

Unpublished Disposition
66 Mass.App.Ct. 1110
NOTICE: THIS IS AN
UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Ruth ROSENFELD,
v.
Surinder JOSHI, trustee.¹

No. 05-P-549. | June 6, 2006.

Opinion

***MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28***

*1 In 1969, the defendant, Surinder Joshi (Surinder), and her husband, Sewa Ram Joshi (Sewa Ram), purchased as tenants by the entirety a two-unit property located at 227 Winchester Street in Brookline (locus). In December, 1974, the plaintiff, Ruth Rosenfield, obtained a District Court judgment against Surinder, individually, in the amount of \$1,753.12, plus costs of \$18.48.² Rosenfield obtained an attachment against Surinder's interest in the locus and execution was recorded in the Norfolk County Registry of Deeds on December 31, 1974. In April, 1975, a sheriff's sale of Surinder's interest in the locus was conducted. Rosenfield purchased Surinder's one-half interest in the locus for an undisclosed sum. The sheriff's deed to Rosenfield was recorded on June 24, 1975. At the time, Rosenfield took no further action regarding the locus or the underlying debt.

Between 1975 and the proceedings below, title to the locus was transferred several times for estate planning purposes. On September 2, 2002, Sewa Ram died, leaving Surinder as sole trustee and beneficiary of the Joshi Living Trust, which was then rendered irrevocable.

Rosenfield took no action until October 30, 2002, when she filed a petition in Probate Court for partition of the locus,³ which the parties stipulated was worth between \$850,000 and \$1,000,000 in May, 2004 (A.234). The parties waived an evidentiary hearing and stipulated to facts (A.232–234), which the judge adopted (A.100, 101–111). In her defense, Surinder challenged the validity of the attachment of her interest in 1974 and the sheriff's sale of one-half the interest in the locus in 1975 on two grounds: inadequate notice and by operation of the pre-1980 common law of tenancy by the entirety. (A.135–142)

As to Surinder's attack on the attachment and sale, the Probate Court judge found the evidence “scant” due to the passage of time (A.108) and also concluded that the proper forum for such a challenge would be in the District Court whence the final judgment issued. See G.L. c. 236, § 51. Accordingly, the judge concluded that Rosenfield had standing to bring her petition for partition. Proceeding on the petition, the judge subsequently determined that Rosenfield's interest in the locus was a matter of equity and concluded that it was less than one-half of the property's value to which she claimed under the sheriff's deed. Surinder was ordered to pay Rosenfield \$75,706.62 (the amount of the original debt plus interest) in return for Rosenfield's execution of a deed to

Surinder .⁴ This appeal followed. Surinder, in turn, cross-appealed from the calculation of damages.

Because we conclude that the 1974 attachment and the subsequent 1975 sheriff's sale of Surinder's interest in the locus were invalid considering the pre-1980 common law tenancy by the entirety, we do not reach the parties' arguments concerning the partition and calculation of damages.⁵ Under that tenancy, Surinder could not convey a valid interest in the locus as her rights to the property were merged with those of her husband "as an inseverable part of the marital unity." *Schwachman v. Meagher*, 45 Mass.App.Ct. 428, 432 (1998). Nor could her interest be attached, levied upon, or acquired by sale, as Rosenfield attempted here. See *Licker v. Gluskin*, 265 Mass. 403, 404-407 (1929); *West v. First Agric. Bank*, 382 Mass. 534, 543 & n. 16 (1981); *Schwachman v. Meagher*, *supra*. Moreover, absent evidence of

Surinder's husband's assent to the attachment, execution, levy, and sale of the locus, the resulting sheriff's deed was void under the law in effect at the time. Rosenfield thus acquired *no* legal interest in the locus.⁶

*2 Consequently, because Rosenfield never had title in the locus, she lacked standing to bring this action for partition in 2002, and the Probate Court judge had no jurisdiction under G.L. c. 241, § 1, to rule on it. See *Rolland v. Hamilton*, 314 Mass. 56, 60 (1943).⁷

The judgment is reversed, and a new judgment shall enter dismissing the petition.

So ordered.

Parallel Citations

848 N.E.2d 447 (Table), 2006 WL 1543967 (Mass.App.Ct.)

Footnotes

- 1 Of the Joshi Living Trust.
- 2 In hearing before a Probate Court judge, counsel represented that the debt was for a real estate broker's commission (A.241-242). On appeal, Surinder does not challenge the validity of the 1974 District Court judgment.
- 3 The petition originally named as respondent Sewa Ram Joshi in his capacity as trustee of the Joshi Living Trust. Thereafter, Surinder Joshi was substituted as respondent.
- 4 The judge also ordered Surinder to pay the commissioner \$5,161.80 for her services (A.111).
- 5 Surinder addressed the pre-1980 common law in her sur-reply brief. At oral argument, the parties argued the issue and counsel for Rosenfield was given leave to respond to Surinder's sur-reply brief within ten days, which he did.
- 6 Rosenfield argues that the burden rests with Surinder to present evidence that Sewa Ram did not assent to the attachment, and that absent such evidence, the Probate Court judge was correct to treat the District Court judgment as final relative to Rosenfield's legal interest in the locus. (Response to sur-reply br. at 6-8) We disagree. By law, Surinder's interest in the locus was protected at the time of the attachment and sheriff's sale. Given that Rosenfield now seeks to enforce her purported rights under the sheriff's deed, it is her burden to come forward with evidence that Surinder was not afforded such protection, and consequently, that Rosenfield has a valid legal interest that would permit her to seek partition. The District Court judgment notwithstanding, on this record, such evidence was not forthcoming.
- 7 Rosenfield also argues that Surinder's voluntary destruction of the tenancy by the entirety in 1984 "cured" any defect that may have existed. Rosenfield, however, cites no case law or statute for this proposition, nor are we aware of any legal cure, statutory or otherwise, that is designed to correct a defect, as here, that is based on a want of title. See, e.g., *Sheriff's Meadow Foundation, Inc. v. Bay-Courte Edgartown, Inc.*, 401 Mass. 267, 269-270 (1987).

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