

(1978) 04 PAT CK 0008

In the Patna High Court

Case No : AFOD No's. 386 and 409 of 1967

Kumar Krishna Rohatgi and Others and India Electric Works Ltd.

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 17-04-1978

Acts Referred:

Bankers Books Evidence Act, 1891 — Section 4
Companies Act, 1956 — Section 292
Contract Act, 1872 — Section 127, 2
Evidence Act, 1872 — Section 34
Negotiable Instruments Act, 1881 (NI) — Section 64

Citation : (1979) PLJR 122

Hon'ble Judges : Nagendra Prasad Singh, J;B.P. Jah, J

Bench : Division Bench

Advocate : R.S. Chatterjee and H.R. Das, in AFOD No. 386 of 1967 and K.D. Chatterjee and Chunni Lal, in AFOD No. 409 of 1967, for the Appellant; K.D. Chatterjee, Chunni Rai, Ramnandan Prasad, Rajendra Kishore Prasad, R.S. Chatterjee, H.R. Das and K.K. Ghosh, for the Respondent

Judgement

N.P. Singh, J.—The appellants in these two appeals were defendants in a money suit which had been filed on behalf of the Bank of Bihar Ltd. (hereinafter to be referred to as " the bank ") for a decree of Rs. 1,82,728.99 along with interest pendente lite and future.

2. According to the respondent-bank, on March 5, 1947, M/s. Indian Electric Works Ltd. (hereinafter to be referred to as " the company "), defendant No. 1, which is appellant in F.A. No. 409 of 1967, approached the bank for a loan of rupees five lakhs for the purpose of its business and a sum of rupees five lakhs was advanced to it. The company executed a promissory note for rupees five lakhs in favour of the bank. The promissory note used to be renewed from time to time and the defendant-company used to make payments towards the amount advanced to it. Shri Binay Krishna Rohatgi, who was the father of appellants Nos. 1 to 6 and husband of appellant No. 7 in F.A. No. 386 of 1967, guaranteed the

repayment of the aforesaid loan by executing guarantees in favour of the bank. On April 24, 1953, again a promissory note for Rs. 2,50,000 was executed by the company and the aforesaid Shri Binay Krishna Rohatgi executed a guarantee for that amount. On June 23, 1956, the company again renewed the pronote for Rs. 1,50,000 (Ex. 1c), which was the amount due against it, and Shri Binay Krishna Rohatgi executed a guarantee for the repayment of the said loan (Ex. 3b). Finally, on June 23, 1959, the last pronote was renewed by the company for an amount of Rs. 1,62,000 (Ex. 1d), agreeing to pay interest thereon at the rate of 7 1/2 per cent, per annum. Shri Binay Krishna Rohatgi again executed a guarantee for that amount in favour of the bank (Ex. 3c). This amount was, however, not paid by the company and ultimately the bank filed the money suit in question on May 12, 1962. Till that date the total dues including interest was at Rs. 1,82,728-99. Along with the plaint, the details of the transactions from 1947 up to 1962 were also annexed. As on the date of the suit the aforesaid Shri Binay Krishna Rohatgi was dead, his heirs, who are appellants in F.A. No. 386 of 1967, were impleaded as defendants Nos. 4 to 16.

3. Written statements were filed on behalf of the company as well as on behalf of some of the heirs of Shri Binay Krishna Rohatgi. The defence of the company in a nutshell appears to be that the managing director of the defendant-company had no authority to execute the pronote (Ex. 1d), in the absence of a resolution duly adopted by the board of directors authorising the managing director to borrow Rs. 1,62,000, and, as such, it was not binding on the defendant-company. The heirs of Shri Binay Krishna Rohatgi, the guarantor, have questioned their liability in respect of the transaction in question primarily on the ground that the said guarantee was offered by Shri Binay Krishna Rohatgi in his individual capacity and it cannot be enforced against his heirs who were neither party to the transaction in question nor had any concern with the same. At the trial, parties produced documents and examined witnesses in support of their respective contentions.

