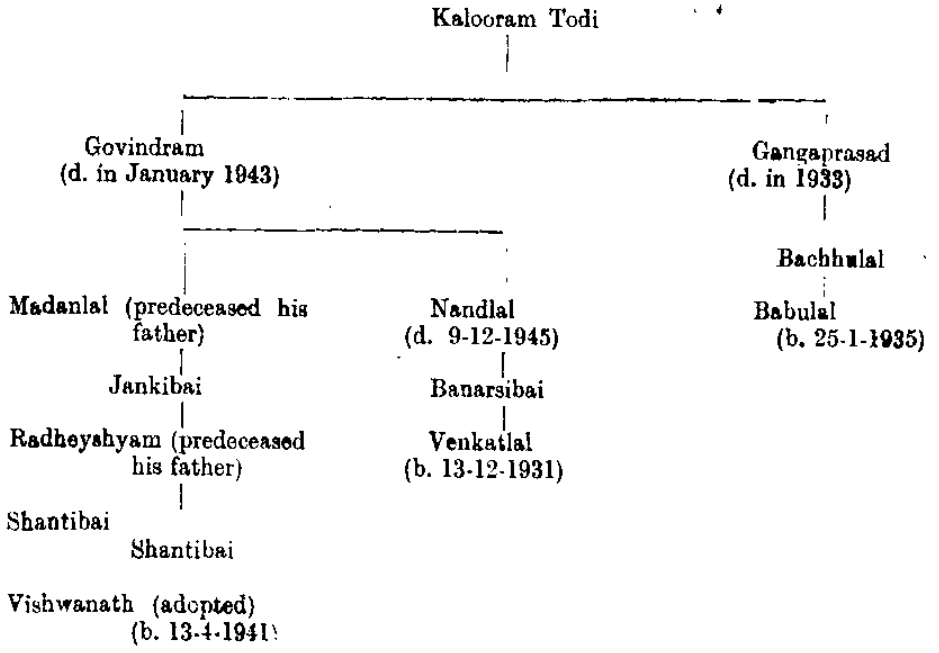
C. K. Daphtary, Attorney-General, R. Ganapathy Iyer and *R. N. Sachthey*, for the appellant (for both the appeals).

N. D. Karkhanis, Rameshwar Nath, S. N. Andley and *P. L. Vohra*, for the respondent (in both the appeals).

The Judgment of the Court was delivered by

Subba Rao, J. These two appeals by certificate arise out of the judgment of the High Court of Madhya Pradesh, Jabalpur, in Miscellaneous Case No. 63 of 1961 from a reference under s. 66(2) of the Indian Income-tax Act, 1922, made by the Income-tax Appellate Tribunal, Bombay.

To appreciate the contention of the parties the following genealogy will be useful:



After the death of Kalooram Todi, his two sons by name Govindram and Gangaprasad constituted a joint Hindu family which owned extensive property in Jaora State and a sugar mill called "Seth Govindram Sugar Mills" at Mahidpur Road in Holkar State. In the year 1942 Bachhulal filed a suit for partition against Govindram and obtained a decree therein. In due course the property was divided and a final decree was made. We are concerned in these appeals only with the Sugar Mills at Mahidpur Road. After the partition Govindram and Bachhulal jointly worked the Sugar Mills at Mahidpur Road. After the death of Govindram in 1943, Nandlal, the son of Govindram, and Bachhulal, as *kartas* of their respective joint families, entered into a partnership on September 28, 1943 to carry on the business of the said Sugar Mills. Nandlal died on December 9, 1945, leaving behind him the members of his branch of the joint family, namely, the three widows and the two minor sons shown in the genealogy. After the death of Nandlal, Bachhulal carried on the business of the Sugar Mills in the name of "Seth Govindram Sugar Mills". For the assessment year 1950-51, the said firm applied for registration on the basis of the agreement of partnership dated September 28, 1943. The Income-tax Officer refused to register the partnership on the ground that after the death of Nandlal the partnership was dissolved and thereafter Bachhulal and the minors could be treated only as an association of persons. On that footing he made another order assessing the income of the business of the firm as that of an association of persons. Against the said orders, two appeals—one being Appeal No. 21 of 1955-56 against the order refusing registration and the other being Appeal No. 24 of 1955-56 against the order of assessment—were filed to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner dismissed both the appeals. In the appeal against the order of assessment, the Appellate Assistant Commissioner exhaustively considered the question whether there was any partnership between the members of the two families after the death of Nandlal and came to the conclusion that in fact as well as in law such partnership did not exist. Two separate appeals, being Income-tax Appeal No. 8328 of 1957-58 and Income-tax Appeal No. 8329 of 1957-58, preferred to the Income-tax Appellate Tribunal against the orders of the Appellate Assistant Commissioner were dismissed. The assessee made two applications to the Tribunal for referring certain questions of law to the High Court, but they were dismissed. Thereafter, at the instance of the assessee the High Court directed the Tribunal to submit the following two questions for its decision and it accordingly did so:

