

## GENERALITIES OF THE JURIDICAL PROTECTION OF THE RIGHT TO COMMON PROPERTY

*Paper is devoted to actual issues of the development of national legislation and the mechanism of the realization of law practice in the field of the protection of common property in court. As a result of an analysis of the scientific literature, legislation and judicial practice several comments on major issues and errors arisen in the practice of the legal measures application in order to protect the right of common properties, as well as several recommendations for its preventing and overcoming are formulated.*

**Keywords:** *property rights, common property, judicial protection of common property, judicial remedies of common property.*

European integration, continuous development of social relations, compliance with their regulatory needs of the modern society imply the need for the improvement of the current legislation of Ukraine. At the same time there is not only the problem of regulatory settlement relationships, making changes and additions to the regulations, but the problem of the mechanism of implementation of the rules in practice, problems of their interpretation and application as well. In particular, this applies to such important spheres as the right to common property and its protection. Today we can state the existence of problems and mistakes in practice that take place when implementing constitutional and civil rights on the property (art. 41 of the Constitution of Ukraine [1], art. 321 of the Civil Code of Ukraine [2] (hereinafter referred to CC) and its judicial protection (par. 1 art. 55 of the Constitution of Ukraine, including Art. 16 of the CC), which is confirmed by numerous lawsuits in this sphere.

The issues of protection of the rights of common property, including in the judicial procedure described in the workss of T. Arivanyuk, I. Bolokan,

A. Grinyak, I. Dzera, O. Dzera, I. Ivashova, V. Krat, K. Kucheruk, O. Pecheny, Z. Romovska, O. Safonchyk, I. Sevryukova, A. Sichevska, R. Stefanchuk, N. Hristenko, I. Cherevatenko, A. Yarema and others.

At the same time a variety of disputes and court cases, continuous development of social relations, the inability to the comprehension in one work all the cases of violation and protection of the rights of common property may result in a need for continuation of a thorough study of this scope. So, the purpose of this paper is to develop several proposals and recommendations to overcome the problems of the implementation of the bill on the protection of the rights of a common property in the judicial order and the shortcomings of the current legislation in this field.

Common ways to protect the rights of a common property judicially are defined in p.2 of art.16 CC, these include: recognition of rights; acknowledgement of the transaction invalid; termination, which violates the law; restoring the situation that existed before the violation; enforce the obligation in kind; change of legal relations; end of legal relations; different ways of the compensation for property damage; reimbursement of moral (non-proprietary) damages; recognition of unlawful decisions, actions or inaction of the State authorities, authorities of the Autonomous Republic of Crimea or a body of local self-government, their officials and officers. The following list of the means of protection is not exhaustive, as this article points out, that the Court can protect civil rights or interest in another way, established by an agreement or by the law.

Special means of judicial protection in the joint property relations of the sources [3, p. 12; 4, p 9, 13; 5, p. 232; 6, p. 200] are recognized: dividing of property for parts, selecting share, establishment of the procedures for use of common property and transferring of rights and obligations of the buyer. For this position we have several comments:

1) 1) specified list of special protection methods are not limited to, because the law provided other ways of protection of rights and interests in the relationship of shared ownership in court, characteristic only for this type of

relations, including the termination of the right to share in the joint property of the indemnification

2) any general ways, fixed by law, as a basis, on which one can rely upon the wording of the claims, the subject matter and cause of action, etc., that are exposed to their specificity, relationship is always filled with certain individual features, whereby common methods are converted to the specific spot;

3) general and special ways to protect the rights of common property in court based on the same grounds: infringement, litigation and (or) recognition (p. 1 of the Art. 15 CC) of the legitimate rights and interests.

4) as far as the lists of common ways are not exhaustive, but controlling, any way can be referred to the general, as it is regulated by as well-known and is possible to apply for the whole society, and as it has been already stated, under the influence of the specifics of the particular relations and due to the implementation of subjective right it becomes special one.

4) 5) any supposedly special way follows from the context of the fixed, meets their criteria, such as transfer of rights and obligations of the buyer, can be characterized as follows: termination, which violates the law, and changing legal relations.

In view of the above mentioned, we consider appropriate in characteristic ways to protect the rights of common property in the courts and in carrying out a thorough analysis of classification for the purpose of applying the criterion of subjectivity, i.e., sharing ways to protect the general and special, you should go with, that lists common ways are not exhaustive and that the special ways to make the specifics and individuality of every specific relations.

We can say, that in practice rarely applies to only one of the known methods of judicial protection, usually used in its totality (mixed) with the aim of full and comprehensive protection of civil rights and interests

1. Analysis of court decisions to select measures of judicial protection rights of common property, which often occur in practice and (or) errors: 1) the

recognition of the ownership of a share in the property, which is a common property; 2) defining the use of common property;

3) termination, which violates the law (removal of obstacles in use);

4) restore of the original condition of the property, which is in common ownership; 5) acceptance of the contract of alienation share in joint property invalid; 6) the allocation of a share of the property, which is in common.