4. The learned subordinate judge, on a consideration of the materials on the record, came to the conclusion that the company is liable to repay the loan in question. He also held that Shri Binay Krishna Rohatgi had executed the letter of guarantee (Ex. 3c), whereby on default by the principal debtor, he took upon himself the liability to pay the sum of Rs. 1,62,000 with interest thereon and in such a situation, his liability was co-extensive with the liability of the principal debtor, and as such, his heirs cannot be absolved from that liability. On that finding, he passed a decree against the company (defendant No. 1) as well as against the heirs of Shri Binay Krishna Rohatgi, i.e., defendant Nos. 4 to 10 and 12 to 16. In the appeals filed before this court the aforesaid findings have been challenged on behalf of the appellants in the two appeals on the question of fact as well as on the question of law.

5. The relevant portion of the promissory note dated June 23, 1959 (Ex. 1d), is as follows ;

" On Demand we jointly and severally promise to pay the Bank of Bihar Ltd. or order at Patna or Calcutta the sum of rupees one lakh sixty-two thousand only for value received with interest at 3 1/2 per cent, over the Reserve Bank of India rate with a minimum of 7 1/2 per cent, per annum with monthly rests."

6. This was signed by the chairman of the company. It also bears the signature of one Shri Anandi Lall Poddar as the director of the company. I propose to first deal with the question as to whether in the facts and circumstances of the present case the company is liable to repay the amount in question.

7. Learned Advocate-General appearing on behalf of the company submitted that as the pronote (Ex. 1d) was executed by the chairman of the company without there being a resolution of the board of directors authorising him to execute the said pronote, the company is not liable to pay the amount in question. In that connection, learned Advocate-General drew our attention to the earlier pronotes which were executed on February 7, 1950 (Ex. 1), on February 3, 1953 (Ex. 1a), on April 24, 1953 (Ex. 1b) and on June 23, 1956 (Ex. 1c), as well as to the two resolutions of the board of directors dated February 23, 1953 (Ex. 9c), and April 4, 1956 (Ex. 9b), in support of his contention that the board of directors had passed resolutions authorising the managing director of the company to borrow the specified sum as loan from the bank and authorising him to execute necessary documents as required by the bank. It appears that the resolution dated February 23, 1953, is in respect of the aforesaid pronote which was executed on February 3, 1953 (Ex. 1a), and the resolution dated April 4, 1956, is in respect of the pronote which was executed on June 23, 1956 (Ex. 1c). No similar resolution has been produced in respect of the pronote in question which was executed on June 23, 1959 (Ex. 1d). Now, the question is as to whether, in the absence of a resolution authorising the person who executed the pronote in question, or due to non-production of any such resolution even if it may be in existence, it can be held that the bank is not entitled to realise the amount in question. In this connection, learned Advocate-General made reference to Section 292(1)(c) of the Companies Act, 1956, hereinafter referred to as " the Companies Act ", and submitted that there must be a resolution of the board of directors authorising the managing director to borrow any amount from the bank or any other company. Sections 291 and 292 of the Companies Act specify the power of the board of directors while managing a company. It places certain restrictions on the power of the managing director. In the present case, there is no dispute that the initial loan of rupees five lakhs was taken after a resolution by the board of directors of the company. From the account book, a copy whereof has been produced on behalf of the bank, it appears that from time to time payments were made by the company and after every three years a new pronote was executed for the balance amount. On June 23, 1959, the total amount due to the bank, as shown in the account of the bank, was about Rs. 1,62,000 and the managing director of the company executed the pronote in question for that amount on behalf of the company. The original pronote bears the seal of the company as well. D.W. 1, who is the law clerk of the company,