> "(1) Whether on the facts and in the circumstances of the case, the status of the assessee, "Seth Govindram Sugar Mills, Mahidpur Road, Proprietor Nandlal Bachhulal, Jaora", is an Association of Persons or a firm within the meaning of Section 16(1)(b) of the Income-tax Act."

A "(2) Whether the order of the Appellate Tribunal is illegal on account of the Tribunal having committed an error of record and having omitted to consider the relevant material in the case."

The High Court, for reasons given in its judgment, held on the first B question that in the assessment year 1949-50 the status of the assessee was that of a firm within the meaning of s. 16(1)(b) of the Income-tax Act and on the second question it held that the Tribunal misdirected itself in law in reaching the conclusion that the parties could not be regarded as partners. The present two appeals are preferred against the said order.

C At the outset we must make it clear that the question of registration could not be agitated in these appeals, as that question was not referred to the High Court. We shall, therefore, only consider the points raised by the questions referred to the High Court and held by the High Court against the appellant. Indeed, the only effective question is whether during the assessment year 1950-51 the D assessee was a firm or an association of persons.

The first question raised by the learned Attorney General is that on the death of Nandlal the firm of Seth Govindram Sugar Mills was dissolved and thereafter the income of the said business could only be assessed as that of an association of persons.

E To appreciate this contention some more necessary facts may be stated. The deed of partnership dated September 28, 1943, was executed between Nandlal and Bachhulal. It is not disputed that each of the said two partners entered into that partnership as representing their respective joint families. Under cl. (3) of the partnership deed, "The death of any of the parties shall not dissolve the F partnership and either the legal heir or the nominee of the deceased partner shall take his place in the provisions of the partnership."

The question is whether on the death of Nandlal his heirs, *i.e.*, the members of his branch of the family, automatically became the partners of the said firm. The answer to the question turns upon G s. 42 of the Indian Partnership Act, 1932 (Act 9 of 1932), the material part of which reads:

"Subject to contract between the partners a firm is dissolved by the death of a partner."

While for the appellant the learned Attorney General contended H that s. 42 applied only to a partnership consisting of more than two partners, for the respondent Mr. Karkhanis argued that the section did not impose any such limitation and that on its terms it equally applied to a partnership comprising only two partners. It was argued that the contract mentioned in the over-riding clause was a contract between the partners and that, if the parties to the contract agreed that in the event of death of either of them his successor would be inducted in his place, the said contract would ube binding

on the surviving member. On the death of one of the partners, it was said, his heir would be automatically inducted into the partnership, though after such entry he might opt to get out of it. This conclusion the argument proceeded was also supported by s. 31 of the Partnership Act. Section 31 of the Partnership Act reads:

> "(1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners."

Converting the negative into positive, under s. 31 of the Partnership Act if there was a contract between the partners, a person other than the partners could be introduced as a partner of the firm without the consent of all the existing partners. A combined reading of ss. 42 and 31 of the Partnership Act, according to the learned counsel, would lead to the only conclusion that two partners of a firm could by agreement induct a third person into the partnership after the death of one of them.

