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Establishment by virtue of the law of land easement with the content corresponding to transmission easement in the light of the resolution of the Supreme Court of June 5, 2018, in case III CZP 50/17

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Abstract: The subject of this article is the resolution of the enlarged composition of the Supreme Court of 5 June 2018, which resolves the issue of acquiring by land easement with content corresponding to transmission easement together with the acquisition by a state-owned company of transmission facilities developed on State Treasury properties. As a result of granting property rights to state-owned companies of state property in the early 1990s, the ownership of transmission infrastructure and the property on which they were situated were separated.

In the judicature, divergent concepts emerged regarding the solution of the issue of further use of this land by transmission companies. According to the first one, the transfer of property rights was accompanied by the creation by law of land easement with content corresponding to a transmission easement. On the other hand, according to the second concept, obtaining a legal title for further use of the property was possible only through contractual acquisition or prescription of transmission easement.

Powstanie z mocy prawa służebności gruntowej o treści odpowiadającej służebności przesyłu w świetle uchwały Sądu Najwyższego z dnia 5 czerwca 2018 roku, sygn. akt III CZP 50/17

Abstrakt: Tematem artykułu jest uchwała powiększonego składu Sądu Najwyższego z dnia 5 czerwca 2018 roku, która rozstrzyga kwestię nabycia z mocy prawa służebności gruntowej

o treści odpowiadającej służebności przesyłu wraz z nabyciem przez przedsiębiorstwo państwowe własności urządzeń przesyłowych posadowionych na nieruchomościach Skarbu Państwa. W wyniku uwłaszczenia mienia państwowego na początku lat dziewięćdziesiątych ubiegłego wieku doszło do rozdzielania własności infrastruktury przesyłowej oraz nieruchomości, na której były one posadowione. W judykaturze pojawiły się rozbieżne koncepcje odnośnie do rozwiązania kwestii dalszego korzystania przez przedsiębiorstwa przesyłowe z tych gruntów. Zgodnie z pierwszą z nich przeniesieniu prawa własności towarzyszyło powstanie z mocy prawa służebności gruntowej o treści odpowiadającej służebności przesyłu. Na podstawie drugiej — uzyskanie tytułu prawnego do dalszego korzystania z nieruchomości było możliwe wyłącznie w drodze umownego nabycia albo zasiedzenia służebności przesyłu.

Introduction

Despite more than a decade since the introduction of the transmission easement to the Civil Code, the use of land easement with content corresponding to the easement of transmission still raises numerous controversies. One of the issues that arose from the interpretation of this concept was the question of the possibility of acquiring by virtue of law land easement with content corresponding to transmission easement together with the acquisition by a state-owned company of the ownership of transmission facilities located on State Treasury properties.

This issue was definitely resolved by the recent resolution of the seven Supreme Court judges of 5 June 2018,¹ answering the question whether acquisition by the transmission company of transmission facilities located on properties owned by the State Treasury on the basis of the Act of 20 December 1990 on the amendment of the Act on State-owned Companies,² resulted in the acquisition by the transmission company by virtue of law — as a right related to the ownership of such equipment — land easement with content corresponding to transmission easement, encumbering those properties.

Although the Supreme Court's response ultimately seems quite intuitive, in the period preceding the adoption of the resolution the discrepancies in the jurisprudence, weakening its consistency and predictability were widely visible.

Facts

The discussed legal issue was transferred to the enlarged composition of the Supreme Court as a result of examining a cassation complaint in a case in which the applicant demanded that his property should be encumbered with a paid transmission easement for the benefit of the participant in the proceedings — Polskie Sieci Elektroenergetyczne S.A. The participant, on the other hand, defended

¹ Decision of the Supreme Court of 5 June 2018, in case III CZP 50/17, Legalis no. 1779436.

² Act of 20 December 1990 amending the act on state-owned enterprises and amending certain other acts, Official Journal 1990 No. 2, item 6.

himself with charge of acquisitive prescription of transmission easement (or land easement with content corresponding to transmission easement).

