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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER

of 22 March 2001

Review of the petition of the Saare County Court to declare clause 25 (1) of the Procedure for Privatisation of Land by Auction invalid.

The Constitutional Review Chamber, presided over by justice Tõnu Anton and composed of the members of the Chamber, justices Lea Kivi, Ants Kull and Jüri Põld, at its open session of 1 March 2001, with the representative of the Government of the Republic attorney Anne Tammer, representative of the Chancellor of Justice senior adviser to the Chancellor of Justice Maret Liivak and the representative of the Minister of Justice the head of the department of courts of the Ministry of Justice Enno Loonurm appearing and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petition of Saare County Court of 5 January 2001.

I. FACTS AND COURSE OF PROCEEDINGS

1. Jaak Treima submitted an application to participate in the privatisation of a plot of land, located in Valjala rural municipality, Saare County, by closed auction. The commission organising the auction decided, in its protocol, that the documents submitted by J. Treima did not meet the requirements. J. Treima was not considered to be a participant in the auction because he had not appended a certified copy of the order of local government concerning partial or full compensation for land.

2. Jaak Treima filed a complaint with the Saare County Court, requesting that the resolution part of the protocol be annulled, not applied and that clause 25(1) of the Procedure for Privatisation of Land by Auction, approved by the Government of the Republic Regulation no. 268 of 6 November 1996 (hereinafter "the Procedure") be declared unconstitutional. The complainant argued that clause 25 (1) of the Procedure was in conflict with § 22(4)1) of the Land Reform Act (hereinafter "the LRA") and, consequently, with § 3(1) as well as with § 87(3) and (6) of the Constitution. Namely, this provision of the Procedure limits the circle of persons who can, under § 22(4)1) of LRA, participate in privatisation of land by auction. As J. Treima met the requirements of § 22(4)1) of LRA (he was an entitled subject of ownership reform to whom, under § 6(2)3) of LRA, the land located in Valjala rural municipality was not returned), the commission had no ground to regard his bid as not meeting the requirements.

3. The Saare County Court satisfied the complaint by its judgment of 22 December 2000. The court did not apply clause 25(1) of the Procedure because of its conflict with § 3 and § 87(3) and (6) of the Constitution. On 5 January 2001 the Saare County Court submitted a petition to the Supreme Court requesting that it review the constitutionality of clause 25(1) of the Procedure.

II. THE LAW

The disputed provision

4. Clause 25 (1) of the Procedure prescribes the following:

"25. The following documents shall be appended to the application:

1) upon applying for land under § 22(4)1) of Land reform Act a certified copy of a local government decision concerning partial or full compensation of land;

....."

Justifications of the participants

5. The court judgments sets forth the following reasons for the petition:

1) According to § 22(4)1) of Land Reform Act a person to whom land was not returned in part or in whole on the bases provided for in clauses 6 (2) 2) 4) of the same Act may purchase residential land or a land not designated for a specific purpose in the administrative territory of the local government of the location of the land. According to § 23(6) of LRA land is privatised pursuant to the procedure established by the Government of the Republic. Clause 25(1) of the Procedure stipulates that upon privatisation of land by closed auction under § 22(4)1) of LRA a certified copy of an order of the local government that land has been compensated for partially or fully must be appended to the application. In comparison with the Land Reform Act the latter provision of the Procedure restricts the circle of persons who have the opportunity to privatise land by closed auction. A decision to compensate for land can not be decisive for determining whether land was or was not returned. For various reasons compensation need not necessarily have been paid when land was not returned in part.

2) As by clause 25 (1) of the Procedure the Government has restricted the circle of persons who can participate in privatisation of land by auction under § 22(4)1) of LRA, the former provision is in conflict with § 3(1) and § 87(3) and (6) of the Constitution.

6. At the court session the representative of the Government of the Republic expressed the view that the disputed provision of the Procedure was in conformity with the Constitution. Land can not be regarded to have been returned from the moment when an order to return land is issued, but from the moment the returned land is entered in land register, that is from the moment the right of ownership of the returned land arises. Land can not be regarded as not returned from the moment the order not to return land is issued, but from the moment compensation is received for the land which is not returned. Submission of a certified copy of the local government decision concerning partial or full compensation for land serves as a proof to the organiser of privatisation that process of not returning land in part or in whole to an entitled subject of privatisation has been completed and that the entitled subject of privatisation belongs to the circle of persons established by § 22(4)1) of LRA.