There is a fallacy in this argument. Partnership, under s. 4 of the Partnership Act, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Section 5 of the said Act says that the relation of partnership arises from contract and not from status. The fundamental principle of partnership, therefore, is that the relation of partnership arises out of contract and not out of status. To accept the argument of the learned counsel is to negative the basic principle of law of partnership. Section 42 can be interpreted without doing violence either to the language used or to the said basic principle. Section 42(c) of the Partnership Act can appropriately be applied to a partnership where there are more than two partners. If one of them dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners will continue the firm. On the other hand, if one of the two partners of a firm dies, the firm automatically comes to an end and, thereafter, there is no partnership for a third party to be introduced therein and, therefore, there is no scope for applying cl. (c) of s. 42 to such a situation. It may be that pursuant to the wishes of the directions of the deceased partner the surviving partner may enter into a new partnership with the heir of the deceased partner, but that would constitute a new partnership. In this light s. 31 of the Partnership Act falls in line with s. 42 thereof. That section only recognizes the validity of a contract between the partners to introduce a third party without the consent of all the existing partners: it presupposes the subsistence of a partnership; it does not apply to a partnership of two partners which is dissolved by the death of one of them, for in that event there is no partnership at all for any new partner to be inducted into it without the consent of others.

There is a conflict of judicial decisions on this question. The decision of the Allahabad High Court in *Lal Ram Kumar* v.

A *Kishori Lal*(1) is not of any practical help to decide the present case. There, from the conduct of the surviving partner and the heirs of the deceased partner after the death of the said partner, the contract between the original partners that the partnership should not be dissolved on the death of any of them was inferred. Though the partnership there was only between two partners, the question of
B the inapplicability of s. 42(c) of the Partnership Act to such a partnership was neither raised nor decided therein. The same criticism applies to the decision of the Nagpur High Court in *Chainkaran Sidhakaran Oswal* v *Radhakisan Vishwanath Dixit*(2). This question was directly raised and clearly answered by a Division Bench of the Allahabad High Court in *Mt. Sughra* v. *Babu*(3) against the
C legality of such a term of a contract of partnership consisting of only two partners. Agarwala, J., neatly stated the principle thus:

> "In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is a contradiction in terms to say
D that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue..... ..... Partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent,
E express or implied."

This view accords with that expressed by us earlier. In *Narayanan* v. *Umayal*(4), Ramachandra Iyer J., as he then was, said much to the same effect when he observed thus:

> ".....if one of the partners died, there will not
F be any partnership existing to which the legal representatives of the deceased partner could be taken in. In such a case the partnership would come to an end by the death of one of the two partners, and if the legal representatives of the deceased partner joins in the business later,
G it should be referable to a new partnership between them."

But Chatterjee J., in *Hansraj Manot* v. *Messrs. Gorak Nath Pandey*(5) struck a different note. His reasons for the contrary view are expressed thus:

> "Here the contract that has been referred to is the
H contract between the two partners Gorak Nath and Champalal ..... Therefore, it cannot be said that the contract ceased to have effect because a partner died. The contract was there. There was no new contract

(1) A.I.R. 1946 All. 259. (2) A.I.R. 1956 Nag. 46.
(3) A.I.R. 1952 All. 506, 507. (4) A.I.R. 1959 Mad. 283, 284.
(5) [1961] 66 C.W.N. 262, 264.

with the heirs and there was no question of a new contract with the heirs because of the original contract, and by virtue of the original contract the heirs become partners as soon as one of the partners died ..... As soon as there is the death, the heirs become the partners automatically without any agreement between the original partners by virtue of the original agreement between the partners while they were surviving. There is no question of interregnum. As soon as the death occurs the right of somebody else occurs. The question of interregnum does not arise. The heirs become partners not because of a contract between the heirs on the one hand and the other partners on the other but because of the contract between the original partners of the firm."

With great respect to the learned Judge, we find it difficult to appreciate the said reasons. The learned Judge seems to suggest that by reason of the contract between the original partners, the heirs of the deceased partner enter the field simultaneously with the removal by death of the other partner from the partnership. This implies that the personality of the deceased partner projects into that of his heirs, with the result that there is a continuity of the partnership without any interregnum. There is no support either on authority or on principle for such a legal position. In law and in fact there is an interregnum between the death of one and the succession to him. We accept the view of the Allahabad and Madras High Courts and reject the view expressed by Nagpur and Calcutta High Courts.

The result of the discussion is that the partnership between Nandlal and Bachhulal came to an end on the death of Nandlal on December 9, 1945.

