

THE LEGAL NATURE OF AGRICULTURAL LAND DIVISION AGREEMENTS WITH REFERENCE TO THE PRINCIPLE OF REGISTRATION AND RELIANCE IN THE CADASTRE

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Abstract

In this paper, the author analyzes the legal nature of the contract on the physical division of agricultural land, which is the basis for acquiring ownership rights to real estate created by division. The contract is concluded in the form of a notarial document, which proves the resulting legal relationship and represents the assumption of the accuracy of the data specified in the contract. The burden of proving the falsity of the data is borne by the one who disputes its veracity. The notary public has the obligation to check whether the transaction is permitted and to warn the parties of the legal consequences of the transaction. The purpose of real estate records is to provide reliable evidence of ownership or other rights to real estate. In the practice of Serbia, it has been shown that there are errors in the cadastre records, which is contrary to the general principles of cadastre management, but leads to errors in the contract. In the case of a dispute for the annulment of the document, the contractors would have to prove separately that the facts were untruthfully stated in the document or that it was drawn up improperly, due to an error in the cadastre. To achieve the purpose of the principle of reliability of registration in the cadastre, the creators of the regulations, as well as those who apply them, are responsible.

Key words: *Physical division, contract, constitutivity, principle of reliability of registration in the cadastre, errors in the cadastre.*

Introduction

Rights and obligations between market participants can arise on various grounds. In all national regulations, contractual relations are mainly regulated by dispositive norms, that is, norms whose form and content the contracting parties can contract, change at will and adapt to their interests (Rajnović 2021). Obligations between business entities arise by concluding contracts,

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in various forms or informally, when agreement is reached on the essential elements of the contract. The contract is the work of the parties. That power of legal subjects to create, change or cancel binding legal relations of their own free will is based on the generally accepted principle of autonomy of will *or freedom of contract*.

Co-ownership is the property right of several persons on the same thing that is not physically divided. The shares of co-owners are aliquoted, ideal, undetermined. Shares of co-owners are determined by fractions or percentages. If the size of the co-ownership shares is not precisely determined, there is a presumption that the shares are equal. Co-ownership is created in various ways: a gift contract, sale, exchange, will, court decision, etc. The co-owner has the right to dispose of his co-owned part. If he wants to sell his co-ownership share, he must first offer it to the other co-owners with the right of first refusal. The co-owner has the right to demand the division of things at any time, except when the division would be to the detriment of other co-owners, unless otherwise stipulated by law.

A contract on the physical division of agricultural land is a contract on the basis of which the (exclusive) right of ownership is acquired on real estate that is created by division. The contract is concluded in the form prescribed for real estate contracts, which have changed over time (Act on Public Notaries). The Law on Obligations stipulates that a contract that is not concluded in the prescribed form has no legal effect, if something else does not follow from the purpose of the regulation that determined the form. The Law on the Basics of Property Relations stipulates that the right to property is acquired according to the law itself, on the basis of a legal transaction, by inheritance, by a decision of a state authority, etc. When ownership of real estate is acquired on the basis of a legal transaction, it can be acquired and lost only by registration in the real estate cadastre, which means that the registration in the cadastre, on that basis, has a constitutive character.

Metodology and data sources

The information and data used for the research in this paper were obtained by analyzing the case of the division of agricultural land. Information related to data entered in the cadastre, errors in entered data, are the result of years of research by the author, analysis of examples from practice and publicly available information via the Internet and other means of information.

The main goal of this paper is to show the legal nature of the contract on the division of agricultural land and the importance of the reliability of registration in the real estate cadastre. The research was conducted on the Serbian market in the last three years. In order to collect and evaluate relevant information, the following methods were used:

- case analysis, which refers to the division of agricultural land,
- interviews with 100 owners of agricultural land as a descriptive method, the subject of which is the research of fees paid for drainage by JP Voda Vojvodina, because it was noticed that there are thousands of cases of improperly determined fees in the territory of Vojvodina,
- the comparative method enabled the author to reach generalizations or new conclusions by comparing the same or similar phenomena or establishing similarities and differences between them,
- the synthesis method was used to summarize the conclusions, while giving recommendations for the application of good rules in this area.

