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THE LIMITATION OF EXERCISING THE RIGHT TO PRIVATE PROPERTY THROUGH PREEMPTION IN THE MATTER OF SALE

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Abstract

The pre-emptive right, known from antiquity, is subject to new forms of manifestation in present times, forms which emphasize both the interests of the legislator and those of the subjects of law, persons or authorities, in order to provide the possibility for some categories of people to manifest certain preferences, facilities, prerogatives in case an act of translation of property is concluded; the pre-emptive right can be found in case of other types of contracts. The present study aims to show the current status of speciality doctrine in regard to the legal regime which applies, as well as the legal nature of the pre-emptive right.

Keywords: *subjective right, real right, right of claim, potestative right, limitation, doctrine, law*

INTRODUCTION PRE-EMPTION

Pre-emption and implicitly the pre-emptive right appears as a distinctive judicial institution even from ancient times, as we are able to identify references to the birth of a subjective right which allowed for the possibility of a ransom pact, thus providing the seller with the possibility to buy back the good he sold within a clearly established term and with the normal obligation of giving back the price of the good and other expenses which derive from the change in ownership. These references are found within the Bible in the paragraphs which are dedicated to contracts (Romano, 1997, p. 5).

The operation of buying back a certain good was implicitly related to the pre-emptive right so, “if your brother will become impoverished and will sell his inheritance, the closest relative will buy what the brother is selling” (Romano, 1997, p. 109).

However, the pre-emptive right would later be configured as a legal institution, regulated both on a national level and on a technical level in Romanian

jurisprudence, in the post classical age, when the so-called emphyteusis contract appears, during the time of emperor Zenon.

Within the category of real rights over the good owned by another person, therefore in the case of an attribute of the private property right, a certain person, called an emphyteut would enjoy the attribute of “*ius utendi*” and „*ius fruendi*” over an agricultural land which belonged to a land owner; he was thus obliged to pay a sum of money to the land owner, in accordance with the parties ‘agreement, known as a cannon. In case “the owner terminates the emphyteusis contract with the purpose of selling the land, the emphyteut would benefit from the pre-emptive right” (Ciucă, 1999, pp. 367-378) in acquiring the good he was previously using. Considering this, but also the fact that the right of use could be passed on by the emphyteut within the succession procedure, the emphyteusis contract is different from the lease of land contract, as they have a different legal nature.

Under the influence of the byzantine law, the pre-emptive right is regulated in the old feudal Romanian law under the name of protimisis. Based on a systemic analysis of the sources of written Romanian law in the Romanian provinces, Valentin Al. Georgescu defined „protimisis as a preferential buy back right, acknowledged to some people in regard to certain goods, whose owners, privileged in buying back those goods are found in a solidarity relation - kinship, common property, neighbouring property, ownership or previous ownership of that good” (Georgescu, 1980, p. 199).

The above stated definition valorises the historical texts, thus suggesting that protimisis was expressed in one of the two ways: previous buying, which was basically a pre-emptive right or the possibility of buy back which was in fact a retraction of sale. In the first situation, the person who wanted to sell a good was obliged to previously notify the holder of the protimisis right and, in case he was not interested in acquiring the good, the owner was able to sell the good to any buyer. In case the seller did not fulfil this procedure called – *denuntatio* – and sold the good without notifying the holder of the protimisis right, he would conclude an illegal act, thus, the holder of the protimisis right had the possibility of using the buy back right; this was a retraction of sale, resulting in paying the buyer the price he paid in order to avoid unlawful enrichment. The above mentioned situation results in the fact that the protimisis right was, by its effects, protecting the property over goods held in the same circle of social solidarity, thus avoiding certain sales which would impair on the balance and habits of that community.

We can thus conclude that protimisis was becoming a real right opposable „*erga omnes*” in the form of the pre-emptive right of the seller to the benefit of the holder of the preference right within a 30 day term. After 30 days, if the holder of the protimisis right did not exercise his right, to seller was able to sell the good to a third party.

After the changes occurred in 1989, when the private property right is again regulated as a real right, both on a legislative level and a jurisprudential one, the pre – emptive right knows a new and more diverse form of expression; this fact is

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obvious given the new Civil code (see article 1730) and the specific laws in this domain.

The interpretation of article 1730 of the Civil Code, as well as other texts of civil law attempts to provide a definition of the pre-emptive right by considering the content of this right and emphasizing the sources of law which generate it or the convention of the parties.

Thus, the dictionary of civil law and civil procedures defines pre-emptive right as “that certain right which provides the holder called the pre-emptor - the prerogative, the possibility (n.n.) to acquire a certain good with priority” (D. Rădulescu, E. Rădulescu, G. Stoican, 2009, p. 411).

When performing a quantity analysis of the definitions phrased by specialty doctrine, we notice that they are different in regard to the area in which they apply; thus, if the pre-emptive right regards the main real rights, namely the civil circuit of immobile goods which are subject to private property, the definitions emphasize the thesis according to which the pre-emptive right is basically a limitation of the attribute of – *ius abutendi* - in regard to selling goods which are subject to passing on of property, namely the sale contract (G. Boroi, C.A. Anghelescu, B. Nazat, 2013, p. 53). Per a contrario, if this right applies to other types of contracts, the definitions emphasize the content of this right in regard to its normal (C. Macovei, 2006, p. 25) exercise.

Doctrine has continuously discussed the fact that this right is a faculty, a prerogative for a certain category of people.

In its essence, the pre-emptive right is that right, arising from law or the convention of the parties which provides its holder, called a pre-emptor, a priority, a preference in regard to the conduct of other people, who are third parties.

