SEPARATE GROUNDS FOR INVALIDITY OF A MARRIAGE AGREEMENT: ISSUES OF THEORY AND PRACTICE

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Annotation. *The article analyzes some grounds for the invalidity of a prenuptial agreement. It is concluded that there is a lack of uniformity in law enforcement practice, which negatively affects the implementation of the principle of legal certainty. For a more accurate content of the assessment categories, the adoption of guidance clarifications by the highest court is required, which will contribute to the formation of a uniform practice in the application of the relevant rules on the invalidity of the marriage contract.*

Keywords: *prenuptial agreement, invalidity of the transaction, contestability, nullity, extremely unfavorable situation, marriage, property relations.*

Institution of prenuptial agreement eventually gaining more and more popularity. In 2017 88 672 prenuptial agreements were concluded in the Russian Federation, in 2018 it amounted to 109 640, in 2019 the amount reached 114 352 and we approached 147 948 prenuptial agreements in 2020[1].

Based on these data, we can conclude that the number of registered prenuptial agreements in the Russian Federation has increased by more than 1.5 times over a four-year period. That shows the relevance of researching such a legal instrument for regulating marriage and family relations as a prenuptial agreement.

From the point of view of legal nature, a prenuptial agreement is a civil law agreement. Its certain specificity does not mean that it is a special family law agreement, different from the civil agreements [2, p. 54]. However, according to any authors, the prenuptial agreement should be

considered as a separate type of civil agreements that unites agreements aimed at establishing or changing legal regime of property [3, p. 156].

This type of agreement between the parties allows determining the property rights and the obligations of the spouses during marriage and in the event of its dissolution as well. In such a situation, the parties to the agreement do not have a need for lengthy litigation regarding the distribution of property rights and obligations. However, there are some nuances in this issue as well.

To begin with, let us take a closer look at the legal aspects of a prenuptial agreement. The main provisions are enshrined in the Family Code of the Russian Federation (hereinafter – FC RF). So, Art. 40 of the FC RF defines a prenuptial agreement as an agreement between persons entering into marriage or being spouses regarding the provisions on their property rights and obligations, determined both during marriage and in the event of its dissolution. Art. 41 of the FC RF regulates the procedure for its concluding and the form of this type of family law agreement, and Art. 42 of the FC RF IC regulates its content.

Art. 44 FC RF regulates the issue of invalidity of the prenuptial agreement, which refers to the reasons provided by the Civil Code of the Russian Federation (hereinafter - the CC RF) for the nullity of transactions. Depending on each, prenuptial agreement can be found either contestable or void if the law does not contain any effects of the wrongdoing, which were not related to the nullity of the prenuptial agreement. This conclusion can be drawn from the provisions of Art. 168 of the CC RF.

The first reason is the conclusion of a prenuptial agreement by a citizen who is declared as an incapable due to a mental disorder by a court decision. In this case, such an agreement will be null and void. An exception is the case when the conditions of such an agreement constitute a benefit for a disabled citizen. In this case, the agreement is recognized as valid upon the request of the guardian in accordance with the interests of such citizen.

When a citizen concludes a prenuptial agreement, but he or she is limited of legal capacity, such an agreement will be nulled if concluded without the consent of the guardian of such a citizen. The court recognizes the agreement as such when the trustee submits a statement of claim. These provisions are regulated by Art. 171 and Art. 176 of the CC RF.

The third reason is the conclusion of a prenuptial agreement by a citizen, who at the moment of its conclusion was not able to understand the meaning of his or her actions or control them but who was not declared as an incapable. In this case, the provisions of Art. 177 of the CC RF are applied. The provisions of this article can be applied in the following cases:

– violation of the rights and legitimate interests of such a citizen, as well as other persons by the conclusion of a prenuptial agreement. The nullity of such an agreement is recognized at the request of the relevant persons;

– a citizen who entered into a prenuptial agreement was later declared incapable. In this situation, the guardian of such a person files the statement of claim and the contract is nulled if there is an evidence that the prenuptial agreement was concluded at the time of the citizen's inability to understand the meaning of his actions or to direct them;

– a citizen who entered into a prenuptial agreement was recognized of limited legal capacity later due to a mental disorder by a court. In this case, the trustee has the opportunity to file a statement of claim. A prenuptial agreement will be declared invalid if there is necessary evidence that the other party knew or should have known about the inability of the citizen to understand the meaning of his or her actions or control them at the time of the conclusion of the agreement.