has stated that to his knowledge, there was no resolution of the year 1959, by which Shri Anandi Lall Poddar, who has executed the pronote in question, has been empowered to execute the same or renew it. The minutes book containing the resolution of the board of directors of the company for the year 1959 has not been proved and marked as an exhibit in the case. Perhaps, it was only filed and later withdrawn from the record of the case. In my opinion, in such a situation, on the statement of D.W. 1 only, it will not be proper to infer that there was no resolution by the board of directors authorising the managing director to execute the pronote in question. Even if it is assumed that there is no resolution, in my view, the right of the bank to realise the amount which it has advanced to the company cannot be defeated on this ground. It is not the case of the company that Shri Poddar, its managing director, had executed the pronote in question in his personal capacity, rather, it is almost admitted that he had executed the pronote in question in favour of the bank on behalf of the company. After the execution of the pronote in question, a receipt had been granted on behalf of the company saying that it had received from the bank a sum of Rs. 1,62,000, on account of consideration money of pronote executed by them in favour of the bank dated June 23, 1959. This has been marked Ex. 2a. In such a situation, it is not open to the company to say that the managing director of the company was not duly authorised to execute the pronote in question. Any defect, for which the company (sic) of the bank for realisation of the amount in question. This aspect of the matter has been considered in the cases of *T.R. Pratt (Bombay) Ltd. v. E. D. Sassoon & Co. Ltd.* [1936] 6 Comp Cas 90 (Bom) and *Shri Kishan Rathi Vs. Mondal Brothers and Co. (Private) Ltd. and Another*, , it was held that under the general principle of law when an agent borrows money for a principal without the authority of the principal, but if the principal takes benefit of the money so borrowed or when the money so borrowed have gone into the coffers of the principal, the law implies a promise to repay. In that connection it was further observed that there appears to be nothing in law which makes this principle inapplicable to the case of a joint stock company and even in cases where the directors or the managing agent had borrowed money without there being authorisation from the company, if it has been used for the benefit of the company, the company cannot repudiate its liability to repay. The aforesaid view of Kania J. of the Bombay High Court expressed in connection with a liquidation proceeding was also affirmed by a Bench of that court, on appeal, and it was pointed out by Beaumont C.J. that distinction has to be drawn between the cases where the borrowing is ultra vires the directors and not ultra vires the company and in such cases the money could be recovered in an action for money had and received. The aforesaid judgment was also affirmed by the Privy Council in the case of *T.R. Pratt (Bombay) Ltd. v. M. T. Ltd.* [1938] 8 Comp Cas 137 (PC). In the case of *Shri Kishan Rathi Vs. Mondal Brothers and Co. (Private) Ltd. and Another*, , Section 292 of the Companies Act was itself considered in connection with a dispute as to whether there was a resolution by the board of directors empowering the director to take loans. It was pointed out that in such a situation the dispute being in respect of an internal management, the onus was on the

company to prove that the director had no authority to borrow and any such violation shall not defeat the bona fide claim of the creditor against the company because the creditor can assume that all requirements of internal management have been complied with.

8. It was then submitted that Shri Anandi Lalj Poddar, who executed the pronote in question, had not executed the said pronote as the managing director of the company, but only as chairman and the chairman of the company had no such power. In my opinion, this submission is against the pleading of the company itself. In para. 7 of its written statement it has been stated that the managing director of the company had no authority to execute the pronote in the absence of a resolution duly adopted by the board of directors authorising the managing director to borrow Rs. 1,62,000. Thus, it is admitted that on the relevant date Shri Anandi Lal Poddar was also the managing director of the company and he executed it in that capacity. Witness No. 3 examined on behalf of the company (D.W. 3) has stated that Binay Babu, who was the managing director of the company, was ill in the year 1959, and, as such, Anandi Lal Poddar, the chairman of the company, began to look after the business of the company. In view of the statement made in the written statement, it is not open to the company to urge that the pronote in question was not executed by the managing director of the company. Accordingly, I hold that, in the facts and circumstances of the case, the company is liable to pay the amount in question which had been advanced to it by the bank and the learned subordinate judge has rightly held that the company cannot repudiate its liability in respect of the transaction in question.

