

PRIORITY RIGHT OF LAND USERS TO CONCLUDE A NEW LAND RENTAL CONTRACT

PREDNOSTNÉ PRÁVO UŽÍVATEĽOV PÔDY NA UZATVORENIE NÁJOMNEJ ZMLUVY

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I. Introduction

In Slovakia, the agricultural land is used usually by the land users other than its landlords. The legal relations between land users and landlords are regulated by the land rental contracts. The land rental contracts are depended on the agreement between the contract parties; however there are some issues regulated by the laws. Firstly, it is the law no. 504/2003 Coll. on the rent of the agricultural land, agricultural enterprise and forest land and on the amendment of some laws (hereinafter referred to as the law on the land rent). Secondly, there is the Civil Code (§ 663-684) regulating the rental contracts as general. The law on the land rent is *lex specialis* to the Civil Code. The first part of the law on the land rent regulates the land rent for the agricultural purposes without business objectives (e.g. an inhabitant of a town or city can conclude a land rental contract if he wants to produce vegetables, fruits or flowers for own needs). The second part of the law on the land rent regulates the land rent for the agricultural purposes of the agricultural businessmen. There is also the controversial legal norm (§ 13 (2) of the law on the land rent) on the priority right of the land users to conclude a new land rental contract according to the conditions stipulated in this paragraph. This paragraph states: *"If a land user meets his contract obligations properly and in time, he has a priority right after the termination of this contract to conclude a new land rental contract on that land plots for the land rental payment in usual amount."* The second sentence of this paragraph stipulates four exceptions when this priority

right is not respected regardless the land users meet their obligations properly and in time. Firstly, the landlords start to do business in agriculture after the termination of the land rental contract. Secondly, the new land user should be a relative of the landlord. The law does not explain who is a relative; therefore the definition included in the Civil Code will be used. According to the § 116 of the Civil Code *the relative is an ascendant, a descendant, a brother or a sister, a husband or other family member who shall be deemed to be relative to each other if an injury suffered by one is reasonably felt by the other as his own*. Thirdly, the land user shall be a legal entity, in which the landlord is a partner. Fourthly, the land plot should be used for other than agricultural purposes according to the special law (Law no. 220/2004 Coll. on the agricultural land use and its protection).

II. Objective and Methodology

The objective of the paper is to analyse the priority right of the land user from two points of view. Firstly, this § 13 (2) of the law on the land rent is not applied in the praxis very often. The landlords usually violate the priority right of land users and let to rent their land to the new land users after the termination of their land rental contracts. There is a question if such new land rental contract is void or voidable. And which measures can be used by prior land user if his priority right was violated or how to prevent this violation? Secondly, is the legal regulation on the priority right of land user to

Abstract (EN)

The paper deals with the problem of priority right of land users to conclude a new land rental contract from two points of view. The first one is what kind of legal protection can be used by land user if the land owner (landlord) violates his priority right guaranteed by the law. The second point of view is oriented to the ownership right of landlord as one of the human rights and its limitation in favour the land users.

Keywords (EN)

priority right, land rental contract, land user, landlord, human rights

Abstrakt (SK)

Príspevok sa zaoberá problematikou spojenou s prednostným právom užívateľa pôdy na uzatvorenie novej nájomnej zmluvy z dvoch uhlov pohľadu. Prvý zachytáva typy právnej ochrany, ktoré môžu byť použité užívateľom pôdy v prípade, keď vlastník pôdy poruší toto prednostné právo garantované zákonom. Druhý uhol pohľadu je orientovaný na vlastnícke právo k pôde, ako jedno z ľudských práv a jeho obmedzenia v prospech užívateľov pôdy.

Kľúčové slová (SK)

prednostné právo, zmluva o nájme pôdy, užívateľ pôdy, vlastník pôdy, ľudské práva

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conclude a new land rental contract conforms to the human rights guaranteed by the Slovak Constitution as well as the Convention for the Protection of Human Rights and Fundamental Freedoms?

For the purpose of this paper, literary sources available on this subject, the national laws, explanatory memoranda and the case law of national courts as well as of the European Court of the Human Rights and the jurisprudence was used. Basic methods of legal science such as legal analysis and comparison were used.