The District Court determined that the property covered by the application remained state-owned property since the development of transmission facilities until 15 July 1993. Taking into account the claim, the Court indicated that the period of acquisitive prescription had not yet elapsed due to the fact that during the period of uniform state ownership the usucaption of land easement (with content corresponding to easement of transmission) by the state-owned company was excluded in the case of facilities located on state-owned land. As a consequence, the course of the usucaption period began only on 15 July 1993, when the property was sold to the applicant, thus ceasing to be owned by the State Treasury.

The Court of Appeal hearing the case as a result of the participant's appeal deliberated, however, whether the recognition of the allegation of acquisitive prescription of land easement with content corresponding to transmission easement does not need to be preceded by an assessment as to whether the entity raising such an allegation no longer has a legal title to use the property in question. The creation of such a title by virtue of law on the day when the state-owned enterprise acquired the ownership of the transmission facility would render the application to establish the transmission easement unjustified.

The previous position of judicature and doctrine

In the period preceding the adoption of the resolution of 5 June 2018, the above-mentioned issue was the subject of discrepancies not only in the case law of common courts, but also in the decisions of the Supreme Court. In some judgments, the Supreme Court took the position that due to ownership transformations in the 1990s, a state-owned enterprise acquiring ownership of transmission facilities also automatically acquired the right to further use of the property on which they were located. At the same time, in other cases, it approved the view that acquisitive prescription of land easement with content corresponding to the easement of transmission by a state enterprise (or its legal successors) is possible on land owned by the State Treasury, starting from the day of enfranchisement. However, due to the fact that the possession of a legal title to the property prevents the commencement of the course of acquisitive prescription, these theses are clearly contradictory.

The first of the evoked jurisprudence line was initiated by the decisions of the Supreme Court of 12 May 2016.³ It was explained in them that with the abolition — as of 1 February 1989 — of the construction of a single state property, there was no automatic transformation of the rights of state legal persons to the part of national

³ Decision of the Supreme Court of 12 May 2016 in case IV CSK 509/15, *Legalis* no. 1488827; Decision of the Supreme Court of 12 May 2016 in case IV CSK 510/15, *Legalis* no. 1472995.

property remaining in their management. Only on 5 December 1990, based on Art. 2 para. 1 and 2 of the Act of 29 September 1990 amending the act on land management and expropriation of real estate,⁴ the right of the management with respect to land in the right of perpetual usufruct has been transformed into land and buildings ownership. However, in relation to other property components, including transmission facilities, the transformation into ownership took place on 7 January 1991, pursuant to the provision of Art. 1 point 9 of the Act of 20 December 1990 amending the Act on state enterprises. Under this provision, there was an amendment to Art. 42 para. 2 of the Act of 25 January 1981 on state-owned enterprises⁵ by deleting from its content the words “forming part of a nationwide property.” Since then, the property of state-owned enterprises has ceased to form part of nationwide property.

Subsequently, the Supreme Court came to the conclusion that the state-owned enterprise, which included transmission facilities developed on real estates owned by the State Treasury at the time of entry into force of the Act of 20 December 1990, also acquired a legal title to use the land in the form of land easement with content corresponding to easement of transmission. In other words, the enfranchisement caused not only the transformation of the company’s management over the transmission facilities into the right of their ownership, but also resulted in the transformation of the legal title to use the state-owned property within a limited scope into the relevant subjective right (easement). According to the Supreme Court, it would be completely incomprehensible

if any part of state authority of a legal entity being a state-owned enterprise over state land, which has been performed under the principle of a uniform state-ownership fund for a long period of time, approved by the State Treasury and necessary to perform the tasks of this enterprise, but not having the character of a civil subjective right due to the application of this principle, is not subject to expropriation decision.. It cannot be accepted that the legislator’s will would be to impose on state-owned enterprises the necessity to immediately conclude with the State Treasury countless contracts necessary for the fragmentary use of their real estate.

Furthermore, since in the period prior to the statutory regulation of transmission easement, it was possible to acquire land easement with identical content on the basis of a contract or as a result of acquisitive prescription, it could also arise by virtue of law itself, i.e., as a result of the expropriation decision of state legal entities. These views were also shared by the Supreme Court, including the decisions of 17 June 2016,⁶ of 12 October 2017⁷ and of 23 March 2018.⁸

⁴ Act of 29 September 1990 amending the act on land management and expropriation of real estate, Official Journal 1990 No. 79, item 464.

⁵ Act of 25 January 1981 about state-owned enterprises, Official Journal 1981 No. 24, item 122.

