POSITION AND PROTECTION OF THE INTEREST OF THE HOLDER OF THE RIGHT OF PREFERRED PURCHASE OF AGRICULTURAL LAND

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Abstract

The right of pre-emption is a way of acquiring property rights on real estate, but it is essentially different from acquiring property rights on other grounds. The right of pre-emption is established by law primarily with the aim of not shredding the plots unnecessarily, so the owner of agricultural land during the sale is obliged to offer the agricultural land to the person who has the first pre-emption. If that person is not interested in buying agricultural land, the seller can sell it to a third party, but not on more favorable terms. Failure to comply with this legal obligation leads to a sanction that can be reflected in the annulment of the contract of sale with a third party who is not the holder of the right of pre-emption. Although this obligation is established by law, in practice there are frequent cases of playing the right of pre-emption of natural and legal persons, while the same right of the state is respected, which puts other holders of pre-emptive rights in an unequal position. In this paper, the authors analyze the position of the holder of the right of pre-emption and and seek to find solutions to this problem.

Key words: *pre-emption right, purchase offer, land seller, pre-emption right holder, position of pre-emption right holder, protection of pre-emption right.*

Introduction

Business entities, natural and legal persons, during their business activity must own or have in the possession, the necessary means of labor, movable and immovable property and rights. Also, in the course of business, economic entities plan their life, development and growth, by the realization of planned investment projects or the cessation of performing a certain activity and the disposal of their basic means of work. In these transactions, there is a turnover

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of goods and services, by the will of economic entities, in which contractual relations are created, or outside the will of the contractor, on the basis of law or other facts established by law.

Social life, everywhere in the world, is regulated in order to protect certain goods and interests, personal and property. A general norm affects the participants in a legal relationship by imposing certain behavior on them (by obliging them) or by authorizing them to conduct certain behavior. This means that the subjective right of a certain person represents an objectively recognized authority (authority) of an individual (subjects) to take the acts necessary to satisfy their material or immaterial interests (Stanković, O., Vodinelić, V. 2007).

This means that e.g. the owner of the thing has the authority to hold the thing, to reap the fruits of it, to use it, to dispose of it, excluding from this sphere of power the state and all third parties. The right of ownership is absolute, it acts towards all third parties and implies the stated three rights: usus, fructus and abusus. In that sense, the injured person, e.g. may demand compensation from the responsible person, the buyer is authorized to ask the seller to hand over the items that are the subject of the purchase, the seller from the buyer the payment of the price, etc.

Thus, the sale of agricultural land is the right of one party, the owner, to sell his property. But unlike the rule that he can "exclude the government and all third parties", this right is somewhat limited by the right - the holder of the right of pre-emption, to be offered agricultural land first. His right is the obligation of the seller of agricultural land. At the same time, the law does not make a difference whether the holder of the right of pre-emption is the state or any other legal or natural persons.

When researching this issue, the authors noticed that in practice, the right of pre-emption of the state is treated in a different, more favorable way than the right of pre-emption of other persons. In this regard, they want to show the current situation in practice, the rights of the holder of the pre-emption and the obligations of the seller, as well as the role of the state in regulating these property relations.

The right to property - a natural right

The right to property is a natural right (ius naturale). Natural law is a set of objective, unchangeable and eternal rules of human behavior that are similar in nature to natural laws (Vasić, R., Jovanović M., 2020). Its origin has been viewed dif-

ferently in theory and practice: some theorists believe that it arises from nature itself (John, L., 2003), and the scientific direction, rationalism, has developed the opinion that it arises from human reason. In this regard, it is stated that every man can, using only his own, given by nature reason, understand its rules and act in that way. For them, Roman law was a ratio scripta-written reason, a legal system in which eternally valid principles were largely contained.

Natural law is above the existing, positive law and its source is human nature and the nature of the universe (nature), and it can only be discovered by human reason. The school of law, Jusnaturalism, starts from the belief that, as is the case in nature where certain laws apply (eg the forces of gravity), both the individual and society are subject to them. Such natural laws, the natural law by which society is governed, exist independently of our will and consciousness. The task of all subjects, including the state, is to respect the principles of that ideal, natural right. Such a natural right is considered the right of ownership (Avramović, S., Stanimirović V., 2019). Applying this attitude to the sale of agricultural land, such a natural right has the seller, but also the holder of the right of pre-emption, regardless of whether it appears in the person of the state, or any other person.

