

REMEDIES FOR THE ENTRY IN THE LAND REGISTER OF THE DEED CONCLUDED BY VITIATION OF CONSENT

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***Abstract:** The purpose of this study is to present a practical approach to effective instruments for combating defects of consent in legal acts affecting land rights, such as an action to establish rank, an action for a land benefit or an action to rectify a land register. Given that formalism in the land register system is imposed both by the requirement that the legal act constituting the rights in land must be in authentic form and by the primacy given to the functioning of the land registration system within clearly defined parameters, a check on the effects of defects of consent designed into the land register system is particularly necessary.*

***Keywords:** land register, rectification, legal act, defects of consent, error, fraud, third party.*

INTRODUCTION

Will can be found in almost every area of human social or individual life, but more than in any other area, will is omnipresent in law, giving rise to the legal act itself, which in turn creates legal relationships, thus producing the legal effects of human actions or inactions.

In legal terms and in terms of its intensity, the will manifests itself as a process by means of which the individual or collective person, as a pricit, undertakes commitments that go beyond the sphere of mere completeness, a will that falls under the legal rules that give limits and content to objective law.

It should be noted that, for the valid formation of any legal act, it is not sufficient for the manifestation of will to be conscious, externalised and made with the intention of producing legal effects, it must also be freely expressed and in full knowledge of the facts, in other words, not vitiated.

We might think that the existence of a conscious and free consent undoubtedly implies a valid legal act, it would mean that any alteration of the psychological process of consent formation automatically leads to the annulment of that act, but the legislator has judiciously assessed through the legal texts established, the fact that the stability of legal relationships must be sought at the same time, which is why only when the alteration of consent is of a certain seriousness and only in cases provided by law, the annulment of legal acts is imposed.

In other words, it would not be moral for a person to benefit from the situation of inferiority in which the author of the legal act or the co-contractor found himself at a given moment, as a result of ignorance of the reality, the fraudulent manoeuvres used or the coercion exercised on him.

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From a psycho-philosophical point of view, it can be appreciated that error, malice, violence and injury are vices of the will, and from a legal point of view, they are vices of consent, and only when this will is externalised with the intention of producing legal effects will it become consent.

Thus, in the sphere of civil law, the will is of particular importance because it plays an essential role in the valid formation of the legal act, and it can be said that without the legal will or without its manifestation, there is no legal act.

The obvious importance of the human will, especially in the process of forming the civil legal act, imposes the need to explain this complex psychological process, which to a large extent also forms the object of concern for psychology, but which also interests the science of law.

1. Action for priority of registration of right or grant of preferential ranking

The action to establish the rank or priority of the entry in the land register is premised on the entry in the land register of the right of a third party acquirer in bad faith, and the solution offered by the legislator by regulating this procedure is to derogate from the principle of priority of entries in the land register, according to which pre-eminence is granted to the acquirer who first submitted to the registry of the competent land registry and real estate publicity office his application for entry in the land register accompanied by the supporting title.

According to this principle, the conflict between several acquirers of rights in title which are mutually exclusive due to the supporting titles concluded with their common author at different dates shall be resolved by granting priority to the one who first registers his application for entry in the land register of the right thus acquired, while the application of the other acquirers shall be rejected.

The remedy offered by the legislator through the procedure established in Article 892 of the Civil Code, may concern either the cancellation of a right in rem in immovable property and the registration in the land register of the plaintiff's right where the defendant's right cannot coexist with the plaintiff's right, or the granting of preferential rank to the registration of the plaintiff's right over the existing registration in the land register of a similar right in rem in the same immovable property, as in the case of a mortgage right granted in bad faith in favour of another creditor. As can easily be seen, the bad faith of the acquiring third party is essential for the granting of priority to the registration, and in cases where the third party registered in the land register on the basis of a title with a later date than that held by the plaintiff, is also considered to be in bad faith when he prevents by violence or cunning another person from registering his right in the land register on the basis of a concurrent title, but also when he knew or at least ought to have known this fact at the time of the conclusion of his contract.

The third party registered in the land register is also in bad faith if, although he should have known of the anteriority of the title held by the plaintiff, when concluding his own contract with the joint author, he was in excusable error as to the existence of the concurrent title.