From the analysis of all collected data and the fact that Serbia is predominantly a rural country, which is important for the entire economy, the author came to the knowledge that the real estate cadastre does not function reliably and efficiently. Considering the importance of the real estate cadastre, it is necessary to improve the operation of the cadastre as soon as possible, for which the state is responsible. Also, there are evident differences in the regulations related to the legal nature of the partition agreement.

Results with discussion

Division of co-ownership

In order to precisely determine which part of the real estate belongs to each co-owner, it is necessary to divide the property. The right to demand the division of things does not expire, and any waiver of the right to division is null and void. When the co-owners decide to divide the real estate, the question of the form of the division agreement arises. In judicial practice and doctrine, (complete) physical division can be done in two ways:

- division in which the co-owners acquire exclusive ownership of the immovable property being divided, in proportion to the ideal parts of each of them and

- division in which the co-owners perform a physical division of the property out of proportion to the corresponding co-ownership shares.

There is an understanding that the first (partition) does not represent turnover and the second represents a partial turnover, a gift or a sale, depending on whether compensation is given for the difference or not. The division of things can be physical or civil. First of all, it is determined whether it is possible to physically divide the real estate so that separate parcels are formed from it in proportion to the shares owned by the co-owners. If this is not feasible, the court will order a civil division, which means the sale of the real estate and the distribution of the compensation received in proportion to the shares of the co-owners. If the item does not sell on the first try, the items are sold below market value on the second try. The court makes a decision to carry out the division by selling things if physical division is impossible or is possible only with a significant reduction in the value of things.

The proposal submitted to the court for the division of real estate must include all co-owners. If, during the procedure, the participants reach an agreement on the conditions and method of division, the court enters that agreement into the minutes, making sure that the settlement settles all disputed issues between the co-owners, as well as the real rights of other persons on the subject of the division. If the participants do not reach an agreement on the division, the court is obliged to listen to the participants, present the necessary evidence, and if necessary, expert testimony, and based on the results of the entire procedure, the court makes a decision on the division of common property, taking care to satisfy the justified demands and interests of the co-owners.

Legal nature of the agreement on the division of agricultural land

In judicial practice in Serbia, opinions related to the nature of the contract on the division of the co-ownership community are divided, sometimes contradictory. This well illustrates the position according to which the partition agreement does not constitute a real estate transfer agreement, so its validity and validation do not require conditions from the law on real estate transfer, and that: to be concluded in the form of a notary public (solemnization) certificate and to be certified by a notary public on whose territory the immovable property is located (Act on the Transfer of Immovable Property). If an oral agreement on partition has been executed, the conditions for its validation are evaluated based on the provisions of the law on obligations, which stipulates that an agreement for the

conclusion of which a written form is required is considered valid even if it was not concluded in that form if the contracting parties have fulfilled their obligations, in whole or in most part, unless something else obviously follows from the purpose for which the form is prescribed. (Supreme Court of Serbia, 1996; Bulletin of the District Court in Belgrade, 2006; Ćosić, F., 1960). At first glance, the form is not required, but if the court is talking about convalidation, it is a formal contract, and there was no other regulation that stipulated the form except for the law regulating the sale of real estate at the time of the decision. (Hiber, D., 1998)

The provision of the Law on State Survey and Cadastre has a different attitude, which stipulates, among other things, that a private document, i.e. a document on a legal transaction, in order to be eligible for registration in the real estate cadastre, must be drawn up in written form with the signature of the contractor certified, if a different form documents is not prescribed by a special law. Also, it is stipulated that the contract must contain a statement on the registration permission, which is neither conditional nor time-bound (*clausula intabulandi*), and if the registration permission statement is not included in the contract, it can be given in a separate document with the signature of the person making the statement certified. It follows from the above that the partition agreement is a document that is the basis for the registration of real rights in the real estate cadastre, but that as a private document, it can be in the form of signature verification.

