Subjective Collective Will In the Management of Shared Agricultural Land and Its Consequences

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ABSTRACT

A new stage in the development of relations in the management of agricultural land plots has replaced the initial privatization of agricultural land. Its difference is the change in the composition of the participants in the share ownership and the presence of economically strong economic counterparties-tenants of land. The composition of new owners is socially heterogeneous and, as a result, it does not have a legal instrument allowing to form the collective will of the general meeting according to the goals of property management, since the heterogeneity of the composition prevents the emergence of the possibility of unity of management goals. The expression of subjective collective will must have a legal instrument to prevent the possibility of its usurpation by an economically strong subject. It seems that such an instrument should be the differentiation of the types of disputes related to the formation of collective will on the management of common ownership and the procedural peculiarities of their resolution.

Keywords: subjective rights at collective will; agricultural land; common ownership; general meeting; civil law community.

Target setting

Since 2002, Federal Law No. 101-FZ of July 24, 2002 "On Agricultural Land Turnover" (hereinafter – the "Law") has been in force following the institutional reform of land relations in the Russian Federation. It is to be recalled that the reform consisted in changing the form of ownership and the distribution of agricultural land between collective farm participants and state owned farm workers pro rata their working experience in the collective farm and state owned farm, respectively. Subsequently, social officers in rural areas, i. e. those of healthcare, education, culture fields, etc. were equated with persons entitled to receive a farmland allotment. Following the privatization of 1991–1993, a class of land share owners has been formed, which together had the title in agricultural land. At the same time, the right of ordinary property privatization for the same persons, as well as for other participants in the voucher privatization, was supposed to be transformed into common ownership of the means of production: real estate, agricultural machinery, etc. Further public relations development dynamics led to the preservation of shared ownership of land, but to the actual loss of the share ownership of the property of privatized collective farms and state owned farms. The course of time itself has led to a generational change and today the shared ownership of land plots belongs to other persons, not the participants in their initial privatization: as a rule, heirs in the manner established for inheritance in civil law. The new farmland allotments owners are not carriers of consciousness fixing the value of the collective form of agricultural production as collective (cooperative) agricultural production is not the dominant form thereof. The lack of dominant value in the mass consciousness — the advantages of the collective form of economic management in agricultural production results in the differentiation of the social group of land share owners that is taking place right now. In our opinion, such a differentiation is a new social relation, the regulation of which is the legislative problem of the modern development of agricultural land circulation regulation.

In the legal sense, the aforementioned Law as amended establishes the identity of the concepts of a farmland allotment and a share in the right to common ownership in a land plot. Such an identity allows us to apply not only special rules for the management of commonly owned land plots (if there are more than five owners), but also apply the rules of the civil legislation of the Russian Federation to the extent not governed by this Law.

The foregoing allows us to conclude that, firstly, modern land share owners are not identical to the owners of other real estate or shares in the title in other real estate. The land is in shared ownership, the cultivation tools are owned by the agricultural product producer, and these are different groups of owners. At the same time, property, both the land itself and the cultivation tools, have been obtained by the indicated groups not as a result of performance but on other civil law grounds and constitute property rather than labour value for the groups. Secondly, the owners of land shares do not constitute a socially homogeneous group like they did in the early 1990s. These are not persons who jointly created collective property but persons whose wealth, social and educational inequality is obvious, including

for themselves. Thirdly, the lack of basic values equality inevitably affects the essence of decisions made when managing shared ownership, which, in turn, necessitates the present analysis and proposals regarding changes to the management mechanism, i. e. the general meeting of the land-plot co-owners.

Autonomy of individual will of a party to relations and community of collective will

The chief principle of the civil legislation of the Russian Federation defined by article 1 of the Civil Code of the Russian Federation is that the citizens (natural persons) and the legal entities shall acquire and exercise their civil rights of their own free will and in their own interest. They shall be free to establish their rights and duties on the basis of an agreement and to define any terms of the agreement, which are not in contradiction with legislation.

