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The Superficies Right in the Light of the Romanian Land Law

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Abstract

The present study attempts to bring in front that issue of persons who even they are not owning the land, they received a right of use on it and, therefore, have raised different buildings (houses for living, for example), or make some investments (like vineyards, orchards, and so on) on that land. In this context, we will try to look into our national regulations in this matter, because the way in which Romanian Land Law (no. 18/1991 republished) was enforced, raised and continues to raise problems in front of trial proceeding courts, which are comparing with new and complex judicial situations. One of this is about the case that persons who were reconstituted property right and they came into contact with realities already existing, as result to a former judicial document perfectly legal at that time.

Keywords: reconstituted property right, land use allocation, superficies right

1. Introduction

1.1 Introduce the Problem

The superficies right is known as a dismemberment of property right which had no clear regulation until the entry into force of the New Civil Code (Law nr.287/2009). Still, the legislation at that time, such as Decree - Law no.115/1938 for unification of provisions on land registers, Decree no.167/1958 about the extinctive prescription and legal practice have established it as an immovable property. The superficies right was defined in our legal literature as a real right which includes the property right of that person who is called superficiary and have a construction, plantations or other investments on some another land owner then himself, the ground on which the superficiary acquires a right of use. Being a real right, it is not extinguished by unused, it is apparently and continuously gives to its owner attributes of possession, use and disposal.

The existence of superficies rights enshrined to the superficiary a disposal material right over the land, which offers the possibility to dispose of its land's substance only for use of building. According with it, the superficies right concerned the use of the land on which exists a construction; the superficies right will have in this situation the same duration as the existence of construction (Pop et al., 2012). If the building was demolished and the demolition was ordered legally, the superficies right invoked did no longer exist. In case of superficies right we are in the presence of two overlapping property rights related to two different owners that ownership of land belonging to a person and ownership of buildings belonging to another person.

Both before and after 1990 in Romania, the state owned lands could be and were awarded individual administrative acts by way of right of use, cooperative organizations, other community organizations, and individuals.

In most cases, land use allocation was done on some buildable land perimeter of the settlements, to accelerate construction, particularly for housing owned by individuals (Alunaru, 1993).

This study, based on adequate literature in domain and jurisprudence also, propose to deal with the regime of superficies, which now became legal, starting with some notions about the present issue, the effects of this right and ending with the consequences on it through juridical relations (Surdu, 1973).

1.2 Explore Importance of the Problem

The real right to use the land allocated under some regulations (Decree no.244 / 1955, Law no. 4/1973, Law no. 58/1974, Decree-Law no.61 / 1990, Law no. 50/1991) the extent to which their holders - owners of those buildings - have not requested and obtained the allotment according to Article 35 of Law No.18 / 1991

republished, there is still today (Bârsan, 1972). But it can not be qualified as a real right to use distinct from ownership of the house, but, at present, the right to use, along with ownership of the building must be qualified as a right of superficies, dismemberment of the state or administrative-territorial units law private property.

Our legislation establishes a single *ex lege* superficies right which is regulated directly from the law (Family Code). It's about the situation when during the marriage on the land own by one spouse exist common goods (Alexandresco, 1909). The non-proprietary spouse of the land becomes the holder of a superficies right. As a result, and according with the legal regulation, all buildings built in joint property by both spouses, becomes their property and the land on which they built remain the sole property of one spouse, but gaining on it a right to use the other spouse. Thus, the superficies right in this case is acquired directly based on Family Code regulations (Article 30) and not in the conventional way (Brădeanu, 1957).

But not about this case or about the superficies right in its plenitude have we spoken in this article, because not here could be meet the most controversial issues relating to the property. It is much discussed - why not face it? - the Land Law (18/1991) and the award procedure in use or ownership of some categories of land, which in many cases was made by breaching the law, those who were part of the local committees in property award land under the Land Law restitution land to former owners - people of good faith - thereof without taking out the fact that those lands were already edified investments made by those who had in the past those land use, in spite of legal regulations (Law no. 18/1991, Article 23).

This was happened because the application of the Land Law has raised and continues to raise issues to the courts which are seeing confronted with new legal situation, the most of its very complex.

2. Method

Known in Roman law as that right for a person to use a building build on the land of another person, forever or for a very long period, for a sum of money called *solarium*, the superficies right was born usually, by treaty, as an annex to a long or very long lease, on a land for construction. Its institution was taken over in modern civil law through, for example, regulations of Article 553 from the Napoleonic Code, and then, partial was reproduced by the Article 492 of the Romanian Civil Code. The existence of the superficies right, as an exception to make the purchase of artificial real estate accession, is recognized indirectly by the provisions of the law text noted: "Any construction, plantation or thing done in the ground or on the ground, are presumed to be made by the owner of that land and that are his, until the contrary is proved". This legal text establishes a rebuttable presumption of ownership of the building located on a land, in favour of the landowner, who built the building, may prove contrary, that these buildings are not owned by the holder of ownership over the land (Galan, 2005).