III. Priority right of the land user and its legal protection

The priority right of land user is guaranteed by the legal regulation; however there are many land users and landlords who do not have any knowledge on this right. Information on this right is the first condition for its successful applying. The second condition is the landlord wants to let to rent his land again after the termination of the previous land rental contract. The third condition is stipulated in the legal regulation: the land users must meet his obligations properly and in time. The fourth condition is that there is missing all four exceptions which impede the priority right of land user to conclude a new land rental contract.

The land user shall apply two form of his priority rights protection: the preventive one (by the terms of contract stipulated in the land rental contract) and the repressive one (by filing a claim at the court).

The contract parties of the land rental contract shall include also the priority right of the land user and specify its applying (e.g. when and how the landlords has the obligation to call the land user to conclude a new land rental contract; period for land user to accept or to refuse the new offer of the landlord; sanction such as penalty when the landlord violates this priority right of the land user etc.). However, any agreement such as "land user will not ask his priority rights after the termination of the land rental contract" or "land user does not have any priority right to the used land plots" is void. The law on the land rent expressly stipulates that there is given the priority rights to conclude a new land rental contract for the prior land user. And the Civil Code prohibits such agreements related to give up the future rights of any subject. The § 574 (2) of the Civil Code stipulates "Any agreement by which a person waives his rights that may arise in the future is void." The priority right to conclude a new rental contract arises only in the future after the concluding the contract because this priority right is conditional by the meeting of the land user obligations properly and in time. This meeting of land user obligations is not possible to predict in time of concluding the land rental contract.

The land user is entitled to file a claim at the court if the landlord violates the priority right to conclude a new land rental contract with him. Of course, the first step shall be to try to solve a dispute by the negotiation. The claim at the court shall be used if the negotiation does not bring any com-

promise. Firstly, the land user shall prove at the court the meeting his land rental obligation properly and in time related to the previous land rental contract. Secondly, he shall prove missing all four exceptions stipulated by law when the priority right is not given. Thirdly, the land user has to formulate a precise claim. The land user can ask the penalty only if it is agreed in the land rental contract. There is necessary to prove the violation of the priority right to conclude a new land rental contract and the agreement on the penalty bound on this violation. If the penalty was not agreed, the land user can claim only for damages. However, there is a risk how to prove amount of damage caused to the land user by the violation of this priority right. Therefore it is better to be careful when concluding the land rental contract. In praxis, there is usually no mention on the priority right of the land user in the land rental contracts.

Regardless the penalty, damages or existence a new land rental contract concluded with a new land user, the priority right of the prior land user to conclude a new land rental contract does not lapse. The land user can file a special claim according to the § 161 (3) of the Civil Procedure Code. According to this paragraph "*the final judgments imposing declaration of intent shall supersede such declaration.*" It means the land user can ask to conclude a new land rental contract at the court and the court can supersede the landlord's will by its own judgment if this will is missing. According to the judgment of the Supreme Court of the Czech Republic, "*If the judgment shall supersede a will of some of the contract parties (...), the contract should be included in the enunciation of the court judgment. At least, the enunciation should refer the contract which should be attached to the written judgement. And this attachment is a part of the enunciation of the judgment.*"⁽¹⁾ After the final judgment, the land rental contract is considered as concluded between the landlord and the prior land user. This contract is valid at least five years because of the paragraph 8 (1) of the law on the land rent; "*the land plot for the agricultural purposes within the businesses activities shall let to rent at least for five years.*" This land rental contract should be noticed also in the land cadastre. According to the paragraph 1 (1) of the law no. 162/1995 Coll. on the land cadastre "In the land cadastre, there are noticed (...) land rental rights, if the rental rights should exist at least five years." This notice in the land cadastre creates the rebuttable presumption of the data correctness; it means it is a presumption that the land rental contract is concluded between contract parties inscribed in the cadastre. In the case of dispute, the burden of proof will bear a person who is not inscribed in the land cadastre.

In addition, the land user should ask for the interlocutory judgement which prohibits the land rent to the third person till final judgment. Otherwise there is a risk that the landlord lets to rent his land to the third persons.

However, it is necessary to make a notice that the rights and obligation from the land rental contracts are transferred also to the legal successors. It means that the rights and obligations of the land user including his priority right continue

⁽¹⁾ Judgment of the Supreme Court of the Czech Republic, 18.09.2001, no. 22 Cdo 2760/99

after the sale of the land plots used by the land user or after the general succession of land rent rights and obligations on the heirs.