Pursuant to article 2 of the Civil Code of the Russian Federation, civil law relations are based on the equality, the autonomous will and the property independence of their participants. The basis of relations on the equality of individuals and legal entities corresponds to the constitutional provision on the equality of all before the law and the court stipulated in part 1 of article 19 of the Constitution of Russia. The very idea of autonomy of will when determining agreement is taken *a priore*.[1]

However, the constitutional principle of equality itself does not exclude the possibility of establishing different legal conditions for different categories of persons subject to law. It is important that such differences should be enshrined in law and based on the objective characteristics of the respective categories of persons subject to law.

The subjects of relations associated with the turnover of agricultural land are listed in clause 1 of article 2 of the Law, according to which the participants in relations regulated by the specified Federal Law are citizens, legal entities, the Russian Federation, constituents of the Russian Federation, and municipalities.

Foreign citizens, foreign legal entities and/or stateless persons, as well as legal entities in whose authorized (share) capital of which the share of foreign citizens, foreign legal entities and/or stateless persons is more than 50% are actually a separate group of entities with curtailed rights in terms of a guarantee equality of rights with respect to the ordinary subjective circle. Such persons are not entitled to own agricultural land plots. In fact, they cannot also own shares in the title in the indicated land plots, following the law enforcement practice of this Law implementation.[2]

The Russian Federation, as a party to relations, unlike other public entities, actually follows the principle of English law that anyone who owns the land owns everything up to heaven and down to the center of the earth,[3] allocating subsoil and air into separate subjects of regulation.

Other ordinary entities: individuals and legal entities, are limited by the Law in terms of the owner's rights regarding the scope of rights in relation to other real estate. Such a restriction applies not only to the impossibility to change the type of permitted use of agricultural land plots as part of agricultural land, but also to the establishment of a limit in the scope of land that can be owned by one person.[4] At the same time, the public-law entity has a number of advantages in comparison to a private entity: e. g., the pre-emptive right to acquire a land plot,[5] the right to seize a land plot for public needs,[6] etc. That is, the subject composition of the relations in question is vested with certain properties that distinguish it from the ordinary legal identity of the civil circulation participants. Therefore, setting of the problem of the presence of immanent properties when forming the will of the subjects in such relations is not only of an economic nature of the rationale but also has regulatory and legal prerequisites for the allocation of such properties in a separate subject of study.

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[1] Nygh P. Autonomy in International Contracts. Oxford, 1999. PP. 13–14.

[2] Mayboroda V. A. Inheritance of a land share by a foreign citizen [Nasledovanie zemel'noi doli inostrannym grazhdaninom] // Inheritance law [Nasledstvennoe pravo]. 2018. No. 3. PP. 19–22. (In rus)

[3] Gray K. J., Gray S. F. Elements of Land Law. 4th ed. OUP, 2005. P. 18.

[4] Answer to question 5 in the Judicial Review of the Supreme Court of the Russian Federation for the fourth quarter of 2013, approved by the Presidium of the Supreme Court of the Russian Federation on June 4, 2014.

[5] See: Lipsky S. A. The legal mechanism of state regulation of market turnover of agricultural land in modern Russia: features of formation, trends and prospects [Pravovoi mekhanizm gosudarstvennogo regulirovaniya rynochnogo oborota zemel' sel'skokhozyaistvennogo naznacheniya v sovremennoi Rossii: osobennosti formirovaniya, tendentsii i perspektivy] // Law and Economics. [Pravo i ehkonomika] 2011. No. 12. PP. 18–24. (In rus.)

[6] See: Mayboroda V. A. Withdrawal of land plots for public needs [Iz"yatie zemel'nykh uchastkov dlya publichnykh nuzhd] // Legal Issues of Real Estate [Pravovye voprosy nedvizhimosti]. 2015. No. 1. PP. 28–32. (In rus)

The Law establishes a special rule that a land plot owned by 5 or more participants shall be possessed, used and disposed of in accordance with the decision of the joined interest owners taken at the general meeting of such joined interest owners. Clause 1 of article 246 and clause 1 of article 247 of the Civil Code of the Russian Federation should be considered to be general rules in respect of this special rule. According to the aforesaid provisions of the Civil Code of the Russian Federation, the property in common ownership shall be disposed, possessed and used by agreement of all the participants. In case of failure to reach the consent of the owners, the title in and use of property in shared ownership shall be in the manner established by the court.