⁶ Decision of the Supreme Court of 17 June 2016 in case IV CSK 531/15, Legalis no. 1471871.

⁷ Decision of the Supreme Court of 12 October 2017 in case IV 687/16, Legalis no. 1695699.

⁸ Decision of the Supreme Court of 23 March 2018 in case I CSK 422/17, Legalis no. 1770222.

The above concept has been criticized in the doctrine, among others in a gloss to the decision of the Supreme Court of 12 May 2016, Ref. act IV CSK 510/15, by K. Dadańska.⁹ In the author's opinion, it is unacceptable to recognize, by way of functional interpretation, the possibility of creating a limited property right as a consequence of enfranchisement. Automatic, ex lege, change of ownership must have a clear legal basis. The creation of a limited property right cannot be presumed. G. Matusik and M. Warciński¹⁰ also took a similar position.

As has already been mentioned, the above thesis about the possibility of arising from the law land easement with content corresponding to easement of transmission is also in clear contradiction with the developing parallel view of the Supreme Court regarding the possibility of acquisitive prescription of land easement with content corresponding to the transmission easement on property owned by the State Treasury, on which transmission facilities were developed during the period of uniform state ownership.¹¹ According to this view, until 1 February 1989, the State Treasury remained the owner of both the property and the transmission infrastructure located on it, and therefore the acquisitive prescription of transmission easement was not possible at all since it is, in principle, a right on someone else's property. The abolition of the principle of uniform state ownership did not result in automatic transformation of the rights of state legal entities to use the property remaining in their management. Only the amendment to the act on land management and expropriation of real estate (possibly the amendment to the Act on state-owned enterprises in December 1990) settled this issue, enfranchising state-owned enterprises in the field of devices, as of 5 December 1990 (or 7 January 1991) transmission.¹² As a consequence, only on that date transmission companies became the owners of transmission equipment and dependent

⁹ K.A. Dadańska, "Cywilne prawo — rzeczowe prawo — służebność przesyłu — zasiedzenie służebności gruntowej odpowiadającej służebności przesyłu glosa do postanowienia Sądu Najwyższego z dnia 12 maja 2016 r., sygn. akt CSK 510/15," *Orzecznictwo Sądów Polskich* 2017, no. 5, item 45, pp. 28 ff.

¹⁰ G. Matusik, "Glosa do postanowienia Sądu Najwyższego z dnia 12 maja 2016 r., sygn. akt CSK 510/15," *Rejent* 2017, no. 5, pp. 98 ff.; M. Warciński, "O służebności gruntowej o treści służebności przesyłu. glosa do postanowienia Sądu Najwyższego z dnia 12 maja 2016 r., sygn. akt CSK 510/15," *Palestra* 2018, no. 1–2, pp. 162 ff.

¹¹ Decision of the Supreme Court of 4 July 2014 in case II CSK 551/13, *Legalis* no. 1061836; Decision of the Supreme Court of 16 December 2015 in case IV CSK 132/15, *Legalis* no. 1398615; Decision of the Supreme Court of 18 January 2017 in case V CSK 159/16, *Legalis* no. 1603871; Decision of the Supreme Court of 2 March 2017 in case V CSK 356/16, *Legalis* no. 1650961; Decision of the Supreme Court of 14 March 2017 in case II CSK 463/16, *Legalis* no. 1668516.

¹² In decisions of the Supreme Court there is a lack of unified position about what is the date of enfranchisement of state enterprises in the field of transmission equipment. Equally often, the Supreme Court adopts the date 5 December 1990, and 7 January 1991. However, taking into account discussed problem this issue is of minor importance, because in both cases the Supreme Court allows the possibility of acquisitive prescription of the land easement with the content corresponding to the easement of transmission.

possessors of the real estate on which they were located. In other words, on this date there took place a real separation of ownership of equipment and land.

It is worth noticing that also in the doctrine the view allowing the prescription of land easement with content corresponding to easement of transmission is commonly approved.¹³

Recognizing the above discrepancies, by decision of 16 February 2017,¹⁴ the Supreme Court forwarded the issues presented to the enlarged composition of the Supreme Court, considering them important from the point of view of the proper balance of the protection of property owners' rights and the interests of transmission entrepreneurs.

