JUDGMENT NO. 43 YEAR 2022

In this case, the Court considered a referral order from the Tribunal of Verona challenging a set of property law provisions dealing with physical persons who purchase real property "on paper," when it is yet to be built. The provisions extended protections to purchasers who contracted to buy after the builder had submitted a request for a building permit, in the form of a right of preemption (or right of first refusal). The Court held that the provisions were unconstitutional to the extent that they failed to extend the right of preemption to buyers of new construction who contracted to buy prior to the submission of the request for a building permit.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 1(1)(*d*) and 9 of Legislative Decree No. 122 of 20 June 2005 (Provisions protecting the proprietary rights of buyers of real property to be constructed, pursuant to Law No. 210 of 2 August 2004) and of Article 1(1) of Law No. 210 of 2 August 2004 (Delegation to the government to protect the proprietary rights of buyers of real property to be constructed), initiated by the second civil division of the Tribunal of Verona amid ongoing proceedings between S.C.A. srl and others and F.C. *società cooperativa edilizia*, with a referral order of 2 October 2020, registered as No. 24 of the 2021 Register of Referral Orders and published in the *Official Journal* of the Republic, No. 9, first special series of 2021.

[omitted]

Facts of the case

[omitted]

Conclusions on points of law

1.– With a referral order of 2 October 2020, registered as No. 24 of the 2021 Register of Referral Orders, the second civil division of the Tribunal of Verona has raised, in reference to Article 3 of the Constitution, questions as to the constitutionality of Articles 1(1)(*d*) and 9 of Legislative Decree No. 122 of 20 June 2005 (Provisions protecting the proprietary rights of buyers of real property to be constructed, pursuant to Law No. 210 of 2 August 2004), as well as Article 1 of Law No. 210 of 2 August 2004 (Delegation to the Government to protect the proprietary rights of buyers of real property to be constructed).

2.– The referring tribunal states that the F.C. business cooperative had stipulated housing reservation contracts with certain partners, "under which the *Cooperativa* commit[ted] to transfer property rights to the reserving partners upon payment of compensation, already made in part at the time of the signing of the contract of sale," with regard to real property that the company had committed to build in an area of public housing area.

In its order initiating these proceedings, the referring tribunal recounts that in July 2013 the company, after having formulated the request for a building permit and then obtained the deed of habitation and the certificate of habitability, assigned the units on a provisional basis. The company turned them over to the respective inhabitants who had

reserved them, without going through the complete procedure to make the final assignment of the units or official transfer of the property.

The referring tribunal also states that, with an official act filed on 20 October 2017, the entire building complex was foreclosed upon and, in the course of enforcement proceedings, the professional delegate found that eighteen units were occupied by parties who had reserved housing. These parties had filed petitions to recognize their right of preemption pursuant to Article 9(1) of Legislative Decree No. 122 of 2005. The delegate accordingly asked the enforcing tribunal to rule on the existence of the right and on how it may be exercised. Both the ruling of the enforcing court in its decree under Article 591-*ter* of the Italian Code of Civil Procedure, and the subsequent order handed down by the same court on appeal, rejected the petition on the grounds that the right of preemption fell, pursuant to the aforementioned Article 9, only to subjects who are buyers of real property to be constructed, as defined by Article 1(1)(*d*) of the same legislative decree and by Article 1(1) of Law No. 210 of 2004.

The referring tribunal recounts that, in opposition to the latter ruling of rejection, nearly all the parties – who had already objected to the enforcing court's decree, laying out a thorough interpretation of Article 9 of Legislative Decree No. 122 of 2005, so as to encompass purchasers of real property for whom, at the time of purchase, no building permit had yet been requested – filed appeal.

[omitted]

5.– In order to proceed with an examination on the merits of the question raised as to constitutionality, it is useful to first provide for a rapid analysis of the legal framework of reference.

5.1.– Legislative Decree No. 122 of 2005, which implemented Enabling Law No. 210 of 2004, was intended to enhance (with respect to the normal set of civil remedies) protections for physical persons who, by putting their savings toward the purchase of a home, expose themselves to the risks. These risks may be particularly high in connection with financial operations the object of which is real property that is "yet to be constructed or the construction of which is not yet completed, being in such a state as does not yet allow for granting the certificate of habitability."

The framework of available remedies marks different points of this complex matter.

