

ГРАЖДАНСКОЕ И ГРАЖДАНСКО-ПРОЦЕССУАЛЬНОЕ ЗАКОНОДАТЕЛЬСТВО

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Legal nature of pledge

Түйін

«Legal nature of pledge» мақалада кепіл ұғымының және құқықтық табиғатының мәселелері қарастырылады. Авторлар міндеттемені орындауды қамтамасыз етудің негізгі құралы ретінде кепілдің негізгі белгілеріне ерекше назар аударады.

Түйін сөздер: Азаматтық кодекс, кепіл, кепіл беруші, кепіл ұстаушы, міндеттеме, несие беруші.

Аннотация

В статье «Legal nature of pledge» освещены проблемы определения и правовой природы залога. Особое внимание автор уделяет основным признакам залога как основного средства обеспечения исполнения обязательства.

Ключевые слова: Гражданский кодекс, залог, залогодатель, залогодержатель, обязательство, кредитор.

Summary

Issues of determination and legal nature of pledge are covered by the article. Authors give special consideration to basic qualities of pledge as the main instrument of securing of obligation execution.

Key words: the Civil Code, pledge, pledger, pledgee, obligation, creditor.

In theory of civil law opinions of scholars regarding determination of legal nature of pledge are still contradictory. Some researchers relate it to property law, while others consider it as obligation. However it is impossible not to observe that while definition of pledge relates to property law, it also includes legal nature of obligation. On the basis of that essence of pledge must support priority of pledgee's claims satisfaction to enforce from price of pledged property before another creditor, to be a security of pledgee's rights priority. Considering necessity to not allow emergence of conditions, which affect adversely on effective assurance of creditor's interests by instruments of pledge, in legal context it becomes obvious to further develop guarantee of rights [1, p.31].

After analysis of scholars' opinions on legal nature of pledge, which were quite contradictory, reveals the reason for debatableness – it is imperfection of previously effective law on pledge. Thus, K. Annenkov wrote: “It is obvious that lack of general provisions on pledge in our legislation seems as its huge blemish”. Therefore, K.



Annenkov notes: “There is nothing surprising that our civilians give different definitions to it” [2, p.142].

Views of modern researchers of pledge also differ in appraisal of pledge legal nature. It is possible to distinguish four approaches to matter of pledge legal nature, which take place in modern science. Some scholars define pledge as property law, others as contractual law. There also opinions on classification of pledge legal relationships as independent type of property legal relationships along with property and contract legal relations. A number of scholars suggest widening dispute regarding legal nature of pledge as recognition of dual nature of pledge with presence of features of both property and contract law.

Zhumabekova G.H. presents her own justification of dual nature of pledge: “Specificity of pledge consists, particularly, of wide range of objects that can institute as pledge subject and that by pledge obligatory relations arise between its subjects: pledgee and pledger have corresponding rights and obligations, arising from pledge agreement. Pledge legal relations also include property rights”. Besides that Zhumabekova G.H. states: “...at resolution of matter on legal nature of pledge influences not only specificity of types (and subjects) of pledge, but also variety of pledge rights, as pledge right includes a complex of pledgee’s rights bearing both legal property and legal obligatory character” [3, p.12].

We think that this point of view deserves to be agreed with and subscribed to.

Reviewing the matter whether such an attribute of property rights as preemptive right is inherent to pledge, it is possible to make a conclusion that essence of pledge presumes preemptive satisfaction of pledgee’s claims to enforce from price of pledged property before another creditors of pledger and that is why preemptive right of pledgee must be absolute. Admission of cases by civil code, when priority of pledgee forfeits, affects adversely on effective security of creditor’s interests by pledge. That is why there are issues, connected with high price of credit resources, offered by banks, as level of credit risks is high. Nowadays, however, demand on credit resources, available for ordinary citizens and businessmen is very high. Therefore reliable legal instruments of securing redemption of credit are needed. Not only creditors, but also potential borrowers are interested in them, as otherwise they are deprived of possibility of real involve of assets into sphere of their activity. It is necessary to use pledge as instrument of real security of creditor’s claims with maximum effectiveness.

