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Security Dimensions. International & National Studies nr 1 (11), 100-105

2014

SECURITY DIMENSIONS
INTERNATIONAL & NATIONAL STUDIES
NO. 11; 2014 (100-105)

POSSIBILITY OF ESTABLISHING A SEPARATE PROPERTY OF PREMISES AS ONE OF THE LEGAL WARRANTY OF SOCIAL SECURITY

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ABSTRACT

The author focuses on the analysis of the separate property of premises as one of the legal warranty of social security in the legal and economic context as well as on the methods of the abolition of the co-ownership of the real estate by establishing separate property of premises. The author describes the most common ways to obtain the ownership of the premises after one has only an abstract share in the property and also points out how the right of ownership is different than the division *quoad usum*.

ARTICLE INFO

Article history
Received: 04.05.2014 Accepted 02.07.2014

Keywords
separate ownership, premises, property, division

INTRODUCTION

Meeting the housing needs for most Poles guarantee their independence and social security. It should be remembered, however, that separate ownership of the premises does not give together with the title of ownership of the premises the complete independence, although it is still for most Poles the most desirable achievement. The issue of creation of separate ownership is therefore still alive and often discussed in legal practice. The prospect of investment focused on property of irregular legal status, effectively discouraging potential investors. The co - ownership significantly reduces the right for the common thing. In case of disagreement between the co-owners through years last problems and proceedeings related to the issue of the managing and settlements relating to expenditures and disputes arising from the use of common things. Lack of regulated legal status conducive to the lack of a sense of responsibility for the common property and often causes degradation of the ownerless property.

CO-OWNERSHIP OF REAL ESTATE

In legal practice common phenomenon is the occurrence of co-ownership of real estate. Co-ownership exists when things have the undivided ownership of several people. Article 195 of the Civil Code[1] gives the descriptive definition of ownership as right, characterized in that one and the same ownership is possessed by more than one person, whose scope can only be different because of the size of the shares in the common law. Legal literature emphasizes

[1] Act from 23 April 1964, Kodeks cywilny (Polish Civil Code), Bill of Acts 1964 Nr 16 pos. 93 with later amendments.

that the nature of joint ownership determine and define the three characteristics: the unity of the subject, the multiplicity of people and the indivisibility of the common right.[2] The unity of the subject is the result of the fact that the subject of the common right is the same thing, the multiplicity means that the number eligible is more than one, and at the same time neither of co-owners has the exclusive right to physically separate part of the common thing, and each of them is entitled to the whole thing.[3] In all these cases, in which there is a commonality of property (inheritance, property of the spouses), provisions on ownership apply by analogy. Joint ownership is the legal reletionship derived from the ownership, have so regulated by the provisions regarding ownership.

Co-owners must decide about the destination of the common thing and together account for maintenance costs, none of them has the right to the whole thing. This results in a number of conflicts The solution to problems is to immediately exit from ownership. Co-owner is entitled at any time to exit from co-ownership, which in many respects is not a desirable state due to both legal and economic reasons. This procedure because of these reasons is an extremely complex process, as one must unravel a number of issues, e.g. settlement of expenditures, eligibility of ownership, but it is worth the money.

The reasons of joint co -ownership may be different. the most common situations resulting in the co - ownership of the property are:

a) the actual event , with which the law binds certain legal effects like prescription jointly by several inhabitants (Article 172 of the Civil Code);
b) legal action , such as acquisition of a share in the ownership of the real estate;
c) legal provision , for example, as a result of the conversion the right of perpetual usufruct into the ownership under the Act to transform the right of perpetual usufruct ijto the right of property ownership;
d) the judgment of the court;
e) acquisition of inheritance by the heir, according to art. 1035 of the Civil Code , if the inheritance goes to several heirs, to the joint assets of the estate and the division of the estate , the provisions of joint ownership in fractional parts are used by analogy[4];
f) marriage, along with the divorce between the spouses ceases statutory co-ownership . In contrast, on objects , including real property acquired under conjugal community with a spouse, fractional co-ownership arises;
g) the articles of association;

THE DEMAND OF THE ABOLITION OF CO-OWNERSHIP

Among the provisions relating to the procedure for the abolition of co-ownership there is lack of the provision constituting who is entitled to make a request including the demanding of divisi on of the co-ownership. The issue of this right belongs to the substantive law.
The removal of co-ownership may be required by each of the co-owners at any time, the application may be submitted by each of the co-owners separately, several of them or all of them acting together.[5] Co-owner is not required to justify abovementioned decision. He can demand a

[2] S. Rudnicki, *Własność i inne prawa rzeczowe. Komentarz do Kodeksu Cywilnego*, Warszawa 1996, p. 186.
[3] H. Ciepła, *Kodeks cywilny. Komentarz*, t I, Warszawa 2005, p.137-138.
[4] E. Skowrońska – Bocian, *Komentarz do kodeksu cywilnego. Spadki,* Warszawa 2003, p. 226.
[5] M. Sychowicz, *Postępowanie o zniesienie współwłasności*, Warszawa 1976, p. 22.