Doing this contrary evidence, who owns a construction built on land on other, becomes the holder of a superficies right. Later, the superficies right was mentioned in Article 11 of Law no. 115/1938. Among real estate rights to be tabulated, Article 19 of Law no. 7/1996 mentions the superficies right.

Also, the Article 22 of Decree no. 167/1958 on extinctive prescription rights include through exempted rights from the provisions of this decree also the superficies right. So, the superficies right is, according to the definition given by judicial practice and literature after a prolonged debate, a real estate right, dismemberment of the right ownership over land, and consists of the ownership of a person named superficiary on construction or plantation built on the land of another person on whom the land has an use right.

In the light of new regulation as Law no.71/2011 for the implementation of the New Romanian Civil Code which provides that the provisions on the superficies right are applicable only for establishment of this dismemberment after entry into force of the New Civil Code. Thus, the superficies right has been regulated by the New Civil Code (Law no. 287/2009 implemented by Law no. 71/2011) (Bîrsan, 2013).

Being it, results that, in case of this right real estate, two property rights overlap, and it is mean that's one of the superficiary ownership of the buildings built or plantations and the second one of the land ownership on which these buildings were built and owned by someone other than the builder. In light of these considerations, the existing law ownership of the building located on the land of another person, acquired by any title, exclude through hypothetic intervening mechanism of accession.

In the same time, the existence of this right entails in an objectively necessary way, as otherwise there couldn't be exercised, a right of use land concerned, embodying these rights real superficies right. So being, the builder has for the land of another person only possession and use of it, the disposal attribute will remain to the owner of the land, in this way confers character dismemberment of ownership.

For this reason, the superficies right must be viewed in the light of safeguards imposed by the European Court of Human Rights (i.e., Case Moculescu against Romania, judgment of 2 March 2010), but within investiture court.

The superficies right may arise under the law, by title or acquisitive prescription (Bârsan, 2005; Chirică, 1992).

In these conditions, even if between the owner of the building and the owner of the land has not been a convention through the latter consent to the encumbrance of land or certain tasks, is admitted on rational interpretation of Article 492 Civil Code that has acquired a right of ownership of the building, heritage is born an *ope legis* superficies right, which are consisting in ownership of the building and use the land during the construction existence.

Also, acquiring of the superficies right, according to the rules of the New Romanian Civil Code, can be done by legal act *inter vivos* or *mortis cause*, legal facts or otherwise provided by law. In all cases the provisions are applied according with Land Registry. Thus, if another building on the other land owner, the superficies can be enrolled in the Land Registry based on disclaimer of the landowner right to invoke accession. We note that the superficies right can be acquired even through testament (as unilateral act) and not only by convention. The birth of the superficies rights by legal fact refers of its acquisition by usucapio and lawful inheritance (Boroi & Stanciulescu, 2012). Usucapio is possible when the owner of the land acts as a superficiary, not as an owner such could be in case of possession as fact. Of course, in conditions regulated by the New Civil Code, the acquisitive prescription is unregistered title when this right is not registered in Land Registry and shall take place within 10 years, or registered title where the superficies right is registered in Land Registry, for which the term is 5 years. The New Civil Code, through its regulations, give up the idea of super perpetuity of the superficies right, embracing, comparative with the old one (Uilescu, 2013), the temporary nature of this right, the maximum of its being 99 years (Article 694 of the Civil Code). This period, after it's finished, could be renewed with a new period which could not over the 99 years. In this case, it is necessary to be specifying what happens with construction, plantation or the other investments, if the superficies get in terms. Typically, in the absence of any contrary stipulation, the exercise of the right is bounded by the land area on which build and that's one which is necessary for build up construction operation needs (Article 695, al. l, Civil Code).

3. Results

One of these concerns the case of those who reconstituting their ownership right come into contact with existing realities, as a result of previous legal acts perfectly legal at the time (Pop, 1980). It is exactly meaning such people - usually peasants, former cooperative members of agricultural cooperatives, today abolished - who had in use lands and they built on these houses, other buildings or had been various other investments such as plantings of vines or fruit trees.

In this regard the Land Law is very clear because by Article 23 stipulate that "are and remain in private property of the cooperative or, where appropriate, their heirs, regardless of their occupation or residence, adjacent land dwelling house and annexes and around their yard and garden [...]" (Stoica, 2004)

But there were some local committees for the implementation of Law no. 18/1991 which did not take into account the legal provisions and proceeded to land restitution to former owners, without taking into account that on those lands were already existed structures (houses, plantations and other facilities necessary for a household) of the persons to whom were put into use those lands.