2. Termination of rights of ownership of the indemnification value share.

3. Transfer of rights and obligations of the purchaser under an agreement of purchase and sale share in joint property.

Let's consider the following ways to display their characteristics and (or) typical errors.

*Recognition of property rights*, as O. Lushnya, this Court confirms the presence or absence of disputed ownership on the side of the owner (plaintiff) or the offender (defendant). Recognition can be of two kinds: positive, when the Court notes that the presence at the side of the holder of the disputed law, and negative – lack of offender rights [7, p. 9–10].

While applying this method of the protection, in practice there are several problems related to the lack of necessary proofs and wrong interpretation of the provisions of the legislation in Ukraine. For the application of the method of protection of the rights of common property "recognition of property rights, legal status is: the owner, the presence of fact disputes, rejection of the right to property or loss of documents, which prove it. For the application of the method of recognition of property rights for the *nabuvanno* term "is compliance with legislatively prescribed term of open and continuous possession of the property (p.1 art. 344 CC), good faith possession, i.e. the existence of the facts which would have testified about the legality of the acquisition of property by the plaintiff (the conscientious owners) and lack of knowledge about what this property belongs legally to another person (absence of hijacking somebody else).

In order to prevent mistakes in practice at the legislative level to consolidate the concept of good faith of, in particular, by putting in Art. 344 CC. The next way to protect the rights of common property in the courts is to determine the order of use of common property. This method is derived from the rights owners enshrined in art. 358 and art. 369 CC.

Defining the use of common property can be understood as establishing the court order and the conditions under which owners sell their ownership in the joint part due to them both in a way that will not harm the rights of other co-owners.

This method is used when there is an agreement between the co-owners concerning the use of the common property, without judicial intervention, sharing is an impossible as co-owners of impeding the realization of the rights and interests of other stakeholders through the lack of understanding

Let's note that this method of protection is often associated with others – the removal of obstacles to use (art. 391 of the code) that applies regardless of the presence of the order in the use of a common property. Committing obstruction of use means creating the conditions under which the use of joint property for the other co-owners is impossible.

The next way to protect the rights of common property in the courts is the restoration of the original condition of the property, which is in the common ownership. Application of this method is based on part 3–5. 357, p. 1. 358, art. 361, p. 2 of art. 369 of the CC of Ukraine.

When choosing this method of protection of the rights of a common property it should be coordinated, first of all, the dispositions of the art. 215–235 of the CC of the invalidity of transactions, which is understood as underexposed law at the moment of committing the transaction. In such cases, in particular, include: – underexposed requirements of the written form of transaction, at the same time, the Foundation may or may not lead to the invalidity of the transaction if the parties properly perform the contract conditions and acknowledge him (Art. 218 of the CC of Ukraine).

– notarization requirements underexposed unilateral transaction, at the same time, similarly to the previous case, this basis may not lead to the invalidity of the transaction (art. 217 CC);

– underexposed claims about notarization of agreement, at the same time, similarly to the previous case, this basis may not lead to the invalidity of the transaction (art. 217 CC) is similar to the previous grounds;

– underexposed requirements of age and legal capacity of the parties to the contract in the absence of an approval of such agreement of parents, guardians, caregivers, adopters, one or both sides of the transaction, without the permission of the guardianship and custody (art. 221–224, 226 of CC of Ukraine), as well as in the cases when the legal person was aware of their importance and could not control his actions;

- – underexposed requirements necessary to obtain a permit (license) for legal entities (art. 227 CC);
- – committing of the transaction that violates public order, placed with the purpose that is contrary to the interests of the State and society (art. 227 CC);
- – committing of the transaction under the influence of errors (art. 227 CC);
- – committing of the transaction under the influence of fraud (art. 230 CC);
- – committing the transaction under violence (art. 231 CC).
- committing the transaction as a result of abusive arrangements representative of one side with the other party (art. 227 CC);
- committing the transaction under the influence of bad circumstances under extremely unfavorable conditions, this substance is applied only when the second party knew about these circumstances and seized this (art. 233 of the CC of Ukraine);
- committing the transaction without intention of creating legal effects (a bogus deal) (art. 234 of the Ukraine);

– committing transaction for hiding another transaction, which is actually done (simulated laps) (art. 235 CC).

I want to add that in some cases the offender commits a crime and, therefore, should bear criminal responsibility (for example, forced to perform non-civil-legal obligations – Art. 355 of the Criminal Code of Ukraine [8] (hereinafter referred to CC of Ukraine); forging documents and using a counterfeit document, knowingly – ch. 1, p. 4, art. 358 of the Criminal Code).

It must be said that while recognizing the transaction null and void should also be required the application of the consequences of the invalidity of the transaction, as it follows from the art. 216 CC. Often, in cases of protection of the rights of common property are instances of the fictitious transactions in order to avoid the necessity of paying taxes or circumvention of rights and interests of other stakeholders, such as the conclusion of the contract of donation that actually hides the relationship for the sale. However, in practice, also rare cases of alienation of shares as a result of fraud,

Allocation of a share of the property, which is in common ownership, as a way to protect civil rights and interests of the co-owner of the property in court, as it follows from art. 364 CC of Ukraine, according to which a co-owner has the right to select the physical share of the joint property or receiving monetary or other compensation of value of such shares, if such apportionment is impossible (part 1, 2, art. 364, part 2 of art. 183 of the CC).