The special rule of the Law combines all the powers of the owner of a share in a common ownership right into a single implementation procedure: through resolutions of the general meeting of participants in shared property.

In terms of the purpose of this study, it should be noted that the Law provides for two mechanisms for exercising the powers of possession, use and disposal of a common land plot:

1) the powers within the competence of the general meeting are exercised in compliance with the procedure for holding the general meeting and in the presence of a quorum sufficient for holding thereof;

2) other powers regarding the possession, use and disposal of the land plot are authorized by an agreement on the procedure for use, possession and disposal of the land plot. When concluding such an agreement, the positive will of each of the participants in the shared property must be expressed, in contrast to the expression of will on the matters within the competence of the general meeting of participants in the shared property.

A person who does not agree with the contract terms may separate regardless of the consent of the land holder. That is, the collective will in this rule is combined with individual interest (will) by means of an exception to the general rule for a land holder, who/which, by its/his consent (disagreement) to the allotment, preserves certainty conditions regarding the object being rented, i. e. the land plot. The dichotomy of collective / individual will (interest) in the lessor's transaction is permitted by the legislator at the tenant's expense.

Thus, the regulation in question indicates two forms of will expression: individual (interest) and collective expression of will. If, with respect to individual interest, its freedom to conclude an agreement is fixed by the above regulation of the fundamental principles of civil law, then regarding the collective will, we will not find the rules for its formation and expression of the direct rule on its autonomy and freedom to conclude an agreement either in general principles or special regulation.

The argument about the will autonomy is similar. The individual owner of the land share is fully endowed with it, and in the case of collective will expression, personal autonomy of will is supplanted by collective expression of the will of the majority of the general meeting participants, which should be followed by a minority with the only exception based on the implementation of the freedom of contract principle, i. e. disagreement with the lease agreement terms.

The formation of collective will when managing the shared ownership, i. e. agricultural land, is carried out by restricting the individual autonomy of each of the participants in shared ownership in the land plot. Such a structure is doctrinally developed in corporate law, but not in relation to civil law communities, which include participants in land common ownership. Such a substitution of autonomy of will by collective will is motivated in corporate law by economic feasibility in company management.[7] However, participants in the corporation voluntarily sacrifice autonomy of their will, losing their property autonomy in terms of their contribution to the authorized (share) capital. The participants of the shared ownership in the land plot are deprived of the attribute of autonomy by the law regulating relations on the circulation of agricultural land in case the minority follows the will of the majority.

In this connection, it is especially worth highlighting the fact that participants in shared ownership in the land plot, in contrast to the corporate community, are not based on the universal value of making profit using their property. As noted above, now it is a heterogeneous group of people without a single value platform for unifying wilful association at a general meeting. In case of the unity of values, it would be fair for the minority to follow the will of the majority, as is true in a corporate association. In the case under consideration, participants in shared ownership may have different goals: some are attracted by the value of the lease, others, on the contrary, consider the amount of the rent, the stability of its payment and other circumstances to be a disadvantage, since they aim at buying up land shares with the subsequent allotment thereof in a separate land plot. The less stable the lease, the lower is the price of the land share. Still others believe that the land plot in shared ownership is disproportionately uniting

[7] Roth G. H., Kindler P. The Spirit of Corporate Law. Core Principles of Corporate Law in Continental Europe. Munchen, 2013. PP. 113–115.

arable land, hayfields, pastures, deposits, and other lands, and aim to isolate the most valuable part of the common property ahead of the others.

Thus, in relations of shared ownership, the impairment of the autonomy of the will of the minority in favour of the will of the majority does not possess the unity of unifying values and cannot be fair in relation to the association as a whole.

The procedure for the collective will formation

The law provides for two forms of collective will formation: a general meeting of participants in shared ownership of a land plot and an objection to a land demarcation project proposed by one of the participants (group of participants). At the same time, the issue of renting a land plot in common ownership cannot be resolved otherwise than by the general meeting of participants in shared ownership.

