

DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE NË LIDHJE ME AGJENCINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA O PITANJIMA KOJA SE ODMOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU
--	---	---

AC-I-16-0200

*In the appeal of**Claimants/Appellants*

1. **M. S,(successor of Z. S)**
2. **Sh.S,(successor of Z. S)**
3. **H.S, (brother of Z. S)**
4. **L.S,(successor of F. S, who is the brother of Z. S)**
5. **R.S (successor of F. S, who is the brother of Z. S)**

All from Prizren

Represented by the lawyer **Y. K**,Prizren**Vs.***Respondent***ACI "P-E"**, Prizren/Prizren,Represented by **Privatisation Agency of Kosovo**, "Ilir Konushevci" 8,
Prishtinë/Priština

The Appeals Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (SCSC), composed of Mr.sc Sahit Sylejmani, President of the Special Chamber, the Presiding Judge, Vladimir Kanev, Werner Kannenberg, Ilmi Bajrami and Sabri Halili, Judges, on the appeal of the claimants filed against the Judgement C-III-12-0745 of the Specialized Panel of the SCSC, dated 2 August 2016, after deliberation held on 24 November 2016, issues the following:

J U D G E M E N T

1. **The appeal of the claimants is rejected as ungrounded**
2. **The judgement C-III-12-0745 of the Specialized Panel of the SCSC, dated 2 August 2016 is upheld.**

Factual and Procedural Background

On 1 April 2010 the claimants filed an ownership claim with the Municipal Court in Prizren, requesting from the court the annulment of the contract on exchange of immovable property, with reference number, Leg.nr. 651/66 and which is verified in the Municipal Court of Prizren. The claimants also requested the right of co-ownership over cadastral parcels no. **135, 136** and 4/5 of the cadastral parcel no. **138**, evidenced according to the possession list no. 10 and 284, Cadastral Zone Petrovë (contested property). Furthermore, the claimants in their claim asserted that Z.S and his brothers H.S and F.S lived in the family community. F.S is the predecessor of the two claimants L. S and R. S.

According to the claimants, Z. S, concluded a contract on exchange of immovable property with the respondent, based on which Z.S took into possession and ownership the cadastral parcel **290/1**, giving to the respondent the cadastral parcels **135, 136** and 4/5 of the cadastral parcel no. **138** (claimed property). According to the claimants, the contested contract was never fulfilled. The claimants asserted that continually they possessed and used the contested properties, while in the other hand they have never been in possession of the parcel no. **290/1**, which based on the cadastral history it is evidenced in the cadastral registry as the property of their predecessor Z.S.

Dated on 16 March 2011 the Municipal Court in Prizren through the Decision C.nr. 247/10 declared itself incompetent to decide in regard to the subject matter of the claim and therefore decided to refer the case for adjudication to the SCSC.

On 27 April 2012 the case in hand was registered in the SCSC with the number C-III-12-0745.

On 2 August 2016 the Specialized Panel of the SCSC with the Judgement C-III-12-0745 rejected the claim of the claimant H. S due to the lack of active legitimacy in the proceedings, the claim of the claimants in regard to the cadastral parcels **135,**