Compared to the regulation contained in Article 28 of Law No 7/1996, prior to the entry into force of the Civil Code, according to the current legislation, the claimant is no longer given priority in the registration only because he is the acquirer with a title for consideration, and the third party, even if he has first completed the formalities of registration in the land register, is not given this pre-eminence because he has acquired the right of partition free of charge (Puie, 2012).

As regards the condition of the third party's bad faith, Law No 7/1996 limited itself to providing for the attitude of the third party only as a simple condition, without putting into perspective the situations in which the bad faith of the third party can be assessed, as the legislator has established in the new legislative framework provided by Article 892 of the Civil Code, respectively the condition of hindering the plaintiff by violence and vileness.

Another important condition imposed by Article 892 of the Civil Code for the admissibility of the action for priority of registration of the right or granting of preferential rank is that it must be brought within the limitation period of 3 years from the date of registration by the third party of the right in his favour, a period which in the case of violence must be in conjunction with Article 2529 para. (1) lit. a) of the Civil Code, which provides that the moment at which the three-year period begins to run is the moment at which the violence ceases, even if this moment is after the third party's entry in the land register.

With regard to the phrase "by guile", we cannot say that it constitutes a defect of consent as such, but we can agree that it fulfils the characteristics of fraud, more specifically of the error caused by fraud, which can be transposed to the situation where the third party in bad faith or another person directs the true acquirer of the right in rem, to register his application for registration with a land registry office other than the one in the district of the court in which the property is situated, in effect seeking to delay registration in order to facilitate his own registration.

1.1. Action in tabular benefit

The current regulation given to this action by articles 896-897 of the Civil Code implies two manifestations, namely the ordinary or general tabular action and the special tabular action, which we will analyse below.

In practice, the claimant seeks, by means of an action for partition, to order the predecessor in title to surrender the documents necessary for entry in the land register, in the event that the predecessor in title fails to fulfil its obligations relating to entry of the claimant's right in the land register.

Because it is not infrequent that registration in the land register may involve successive acts of acquisition, a situation also provided for by the legislator, resulting from the fact that the action for registration in the land register does not have to be brought against the predecessor in title, but against the transferor or creator of the right, who will be registered in the land register at the latest with the right of the acquirer.

As regards the obligations to be fulfilled by the predecessor in title, these do not only concern the creation or transfer of rights in rem over immovable property in favour of another person, but also their modification, but not the cancellation of a right in title as was provided for prior to the entry into force of the new Civil Code, respectively by Law No 7/1996 and by

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Decree-Law No 115/1938, which qualified the action for partition as a form of substitution of consent to registration.

The obligations which the predecessor in title, the conveyancer or the grantor of the right is required to fulfil by bringing an action for a partition claim against him are not limited to providing the claimant with the necessary documents, since these obligations take on a more complex form characterised by the drawing up of cadastral documentation, operations for the dismemberment or annexation of immovable property, obtaining prior alienation agreements, the cancellation of usufruct rights and so on.

1.2. Action for special tabular benefit

A first aspect by which we can distinguish the action in special tabular benefit from the general one, is the fact that it is not brought against the tabular predecessor but against the third party registered in bad faith in the land register, and in addition to this first condition, the legal text of Article 897 of the Civil Code also mentions the situation regarding the anteriority of the legal act invoked by the plaintiff against the third party registered in the land register in bad faith.

In this hypothesis, it is irrelevant whether the legal act concluded in bad faith by the third party who acquired the right of partition entered in the land register is for valuable consideration or free of charge.

However, a similarity can be observed between the action for a general and a special tabular claim, i.e. the fact that the person entitled to registration is not in possession of the titles or documents necessary to complete the formalities for registration in the land register, and a third party registers his right first despite being aware of the existence of a prior act of alienation.

In the case of a special action, the third party's knowledge of the existence of the prior act of alienation must take the form of bad faith, which will actually relate to the time of conclusion of the act of acquisition itself.

Compared to the procedure for establishing preferential rank or priority of registration, the latter action requires the claimant to be in possession of the documents necessary to carry out the registration, but is prevented from doing so by acts of violence or cunning on the part of the third party or another person of whom the third party has knowledge.

