



ORIGINAL PAPER

Active and Passive Legal Standing in the Division Process: A Radiography of Property Rights and Judicial Procedure

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Abstract

Ownership state involves, by definition, the existence of several persons who jointly owned in property one or more goods. These persons are not forced to remain in joint tenancy, they may request the sharing of the common property right. This right may be exercised both by voluntary partition, conventional, and by legal partition, and each joint owner, exercising this right virtually realizes the power it has on the state of shared ownership, causing it to stop. Active and passive procedural legitimacy have, in the first place each joint owner. They can demand anytime the sharing of the common property. Besides those persons in the partition process, active and passive procedural legitimacy can also have other people who have legal relationships with the joint owners and who pursue the common good. This study aims to analyze the particularities of the parties in a request of partition, and to highlight the issues arising in the judicial practice who faced with the solving some complexes partition request.

Keywords: *request for partition, active legal standing, passive legal standing, parties, third parties*

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General considerations

The Code of Civil Procedure does not offer a legal definition of the concept of party and because of these legislative gap, this concept has been and will be an object of doctrine dispute (Leș, 2012: 195); in exchange, the dispositions of article 55 state that the quality of parties in the civil trial belongs to the plaintiff, defendant and third parties that intervene voluntarily or by force in the civil trial. Regarding the intervening third parties, we mention that they become parties only after the admission in principle of the intervention request through a conclusion pronounced by the court. Thus, in the event of a contentious procedure, the parties of the civil action are represented by the natural or legal persons between whom there is a litigation regarding a subjective civil right or a juridical situation which can only be solved through a trial and which is subject to the effects of the court order pronounced in the cause. In the case of a non-contentious procedure, the parties in the civil trial are represented by the persons addressing the court with a request, without aiming to obtain an opposing right in front of another person as well as, if there is the case, the persons summoned to trial in order to solve the respective request. Next to the court and the prosecutor, the witness, the experts, interpreters, translators, lawyers or representatives of the parties are not considered parties of the civil action, but participants to the trial.

Particular aspects regarding the parties in the partition process

Taking into account the fact that the joint ownership or co-ownership implies, by their definition, the existence of several people, the juridical partition cannot be conceived without the existence of at least one plaintiff and at least one defendant (Leș, 2010: 890). In fact, as stated in the doctrine as well, the possibility of each co-owner to request the partition represents one of the important particularities of this action (Comăniță, 2002: 47; Leș, 2010: 890). In case of a mandatory co-participation, it is possible to meet more than one plaintiff and one defendant (Leș, 1982: 116-120). Obviously, we discuss about an active co-participation if one of the co-owners request the partition, as plaintiff and passive if other co-owners are summoned to court as defendants. The participation of all the co-owners to the partition process is mandatory due to the necessity to pronounce a unitary decision to all the co-owners regarding the goods in joint ownership. Specific to the partition access is the fact that each party is, at the same time, plaintiff and defendant, the partition issuing a double judgment “*duplex iudicium*”, irrespective of which of the co-owners has the initiative of the partition action (Leș, 2012: 1245). Thus, the defendant may obtain the conviction of the plaintiff, without even placing a reconventional request in this direction. This fact has consequences regarding the costs, which, in principle, will be compensated.

Despite this fact, in practice it has been decided that the defendant from the partition action does not have the possibility to appeal the decision by which the request had been denied, as it does not have an interest (Ciobanu, 1972: 549). In case one of the co-owners had been omitted from the request whose object is the juridical partition, this omission can be repaired during the trial in court. In this situation, the initiative can belong to any of the parties or even the co-owner that had been omitted. If the initiative belongs to any of the parties, the right procedural path to follow in order to introduce the co-owner in the trial is the one of summoning other people to trial, under the conditions stated by article 68 and the following from the Code of Civil Procedure. If the initiative belongs to the co-owner that had been omitted, this one may use the procedure of voluntary intervention, under the conditions of article 61 and following from the Code of Civil

Procedure. Even the court, based on its active role in finding out the truth, regulated by the dispositions of article 22 from the Code of Civil Procedure, is obliged to submit to the parties the necessity of introducing all the co-owners in the cause.

Besides, according to the dispositions of article 684 align (2) from the Civil Code, one of the specific conditions of validity for the partition of the participation of all the co-owners. The violation of this condition is sanctioned with absolute nullity of the partition act. The Supreme Court has pronounced likewise, considering that in the contrary case, we would have a validated partition during which another person's rights have been disposed, without their agreement, which is unacceptable.

