1948 *Present :* **Nagalingam J.**

ORR, Petitioner, *and* THE DISTRICT JUDGE, KALUTARA, Respondent

In the Matter of an Application for a Writ of Mandamus *on the District Judge, Kalutara.*

Mandamus—*Court's refusal to issue process in a civil case—Plaintiff's remedy—Civil Procedure Code, section, 46.*

Where a District Judge refused to issue process in a civil case on the ground that the plaint which was filed was wanting in necessary particulars—

Held, that, as the Judge had not refused to exercise jurisdiction, a writ of *mandamus* could not be issued.

APPLICATION for a writ of *mandamus* to compel the District Judge of Kalutara to accept a plaint and order process on the defendants.

Petitioner in person.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 23, 1948. NAGALINGAM J.—

This is an application by the petitioner for a writ of *mandamus* to compel the District Judge of Kalutara to accept a plaint filed by him and to order process on the defendants.

The petitioner tendered a plaint on August 7, 1947, claiming a sum of Rs. 20,000 as damages against certain defendants, all of whom were either advocates or proctors practising in the Kalutara Courts, on the ground of their having committed " grave and reckless acts of conspiracy, fraud, treachery and forgery practised on plaintiff ". On receipt of the plaint, the Judge scrutinized it, as he had to do, and made order on August 12, 1947.

" The plaint is prolix. It does not appear to me to disclose a cause of action. I therefore reject it ".

It is unnecessary to dwell at length on the legality of this order, but it will suffice to observe that under section 46 of the Civil Procedure Code, where a plaint is in the opinion of the Court prolix or does not disclose a cause of action the Court cannot reject it but must return it for amendment either then and there or within a fixed time. The proceedings in the District Court, however, were carried to stages beyond.

On August 13, 1947, the petitioner filed a motion contending that he could amend his plaint at any time before trial and applied for the issue of summons on the defendants. It would thus be apparent that the plaintiff regarded the order made on August 12, 1947, as one which tantamounted to an order directing the amendment of the plaint. On this motion, the Court amplified its earlier order by ruling that the plaint was defective for the reason that, to quote the words of the order,—

> " it offends against section 46 (2) (*a*), (*b*) and (*d*) Civil Procedure Code. No summons can in the circumstances be ordered unless the plaint is amended to comply with the provisions I have referred to."

This order clearly shows that the Judge had directed his mind to the question whether the plaint presented conformed to the provisions of section 46, and having formed the view that it did not, he made an order which was perfectly legitimate and in accordance with the provisions of the law.

In compliance with this order the petitioner filed on August 27, 1947, an amended plaint and on the following day, in regard to it the Court made order as follows :—

> " The amended plaint is still defective in the particulars referred to by me in my order of August 20, 1947, and I reject it."

The various orders made by the Judge establish quite clearly that he exercised the functions appertaining to his office, and having considered the matters relevant to the question before him he reached the conclusion that the plaint offended against express provisions of the law and in the exercise of the discretion vested in him by section 46 of the Code made orders which give rise to this application. That the Judge declined to exercise jurisdiction it is impossible to assert in the circumstances.

In this state of facts the question arises whether a writ of *mandamus* can be said to lie. The petitioner contends that it does. He relies upon certain rulings of this Court and argues that on a refusal of process the only remedy is by way of a writ of *mandamus*. That proposition is true if properly understood. An examination of the rulings relied upon, which relate to Magistrates' Courts, reveals that the true principle to be deduced from them is that where a magistrate refuses to entertain a plaint declining to hear any evidence a writ of *mandamus* would lie, but not where the magistrate exercises jurisdiction and thereafter refuses to issue process. I need only refer to the case of *Application for a Writ of Mandamus on the Police Magistrate, Matara*,[1] where Bertram A.C.J. referring to the earlier cases enunciated the doctrine as follows :—

> " It is settled by a series of decisions of this Court, namely, *Punchihewage Baba Singho v. Don Lewis Wijesingne Patabendirala*[2], *Norman v. Perera*[3] and *Ramanathan Pillai v. Ramanathan Pillai*[4], that the remedies given by section 337 of the Criminal Procedure Code are alternative remedies, but that the remedy by *mandamus* only lies where a Magistrate has actually refused to exercise jurisdiction. It cannot be said in this case that the Magistrate refused to exercise jurisdiction inasmuch as he actually heard the complainant and decided the case upon his evidence."

Generally, in regard to the issue of a writ of *mandamus* to inferior Courts, Shortt in his well known work sets out the proposition at page 295 as follows :—

> " Wherever granted (*i.e.*, a Writ of *Mandamus*) it is to compel the exercise of a jurisdiction which the inferior tribunal possesses but refuses to exercise, never to compel the exercise of such jurisdiction in any particular manner."

It cannot be said in this case that the Judge refused to exercise jurisdiction, and sufficient has already been said to indicate that the Judge, far from declining jurisdiction, has with meticulous care and precision, examined the plaint and reached certain judicial conclusions. The writ, therefore, cannot in these circumstances issue.

The petitioner also submitted an argument based on considerations *ab inconvenienti*, namely that as the plaint had been rejected none of the defendants could have been named respondents to an appeal, and that as the law also prohibited the naming of a Judge as a respondent for an act done by him in his judicial capacity, no remedy lay by way of appeal, and there being no other method of obtaining redress the only remedy open to him was by an application for a writ of *mandamus*. The fallacy

[1] *(1918) 5 C. W. R. 225.*
[2] *(1886) 7 S. C. C. 201.*
[3] *(1900) 4 N. L. R. 85.*
[4] *(1909) 1 Cur. L. R. 29.*

underlying this argument is the assumption that to every appeal there should be a respondent named. *Ex parte* appeals with no respondents named therein are quite a common feature in our Courts. This argument too, therefore, has no merit in it.

In my opinion, the proper remedy for the petitioner was to have appealed from the order of the Judge within the appealable time, but not having done so he is even now not without a remedy if he wishes to pursue the matter further. Section 46 of the Code expressly enables a plaintiff whose plaint has been rejected to present a fresh plaint in respect of the same cause of action.

In view of the conclusions reached, the application of the petitioner fails and is dismissed with costs.

Application dismissed.