In all cases pledgee must have an absolute priority to satisfaction of his claims of pledge subject price before other creditors of pledger – legal entity by its liquidation, including in bankruptcy procedure must be satisfied out of turn. Effectiveness of pledge is mainly defined in what extent interests of creditor are protected when announcing of debtor as insolvent. When bankruptcy of legal entity, pledged property should not be included in bankrupt estate, but it should only serve for satisfaction of creditor’s claims – pledgee. Only in case if realized sum of pledged property exceeds amount of claims of creditor-pledgee, it may be used for satisfaction of other creditors’ claims. Also pledgee should have a right to exceptional satisfaction of his claims from price of pledged property by bankruptcy of pledger-individual entrepreneur, and property which is pledge subject, should not be included in bankrupt estate. There comes a conclusion that there should be no exceptions from pledgee’s rights to preemptive satisfaction of his claims from pledge subject price before other creditors of pledger. Only pledgee should have priority in satisfaction of his claims from pledge subject price.

Considering pledge as instrument of security of obligations execution, S.Skryabin supposes that it is necessary for the legislator to make a decision on exclusion of pledge subject from bankrupt estate of legal entity or individual entrepreneur, granting

other creditors, as well as victim from law violation, satisfaction from other property of debtor [4, p.49].

Pledge as well as penalties, charging of debtor property, guarantee, deposit and other instruments, prescribed by legislation or agreement, may use for security of any obligation, as: credit agreement, lease agreement, etc.

Being one of instruments of security of obligations execution, pledge, however, takes a special place among them. It is stipulated by presence of a number of negative events in the Republic's economy – inflation, non-return of bank loans, etc. Such popular earlier instruments of obligations security as penalties and guarantee nowadays lose practical meaning, as it is very difficult to find a reliable guarantor in conditions of crisis and creditor is almost deprived from possibility to check solvency of guarantor. The same can be said about penalties as well. If debtor cannot repay main sum of debt, it is not practical to consider he will recover penalties for improper execution of obligations.

Unlike mentioned above instruments of obligations execution security, pledge has a number of advantages.

First – pledge is a property instrument of obligations security and therefore creditor is not dependent on personality of debtor or guarantor, as obligations execution is secured by a thing, not person.

Second – obligation secured by pledge is satisfied from pledge subject price preemptively before other creditors.

Third – real danger to lose property or property rights is a good motivation for debtor to execute obligations properly.

Fourth – notwithstanding inflation, creditor has a possibility to actually compensate all losses, inflicted by fault of debtor, as pledge subject is valuable and liquid property, which safe and presence is secured by pledge agreement at the moment of debtor payment to creditor.

Basic principle provisions on pledge are contained in para. 3 ch. 18 of General Part of Civil Code of RoK [5].

Moreover, other provisions of first chapter of Civil Code apply to pledge legal relations as well, particularly on emergence of civil rights and obligations, exercise and protection of civil rights (Art. 7-9), on order of satisfaction of creditors' claims execution in case of recognition of individual entrepreneur as bankrupt (Art. 21), on order of satisfaction of creditors' claims execution in case of legal entity liquidation (Art. 51) and bankruptcy (Art. 53), on objects of civil rights (Art. 115), on state registration of transactions (Art. 155), rights of owner over property being under economic conduction (Art. 199), right of operative administration (Art. 203), administration of state venture's property (Art. 206), reclaiming of property from someone else's illegal possession (Art. 260), and fraudulent acquirer (Art. 261), on owner's rights protection from violation not related with deprivation of possession (Art. 264), protection of owner's rights not being proprietor (Art. 265) and others.