Active legal standing belongs, firstly, to the co-owners, article 669 from the Civil Code providing that a co-owner can request the partition at any time. From here, a series of practical consequences result, among which the fact that once invested, the court must complete the partition, while the defendant cannot oppose to the admission of the partition request, because the advantage is his and no other person can be obliged to remain in joint ownership. Also, if the parties declare that they no longer request a partition, and wish to continue to own the goods in joint ownership, the solution is to take act of the plaintiff's giving up the action and not to deny the partition request as remaining without an object (Deak, 1999: 163). As mentioned above, the quality of plaintiff in the partition request belongs firstly to the co-owners. Concretely, depending on the partition type, the quality of plaintiff is specific to each form of the partition. Thus, in case of common goods, this quality belongs to the spouses or ex-spouses. In the situation of common property, any co-owner can be plaintiff. In exchange, in the case of partition, the heirs can be legal heirs, universal legatees, the ones with universal title and the legatees with particular title.

Irrespective of the partition type, we keep the rule according to which the plaintiff who places the request to summon for partition will have to summon all the other co-owners, as defendants, otherwise the partition is void. The consequence of failing to fulfil this obligation is the fact that the decision pronounced like that is not opposable and the missing co-owner will be able to formulate under any term a partition action, and the defendants from this latest action will not be able to use the initial partition decision, summoning the authority of *res judicata*. In this case, we mention that the nullity can only be invoked through the appeal ways and not through a separate action for annulment. Also, if a succession is debated, the heir co-owner who had not taken part in the partition of the goods in the first place, as not having been introduced in the trial, but owning goods from that succession, may summon the unenforceability of the decision through the appeal to enforcement. In the case of community of goods between spouses, if the confiscation of property has been disposed for one of them, the partition can be requested both by the state and by the other spouse (Deak, 1999: 163). If one of the spouses dies during the partition of common goods during the marriage, their heirs will not be introduced in the cause, but the case will be closed, the marriage ceasing, and the rights of the heirs will be capitalized during the succession procedure.

An active procedural quality in the partition trials may belong, besides the co-parties and their successors in rights, to other people as well, such as the personal creditors of the spouses, the personal creditors of the co-owners, the assignee of succession rights and the creditors of the inheritance. Regarding the personal creditors of the debtor spouse, they can request the partition of the common goods under the conditions imposed by article 353 align (1) and (2) from the Civil Code, "common goods cannot be followed by the personal creditors of one of the spouses. In spite of this, after following the personal goods of the debtor spouse, their personal creditor may request the partition of the

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common goods, but only in the necessary measure to cover their debt". Their right is restricted two times, in the sense that their action is admissible only after they have followed the personal goods of the debtor spouse and only in order to satisfy their claim and it is an incident only in the case of the matrimonial law of the legal or conventional community and only in the case of the common goods in co-ownership. Indeed, article 353 align (2) is placed in the context of the regulations consecrated to legal community law and based on article 368 from the Civil Code, if the spouses do not decide otherwise, it is also applicable in the conventional community law.

The situation changes for the personal creditors of the debtor spouse married under the regime of separation of goods, they might request the partition of the common goods on quota-parts under the conditions imposed by article 678 align (1) from the Civil Code, under the mention that the partition has as an object the common property right. Practically, under the conditions of this legal disposition, the creditors of a co-owner may follow their quota-part from the right on the common good or may request the partition of the good to the court, case in which the prosecution is made on the quota of the good, or after case, on the amount of money due to the debtor.

The order of the prosecution of imperative, at first they follow the debtor spouse's personal goods, then the ones which became personal through partition, with the mention that the solution of dividing the common goods, usually partially, is applied only after the pursuit of the personal goods has been exhausted, without having managed to cover the debt. The doctrine (Florian, 2006: 164) has stated that since the law forbids the pursuit of the common goods only by the personal creditor, it is admissible to provisionally render certain common goods unavailable by taking precautionary measures such as precautionary sequester or precautionary deduction, regulated by the Code of Civil Procedure in articles 951-970. Thus, the juridical practice (Timișoara Court of Appeal, civil matters judgements, Decision no. 498/12 may 2009) decided that it is admissible to take the mortgage inscription based of article 154 from G.O. 92/2003 regarding the Code of Fiscal Procedure on the co-owned common property estate in order to guarantee the debt that one of the spouses has, as long as this measure is a precautionary one and not a foreclosing one.

