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ПРОБЛЕМИ ЗАКОНОДАВЧОГО ЗАБЕЗПЕЧЕННЯ ПРАВОВИХ ФОРМ ВИКОРИСТАННЯ ЗЕМЕЛЬ СІЛЬСЬКОГОСПОДАРСЬКОГО ПРИЗНАЧЕННЯ КОЛЕКТИВНОЇ ВЛАСНОСТІ В УКРАЇНІ

Анотація. *Стаття присвячена аналізу теоретичних і практичних проблем сучасного стану використання розпайованих земель сільськогосподарського призначення колективної власності з невизначеним правовим режимом, а також перспективам законодавчого забезпечення правових форм використання таких земель у ринкових умовах. Виділено та охарактеризовано основні періоди становлення правового режиму земель колективної власності сільськогосподарських підприємств, а також законодавчі документи, які забезпечували цей процес. У результаті дослідження було визначено основні проблеми та суперечності в законодавстві України стосовно правового режиму земель колективної власності. Розроблено практичні рекомендації щодо внесення змін до чинного Земельного кодексу України, які спрямовані на усунення цих суперечностей та врегулювання правового режиму земель колективної власності.*

Ключові слова: землі сільськогосподарського призначення, паювання земель, земельна частка (пай), Земельний кодекс України.

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ПРОБЛЕМЫ ЗАКОНОДАТЕЛЬНОГО ОБЕСПЕЧЕНИЯ ПРАВОВЫХ ФОРМ ИСПОЛЬЗОВАНИЯ ЗЕМЕЛЬ СЕЛЬСКОХОЗЯЙСТВЕННОГО НАЗНАЧЕНИЯ КОЛЕКТИВНОЙ СОБСТВЕННОСТИ В УКРАИНЕ

Аннотация. *Статья посвящена анализу теоретических и практических проблем современного состояния использования распаеванных земель сельскохозяйственного назначения коллективной собственности с неопределенным правовым режимом, а также перспективам законодательного обеспечения правовых форм использования таких земель в рыночных условиях. Выделены и охарактеризованы основные периоды становления правового режима земель коллективной собственности сельскохозяйственных предприятий, а также законодательные документы, обеспечивающие этот процесс. В результате исследования были определены основные проблемы и противоречия в законодательстве Украины относительно правового режима земель коллективной собственности. Раз-*

работаны практические рекомендации по внесению изменений в действующий Земельный кодекс Украины, направленные на устранение этих противоречий и урегулирование правового режима земель коллективной собственности.

Ключевые слова: земли сельскохозяйственного назначения, паевание земель, земельная доля (пай), Земельный кодекс Украины.

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ISSUES OF LEGISLATIVE SUPPORT OF LEGAL USE OF FARMING LANDS IN COLLECTIVE OWNERSHIP IN UKRAINE

Abstract. *The article is devoted to the analysis of theoretical and practical problems of the current state of using agricultural lands of collective ownership with uncertain legal regime, as well as prospects of legislative provision of legal forms for the use of such lands in market conditions. The main periods of formation of the legal regime of collective-ownership land of agricultural enterprises, as well as the legislative documents that ensured this process, were identified and characterized. The main problems and contradictions in the legislation of Ukraine regarding the legal regime of collective ownership land were identified during the study. Practical recommendations for amending the current Land Code of Ukraine, aimed at eliminate these contradictions and regulate the legal regime of collective ownership land, are developed.*

Keywords: agricultural land, land parcels, land parcel (share), Land Code of Ukraine.

INTRODUCTION

At the beginning of the 1990s farming lands were free transferred into collective ownership to agricultural enterprises, agricultural cooperatives, farming corporations, including those established on the basis of state farms. Part of them was divided in land parcels and transferred into private ownership, the other part of agricultural and non-agricultural lands remained in collective ownership of agricultural enterprises till adoption of the current Land Code (LC) of Ukraine in October 2001, which came into effect on January 01, 2002 [1]. Land and agrarian reforms cannot be considered as completed without solution of set of issues regarding legislative definition of the legal regime of such lands [2; 3; 4; 5].