9. So far as the appeal on behalf of the heirs of Shri Binay Krishna Rohatgi, the guarantor, is concerned, learned counsel appearing for the appellants has challenged the judgment and decree of the court below on several grounds. While disputing the liability of the appellants in question, it was also urged that, in the facts and circumstances of the present case, the company itself was not liable to pay the amount in question. Learned counsel urged that in view of Section 64 of the Negotiable Instruments Act, 1881, the promissory note in question should have been presented to the company by the bank for payment, and, as in the present case merely a notice was given by the bank to the company, it will not be deemed to be a presentation within the meaning of that section and the suit could not have been filed. Section 64 of the Negotiable Instruments Act requires the holder of a pronote to present it for payment to the maker thereof and it further provides that in default of such presentment the parties thereto are not liable thereon to such holder. But, in that very section, there is a clause in the nature of a proviso which says that " Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is sufficient ". Admittedly, the demand was made by registered letters which have been proved and marked as Exs. 5 series. The bank has also produced a letter dated June 23, 1959, of the company forwarding the pronote in question and waiving the right of the presentment under the Negotiable

Instruments Act. It has been marked as Ex, 7. In view of this document by which the right of presentment was waived, it cannot be urged that the suit was premature because the pronote was not physically presented for payment before filing of the suit.

10. Learned counsel then submitted that as the guarantee (Ex. 3-c) was without consideration, the agreement between Shri Binay Krishna Rohatgi and the bank itself was void in view of Section 25 of the Contract Act. In this connection, it was urged that even the pronote itself was executed without there being any consideration for the same, and, as such, it cannot be enforced in law. Section 2(d) of the Contract Act provides that when at the desire of the promisor, a promisee or any other person does or abstains from doing or promises to do or abstain from doing something, such actor abstinence or promise is called a consideration for the promise. It was submitted that although a pronote was executed on June 23, 1959, actually 110 amount was paid on that day by the bank. In my opinion, this argument is misconceived. From the copy of the ledger of the bank it appears that about Rs. 1,62,000 was shown to have been deposited on the basis of the pronote and then shown to have been withdrawn the same day. In the eye of law this will amount to payment of Rs. 1,62,000 by the bank to the company on the basis of the pronote in question. This will be deemed to be a consideration within the meaning of Section 2(d) of the Contract Act. In the case of Ibrahim Mallick Vs. Lalit Mohan Roy, Rankin J. (as he then was) held in a more or less similar situation that the fresh promise in respect of the old debt would be valid and enforceable and it is not hit by Section 25 of the Contract Act. The same will also be the consideration for the guarantee by Shri Binay Krishna Rohatgi. Section 126 of the Contract Act provides that a contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. Section 127 of that very Act says that anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. As it will be deemed that the bank had advanced on that day Rs. 1,62,000 to the company, that will be an act done for the benefit of the company and can be held to be sufficient consideration for giving the guarantee.

11. Even if it is assumed that as nothing was advanced to the company at the time of the execution of the promissory note and guarantee, the agreements in question were in respect of a past debt, still the two agreements cannot be held to be without consideration. u/s 2(d) of the Contract Act not only some act done for the promisor but even abstinence on the part of the promisee will be deemed to be a good consideration. But for the execution of the pronote the bank in the usual course would have filed the money suit, as the pronote which was executed in the year 1956 was getting time-barred. In the case of Alliance Bank Ltd. v. Broom [1864] 2 Drew. & Sm. 289 ; 62 ER (II) 631, it was held ;

" It appears to me, that when the plaintiffs demanded payment of their debt and, in consequence of that application, the defendant agreed to give certain security,

although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance ; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action ; but the circumstances necessarily involve the benefit to the debtor, of a certain amount of forbearance, which he would not have derived if he had not made the agreement."

