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Constitutional judgment 3-4-1-16-05

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-16-05
Date of decision	15 December 2005
Composition of court	Chairman Tõnu Anton, members Lea Kivi, Ants Kull, Villu Kõve and Jüri Põld
Court case	Petition of Tallinn Circuit Court to declare sentences 3 and 5 of § 131(2) of Law of Property Act Implementation Act invalid.
Basis of proceeding	Judgment of Tallinn Circuit Court of 13 September 2005 in civil matter No 2-2/793/05.
Hearing	Written proceeding
Decision	**To dismiss the petition of Tallinn Circuit Court.**

FACTS AND COURSE OF PROCEEDING

1. On 5 May 2004 Riina Leinsalu filed an action with Lääne County Court against Monika-Kätlin Kriit, requesting that buyer's rights and obligations for the transfer of flat No 2 (hereinafter "flat") in residential building No 27, Sadama street, Haapsalu (hereinafter "residential building") be transferred to her pursuant to the contract entered into on 19 February 2004. Also, the plaintiff requested that her right of ownership to the flat and to a legal share of 234/1092 of the residential building be recognised and that the flat and the legal share of residential building be claimed from the defendant's possession.

On 8 June 2004 Lääne County Court involved Silvi Saareleht in the proceeding in the capacity of a defendant. On 27 October 2004 the county court terminated the proceeding of the claim against M.- K. Kriit due to discontinuance of action. After repeated amendment of object of action the plaintiff finally requested that the court recognise that the plaintiff has exercised the right of pre-emption in regard to the flat and that defendant S. Saareleht was obliged to transfer the right of ownership of the flat to the plaintiff and make a declaration to that effect.

Both the plaintiff and S. Saareleht own a legal share of the residential building. The residential building is in commerce as a movable and it consists of less than six dwellings. The dwellings have bee privatised. On 19 February the defendant entered into the contract of sale of the dwelling she owned with M. K. Kriit, and she did not inform the other owners of dwellings in the same residential building of the fact. The plaintiff learned about the contract of sale on her own initiative from a notary on 29 March 2004. Having examined the terms and conditions of the contract, the plaintiff prepared a notification for the exercise of her right of

pre-emption, stipulated in § 244(4) of the Law of Obligations Act (hereinafter "LOA"). The notary sent the parties of the transaction notarised copies of the notification of the exercise of the right of pre-emption and invited the parties to the initial contract to appear to the notary's office to enter into a real right contract concerning the transfer of the flat. The parties of the initial contract appeared in the notary's office neither on 6 April nor on 20 April 2004 – a new date suggested by the notary. The plaintiff has the right to demand the ownership and possession of the flat sold.

2. Defendant S. Saareleht requested that the action be dismissed.

The defendant argued that the plaintiff's right of pre-emption for the acquisition of the dwelling does not arise from § 131(2) of the Law of Property Act Implementation Act (hereinafter "LPAIA"). The contract of sale, entered into between the defendant and M.- K. Kriit on 19 February 2004 has been declared void and thus invalid from the beginning. The plaintiff is aware of the fact. That is why the plaintiff has no legal basis to demand that she enter into a real right contract and transfer the right of ownership.

3. By its judgment of 10 March 2005 Lääne County Court satisfied the action. The court ascertained that on 30 March the plaintiff had exercised her right of pre-emption in regard to the flat and that the defendant was obliged to transfer the right of ownership of the flat to the plaintiff together with corresponding other share of the residential building and make a corresponding declaration.

4. The defendant filed an appeal with Tallinn Circuit Court, requesting that it invalidate the judgment of the county court to the extent that it satisfied the action and ordered the defendant to pay legal costs. The plaintiff contested the appeal.

5. By its judgment of 13 September 2005 Tallinn Circuit Court invalidated the judgment of the County Court and dismissed the action. The court did not apply and declared unconstitutional the third and fifth sentences of § 131(2) of LPAIA. Also, the court ordered that the plaintiff pay 5620 kroons of legal costs for the benefit of the defendant.

OPINIONS OF THE COURTS AND THE PARTICIPANTS IN THE PROCEEDING

6. Tallinn Circuit Court requested that the Supreme Court declare the third and the fifth sentence of § 131(2)of LPAIA invalid due to their conflict with the Constitution.