There is also a reason for the nullity of a prenuptial agreement in judicial practice, if it was concluded only for the sake of appearance, when the parties did not intend to engender the corresponding legal consequences. Such a transaction is considered null and void in accordance with the provisions of paragraph 1 of Art. 170 of the CC RF.

The decision of the Leninsky District Court of Orenburg provides evidence for the following position. Ms Prisyazhnaya I.S. (the plaintiff) and Mr Nikiforov D.S. (the defendant) entered into a prenuptial agreement for the purpose of safeguarding the property jointly acquired from foreclosure. The spouses signed and notarized that agreement after PJSC Rostelecom applied to law enforcement agencies with the appropriate filing for bringing the defendant to criminal liability and recovering the required amount of damage caused. The defendant did not notify his creditors about the conclusion of the prenuptial agreement. On the basis of this, the court concluded that the agreement was invalid as it was concluded without the intention to generate legal consequences" [4].

The next aspect of the nullity of a prenuptial agreement is its conclusion under the influence of a significant misleading. It is necessary to consider the conditions under which the misleading can be understood as significant. That is, one of the parties would not conclude the transaction if it had an idea of the actual state of affairs. Such conditions are determined by the paragraph 2 of Art. 178 CC RF.

It is important to consider the provision that the court may refuse to recognize a prenuptial agreement null and void and keep it in force if the other party agrees to the terms, the idea of which was available to the parties entered into an agreement with a significant misleading.

A prenuptial agreement will also be recognized as null and void by the court if it was concluded under the influence of deception, the definition of which is given in paragraph 2 of Art. 179 of CC RF, and if there was the influence of violence or threat.

The above mentioned article notes the circumstances of extremely unfavorable situation when the agreement will be recognized as null and void as in cases mentioned earlier. Namely, one party was forced to conclude such an agreement due to the desperate situation, while the other party used it to their advantage.

Non-compliance with the notarial form of the prenuptial agreement stand out a particularly important reason, the binding power of which is indicated in paragraph 2 of Art. 41 of the FC RF. So, in accordance with paragraph 3 of Art. 163 of CC RF, if this rule is not observed, such an agreement will be declared null and void.

It is important to comply with the requirements specified in paragraph 3 of Art. 42 of the FC RF. Among them, for example, there is impossibility to specify the terms limiting the legal capacity or capability any of the parties and those relating to the personal non-property relations or relating to the rights and obligations of persons entering into the prenuptial agreement with respect to their children. It is clear that if this rule is disregarded, the terms of such a prenuptial agreement will be deemed null and void.

The final reason for recognizing the nullity of a prenuptial agreement are such terms, in the event of which one party finds itself in an extremely unfavorable situation. In our opinion, this is a contestable point, since there are some contradictions in the practical application of this provision by the courts.

Firstly, this is evident that there is no strict list of terms falling into a category of "extremely unfavorable situation" that allows the courts to construe broadly this provision.

The Resolution of the Plenum of the Supreme Court of the Russian Federation №. 15 "On judicial practice in marriage dissolution cases" indicated the only case that makes it possible to recognize a prenuptial agreement as invalid on the basis of an extremely unfavorable situation of the party, if the agreement comes into force, when one of the parties is deprived of ownership of all property acquired by the spouses during marriage" [5].

The definition of the Constitutional Court of the Russian Federation №. 779-O-O suggests that the court individually establishes such a category as an extremely unfavorable situation for one of the parties to a prenuptial agreement when analyzing specific circumstances [6]. It is also necessary to mention the legal margin of appreciation of this category of circumstances in making decision on a specific case by the courts.

A concept of a significant disparity in property can also be found in judicial acts, for example, in the Definition of the Judicial Devision for Civil Cases of the Supreme Court of the

Russian Federation №. 18-KG16-10 [7]. However, no signs for the subsequent application of such a concept are found in this act.

Secondly, it can be concluded that nullity of a prenuptial agreement is ambiguous. It is based on the analysis of judicial practice in relation to cases on the above-mentioned reason.