The next question is whether after the death of Nandlal a new partnership was entered into between the representatives of the two branches of the families, *i.e.*, Nandlal's and Bachhulal's. Before we consider this question it is as well that we advert to incidental questions of law that were raised. One is whether the widow of Nandlal could under Hindu law be a *karta* of the joint Hindu family consisting of three widows and two minors. There is conflict of view on this question. The Nagpur High Court held that a widow could be a *karta*: see *Commissioner of Income-tax, C. P. & Berar* v. *Seth Laxmi Narayan Raghunathdas*(1); *Pandurang Dahke* v. *Pandurang Gorle*(2). The Calcutta High Court expressed the view that where the male members are minors and their natural guardian is the mother, the mother can represent the Hindu undivided family for the purpose of assessment and recovery of taxes under the Income-tax Act: *see Sushila Devi Rampurla* v. *Income-tax Officer*(3); and

(1)(1948) 16 I.T.R. 313. (2) I.L.R. 1947 Nag. 299
(3) (1959) 38 I.T.R. 316.

A *Sm. Champa Kumari Singhi* v. *Additional Member, Board of Revenue, West Bengal*(1). The said two decisions did not recognize the widow as a *karta* of the family, but treated her as the guardian of the minors for the purpose of income-tax assessment. The said decisions, therefore, do not touch the question now raised. The Madras and Orissa High Courts held that coparcenership is a neces-
B sary qualification for the managership of a joint Hindu family and as a widow is not admittedly a coparcener, she has no legal qualifications to become the manager of a joint Hindu family. The decision of the Orissa High Court in *Budhi Jena* v. *Dhobai Naik*(2) followed the decision of the Madras High Court in *V.M.N. Radha Ammal v. Commissioner of Income-tax, Madras*(3) wherein Satya-
C narayana Rao J., observed:

> "The right to become a manager depends upon the fundamental fact that the person on whom the right devolved was a coparcener of the joint family. ..... Further, the right is confined to the male members of the family as the female members were not treated as copar-
D ceners though they may be members of the joint family."

Viswanatha Sastri J., said:

> "The managership of a joint Hindu family is a creature of law and in certain circumstances, could be created by an agreement among the coparceners of the joint
E family. Coparcenership is a necessary qualification for managership of a joint Hindu family."

Thereafter, the learned Judge proceeded to state:

> "It will be revolutionary of all accepted principles of Hindu law to suppose that the seniormost female member
F of a joint Hindu family, even though she has adult sons who are entitled as coparceners to the absolute ownership of the property, could be the manager of the family..... .....She would be the guardian of her minor sons till the eldest of them attains majority but she would not be the manager of the joint family for she is not a
G coparcener."

The view expressed by the Madras High Court is in accordance with well settled principles of Hindu law, while that expressed by the Nagpur High Court is in direct conflict with them. We are clearly of the opinion that the Madras view is correct.

H Another principle which is also equally well settled may be noticed. A joint Hindu family as such cannot be a partner in a firm, but it may, through its *karta* enter into a valid partnership with a stranger or with the *karta* of another family. This Court in *Kshetra*

(1) (1961) 46 I.T.R. 81 (3) A.I.R. 1956 Orissa 6.
(2) (1950) 18 I.T.R. 225, 230, 232, 233.

Mohan Sanyasi Charan Sadhukhan v. *C.E.P.T.*(1) pointed out that when two *kartas* of different families constituted a partnership the other members of the families did not become partners, though the *karta* might be accountable to them.

The question, therefore, is whether after the death of Nandlal the representatives of the two families constituted a new partnership and carried on the business of the Sugar Mills. Admittedly no fresh partnership deed was executed between Banarsibai, acting as the guardian of the minors in Nandlal's branch of the family and Bachhulal. It is not disputed that partnership between the representatives of two families can be inferred from conduct. Doubtless the accounts produced before the income-tax authorities disclosed that Bachhulal was carrying on the business of "Seth Govindram Sugar Mills Ltd." in the same manner as it was conducted before the death of Nandlal. Therein Kalooram Govindram and Gangaprasad Bachhulal were shown as partners, Govindram having 10 annas share and Bachhulal having 6 annas share. There were separate current accounts for the two parties. The Appellate Assistant Commissioner, who examined the accounts with care, gave the following details from the accounts as on November 1, 1948:

Joint capital account of Kalooram Govindram and Gangaprasad Bachhulal in the ratio of 10 : 6		Rs.
	Credit balance	10,78,660
Current Accounts:—		
Gangaprasad Bachhulal	Do.	10,46,797
Kalooram Govindram	Do.	8,30,348
Profit & Loss Account	Debit balance	14,01,669

No profit or loss was adjusted to the current account of the parties. Thereafter the accounts were closed as on 31-3-1950, when the capital account was squared up by transferring that much loss from the profit and loss account and balance in the profit and loss account was transferred in the ratio of 10:6 to the current accounts of the two parties.

