

**(2005) 07 MAD CK 0153**

**Madras High Court**

**Case No:** C.M.A. (N.P.D.) No. 766 of 1999

Bhuvaneswari

APPELLANT

Vs

Saraswathi Ammal

RESPONDENT

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**Date of Decision:** July 14, 2005

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22

**Citation:** AIR 2005 Mad 399 : (2005) 3 MLJ 626

**Hon'ble Judges:** R. Balasubramanian, J; Prabha Sridevan, J

**Bench:** Division Bench

**Advocate:** P. Valliyappan, for Sarvabhauman Associates, for the Appellant;

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### **Judgement**

R. Balasubramanian, J.

The respondent has been served. She is neither appearing in person nor has engaged any counsel. The plaintiff is before this Court challenging the order of remand passed by the lower appellate Court. Heard the learned counsel for the appellant.

2. The plaintiff went before the learned trial Judge in O.S. No. 166 of 1990 seeking a decree of prohibitory injunction restraining the defendant from in any way interfering with her such possession. Voluminous oral as well as documentary evidence was let in before the trial Judge. The trial Judge decreed the suit in favour of the plaintiff. The defendant appealed in A.S. No. 286 of 1996. The learned appellate Judge, after going through the entire materials placed on record, found that a need had arisen for the appointment of an Advocate Commissioner so that the property forming the subject-matter of the suit could be identified and with that view in his mind, passed the order of remand which is now under challenge.

3. We went through the judgment of the lower appellate Court. As already noted, enough oral and documentary evidence had been let in on the side of the plaintiff as well as on the side of the defendant. An order of remand cannot be for the mere

purpose of remanding a proceeding to the lower Court. It is governed by the provisions of the CPC commencing from O. 41, R. 22 onwards. The appellate Judge's view that in order to enable the parties to have the suit properties identified, an Advocate Commissioner had to be appointed and for that purpose, the suit must be remanded back to the trial Court, in our considered opinion, is not warranted on the facts of the case. If it is possible for the appellate Court to evaluate the evidence made available on record and come to its own conclusion one way or the other, then it is not open to the lower appellate Court to come to the aid of the parties for filling up a lacuna which is found wanting in the records.

4. In these circumstances, holding that the order of remand is wholly unwarranted, we set aside the judgment of the lower appellate Court. The lower appellate Judge is directed to dispose of A.S. No. 286 of 1996 on its own merits, after evaluating the entire evidence available on record, in a manner known to law, within a period of ninety days from the date of receipt of a copy of this order. Consequently, C.M.P. No. 9309 of 1999 is closed. No costs.