Some protections are connected with the stipulation of the contract with deferred statutory or actual effects (Articles 2, 3, and 6). Others operate at the time of transfer of the property (Article 4) or in light of a contract that effects a transfer of ownership (Articles 7 and 8). Still others flow, pursuant to the law, where particular circumstances arise subsequent to the original purchase deed (Articles 9, 10, and 12).

This structure of protections, in its entirety, serves the purpose of protecting savings, implementing Article 47 of the Constitution. Some rules, however, such as Articles 9 and 10 of Legislative Decree No. 122 of 2005, also aim at meeting the primary need to defend the inviolable right to housing (Article 2 of the Constitution).

5.2.– It bears specifying further that both Article 1(1) of Enabling Law No. 210 of 2004, and the definitions provision under Article 1(1)(*d*) of Legislative Decree No. 122 of 2005 connect the concept of real property to be constructed – which places objective boundaries on the scope of the protections – with real property characterized not by having not yet been constructed, but also by the fact that "the building permit [has been] requested."

5.3.– This last element of the legal qualification of the *res* excludes from the framework so-called purchasers "on paper." This Court, with Judgment No. 32 of 2018,

held that this was not an unreasonable limitation of the scope of protection of the provision at issue in that case, since it concerned the specific *rationale* underlying the provisions governing the duty of builders to provide credit guarantees simultaneously with the signing of the purchase contract with deferred statutory or actual effect.

In particular, the aforementioned duty – with its corresponding remedy of nullifying the protection, in favor of the purchaser, as the weaker party to the contract – covers the double risk of the failure of the builder (in the terms specified by Article 3(2) of Legislative Decree No. 122 of 2005) or that the latter fails to include the insurance policy described in Article 4 in the deed transferring the property. In such a case, the credit guarantees the restitution of all sums and payments transferred to the builder in advance of the property transfer.

This Court, in rejecting the question as to the constitutionality of Article 1(1)(*d*) of Legislative Decree No. 122 of 2005, due to the failure to extend protection to buyers of new construction, held that, "the challenged rules pursue the aim of a specific guarantee for the reliance, deserving of protection, which buyers place on the effective execution (or completion, if already begun) of construction of the property as described in the preliminary purchase and sales agreement. This reliance is induced by the fact that the building permit has been granted, or, at least that the request to obtain one has been submitted." As a result, the Court pointed out that, "merely initiating the administrative procedure through the request for a building permit gives […] a degree of concreteness to the building initiative of the promisor […], providing a basis for a greater level of reliance [in the buyer] in their decision to assent to the contractual commitment to purchase the property to be constructed by taking on the related economic burdens."

Ultimately, with reference to the protection constituted by the builder's duty to provide credit guarantees, this Court, in addition to the primary function of protecting the purchaser's savings, also acknowledged the purpose of favoring reliance that has already been consolidated, given that it is part of a legal process.

5.4.– In the present case this Court must again consider the constitutionality of the discriminatory character of the exclusion of purchasers of new construction from the sphere of the governing provisions, but this time, unlike in the case of the question considered in Judgment No. 32 of 2018, the challenge referred to the Court concerns the different protection offered by Article 9 of Legislative Decree No. 122 of 2005.

In particular, that article introduces a right of preemption, which may be enforced in the event of the forced sale of the real property, following the builder's default – a right that arises *ex lege* where the following requirements are met.

In the first place, the real property must have been handed over, in terms of legal possession or mere occupancy, on the basis of the different circumstances surrounding the transfer.

Second, the real property must have been intended by the purchaser (or by the promised purchaser) to serve as the purchaser's principal residence, or as that of their spouse or of a first-degree relative.

Finally, according to the analysis of the referring tribunal, the right of preemption may only be exercised by parties who have purchased real property to be constructed, which fits the definition found in Article 1(1)(*d*) of Legislative Decree No. 122 of 2005, thus excluding persons who, despite having purchased real property that is not yet constructed or the construction of which is incomplete, had, nevertheless, concluded the contract before the constructor presented the request for a building permit.

