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BONA FIDE IN TERMS OF PROPERTY RIGHT. THE CLAIM STIPULATED DE ARTICLE 45 OF LAW NO. 10/2001

Abstract

In general, in the case of the sale of another person's goods, bona fide (good faith) can lead to obtaining the private property right only associated to other principles of right. In the special case instituted by article 45 (former article 46) of the special reparatory law no. 10/2001 we notice an exception from this rule, since good faith alone shall lead to obtaining the private property right.

The communist regime established after 06.03.1945 has as fundamental desideratum the liquidation of private property. After the abolition of this regime, the Romanian legislature is faced with the problem of repairing the damage[1] created by the abusive taking over of the private property during 06.03.1945-22.12.1989.

The first step is made in this direction by editing the Law no 112/1995[2] on the regulation of the legal situation of real estate intended for housing passing over to the State property.

As a general feature of this law one should notice that it only partially appear being a reparation law, whereas concerns only the restitution of real estate intended for housing passed over to the State or to other legal entities. The beneficiaries are those who live in buildings of their former property under a lease contract, or whose buildings are vacant, not occupied by the tenant.

As such, the scope of beneficiaries of this legal remedy is very limited, because most of the buildings intended for housing were occupied, meanwhile, by tenants who according to Law no 112/1995 have created the opportunity to buy the rented buildings. Moreover, the scope of beneficiaries of this law is restricted to Romanian natural persons; therefore, former owners or legal persons who have become foreign citizens or Stateless persons could not be holder of the right of reconstitution under this law.

Two different situations can be distinguished from the application of Law no. 112/1995: when there is a title, or when we talk about the factual taking over, when the passing was made without the existence of legislative support. In the first case, the passing over to the State was made by „the title" and in the other case, it was „without basis"[3].

It should be made a distinction between taking over „with no title", that is, just factual of a building, without the existence of any legal act, practically through forced eviction of the owner, and the situation in which the real estate became State's property by abusive enforcement of these laws, so "without valid title"[4].

The distinction between the expressions „with title", „title less" or „no valid title", it is useful to determine which action is at the reach of the former owner deprived of his property.

In the case of a „title less" taking over, the former owner uses a vindication action of common law with the legal foundation art. 480, art. 481 of Civil Code. If crossing over to State was made by infringing the act of retrieval, it can't be said no more that the former owner starts an action in claim based on common law, because, undoubtedly, the holder of such actions must prove the quality of *owner*. Or, if the building was taken over by the State, the title of the former owner was abolished, in addition to the birth of ownership in favour of the State.

In this case, the former owner will have to formulate an action that would abolish first the State's title, citing inapplicability of the law in respect of him, and the abusive nature of the measure taken, and only afterwards, regaining the title of ownership of the real estate , to exercise the powers conferred by ownership[5].

Since the scope of buildings subject to reconstitution in kind, in terms of this law is very limited, the legislative power has covered the possibility of repairing the damage created by equivalent, so the former owners or their heirs / successors are receiving cash compensation for the houses which could not be returned in kind. One should remember that the limit of compensation is set below the value of the building taken over abusively by the State.

Is required another intervention of the legislator, that regulates the problem of abusively taken buildings.

Only in 2001 it adopted the Law no. 10/2001 concerning the legal status of abusively taken properties, during 06.03.1945-22.12.1989[6], as amended by Law no. 247/2005 and republished on 01.04.2007.

This new legal concept which is partially fruit of the jurisprudence of the European Court of Human Rights, referred to in that period by a series of actions concerning the violation of property rights (guaranteed by art. 1 of the First Additional Protocol to the International Convention of Human Rights) and also the recommendations of European bodies on the amendment of legislation in this area.

By Resolution No. 1123/1997, the Parliamentary Assembly of the Council of Europe recommended Romania to amend the law in terms of confiscated and expropriated assets and, in particular, Law no. 18/1991 and 112/1995, the purpose of providing restitution of property *in integrum*, or if this is not possible, by providing fair compensation.

In this context it is adopted the Law no. 10/2001. As a feature of this law one may notice that it concerns the whole area of abusively taken over real estate by the State, by cooperative organizations, or any other legal entities that are being irrelevant buildings intended for housing or destination other than the housing. By buildings, for the purposes of this law are concerned that construction and land, nay, more, even mobile assets become property through incorporation in construction or equipment and facilities taken over by the State with the building.

As a basic rule the principle of restitution in kind enshrines, and only when restitution in kind is no longer possible it was created the opportunity to repair the injury by equivalent. There are receiving remedial measures, in kind or equivalent, individuals and legal entities, former owners of such property or successors of their rights, even if they now have the status of foreign citizens or Stateless persons.

Tenants in buildings covered by the law enjoy legal protection, realising a legal extension of lease contracts.

Regarding the former tenants who bought homes that can form the subject of this law, legal acts of alienation remain valid if they have been completed in compliance with the laws in force at the date of their disposal, and the under-acquirers former tenants had been good faith / *bona fide*[7].

The impossibility that the owner regains in fact and in law the real eState, under the circumstances in which no one abolished the title, or more, the legislature confirms the its validity, is certainly a case for the sale of other's good in connection with the law, it is recognized the principle of *bona fide* / good faith, exclusively the constituent effects of rights in rem[8].