7. In his written opinion submitted to the Supreme Court the Chancellor of Justice argues that land reform is completed in regard to each specific claim and plot of land when a decision concerning return of or compensation for land has been made. Under § 22(4)1) of LRA "a person to whom land was not returned..." belongs to the circle of persons who have the right to participate in closed auction. As § 22(4)1) of LRA does not use the term "compensate", the provision gives no ground to demand that the land which was not returned must have been compensated for. Under this provision of the Act a closed auction is open to persons in regard of whose application the final decision has not been made in the course of land reform, but

in regard of whom an order has been issued concerning refusal to return land. In comparison with the Land Reform Act clause 25 (1) of the Procedure restricts, without basis, the circle of persons who have the right to privatise land by closed auction. As this provision of the Procedure has been issued exceeding competence, it is conflict with § 3(1) and § 87(6) of the Constitution. Clause 25 (1) of the Procedure should be declared invalid to the extent that it restricts the circle of participants of closed auction.

8. The Minister of Justice is of the opinion that clause 25(1) of the Procedure is not in conflict with § 3(1) and § 87(6) of the Constitution. This provision of the Procedure does not restrict the circle of persons who, under § 22(4)1) of LRA, have the right to purchase land by closed auction. As the Land Reform Act gives no possibility not to return unlawfully expropriated land without compensation, the decision not to return land directly results in an obligation to compensate for the land. Decision concerning non-return of land in part or in whole, referred to in clause 25(1) of the Procedure, must not be understood as a decision concerning specific amount or method of compensation, it has to be read as a decision on principle that instead of return land shall be compensated for. Thus, the decision referred to in clause 25(1) of the Procedure also includes a decision of a local government not to return land. Clause 25(1) of the Procedure is not in conflict with § 87(3) of the Constitution, either. Under § 15(1) of the Land Reform Act the Government of the Republic had both the right and the obligation to establish procedure for deciding on return and compensation for land by local governments. The Government has fulfilled its obligation and presently the Procedure for Return of Unlawfully Expropriated Land, approved by the Government of the Republic Regulation no. 36 of 5 February 1993 and the Procedure for Determining Compensation for Unlawfully Expropriated Property, approved by the Government of the Republic Regulation no. 216 of 13 July 1993 are valid within this sphere.

The opinion of the Constitutional Review Chamber

9. § 4 of the Land Reform Act regards land reform as part of ownership reform, which is carried out under the conditions of and pursuant to the procedure provided for in the Republic of Estonia Principles of Ownership Reform Act and the Land Reform Act. Unless otherwise provided by the Land Reform Act, the Principles of Ownership Reform Act shall be applied to land reform.

Both Acts differentiate between the return of and compensation for unlawfully expropriated land. § 13 of the Principles of Ownership Reform Act considers the fact that property is not returned as a basis for compensation. § 13 of the Land Reform Act provides that if land is not returned in part or in whole, the land is compensated for pursuant to the procedure provided for in the Land Evaluation Act.

10. § 13 (7) of the Principles of Ownership Reform Act differentiates compensation for unlawfully expropriated property as an independent proceeding.

The two legal acts approved by Regulations of the Government of the Republic – the Procedure for Return of Unlawfully Expropriated Property and the Procedure for Compensating for Unlawfully Expropriated Property - also proceed from the fact that proceedings in matters concerning return of property and proceedings in matters of compensation are different. Clause 7 of the procedure for return of property distinguishes the procedure of return of property, which has the following parts: preparatory proceeding for return of property, making of the decision concerning the return of property, and return of property to an entitled subject. The procedure for return of property also regulates the decision-making concerning non-return of property (clause 58). Pursuant to clause 2 of the procedure for compensating the procedure consists of the following parts: initiation of the proceeding for compensating for property, determination of the value of the property to be compensated, determination of compensation and issuing of compensation vouchers to an entitled subject.

11. According to the logic of the procedure for return of property the proceeding in the matter of returning land can be completed by a rural municipality or city government order to return the property (clause 57) or with an order not to return the property (clause 58). In order to complete the proceeding in the matter of compensation the executive body of a local government shall issue an order determining the amount of compensation (clause 33 of the procedure for compensation). Each of these orders can be disputed in court.

Judicial revocation of an order to compensate does not affect the validity of an order concerning the refusal to return property.

12. Pursuant to clause 58 of the procedure for return of property an order concerning refusal to return property must include the reason why land is not returned and a legal basis by reference to a pertinent clause of § 6(2) of the LRA. The procedure for return of property does not require an order concerning refusal to return land to indicate that land shall be compensated for.