Before drawing a conclusion about the necessary form of the partition agreement, the purpose of the form must be taken into account. Bearing in mind the importance of the real estate cadastre, it could be said that the form of the partition agreement is necessary above all for the protection of public interests, and that the provisions on the form of the contract relating to the transfer of real estate should be applied analogously to all types of partition agreements and should interpret them in connection with other provisions of the law regulating real estate transactions. Furthermore, the provisions of the Family Law prescribe that the agreement on the division of common property acquired in marriage is concluded in the form of a notarized (solemnized) document. When all the above circumstances are taken into account, it can be concluded that the contract on the physical division of real estate represents:

- basis for the creation of new immovable properties (i.e. physical parts of the same immovable property) as well as

- basis for acquiring (registration) of ownership rights on that new immovable property in the immovable cadastre.

The legal question is whether it has a translational and at the same time constitutive effect, that is, whether the participants in the subdivision acquire ownership of the new object or whether it only has a declarative effect, so that it only determines the already existing property right. In support of the first understanding, according to which we are talking about the acquisition of the exclusive right of ownership, and thus the transfer, is the position that no co-owner was the exclusive owner of any piece of immovable property and that he acquires exclusive ownership based on the partition agreement and registration in the cadastre. In support of the second understanding, according to which there is no turnover, but that it is only a declaration, the position is that each co-owner was already (in proportion to his share) the owner of each piece of immovable property that is the subject of division, and thus of the newly created immovable property. The author believes that, according to the law governing the real estate cadastre, the declarative effect of the contract is in question. This is supported by the tax regulations that regulate the division of co-ownership in the tax sense.

Tax treatment of contracts on the division of agricultural land

In practice in Serbia, the derived question of the application of tax rules to the contract on the division of immovable property has arisen: is it a transfer of absolute rights or not, has there been a taxable case to which the rules on taxation of transfer of absolute rights on immovable properties are applied? The legislator solved the dilemma by deciding to exempt that case from taxation (Law on Property Taxes). Payment of tax on the difference (disproportion) allows the attitude that in the basic part that transaction is treated as a real estate exchange contract.

The principle of trust in the real estate cadastre

Historically speaking, the purpose of real estate records has always been to provide reliable proof of ownership and other rights to real estate. Viewed from that aspect, the goal of the legator is to ensure the safety of legal transactions, the safety of the holders of existing rights on chattels, but also of conscientious third parties who appear as potential holders. (Cvetić, R. 2015). The principles of real estate registration should represent the most general

rules on which it is based, i.e. should represent the conceptual framework that is the basis for its arrangement (Vodinelić, V. 2014). At the same time, there are great differences in legal theory when determining which rules should be given the most general character, especially in the case when the legislator does not reserve this role for himself. The character of the most general rules of land registry law in our legislation is given by the principles of registration, trust, legality and priority order (Orlić, M., Stanković, O., 1996).

The principle of trust is the most important principle in legal transactions. It guarantees that the data in the cadastre is accurate, true, reliable and up-to-date. The main legal consequence of this is that no one can bear adverse consequences for relying on the correctness of cadastral data. The principle of trust guarantees legal certainty to all economic entities.

Legal theory talks about the operation of the principle of trust in a double sense. This means that a conscientious acquirer can rely on the veracity of the data entered in the real estate cadastre and the completeness of the cadastre as a public register of real estate rights. In doing so, the question arises as to whether the assumptions about the truth and completeness of the register are irrefutable or rebuttable. The principle of reliability protects only the conscientious acquirer, i.e. the one who justifiably believed that the data entered in the real estate cadastre are correct. Conscientious persons cannot have negative consequences even in a situation where the written state differs from the actual state (Orlić, M., Petrović, D., 1976).