Thus, those decisions of local commissions had became final because they were not challenged within the statutory period, the people who and had been built or made other investments in those fields seeing it put into the position of being ignored by the former owners, who did the demolition of buildings - even if were houses! - even the destruction of plantations; this happening in many cases (Pop, 1993).

The courts were also invested with solving of some cases that had such an object; that is why was put the question if it is time to recognize those people (the builder or investor with good faith, who ascended construction or made different investments within the law at that time), a superficies right on the land were returned to their former owners?

In accordance with Article 482 regulations from the Romanian Civil Code "the movable or immovable property of a thing gives rights on everything of what the thing produce and on the cause of all that unites, as an accessory, with the thing, in a natural or artificial way". This right is called "right of accession", and its giving a use right to the land owner on everything was built on that land, of course, with pay compensation to that one who has made construction (Ungureanu & Munteanu, 2008).

But these evoked provisions by the Civil Code disadvantage the builder or investor because its do not take into account the realities of contemporary life, which involving profound changes in terms of ownership.

According to Law no. 58/1974 and Law no. 59/1974 (now both abrogated), the lands which were taken out of civil circuit and were put into use on long times, involving building construction or other investments that are

sometimes even higher than the negotiated value of the land.

In other words, building construction or other investments made on land that now reverted property of those who have owned them earlier of their removal from the civil circuit, is no longer a situation identical with that contemplated by the legislator when published 482 and 489 articles from Civil Code. Indirectly, this follows from regulation of Article 23 of Law no. 18/1991 which setting up, in a way, an exemption from the rules of those two articles of the Civil Code.

Therefore, we can say that we face with an exception situation, which requires the imposition in such cases of broadening the scope of the superficies institution, real main right entitling on investments made on the land of another to builder.

The definition of the superficies right is very clear in this regard: "real main right, dismemberment of ownership over land, including the right property of a person called superficiary, for building, plantations and other works that are on another land property, land over which the superficiary has a right to use". Thus, because the text of Article 492 Civil Code establishes a rebuttable presumption of ownership of the constructions located on land in favour of the land owner, the builder can to remove (the presumption) by contrary evidence, because if he proof the contrary, the builder becomes the holder of a superficies right of, meaning he will have a use right on another owner land. If we were to take into account the conditions of the two above-mentioned laws were repealed today (Laws No. 58 and 59/1974) regarding the right to use it only stretched over the life of the building.

4. Discussion

The superficies right is a real right that allows to a person (named superficiary) being the owner of construction, works or plantations on land belong to another person, land that superficiary has a right to use it. The superficies right is an exception to the estate joining governed by Article 492 of the Civil Code. It is defined as a real estate right, perpetuated and imprescriptible.

Before 2011 the legal regime of superficies right weren't defined by any legal provision in our legislation. However, several legislative acts refer to the term "superficies", like Article 11 of Decree-Law no. 115/1938 on unification of land registries, Article 22 of Decree no. 167/1958 on extinctive prescription, Article 21 of Law no. 7/1996 about Cadastre and Land Advertising and Article 488 of the Civil Code, amended by Government Decision no. 138/2000 (Drăguşin, 2012).

Based on these existing cases in judicial practice and based on the current legal texts (Article 693-702 the New Civil Code), it is advisable to operate in the case of former cooperative members in good faith, who receiving lands for use on long-term, they were proceeded to build housing or orchards or vineyards, and even households, farm animals, and many other investments, whose value - today - rises far higher than actual land value were in use.

We must mention that the disposition of Article 693-702 from Civil Code has no application on that's superficies rights established before the entry into a force of the Civil Code.

Till entry into force of the New Civil Code, which was happened at 01.10.2011, the superficies right has not its own legislative regulation. In doctrine, this fact led that the right of using land by cooperative organizations awarded before 1990, to be qualify as superficies right, dismemberment of the ownership state private right (Bodoasca et al., 2012).

With other words, in case of former cooperative entities, the superficies right on land as born in the same time with award of use with no pay use and no term or on the existence of construction on lands which belonged to state. That's why because through awards of use right on the lands acts was specified that the lands was given in scope to building on it's of some estates for deserve in cooperative entities activities.

Obviously that the former owners are entitled to receive back their property, but also the good faith builders are entitled too at least to pay compensation for their construction / investment was made on those lands, which they have used and exploited like a good owner. With these regulations we believe that the lands which were allocated for free use by the Romanian state to cooperative organizations, to be automatic encumbered with a free superficies right, in effect of clearing efforts of cooperative organizations which have built on such lands.

In conclusion, like servitudes we believe that land ownership can be legally subjugation due to a superficies right.

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