By performing a compared law analysis, we find similar regulations in French speciality literature, stating that “the pre-emptive right is that certain right acknowledged to a person or an administrative entity, based on a contract or a legal provision, to acquire property over a good in case it is sold, by considering the right of preference before any other buyer” (Guide juridique, Dalloz, 1991, p. 398).

Romanian doctrine correctly stated that the pre-emptive right is by itself a pre contractual institution as, the time when the right actually causes effect, is „*ante rem venditio*” as, if it would occur „*post rem venditio*” we would be in the presence of an assignment contract, thus resulting in a substitution of the initial buyer with the person of the pre-emptor.

In regard to the pre-emptive right, from an etymological perspective, there is a certain inconsistency from the Romanian lawmaker, as “the pre-emptive right is exclusively used in regard to the sale contract; in case of other contracts, the term of “preference” is used”.

In our opinion, the two terms cause similar legal effects, thus they will in appearance cause a state of confusion; as an example, I will mention article 1828 of the Civil Code, stating that - “When concluding a new lease contract, the tenant is entitled to a preference right in equal conditions ...”.

A matter which is extremely controversial in speciality doctrine is the legal nature of the pre-emptive right; thus the present study phrases a series of conclusions and opinions which show that this right is manifested by a previous procedure with a publicity purpose.

By synthetizing, we show that several opinions were phrased, which qualify the pre-emptive right as a real right, whether the right to claim or the position of future regulations which would allow for the possibility of classifying criteria for patrimonial rights and potestative rights.

By interpreting the provisions of Law no 18/1991, professor Gh.Beleiu unequivocally showed that the pre-emptive right is a real right, as it provides the holder with the right to “pursue the good which is subject to pre-emptive right” and exclusive prerogatives of real rights; subsequently, it is opposable erga omnes with a special mention that, in case of passive subjects, called to abstain from any act or fact which would impair the exercise of the right, the seller holds a distinctive position, as he has the obligation of publicise the sale offer (see the to do obligation) or the obligation to not sell the land before the pre-emptive right is exercised (see the obligation to abstain).

As a consequence, the seller has additional obligations as opposed to other passive subjects, obligations which are mainly guarantees likely to protect the pre-emptive right, which is a real, absolute and main right (Gh. Beleiu, 1992, p. 3-13).

At the same time, it is the opinion of the author that the pre-emptive right is a right affected by certain factors as “failing to exercise this right within the specified term results in the loss of exercise for the holder of the right”, (Gh. Beleiu, 1992, p. 3-13).

An opposing view is expressed by other authors (E. Chelaru, 2000, p. 15-28)” who qualify the pre-emptive right as a right to claim, a personal right, given the criticism of the character of this right, which is a real right in the regulated meaning of this term.

The opinion of professor E.Chelaru shows that - “the action which protects the pre-emptive right is not a real action, as it does not follow the good, but merely the dissolution of the sale contract; the consequence is not the acquiring of the good by the holder of the right but the return of the good to the initial seller” (E. Chelaru, 2000, p. 15-28).

Thus, the respect of the pre-emptive right represents a validity condition for the selling contract; the sanction for the disrespect of this conditions is annulment of the act (E. Chelaru, 2000, p. 15-28); as a consequence, we are not in the presence of opposability erga omnes, but the respect of law which is a general requirement for all subjects of law.

In the opinion of the author, we are in the presence of a relative right, which provides his holder with the prerogative to conclude a sale contract with priority, in case the owner manifested his wish to sell the good.

As a conclusion, the pre-emptive right is a right of claim which provides the holder with a right of preference before all other buyers, with the same price and equal conditions (Al.G. Ilie, M. Nicolae, 2004, p. 34-64).

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This right is only opposable *erga certa personam*, as its holder can demand a certain conduct from the owner who sells a certain good, namely the obligation to do (see publicity) or the obligation to abstain (see third party sale).

In the opinion of other authors (see professor V.Stoica) the pre-emptive right is a potestative right which provides its holder with the possibility of “unilaterally and discretionary influencing pre-existing legal situations, thus changing it or creating new legal situations” (V. Stoica, 2003, p. 5).

By failing to include the pre-emptive right in the category of real rights and that of claim rights, the followers of the theory according to which this right is a potestative right, emphasize the thesis according to which “only a potestative right can explain the legal power of the holder of the pre-emptive right to decisively influence a previously created legal situation which he was not a part of, thus being able to terminate, change or cause new legal situations by his manifestation of will” (I. Negru, D. Corneanu, 2004, p. 30).

Although the Romanian lawmaker did not regulate the pre-emptive right in the category of real rights - see article 551 of the Civil Code - our opinion is that it has several elements of congruence with the legal characteristics of this – *jus in re* – for this reason, we agree with the moderate opinion phrased by professor Liviu Pop, who mentions the “so called” pre-emptive right.

Seen with obvious reservations, the pre-emptive right appears, by considering the effects it causes, as a legal or conventional limit of the attribute of – *jus abutendi* – in regard to contractual freedom with express reference to the matter of sales.

In case the lawmaker or the parties agreed, through their freely expressed consent, the existence of this facility given to the pre-emptor to hold a preference in case of sale and in regard to the price, we can state that, regardless of the legal nature of the analysed right, its effect is that of a limitation of the disposition right within the civil circuit.

CONCLUSIONS

Given the obligation to abstain, namely that of not selling the good before the exercise of the pre-emptive right and the obligation to fulfil all publicity formalities, the pre-emptive right is a true legal and conventional limit to disposition in the matter of the sale contract.

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