THE REQUIRED FORM OF A PRE-CONTRACT ALLOWING FOR A COURT JUDGMENT TO STAND FOR A SALE CONTRACT

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Abstract

A bilateral promissory agreement for sale needs no notarial deed to constitute, in case of non-fulfillment, grounds for the delivery of a judgment which takes the place of a sale contract, a private agreement being sufficient whereas the judgment itself represents the sale contract and both the substantive and formal conditions are therefore satisfied.

Keywords: *pre-contract, sale, judgment taking the place of a contract, formal requirements*

1. Introduction

This article provides an analysis of the form which a bilateral promissory agreement for sale should take so that, unless fulfilled, it allows for a judgment to be delivered and stand for of the sale contract. This analysis is important because it is a matter of non-unitary judicial practice due to the ambiguity of the legal regulation of the issue at debate.

1.1. The legal regulation

According to Article 1669 (1) Civil Code, if one of the parties to a bilateral promissory agreement for sale unreasonably refuses to conclude the promised contract, the other party may apply for the delivery of a judgment which would stand for a contract, provided that all the other validity conditions are fulfilled.

Furthermore, in accordance with Article 1.279 (3) Civil Code, if the promisor refuses to conclude the promised contract, the court, upon the request of the party that did perform its own obligations, the court may deliver a judgment to stand for a contract, where the nature of the contract allows that and the legal requirements for its validity are fulfilled.

1.2. Legal solutions adopted in judicial practice

By the civil sentence no. 267/2016 delivered by the Court of Blaj in the case no. 173/191/2016, the application of applicant A against respondents B for the delivery of a judgment to take place of the sale contract, was dismissed as unfounded. Among the grounds for its judgment, the first instance court basically held the following: "In accordance with the 1st sentence of Article 1270 (3) Civil Code and the final sentence of Article 1669 (1) Civil Code, the pre-contract subject to examination should have been concluded in notarial deed, given that it envisaged the conclusion of a contract for the transfer of a right in rem in immovable property. Article 1179 (2) Civil Code stipulates that, in so far as the law provides a certain form of the contract, that form should be respected subject to the sanction provided by the applicable law. Article 1244 Civil Code stipulates that, except other cases provided by law, any agreement for the transfer or constitution of rights in rem to be

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registered with the Real Estate Register should be concluded in the form of an authentic document, under penalty of absolute nullity. Therefore, the respective contract should fulfill all the validity conditions if a judgment to stand for a pre-contract is aimed at. Practically, the notarial deed is not a validity requirement for a pre-contract, but a requirement which, if fulfilled, allows for a judgment to stand for the contract to be obtained."

The Alba County Law Court, before which the appeal against the above-mentioned judgment was pending rule, referred the matter to the High Court of Cassation and Justice for preliminary ruling on certain points of law, based on Article 519-521 Code of Civil Procedure. In support of its referral, the court held the following: "The bilateral promissory agreement for sale is a contract based on which the parties undertake to conclude the sale contract in future, under the terms and with the content already established in the document proving the promise. The parties agree upon their commitment to contract, but they also pre-establish the basic content of the contract to be concluded (the nature, object and price of the contract). However, the two legal transactions cannot be intermixed. The bilateral promissory agreement for sale is not an alienation document and does not transfer any property rights, but generates personal obligations to do, respectively to conclude the promised sale contract. As for the form which a promise of sale should take, the Civil Code does not provide the notarial deed *ad validitatem*."

At the time of this writing, the High Court of Cassation and Justice had not given a decision on the above-mentioned issue.

2. The form of a bilateral promissory agreement for sale

The opinion I share is that a bilateral promissory agreement for sale needs no notarial deed to constitute, in case of non-fulfillment, grounds for the delivery of a judgment which would stand for the sale contract, for the following specific reasons:

1. The law does not derogate from the principle of consensualism in the case of bilateral promissory agreements for sale and neither does it introduce any specific difference as regards the form required for such agreements to produce effects (for obtaining damages, respectively for the delivery of a judgment which would stand for the sale contract).

According to Article 1178 Civil Code, a contract can be merely concluded by the will agreement of the parties unless the law requires a certain formality for its valid conclusion.

The exceptions from the principle of consensualism, among which the notarial deed *ad validitatem*, are required to be expressly provided by law, as it results from the text specified.

No specific exception is established in respect of the form of a promise of sale and no derogation from the principle at issue is provided.