The doctrine has stated that the right to request the partition of the common goods of the debtor spouse belongs to all the creditors and not only to the ones who possess the quality of unsecured creditors. There has been a contrary opinion as well, according to which only the unsecured creditors of the debtor spouse would have the right to request the partition of the common goods (Albu, 1997: 167). Presently, the conclusion is easily drawn from the analysis of the laws which in the previous regulation (article 33 align (2) from the Family Code) as well as in the present regulation (article 353 align (2) as well as article 678 align (1) from the Civil Code), use the phrases "personal creditors", respectively "creditors of one of the co-owners" without making a distinction between them. On the other hand, if an heir gives up their succession rights to a third party, the assignee of the acquired rights, with a universal or particular title, substitutes in the rights of the assignor who had the quality of co-owner, therefore acquiring the right to request the partition also.

As mentioned above, in the situation when an inheritance is partitioned, the following entities may be plaintiff: legal heirs, universal legatees, the ones with universal title and the legatees with particular title. Regarding the plaintiff quality of the legatee with particular title, the doctrine expressed different opinions. Thus, according to one of them, the legatee with particular title cannot have the quality of co-owner and implicitly,

the one of plaintiff. Contrary to this idea, we consider that the legatee with particular title can acquire the quality of co-owner and implicitly the one of plaintiff in a partition request if the deceased owned a good or two or many goods, taken *ut singuli*, in favor of two or many people. Thus, from the practical point of view, the legatees with particular title are in the same situation as the spouses or ex-spouses reported to their common goods, which do not form a patrimony or a fraction of patrimony, distinct from their patrimonies (Bodoaşcă et al., 2013: 95).

Still in the domain of inheritance, according to the dispositions of article 1156 from the Civil Code, prior to the succession partition, the personal creditors of one of the heirs cannot follow their part from the inherited goods before the partition of the entire succession inheritance is performed. The partition can be performed even at their request, based on align 2 of the same article, which expressly allows the heirs' personal creditors and any person that justified a legitimate interest to request the partition in the name of their debtor, but also to request to be present in the partition through good agreement or to intervene in the partition process. These creditors do not exert the right in their own name, but in the debtor co-owner's name. The personal creditors of the heirs and any person that justifies a legitimate and moral interest may request the partition in the debtor's name may request to be present to the partition or may intervene in the partition process. Also, the creditors may request the revocation of the partition without having to prove the fraud of the co-parties only if, although they requested to be present, the partition took place in their absence and without having been summoned. Because, by agreement, the co-owners may try to fraud their creditors, article 1156 align (4) from the new Civil Code offers them the possibility to intervene in the partition procedure through the opposition to partition, trying in this way to prevent the ineffectiveness of the partition by subsequently introducing the *paulian action* by the creditors. The opposition gives the creditors the right to participate to the partition and express their interests towards it.

Reported to the conditions that must be fulfilled for the creditors that request the revocation of the partition, the rule states that the action in revocation of the partition remains subject to the general dispositions regarding the revocation action and the creditors have to prove the prejudice. By exception, when the creditors requested to be present, and the partition took place in their absence and without having been summoned, the creditors may request the revocation of the partition without having to prove the fraud of the co-parties. Regarding the form, the law does not provide a special condition, the opposition having to result unequivocally. If during the partition action the payment of the debts is performed, it may not continue, as it lacks the interest for the personal creditors of the successors. Thus, article 1156 align (3) of the New Civil Code admits the possibility of the other heirs to obtain the rejection of the partition action requested by the personal creditor of one of the debtor co-heirs, by paying the debt in the name of the debtor heir.

In doctrine, certain authors (Deleanu, 1999: 340-341; Chirică, 1999: 297) consider that the creditors of the inheritance are also entitled to request the partition through oblique action, motivated by the fact that they are in the same situation as the personal creditors of the successors.

Other authors share the contrary opinion, according to which the creditors of the inheritance have no interest to request the partition, because their right to follow all the goods of the inheritance is an exception from the principle of the division by law of the inheritance liability (Toader et al., 1996: 157). Thus, according to these authors, the creditors of the inheritance have no reasons to request the partition, namely to divide their follow as long as they can follow the entire succession mass, without opposing the

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principle of division by law of the succession liability, according to the dispositions of article 1155 from the Civil Code, according to which the succession liability is incurred proportionally with the succession quota assigned to the universal heirs or the heirs with universal title. In reality, taking into account the principle of the availability, specific to the private law juridical reports, we cannot exclude the inheritance creditors' possibility to request the partition. Indeed, in order to satisfy the debt, it is necessary to follow certain goods regarded as *ut singuli*.

