

ACQUIRING REAL ESTATE'S OWNERSHIP THROUGH ACQUISITIVE PRESCRIPTION

Acquisitive prescription is one of the modes of acquiring ownership of a thing regulated by the Civil Code (Art. 172 of the Civil Code and subsequent articles). This institution mostly refers to acquisition of ownership of movable and immovable property by a non-rightful owner, which results expressly from Art. 172 and 174 of the Civil Code, however, land servitude (Art. 292 of the Civil Code) and perpetual usufruct can also be objects of acquisitive prescription. The Supreme Court forejudged/settled a possibility of the latter property law's prescription in one of its resolutions/decisions¹. In practice, however, acquisitive prescription is of the greatest legal importance with regard to real estates.

A basic function, and at the same time acquisitive prescription function's justification, is elimination of inexpedient discrepancies between a legal and factual situation of the thing in question. Acquisitive prescription is a specific case of acquiring ownership because, contrary to other legal forms of ownership acquirement, it does not occur in a mode of legal act but through the existence of legally envisaged prerequisites in a specified factual condition. Hence, in case of real estate acquisitive prescription two prerequisites must jointly occur: possession and the lapse of time. In case of movables' acquisitive prescription, a third prerequisite is necessary, namely the holder's good faith². A possibility of acquisitive prescription is absolutely excluded without this prerequisite (Art. 174 of the Civil Code). Whereas the holder's good or bad faith does not condition a possibility of real estate acquisitive prescription itself as it only acts to the effect of the length of the lapse of time after which it is to occur.

Possession is a specified factual status expressed in a possibility of factual and real management/use of a thing. Pursuant to Art. 336 of the Civil Code, the

1 The resolution of the composition of 7 Judges of the Supreme Court of 11th December 1975, docket no. III CZP 63/75 (OSNCP 1976, No. 12, par. 259), which was granted legal rule's force by the Supreme Court.

2 Supreme Court, in the decision of 17th May 2000 docket no. I CKN 730/98 (Lex Polonica No. 379893), adjudicated that good faith of the holder of movable must last throughout the entire period of the acquisitive prescription's term.

holder of a thing is both a person who factually uses/manages it in the scope of its ownership as well as the person who uses /manages it in the scope of another right that is connected with a specified management/use of a thing. Specified presumptions provide benefits/advantages for the holder's legal situation. They include: presumption of independent possession (Art. 339 of the Civil Code), uninterrupted possession (Art.340 of the Civil Code) and legitimate possession (Art. 341 of the Civil Code). The first two presumptions are of particular importance in the context of acquisitive prescription of a thing to specify its main prerequisite, i.e. independent possession, as well as to count the time of possession. They are mutable presumptions (*iuris tantum*), therefore, until they are abolished in a proceeding, they exempt the holder from the necessity to prove that the use/management he/she is exercising over a thing has properties and scope corresponding to the owner's use/management, as well as from sometimes problematic proving that possession's continuity has been preserved for many years.

Possession as a prerequisite to acquire ownership by acquisitive prescription must be independent in nature, that is with the intention to possess a thing for oneself (*cum animo rem sibi habendi*). The Supreme Court accurately characterized an independent holder in the judgment of 19th December, 2000 (docket number V CKN 164/00 Lex Polonica No. 388726) ascribing him/her with the features of a person whose factual scope of the thing's (land's) use/management is the same as the owner's, moreover, who is in a position allowing the use of the thing in the same manner as the owner. It results from this that two elements must occur if we are to talk about independent possession of the holder: a physical element of managing/using the thing (*corpus possessionis*) and an intellectual element of the intention to use/manage the thing for yourself (*animus possidendi*). The latter one is manifested by the will to possess a thing in a scope appropriate/suitable to the entitlement to a thing in the broadest meaning (possessing it for oneself), excluding other subjects/entities. A factor of will is the element that allows to distinguish independent possession from dependent possession. Therefore in practice, external (that is visible/apparent to others) indications of manifestation of the use/management of a thing "like an owner" made by the holder decide whether we deal with possession characteristic of ownership or dependent possession. Apart from acts of the holder's conduct, lack of effective resistance of third parties is also a characteristic indication of factual management/use.