full division, even if some of the co-owners in favor of the abolition of the part of the property. This prevents domination from the the majority. Therefore, co-owner of the property, which has even minimal share in the ownership of real property, such as building, may apply for a divisi on in one of several ways , if its share is small he can demand repayment, if he is interested in obtaining the ownership of one of the premises he may require it for himself and propose repayment for the rest of the owners. The proposed division of the property should be marked on the plan prepared in accordance with the rules governing the determination of land and mortgage registers. Marking the proposed division of property on the part occurs when the trial court has already crystallized the concept of division and therefore in the final stage of the proceedings . This applies to all kinds of real estate , it is irrelevant whether the property whis is to be divided already has the land and mortgage register or it is going to be established.

COMPATIBLE DIVISION

If in the course of the proceedings does not come to the conclusion of a court settlement in accordance with Art. 622 § 1 of the Civil Proceedings Code the court should induce co-owners to ma king a compatible division, while pointing ways likely to bring this about. This obligation of the court is an example of fulfilling general postulate of interaction with the parties, so that in the shortest possible time effectively solve the problem. The first attempts to persuade the co-owners to agree on how to share is desirable at this stage of the proceedings in which the collected material makes it possible to present realistic proposals[6].

It is recommended that the division ran as the co-owners expected, because it excludes further potential conflicts. The court may proceed the implementation of the above duties in different ways. Mostly it depends on the nature of the case, the approach of the participants, the complexity of division but also on the skills of mediation judge , his experience and ability to arbitrate.

If there are no grounds to issue a decision corresponding to the unanimously application of co-owners and there are the conditions of division in nature, the court shall make this division into parts corresponding to the value of the shares of the co-owners with regard to all the circumstances in the interests of social and economic development.

The differences in value are compansated by repayments. If division in nature do not object to the criteria of Art. 211 of the Civil Code and therefore there are no reasons to believe that the divisi on would be contrary to the provisions of the act or the socio - economic purpose of things or that would entail a substantial change of things or a significant reduction in its value, each co-owner may demand the abolition of co-ownership took place through the division in nature. If even one co-owner has applied for a divisi on in this way, and at the same time, this solution is possible , the duty of the court is to abolish the co-ownership in that way. [7]

Where the other co-owners do not agree to grant them physically separate parts of things, the applicant may request for the assignment the property of the entire common property for the repayment of the rest. Granting each individual co-owners of the property depends on the assessment of the court , which should be the result of the

[6] T. Demendecki, [in:] A. Jakubecki [ed:] *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2008, p.880.

[7] M. Sychowicz, *Postepowanie o zniesienie współwłasności*, Warszawa 1976, p 62.

assessment of all the meaningful circumstances, of course, one of these circumstances can be a unanimous choice of the co-owners , and so is the most common, but it is not absolutely binding for the court[8]. This division is supported by the fact that the co-owner has the opportunity to get this part of the property which previously belonged to him and made expenditures for it , in fact, treating it as his property - it is without a doubt one of the arguments for which the civil code so exposes the abolition of this form of co-ownership (Article 211 of the Civil Code) .

The content of art. 623 Civil Procedure Code says that in the case when the property cannot be divided into physical parts, which would be proportional to the shares of the individual participants , priority to grant ownership of the entire property is entitled to the participants who possess majority of the shares. Generally, in the Polish law there is a principle that the division of the building by vertical planes is unacceptable. The buildings are in fact indivisible. This rule allows for some exceptions . According to current case law is still possible to divide the building into two parts provided synchronize this division with the division of the land. [9] The building can be divided if the dividing line runs through the wall that separates the building on a regular and single component can not be divided, if crosses the center in the building premises or building is divided into irregular parts. According to the Supreme Court if there is a situation when the division of the building into two parts would not be possible to synchronize with the division of the land on which the administrative authorities give consent , one of the resulting buildings can in part be found in the neighboring plot . The condition is to set the easement to the owner of the other property. Control over the admissibility of such division exercise appropriate administrative authorities.

It should be stressed that the abolition of the co-ownership through the sale of common property is the ultimate solution , practiced mostly when the co-owners are not able to meet the other participants financial expectations by way of repayment, and there are no possibility of physical division[10].

PAYMENTS AND REPAYMENT

The difference between the value of common property, granted to individual co-owners compensated for by payments in cash, proportional to the value of their shares in the common property . Surcharge occurs as a result of the elimination of co-ownership, previous co-owner receive part of the property in nature, but with a value less than the value of his share in the common things. Payment occurs when the co-owner does not receive any part of the property under the sole ownership[11] .