In doctrine it is mentioned that the acquirer with a particular title of certain succession goods may not request the partition, considering wrong the opinion according to which the acquirer of a good from a joint ownership may request the termination of the joint ownership based on the fact that they would acquire the quality of co-owner (Georgescu, Oproiu, 1993: 105). For instance, if a good from the joint ownership is sold by a co-owner, the buyer will not have the quality of co-owner, but just an acquirer with a particular title. In reality, the right acquired by the buyer is subject to a resolution condition, whose fulfilment takes place of the good had not been attributed, when going out of the joint ownership, to the co-owner who alienated it (Mihuță, 1976: 125-126; Mihuță, 1986: 127). In this situation, the acquirer may formulate an intervention request in their own interest, under the form of a main intervention, as regulated by the dispositions of article 61 align 2 from the Code of Civil Procedure and will have the interest that the acquired good be attributed to the co-owner who transmitted it to them. Also, in the same sense, we can analyse the dispositions of article 679 align (1) from the Civil Code, according to which in order to prevent the situations in which the partition may take place under conditions that would fraud their rights, the personal creditors of a co-owner will be allowed to intervene in the partition process, irrespective if it had been requested by a co-owner or another creditor. The intervening creditor will bear their trial costs, without being able to recover them from the other parties from the trial. In principle, the personal creditors who did not intervene in the process cannot appeal the juridical partition. According to article 679 paragraph (1) the personal creditors will still be able to appeal the partition if this took place in their absence and without taking into account the opposition they made, as well as in the cases when the partition was either simulated or performed in such a way that prevented the creditors from intervening in the process. Against the act or voluntary partition, concluded in the fraud of their rights, the personal creditor will be able to formulate the revocation action, according to article 1562 from the New Civil Code. The acquirer of an undivided quota from a good in a joint ownership is equal to the acquirer with particular title of a good from the joint ownership and thus, they cannot request the partition. Such acquirer has the quality of co-owner only in report with the good out of which they have a quota-part, thus being able to request the partition only regarding the respective good and obviously, under the condition that the respective good is not a part of an undivided mass (Deak, 1999:45).

Article 679 paragraph (2) from the New Civil Code admits that the creditors who have a guarantee right on the common good, but also on the goods whose debt resulted from its preservation or administration, have the right to intervene in the partition process. Also, they will be able to appeal a partition performed, under the same conditions as the personal creditors of a co-owner. The issue that emerges in this situation is that such a request from the creditors that have a guarantee right on the common good or on the one whose debt resulted from its preservation or administration may be rejected by the court as having no interest, taking into account the right of foreclosure, irrespective of the present owner, both before and after the partition, admitted through the dispositions of

article 678 align (3) from the Civil Code. Another aspect that posed interpretations issues in the specialized literature was the existence of the usufruct's possibility to request the partition. In doctrine, it was shown that the usufruct cannot request the partition because they are not in a joint ownership with the legal owner (Stoenescu, 1982: 211) or, in other words, there is no joint ownership in the situation of rights of different nature.

Other opinion, accepted also in the foreign juridical doctrine (Braudry-Lacantinerie, 1894: 808; Terre, Lequette, 1998: 765) it is stated that there is a joint ownership regarding the usufruct when there are two or more usufructuaries on quata-parts from a good or universality of goods (Comăniță, 2002: 53). Actually, generally, the partition is allowed when it is exerted fractionally by two or more people on a good or universality of goods (Leș, 2010: 891; Leș, 2012: 1246). The Ex Supreme Court expressed in favour of this opinion and from the procedural point of view, in such situations it is necessary to summon the owner of the rented right, in order for the decision to be opposable to them as well (Supreme Court, civil matter judgements, Decision no. 2263/1998). In the partition processes, it is sustained that the prosecutor may also have an active quality in the process (Comăniță, 2002: 48). According to article 92 align (1) from the Code of Civil Procedure, the prosecutor does not act in their own name, but in order to exert a right or a legitimate interest of an underage person, under juridical interdiction or missing. Thus, in case of a partition action, the prosecutor may request its execution only if the minor, the person under juridical interdiction or the missing person have this right. If the prosecutor started the partition action under the conditions imposed by article 92 align (1) from the Code of Civil Procedure, based on article 93 from the same code, the owner of the right will be introduced in the process and will be able to prevail from the acts of disposition offered by the law maker, respectively giving the trial up (article 406), giving the right up (article 408) and will be able to conclude a transaction that would cease the litigation (articles 438-440). If the prosecutor retires the request, they will be able to request the continuation of the trial or foreclosure.

Regarding the *passive legal standing*, in the partition process, it may be recognized to any person that has the quality of co-owner, namely any person who may be summoned to court by the one who has the right to request the partition. In concrete, any of the spouses or ex-spouses, universal heirs, universal legatees and legatees with universal title as well as the assignee of the succession rights and the people that benefit from excessive liberalities may be plaintiff in the partition process.

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