12. In the case of Fullerton v. Provincial Bank of Ireland [1903] AC 309 (HL), after making reference to the Alliance Bank's case [1864] 2 Drew. & Sm. 289 ; 62 ER (II) 631, at page 313, it was observed that there need not be an arrangement for forbearance for any definite or particular time; it can be inferred from the surrounding; circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. In such a situation any document executed will be deemed to be for consideration, the consideration being abstinence on the part of the creditor. In the case of Glegg v. Bromley [1912] 3 KB 474 (CA), at page 491, it was observed;

" I think that where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security, and I cannot think that this inference is rebutted by the fact that the reason why he asks for further security is his desire to obtain a benefit for himself at the expense of another creditor who may shortly be in a position to take the subject-matter of the proposed security in execution."

13. The same view was expressed in the case of Miles v. New Zealand Alford Estate Company [1885] 32 Ch D 266 (CA) and in the case of Anant Krishna Modak Vs. Sarasvatibai Padmanabh Shetti, . On behalf of the appellants, however, reliance was placed on the cases of Pestonji Manekji Mody Vs. Bai Meherbai, , and Prem Singh and Another Vs. State of Rajasthan and Others, . In my opinion, the aforesaid two cases are of no help to the appellants. In the facts and circumstances of the case, it has to be held that the pronote was executed by the company for consideration. If the pronote was executed for consideration, then, in view of Section 127 of the Contract Act, the letter of guarantee will also be deemed to have been executed for consideration, because anything done for the benefit of the principal debtor, shall be sufficient consideration to the surety for giving the guarantee (Kali Charan v. Abdul Rahman AIR 1918 PC 226 ; 50 1C 651).

14. Learned counsel then urged that the bank has filed the suit in question

basing its claim on the aforesaid promissory note dated June 23, 1959, and Sri Binay Krishna Rohatgi had never guaranteed repayment of the amount covered by that promissory note ; by his letter of guarantee dated June 23, 1959 (Ex. 3c), he had only guaranteed repayment of any amount which may be found to be due on the basis of the account of the company with the bank. In the plaint it has been stated in detail as to how the company opened its account in the year 1947 and a sum of rupees five lakhs was advanced and a pronote was executed by it in favour of the bank for that amount. It has been further stated as to how from time to time some payments were made and roughly after every three years a fresh pronote was executed on behalf of the company for sums standing due on that date and fresh letters of guarantee were executed by Shri Binay Krishna Rohatgi and as to how ultimately, the pronote and letter of guarantee in question were executed. In my opinion, the suit is for the realisation of the amount which, had been advanced by the bank as loan to the company. The pronotes were executed from time to time by the company making itself liable to repay the amount shown as dues in the account of the bank. Apart from that it is not correct to urge that Shri Binay Krishna Rohatgi had only guaranteed to discharge the liability of the company in respect of the amount which had been withdrawn by it from the account of the bank. He had guaranteed to discharge the liability of the company in respect of the amount which had been advanced to it through the account or on the basis of a pronote. The relevant portion of the letter of guarantee is as follows:

"1. That on default of the constituent to discharge or pay you on demand all his/their liabilities or moneys already advanced or to be advanced paid or incurred by you on such account, or at any time or from time to time advanced paid or incurred to or for the use or accommodation of or on the credit of the constituent (whether on current, cash credit, pronote and/or overdraft or letters of credit accounts, or for bills discount or in the form of liabilities against bills, bills of exchange, promissory notes and/or other negotiable securities drawn, accepted or endorsed by him or otherwise howsoever) I/we shall pay you on demand and discharge all such moneys and liabilities together with all interest, discount, commissions and other banking charges, law and other costs, charges and expenses, which may be or become payable in connection therewith, and my/our liability to pay and discharge the same shall, on such default of the constituent, be co-extensive with that of the constituent provided nevertheless that my/our liability on this guarantee shall not exceed in the whole the sum of Rs. 1,62,000 (Rs. one lakh sixty-two thousand) which you will be entitled to realise from me/us with interest at the rate of 7 1/2 per cent, per annum from the date on which demand for payment shall have been made by you upon me/us. "

15. From a bare reference to para. 1 of the letter of guarantee (Ex. 3c) it is obvious that the guarantor had guaranteed on default of the constituent to discharge or pay the bank the liabilities of the company, advanced to it at any time whether on current, cash credit, pronote or overdraft or in the form of

liabilities against bills, promissory notes or other negotiable securities, drawn, accepted or enforced by the company.