THE ABOLITION OF CO-OWNERSHIP BY ESTABLISHING SEPARATE OWNERSHIP OF THE PREMISES

In the previous legislation only a judicature accepted establishing separate ownership of the premises in the proceedings of the abolition of the co-ownership, but there were no provisions in substantive law. Currently, this problem has been precisely regulated by art. 11 of the Act on the ownership of the premises which says that the provisions on the establishment of separate ownership of the premises by agreement shall apply *mutatis mutandis* to court decision abolishing the co-ownership of the property. The court

[8] *Ibidem.* p. 62.

[9] Judgement of Supreme Court from 8th September 1975 r., III CRN 207/75, OSN 1976, no 7-8, pos. 172.

[10] Ł. Dziurleja, *Współwłasność nieruchomości. Sposoby zniesienia współwłasności*, Kraków 2008, p. 86.

[11] M. Sychowicz, *Postepowanie o zniesienie współwłasności*, Warszawa 1976, p. 64.

may also authorize a party to conduct the necessary adaptation work. Acceptable is the division of a premises which already constituting separate property , if the premises which are the result of the division also meets the conditions of the creation of the separate ownership of the premises. [12]
Thus, separate property can be a stand-alone premises with separate permanent walls within the building room all a few rooms intended to be permanent residence , and which together with auxiliary spaces (basement) are meeting their housing needs. It is irrelevant in what way the premises is located inside the building. It may include rooms located on different floors, as long as they are functionally separate entity. [13]

The fulfillment of the conditions for premises are estimated by the authorities responsible for the architectural and construction supervision, but it is mandatory only if an agreement dividing the property concluded before a notary. The Supreme Court expressed the opinion[14] that in the proceedings of the abolition of co-ownership of the property in court, the court is not bound by such certificate . In justification The Supreme Court said that, in contrast to the agreement concluded before a notary public, in court proceedings the court has the opportunity to benefit from an appropriate expert opinion that will help him to decide.

The act on ownership of premises requires constitutive entry in the register of land and mortgages to create the separate ownership of the premises. The consequence of this is the fact that the agreement disposing of premises is then permissible, but its effect will remain suspended until the entry[15].

SEPARATE OWNERSHIP OF PREMISES

The premises is part of the building associated permanently with the land , which on the basis of specific provisions is subject to property separate from the land. The premises can be only independent residential premises or premises for other purposes, legally separated in a separate item of property on the basis of an agreement, a unilateral act , a court decision or a contract requiring the owner of the land to build a building and establish separate ownership of premises and constitutive entry to land and mortgage register[16].
The subject of separate property is not a structural part of the building, as specified floor, but the premises which may Has certain components, even if they were located outside the building (garage, basement) called belonging rooms, with the ownership of the separate premises is related the issue of common property, creation of separate premises is inevitable connected with those parts of the building which are intended for use by at least two owners of individual units and to establish co-ownership of the land.

QUOAD USUM AND THE DEFINITE ABOLITION OF CO-OWNERSHIP

With the permanent abolition of co-ownership should not be confused construction temporary division to use also called as division quoad usum that only precisely determines how to use of common property by each of the joint owners on the

[12] Resolution of the Supreme Court from 15th March 1989, III CZP 14/89, OSN 1990, no 2, pos. 27.
[13] J. Ignatowicz, *Komentarz do ustawy o własności lokali*, Warszawa 1995, p. 23.
[14] Judgement of the Supreme Court from 13th March 1997., III CKN 14/97, OSNC 1997, no 8, pos. 115.
[15] A. Oleszko, *Oświadczenie właściciela nieruchomości o ustanowienie dla siebie odrębnej własności lokalu oraz sprzedaż tegoż lokalu jako ekspektatywy*, Rej 1996, no 10, p. 24.
[16] E. Bończyk – Kucharczyk, *Poradnik dla wspólnot mieszkaniowych. Zeszyt II. Regulacje w zakresie własności lokali i nieruchomości i ich wpływ na funkcjonowanie wspólnot mieszkaniowych*, Warszawa 1997, p. 8.

basis of art. 206 of the Civil Code. This form of use of the common things may apply all interested co-owners in the relevant agreement. It is not, however, division of property but the way to harmonious benefit from the property ad hoc. Abovementioned solution is only possible in relation to things divisible, so that it was possible to disjoint use by individual co-owners of physically separated parts of common things. Hence, it is possible to divide quoad usum agricultural property, the division of building (if there are not separate premises yet) . According to the case law of this legal relationship is a specific unnamed reletionship[17].

CONCLUSION

As shown, the optimal and safest for the economic relatiosn is when the property is fully established the legal status of the owners and everyone knows what part is responsible for yourself. It should be remembered that, in accordance with the definition of co-ownership right to the property has each co-owner, but it is difficult to make investments in real estate, when one does not know you who specifically is responsible for its specified part, which can be compared to state ownership to the kind of legal limbo in which seldom are derived the real benefits of the object of common ownership, there is a sense of social security and independence.

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[17] Judgement of Supreme Court from 23th January 1958 , II CR 804/57, OSN 1959 no 3, pos. 81.