However, a sale contract for the transfer of a right in rem in immovable property should be concluded as an authentic document, the form being *ad validitatem* required by Article 1244 Civil Code, which thus regulates an exemption from the principle of consensualism.

Since the promise of sale and the sale itself are two distinct legal transactions, the exception established with regard to the form of the sale cannot also be extended to another legal transaction being not subject to it, because such exception must be applied strictly (*exceptio est strictissimae aplicationis*).

Moreover, no distinction can be made in the interpretation of the relevant legal texts regarding the required form of the promise of sale so that it could produce each separate legal effect, as no such differentiation is provided by law (*ubi lex non distinguit, nec nos distinguere debemus*).

Therefore, the opinion[1] according to which, in case of non-fulfillment of the promise to contract, it is sufficient that the agreement takes the form of a document under private signature for the beneficiary to obtain damages, but for the delivery of a judgment to stand for the contract it is mandatory that the promise is made in the form of an authentic document, finds no solid legal support to give the interpreter the right to differentiate.

Thus, according to Article 1669 (1) Civil Code, if one of the parties that concluded a bilateral promissory agreement for sale unreasonably refuses to conclude the promised contract, the other party may apply for the delivery of a judgment to stand for the contract, provided that all the other validity conditions are fulfilled.

At the same time, in accordance with Article 1.279 (3) Civil Code, if the promisor refuses to conclude the promised contract, the court, upon the request of the party that fulfilled its own obligations, may deliver a judgment to stand for the contract, where the nature of the contract allows that and the legal requirements for its validity are fulfilled.

From the interpretation of the correlation of the two legal texts it results that the court may deliver a judgment to stand for the sale contract, if at the time of such delivery the validity conditions of the sale are fulfilled.

The validity conditions for the sale of an immovable property refer to the consent, object, cause, capacity and form, but other special requirements expressly provided for certain types of sale could possibly exist.

The specified text uses the words "if all the other validity conditions are fulfilled" while in its content it mentions the "refusal" of one party to conclude the promised contract (the refusal being related to the condition of consent), as well as the right to obtain a judgment with the value of a contract (judgment which gives the form of the contract).

Therefore, the "other validity conditions" include the remaining requirements provided by law for the valid conclusion of a sale contract, with the exception of those which the text already refers to, namely the respondent's consent to sell and the form of the sale contract.

As a consequence, there was no need for the legislator to make any distinction as regards the substantive conditions and, respectively, the formal conditions of the sale, since the text subject to analysis contains the reference to the form which is given by the judgment itself, all the other conditions remained to be analyzed being substantive.

2. When the legislators wanted to impose the notarial deed of a promise to contract, they expressly regulated this requirement; *per a contrario*, in the other cases, such as the promise of sale, there was a certain intention of derogation from the principle of consensualism.

According to Article 1014 (1) Civil Code, under penalty of absolute nullity, the donation promise is subject to formalization in notarial deed.

Therefore, the Civil Code established the notarial deed *ad validitatem* only for

[1] D. Chirică, Is the authentic form mandatory for the conclusion of a bilateral promissory agreement for the sale-purchase of an immovable property, so that a judgment could be delivered to stand for of an authentic document? – a study published on www.juridice.ro.

donation promises, there being no specific regulation in the case of promises of sale.

Since both the sale of an immovable property and the donation constitute formal legal transactions and the legislator understood to regulate derogating formal requirements only for the donation promises, the argument raised by the relevant literature[2] - in the sense that, in the case of formal contracts, the validity of promises to contract is conditional on the fulfillment of the same formal requirements as the promised contract, as it would result from the provisions of Article 1014 (1) Civil Code – cannot be accepted, as these provisions, interpreted *per a contrario*, constitute an argument in favor of the opinion I am supporting.

3. Regulating the right to obtain a judgment that takes the place of a sale contract, the Civil Code essentially provided another means to conclude sales, different from a notarial authentic document, which makes irrelevant the fact that a certain judgment may or not be fully treated as an authentic document.

Since the Civil Code expressly allows for the delivery of a judgment which takes the place of a sale contract, while Article 888 of the same code lists, among other documents (together with the notarial authentic document), the final judgment as grounds for the right to register a title to property, it is useless to analyze if such judgments can or cannot be qualified as authentic documents.

The sale is equally valid and the right in rem may as well be registered with the Real Estate Register where the parties conclude a sale contract in a notarial deed or a judgment is delivered to stand for a contract.