4. Resolution of the Supreme Court of 5 June 2018

The Supreme Court — before considering the merits — made a preliminary assumption that a state-owned enterprise, which had used transmission equipment before separating its assets from the State Treasury, and at the moment of expropriation decision acquired these facilities into ownership pursuant to Art. 1 Point 9 of the Act of 20 December 1990 amending the act on state enterprises and amending certain other acts. This position was based on the legal principle expressed in the resolution of the Supreme Court of 18 June 1991.¹⁵

Subsequently, the Supreme Court criticized the line of rulings approving the creation of an *ex lege* limited property right in the form of land easement with content corresponding to easement of transmission due to the expropriation decision of state-owned enterprises. The Court indicated that this view allows that the object of the expropriation decision is made not only of rights, but also factual situations corresponding in a specific manner to subjective rights. This interpretation finds no support in the law, creating a legal norm not provided by the legislator. As a consequence, the view expressed by the Supreme Court in the above rulings results in a expropriation decision, which absolutely requires a direct legal basis, which cannot be found in such a determined factual state.

¹³ B. Lanckoroński, "Comment to art. 305⁴ of Civil Code," [in:] *Kodeks Cywilny. Komentarz*, ed. K. Osajda, Warszawa 2019; M. Jankowska, "Comment to art. 305⁴ of Civil Code," [in:] *Kodeks cywilny. Komentarz*, vol. 2. *Własność i inne prawa rzeczowe (art. 126–352)*, eds. M. Fras, M. Habdas, Warszawa 2018; B. Panfil, J. Zralek, "W sprawie zasiedzenia służebności przesyłu i jego skutków," *Przegląd Sądowy* 2016, no. 11, pp. 60 ff.; M. Bałwicka-Szczyrba, *Korzystanie z nieruchomości przez przedsiębiorców przesyłowych — właściciele urządzeń przesyłowych*, Warszawa 2015; B. Rakoczy, *Służebność przesyłu w praktyce*, Warszawa 2009, p. 159; G. Bieniek, "Głos do uchwały SN z 17.01.2003 r., III CZP 79/02," *Rejent* 2003, no. 3, pp. 130 ff.

¹⁴ Decision of the Supreme Court of 12 February 2017 in case III CZP 100/16, Legalis no. 1575941.

¹⁵ Resolution of the Supreme Court of 18 June 1991 in case III CZP 38/9, Legalis no. 27374.

The resolution also indicates that our legal system does not know the concept of legal servitude. Only the provisions concerning neighboring law (Art. 145, 146 and 151 and 305[2] of the Civil Code¹⁶) may lead to the establishment of land easement against the will of the property owner, based on the court's decision. This is a reflection of the general principle that the rights *in rem* which are effective *erga omnes* must be public. It is impossible to require anyone to respect a law the existence or content of which is inaccessible and non-disclosed and the consequences of which cannot be foreseen.

Further, the Supreme Court noted that, although the Polish legal system recognizes the case of the creation of land easement by virtue of law, it might only be effected on the basis of explicit statutory regulation, i.e., no longer binding Art. 51 Section 2 of the Act on retirement provision and other benefits for farmers and their families.¹⁷ However, the disposition of Art. 1 Point 9 on amendment of the Act on state-owned enterprises under no circumstances provides for the establishment of land easement with content corresponding to transmission easement. If, on the other hand, the intention of the legislator was to cause such an effect (along with the creation of the right of ownership), it would certainly define it in a clear and indisputable manner. This conclusion is a logical consequence of the adoption of the rule on the rationality of the legislator.

Finally, the Supreme Court pointed out that the position presented in the decisions of 12 May 2016 cannot be reconciled with the *numerus clausus* principle of property rights, which implies not only their closed catalog, but also a closed catalog of ways of acquiring them. In other words, both land easement and transmission easement may only be created in one of the ways listed in the Civil Code. As a result, land easement established by virtue of law, with content corresponding to easement of transmission, would constitute a new kind of limited property right, which for obvious reasons would violate the principle of *numerus clausus* of limited property rights.

The Court also expressed the opinion that the line of jurisprudence initiated by the judgments of May 2016 violates the long-established Supreme Court jurisprudence line, according to which the acquisitive prescription of land easement with content corresponding to transmission easement is possible also on State Treasury properties, with the reservation however that the course of the period of acquisitive prescription could only begin when the ownership of the property and transmission equipment were separated.

