

MAŁGORZATA SEKUŁA-LELENO\*

**GLOSS**

**on the Supreme Court judgement of 21 July 2016, II CSK 604/15<sup>1</sup>  
Admissibility of issuing a preliminary ruling  
by a court in a non-litigious procedure**

The matter of admissibility of issuing a preliminary ruling does not constitute a novelty in the Supreme Court judgements. The general stand indicates admissibility of issuing preliminary rulings in a non-litigious procedure in accordance with general rules and there are no strict premises excluding such admissibility. This stand, although dominant, is not unquestionable and the main axis of the dispute is the scope of application of Article 318 §1 Code of Civil Procedure (CCP) in conjunction with Article 13 §2 CCP. Pursuant to Article 318 §1 CCP, a court may issue a preliminary ruling if it recognises that the claims have justified grounds. This means that the preliminary ruling cannot be issued only in cases concerning awarding performance or establishment of a legal relation or a right, and its issue is admissible only when both the grounds for claims and the amount are in question. As the Supreme Court rightly indicated in the judgement of 11 December 1999, I PKN401/99,<sup>2</sup> the issue of a preliminary ruling aims to avoid further purposeless work of a court connected with the establishment of the amount of the claims in a situation when the grounds for claims are doubtful. The aim is to implement the call for speed and effectiveness of proceedings laid down in Article 6 CCP and the principle of the economics of trials, which must be applied in a non-litigious procedure, too.

On the basis of a non-litigious procedure, the possibility of issuing a preliminary ruling is laid down in Articles 618 §1, 685 and 567 §2 CCP. The provisions determine also the scope of a court's cognition in those cases.

The judgements allowing the possibility of issuing preliminary rulings in a non-litigious procedure concerned proceedings the subject matter of which indicated the possibility of adequate application of Article 567 §2 CCP (i.e. in connection with the establishment of unequal share in the spouses' joint property), Article 618 §1 CCP

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<sup>1</sup> LEX No. 2094779.

<sup>2</sup> OSNP No. 8, item 259, 2001.

(i.e. in a dispute between co-owners concerning the right to apply for dissolution of the co-ownership or concerning the right of co-ownership), or Article 685 CCP (with respect to the right to claim distribution of inheritance and belonging of a given thing to the inheritance).<sup>3</sup>

There is a controversy in jurisprudence and the judicature over the issue whether a court can adopt a preliminary ruling in a non-litigious procedure also in cases other than those indicated, applying Article 318 §1 in conjunction with Article 13 §2 CCP, respectively. The Supreme Court expressed a positive opinion on this issue in resolutions of 9 May 1967, III CZP 37/67,<sup>4</sup> and of 7 July 1971, III CZP 35/71,<sup>5</sup> and then in a ruling of 21 October 1999, I CKN 169/98<sup>6</sup>.

The Supreme Court adopted a different stand in the justification for the resolution of seven judges of 26 February 1968, III CZP 101/67,<sup>7</sup> in which it substantiated inadmissibility of respective application of Article 318 CCP in a non-litigious procedure and stated that in the event of a lack of the above special provisions, matters indicated in them should be heard in a trial and regulations being exceptional in nature should be interpreted precisely, institutions typical only of a trial should not be transferred to the area of a non-litigious procedure, and a ruling that is constitutive in nature cannot be issued in a non-litigious procedure (e.g. the determination of a heir's unworthiness to inherit) if a ruling issued in a non-litigious procedure is declarative (e.g. confirmation of the acquisition of an inheritance). The arguments did not meet with approval from jurisprudence and the judicature.

However, the decision that is discussed in the gloss deserves attention because earlier the Supreme Court did not analyse a possibility of issuing a preliminary ruling in a case concerning establishing transmission servitude and acquisitive prescription claimed by the party to the proceedings, especially in a situation when there is a lack of regulations providing for such a solution. Thus, the Supreme Court's attempt to solve the above problem should be appreciated because it influences rational assessment of the appropriateness of non-litigious proceedings and the economics of trials. A preliminary ruling may be issued only when reasons related to the economics of trials are arguments for ruling on a given right or a legal relationship.<sup>8</sup>

It is worth taking into consideration the resolution of 7 May 2010, III CZP 34/10,<sup>9</sup> in which the Supreme Court expressed an opinion that in the case concerning

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<sup>3</sup> See, the Supreme Court rulings of: 8 November 2013, I CSK 732/12, 22 October 2009, III CSK 21/09 and the Supreme Court resolution of 7 May 2010, III CZP 34/10.

<sup>4</sup> OSNCP No. 11, item 198, 1967.

<sup>5</sup> OSNCP No. 1, item 4, 1972.

<sup>6</sup> See, more about this issue in: K. Piasecki, *Postępowanie sporne rozpoznawcze* [Preliminary proceedings in disputed grounds for a claim], Warsaw 2004, pp. 352–354; W. Broniewicz, *Postępowanie cywilne w zarysie* [Overview of civil procedure], Warsaw 2008, p. 240; W. Siedlecki, *Postępowanie nieprocesowe* [Non-litigious procedure], Warsaw 1988, p. 76; K. Korzan, *Postępowanie nieprocesowe* [Non-litigious procedure], Warsaw 1997, p. 156.