A change of dependent management/use into independent one is also admissible but it is effective under a condition such a change will be expressly manifested to the outside as far as real estate acquirement through acquisitive prescription is concerned. A change which has been externalized and which will only remain in

the holder's intentional sphere, will be legally ineffective³. The holder's knowledge about who the title to the thing's ownership belongs to does not exclude him/her of a status of independent possession. Even in the situation they know they manage/use another person's thing, and although they want to maintain its possession and do it in such a way as if they were its owners, they obtain an attribute of independent possession.

The regulation included in Art. 172 of the Civil Code conditions the length of the period of time necessary to acquire real estate's ownership through acquisitive prescription upon good or bad faith. It should be emphasized that pursuant to grammatical interpretation of Art. 172 § 1 of the Civil Code, the assessment of real estate holder's good or bad faith is made at the moment of acquiring possession. Subsequent changes in the holder's awareness in the scope of good or bad faith do not influence the character/nature of this possession or the length of time after which ownership acquirement through acquisitive prescription occurs.

Due to the lack of a definition of good and bad faith in the Civil Code⁴, this issue has been a subject of numerous opinions of judicature and doctrine. At present jurisdiction opts for the so called traditional understanding of the term good faith, according to which holder's good faith occurs when he/she is convinced he/she owns/possesses the thing in accordance with law, and his/her conviction is justified by the circumstances of a given case, nonetheless, good faith is excluded not only by a positive notice about lack of the right/entitlement but also a lack of the notice caused by negligence. A person who acquired real estate's ownership on the basis of an agreement aiming at a transfer of ownership concluded in a form different from a notary deed cannot be recognized as independent holder⁵.

Acquisitive prescription runs against real estate's owner. Establishing a course of acquisitive prescription, provisions on the course of actions' termination are taken into account, which should be applied here according to Art. 175 of the Civil Code. Regulations on termination, once suitably adapted to the institution of acquisitive prescription, regulate issues regarding adjournment, suspension, disruption and renewal of acquisitive prescription's course (Art. 121-124 of the Civil Code).

Generally, the moment a thing is acquired into independent possession is designated as a starting date of acquisitive prescription's course. However, the moment which starts acquisitive prescription's course may be moved in time under

3 Decision of the Supreme Court of 13th March 1998, docket no. I CKN 538/97 (Lex Polonica No. 350704).

4 It may be indicated that for the needs of the provisions on warranty of public faith of Land and Mortgage Register, a definition of a person in bad faith is included in Art. 6 par. 2 of the Act of 6th July 1982 on Land and Mortgage Register and Mortgage (Journal of Laws of 2001, No. 124, par. 1361 with subsequent changes), which defines that it is a person who knows that the content of the Land and Mortgage Register is inconsistent with real legal status or the one who could have easily found it out.

5 Such was the decision of the Supreme Court in the resolution of the composition of Seven Judges of 6th December 1991 docket no. III CZP 108/91 (OSNCP 1992, No. 4 par. 48), granting it a legal rule's force.

the reasons specified in Art. 121 of the Civil Code. These reasons are connected with specified subject dependencies occurring between the thing's owner and its potential holder. Hence, acquisitive prescription's course by parents becomes suspended to the things possessed by minor children during parental authority. Acquisitive prescription does not run also in case of possessing things that belong to people who lack complete/entire capacity to legal transactions, i.e. guardians or curators during guardianship or tutelage/curatorship. A period of acquisitive prescription will also not run during marriage in favor of one of the spouses as to the objects separately owned by another spouse or to those jointly owned by the spouses. The course of acquisitive prescription's terms will also become suspended in case of force majeure throughout its occurrence.