Finally, as a summary of their arguments, the Supreme Court noted that: "the argument of guaranteeing the unimpeded exercise of management over someone

¹⁶ Act of 23 April 1964 Civil Code — Official Journal 2018 No. 1025.

¹⁷ Act of 27 October 1977 on retirement provision and other benefits for farmers and their families, Official Journal 1977 No. 32, item 140.

else's real estate, in connection with the continuation principle, cannot be considered as determinative in a state governed by the rule of law."

Conclusions

The position of the Supreme Court presented in the resolution should be assessed positively. Referring to the line of jurisprudence initiated in the decision of 12 May 2016, reference number IV CSK 509/15, it should be stated that it is a too far-reaching and pragmatic solution.

It cannot be disregarded that the above concept is based solely on a purposeful interpretation, without any provision of law giving rise to a legal basis. The main argument remains the claim that it would be incomprehensible and unreasonable if, due to the expropriation decision, only some elements of the existing ownership have passed onto the state enterprise, at the same time forcing these entities to execute agreements with the State Treasury legalizing further use of the respective property on which the transmission facilities (already owned by companies) were located. However, this position completely marginalizes the issue that under the Act of 20 December 1990 only the law, and not the actual situation, could be transformed. The latter category, however, undoubtedly includes the fact of having and using the State Treasury's property to the extent of enabling the operation of transmission equipment. Thus, although there is an explicit legal basis justifying the transfer of ownership of existing transmission equipment to newly-established state enterprises, it is impossible to find in the content of that regulation the grounds for establishing limited property rights in the form of land easement by virtue of law. In particular, it must be considered that until the ownership of transmission facilities and real properties was separated, land easement with content corresponding to easement of transmission could not arise on this land since the same entity, i.e., the State Treasury, was the owner of both transmission infrastructure and real estate.

As of that, it should be agreed with the Supreme Court's opinion expressed in the resolution that the Polish legal system is not familiar with the construction of easement by virtue law, except in the cases referred to in the Civil Code. However, these cases have been precisely described, making it clear in what situation the given easement may arise against the will of the owner of the encumbered property. The inadmissibility of establishing easement by operation of law is connected with the existence of a closed catalog of property rights and the manner of their acquisition, as well as protection of the right of ownership and legal certainty. At the same time, there can be no doubt that the establishment of easement in each case constitutes a limitation of the right to property, and therefore it should be based on universally binding legal regulations, and not only their broadening, law-making interpretation.

Only the Supreme Court's statement on the expropriating effect of the criticized line of rulings is questionable. Institution of expropriation, by definition, causes compulsory and permanent deprivation of property rights on behalf of the State Treasury or another public entity. The construction of land easement with content corresponding to the easement of transmission only leads to the limitation of the right to property, and not detracting from it. What's more, according to Art. 293 § 1 of the Civil Code land easement expires as a result of its failure to perform for ten years. The grounds for establishing such a limitation in statutory form should be seen in Art. 64 § 3 of the Constitution of the Republic of Poland,¹⁸ which stipulates that ownership may be limited only by way of a statute and only to the extent that it does not infringe the essence of the right of ownership.

Assessing the rightness of this view, the fact that for many years both judicature and jurisprudence consistently presents a view approving land easement with content corresponding to easement of transmission on State Treasury land, on which transmission facilities were developed in the period of the principle of uniform state ownership. This thesis clearly contradicts the possibility of creating easement in question by virtue of law. It is obvious that only possession without a legal title may result in the commencement of the period of prescription.

To sum up, the resolution of the Supreme Court clearly indicates that the acquisition by a state-owned company due to the transformation in the 1990s of ownership of the transmission facilities located on State Treasury property could not result in the establishment of land easement with content corresponding to easement of transmission. Thus, it definitely clarifies doubts arising as a result of discrepancies in the Supreme Court's jurisprudence, initiated by the decisions of 12 May 2016, reference number IV CSK 509/15 and IV CSK 510/15, according to which it was possible to acquire by virtue of law land easement with content corresponding to transmission easement due to the appropriation of a state-owned enterprise.

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