It can therefore be concluded that the special action for a partition is admissible if the plaintiff is not in possession of all the documents necessary for registration, and if a third party acquires a concurrent right and registers it in the land register after the plaintiff has received the documents that could make registration possible, then the plaintiff cannot use the mechanism of the special action for a partition because at the time of the registration of the third party in the land register, the plaintiff was in possession of the documents that would have enabled him to register his right.

1.3. Action in tabular rectification

Entries in the land register may be rectified at the request of the persons concerned for documents affected by the vitiation of consent, but there are situations, even regulated by the legislator in which the land registrar may also order the rectification of these entries ex officio, namely in the case of promises of sale or option agreements, as provided for in Article 906 para. (3) and (4) of the Civil Code.

Therefore, in the case of a land register entry relating to a unilateral or bilateral promise of sale, if the person entitled does not request the entry in the land register of an action for the pronouncement of a court judgment in lieu of a contract within the 6-month period within which the deed of transfer of ownership should have been concluded, the registrar will automatically order its removal from the land register.

A similar solution is found in the case of the option agreement, where if the beneficiary of the agreement does not request the registration of the right to be acquired before the expiry of the period stipulated by the parties for this purpose, the agreement registered in favour of the beneficiary will be cancelled ex officio.

Even in the situations described above, which provide for the possibility of ex officio cancellation of land register entries and which apparently do not seem to involve acts affected by vitiation of consent, the interested party may indirectly make use of the remedies offered by the legislator through the provisions of Article 906 of the Civil Code, in the sense that he chooses not to proceed with the execution of the promise of sale or the option agreement concluded by him in error and thus the expiry of the deadlines inevitably leads to the ex officio cancellation of the entry.

The place of jurisdiction for the action for rectification of the provisional registration is laid down in Art. 908 of the Civil Code, where the situations in which any interested person may request the rectification of a land register entry are exhaustively presented, but only a few of these cases are dealt with, namely: "the entry or the conclusion is not valid or the act on the basis of which the entry was made has been cancelled, in accordance with the law, for causes or reasons prior to or concomitant with the conclusion or, as the case may be, its issue" and "the right entered has been wrongly qualified".

2. The instrument on the basis of which the entry was made has been declared void, in accordance with the law, for causes or reasons prior to or concurrent with its conclusion or, as the case may be, its issue (Art. 908 para. (1), 2nd sentence of the Civil Code).

This first premise established by the legislator in Art. 908 para. (1), point 1 of the Civil Code, requires the analysis of two possibilities, on the one hand, the legal non-existence of the legal act as an evidentiary document as an effect of nullity and, on the other hand, the ineffectiveness of the act for causes prior to or concomitant with its conclusion or issue, as the case may be (Mîneran, 2012:297).

The type of invalidity affecting the legal act is of no importance in the analysis of the conditions for the existence of the action for rectification of the land register, nor the type of legal act affected by this invalidity, and even less so whether the invalidity is judicially or amicably enforced, since from the point of view of the land register only the consequence of these sanctions matters, namely the lack of effects of the legal act for which it was concluded or issued.

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The explanation is to be found even in the specialist doctrine which maintains that regardless of the basis for the dissolution of the legal act, relative or absolute nullity, the registration remains without legal basis from the outset, which is why it must be deleted.

The invalidity of the title is also related to situations where the signature of one of the parties is missing from the original notarial deed, or when the registration was made against a person with an identical name, but who did not participate in the conclusion of the legal act or on another property. As regards the ineffectiveness of the legal act, as used by the Civil Code, it implies a much broader application than nullity, in the sense that it includes all cases of ineffectiveness of the legal act provided that they are prior to or concurrent with its conclusion.

We consider it necessary to point out that an action for rectification of the land register based on the provisions of Article 908 para. (1), item 1 of the Civil Code cannot be successfully brought if the plaintiff has not previously requested a declaration of the ineffectiveness of the act on the basis of which the entry was made, and the rectification must be requested either as a small accessory to the main action or on the basis of a final court judgment which has found the act ineffective.

In another sense, the action for rectification of the land register is based on the action for annulment, and this is also reflected in the time-barring of the action for rectification of the land register, the time limit for which may differ depending on the cause of ineffectiveness on the basis of which the action for annulment is brought, but these mechanisms will be examined on another occasion.