The court argues that the third and the fifth sentence of § 131(2)of LPAIA are so much lacking in legal clarity that they do not meet the principles of a state based on the rule of law and of legal clarity, established in § 10 of the Constitution. The circuit court motivates its opinion with the fact that the heading of the norm under discussion speaks of the right of pre-emption upon transfer of structure as movable, whereas the third sentence of subsection (2) restricts the right of pre-emption of a privatised dwelling. The court is of the opinion that the norm does not at all give rise to the right of pre-emption with respect to a privatised dwelling. Thus, a right, the existence of which does not arise from the law, is being restricted. The court argues that § 131(2)of LPAIA pertains to right of pre-emption of a co-owner, whereas in case of a privatised dwelling it is impossible to speak of co-owners. The circuit court does not consider it possible to conclude, on the basis of the fact that a legal share of a co-ownership belongs to a privatised dwelling, that the owners of privatised dwellings are co-owners of a residential building as a movable.

The court is of the opinion that there is no provision giving rise to the idea that a right of pre-emption with respect to physical shares of a structure (a privatised dwelling or non-residential space) could be derived from the legal share of co-ownership belonging to a dwelling. A dwelling and a legal share belonging thereto are in commerce together. The circuit could does not consider it possible that the right of pre-emption arises solely with respect to a legal share of a structure and not with respect to a dwelling, and thus the court declares that the fifth sentence of § 131(2)of LPAIA is also legally ambiguous.

7. The Legal Affairs Committee of the Riigikogu is of the opinion that because of the existing legal practice the third and the fifth sentence of § 131(2)of LPAIA are not lacking of legal clarity. Thus, there is no ground

to declare the provisions unconstitutional due to the conflict with the principle of a state based on the rule of law.

The norm was enacted in 1995 on the proposal of the Minister of Economic Affairs, proceeding from the consideration that the right of pre-emption fosters the creation of smaller number of owners in smaller buildings. This in turn contributed to the organisation of necessary repair and maintenance works. In private law and public law the requirement of specificity of law is different. In general, the norms of private law are of lower level of specificity and often acquire a more specific content only through court practice. During the ten years of applying the provision under discussion the notaries have developed a uniform practice, thus the arguments presented by the circuit court are insufficient. The Legal Affairs Committee also considers it necessary to point out that very soon § 131of LPAIA will loose its regulatory force as, pursuant to § 13(6) of LPAIA, after 1 March 2006 it will no longer be possible to conclude transactions with a structure which is a movable.

According to the opinion of the Constitutional Committee of the Riigikogu, appended to the opinion of the Legal Affairs Committee, § 131(2) of LPAIA gravely infringes the principle of legal clarity and the problems referred to by the court are serious, nevertheless, on the basis of other constitutional values the declaration of unconstitutionality of the provision would not be justified. What has to be taken into account is the principle of protection of trust and the fact that the regulatory effect of the provision will terminate on 1 March 2006. Also, in commerce, all notaries have interpreted the contested provisions as giving rise to the right of pre-emption.

8. The Minister of Justice is of the opinion that the third and the firth sentence of § 131(2)of LPAIA are in conformity with the Constitution.

The Minister of Justice is of the opinion that irrespective of the method of interpretation the sentences under discussion are subject to unambiguous interpretation. Certain terminological differences with the general regulation of private law can be explained by the fact that we are dealing with a reform law. The fact that the final legal consequences of the regulation under discussion arise in the application of several provisions in their conjunction, is also common to other private law regulations. The degree of legal clarity of this regulation is comparable to that of other valid reform laws.

The Minister of Justice points out that civil commerce of a structure which is a movable is subject to obligatory notarised formal requirements. According to the information from the Chamber of Notaries a uniform notarial practice has developed for the interpretation of the contested provisions and so far there have been no disputes concerning the existence of the right of pre-emption. Thus, everyone participating in commerce can, with competent counselling, be informed of the valid right of pre-emption upon transferring a privatised dwelling, of the procedure for the exercise of the right and of the legal consequences thereof. The practice as long and as uniform as this does not allow to regard pertinent regulation as lacking legal clarity.

Nevertheless, the Minister of Justice admits that § 131 of LPAIA is not free of problems. It can be argued that the owners of privatised dwellings are treated unequally in comparison with the owners of apartment ownership, as in case of transfer of registered apartments no right of pre-emption has been prescribed. The legislator enacted a different regulation in regard to these objects of rights because it wished to make apartment ownership an attractive object of civil commerce. The right of pre-emption of co-owners is but a temporary measure, fostering the interests of the owners of small residential buildings.

The Minister of Justice does not consider it necessary to analyse the proportionality of the infringement of the right of ownership, caused by the right of pre-emption, because his opinion on that issue has not been requested.

9. The Chancellor of Justice is of the opinion that sentences 3 and 5 of § 131(2) of LPAIA are not pertinent provisions for the adjudication of the civil matter. Furthermore, when reviewing the formal constitutionality

of the provisions, the Chancellor of Justice came to the conclusion that these are in conformity with the principle of legal clarity. The provisions are of a reform law and meet the level of legal clarity required of reform laws and they can be understood with the help of commentaries to the Act and with competent counselling. The Chancellor of Justice argues that the substantial constitutionality of the infringement can not be assessed on the basis of the facts submitted within the concrete norm control.