Among the referring tribunal's reasons for reaching the aforementioned

interpretation and, therefore, holding that the definition in Article 1(1)(*d*) of Legislative Decree No. 122 of 2005 places objective limits on all the protections provided by the legislative delegate in the same provision, its argument founded on the reference to the enabling law proves decisive. Indeed, Law No. 210 of 2004, at Article 1(1), explicitly provides that the delegation to the Government to emanate one or more legislative decrees is to involve "provisions for the protection of the proprietary rights of buyers of real property concerning which the building permit has been requested and which are yet to be constructed or the construction of which are not yet completed, being in such a state as does not yet allow for granting the certificate of habitability."

The cited provision is, thus, explicit in delimiting, with contents which then flow into the definition provision in Article 1(1)(*d*) of Legislative Decree No. 122 of 2005, the entire scope of the "protection of the proprietary rights of buyers of real estate" to be constructed, which excludes any interpretation of the legislative decree that falls outside the guidelines indicated in the delegation.

The referring tribunal's interpretive reconstruction finds confirmation, moreover, in the case law of the Supreme Court of Cassation, according to which, "[t]he perimeter of application of the new regulatory scheme of protection introduced by Legislative Decree No. 122/2005 is laid out in Article 1" (Supreme Court of Cassation, second civil division, Judgment No. 5749 of 10 March 2011; and see, in the same vein, the second civil division, Judgment No. 24535 of 1 December 2016).

6.– Having said all this, the question as to the constitutionality of the provisions of Article 1(1) of Law No. 120 of 2004 and Articles 1(1)(*d*) and 9(1) of Legislative Decree No. 122 of 2005 is well founded, in reference to Article 3 of the Constitution.

In particular, the challenge related to the unreasonable disparity of treatment between those who meet the conditions laid out in the provisions of Articles 1(1)(*d*) and 9(1) of Legislative Decree No. 122 of 2005 and those who equally meet the requirements in those provisions, with the exception that they concluded the purchase and sales agreement for the real property with deferred statutory or actual effects before the builder submitted the request for a building permit.

6.1.– Here it bears noting that the case law of this Court has clarified, in general terms, that if "the principle of equality expresses a relational judgment such that identical rules must apply in equal situations and, conversely, different rules should apply to different situations. This is tantamount to saying that a dynamic model must be applied in the analysis of a rule's conformity to the principle, focusing on "why" a given set of rules makes a given, specific distinction within the egalitarian fabric of the legal system, and then draw the necessary conclusions with regard to the correct use of regulatory power" (Judgment No. 89 of 1996, later Judgments No. 276 of 2020 and 241 of 2014; in the same vein, Judgment No. 5 of 2000).

6.2.– In light of the aforementioned case law, it is, therefore, necessary to investigate the *rationale* of Article 9(1) of Legislative Decree No. 122 of 2005 and the structure of interests surrounding the right of preemption, in order to compare the two categories of purchasers under discussion and assess whether the diversity of treatment is unreasonable and a breach of the principle of equality.

The provision under review does not grant protection to persons who merely trust in the construction of the real property, like in the case of the protection offered by the duty of the builder to provide credit guarantees, concerning which the aforementioned Judgment No. 32 of 2018 held that the exclusion of less entrenched forms of reliance or those that, at any rate, were less deserving of protection, was not unreasonable.

On the contrary, the right of preemption arises *ex lege* on the twofold premise that the real property has been constructed and that the housing was intended, after transfer, to serve as the principal residence of the buyer, or of their spouse or a first-degree relative.

The right of preemption, by means of the claim to be preferred under equal conditions in a forced sale, thus pursues the aim of preserving a present legal interest, the inviolable right to housing, which is triggered, on condition that the real property is transferred to the buyer or contracted buyer, by the intention to use to house to meet a primary existential need of the person or their family.

And indeed, this Court, "beginning with Judgment No. 404 of 1988 (and see the later Judgments, among others, Nos. 44 of 2020, 168 of 2014, 161 of 2013, 61 of 2011, and 176 of 2000, and Order No. 76 of 2010)" (Judgment No. 112 of 2021) has "included in the catalogue of inviolable rights" of the person the right to housing, which "belongs among the essential requirements that characterize sociality, to which the democratic State designed by the Constitution conforms" (Judgment No. 217 of 1988 and, more recently, Judgments Nos. 128 of 2021 and 44 of 2020), because it falls to the State to ensure "that the life of each person reflect, every day and in all its facets, the universal image of human dignity" (Judgment No. 217 of 1988).