In one case, judicial practice confirms the provision on the possibility of the parties to deviate from the equality of the shares of the property when concluding a prenuptial agreement. This is due to the freedom of contract doctrine, including a prenuptial agreement, which in turn stipulates the necessity of preserving the continuity of such transaction. It should be noted that such a case is rather common in the judicial practice.

As an example, we can provide the Decision of the Vasileostrovsky District Court of St. Petersburg [8]. According to the terms of the prenuptial agreement and its supplementary agreement, Ms. Kuznetsova I.B. (the defendant) possessed 87% of property, while Mr. Kuznetsov R.Yu. (the plaintiff), possessed, respectively, 15%, with a ten to twelve ratio of property shares.

The plaintiff asks to declare the terms of the prenuptial agreement invalid due to the fact that during their implementation he was in an extremely unfavorable position. The court cites the provisions of clause 10 of this agreement on the voluntariness of determining its conditions and astipulation. In addition, this paragraph contains a direct indication that such a procedure for the distribution of property does not put any of the parties in an extremely unfavorable position.

As a substantiation of its position, the court also argues that no significant disparity in the shares transferred to the spouses' property has been revealed in the course of the proceedings. It is important to note that for resolving this category of disputes, the court established that, the terms of the prenuptial agreement provided the transfer of ownership of both movable property and immovable property to each of the spouses, the same referred to residential premises and non-residential buildings, shares, deposits and other income. Accordingly, this prenuptial agreement cannot be nulled.

The courts took a similar position of in the Decision of the Nevsky District Court of St. Petersburg [9], and in the Decision of the Achinsk City Court [10].

Further, it is necessary to consider the situation when similar provisions of the prenuptial agreement are recognized as nulled by the courts because they put one of the spouses in an extremely unfavorable position.

Thus, we can notice the similarity of the terms of the prenuptial agreement and the ratio of spouses' shares in the event of divorce in the appellate decision of the Moscow Regional Court [11]. In this case R.I. (the defendant), would receive 25 percent of the property if the terms of the prenuptial agreement were implemented, and R.T. (plaintiff), respectively, 75 percent, with a ratio

of shares of one to three. In the above case, the prenuptial agreement was nulled by the court as violating the provisions of paragraph 2 of Article 44 FC RF.

The similar case is found in the Appellate decision of the Saratov Regional court [12].

Another example of such category of cases is the appeal decision of the Nizhny Novgorod Regional Court [13]. A compensatory nature of a prenuptial agreement is an interesting argument regarding the conditions necessary to certify and to make it valid. That contradicts the courts' explanation about the right of spouses to depart from the principle of equality of their shares. The position of the court is that the absence of clearly defined property in the prenuptial agreement breaches the terms of the Art. 42 FC RF, since property division should provide compensation to one of the spouses when transferring to the personal property to the other.

In our opinion, the notary certification of a prenuptial agreement is an important circumstance. Since a notary explains the rights and obligations to the parties and legal consequences if the terms of such an agreement come into force, namely, as mentioned earlier, the deviation from equal shares in the distribution of property acquired by spouses during marriage. Therefore, it is impossible to conclude this type of family law agreements through a representative.

That is, a notary examines the provisions of the prenuptial agreement for compliance with the legislation of the Russian Federation (the terms of the agreement should not put one of the parties in a deliberately unfavorable position), and if contradictions are found, the notary refuses to certify a prenuptial agreement.

Summing up, we can conclude that family law and the most part of civil law contain the terms for the nullity of the prenuptial agreement. Judicial practice is rather diverse on implementation of such reason for the agreement invalidity as highly unfavorable situation of one of the spouses. This is facilitated by the evaluation category of highly unfavorable situation.

In this situation, it is necessary to recall the principle of legal certainty, which implies the stability of legal regulation and existing legal relations. Though this principle is not directly enshrined in the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation indicates that the general legal criterion of certainty, clarity, and unambiguousness of a legal norm is implied by the constitutional principle of equality of all persons before the law and the court, since such equality can be ensured only by a common understanding and uniform interpretation of the legal norm by all judiciaries [14].

European Court of Human Rights keeps to the similar position, believing that a legal norm should be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" [15].

Therefore, we believe it is necessary to review of judicial practice in this category of cases at the level of the highest court, i.e. the Supreme Court of the Russian Federation, to provide more details to the evaluation category of "an extremely unfavorable situation". That, in turn, should lead to uniformity of judicial practice and, as a result, to legal certainty.

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