For these reasons, we think, the order of the Civil Court must be reversed and the case remanded for the hearing of the application rejected by such order.

1870. *November* 11. *C. M. S. A. No.* 116 *of* 1870.

Appeal allowed.

Appellate Jurisdiction. (*a*)

Special Appeal No. 442 *of* 1869.

SADAGOPA CHARIYAR.....*Special Appellant.*

RUTHNA MUDALI.....*Special Respondent.*

Land subsequently sold is liable for a debt for which the land was previously hypothecated.

1870. *November* 11. *S. A. No.* 442 *of* 1869.

THIS was a special appeal from the decision of E. F. Eliot, the Acting Civil Judge of Chittoor in Regular Appeal No. 1 of 1868, modifying the Decree of the Court of the District Munsif of Trivatbor in Original Suit No. 166 of 1866

Plaintiff brought this suit, stating that on the 10th April 1862, one Madapusi Varadiengar executed a mortgage bond to him for Rupees 200, hypothecating thereunder the nunjah lands belonging to him; that he (the said Varadiengar) died without putting him (plaintiff) in possession of the said lands; that the property left by the deceased was in the possession of the 1st defendant; that the 2nd defendant held the puttah for the said mortgaged lands and continues in the enjoyment of the same; and praying therefore that out of Rupees 302, in which is included the principal amount of Rupees 200 and interest Rupees 102, deducting Rupees 64-12-0, being the counter interest already paid, the balance of Rupees 237-4-0 may be recovered to him by means of the lands mortgaged.

The 1st defendant denied all knowledge of the execution of the plaint-bond to plaintiff by his brother Varadiengar, as well as of his signature, or that he ever obtained his (deceased's) property, and stated that the lands in dispute were mortgaged about ten years ago to the 2nd defendant who holds the same under a puttah issued in his name.

The 2nd defendant pleaded that the lands in dispute along with certain other lands were mortgaged to him by

(*a*) Present: Holloway and Innes, JJ.

1870. November 11. S. A. No. 442 of 1869.

Varadiengar, deceased, about ten years ago, who afterwards sold them to one Mamundur Varadiengar, who sold them to one Ruthna Mudali who discharged his (2nd defendant's) mortgage claim partly by payment in cash and partly by the sale of the lands Nos. 286 and 377 for Rupees 142-12-0, and that the said Ruthna Mudali was then put in possession of all the lands by the 2nd defendant, with the exception of the said two numbers.

The 3rd defendant, who was included as a party to this suit by order of the Court, denied the genuineness of the bond in question, and stated that previous to its alleged execution, the deceased Varadiengar had executed to the 2nd defendant three mortgage bonds, one for Rupees 238-8-0 on the 22nd June 1860, one for Rupees 64, and the other for Rupees 50 on the 27th July 1862; that the lands referred to in the plaint are in the enjoyment of the 2nd defendant who obtained a puttah for the same in 1862; that certain lands including those under mortgage, were sold by him (deceased Varadiengar) to one Mamundur Varadiengar under a deed of sale; that a portion of those lands measuring 3-2-12 cawnies was sold to him (3rd defendant) by the said Mamundur Varada Charry for Rupees 60 under a deed of sale, dated 19th May 1866; that ever since the mortgaged lands have been in his (3rd defendant's) possession; and that this suit is barred by the Statute of Limitation.

The issues were—

1st.—Whether or not the deceased Varadiengar executed the bond A in question to plaintiff? and

2nd.—Whether the property under mortgage can be made answerable for the amount thereof?

The District Munsif found both issues in favor of the plaintiff and pronounced a decree in his favor.

Upon appeal the Civil Judge delivered the following Judgment:—

The question to be determined in appeal is, whether in point of law preference is to be given to the plaintiff's claim or to the claim of 3rd defendant.

On the case coming up for hearing on appeal, neither party denied or admitted the genuineness of the documents

