1943 *Present :* **de Kretser and Jayetileke JJ.**

NATIONAL BANK OF INDIA, LTD., Appellant, *and*
ARTHUR FERNANDO, Respondent.

340—D. C. Colombo, 39B.

Contract—Mistaken belief regarding subject-matter—Not induced by other party—Want of assent—Rescission.

Where a party enters into a contract under a mistaken belief regarding the subject-matter of the contract, which was not induced by the other party to the contract, it is not open to him to set up such mistake as a want of assent on his part in order to rescind the contract.

APPEAL from a judgment of the District Judge of Colombo.

N. Nadarajah, K.C. (with him *D. W. Fernando*), for plaintiff, appellant.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *Cyril E. S. Perera*), for defendant, respondent.

Cur. adv. vult.

June 7, 1943. JAYETILEKE J.—

In this case the plaintiff, the National Bank of India, Limited, sued the defendant, the executor of the will of Mr. F. L. Goonewardene, deceased, for the recovery of a sum of Rs. 19,795.07 and interest and for a hypothecary decree over the following shares :—

913 shares in the Mayen (Ceylon) Tea & Rubber Co., Limited.
300 shares in the Mulhalkelle Tea Company, Limited.
2,130 shares in Walker & Greig, Limited.
150 shares in the Meall Mor (Ceylon) Estates, Limited.

After the institution of the action some of the shares were sold with the consent of the defendant and the amount due to the plaintiff at the date of trial was Rs. 8,989.80.

The defendant pleaded that the plaintiff had agreed to take a transfer of the shares held by it as security in full satisfaction of its claim and therefore this action could not be maintained. This plea was upheld by the trial Judge and the plaintiff's action was dismissed with costs. The appeal is from that order.

[1] *3 Balasingham's Reports 53.*

The material facts are these:—The deceased had a banking account with the plaintiff. On February 15, 1928, he arranged for an overdraft for Rs. 25,000 by pledging to the plaintiff the following shares:—

1,143 shares in the Mayen (Ceylon) Tea & Rubber Co., Limited.
2,130 ordinary shares of Rs. 10 each in Walker & Greig, Ltd.
10 shares in the Mahawila Estates Company, Limited.

He granted to the plaintiff a letter of lien (P 7) and a promissory note for Rs. 25,000 (P 8).

On March 13, 1928, and June 7, 1928, he arranged for further overdrafts for Rs. 4,000 and Rs. 11,000 respectively by pledging to the plaintiff the following shares:—

408 shares in the Uva Highlands Tea Company, Limited.
222 shares in the Onnagala Tea Company, Limited.
600 shares in the Mulhalkelle Tea Company, Limited.
500 shares in the Meall Mor (Ceylon) Estates, Limited.
150 shares in the Fairlawn Estates, Limited.

He granted to the plaintiff two promissory notes for Rs. 4,000 (P 9) and Rs. 11,000 (P 10).

He died in England leaving a last will which was proved in testamentary proceedings No. 6,537 of the District Court of Colombo and probate was granted to the defendant on February 20, 1934. The account with the plaintiff was continued by the defendant who in the years 1935, 1936, 1937, and 1938 wrote P 1, P 2, P 3, and P 4 confirming the correctness of the amount due by him to the plaintiff.

In 1937, the London Office of the plaintiff instructed Mr. Scroggie, the local Manager, to get a valuation of the shares pledged to the plaintiff. Mr. Scroggie sent for Mr. Parsons of Messrs. Bartleet & Company, a firm of share brokers, and discussed with him the question of selling or retaining the shares, and he was advised that, from a market point of view, the shares ought to be held till the beginning of the following year.

A note of the interview dated July 2, 1937, was read in evidence marked P 12. This document shows that at that interview Mr. Scroggie got the impression that the estate of the deceased had no other assets besides the shares that were pledged to the plaintiff.

In August, 1939, Mr. Harrison, the Accountant of the Bank, was appointed Manager, and he sent for the defendant to discuss the deceased's affairs. At an interview he suggested to the defendant to transfer the shares in the name of the plaintiff's nominee and to give a letter authorising the plaintiff to sell the shares at its discretion. The correspondence that followed shows that there was a misunderstanding as to the proposal made by Mr. Harrison to the defendant at the interview.

On August 26, 1938, Mr. Harrison wrote to the defendant a letter (D 2) requesting him to sign and return to him nine blank transfer deeds which he enclosed, together with a cheque for Rs. 150, being the approximate

cost of transfer, to enable him to arrange for transfers to be executed in favour of the plaintiff's nominee of the following shares :—

2,130 shares of Walker & Greig, Limited.
150 shares of Meall Mor (Ceylon) Estates, Limited.
300 shares of Mulhalkelle Tea Company, Limited.
913 shares of Mayen (Ceylon) Tea & Rubber Co., Limited.

The evidence does not show that these were the only shares held by the plaintiff at that date.

On August 27, 1938, the defendant wrote D 3 in reply to D 2 stating that his offer was to transfer "the shares" in full settlement of the debt. We do not know what he meant by "the shares" because admittedly there were other shares pledged to the plaintiff besides those referred to in D 2.

On August 29, 1938, Mr. Harrison wrote to the defendant informing him that he could not accept a transfer of "the shares held by the plaintiff as security for the overdraft" in full settlement of the amount due to the defendant. The first paragraph of the letter seems to indicate that Mr. Harrison understood the defandant's offer to be to transfer the shares held by the plaintiff as security for the overdraft in full settlement of the plaintiff's claim.

On August 30, 1938, the defendant wrote D 5 regetting the misunderstanding and stating that there was no point in transferring the shares to a nominee of the plaintiff as he had hitherto been acting as its nominee.