If, therefore, the right to housing originates, in the scenario designed by Article 9(1) of Legislative Decree No. 122 of 2005, from the transfer of the real property to the purchaser or the contracted buyer and from its intended use to meet the need for housing, then the inviolable right to be protected remains identical where these conditions are met, both in the event that the original purchase of the real property occurred after the builder submitted the request for a building permit and in the event that it was stipulated before such a request was submitted.

6.3.– It is worth adding that, at the point at which the prerequisites that constitute the right of preemption are fulfilled *ex lege*, the type of administrative procedure concerning the real property turns out to be independent and unconnected with the legal issues.

The potential conclusion of the administrative process or its legitimacy are circumstances that are independent from and are not influenced by the fact that the sales contract was concluded before or after the mere submission of the request for a building permit.

Even from this point of view, no reason presents itself that could serve to justify a difference in the treatment of the two categories of buyers in the protection offered by the right of preemption to the home.

6.4.– Finally, the outcome remains unchanged if one compares the importance of the protection attributed to the two categories of purchasers with the structure of other interests implicated by the provisions of Article 9(1) of Legislative Decree No. 122 of 2005.

Indeed, the right of preemption does not place duties upon the counterparty to the contract, the builder, but instead involves the interests of admitted creditors and of third party buyers in the forced sale. Not only are these interests external to the context in which the original sales agreement was formed, but, above all, they become subject to a condition, by means of the preemption, which does not change regardless of whether the protection applies to persons entitled to a right to housing, be they purchasers of real property who fit the definition of Article 1(1)(*d*) or to buyers of new construction only.

The creditors, in any case, receive compensation in measure no different than they would otherwise be guaranteed, given that the right of preemption concerning the real

property is granted to the purchaser at the final price reached at auction, at the conclusion of the enforcement proceedings. And the third-party assignees do not face particular risks given that, in the event that the authority overseeing the forced sale grants the real property to the right of preemption holder, they are under no obligation to pay, whereas, in the event the adjudication rules in their favor, the right of preemption holder loses the option to buy (Article 9(5)).

6.5.– Therefore, in light of the underlying *rationale* for Article 9(1) of Legislative Decree No. 122 of 2005 and of the structure of interests touched upon by its provisions, there is an unreasonable disparity of treatment between purchasers of real property to be constructed and purchasers of real property that is also yet to be built, who do not fit into the definition in Article 1(1)(*d*) of Legislative Decree No. 122 of 2005 and the provision of the Enabling law, simply because the purchase contract with deferred statutory or actual effects was concluded prior to the submission of a request for a building permit.

Nor can the reference that Article 9 makes to the earlier Article 2 (on the guarantee) alter this conclusion, since the two scenarios are not logically dependent upon one another: the right of preemption may also (and not only) be exercised in the event in which the purchaser has already used the guarantee, thus the rule does not prohibit its exercise, even where there is no guarantee to use.

If anything, it bears pointing out that it is precisely the absence of protection offered by the guarantee that makes the buyer of new construction all the more needy of the protection offered by the right of preemption. In a situation in which the purchaser cannot easily recover what they have paid in the form of advance payment (or even full payment of the total price, if the definitive purchase occurred and was later rendered null) to the now-bankrupt builder through the regular legal avenues, it is patently unreasonable to deny the purchaser, who lives in the unit now subject to forced sale, the right of first refusal on equal terms, and to, in addition, offer them a new price in the context of the sale.

7.– In light of all this, the question as to the constitutionality of the combined provisions of Article 1(1) of Law No. 205 of 2005 and Articles 1(1)(*d*) and 9(1) of Legislative Decree No. 122 of 2005, is well founded in reference to Article 3 of the Constitution, insofar as they fail to recognize the right of preemption for physical persons who purchased before a request for a building permit was submitted.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that the combined provisions of Article 1(1) of Law No. 210 of 2 August 2004 (Delegation to the government to protect the proprietary rights of buyers of real property to be constructed), and Articles 1(1)(*d*) and 9(1) of Legislative Decree No. 122 of 20 June 2005 (Provisions protecting the proprietary rights of buyers of real property to be constructed, pursuant to Law No. 210 of 2 August 2004), are unconstitutional, insofar as they fail to recognize the right of preemption for physical persons who have purchased prior to the submission of a request for a building permit.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 January 2022.

Signed by:

Giuliano Amato, President

Emanuela Navarretta, Author of the Judgment