In cases specified in the Civil Code the course of acquisitive prescription's term may be suspended. It means that when a prerequisite to suspend acquisitive prescription's term occurs, it will run further, as a matter of fact, but it will not be able to terminate before the lapse of specified time. Acquisitive prescription cannot terminate earlier than after the lapse of two years from the moment the real estate's owner came of age (Art. 173 of the Civil Code), or from the moment a statutory representative was appointed for a person lacking complete/entire capacity to legal transactions, or the reasons for their appointment came to an end (Art. 122 § 1 of the Civil Code). The course of acquisitive prescription's term is suspended also in case of a major person who is subject to total legal incapacitation (Art. 121 § 3 in connection with Art. 13 § 1 of the Civil Code).

Another situation connected with acquisitive prescription is interrupting its course. Pursuant to Art. 123 § 1 of the Civil Code, such interruption may occur for two reasons. The first one is so called owner's aggressive/offensive action aiming at causing interruption to possession. It is assumed that apart from a lawsuit aiming directly at interruption to possession, it may also be caused by other actions aiming directly at claiming, establishing, satisfying or securing property rights. E. Janeczko⁶ includes the following actions therein: a lawsuit for ownership's establishment brought against the owner, motions/applications for a change of provisions in Land and Mortgage Register, proceeding aiming at Land and Mortgage Register's establishment (provided the holder participates in it), or a motion/application for real estate's separation.

The second reason for the interruption of acquisitive prescription's term is recognition of the owner's right by the holder. Such recognition may take a form of the holder's unilateral statement (so called improper/undue recognition) or a form of legal action concluded between the owner and the holder (so called proper/

6 E. Janeczko, *Zasiedzenie*, II edition, Warsaw – Zielona Góra 1999, p. 134.

due recognition)⁷. In the first case externalization of the owner's rights to the real estate by the holder may be manifested in his/her different conducts, both expressed and implied. Whereas in the second case it assumes a specified legal form whose subject is a given real estate (e.g. concluding a tenancy agreement whose subject is a specified real estate).

Interruption to acquisitive prescription effects in annihilation of a previous period of independent possession; it is assumed to be unexisting/null and void. After interruption is over, the course of acquisitive prescription commences from the beginning (Art. 124 § 1 of the Civil Code).

In Art. 176 of the Civil Code the legislator admitted a possibility of adding possession of a previous possessor during the course of acquisitive prescription's term. Such adding may solely occur if ownership has been transferred between the predecessor and successor, or when the holder is his/her predecessor's heir. Good faith plays an important role in adding predecessor's possession. If a previous holder acquired possession in bad faith, then a present holder, even if he/she has acted in good faith, may add the predecessor's time of possession only when it amounts to at least thirty years together with the time of possession of a present holder.

Acquiring the right through acquisitive prescription is connected with a relatively long lapse of time during which legal provisions may change several times. Therefore, international legal regulations on acquisitive prescription should be taken into consideration to count acquisitive prescription's terms.

After the Second World War civil law provisions within the territory of Poland were unified, including those regarding acquirement through acquisitive prescription. The decree of 11th October 1946 Property Law (Journal of Laws of 1946 No. 57 par. 319) valid/in force since 1st January 1947, specified terms of real estate's acquisitive prescription to be twenty years in case of possession in good faith and thirty years in case of possession in bad faith. It also envisaged a privileged form of acquisitive prescription by the holder entered into the Land and Mortgage Register, so called *secundum tabulas*, who became the real estate's owner already after the lapse of ten years, and in case of bad faith, at the moment of acquiring real estate into possession – after the lapse of twenty years.

The Civil Code which was in force since 1st January 1965 did not adopt *secundum tabulas*, however, it stipulated shorter terms for real estate's acquisitive prescription, which amounted to ten years in case of the holder's good faith, and twenty years – in case of bad faith. Since 1st October 1990 – the Act of 28th July 1990 on the change of the Act on the Civil Code⁸ came into force, terms of possession required for

7 *Ibid.*, p. 138.