So, the idea of natural law is woven into the very foundations of our civilization, it is a permanent feature of European legal culture. Moreover, the whole history of legal philosophy until the beginning of the 19th century was the history of solving only one issue - the question of the source and content of natural law. The term itself, naturally, represents the aspiration to discover immutable, objective and lasting principles or rules of human behavior, rules that are independent of human choice, will and consciousness, just what natural laws are. The properties of natural law are finality and inevitability - they must be respected as they are (D'Antrev, A., 2001. If a person violates them, he must be held accountable. Therefore, the two basic theses of all natural law theories are:

- in addition to the positive, man-made and transitory law, there is an order of legal norms whose basis is in the unchangeable and eternal nature,
- this order is above the rank of positive law and better in terms of values (Pierre, B., 1990). Positive law is a means by which the state fulfills its task and it is obligatory only to the extent that it is harmonized with natural law.

The pre-emption right of agricultural land

The right of pre-emption is a way of acquiring the right of ownership of real estate, regardless of whether the seller has the will to sell to the holder of the right of pre-emption. The right of pre-emption is an imperative rule established by law during the sale of agricultural land (Milošević, Lj., 1970). The goal of the right of first refusal to purchase agricultural land is to prevent the fragmentation of plots and enable the creation of larger estates on which more modern models of cultivation can be applied, and thus achieve greater property benefits for the investor and the wider community. In addition to the above, since Serbia is dominated by small farms of an average of 5.4 ha (Agriculture in the Republic of Serbia I, 2013 ;, Agriculture in the Republic of Serbia II, 2013), without economic strength, such farms can find a way to competitiveness in value-added products, such as organic production (Kovačević, V., 2021), for whose products there is a growing demand in the developed world. Ecologically sustainable agriculture that wisely uses natural resources is necessary for the production of food for the population and the quality of life of people and at the same time cares for nature, while preserving biodiversity (Cico, S., Rajnović, Lj., Bošnjak, I., 2021).

If there are several owners whose plots border on the plot sold by the seller, the right of priority in the realization of the right of pre-emption has the owner of the neighboring land whose land is mostly bordered by the agricultural land of the seller. If there are more such persons, and the border lines are equal, the problem is solved in such a way that the owner of the neighboring land whose area is the largest has the right of pre-emption. Also, when exercising the right of pre-emption, the owner of the neighboring land is behind the co-owner of the land that is the subject of sale, so the seller has the obligation to first offer the land to the co-owner, and only then to other persons who have the right of pre-emption. After the co-owner, follows the state (Law on Agricultural Land) and then the person whose agricultural plot borders the seller's plot.

The seller's offer should contain all the essential elements about the subject of the sale, the price and other important conditions of the sale, if any. In order to realize the general principle of contract law, the offer must be made in writing, sent by registered mail so that the right of pre-emption can be realized, which is a possible condition for the sale of real estate to a third party in a lawful manner. In one case from case law, the seller sent a written offer to the owner of the neighboring agricultural land to the address listed in the public books, as the address where the house of the recipient of the offer is located. However, the seller did not know that the holder of the right of pre-emption did not live at that address and that he rarely came to the same address,

so he did not receive the offer. The court took the position that, since the defendant (seller) before concluding the disputed contract, by registered mail offered the holder of the right pre-emption to sell his real estate and that the shipment was returned to him with an indication that the potential recipient did not ask for it, that the defendant , could not have known that he did not live at the address indicated in the public books, so he fulfilled his legal obligation with the described offer. The court pointed out that the harmful consequences of non-delivery must be borne by the plaintiff because he did not change his address in the public books, which he was obliged to do, and thus provided the conditions for his delivery to the address where he actually lives.

Failure to act in accordance with this legal obligation leads to a sanction which is reflected in the possibility of annulling the contract of sale with a third party who is not the holder of the right of pre-emption (Stanković, O., Orlić, M., 1999). This obligation is established by law. Thus, the co-owner of the real estate, when selling his co-ownership part, has the obligation to offer the same for sale to other co-owners (Law on Real Estate). It is possible that there are several co-owners of one property. Then, the law prescribes that the co-owner with a larger co-ownership share has the priority in exercising the right of pre-emption. If the co-owners have the same parts, the co-owner of the real estate is free to decide to whom he will sell his co-ownership part.