The general meeting of participants in shared ownership cannot be attributed to corporate relations for an obvious reason: the absence of a corporation.[8]

In this regard, general meetings should be considered as an organizational element of the legal standing of one of the parties to the transaction in the lease agreement, i. e. the lessor. General meetings have organizational unity, but not unity of purpose.[9]

Pursuant to subclause 1.1, clause 1 of article 8 of the Civil Code of the Russian Federation, civil rights and obligations arise, inter alia, from decisions of the meetings in cases provided for by law. Moreover, by virtue of clause 2 of article 181.1 of the Civil Code of the Russian Federation, the resolution of the meeting, which the law relates civil law consequences with, gives rise to the legal consequences, which the resolution of the meeting is aimed at, for all persons who were entitled to participate in such a meeting (shareholders of a legal entity, owners, creditors in bankruptcy, and other- participants of the civil law community), as well as for other persons, if this is established by law or arises out of the essence of the relationship. Thus, the civil law establishes that one of the prerequisites for recognizing a resolution of a meeting to be the basis for the occurrence, change or termination of civil rights and obligations is the indication in the law of civil law consequences binding on all persons authorized to participate in such a meeting.

Clause 5 of article 14 of the Law stipulates that a participant in shared ownership who expressed his disagreement with the lease of a land plot in shared ownership or with the terms of a lease agreement for such a land plot at the general meeting of participants in shared ownership, in the event of lease of such a land plot, is entitled to allocate the land plot on account of his farmland allotment or allotments without a general meeting. In such a case, the consent of the tenant of the land plot or the pledge holder of the right to lease the land plot to allocate the land plot on account of a farmland allotment or allotments is not required and the lease agreement or agreement for pledge of lease rights in respect of the allocated land plot shall be terminated.

The foregoing allows us to conclude that the general meeting of participants in shared ownership of a land plot duffers in its nature from corporate meetings and other meetings of civil law communities, since not only it itself serves as the basis for the emergence of civil rights and obligations with regard to the issue of land plot lease and pledge of lease rights, but its course as well, that is, the procedure thereof is the basis for the emergence and / or termination of civil rights and obligations.

Therefore, the way of voting, i. e. the way of collective will formation, is more important for the meeting in question than for any other meeting.

Pursuant to clause 8 of article 14.1 of the Law, general meeting makes decisions by open ballot. Moreover, the Law indicates that the resolution is considered adopted if it was voted upon by the general meeting participants holding in aggregate more than 50% of the total number of shares of owners present at the general meeting (provided that the method of indicating the size of the land share allows the comparison of shares in the shared ownership right to this land plot), or the majority of the general meeting participants.

Open voting is the antithesis of ballot voting, which involves the use of means to hide individual expression of will, that is, ballots, voting booths, etc. Open voting means that there is a consolidation of voters at the physical level. Persons authorized to participate in the general meeting express their will

[8] See: Laptev V. A. Resolutions of Meetings and Transactions: Legal Regime and Differences [Resheniya sobranii i sdelki: pravovoi rezhim i otlichiya] // Lawyer. [Yurist]. 2016. No. 2. PP. 30–37. (In rus)

[9] See: Filipenko N. V. Legal personality of social communities illustrated by the practice of the constitutional court of the Russian Federation [O pravosub"ektnosti ob"edinenii grazhdan na primere praktiki Konstitutsionnogo Suda RF] // Law [Zakon]. 2017. No. 4. PP. 141–150. (In rus)

together by the general movement: by show of hands; by raising a registration document, etc. That is, general meeting participants in the general meeting are consubstantiated at the time of open voting, either approving or rejecting the corresponding agenda item.[10] In fact, it is the general meeting that is the only possible means to reach a consensus regarding the advantages and disadvantages of the land plot, including regarding the allotted land plot comparison with the land plot remaining in shared ownership. Such factors as land quality, availability (absence) of infrastructure, remoteness and quality of fertilizer use, availability and quality of windbreaks, the size of the arable "square" in relation to available agricultural machinery, etc. are taken into account.