136/2 was rejected due to the lack of passive legitimacy, whereas the claim in regard to the cadastral parcels No. **361/1** and **138** was rejected as ungrounded. The Specialized Panel reasoned that the Claimant H.S is also not a contracting party in the contract regarding the exchange of the immovable properties, a contract which was requested to be annulled, and also he is not a successor of Z.S, therefore on the basis of Article 73 of LCP he lacks active legitimacy. Furthermore, the Specialized Panel argued that based on the submitted cadastral evidence, the cadastral parcel no. **135** and **136/2** are neither in the ownership nor in the possession of the respondent, therefore, the claim in regard to these parcels is rejected because on the basis of article 73 of the LCP the respondent lacks passive legitimacy. The claim in regard to cadastral parcels No. **136/1** and **138** is rejected for the reason that the Specialized Panel reached the conclusion that the legislation of Kosovo does not include a law for the restitution of properties that were taken after the Second World War, whereas in the other hand Article 8a of the Law on Transfer of the Immovable Properties from the year 1981 of the Republic of Serbia has never been applicable in Kosovo, and this is also the stance of the Appeals Panel of the SCSC, as referred in the case with number AC-I-13-0114-A0001 issued on 11 December 2014. Furthermore, the Specialized Panel has reasoned that the Appeals Panel has created a stance in the aforementioned case stating that the Law on Contracts and Torts from the year 1978 has no retroactive power for the cases and contracts concluded prior to 1 October 1978, when the Law on Contracts and Torts entered into power. The Specialized Panel also reasoned that since 1966 to 2010 the claimants have never challenged the validity of the contract even though they were able to do it from 1991 up to 1999, based on the Law on Supplementing the Law on Circulation of the Immovable Properties. The Specialized Panel also found that the deadlines for seeking the annulment of rescindable contracts, such as it is the case with this one, have already passed at the moment of submitting the claim and that the principle of legality and security lies in understanding this interpretation. In the end, the Specialized Panel concluded that M.Sh.L and R.S acted in the capacity of the successors of the late Z. S and F. S and they proved their active legitimacy based on a copy of the Decision on Inheritance and a Notice in regard to the review of the inheritance issued by the Notary Office of A. M. M.

On 25 August 2016, the claimants (hereinafter the appellants) submitted a timely appeal against the Judgement of the Specialized Panel of the SCSC, C-III-12-0745, dated 2 August 2016, due to the essential violation of the procedural provisions, incorrect confirmation of the factual situation and wrong application of the substantive law. The appellants require from the Appeals Panel to approve their appeal as grounded, to amend the appealed judgement and to approve the claim as grounded or else to quash the appealed judgment and remit the case for retrial with the first instance court. Furthermore, in the appeal the appellants asserted that the contested property belonged to Z.S, who used to be the mutual predecessor of claimants, and in such cases the land was registered only in the name of one brother, although the land was laboured by all of the brothers and therefore it was a land that belonged to all of them. Therefore, according to the appellants the court should not have rejected the claim of the claimant H.S due to the lack of the active legitimacy. Further in their appeal the appellants asserted that a request was made to the court to conduct a sight visit, but however such a request was not taken into consideration, and therefore according to them for this reason the court had a wrong approach in regard to the reality of these land parcels. In the appeal it was asserted by the appellants that the cadastral parcel **290/1**, which is subject of the exchange contract, was never used or possessed by the claimants, therefore according to them this contracting relationship for the exchange of the properties was not valid and it created no legal effect. In the appeal the appellant still claim that Article 8a of the Serbian Law on Transfer of Immovable Property is applicable in the territory of Kosovo, because according to them the Civil Branch of the Supreme Court of Kosovo holds such a stance, and it is surprising to them how the Special Chamber which is part of the Supreme Court could hold a different legal stance.

On 15 September 2016 the Appeals Panel issued an order, serving the appeal of the appellants to PAK in order for it to provide a response to the appeal. PAK received the order on 16 September 2016.

On 6 October 2016, PAK filed a submission and responded to the appeal of the claimants. Furthermore, in the response to the appeal PAK requested from the court to reject the appeal as ungrounded and to uphold the appealed judgment of the Specialized Panel. In the response to appeal PAK asserts that it was the obligation of the claimants to regulate the issue of inheritance in terms of Article 171 of the Law on Uncontested Procedure, which is not regulated even in the appeals proceedings. PAK in the response to the appeal asserts that the contested properties do not appear in the name of the claimant and therefore in terms of this the respondent party lacks with passive legitimacy.

Legal Reasoning

The appeal is admissible but ungrounded.

Based on Article 64.1 of the Annex of the Law of Republic of Kosovo No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (the Annex), the Appeals Panel decided to dispense with the oral part of the proceedings.

The merits of the appeal and the assessment of the Appeals Panel

The appealed judgment of the Specialized Panel is correct in its outcome and legal reasoning, therefore it should be upheld.