IV. Void or voidable new land rental contract with the third person?

The Slovak Civil Code makes a difference between the void and the voidable legal acts. If the landlords violates the priority right of the prior land user by the concluding the land rental contract with a third person, the prior land user can file a claim at the court to ask for concluding the contract with him as well as to ask for void (or voidable) the contract with the third person. There is a question if the land rental contract concluded with the third person is void or voidable.

In spite of similarity of the priority right to the pre-emption right, there is no possible to apply this analogy. The violation of the pre-emption right causes that the legal act is voidable. It means the legal act is valid until the entitled person from the pre-emption right files a claim at the court because of voidable legal act. The priority right of the land user is similar; however the cases of the voidable legal acts are given by total enumeration in § 40a of the Civil Code. According to the judgment of the Supreme Court of the Slovak Republic “this enumeration may not be amended by the addition of the new issues.”⁽²⁾ So, the legal act related to the violation of the priority right should be only void. The reasons of the void legal acts are stipulated in the paragraphs 37 – 40 of the Civil Code. The violation of the priority right of the land user is possible to subsume under the paragraph 39 of the Civil Code. According to this paragraph, a legal act is void if its content or purpose is contrary to the law (*contra legem*), or it evades the law (*in fraudem legis*) or it contravenes against the good manners (*contra bonum mores*). In our case, the violation of the priority right of the land user can be defined as the act *in fraudem legis* because of existence of the legal obligation to conclude the new land rental contract with the prior land user. If the priority right of the land user was negotiated only in the contract without the legal regulation, it would be not possible to claim the legal act (the new land rental contract concluded with a new land user) is void. According to the judgment of the Supreme Court of the Slovak Republic “If the pre-emption right to the real-estate was concluded only as the law of obligation and not as the right *in rem*, the sale contract between the landlord and the third person cannot be void according to the paragraph 39.”⁽³⁾ However, the priority right of the land user is an obligation stipulated by law, not only by the contract of the parties, therefore if violated, this act can be declared as void because of *in fraudem legis*.

⁽²⁾ R 50/1985 Supreme Court of the Slovak Republic, 22.5.1985, Cpj 13/85.

⁽³⁾ R 30/2000 Rozsudok Najvyššieho súdu Slovenskej republiky z 27. apríla 1999, sp. zn. 1 Cdo 7/99.

V. Priority right of land user and property right protection of the landlord

This subchapter tries to analyse the priority right of the land user stipulated by law from the view of human rights, mainly the right to own some property by individuals. There is a question if the priority right of the land user does not limit the ownership of the landlord more than the Slovak Constitution and Convention for the Protection of Human Rights and Fundamental Freedoms enable.

We suppose that the person who let to rent the land is landlord (we do not consider the cases when the land is rented by the Slovak Land Fund⁽⁴⁾). According to the paragraph 123 of the Civil Code the owner is entitled to hold his property (*ius possidendi*), to use his property (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to dispose of his property (*ius disponendi*). The priority right of the land user is *de facto* limitation of the *ius disponendi* of the landlord. He cannot be free in a decision who will be a new land user of his land plots after the termination of the land rental contract. The law maker prefers the protection of the land users' rights regardless the interference to the landlords' rights. The landlord's right protection has become worse by the law amendment no. 396/2009 Coll. which amends the law on land rent. The new paragraph 10 (5) was adopt. According to this paragraph if the land rental payment is calculated as the 1 percentage of the agricultural land value according to the special legal regulation and the rental payment shall be less than 2 Euros, the landlords and the land user can conclude a contract on the land use without an obligation of the land user to pay the rental payments. We consider this paragraph as obsolete one because there is no legal barrier for the contract parties to conclude a contract on the land use without obligation to pay a rental payment regardless amount of land rental payment calculation.