All these circumstances should be grouped into simple "for" or "against", which inevitably leads to the formation of a short-term social community based on the unity of interest.[11]

Summarizing the above, we can conclude that the legal nature of the general meeting resolving the issue of land lease is dualistic in nature, combining the formation of collective will and the possibility of individual will opposing. The decision of the meeting on such an issue is both the basis for the emergence of rights and obligations under a lease transaction between lessors and a tenant and the basis for the emergence of a property right for a future land plot to be supposedly formed out of the farmland allotment (allotments) of the person who voted "against" the conclusion of the lease agreement or terms thereof.

With regard to resolving issues on the land plot allocation, the general meeting is solely the basis for the occurrence oe of rights and obligations.

The second form of the collective will formation is provided for in clause 14 of article 13.1 of the Law and constitutes the filing of objections as to the size and location of the boundaries of the land plot allocated on the account of the land share or land shares. In such a case, the objections are individual in the formal sense. However, in the actual situation, such objections are directed against the impairment of the shared property due to the separation of shares therefrom, that is, they are obviously an expression of a collective will, even if they are presented individually. The challenger supports common property, advocating the prevailing rule of law for its management. Participants in shared ownership are united not by the physical unity of voting but by the common value. And this unity is permanent, not short-term one.

The foregoing allows us to conclude that, regardless of the collective will formation, it is dominant in relation to the transaction by the owners of farmland allotments with their land plot and, in this sense, is the basis for the emergence of rights and duties, that is, obligations. Collective will in this case is a feature of binding relations. In the case of the farmland allotment (allotments) owner's voting against the terms of the lease agreement, such a decision made by him at the general meeting is the basis for the emergence of rights to the future thing, i.e. the land plot to be formed. Such an individual will is the basis for the emergence of a property relationship.

From the standpoint of civil regulation, such a division fully corresponds to the economic essence of the above decisions. The former can be characterized as decisions of economically dependent entities that rely on the use of their property by a third party for rent; the latter, as a rule, are decisions of economically strong entities that rely on their ability to produce agricultural products on the allocated land. Such positions are diverse in nature: the first case is about preserving the traditional socialist way of life; in the second, we observe the land share owner's recognizing the right to appropriate what he can control, taking advantage of it.[12]

Conclusions

The foregoing allows us to state with certainty that decisions of general meetings of participants in shared property should be differentiated by the range of issues included in the agenda.

Firstly, economic issues based on the need for separation can be considered according to the existing procedure but with the establishment of arbitration jurisdiction of such cases, since it is obvious that it is not the subjective composition of the legal relationship participants is the determining factor but

[10] Yampolskaya Ts. A. On the concept of public organizations in the USSR [O ponyatii obshchestvennykh organizatsii v SSSR] // Questions of the theory and history of public organizations [Voprosy teorii i istorii obshchestvennykh organizatsii]. M., 1971. P. 14. (In rus)

[11] See: Mayboroda V. A. On the possibility of notarizing the decisions of part owners of agricultural land plots [O vozmozhnosti notarial'nogo udostovereniya reshenii dolevykh sobstvennikov zemel'nykh uchastkov sel'skokhozyaistvennogo naznacheniya] // Judge. [Sud'ya]. 2015. No. 12. PP. 29–32. (In rus)

[12] Pound R. An Introduction to the Philosophy of Law. 1922. Reprinted by The Lawbook Exchange Ltd. 2008. P. 192.

the essence of the dispute, that is dispute on the land plot allocation out of the shared ownership. Separation entails economic effects for the remaining and separated land plots.[13]

The current differentiation of jurisdiction for this category of cases relates them entirely to the jurisdiction of courts of general jurisdiction.

Secondly, issues related to the lease of a common land plot represent a decision-making format for managing common property and can be considered through a local government by delegating to it the authority to provide a common land plot on the same conditions and in the same manner as the leasing of public property land, that is, at an auction.[14]

Such an approach will make it possible to introduce legal certainty into the status of an local authority official participating in the general meeting, bringing to a logical conclusion his exercise of public law powers in such relations.

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