Thus the profit and loss account showed:—

Net debit balance including current year's loss		Rs. 17,51,992
Loss set off against capital account		10,78,666
	Rs.	6,73,326
Transferred to partners' accounts:—		
Messrs. Kalooram Govindram ..	4,20,829	
Messrs. Gangaprasad Bachhulal ..	2,52,497	6,73,326
Balance ..		Nil

(1) [1954] S.C.R. 268

A The accounts only establish that Bachhulal was doing the business of Govindram Sugar Mills Ltd. But Banarsibai's name was not found in the accounts. If she was a partner, her name should have found a place in the accounts. Not a single document has been produced on behalf of the assessee which supports the assertion that Banarsibai acted as a partner or was treated by the customers of the B firm as a partner. There is not a little of evidence of conduct of Bachhulal, Banarsibai or even of third parties who had dealings with the firm to sustain the plea that Banarsibai was a partner of the firm. Indeed, the conduct of the parties was inconsistent with any such partnership between Banarsibai and Bachhulal. After the death of Nandlal, Banarsibai and Shantibai applied to Jaora Dis- C trict Court for the appointment of guardians to look after the properties and the persons of the two minors; and on January 21, 1946, four persons other than these two widows were appointed as guardians of the minors. If Banarsibai was acting as a guardian of the minors representing the family in the business, she would not have applied for the appointment of others as guardians. On October 4, D 1952, a partnership deed was drawn up between Bachhulal on the one hand and the minors represented by the said four guardians on the other. If Banarsibai was the representative of the family in the business, this document would not have come into being Banarsibai also had no place in another partnership deed which was executed on March 27, 1953, between Venkatlal represented by the aforesaid E guardians and Bachhulal. The evidence, therefore, demonstrates beyond any reasonable doubt that Banarsibai was nowhere in the picture and that Bachhulal carried on the business of the Sugar Mills on behalf of the two families. Nor is there any evidence to show that from 1943 till the assessment year the guardians of the F minors appointed by the District and Sessions Judge, Jaora, in 1946 representing the minors entered into a partnership with Bachhulal. The partnership deeds of 1952 and 1953 were subsequent to the order of assessment and they contain only self-serving statements and they cannot, in the absence of any evidence, sustain the plea of earlier partnership. Indeed, the guardians were only appointed for G the properties situated within the jurisdiction of the District Judge, Jaora, and they could not act as guardians in respect of the properties outside the said jurisdiction. If they were acting as partners with Bachhulal, their names would have been mentioned either in the accounts or in the relevant documents pertaining to the business. The conflicting version given by the assessee in regard to person H or persons who actually represented the family in the partnership in itself indicates the falsity of the present version. It must, therefore, be held that the Court guardians did not enter into a partnership with Bachhulal.

But, Venkatlal became a major on December 13, 1949, *i.e.*, during the accounting year 1949-50. On October 17, 1951, an application for registration was received by the Income-tax Officer

signed by Venkatlal and Bachhulal who are shown as partners representing their respective joint families. The return of income submitted along with the application for registration was signed by Venkatlal on August 29, 1951. After Venkatlal became a major, there was no obstacle in his representing his branch of the family in the partnership. Indeed, it was conceded in the High Court that there was a partnership from December 13, 1949, when Venkatlal attained majority. Having regard to the said circumstances and the concession, we must hold that from December 13, 1949, the business was carried on in partnership between Venkatlal, representing his branch of the family, and Bachhulal, representing his branch of the family.

In the result we set aside that part of the finding of the High Court holding that the partnership business was carried on by the representatives of the two families after the death of Nandlal, but confirm the finding to the extent that such a partnership came into existence only after December 13, 1949. In this view, we answer the two questions referred to the High Court as under:

(1) For the assessment year 1950-51 the status of the assessee was that of a firm within the meaning of s. 16 (1)(b) of the Income-tax Act, 1922.

(2) The Tribunal misdirected itself in law in reaching the conclusion that the parties could not be regarded as partners.

In the result the appeals are dismissed. But as the respondent failed in its main contentions, the parties will bear their own costs in this Court.

Appeals dismissed.