Adoption of the Land Code resulted in such a legal situation when de jure collective ownership remains in respect of the part of the shared and unclaimed lands of the former collective agricultural enterprises (CAE), although LC of Ukraine does not provide this. General use lands of the former CAE are not transferred into state ownership, the law does not determine legal succession of these lands, legal regime of the land plots under buildings, structures, property complexes divided into property shares between members of the former CAE is not determined.

If you take a look at the theory of Ukrainian land and agrarian law, it may be concluded that conducted research of the issues regarding legal regime of the collective ownership lands mainly concerns disclosure of a legal nature of collective land ownership as part the Law of Ukraine (LU) "About the property" [6] and LC of Ukraine dated March 13, 1992 [7] (legal issues of a right of private property to the shared agricultural lands, legal regulation of lease land relations, exercise of other rights to land plots [8]). At the same time, upon adoption of the current LC of Ukraine in October 2001 right of collective ownership was not legally expressed and became lawless. Hence, legal, economic, social and other issues which occurred in the practice of using collective ownership lands have not become the subject of a comprehensive scientific research in the land, agrarian, civil law doctrines [9]. Except for certain published works, practical issues of use of agricultural land plots with uncertain legal regime remain unexamined [10]. Draft laws registered in Verkhovna Rada (VR) of Ukraine, which offer to settle issue of the collective ownership lands with uncertain legal regime, have not yet been adopted [11; 12].

1. MATERIALS AND METHODS

This article reviews the current state, problems, trends and prospects of legislative support of legal use of agricultural lands with uncertain legal regime, which were transferred into collective ownership of collective agricultural enterprises and then were shared between members of such farms; whereby theoretical conclusions and practical recommendations were formulated. In particular, look back analysis of origin, exercise and termination of a right of collective ownership to such lands was performed, which makes it possible to: provide critical scientific assessment of actual problems; formalize in legislation optimal statutory concepts of efficient use of agricultural lands of the former collective ownership; provide legal and other terms for attracting investments to development of agricultural lands of the former collective ownership.

To conduct research, firstly four basic periods of formation of a legal regime of collective ownership lands of the agricultural enterprises were defined, each having its unique features regarding exercise of rights of collective land ownership:

1. First period, January 1992 – January 2002:

1.1. establishment of collective land ownership;

1.2. growth of possibility to exercise a legal right of collective land ownership;

1.3. sharing of the agricultural lands of CAE;

1.4. reclamation of the land parcels shares in the land plots with their free transfer into private ownership for conduction of the commercial farming or private farm holding (PFH);

1.5. reforming of CAE and their reorganization in private agricultural enterprises of various types of business.

2. Second period, January 2002 – March 2009:

2.1. adoption of LC of Ukraine which did not strengthen collective form of land ownership;

2.2. adoption of the law "On the procedure for the allocation of land plots to owners of land parcels (shares) in kind (on the ground)" dated June 05, 2003 [13].

3. Third period, March 2009 – January 2013: adoption of the law which cancelled issue of the State acts for the right of land ownership [14].

4. Fourth period – since January 01, 2013, that is upon entry of the law on demarcation of the boundaries between state-owned and communally-owned land into force and legislative consolidation of a right of communal ownership of land [15].

Legislative documents emphasizing each of these periods became main subjects and materials of the study.

2. RESULTS AND DISCUSSION

Right of collective ownership of land obtained its legislative form in the law of Ukraine "About the forms of ownership of land" dated January 30, 1992, according to which three forms of land ownership were established – state, collective and private, all forms were recognized as equal [16]. The law of Ukraine "About collective agricultural enterprise" dated February 14, 1992 has formalized a provision according to which the land was recognized as object of a right of collective ownership, and collective agricultural enterprises as legal entities, which could own, use and dispose of the property items at own discretion, were recognized as a subject of such right [17].

With adoption of LC of Ukraine dated March 13, 1992 legal regime of collective ownership lands was determined, as well as legal regime of lands of the state and private ownership. According to article 60 of LC of Ukraine, subjects of right of collective ownership were: collective agricultural enterprises; co-operative farms; farming corporations (including those set up as a successor to the state farms and other state agricultural enterprises).