10. The plaintiff is of the opinion that § 131(2) of LPAIA is in conformity with the Constitution.

The contested provisions in their conjunction are understandable and clear in the legal sense. This is supported by the fact that during the whole period of validity of the norm no legal disputes, deserving the attention of the Supreme Court, have arisen on the basis of application of the norm or exercise of the right of pre-emption. Thus, the norm has been uniformly understandable to those who have applied it.

11. The defendant has not forwarded to the Supreme Court her opinion concerning the petition.

CONTESTED PROVISIONS

12. § 131 of the Law of Property Act Implementation Act provides as follows:

“§ 131. Right of pre-emption upon transfer of structure as movable for charge

(1) If a structure is in common ownership, a co-owner has, upon transfer of a legal share of the structure for charge, the right of pre-emption to the share being transferred except if the share is transferred to a descendant or parent of the co-owner, another co-owner or a person who has preference by law.
(2) The right of pre-emption of a co-owner does not apply upon privatisation of a dwelling and of a non-residential space in a residential building. A privatised dwelling and privatised non-residential space in a residential building and other shares belonging thereto are in commerce together. The right of pre-emption of a co-owner does not apply upon transfer of a privatised dwelling or non-residential space in a residential building for charge if there are more than six co-owners. An obligated subject of privatisation of a dwelling or non-residential space does not have the right of pre-emption. In the case of a co-owner’s right of pre-emption, it also extends to the dwelling connected with another share of the structure and to non-residential space in the residential building.”

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

13. Pursuant to § 14(2) of the Constitutional Review Court Procedure act the Supreme Court can only review the constitutionality of a pertinent norm. A norm is pertinent if it is of decisive importance for the resolution of a case (see judgment of the General Assembly of the Supreme Court of 22 December 2000, in matter No 3-4-1-10-00 – RT III 2001, 1, 1, § 10).

14. The circuit court was of the opinion that the resolution of the civil matter depended on the third and fifth sentences of § 131(2) of the Law of Property Act Implementation Act. The court proceeded from the assumption that other provisions of the Act do not establish the right of pre-emption with respect to a flat, which was also one of the justifications why the court regarded the contested provisions to be lacking legal clarity. Thus, the Chamber must first check whether any of the uncontested provisions of the Act give rise to the right of pre-emption with respect to flats, and after that the Chamber will be able to assess whether the contested provision is pertinent and the whole regulation constitutional.

15. Pursuant to § 13(4) and (6) of LPAIA a privatised dwelling may be in commerce as a movable, that is it can be an object of transactions. The referred provisions do not say that a privatised dwelling shall be in commerce together with a legal share of a structure, belonging to it, as it is provided for in the § 1(2) and (3) of the Apartment Ownership Act in regard to registered flats (apartment ownership). Nevertheless, such a principle arises from the conjunction of these provisions with several other provisions.

Thus, pursuant to § 3(1) of the Privatisation of Dwellings Act a residential building or an apartment with

another corresponding share of the structure shall be the object of privatisation. Pursuant to § 3(2) of the same Act the size of a share of a structure corresponding to an apartment or a non-residential premises shall be determined on the basis of the proportion of the total area of the apartment or non-residential premises of the total area of all the apartments and non-residential premises of the structure, and the referred share shall be determined as a legal share. Pursuant to § 28 of the Apartment Ownership Act the provisions of the Act concerning a community of apartment owners and administration of a residential building consisting of several apartments apply also to dwellings and non-residential premises which are in commerce as movables. Pursuant to § 70(3) of the Law of Property Act, an ownership in legal shares of a shared thing belonging to two or more persons concurrently is common ownership. Also, the second sentence of § 131(2) of LPAIA establishes that a privatised dwelling and privatised non-residential space in a residential building and other shares belonging thereto are in commerce together. The Chamber points out, further, that pursuant to § 211 of the Privatisation of Dwellings Act a person owning a dwelling which is a movable is entitled to become an owner of an apartment ownership, that is he or she has the right to privatise the land belonging to the apartments.

16. The Chamber concludes from the aforesaid that the shares of a privatised residential dwelling, which are not in the sole ownership of one of the apartment owners, are in the common ownership of all owners of apartments. The circuit court took the same position. Before registration the apartments are in commerce as movables (physical shares of a residential building), together with the legal shares of the residential building, inseparably belonging to apartments. Thus, the owners of privatised dwellings are, simultaneously, co-owners of the residential building.