2..1. The registration or conclusion is not valid (Art. 908 para. (1) of the Civil Code)

By means of an action for rectification, both in the case of registration and in the case of the land registry, the aim is to remove them as invalid, without it being necessary to call into question the validity of the legal act on the basis of which the registration or the land registry was issued.

It should be noted that if the land register entry on the basis of which the entry was made is invalid, it follows that the subsequent entry is also invalid as a result of the application of the wrong entry.

With regard to land register entries, the acquirer has the right to apply for a review or to lodge a subsequent complaint against the rejection by the chief registrar of a request for review, as provided for in Article 31 of Law No 7/1996, but with regard to invalid entries the acquirer may only have recourse to the legal remedy provided for in Article 908 para. (1) point 1 of the Civil Code, namely the action for rectification of the land register.

Therefore, if the entry in the land register is incorrect as a result of an invalid land register entry, and the land register entry has been successfully challenged by means of a request for review or a complaint or an action for rectification, the rectification of the land register entry will also result in the amendment, erasure or completion of the land register entry without the need for the court to hear a separate claim challenging the entry itself.

By bringing an action for rectification against an invalid entry, the acquirer will not risk influencing the validity or effectiveness of the deed, which is why we can conclude that

challenging the entry in the land register for a reason unrelated to the content of the legal act and the land register entry does not in any way affect their validity or effectiveness.

Last but not least, in the case of invalid registrations, we cannot speak of simple material errors for the rectification of which the acquirer has at his disposal the procedure laid down in Article 913 of the Civil Code, since the distinction between simple material errors and invalid registrations which may be rectified by means of an action for rectification is given by the seriousness of the latter, which is such as to affect the substance of the rights registered (Nicolae, 2021).

2.2. The right was wrongly qualified (Art. 908 para. (1), para. 2 C.Civ.)

The literature has captured and catalogued several situations regarding the misclassification of the right to be entered in the land register, but the most common causes that can lead to the misclassification of the right result from the erroneous qualification given by the parties or the notary public, or from the misclassification assigned by the application for registration, perpetuated by the registrar in turn through his conclusion of the land register and subsequently through the entry in the land register, or in the situation where the misclassification arises directly in the conclusion of the registrar of the land register (Negrea, 1942).

In order to determine as correctly as possible whether the applicable remedy is an action for rectification of the land register on the grounds that the right has been wrongly qualified, we must observe how the wrong qualification of the right occurred.

Therefore, if there is a misclassification of the right in the sense of error in negotio, then we consider that the action for rectification of the land register will be based on the provisions of Article 908 para. (1)(1), and if the misclassification of the right given by the parties at the time of the conclusion of the legal act cannot be assimilated to a defect of consent which renders the act null and void or ineffective, then the action for rectification of the land register may be based on the provisions of Article 908(1)(1). (1), point 2.

Last but not least, if the wrong qualification of the right resulted from the sole fault of the land registrar, the conclusion is considered invalid, but the action for rectification of the land register will be based on the ground provided for in Article 908 para. (1), point 2, and not the one provided for in point 1, as this is a case of rectification distinct from the general hypothesis of the invalidity of the land register conclusion.

CONCLUSIONS

Therefore, we conclude that land register actions are those legal actions which have as their object entries in the land register, and by means of which the registration of real property rights or personal rights transmitted, constituted, modified or, as the case may be, extinguished, as well as other legal situations, is ensured if the person obliged to consent to the making of these entries refuses to hand over the entries necessary for the land registrar to grant the registration.

Land register actions are specific legal means of ensuring that those who are obliged to tolerate the registration of the transfer, creation, modification or extinction of a right in land registers are penalised if they refuse to hand over, by amicable agreement, the entries necessary to make the corresponding entries.

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If a right in rem has been entered in the land register in accordance with the law in favour of a person, it shall be presumed that the right exists in favour of that person if it was acquired or created in good faith, as long as the contrary is not proved.

The contents of the land register shall be deemed to be accurate for the benefit of the person who has acquired a right in rem by deed for valuable consideration, if at the time of the acquisition of the right an action contesting its contents has not been entered in the land register or if the acquirer has not otherwise become aware of the inaccuracy.

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