16. It was also submitted that the pronote (Ex. 1d) as well as the letter of guarantee (Ex. 3c) have not been proved in accordance with law. In that connection, our attention was drawn to the evidence of witness No. 3 examined on behalf of the plaintiff (P. W. 3), who has proved the two documents, saying that they bear the signature of Shri Anandi Lall Poddar and Shri Binay Krishna Rohatgi, respectively. About the pronote, he has stated that it was executed in his presence. It was submitted that this witness had no occasion to be familiar with the signature of Shri Binay Krishna Rohatgi as he was a clerk in the bank at Patna. There is no merit in this submission. P.W. 3 has stated in his evidence that he had seen Shri Binay Krishna Rohatgi executing the earlier pronotes of the years 1953 and 1956, as managing director of the company, which have been proved by him and have been marked as Exs. 1a, 1b and 1c. As such, he was a competent witness to prove the signature of Shri Binay Krishna Rohatgi over the letter of guarantee (Ex. 3c). Apart from that, both the documents, i.e., the pronote (Ex. 1d) and the letter of guarantee (Ex. 3-c) have been exhibited without objection. This was checked up with reference to the list of exhibits of the court below. Having not raised an objection in the court below it is not open to the appellants to challenge the mode of proof of these documents before this court.

17. Learned counsel then urged that the bank has simply annexed a copy of the accounts for the period from 1947 up to the year 1962, along with the plaint and none has proved the entries in the ledger of the bank in accordance with the requirement of Section 34 of the Evidence Act which requires that every entry in the books of account regularly kept in the course of business to be proved before a claim can be based on the basis of those entries. It is settled law that if the claim against a defendant is based on the entries in the books of account maintained by the plaintiff, it has to be proved that such books of account were kept in the regular course of business and then the relevant entries have to be proved on behalf of the plaintiff. But that procedure is not to be followed in the case of banking companies for whom there is a special law of evidence known as the Bankers' Books Evidence Act, 1891. Section 4 of that Act is as follows:

" Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

18. In the instant case, this formality has been complied with. A certified copy of the ledger of the bank containing the relevant entries for the period between 1947 and 1962, certified to be a true copy of the transaction by the manager of the bank has been filed. It has been marked as Ex. 8. It may be mentioned that this document has also been marked as an exhibit without objection.

19. According to the appellants merely on the basis of these entries no liability can be saddled against the company or the guarantor, Shri Binay Krishna Rohatgi because Section 34 of the Evidence Act says in unmistakable terms that such entries by themselves shall not be sufficient evidence to charge any person with liability. But, in the instant case, the entries are not the only evidence on behalf of the bank. I have already pointed out that on behalf of the bank, apart from the entries in its account book, reliance has been placed on the pronote (Ex. 1d) which was executed on behalf of the company, as well as on the receipt for Rs. 1,62,000 (Ex. 2a), which was granted on behalf of the company, saying that the aforesaid amount has been received from the bank. The witnesses examined on behalf of the bank have also stated about the advance of the amount to the company and about its having operated the account in question. Accordingly, I hold that the liability of the company for repayment of the loan in question, and in case of default by the company the liability of Shri Binay Krishna Rohatgi for repayment of the loan is established.