We suppose that the law maker follows perhaps a good idea to protect the object of the land rental relation (land plots) from the land fragmentation and “to create a suitable legislation which is able to guarantee the investment to the land users within a period of 5-10 years and these investments will guarantee not only the profit of the land user but also the economical and social rural development.”⁽⁵⁾ The ex-

⁽⁴⁾ Slovak Land Fund is a legal entity established by the law no. 330/1991 Coll. on the land arrangement, arrangement of the land ownership, county district offices, Land Fund, and land associations. Slovak Land Fund was established for the purpose to administrate the State land and the land of unknown owners. The land of unknown owners is land which owner's addressee is not known or the land which is in a private property of someone, but it is impossible to identify this person because he is not registered as an owner in the land cadastre and he does not interest in his land property. It is the consequence of the land collectivisation during the socialisms.

⁽⁵⁾ Puškáč, J. Proposal of the legislative measures oriented on the rural development and stability of the business environment. (Návrh legislatívnych opatrení zameraných na rozvoj vidieka a stabilitu podnikateľského prostredia v poľnohospodárstve). In: Rozvoj vidieka a spoločná poľnohospodárska politika EÚ, Nitra: SPU, 2009, s. 268

planatory report to the law on land rent does not contain any reason related to the preference of the land user protection to the prejudice of the landlord's interests.

The protection of property is guaranteed by the Constitution of the Slovak Republic (article 20) and the Convention for the Protection of Human Rights and Fundamental Freedoms (article 1 of the protocol no. 1). On the other hand, there is no right of property user in these two legal documents. Therefore, we consider the law should not prefer the interests of the land user to the prejudice of the landlords to be free with the disposition of his land plots. There is different situation if the land is rented by the Slovak Land Fund. This legal entity only administrates the State land and the land of unknown owners; however this entity is not an owner of this land. One of the few way how to administrate this land is the land rent. In this case, there is an interest of the Slovak Land Fund as well as the unknown owners that the land is cultivated by the land users who meet their obligations properly and in time. Therefore, the priority rights of the land user to conclude a new land rental contract is legitimate. However, the Slovak Land Fund administrates only 25 percentages of the agricultural land in the Slovak Republic. It is a high share from the point of view related to the obstacles on the land market; however it is still minority share to be correct to limit the landlords' right in favour of land users. There is still 75 percentages of agricultural land owned by the landlords who rights are limited by the priority rights of the land users. According to first premise of our consideration, we can conclude that the human right of the landlords is limited by the priority right of the land user to conclude the new land rental contract. The question is what is the margin between the justified interference into the landlord's ownership and the violation of a human right to own property?

There is only one human right which is not limited in favour of other interests. The article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates the prohibition of torture. All other human rights are not absolute and they can be limited by the (1) other human right where the reasonable compromise between both related human rights is looked for; or (2) public interests. Hereby, there is necessary to keep the principle of proportionality. It means that there must be "a reasonable relation between the used measures and the purpose or by the other words, if there was achieved the justified balance between the requirement of public interest and the requirement of individual."⁽⁶⁾ In the case *Sporrong and Lönnroth c. Sweden* the European Court of Human Rights decided there should be a reasonable balance between the public interests and the requirements for human rights protection of individual according to the article 1 of the Protocol no. 1 of the Convention. If the reasonable balance is missing, the individual must bear the consequences of the inadequate burden.⁽⁷⁾ In our case there is a question if there is a reasonable balance between the landlord's interest to be free with the disposition

of his land and the public interest represented by the priority right of land user to conclude the new land rental contract. The purposes of this legal regulation are not explained in the explanatory report to the law on land rent; we can only consider these purposes. There are more potential ones.

Firstly, the potential purpose of the priority right of the land user can be considered the protection of the agricultural land and agricultural production and to ensure the compact use of agricultural land because of its broad fragmentation. However, this problem is better to solve by the paragraph 12a related to the sub rental right. According to this paragraph after the termination of the land rental contract the prior land user has an obligation to conclude the sub rental contract with the landlord (prior person who let to rent his land) to other land plots; the original land plots cannot be issued to the landlords because of impossibility its reasonable use or because of no access to these land plots. In this case the land rental contract does not terminate before doing the land arrangements to ensure some access to the land plots (§ 12 (3) of the law on the land rent). In addition the use of land plots for other than agricultural purposes is one of the four reasons when the priority right of the land user is not given.