The basis of the dispute between the parties is the annulment of the contract for the exchange of the immovable properties, leg. nr. 651/66, confirmed with the Municipal Court in Prizren, as well as the claim of the claimants to be recognised the right of co-ownership over cadastral parcels no. **135, 136** and 4/5 of the cadastral parcel no. **138**, evidenced according to the possession list no. 10 and 284, Cadastral Zone Petrovë (contested property).

The Claimants seek the confirmation of the ownership over the claimed property based on the inheritance and possession of these properties.

The allegation of the claimants is that their predecessor Z.S concluded a contract on exchange of immovable property with the respondent in 1966, based on which contract the claimants' predecessor Z. S took in the cadastral parcel **290/1**, giving to the respondent the cadastral parcels **135, 136** and 4/5 of the cadastral parcel no. **138**. According to the claimants, the contested contract was never fulfilled as they have never been in possession of the parcel no. **290/1**, which was taken by their predecessor in exchange with the above mentioned parcels.

The claimants also claim that from the moments of the exchange of the immovable properties with the respondent happened they have been continually in possession and usage of the contested property.

According to the cadastral history, the parcel No. **290/1** is registered in the cadastral registry in the name of Z.S, who is the predecessor of the first two claimants. This is a sufficient evidence that the exchange of the properties on the basis of the exchange contract has happened.

The cadastral parcels no. **135** and **136/2**, based on the ownership certificates, which were sent by PAK to the court, are not in the possession or ownership of the respondent SOE, but in the name of third persons.

The claimant H.S was not a contracting party for the exchange of the immovable properties neither was he the successor of the late Z.S.

In the circumstances of this case, it is clear that the decision of the Specialized Panel was correct when it rejected the claim of H.S due to the lack of the active legitimacy. Also the decision of Specialized Panel is correct when it rejected the claim for the cadastral parcel No. **135** and **136/2**, as based on the ownership certificates it was confirmed that those parcels are not evidenced in the cadastral

records in the name of the respondent, but in the name of the third parties, therefore for these cadastral parcels the respondent lacked with passive legitimacy.

Whereas in regard to the cadastral parcels No. **136/1** and **138** it is confirmed they are evidenced in the cadastral records in the name of the respondent SOE, however these claimed properties cannot be resumed because there is no legal basis for such restitution.

The Appeals Panel notes that the Specialized Panel has correctly concluded that in Kosovo there is no law for the restitution of properties that were taken after the Second World War, whereas in the other hand Article 8a of the Law on supplementing and amending the law on the Transfer of the Immovable Properties of the Republic of Serbia as well as the Law on Contracts and Torts from the year 1978 cannot be applied in this case. The legal reasons for the inability of application of these legal provisions, as concluded by the Specialized Panel, have already been given by the Appeals Panel in some other similar cases.

Therefore, for these reasons, the claim of the claimants in regard to the parcels **136/1** and **138** has no legal basis to be approved and it was therefore correctly rejected as ungrounded.

The Appeals Panel concluded that on the basis of the Decision on Inheritance, which is in the case file, the claimants M and Sh.S were the successors of Z.S, therefore their active legitimacy in the proceedings had been confirmed. Whereas, the claimant R.S and L.S, based on the Notary Notification issued by the Notary Office stating that they are successors of F.S, however this issued notary document does not replace the Decision on Inheritance which is the only document on the basis of Article 171 of Law on the Uncontested Procedure, by which the active legitimacy of the parties in the proceedings can be verified.

Therefore, for these reasons, the Appeals Panel considers that the claimant L.S and R.S has no active legitimacy to the proceedings. Consequently, their claims should

be rejected, apart from the above mentioned reasons also on the basis of the lack of their active legitimacy, which they failed to prove in the proceedings before the First Instance Court.

As stated above and pursuant to Article 10.10 of the Law on SCSC it is decided as in the enacting clause of this Decision.

It was decided by the Appeals Panel of the SCSC dated on 24 November 2016.

Court Fees

No court fees are to be imposed to the appellants as they have already paid the court fee in the amount of 100 euro for the appeals proceedings dated on 20 September 2016.

Mr. sc. Sahit Sylejmani, Presiding Judge

(signed)