Now we come to six important letters, D 6, D 7, D 9, and D 11 written by Mr. Harrison to the defendant and D 8 and D 10 written by the defendant in reply to D 7 and 9 on the interpretation of which this appeal turns.

The question that arises is whether the correspondence taken as a whole indicates that the parties had concluded a binding contract or not.

The plaintiff's position is that it made an offer which was retracted before it was accepted. It is well settled law that, until both parties are agreed, each has a right to withdraw from the negotiation.

In D 6, dated August 31, 1938, Mr. Harrison wrote "We beg to acknowledge receipt of your letter of 30th instant and to assist you in the matter we are placing before our London Office your offer to transfer the shares standing in the name of the above deceased, into the name of the nominee of this Bank, in consideration of our accepting such shares in full settlement of the amount due to us. We shall revert to the matter on receipt of their reply".

The defendant did not reply to this letter though the proposal was in respect of "the shares standing in the name of the deceased".

In D 7, dated September 23, 1938, Mr. Harrison wrote 'With reference to previous correspondence, we beg to advise that our Head Office are agreeable to the arrangement whereby, in consideration of your transferring into the names of the Bank's nominees the shares standing in the name of the above deceased, we are to accept such transfer in full discharge of the indebtedness of the late Mr. Goonewardene to this Bank. You informed us that, in consideration of our acceptance of your offer,

you would execute transfers in respect of the shares in question and we shall be glad if you will now return to us, duly signed, the nine transfer deeds which accompanied our letter to you of the 26th ultimo. On receipt of these and a remittance for Rs. 150, being the approximate cost of transferring the shares, we shall arrange for transfers to be executed. Should the transfer fees not amount to Rs. 150, we shall, of course, refund to you any balance".

By "the shares standing in the name of the deceased" in D 6 and D 7 Mr. Harrison meant the shares held by the Bank as security for the overdraft but the defendant seems to have had some doubt as to what Mr. Harrison meant as will appear from D 8 which was written in reply to D 7.

In D 8, dated September 24, 1938, the defendant wrote "I thank you for your letter of the 23rd instant offering to accept a transfer of the following shares in full settlement of the debt due by the deceased :—

2,130 shares of Walker & Greig, Limited.
150 shares of Meall Mor (Ceylon) Estates, Limited.
300 shares of Mulhalkelle Tea Company, Limited.
913 shares of Mayen (Ceylon) Tea & Rubber Co., Limited.

The Uva Highlands have been sold. I am prepared to pay the cost of the transfers. Please confirm this arrangement and kindly let me know the balance due as at date".

It can clearly be inferred from the language of D 8 that there were other shares standing in the name of the deceased besides those referred to in it. The defendant was willing to transfer to the plaintiff only the shares mentioned in D 8 and he wanted the matter to be clarified.

He regarded D 7 as an "offer to accept" a transfer of the shares referred to in his letter D 8. He wanted Mr. Harrison to "confirm the arrangement" by which he obviously meant that Mr. Harrison should let him know whether his interpretation of the offer was correct.

He was perhaps doubtful whether Mr. Harrison "would confirm the arrangement" and that may be the reason why he wanted to know the balance that was due. He did not return the draft deeds or send a cheque to meet the expenses of the transfers as requested in D 7.

On receipt of D 8 Mr. Harrison concluded that the estate of the deceased had other assets. He says that right through the negotiations he was under the belief that the estate of the deceased had no other assets. There is no evidence that that belief was in any way induced by the defendant and if on the strength of that belief he entered into a binding contract it is not open to him to set it up as a want of an assent on his part.

In *Menzies v. Menzies* [1], Lord Watson said :—"He cannot rescind unless his error was induced by the representations of the other contracting party, or of his agent, made in the course of negotiation and with reference to the subject-matter of the contract".

There is a stream of judicial authority, from *Cox v. Prentice* [2] in 1815 down to *Pope & Paarson v. The Buenos Ayres New Gas Company* [3] in 1892, to the effect that a mistake merely inducing assent is insufficient to

[1] *(1893) 20 Rettie. 108 H. of Lords.*
[2] *(1815) 3 M. and S. 344.*
[3] *(1892) Times Law Rep. Vol. 8, p. 858.*

nullify assent as it is not a mistake as to the subject-matter of the contract, but as to a collateral fact, on which only one's motive in contracting is based.

In his reply (D 9), dated September 26, 1938, Mr. Harrison wrote "Before we give our final release to the Estate, we shall be glad if you will formally confirm that, apart from the shares in question, there are no other assets belonging to the Estate".

This letter seems to indicate that at that time the only shares which the plaintiff held as security were those referred to by the defendant in D 8. In the course of his evidence Mr. Harrison said that some of the shares had been sold but did not give particulars of the sales.

On September 28, 1938, the defendant wrote D 10 in reply stating that the question whether the Estate had other assets does not arise.

On the same date, in D 11, Mr. Harrison wrote "As, however, it now appears that there are further assets, our agreement to the proposal is withdrawn".

The resulting position is this :—Mr. Harrison informed the defendant by D 7 that his Head Office was agreeable to accept "the shares standing in the name of the deceased" in full satisfaction of the plaintiff's claim. The defendant treated D 7 as an offer and thought that the language used by Mr. Harrison might catch up the shares which had not been pledged to the plaintiff. To clear up the matter he wrote D 8 on receipt of which Mr. Harrison withdrew his offer.

The correspondence does not show that there was an acceptance by the one party of the proposal made by the other and it cannot therefore be said that there was a binding contract between the parties.

I would accordingly set aside the judgment of the District Judge and direct that decree be entered for the plaintiff as prayed for in paragraphs 1 and 2 of the prayer of the petition of appeal.

DE KRETSER J.— I agree.

Appeal allowed.