Objects of right of collective ownership were lands which total area was calculated as a difference between area of the lands of state and private ownership. According to article 60 of LC of Ukraine, lands of collective ownership were divided into two types: lands for agricultural use (provided to collective agricultural enterprises and other subjects for conduction of commercial farming); lands for nonagricultural use.

In addition to the above, LC of Ukraine, as well as Law of Ukraine "About the collective agricultural enterprise" did not regulate issues of free dispose of collective ownership lands, as well as mechanisms for exercise of rights to the collective ownership lands by members of collective agricultural enterprises. Therefore, in 1994-1998 a range of Decrees of the President of Ukraine was issued according to which agricultural lands of collective agricultural enterprises were divided into conventional cadastral hectares between members of such enterprises with a possibility of reclamation of the land parcels (shares) into separate land plots and registration of private ownership of land plots for conduction of commercial farming and private farm holding [18].

According to the conducted sharing of agricultural lands, 6,8 millions of CAE members gained a right to a land parcel (share) and right of ownership of land plots

with average area of land plots equal to 4,6 ha per one CAE member as at the start of year 2000 in Ukraine [9].

According to the Decree of the President of Ukraine "On urgent measures to accelerate the reform of the agrarian sector of the economy" dated December 03, 1999 [19], during the period from 1999 to 2000 reforming of the collective agricultural enterprises based on private ownership of land and property was conducted in Ukraine. Each CAE member had a right of free withdrawal from such enterprises with land and property shares, had a possibility to establish private (private and lease) enterprises based on CAE, peasant (farm) enterprises, business entities, co-operative farms, other economic entities based on private property (hereinafter the private formations). This Decree also obliged enterprises using lands for agricultural needs to conclude lease agreements with owners of the land or property shares with lease payment in cash or in kind.

As a result of such reforming over 11 thousands of CAE ceased their activities as of April 01, 2000, as they were reorganized as entities of various types of business. These entities were not recognized as legal successors of CAE regarding lands of collective ownership, which:

- first, were shared and not distributed among the owners of Certificates of right to a land parcel (share);
- second, were distributed among the owners of Certificates, but for whatever reason they did not receive State acts for right of private land ownership and therefore did not gain a right of private ownership of land plots.

Consequently, since April 01, 2000 significant changes have begun to occur in the legal regime of collective ownership lands regarding subjects, objects and content of right of collective ownership of land:

1. CAE as subjects of right of collective ownership upon reorganization *de jure* ceased to exist, although some of them still remain in the register of legal entities.

2. Most of agricultural lands of such enterprises were transferred free of charge to private ownership of the CAE members, which resulted in certain changes in the land structure as an object of right of collective ownership. *De jure* agricultural lands subject to sharing remained in collective ownership, however they were not distributed among CAE members and remained as lands of public use (for example, grasslands, hay-fields), as well as undistributed land parcels (shares), unclaimed land plots.

3. Right to dispose of such collective ownership lands was provided to the owners of Certificates of right to a land parcel (share), although it was not consistent with LC of Ukraine of 1992.

4. *De jure* and *de facto* lands of nonagricultural or general use (intra-organizational roads, forest shelter belts and other soil protective plantings, water development facilities etc.), which according to part 12 article 5 of LC of Ukraine of 1992 had to be transferred to maintenance of local councils upon CAE liquidation, were not transferred and remained in collective ownership of CAE.

Therefore, till January 01, 2002, that is prior to the entry of LC of Ukraine as of 25.10.2001 into force, the following situation has arisen in Ukraine:

1. De jure and de facto lands of those CAE, regarding which a decision on sharing was not made and which were not reformed and preserved their legal regime of CAE, remained in collective ownership.

2. Certificates of right to a land parcel (share) were not issued.

3. De jure lands were shared between members of the former reformed CAE, which received Certificates of right to a land parcel (share) and did not perform distribution of the land plots according to the Certificates.

4. Lands of the former CAE divided according to Certificates of right to a land parcel (share) into land plots remained unclaimed (that is they were not transferred into private ownership), as for whatever reason State acts for right of land ownership were not issued. Upon reforming of CAE, transfer of a part of the shared lands into private ownership State acts for right of collective ownership were not amended, therefore such acts are still valid.