This exception to the rule has stirred controversy in theory.

Some authors[9] State that can not be said about art.45 alin.2 of Law No. 10/2001 that would validate the acts of alienation in the buildings taken over by the State with no valid title, documents concluded with violations of the laws in force at the time of drawing them up, as an absolute invalid act, according to the law existing at the date on which it was delivered, can not be validated by a subsequent law. The drawn conclusion would be that the subject of art. 45 para. 2 is constituted only from acts of alienation concluded after the entry into force of the law, violating any provision of Article. 15 of the Constitution. Thus, on the assumption that both sides have been *bona fide*, the act of disposal is struck by the relative emptiness for error over the essential quality of the alienator, and the true owner can successfully initiate real estate vindication action. If both sides and, at least the alienator were *mala fide* / bad faith, the contract is struck by the absolute void, in which case the true owner may initiate either the action for invalidity or the claim in action.

Faithful to older views expressed in specialised literature, another author[10] argues that Law no. 10/2001 has only to give a legal consecration to the creations of doctrine and jurisprudence, according to which the rule *resoluto jure dantis*, *resolvitur jus accipientis* suffers a consistent attenuation in the case of acts available for consideration concluded by a *bona fide* under-acquirer. So, the under-acquirer's title will be maintained by considering its good faith, but also the need to ensure security and stability of civil circuit.

It is said then, that "art. 46. para. 2 (current art. 45) is a legal consecration of the theory of appearance in law, designated to rescue the legal invalid act,

issue which has nothing in common with the un-retroactivity of the latest law, which provisions would apply to both sale contracts completed until the date on which entered into force Law no. 10/2001, and also this moment on"[11].

Considerations of order and social stability, made that art. 45 para. 2 of Law no. 10/2001 to consacre with retroactive effect and absolute novelty a validation of an null act, where the mere *bona fide* / good faith is not only necessary but also sufficient to gain a real estate right in rem for another person than the true owner, says another author[12].

According to another opinion, art. 45 of Law no. 10/2001 would be an exceptional situation in which the legislature has expressly enshrined the principle of protection of third party good faith, without further stipulating the need for other conditions, such as common error, in all other cases will operate the Theory of apparent owner[13].

In an article whose writing was determined by the court ruling for the purposes of admitting an claim of action against the former tenants who, in good faith were buying an apartment living based on Law no. 112/1995, an author argues that the application of the principle *resoluto jure dantis resolvitur jus accipientis* would meet an exception, where the subsequent act of acquisition would not be abolished, allowing him, to the under-acquirer, to retain the right won in a *non-dominus*. The situation of exception governed by art. 45 of law, has in mind the cases where the under-acquirer is *bona fide* and the acquisition title is one consideration, plus the condition of common errors, the exception finding reason on equity and social utility[14].

In another point of view it was appreciated that there is the protection of the good faith under-acquirer only in situations where the property was taken over without a valid title, and by applying the wrong law, or in the case of art. 45 "is not about the alienator's nullity title which attracts the under-acquirer's nullity title, but about the lack of the seller's title" which means a sale of another's good. But, in such a sale the operating principle that no one can transmit more rights than he has himself, the State was unable to send the buyer the right property, so that the true owner may intend a notice of claim, the sale not being opposable[15].

Another point of view States that "the provisions contained in art. 46 para. 2 (now art. 45 of Law no. 10/2001 is nothing more than simply enunciation without practical utility of the principles of common law, well known and consolidated, namely: the principle that legal acts with respect for legal norms in force on the date of completion are valid (para. 1), the principle that acts legal agreements in contravention of mandatory legal norms in force on completion of their absolute zero (para. 4), the principle that legal acts dispose of other work are absolutely void if the seller and the buyer were *mala fide* / bad faith, knowing that the goods belongs to another and that alienating other's property is not hit by absolute invalidity if it was bought in good faith at the time of conclusion of the act"[16].

Controversial in terms of theory, as I noted above, art. 46 para.2 (now art. 45) of Law no. 10/2001 and has found numerous screenings in law.

The vindication and annulment action of the contract which, under Law no. 112/1995 the State sold the tenant abusively nationalized building should not be admitted if the buyer was in good faith, operating under *error-comunis facit jus*, an invincible and common error concerning the ownership of the seller. That, prior to the selling of the dwelling, the owner deprived by State, notified the committee formed to implement the law no. 112/1995 to receive a "compensation" - and not restitution in kind - reinforces the conviction, for tenant who buys that the seller (State) was the owner, from which it was entitled to buy the property[17].

The admission of the vindication action is conditioned by the acceptance of the application of the invalidity of the contract by which the State sold the lessee the nationalized property, even if the property was acquired without a valid title. Only proved the existence of bad faith at the lessee buyer may lead to the abolition of the contract of sale in absolute nullity, the *bona fide* presumed according to art. 1899 para. 2 of the Civil Code. As long as there were performance from the seller and also the buyer, it can not be forfeited violation of article 966 from Civil Code, on penalty of duty without question, or a question based on false or illicit cause. The selling price determined in accordance with the Law nr.112/1995 can not be considered untrustworthy[18].