How the law protects persons who have the right to preemptive purchase of land

From the described legal provisions arises the obligation of the seller of agricultural land to first inform the holders of the right of first refusal about the sale and to offer the purchase of the land. If he does not act in a descriptive manner, the law prescribes the possibility of annulling the contract of sale in court proceedings, which are initiated by the injured party, the holder of the right of pre-emption, namely the co-owners, the state, or the owners of neighboring agricultural plots. The offer submitted to the holders of pre-emption rights must be in writing. Such an offer must be responded to within 15 days, also in writing.

A person whose right of pre-emption has been violated (holder of pre-emptive right) has the opportunity to, within one month from the day of learning that his right has been violated, and no later than two years from the day of concluding the contract on sale of real estate), initiate court proceedings for annulment of such sales contract. The lawsuit requests that the real estate be sold to him and handed over under the same conditions from the contract. An aggravating circumstance for a person whose right of pre-emption has been violated is his obligation, in addition to filing a lawsuit, to deposit an amount, in the amount of the market value of

the real estate on the day of filing the lawsuit with the competent court. The market value is determined by expertise by a permanent court expert or a tax administration body (Judgment of the Supreme Court of Cassation Rev. No. 850/2016 of 17 May 2018). This obligation additionally burdens the holders of pre-emption rights who want to exercise their right in court proceedings, because the dispute can be prolonged, and the outcome itself is often uncertain, while the deposited funds cannot be used and lose their value. Therefore, the land is sold to the injured party at the market, not the purchase price, which may be different in relation to the price from the purchase contract. (https://www.agroklub.rs/poljoprivredne-vesti/kako-zakon-stiti-one-koji-imaju-pravo-prece-kupovine-zemljista/57551/).

The authors investigated 18 cases of land sales on the territory of the Municipality of Surčin, in any case there was a violation of the right of pre-emption of all persons except the state. The research established the following:

- sellers fulfill their obligation to offer by right of pre-emption only to the state and not to other persons,
- also notaries public do not act in the same way when certifying a contract of sale. As a mandatory document without which they do not accept the certification of contracts, notaries public ask for proof that the offer was made under the right of pre-emption to the state, but not to other persons who have the right of pre-emption. The authors believe that, in practice, not all persons, holders of pre-emption rights, are treated in the same way, but the position of the state is protected and others are not, although by law they have the same treatment,
- the obligation to put the estimated market value of the land in the court deposit, until the end of the court proceedings, unfairly burdens the holders of pre-emption rights who must exercise their right in court proceedings, because the deposited funds cannot be used and lose value. Every business entity plans its investments in the short or long term and what will be achieved from what is planned will depend, above all, on the available and available to the issuer, own or external financial resources (Rajnović, Lj., Subić, J., Zakić, N., 2016), so that the deposit can be a limiting factor in the development of the holder of the right of pre-emption,
- Also, the authors believe that the procedure for entering a change of address in the cadastre should be more transparent, publicly announced that it is a request for a change of address and, most importantly, resolved as soon as possible. In most countries in the region, this data is visible within one day.

Conclusion

Simultaneously with the development of agriculture in Serbia, as well as everywhere in the world, the purchase and sale of agricultural land, primarily private, but also state, between individuals and / or legal entities on the territory of Serbia is growing. The holders of the right of pre-emption are determined by the Law on Real Estate, which puts all holders, regardless of whether it is the state or other persons, in the same position.

In recent decades, the state has leased or sold its land in accordance with the Law on Agricultural Land and the Rulebook on the Conditions and Procedure for Leasing and Using State-Owned Agricultural Land. In order to protect the public interest, the state is an active participant in various procedures concerning agricultural land: the procedure of consolidation, expropriation, parceling, but also through the procedure of restitution.

Regulation of the agricultural land market and legal security depends on a number of fundamental economic and legal factors, which influence market ideology and market coordination, legal rules and practices, which provide legal security of land market participants, market regulation, control and supervision of participants' actions. , transparency and equal access to every person in exercising the right of pre - emption to purchase land, which is the subject of trade.

Since agricultural land is a good of general interest, in the case of sale, it must be available to any legally determined holder of the right of pre-emption under equal conditions. The authors believe that the state has the legitimacy to, in order to maintain the level of legal security, ensure the application of legal provisions in practice in the same way for all economic entities participating in trade, buyers, sellers, cadastre, notaries.

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