13. As a rule, a compensation procedure is completed by issuing compensation vouchers to an entitled subject (see e.g. clause 2(4) of the procedure for compensation). There is another possibility to complete a compensation procedure. § 13(7) of the Principles of Ownership Reform Act establishes: “During a property compensation proceeding, a person who has been declared an entitled subject is required to perform acts necessary for the proceeding within the terms and pursuant to the procedure established by the Government of the Republic. If, without good reason, an entitled subject fails to perform the necessary acts within the term notified to the entitled subject in writing, the person is deemed to have renounced the claim and the compensation proceeding shall be terminated. If within six months after a compensation decision is made the entitled subject fails, without good reason, to submit an application for transfer of the compensation to a privatisation voucher account, the compensation proceeding shall be terminated and the compensation decision shall be annulled.” Clause 33 (1) of the procedure for compensation refers to this provision.

Consequently, a return proceeding can not be completed by actual receiving of the compensation or by revocation of compensation order. These are two different proceedings within the ownership reform, which are completed by different ways and which serve different aims.

14. § 22(4)1) of the Land Reform Act establishes that a person to whom land was not returned in part or in whole on the bases provided for in clauses 6 (2) 2) 4) of the same Act may purchase, by closed auction, residential land or land not designated for a specific purpose in the administrative territory of the local government of the location of the land. Clause 25 (1) of the Procedure, on the other hand, requires that a certified copy of a local government decision concerning compensation for land partly or in full, must be appended to the application to participate in closed auction. The latter provision deprives persons, who have not been compensated for the land which was not returned, of the right to participate in closed auction of land.

It would hardly meet the objective of § 22 (4) 1) of the LRA if a person who wishes to participate in a closed auction had to go through compensation procedure.

If the right to participate in privatisation of land by a closed auction were linked to compensation for land, a person to whom compensation has not been determined would not be able to participate in an auction. The speed of compensating is established by the procedure for compensation. According to clause 7 (2) of the procedure the term of compensation proceeding is three months, beginning with the decision to start a compensation proceeding. Under clause 1 a compensation proceeding has to be started within one month as of the decision not to return property. The speed of a compensation proceeding does not depend on an entitled subject. This puts persons to whom unlawfully expropriated property has already been compensated for, and persons to whom it has not yet been compensated, in a different situation. The latter lack the possibility to participate in the auction of a plot of land they like. It may even happen that the land in the administrative territory of the local government which is subject to privatisation will be privatised before the compensation is paid to an entitled subject.

Also, a person who has accepted that property is not returned to him, may for different reasons not be interested in compensation and may waive compensation. It is not right to deprive such persons of the possibility to participate in the auction of land.

An entitled subject may not agree with the amount of compensation and may dispute the amount in court. The Chamber does not understand the legal meaning of the disputed compensation order. A compensation

order can be revoked before the decision is made during the auction proceeding.

Proceeding from the above logic the right to participate in privatisation by closed auction should be linked to non-return of land and not to compensation proceedings.

15. § 23(6) of the Land Reform Act establishes that land is privatised pursuant to the procedure established by the Government of the Republic. Authorisation to establish the procedure for privatisation in itself does not exclude the possibility to determine which documents should be submitted to prove the circumstances provided by law. In the present case the Government has, by its regulation, established an additional requirement, which is not established by the Act. The order to compensate for land referred to in clause 25 (1) of the Procedure can serve as a proof that land was not returned, but a sufficient proof that land was not returned is a city or rural municipality order not to return land.

16. As clause 25 (1) of the Procedure established a condition for participation in privatisation of land by auction, which is not provided by law, then this provision of the Procedure is in conflict with § 22(4)1) of the LRA. Also, by establishing clause 25(1) of the Procedure, the Government has exceeded the authority delegated to it by § 23(6) of the LRA. This is why clause 25(1) of the Procedure is in conflict with § 87(6) of the Constitution, pursuant to which the Government of the Republic shall issue regulations on the basis of and for the implementation of law. Clause 25(1) of the Procedure is also in conflict with the first sentence of § 3(1) of the Constitution, which establishes that the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.

Proceeding from § 19(1)2) of the Constitutional Review Court Procedure Act the Constitutional Review Chamber of **the Supreme Court has decided:**

to declare clause 25(1) of the Procedure for Privatisation of Land by Auction, approved by the Government of the Republic Regulation no. 268 of 6 November 1996, invalid.

The judgment is effective as of pronouncement, is final and is not subject to further appeal.

Tõnu Anton
presiding justice

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