The recognition of the prevalence of under-acquirer's interest was imposed based on reasons with a much wider application and have created a true principle, of concerning about the security civil circuit and the stability of legal relationships. From a legal viewpoint, the solution was, therefore, in support of pragmatic reasons, resulting in the principle of valid appearance in law, whose essence is expressed *error comunis facit jus[19]*.

Noteworthy is the point of view of the Constitutional Court, which in considerations of a decision on the unconstitutionality of art.46 line 2 of Law no. 10/2001 (the current art. 45) memorized "in reality, the only element of novelty brought by the controlled text is included in *consecration in terminis*, of the principle of protecting the bona fide / good faith in a particular area, but with major social interest l, that the legal regime of buildings abusively taken over by the State on in the period March 6, 1945-December 22, 1989"[20].

REFERENCES

[1]In this case, it is applied the rectification of the actual damage caused in conjunction with the principle of repairing in kind of the injury involving restitution in kind of property misappropriation. The practice is uniform; in this connection, for example, the Supreme Court, in guidance dec. no 2 / 1970 in Romanian Law Magazine no. 571,970, p. 118;

[2] Law no 112/1995 was published in the Official Gazette of Romania no. 279/29.11.1995;

[3]The title, as the acceptance of this law, is applied to a certain situation of provisions of a regulation, under which the passing over to the State was stipulated and not when it was proceeded to a simple fact of taking over the buildings. Into this „tiltle" category there are regulation edited by government bodies, regardless of their nature, laws, decrees, decisions of the various organs of the State, regulations under which started the passing of real eState, over to the State or to other legal entities.

[4]The law enforcement is either right or wrong for a certain regulation, in a particular case. If, when the building has taken over, the law was obeyed, the States holds a valid title of that real eState, even if such a law could be regarded as abusive in terms of a democratic society. So, there are buildings taken over to the State „without a valid title", the one for who, although there is a legal act of passing over that represents the legal basis for establishing the ownership of the State, it has been applied infringing its provisions.

[5]Ioan Adam, *Law no. 10/2001. The legal regime applicable to buildings that were abusively taken over*, All Ed Beck, Bucharest, 2001, p. 10-12;

[6]Law no.10/2001 was published in Official Romanian Gazette no. 75/14.02.2001;

[7] Ioan Adam, *Law no. 10/2001. The legal regime applicable to buildings that were abusively taken over*, Ed. All Beck, Bucharest, 2001, p. 1-7;

[8] Felician Sergiu Cotea, *Bona fide. Implications on property rights*, Ed Hamangiu, Bucharest, 2007, p. 491;

[9]R. Popescu, R. Dincă, *Disscusions about the admissibility of the vindication action of the true owner against the under-acquier good faith of a building (I)*, The Law no. 6 / 2001, p 4-5; R. Popescu, R. Dincă, discussions about the scope of legal documents that fall under art. Article 46. (2) of Law no. 10/2001, no rights. 7 / 2002, p. 82.88;

[10] P. Perju, *Disscusions about the admissibility of the vindication action of the true owner against the under-acquier good faith of a building*, The Law no. 6 / 2001, p. 16;

[11] Pavel Perju, *Discussions about the scope of legal documents covered by art. 46 alin.2 of Law no. 10/2001*, The Law 2 / 2002, p. 67-68;

[12]F. Baias, B. Dumitrache, M. Nicholas, T*he legal system of abusively taken over real eState. Law no. 10/2001 discussed and annotated*, Ed Rosetti, Bucharest, 2002, p. 297;

[13]R. Sas, *Discussions about the application of the principle of law resoluto jure dantis resolvitur jus accipientis*, Law no. 10/2004, p. 116-118;

[14]Al. Ticlea, V. Lozneanu, *Reflections in connection with the protection of the under-acquirer's good faith*, Law no. 12/2000, p. 43-45;

[15]Eugen Chelaru, *Law no. 10/2001 concerning the legal status of properties illegally taken during the March 6 1945-22 December 1989, commentated and annotated*, All Ed Beck, Bucharest, 2001, p. 246-247;

[16] D. Chirica, *The juridical regime of vindication the real estate taken over by State without title from the under-acquirers which prevail their bona fide at the time of the transaction* , The Law no. 1 / 2002, p. 59;

[17]Claim. Residential, taken over by state nationalization. Request for cancellation of the contract that sold home to the lodgers. Action recorded previously to law no. 10/2001. Good faith / *Bona fide* Î. C.C.J., the department of civil and property rights, decision no. 6429 of 17 November 2004;

[18] Î. C.C.J, the department of civil and property rights, decision no. 417 of 25 January 2005, the Property Law, legislation updates, Ed Morosan, Bucharest, 2006, p. 301;

[19]Claim. The nationalization was in contravention of Decree no. 92/1950. Good faith of the tenant when concluded the act of sale; Court of Appeals Constanta, department civil decision no. 352 / C of 13 July 2005;

[20]C.C., Decision no. 191/2002, in M.Of. No. 567 of 1 August 2002.