Secondly, the potential purpose of the priority right of the land user can be explained by the guarantee of the investment into the agricultural production. However, this role is fulfilled by the paragraph 8 (1) related to the minimum period of land rent (it is five years). This period can be determined in the contract; but the period cannot be shorter than 5 year. The land rental contract terminates by the expiration of the agreed period of land rent, if the contract parties do not make any other agreement (§ 676 (1) of the Civil Code). If the landlord is changed during the period of land rental contract, the notice of the termination of the contract can be given only by the land user (§ 680 (3) of the Civil Code).

The investment of the land user is guaranteed also by the paragraph 13 of the law on the land rent. According to this paragraph if the land rent terminates before the recoupment period, the land user has a right to prolong the land rental contract or right to the appropriate reimbursement of the expenses. Therefore, there is missing any reason to protect the land user interest by the limitation of the human right of the landlord to dispose free with his property. We can conclude by the words of the European Court of the Human Rights that the priority right of the land user put an inadequate burden on the landlord because of missing the public interest which shall be preferred to the prejudice of the landlord's human right.

The priority right of the land user is reasonable in relation to the land rent from the Slovak Land Fund. However, the law maker excludes the land rent related to the land plot administrated by the Slovak Land Fund and includes it into the new paragraph 13 (3) of the law on the land rent. According to this paragraph if it is related to the land plots which are administrated by the Slovak Land Fund, *the land user has a priority right to conclude a new land rental contract for the land rental payment for the usual amount, if the land user meets his obligation properly and in time*. It is considered as obsolete because this priority right was guaranteed by the paragraph 13 (2) to the land plots administrated by the Slovak Land

⁽⁶⁾ Agosi c. Taiansko (24. 10. 1986, Annuaire, č. 108) cited from Svák, J. Human rights protection. (Ochrana ľudských práv). Bratislava: Eurokodex, 2003, s. 735-736.

⁽⁷⁾ Svák, J. Human rights protection. (Ochrana ľudských práv). Bratislava: Eurokodex, 2003, s. 749-750.

Fund as well. The four exceptions, which are missing in the § 13 (3) in comparison with the § 13 (2) are not applied in relation to the Slovak Land Fund as well. On the other hand, the law does not regulate the situation when the land plot administrated by the Slovak Land Fund and used by land users will be issued to the original owner when he become known. Will be the priority right remained? The Civil Code stipulates that the ownership change does not terminate the land rental contract; the rights and obligations from this contract success on the legal successor. So the new landlords will be obliged by the rights and obligations from the land rental contract including the priority rights of the land user. We consider that it is inadequate measure to the ownership rights of the landlords. Therefore we suggest deleting the § 13 (3) of the law on the land rent and to review the § 13 (2) of the law on the land rent as follows: *"If the land user meets his obligations from the land rental contract properly and in time, he has a priority right to conclude a new land rental contract to the land plots administrated by the Slovak Land Fund for the usual rental payment; however this right is not given if the land plot shall be used for other than agricultural purposes according to the special law or the land plots which was issued to its owner."*

The priority right of the land user according to the law on the land rent is not similar to the situation regulated by the paragraph 14 (8) of the law no. 330/1991 Coll. on the land arrangement, arrangement of the land ownership, county district offices, Land Fund and land associations. According to this new adopted paragraph 14 (8) if the administrative decision on the land arrangement will be enter into force the land rental relations to the real-estate included in this land arrangement are deleted ex lege. However, the land user of these land plots has a right to conclude a new land rental contract to the new land plots of the same acreage and according to terms of the original land rental contract. The condition is that the land user had to meet his obligations properly and in time. It is other situation than the priority right according to the law on the land rent. There is a land rental contract between the contract parties and the State interferes in this contract by the law, of course following the public interests (such as clear ownership rights to the land, access to the land plots, land defragmentation etc.). The law terminates the land rental contracts, so the law gives also the right to the land user to ask for new land rental contracts according to the original terms of contracts. The State interferes into the contract freedom of the parties and tries to compensate it by the guarantee of right to conclude a new contract. However, the priority right of the land user guar-

anteed by the law on the land rent does not compensate any similar interference of the State.

VI. Conclusion

The priority right of the land user is an inadequate measure for the landlords. There is only hardly to find a reasonable public interest for explaining such measure. In addition, there is the interests of the owner to let his land plots to the best users who ensure not only profit for themselves but also the land cultivation and protection. According to Adam Smith "the natural order works more perfect if the individuals can follow their individual interests and realise them in the exchange process freer."

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