Chapter two of Civil Code also contains provisions on pledge, provided by separate rules of sale and purchase, rent, lease, entrusted administration of property and others.

According to meaning of Article 301 of Civil Code as pledge subject may be used any property, including things and property rights, excluding property, removed from turnover, and claims connected with personality of creditor having cost estimation and over which, respectively, claim to property is permitted.

Therefore as pledge subject may serve such objects of civil rights as immovable and movable things, and also claiming rights, arising from different obligations.

Claims related with personality of creditor can serve as pledge subject, particularly on alimony, on compensation of damages, caused to life and health, and also rights



on non-material goods – it is life, health, honour and etc., non-transferability of which directly described in civil legislation.

In spite of seeming simplicity to establish legal regime of property, transferred to pledge, it is hard to do in practice, and very often it is difficult to define what the pledge subject is. One of such examples can serve mortgage of factory or other property complex. Pledger, as a rule, does not mention, but pledgee does not try to find out what equipment and mechanisms, included in property complex, is property of pledger, but Art. 309 of Civil Code of RoK provided right over what are leased and received by leasing. Besides that, according to Article 309 of Civil Code of the Republic of Kazakhstan, pledge right applies to whole property complex.

For security of execution in practice is often used transfer of some kind obligation (as a rule return of thing), of cash money, other valuable property, or personal documents, not presenting any value except source of information about debtor or necessary for debtor, which let to be sure that obligation will be executed. In particular, when short-term lease of movable property (lease of sport equipment, VHS, receiving of a book in reading room and etc.), as a rule, the lessee demands lessor to provide documents, confirming personality, or cash money or other valuable property that let creditor to be sure that lease subject will be returned in view of necessity of documents for debtor, basically of more price than price of lease subject. Having many similar attributes with pledge, it is need to recognize that this instrument of security is not pledge, but it is closer to distraint (but not always it is it), as its essence is protective (preventive) goal and initially expects execution of obligation in kind, but not charging remaining thing and documents [5].

Personal non-property goods and rights do not refer to property and cannot serve as pledge subject: life, health, dignity of person, honour, good name, business reputation, inviolability of personal life, personal and family secret, right to name, right of authorship, right of inviolability of art and other non-material rights [5].

So we see that without concrete determination of pledge subject it is impossible to correctly define liquidity of property transferred as pledge, capacity of claims which pledge can secure, means of creditor's claims satisfaction from pledge.

In all probability, material terms of pledge agreements prescribed by legislation and requiring agreement of parties, must be pledge subject and its estimation, essence, amount and period of execution of obligation, secured by pledge, and also agreement on which party shall have the pledged property during pledge and agreement on acceptability to use pledged subjects.

Being basic property right, ownership is also a basis for emergence of remaining property rights. Other property rights are derivative from ownership and institute as other rights of owner, limited by other rights of possession, usage or administration, or in extent of rights to carry out possession, usage or administration, which belong to owner on legal basis – on the basis of agreement or legal act.

Article 196 of Civil Code does not provide exhaustive list of property rights. Reference of that and other rights to property ones has a huge practical meaning, as according to Art. 265 of Civil Code possessor of property rights is provided with the same instruments of protection of his rights, as provided to owner or property [6]. Also a person has right to protect his possession against owner as well.

At the same time the theory of property rights is a new direction of civil law of Kazakhstan, which required even further development and research.

According to Article 379 of Civil Code from agreement may emerge obligatory, property, author and other legal relation. This provision applies to pledge agreement as well – from pledge agreement both obligatory and property legal relations may arise. But

with that being said pledge continues to remain as instrument of obligations execution security, as not being independent from pledged obligation, independent property right of pledgee, and not being independent from pledged obligation, a separate type of civil law obligations. Peculiarity of legal regulation of pledge relations is regulation of two types of relations obligatory and property, which makes it quite fair to allocate pledge into separate institute of pledge obligation and placing it in chapter 118 of Civil Code “Security of obligation execution”.