8 Journal of Laws of 1990, No. 55, par. 321.

ownership acquirement have been extended again, and until now, depending on the holder's good or bad faith, they amount to twenty or thirty years.

According to Art. XLI of the Act of 23rd April 1964 – Introductory Acts to the Civil Code⁹, this Code's provisions are applied to acquisitive prescription whose course commenced before the day the Civil Code came into force. Due to shorter terms of acquisitive prescription as compared to those specified in Property Law, the date the Civil Code came into force is the beginning of the acquisitive prescription's course. However, if acquisitive prescription that started before 1st January 1965 had occurred earlier with reference to previous provisions, acquisitive prescription occurs after the lapse of this earlier period. Whereas the Code's amendment, which has been in force since 1st October 1990 and which extended acquisitive prescription's terms, introduced a rule according to which the provisions of this Act are applied to acquisitive prescription whose course commenced to run before this Act came into force. Hence, if on 30th September 1990 at the latest, real estate's acquisitive prescription did not occur under the law according to shorter terms, after this date the period required to acquire the right got automatically prolonged by another ten years.

On the day the Civil Code came into force the Art. 177 therein excluded application of provisions on acquisitive prescription with regard to the state owned real estates. However, the statutory ban on acquisitive prescription of state owned terrains was introduced earlier, i.e. under the Act of 14th July 1961, but it only considered the real estates located within cities and housing districts' limits. The above mentioned Act of 28th July 1990 repealed Art. 177 of the Civil Code. Thus restrictions in the scope of acquiring state owned real estates through acquisitive prescription have been abolished. Intending to mitigate the effects of more than one many-year-long ownership of state owned real estates in the period excluding a possibility of their acquirement through acquisitive prescription, in Art. 10 thereof the legislator admitted a possibility of qualifying the previous possession's period required for acquirement through acquisitive prescription, however, no more than by a half, that is, depending on the holder's good or bad faith, maximally ten or fifteen years. On the basis of this provision's interpretation, particularly in the issue connected with the question whether a period of possession from before the date the provisions excluding acquisitive prescription of the state owned real estates came into force is qualified as the period of possession by which acquisitive prescription's term is shortened, the Supreme Court has been trying several times to modify the direction of its jurisdiction¹⁰. Eventually, it adjudicated in the resolution composed of

9 Journal of Laws of 1964, No. 16, par. 94).

10 See, e.g: the Act of 26th March 1993, III CZP 14/93, OSNCP 1993, No. 11, par. 196; the resolution of 8th September 1995, III CZP 104/95, OSNC 1996, No. 1, par. 2; decision of 27th June 2000, I CKN 796/98, OSNC 2000, No. 12, par. 234.

Seven Judges of 31st January 2002, Docket No. III CZP 72/2001 (OSNC 2002, No. 9, par. 107) that the period of possession from before the date the provisions excluding acquisitive prescription of the state owned real estates came into force is not qualified as the term by which the state owned real estate acquisitive prescription's term is shortened, nor is it included in establishing the period of time required to acquisitive prescription of such real estate.

Together with the state transformations of 1989 in Poland, there has been a gradual increase of a number of claims before courts for ascertainment of real estate acquisition through acquisitive prescription. Free market economy realities, where real estates were becoming more and more common and attractive objects of turnover, can be indicated as one of the main reasons for this phenomenon. In case of many-year-long real estates' independent holders who were not their formal owners, such turnover was conditioned by confirmation of their rights to the real estate by the court decision.