20. Now, another question which is important for the purpose of the appeal filed on behalf of the heirs of Shri Binay Krishna Rohatgi is as to whether the liability of Shri Binay Krishna Rohatgi can be enforced even against his heirs who have been impleaded as defendants to the suit after his death. Learned counsel appearing for those heirs, however, did not challenge that the liability which had been undertaken by Shri Binay Krishna Rohatgi, will amount to a debt in the eye of law. But he made reference to Article 290 of Mulla's Principles of Hindu Law and submitted that in the instant case there is no evidence or allegations that Shri Binay Krishna Rohatgi had incurred the liability in the nature of a debt either for family purposes or for his own personal benefit, so as to pass on the liability to his heirs even after his death. In my opinion, whatever may be said about following the property which were joint family properties at the time of the death of Shri Binay Krishna Rohatgi, there cannot be any doubt that the properties which have passed on his death to his heirs can certainly be followed while enforcing the liability under the guarantee. Apart from that, so far as the present case is concerned, Shri Binay Krishna Rohatgi in para. 2 of the letter of guarantee (Ex. 3c) had stated: " in the event of my dying or becoming under disability the liability of my executors, administrators or legal personal representatives and of my estate shall continue until the expiration of three calendar months" notice in writing given to you by such legal personal representatives to determine this guarantee ". In that view of the matter the bank can enforce the guarantee given by Shri Binay Krishna Rohatgi against the properties which have devolved after his death on his heirs. It cannot be enforced .either against the personal properties of his heirs or their shares in the joint family properties in view of the clear and unambiguous terms of the letter of guarantee itself. Learned subordinate judge had not dealt with this aspect of the matter and has passed a decree jointly against the company as well as the heirs of Shri Binay Krishna Rohatgi.

21. Lastly, it was urged that the learned subordinate judge could not have

passed a decree for Rs. 1,82,728.99, the amount claimed in the plaint, so far as these appellants are concerned. This amount includes Rs. 1,62,000 plus the interest in respect of that amount since the date of the execution of the pronote and till the filing of the suit. According to the appellants, Shri Binay Krishna Rohatgi had undertaken by the guarantee to pay in the event of default by the company an amount not exceeding in whole the sum of Rs. 1,62,000 with interest at the rate of 7 1/2 per cent, per annum " from the date on which demand for payment shall have been made " by the bank to him. From the plaint it appears that on some of the heirs of Shri Binay Krishna Rohatgi notices of demand were served in 1960-61, on different dates ; about some it is the admitted position that it was not served at all. In such a situation, the liability to pay interest shall arise only if it is proved that demand for payment had been made on them so as to make them liable to pay interest. As in the present case no demand has been made on some of the heirs, and demand has been made on different dates on the remaining heirs which may lead to a lot of complications, I direct that under the terms of the guarantee the demand will be deemed to have been made against all the heirs of Shri Rohatgi since the date of the filing of the suit. The stipulated rate of interest shall run from this date. In that view of the matter, they shall not be liable to pay interest for the period from the date of the execution of the pronote to that of filing of the suit. Learned counsel appearing for the bank had to concede that under the terms of the guarantee Shri Binay Krishna Rohatgi or his heirs cannot be made liable to pay interest prior to the demand having been made on them for repayment of the amount which was payable by the company and for this period only the company will be liable in terms of the pronote itself. Accordingly, while affirming the judgment and decree of the learned subordinate judge so far as the company is concerned, I modify the said judgment and decree in respect of the appellants in F.A. No. 386 of 1967 on two points. Firstly, the heirs of Shri Binay Krishna Rohatgi shall be liable to pay in accordance with the terms and conditions of guarantee an amount of Rs. 1,62,000 along with interest with effect from the date of the filing of the suit, and secondly, that in execution of the decree only such properties can be followed which have devolved upon these appellants after the death of Shri Binay Krishna Rohatgi.

22. In the result, F.A. No. 409 of 1967, filed on behalf of the company is dismissed, whereas F.A. No. 386 of 1967, filed on behalf of the heirs of Shri Binay Krishna Rohatgi is allowed in part to the extent as indicated above. The parties shall bear their own costs.

Jha, J.

23. I agree.