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produced by the other party, but both parties admitted the signature thereto to be genuine, and simply pleaded ignorance each of the other's documents. The question therefore resolves itself into the simple one of which claim has the legal preference. As far as simple priority of dates go, the plaint document which is dated 10th April 1862 as against the 3rd defendant's Sale-deed No. VI, dated 19th May 1866, must be considered the anterior document, but this need not necessarily give it a legal preference. The 3rd defendant's document, though dated 1866, is executed in satisfaction and discharge of mortgage claims on this land held by 2nd defendant since 1860, and it is with reference to this point that the question of law has to be decided. The claim by the 3rd defendant then is based on the plea of his being a *bonâ fide* purchaser for valuable consideration without notice, and necessarily the burden of proof rests with him to establish the innocency of such purchase. With reference to this, 3rd defendant's Vakil argues that in the plaint bond itself, dated 10th April 1862, the land is not held as security for the principal, but the only stipulation is that it is to be enjoyed on account of interest and redeemed on payment of principal, but which has not been carried into effect at all, as the plaintiff has never had the land in his possession according to stipulation, notwithstanding that the executor, Varadiengar, appears not to have died until 1865. On the other hand he says this land was mortgaged to 2nd defendant first of all under document I, dated 22nd June 1860, and again under document II, dated July 1862 on a further loan of money on these lands, and the land made over to the 2nd defendant and a puttah issued in his name as admitted by plaintiff himself. Afterwards under document III, the deceased Varadiengar sold this land to another Mamundur Vardiengar to discharge the mortgage claim of 2nd defendant, and he sold it to 3rd defendant under document IV, dated 19th May 1866 for 600 Rupees, which is registered, who satisfied the claim of 2nd defendant and was put in possession by him—hence he holds this sale to be valid and *bonâ fide* and not to be quashed; in support of which he refers to the decree of this Court in Original Suit 33 of 1866.

The plaintiff through his agent contended that the plaint document has preference by priority of date, and stated

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that although 2nd defendant's document is dated 1860, there is no proof that a puttah was given in that year, and that the puttah itself is dated 1862, and there is no proof of any enjoyment by 2nd defendant before then, and that this was collusion between deceased and first and 3rd defendants.

It is clear then that as far as the *bonâ fide* nature of the purchase of these lands by 3rd defendant for a valuable consideration is concerned it is sufficiently established in evidence to put it beyond all question, and the fact of the innocence of the purchase is also to be considered proved, as it has not been pleaded by plaintiff that notice was given, and this is denied by 3rd defendant, and there is nothing to show that the plaintiff was ever in possession of this land or exercised any right of enjoyment with regard to it by virtue of his alleged lien upon it either on account of interest according to the stipulation contained in his bond, or a security for the principal as now contended by him, or that he has preferred any claim to this land whatever up till now. It is evident, therefore, that if he ever had a claim upon this land, he has preferred to sleep over his rights than to take any active part in their enforcement.

For the foregoing reasons, the Court holds the purchase of this land by 3rd defendant to be a *bonâ fide* and innocent purchase, and that there are not any valid reasons for disturbing his possession thereof, and that a legal preference must accordingly be necessarily given to his claim, and therefore modifies the decision of the Lower Court and adjudges that the plaintiff do recover the amount sued for with costs, but not by means of the property mortgaged, but by means of any other property of the deceased Varadiengar that may be available for that purpose.

The plaintiff appealed specially to the High Court at Madras against the decree of the Civil Court for the following reasons:—

The mortgage document A is admitted to be genuine.

The mortgage of the property in dispute had taken place before the sale.

The plaintiff is entitled to recover the amount due to him by means of the property in dispute.

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Rangaiya Nayudu, for the special appellant, the plaintiffs.

Gould, for the special respondent, the 3rd defendant.

The Court delivered the following Judgments:—

HOLLOWAY, J.—In this case the only question is whether land subsequently sold is to stand as security for a debt for which the land was previously hypothecated.

After the decision at IV, H. C., 434, it is clear that this question must be answered in the affirmative.

This doctrine of hypothecation was found in Roman Law to create so much insecurity that guardians were directed to keep the pupils' money in the chest rather than lay it out upon such securities, and nearly all countries following the Roman Law have remedied the evil by the device of public hypothek books.

I should therefore have been better satisfied to have said that the right acquired by mere hypothecation is indeed a real right but not an absolute one. This was in effect said many years ago by the Supreme Court of Bengal (*Moat* 618, *contra* 637, *ib.*) There would be nothing inconsistent, as the judgment at page 440 seems to assume in so saying.

The reality and absoluteness of a right are perfectly distinct ideas. A real right is one of which a thing is the immediate object. Absoluteness is generally an attribute of reality, but it is not invariably so (*Sav. V. P.*, 26, *Unger I, p.* 518). On the other hand there are rights absolutely enforceable which are not real. The unfortunate phrase "*in rem*" has in this matter too much to answer for. There being a positive recent decision directly upon the point, I am of opinion that the land should be declared to stand as security for the sum found due and should be sold to satisfy it unless the 3rd defendant below pays that sum within three months of the date of this decree. I think that there should be no costs, but that each party should bear his own throughout.

INNES, J.—I concur in the judgment of Mr. Justice Holloway.

Appeal allowed.