For these reasons till January 01, 2002 part of the shared lands of CAE remained in collective ownership, right to which was confirmed by the State act for right of collective ownership issued to a particular CAE which ceased to exist upon reforming. Undistributed shares and unclaimed land plots were leased out in the form of land masses to the owners of Certificates of right to a land parcel (share).

Adoption of LC of Ukraine in October 2001 did not solve a problem with definition of a legal regime of collective ownership lands, as it:

- did not formalize form of collective ownership of land at all;
- did not cancel earlier State acts for right of collective ownership of land;
- did not provide a mechanism for transfer of lands of the former CAE to the lands of state or communal ownership;
- did not mention anything of common lands of the former CAE [10].

To finish the process of sharing of the agricultural lands of CAE with their transfer to private ownership to the former members of reformed CAE initiated by the Decrees of the President of Ukraine, the law "On the procedure for the allocation of land plots to owners of land parcels (shares) in kind (on the ground)" was adopted in Ukraine on June 05, 2003 [13]. According to this law, the owners of Certificates of right to a land parcel (share) obtained land plots distributed according to this law into private ownership for conduction of commercial farming or private farm holding (PFH). This law also determined legal regime of undistributed (unclaimed) land plots of reformed and liquidated CAE in the course of sharing, right to dispose of which was provided to village, township and city councils or state administrations.

According to article 13 of this law, undistributed (unclaimed) land plots by the decision of corresponding village, township, city council or district state administration (DSA) can be leased out for use according to the intended purpose up to the date when their owners receive State acts for right to a land plot, which is stated in the lease agree-

ment for a land plot. Owners of the land parcels (shares) or their successors, who did not participate in distribution of the land plots, shall be informed on the results of conducted distribution in writing (if their location is known).

Legal analysis of the content of this norm of law suggests that it does not directly provide for abolition of a right of collective land ownership. At the same time analysis of separate provisions of this and other laws shows that their norms are aimed at cessation of existence of collective ownership of land. In particular, according to the law on the procedure for allocation of land plots right to dispose of the part of lands in collective ownership is provided to the local government authorities or DSA by means of their lend lease for use according to the intended purpose up to the date when the owners of the Certificates or their successors receive the state acts for right of ownership to the land plots. Herewith, the law does not define maximum terms during which a land parcel (share) must be claimed as a separate land plot, and the owners of the Certificates must receive State acts for the right of land ownership. Besides, upon amendments introduced to LC of Ukraine in March 2009, to article 125, such people cannot receive State acts for the right of land ownership, as their issue is not provided by this Code.

Moreover, upon adoption of LU "On amendments to certain legislative acts of Ukraine regarding the delimitation of state and communal land" dated September 06, 2012, implementation of the above norms became practically impossible, as since January 01, 2013 state and communal lands have been deemed delimited [15]. Main criterion to define the land as a state or communal is its location – within or outside inhabited localities. In other words, if unclaimed land plots leased out to corresponding councils or DSA are located outside inhabited localities, legal regime of the state ownership lands is applied to them, within inhabited localities – communal ownership. At the same time, designating these lands as the state or communal ownership does not mean that the owners of Certificates of right of a land parcel (share) or their successors are deprived of a right to claim a land plot in kind (on the ground) into private ownership, as it is guaranteed by article 22 of the Constitution of Ukraine. It is also subject to jurisdictional protection, if a person did not default a term of limitation equal to three years provided by the Civil Code (CC) of Ukraine [20].

Taking into account that LC of Ukraine does not formalize norm of definition of a legal regime of the former collective ownership lands, the author considers it expedient to develop a draft law on amendments to LC of Ukraine, law "On the procedure for the allocation of land plots to owners of land parcels (shares) in kind (on the ground)" in terms of definition of a legal regime of the former collective ownership lands, and set a term for reclamation of the land plots upon termination of which people forfeit a right to claim allocation of the land plots into private ownership.

In this draft law a legal regime of the lands for nonagricultural use of the former CAE, which were not subject to sharing between the members of collective agricultural enterprises, should be also defined. From January 01, 2013 legal regime of these lands should be defined taking into account their location (within or outside inhabited

localities), as well as taking into account legal regime of buildings, structures and other real property facilities located on such lands, reclamative afforestations, water-works, water, recreation, health-related, medical and other facilities of natural, property, production and social character.