Considering the long-term unsatisfactory state of real estate records in Serbia, the principle of reliability of registration in the real estate cadastre has been seriously questioned. In practice, numerous cadastre omissions are evident. It is common knowledge that in the observed period there were about 10,000 complaints from owners of agricultural land on decisions on the determination of drainage fees only in the territory of AP Vojvodina. The mentioned fees are paid according to the decision issued by JP Vode Vojvodina and are calculated on the basis of data provided by the cadastre on the area of land owned by each taxpayer. In the observed period, the number of complaints from taxpayers indicates the number of cadastre errors, so many administrative disputes, costs for taxpayers that will ultimately be borne by whoever made the mistake. Out of 100 owners of agricultural land, interviewed for the purposes of the research of this work, it was determined that in 46% of cases there was a cadastral error in the submitted information about the area of owned land. In addition to the

above, numerous omissions were caused by taking over old non-existent mortgages from the land registers, then omitting personal data, such as registration numbers, addresses, etc. owner of the property.

Example of a contract on the division of agricultural land

Three persons became co-owners of 1/3 of plot number 118, a first-class field with an area of 4ha 47a and 12m², based on the probate decision of the court from 1978. After that, in 2016, the Disposition, the division of the said field, was made at the request of the three co-owners by the surveyor. It was then realized that, without any prior information, the said plot was divided in the cadastre into a plot of the first class sub-number 1 and a plot of the second class sub-number 2. By disposition, the plot was divided into three cadastral plots numbered 118/1, 118/2 and 118/3. The competent cadastre office carried out the described division, but in such a way that the co-owners of each plot were all three contractors. The cadastre continues to make a mistake and unjustifiably divides each of the three parts of the plot into first and second class plots, even though this is physically and legally impossible. In this way, all three co-owners become co-owners of six ideal parts of the plot, namely three parts of the first class plot and three parts of the second class plot.

The contractors certified the contract on the division of the field with a notary public. Each of these parcels, due to a cadastre error, was divided into two parcels, one of which is of the first class and the other of the second class. The area of the divided property corresponds to the previous co-ownership shares. The division of immovable property resulted in new plots, marked with different numbers. After the division, the contractors have a difficult road to rectify the mistake.

Conclusion

Real estate is one of the most important elements of the social and economic system of Serbia, and that is why it is in the interest of the state and individuals to keep accurate and systematic records of them. The main interest of the state is the possibility of insight into all transactions related to real estate, first of all for legal security, but also for other reasons, in which we primarily count public revenues. Individuals, on the other hand, are most interested in fast and easy real estate transactions, up-to-date and accurate records, so that they can be sure that their property is legally protected and that the possibility of negligent behavior is excluded.

When it comes to the form of the contract on the physical division of co-ownership, it could be concluded that the form is necessary above all for the protection of public interests. It is a legal question whether the agreement on the division of immovable property has a constitutive effect or only a declarative effect, so that it only determines the already existing right of ownership. In support of the declarative effect, the law that governs the cadastre and the tax regulations that regulate the division of co-ownership in the tax sense speaks.

It is obvious that there is a need to have a complete and comprehensive public register, which would consistently apply the principles of registration and trust in the register. Therefore, it is necessary to eliminate the shortcomings that occur in practice. The creators of the regulations, as well as those who implement them, are responsible for that. Also, it is necessary to review the practice of notaries public, because if the contract on the physical division of immovable property is of a declarative nature, in that case only the signature is notarized by a notary public, and constitutiveness is acquired by entering it into the real estate cadastre.

Changes in legal rules and institutions should follow the development of social relations and the demands arising from that development, but at the same time they must be imbued with the principle of legal certainty, which must constantly follow the law in its dynamics and which is an inevitable attribute of every legal order. Therefore, the principle of reliability must not be questioned. The basic specificity of the state is that, with its policies that it creates and implements, it should define the key issues of the rules of the game for all market participants.

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