- – workers' compensation costs is possible, if the selection is not possible, that thing is undivided apportionment of its depreciation (part 2 of art. 183, CC of Ukraine);
- – compensation of the value of a share is possible only if you have consent of the co-owner, who intends to allocate the share in the joint property (p. 2 of part 2 of article 364 CC).

Legal consequences of the use of this method are: – termination of the right co-owner, who got the compensation cost, to share in the common partial property (p. 3 of part 2 of art. 364 CC); for co-owner, who performed a selection of the

common property in the right of joint ownership of the property shall be terminated from the day of its receipt (part 3, art. 364 CC). The right of common ownership shall be terminated only for the selected part. The rest of the property (the aggregate particles which were not selected) is a common partial property for the other co-owners.

- – co-owner, who made the apportionment fraction in nature, acquires ownership of the share, and in the case of legislation, this right is the subject of the state registration (part 3 of art. 364 CC). Similarly, if the owners were only two, then to another share, which remained after the separation, the second with the co-owners also acquires the right to property and, if it is stated in the legislation, is subject to state registration.

We should note that the eligibility for the allotment of share compatible property provided by part 1 of the art. 370 CC and occurs in the same order as the apportionment fraction with common partial property (ch. 3, art. 370 CC). In addition, as it is seen from materials of court practice the application of this method of protection should confirm the possibility of allocating shares in nature conclusion of technical expertise.

Division of property in common ownership as a way to protect the rights and interests of the co-owners in court differs from the previously described method so that in this case the joint property is divided between all the co-owners (p.1 art. 367 of the CC). I.e., the application of this method is determined by the following features:

- the division is carried out exclusively in nature (p.1 art. 367 of the CC), as opposed to separation, when compensation is possible. This rule applies in the case when the division of joint ownership. In the case of the division of joint property compatible this requirement not provided (p.1 art. 372 CC);
- the division is carried out with a selection of all the co-owners (p.1 art. 367 of the CC, part 1 of art. 372 of the CC), not just one, as in the case of segregation;
- this method applies when an agreement about division did not reach out of Court

(p.1 art. 367 of the CC, part 1 of art. 372 CC) or when there is a dispute about the size of the particles in the compatible property (p. 2 of art. 362 CC).

Termination of the right to partial ownership of the indemnification value share, as a way to protect civil rights and interests of the co-owners has its own specifics, which is expressed in terms of the application of this method, as it follows: 1) if it is a part of a co-owner, the right to require you to cease:

- if it is a minor (paragraph 1 part 1 article 365 of the CC of Ukraine);
- if a property, which is in common ownership, is undivided (paragraph 2 of part 1 of article 365 of the Civil Code of Ukraine);
- – if joint ownership and use of property are impossible (p. 3 of part 1 of article 365 of the Civil Code of Ukraine);

– such termination does not give a substantial harm to the interests of co-owner and his family members (p. 4 of part 1 of art. 365 of the Civil Code of Ukraine);

2) the plaintiff must previously make the cost of the share deposit account Court (part 2 of article 365 of the Civil Code of Ukraine). We should note that the legislator has not explained, if it is needed only one of the conditions, associated with the share, or necessary for all of them. This is the shortcoming of current legislation and requires resolving by making additions to the art. 365 CC with the dispositions, which will decided the outlined issues. The above mentioned is necessary to improve and strengthen the protection of the legitimate rights and interests of owners, as well as to avoid errors in practice, losing time for the proceedings and views of cases in court.

Transfer of rights and obligations of the purchaser under an agreement of purchase and sale share in the joint property, as a way of protection, enshrined in part 4. 362 CC. This method is applied in case of violation of preemptive rights to purchase shares in a shared Maino (ABS 1 part 4 of article 362 CC): – When a co-owner is not informed properly of other co-owners about intention to sell its share in the joint property (p.1 art. 362 CC); – cost of the alienated portion is different in the smaller side from the

one which was proposed co-owners (ch. 1, ABS 1 part 2 of article 362 CC); – signed an agreement of purchase and sale with a third person (derived from the General content of the article 362 CC); – there is no refusal of owners from buying this stake (p. 2 of part 2 of art. 362 CC).

Time bar for the application of this method of protection is set for one year (p. 2–4 of art. 362 CC). An applying of the method of protection recognizing the sales contract void is unnecessary, otherwise the relationship sale will be suspended, and, accordingly, the preferential right to purchase a share in a shared property disappears.

Taking into account the above mentioned, the most typical errors in the implementation of the protection law of joint ownership in court are: the lack of the necessary evidence; the lack of implementation of the necessary measures, with the aim of proving claims, for example, not examination; improper interpretation and application of provisions of legislation. For the proper protection of the rights and interests of persons in the exercise of the right to common ownership should be properly worded claims, subject matter and grounds of the claim, to provide credible evidence in court proving the legitimacy of claims.

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