Proceedings for ascertainment of ownership acquisition through acquisitive prescription are regulated in detail by Art. 606-610 of the Code of Civil Procedure and, by reference to a suitable application of the provisions on ascertainment of inheritance acquirement – Art. 669, 673-677 § 1 of the Code of Civil Procedure. Such cases are settled/examined by regional courts (art. 507 of the Code of Civil Procedure). The court's competence/jurisdiction is established by the localization of the real estate covered by the motion/application, however, if the real estate is localized within the area of several regional courts, the choice of a competent court belongs to the applicant (Art. 43 § 1 of the Code of Civil Procedure in connection with Art. 13 § 2 of the Code of Civil Procedure). Cognizance of a case by the court depends on fee payment amounting to PLN 2000¹¹.

In his/her motion the applicant should indicate the interested persons, that is such whose rights are subject to the proceedings' result (art. 510 § 1 of the Code of Civil Procedure). This group of people should by all means include the owner (co-owners) of real estate and their legal successors, all authorized independent holders of a given real estate, and under some conditions, neighboring lands' holders too¹². If the applicant fails to fulfill this requirement, the decision may be made only after summoning other interested parties by announcement (art. 609 § 2 of the Code of Civil Procedure). Failure to fulfill the requirement of establishing and summoning

11 Art. 40 of the Act of 28th July 2005 on Court Fees in Civil Cases (Journal of Laws of 2005, No. 167, par. 1398 with subs. changes).

12 Supreme Court in the decision of 5th October 1971 docket no. III CRN 271/71, OSNC 1972, No. 2, par. 41, declared that holders of neighboring lands may be participants of the proceeding for acquisitive prescription when the result of the proceeding regards the rights they claim to the real estate indicated in the motion or to bordering belts of land .

other interested parties to take part in a case may produce a sanction in a form of proceedings' invalidity (art. 379 point 5 of the Code of Civil Procedure).

The aim of the proceedings is to establish (confirm) the fact of ownership acquirement and a person who acquired it as to the moment when statutory prerequisites of acquisitive prescription have been fulfilled. The court is not bound by the applicant's indication as to the person who should be listed in the decision as a person who acquired the real estate's ownership through acquisitive prescription. For example, it may happen that in the decision a previous independent holder to the applicant (his/her predecessor) will be indicated as the owner, the decision may also include few independent holders who fulfilled prerequisites necessary to acquire ownership through acquisitive prescription to the same real estate at the same time. Regulations of acquisitive prescription do not require a person indicated in the decision as the real estate's owner to be its current holder. During the proceedings the Court establishes all independent holders of real estate *ex officio* (Art. 670 § 1 of the Code of Civil Procedure in connection with Art. 610 § 1 of the Code of Civil Procedure).

Court's decision is of declaratory nature and is effective not only with regard to the proceeding's participants and the court which issued it but also to other courts and authorities' organs (the effect *erga omnes*). It is a proof that a person listed in the conclusion of a decision is the real estate's owner, whereas after it becomes legally valid and binding, it is the basis for further regulation/settlement of the real estate's legal status through entering a current owner in the II Section of the Land and Mortgage Register (Art. 31 par. 2 of the Act of 6th July 1982 on Land and Mortgage Register and Mortgage).

Streszczenie

Zasiedzenie prowadzi do nabycia własności przez nieuprawnionego samoistnego posiadacza danej rzeczy wskutek faktycznego wykonywania tego prawa przez oznaczony w ustawie czas, z czym wiąże się jednoczesna utrata prawa własności przez dotychczasowego właściciela. W ten sposób dochodzi do uzgodnienia długotrwałego stanu faktycznego władania rzeczą ze stanem prawnym, co prowadzi do ustabilizowania stosunków własnościowych. Przedmiotem zasiedzenia może być przede wszystkim prawo własności (rzeczy ruchomych i nieruchomości), ale także służebność gruntową, czy użytkowanie wieczyste. W praktyce jednak instytucja zasiedzenia znajduje najszersze zastosowanie dla nabycia w tej drodze własności nieruchomości. Nabycie własności w drodze zasiedzenia następuje z mocy prawa, a formalnym potwierdzeniem tego faktu jest orzeczenie sądu powszechnego.