Therefore, under the law, the judgment is sufficient in itself, whether it qualifies or not as an authentic document, to constitute a valid sale contract that can allow for the registration of the right in rem with the Real Estate Register.

Taking into account that the judgment takes the place of the contract, the judgment itself also constitutes the form established by law for the contract concluded in a specific manner.

4. The judgment taking the place of a sale contract is a transfer of rights, not s declaration of rights document and the legal action for which it was delivered is an injunction, not a declarator, so that the terms of the sale will be analyzed by reference to a time different from the time when the promise of sale was concluded.

This argument results from the fact that the rights and obligations of the parties, deriving from the sale contract, arise out of the judgment taking the place of the contract, as they were absent at the time of its delivery.

A sale contract is considered concluded at the time the judgment remains final, not at the expiry of the deadline established in the promise of sale for the conclusion of the contract.

The judgment taking the place of the sale contract constitutes the in-kind remedy for the enforcement of the obligation to do (to conclude the sale contract), arising out of the promise of sale.

Based on the above, the court before which the matter was brought for the delivery of a judgment to stand for the contract checks the validity of each of the two legal transactions (sale and promise of sale) by reference to the time of conclusion of each transaction, as follows:

a) the existence of the validity conditions of the sale by reference to the time when the judgment was delivered, on the one hand, and

[2] D. Chirică, *op. cit.*

b) the existence of the validity conditions of the promise of sale by reference to the time of its conclusion, on the other hand.

c) From the first category of conditions required to be fulfilled for the conclusion of the sale, the court checks the object, the cause of the sale in the applicant's view, the capacity of the parties, and possibly other special conditions established for the sale.

Within such examination, the court does not check:

- the respondent's consent to the sale, as it is this consent which is judicially substituted, the respondent expressing his refuse to conclude the sale;
- the cause of the sale in the respondent's view, as this and the consent are part of the complex phenomenon of legal agreement and they cannot be dissociated one from another in this particular case;
- the form of the sale, as it is the judgment the court is going to deliver that will give the form of the contract.

Even if the derived object of the sale (immovable property) is indicated in the promise of sale, it does not mean that the objects of the two legal transactions are identical. On the contrary, the object of the promise of sale refers to the future conclusion of the contract, for the sale of an immovable property, while the sale refers to the transfer of the ownership right over that property. The derived object of the sale constitutes only a fine-tuning of the object of the promise of sale.

If all the validity conditions of the sale were evaluated at the time the promise of sale is concluded, it would mean, for example, that the court can also deliver a judgment to stand for the sale contract in the case the property was removed from the civil registry and declared inalienable after the conclusion of the transaction, which cannot be admitted.

As regards the capacity of the parties, the court will evaluate, in a manner similar to that of a notary public, if the parties can sell, respectively purchase at the time of the sale conclusion, not at the time of the promise of sale.

This entire reasoning given for each separate condition is only reminded to show that the form of the sale can neither be related to the time the promise of sale is concluded.

The mere notarial deed of the pre-contract cannot substitute the notarial deed of the sale. If the parties had concluded the promise of sale in an notarial deed and the sale contract in the form of an authentic document under private signature, such a sale would also have been null due to the lack of the form established by law *ad validitatem*.

In the case subject to analysis, the form of the sale is given by the judgment, whether or not the pre-contract was concluded in an notarial deed; this is similar to a conclusion of the sale by the parties before a notary public, in which case the legal form of the pre-contract has no relevance.

d) From the second category of conditions necessary for the conclusion of a promise of sale, the court examines all the requirements established by law for the conclusion thereof, in terms of consent, object, cause, capacity, form and possibly special conditions.

As for the form of the promise of sale, as indicated above, the law does not lay down any exceptions from the rule of consensualism.

As far as the respondent's consent requirement is concerned, the court may check the validity of the consent at the time the promise of sale was concluded, as it is

substantively shown in the relevant literature[3], as absolute nullity can be invoked by way of substantial law exception, whose appropriateness could lead to the unfounded rejection of the application for the delivery of a judgment to stand for the contract. The respondent is also entitled to invoke, besides the absolute nullity, the relative nullity arising from the existence of some vices of consent, either by means of a counterclaim or a nullity defense on the substance of the case.