Duality of nature of legal relations, emerging at transaction, is not something new and revolutionary. Same duality is seen in many other transactions, related with transfer of property. Thus, for example, when loan there are seen relations between creditor and borrower, which are characterized as obligatory, and relations between borrower and money assets, entering into ownership of the last one, which are characterized as property law. From this property law, which bears absolute character, property legal relations may arise, which by their nature are similar with legal relations, connected with ownership. When storage between bailee and bailor obligatory legal relations are established, while between property and bailee property relations of possession or ownership are established. That is why property right of pledge characterizes legal connection between pledgee and other third parties [7, p.71].

A special attribute of legal relations, emerging from property right is their absolute character.

However it is necessary to note that pledge right as right of pledgee to preemptive satisfaction from price of pledged property before other creditors of pledger, is not, obviously, property law as according to Art. 115 of Civil Code to property refer not only things, but money as well, including foreign currency, stocks, works, services, and objective results of creative intellectual activity, business titles, trademarks and other means of individualization of products, other property rights and other property. Property right over specific property is possible only in that case if ownership is possible over that property, which is only possible in relation to things as compound part of property. The definition of “property law” itself presumes the right of a specific person over the thing, but not over property rights of claim or other property not relating to things. According to that, pledge right shall relate to property rights only in case of usage of things as pledge subject.

Based on foregoing, it is necessary to classify pledge right as property right when a thing serves as pledge subject, and as contract law of claim, when other property serves as pledge subject [8, c.15].

Pledge right being property right provides its owner with an ability to protect his property by instruments, prescribed for protection of ownership and other property rights. Moreover pledgee is entitled to present both compulsory and nugatory claims to any individuals, violating his rights, including to property owner or pledger.

However it is worth noting that pledge right is not property right with unmodified and defined number and extent of rights, which are for example ownership or right of economic management, at least because existing construction of pledge in Kazakhstani law is quite wide. It also includes such a type of pledge of things, which cannot be definitely and undoubtedly characterize as possessing property right – pledge of products in turnover. Therefore dispute on legal property or legal obligatory character of pledge must be resolved in a way of recognition of dual pledge nature: pledge creates two types of legal relations – between pledger and pledgee, and between pledgee and thing, i.e. on one hand pledge is an instrument of security of debtor’s obligation execution by means of establishment of relatively legal relation with creditor, on the other hand – direct legal relation between pledgee and thing. Therefore pledge



of thing can be characterized as property instrument of obligation security.

Also it is necessary to classify property right of pledge into subtypes with specific number of its owner's rights. The most applicable basis of such classification, as we suppose, is division of pledge of things into mortgage and pledge. In so doing pledge right of pledgee can be characterized as right of possession and limited disposition, but mortgage right as right of pledgee to limited disposition of pledge subjects even without their actual possession. In turn, it is necessary to divide mortgage law into immovable property in relation with specialties of legal regulation of property pledge.

Limited disposition right of pledged property is a specific specialty of pledge property right. Being derivation from ownership, essence of such compound part of pledge property right as limited property disposition right, concludes in cancellation of ownership over a thing, used as pledge subject, by appearance of specific conditions, prescribed by pledge law is non-execution of secured obligation. Specifically disposition right of pledge subject usage prescribes absolute character of pledge, as it is applicable by application of pledge right over specific thing regardless of owner's rights and other legal thing owner.

Relating right of pledgee over the thing used as pledge, to property rights, basic correlation between pledge right over the thing and ownership consists in derivation of pledgee's rights from rights of owner.

Derivation of pledge right from ownership is discovered, in particular, in basis for emergence of creditor's pledge right.

Essence of derivation between ownership and pledge right also consists in correlation of pledgee's rights and owner's rights of thing, used as pledge subject, specialty of which is established in right of accordance of pledge right correspondence with thing and in absoluteness of pledgee's rights.

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