As real property facilities on the land plots are subject to division into property shares, upon reforming of CAE and their termination real property was transferred on the basis of care and custody to certain individuals, and ownership of such facilities was not registered in accordance with the procedure established by law [21]. Under these circumstances article 120 of LC of Ukraine and article 377 of CC of Ukraine, according to which property right to land or land leasehold is transferred alongside with transfer of property right to buildings or structures, cannot be applied. This means that from January 01, 2013 land plots, where buildings, structures and other real property facilities, utilities yards, property complexes, etc. are located, shall be regarded as state or communal ownership lands.

Regarding land plots under forest shelter belts and other protective plantings, legal regime of these lands remains uncertain regarding both forms of ownership and forms of use. Due to the fact that land plots under forest shelter belts and other protective plantings were not subject to sharing, during the process of sharing of agricultural lands such lands were transferred to reserve fund or belonged to the reserve lands as a part of communal ownership lands. From January 01, 2013 legal regime of such lands is defined depending on their location – within or outside inhabited localities, therefore, the law qualifies them as communal or state ownership. Besides, these lands are not leased out to agricultural goods producers, therefore, according to LC of Ukraine, they are in reserve as agricultural lands not classified as agriculturally used areas. Moreover, legal regime of the land plots under forest shelter belts and other protective plantings is complicated by a clash of norms of the Land and Forest Codes of Ukraine. Lands under forest shelter belts are qualified as agricultural lands, and the plantings with area over 10 ha are qualified as forest lands, as a result of which the owners of the land plots and land users cannot protect, look after and reproduce forest shelter belts, and specialized forestry enterprises cannot acquire agricultural lands on a permanent basis. In addition to the above, local government authorities have no funds to finance measures for protection and reproduction of forest shelter belts. Complexity in definition of a legal regime of the lands under forest shelter belts is also evident in the fact that no inventory of forest shelter belts on the agricultural lands was taken in Ukraine, no one is engaged in shelterbelt establishment, current forest belts are being destroyed and become unfit for protection of soils from erosion by water and wind.

CONCLUSIONS

Summarizing performed scientific and theoretical analysis of practical issues regarding definition of a legal regime of the collective ownership lands, we can make a general conclusion of necessity for development of a separate law regarding intro-

duction of amendments to LC of Ukraine and other laws regarding exercise of legal rights to collective ownership lands, ensuring their efficient use and protection in the market economy conditions. In particular, it is reasonable to establish the following provisions in the law:

1. Agriculturally used areas, which after January 01, 2013 were not divided into land parcels (shares) or were shared but not divided into land plots and were not claimed in kind (on the ground) as land plots according to the Certificates of right to a land parcel (share) by the members of reorganized collective agricultural enterprises, co-operative farms, farming corporations or their successors according to the law or court decision, are classified as state ownership lands (in case of their location outside inhabited localities) or communal ownership lands (in case of their location outside inhabited localities).

2. Agricultural lands of reorganized collective agricultural enterprises, co-operative farms, farming corporations, including those established on the basis of state farms, which were not subject to sharing after January 01, 2013, are classified as state ownership lands (in case of their location outside inhabited localities) or communal ownership lands (in case of their location outside inhabited localities).

3. Agricultural lands of production-agricultural cooperatives, farming corporations, including those established on the basis of state farms, which were not reorganized after January 01, 2013 and shared agriculturally used areas between the members of such enterprises and privatized the land plots according to the Certificates of right to a land parcel (share), are classified as private lands.

4. To allow members of the former collective agricultural enterprises to acquire land plots under buildings and structures in joint ownership according to the property certificates.

5. To establish that the lands under forest shelter belts and other protective plantings on agricultural lands outside inhabited localities are classified as agricultural lands of state ownership and transferred for permanent use to specialized enterprises of the Ministry of Agrarian Policy of Ukraine for maintenance of forest shelter belts and other protective plantings.

6. To provide that the members of the former agricultural enterprises and their successors are entitled to claim the land plots in kind (on the ground) according to the Certificates of right to a land parcel (share) during three years upon entry of this law into force.

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