5. The consent given at the time of the conclusion of a sale is different from the consent given upon the conclusion of the promise of sale, therefore one cannot hold that the failure to respect the notarial deed at the time of the conclusion of the promise of sale shall result in the invalidity of the consent to the sale[4].

At the time the pre-contract of sale is concluded, the parties express their consent to the future conclusion of a sale contract, but at the time of the sale conclusion the parties give their consent to the transfer of the ownership right over a property form one patrimony into another.

The existence and validity of the respondent's consent to the sale conclusion is not examined at the time of delivery of a judgment taking the place of a sale contract, as the respondent has already refused to conclude the contract, his consent to the sale being totally absent. Instead, the court will check the respondent's consent at the time the promise of sale was concluded, as representing his agreement for the future conclusion of a sale.

6. The reasons doctrinally referred to, for which the notarial deed *ad validitatem* is established by law for certain legal transactions do not subsist in the case of a pre-contract of sale.

Thus, the reasons for the establishment of the notarial deed *ad validitatem*, deduced in the legal doctrine, are intended to remind the parties of the special importance of certain legal transactions for their own patrimonies and to exercise a control of the society, by the state bodies, in respect of the civil law transactions whose importance exceeds the strict interests of a party.

However, these reasons do not maintain in the case of a pre-contract of sale, because:

− a pre-contract of sale creates just a claim, as no effect of property transfer being produced based on such pre-contract;

− - if in the promise to sale document the parties established a confirmatory deposit as penalty for the refusal to conclude the sale contract, while the beneficiary of the promise claims a specific deposit, in which case the form of a document under private signature is sufficient for the promise, and if implicitly there is no warning from the notary public, the loss of the party that fails to respect the pre-contract is higher than in the case of a judgment delivered to stand for the contract, when the party refusing the conclusion thereof receives the full price of the immovable property in exchange to the property and could possibly be obliged to only pay the legal expenses;

− - there is no requirement for a pre-contract to stipulate the risk of a judgment being delivered to stand for the contract in case the pre-contract is not respected, therefore even if the parties are not warned about such a risk (either orally by the notary public, or in the text of the document), the court will still be entitled to deliver a judgment, the lack of warning making no difference;

− - the control of the society in terms of a sale contract is exercised through the

[3] R. Dincă, *Promise of sale an agricultural land located outside a built-up area*, in the Romanian Private Law Magazine no. 3/2015, p. 53.

[4] In this respect – D. Chirică, *op. cit*.

courts.

7. The argument deduced from the claimed similarity between the case subject to analysis and the real contract would not be admitted as long as the real contract cannot be created without the transfer of a property and through a judgment no such condition would be substituted; instead, the form of the sale contract may be represented by the judgment itself which, according to law, not only takes the place of the contract, but is also able to allow for the registration of the ownership right with the Real Estate Register.

Since the transfer of property is assimilated to a formal requirement for the real contract and this requirement cannot be substituted through the judgment which takes the place of the contract, as in the case of real estate sales, it was normal for the legislator to lay down the obligation that such requirement be fulfilled at the time the judgment is delivered.

8. The amendment of Article 5 (1) of Law no. 17/2014 cannot constitute, in itself, an argument to unambiguously establish the intention of the legislator at the time the notarial deed requirement was removed from its text.

Article 5 (1) of Law no. 17/2014, as unamended, established a condition additional to those of the Code, namely the notarial deed of pre-contracts for the sale of lands located outside a built-up area.

It cannot be considered with certainty that the amendment of this text in the sense of removing the notarial deed requirement is based on grounds related to the avoidance of tautology, whereas:

- the initial form of the text indicated Article 1669 Civil Code even in the provision, for which it seems that the text rather imposed a condition additional to those stipulated in the Code;
- in the absence of other arguments, the removal of the provision on the notarial deed cannot be justified on the assumption that the legislator initially breached the legislative technique rules, but rather that the article at issue imposed an additional condition which was then waived, as there was no reason for a derogation from the Code.

3. Conclusions

For all these specific reasons, I believe there is no need that a bilateral promissory agreement for sale takes an notarial deed in order to be able, in case of failure, to constitute grounds for the delivery of a judgment taking the place of the sale contract and that the form of a document under private signature is sufficient.

References

- D. Chirică, "Is the notarial deed mandatory for the conclusion of a bilateral promissory agreement for the sale-purchase of an immovable property, so that a judgment could be delivered to stand for an authentic document?" - a study published on www.juridice.ro.
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