17. Under § 131(1) of the LPAIA a co-owner has, upon transfer of a legal share of the structure for charge, the right of pre-emption to the share being transferred. Proceeding from the second sentence of subsection (2) of the same section it is impossible, in commerce, to separate a privatised dwelling from other shares of the residential building belonging thereto. Pursuant to the fifth sentence of subsection (2) of the same section the co-owner’s right of pre-emption also extends to the dwelling connected with co-ownership. Thus, the possibility to exercise the right of pre-emption, upon sale of a legal share of a structure, also extends to a dwelling which constitutes a physical share of the structure.

18. It proceeds from the aforesaid that the legislator has provided for the right of pre-emption upon transfer of a privatised dwelling. This proceeds from subsection (1) of § 131 of LPAIA and from the second and fifth sentences of subsection (2) of the same section. The Chamber considers the referred provisions in their conjunction to be pertinent and shall next review the formal constitutionality thereof.

The Chamber concurs with the Chancellor of Justice in that the third sentence of § 131(2) of LPAIA, pursuant to which the right of pre-emption of a co-owner does not apply in a residential building where there are more than six co-owners, is not pertinent.

19. The Circuit court has expressed the opinion that the provisions of the Law of Property Act Implementation Act, regulating the co-owner’s right of pre-emption, are so ambiguous in the legal sense that the addressee of the norm will not be able, taking into account the circumstances and even with competent counselling, to reasonably predict the consequences of his or her acts.

20. § 10 of the Constitution gives rise to the principle of legal certainty. In the most general sense the principle is to establish certainty as to the valid legal order. Legal certainty means both clarity as to the content of valid norms (principle of legal clarity) as well as to the standing of the enacted norms (principle of legitimate interest). Pursuant to the principle of legal clarity a person must able to predict with sufficient clarity the legal consequences of his or her acts.

Thus, the circuit court has raised the question of the compatibility of the provisions of § 131 of LPAIA with the principle of legal clarity and the Chamber shall analyse, next, whether the contested provisions are sufficiently clear.

21. The Chamber points out that the degree of determinateness or legal clarity of a norm, required by the Constitution, is not the same in regard to all norms. The norms, which allow for the restriction of individuals rights, must be more clear and precise. As the co-owner's right of pre-emption restricts the right of disposal of the owner of a privatised dwelling in regard to the dwelling owned by the latter, such a restriction must be established in a manner which enables the owner of the dwelling to take this into account.

22. When delimiting the necessary degree of legal clarity, required by the Constitution, the court can also draw on the practice of the European Court of Human Rights. In the judgment of Sunday Times v United Kingdom the European Court of Human Rights has found the following: "A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." (judgment of plenary session of the European Court of Human Rights of 26 April 1979, in Sunday Times v United Kingdom, § 49).

23. The determinateness of a norm must not be assessed from the point of view of the parties to a dispute. The measure is an imaginable person of average abilities who is the addressee of the norm. The Chamber concords with the circuit court in that the wording of § 131 of LPAIA is clumsy and at first glace even illogical and that it is hard to uniformly understand it without specialist knowledge. Yet, the same holds true in regard to several other provisions of law. Analogous problems are related especially to reform laws, which have been amended repeatedly, resulting in controversies of logic between and within laws. The duty of a court is, among other things, to interpret laws and, if need be, overcome the controversies and gaps. Not every ambiguity of an Act necessarily amounts to unconstitutionality. The Chamber is of the opinion that the systematic interpretation of laws enables to conclude that the will of the legislator was to establish the right of pre-emption in small residential buildings (see §§ 15-18 above).

24. What is also to be taken into account is the fact that pursuant to the second sentence of § 131(6) of LPAIA the civil commerce of a structure or of a share thereof, which is a movable, is subject to mandatory notarial certification. Consequently, a notary consults the owner and the buyer of a privatized dwelling, explaining to them the rights and obligations related to a transaction, including the existence of the co-owner's right of pre-emption, the duty to inform other co-owners and the legal consequences. It appears from the opinion of the Minister of Justice that according to the information from the Chamber of Notaries a uniform notarial practice has developed on the basis of the contested regulation and previously there have been no disputes as to whether § 131 of LPAIA provides for the right of pre-emption with respect to a privatized dwelling. Although this is not decisive for the purposes of assessing the legal clarity of the norm, it nevertheless supports the view that so far the persons, who are addressees of the norm, have understood the content of the norm with competent counseling.

25. On the basis of the aforesaid the Chamber is of the opinion that declaration of unconstitutionality of the contested norms on the ground of their lack of legal clarity would not be justified.

It is for these reasons that the Chamber shall dismiss the petition of the circuit court and shall not declare pertinent provisions of § 131 of LPAIA unconstitutional.

Tõnu Anton, Lea Kivi, Ants Kull, Villu Kõve, Jüri Põld

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