<sup>7</sup> OSNC No. 12, item 203, 1968.

<sup>8</sup> [Sic:] the Supreme Court in the ruling of 17 April 2000, V CKN 23/00, LEX No. 1218605.

<sup>9</sup> OSNC No. 12, item 160, 2010.

distribution of joint property after the termination of spouses' joint property, a court adjudicates on claims under Article 231 of the Civil Code (CC) in a judgement concluding the proceedings. However, a court may issue a partial or preliminary ruling if there are justifying circumstances. Thus, the Supreme Court admitted the issue of a preliminary or a partial ruling in matters other than indicated *numerus clausus* in Article 567 §2, Article 618 §1 and Article 685 CCP. It is indicated also that a court should use the possibility of issuing a partial or a preliminary ruling when it is purposeful and will allow the court to adjudicate in a case partially or will cause adjudication on the disputed grounds for a claim or another secondary issue that is subject to adjudication, without the conducting proceedings in other matters, which is not necessary in order to issue a partial ruling or may turn out to be useless if the partial ruling proved to be defective.

## CASE BACKGROUND

In the discussed case, the petitioner applied for the establishment of transmission servitude of the real property for the benefit of a business entity: Mazowiecka Spółka Gazownictwa with respect to the gas pipeline on its plot of land.

In the preliminary ruling of 5 December 2014, the Regional Court recognised that the motion had justified grounds. The Court established that the real estate had been entered into the land and mortgage register and the petitioner was a registered owner. Neither the petitioner nor the former owners had given their consent to build a gas pipeline on their land.

Analysing the legal situation, the Regional Court expressed an opinion that because the party to the proceedings challenged the grounds for motion to establish transmission servitude, there were reasons for issuing a preliminary ruling in accordance with Article 318 §1 in conjunction with Article 13 §2 CCP. According to the Court, all the requirements for claims laid down in Article 305<sup>1</sup> and Article 305<sup>2</sup> §2 CC were met in principle.

The District Court in Łódź in the decision of 29 May 2015 dismissed the appeal of the party to the proceedings. The Court held that, although the possibility of issuing a preliminary ruling in a non-litigious procedure based on Article 318 §1 in conjunction with Article 13 §2 CCP raised doubts in case law, the judicature admitted such a possibility because the Supreme Court in the resolution of 7 May 2010, III CZP 34/10<sup>10</sup> admitted the issue of a preliminary or partial ruling in cases other than indicated *numerus clausus* in Article 567 §2, Article 618 §1 and Article 685 CCP.

The Court also indicated the a court should use the possibility of issuing a partial or preliminary ruling when it is purposeful and will allow a court to adjudicate partially in the case or will cause a court to adjudicate in a case partially or will cause adjudication on the disputed grounds for a claim or another secondary issue that is subject to adjudication, without conducting proceedings in other matters,

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<sup>10</sup> OSNC 2010, No. 12, item 160, 2010.

which is not necessary in order to issue a partial ruling or may turn out to be useless if the partial ruling proved to be defective. In the Court's opinion, such a situation occurred in the case because the adjudication on justified grounds for a claim allowed the Regional Court to adjudicate on the claim of the servitude acquisitive prescription.

In the cassation appeal, the party to the proceedings first of all claimed that the provisions of Article 318 §1 in conjunction with Article 13 §2 CCP were infringed because the provisions of Article 318 §1 CCP concerning a trial were applied to a non-litigious procedure. This made it possible to issue a preliminary ruling in a situation when in a non-litigious procedure, there are special regulations concerning admissibility of issuing preliminary rulings, and this resulted in the recognition of admissibility of issuing a preliminary ruling in the proceedings to establish transmission servitude, for which there is a lack of special regulations providing for such a possibility.

The Supreme Court in the theses of its ruling stated that:

- (1) Preliminary rulings laid down in Article 567 §2, Article 618 §1 and Article 685 CCP differ from preliminary judgements in the meaning of Article 318 §1 CCP because they adjudicate independently, finally and completely on the matters that are significant for the main case without referring the parties to the litigation mode.
- (2) Preliminary rulings adjudicating on prejudicial issues may be adopted only in distributing proceedings and not in other cases heard in this mode, and in order to issue a "classical" preliminary ruling in a non-litigious procedure, the requirements laid down in Article 3118 §1 in conjunction with Article 13 §2 CCP must be met.
- (3) In the light of the provisions implementing the principle of the proceeding continuity and integrity, Article 318 §1 CCP is recognised as an exception to it because it leads to the division of the proceedings into two separate stages. Such nature requires, in accordance with the principle *exceptiones non sunt extendae*, that it should be precisely interpreted and the interpretation should take into consideration the aim of the norm contained in it, which is to serve the economics of trials.
- (4) The Court disapproved of the opinion that what determines whether a given matter may be subject to adjudication with the use of a preliminary ruling is its significance for the main claim and the need to issue a final ruling, which means the need to adjudicate *ad casum* on such possibility to particular types of cases (e.g. in the case concerning the establishment of the right-of-way) and the use of an argument of the lack of dependence between "grounds and amount" is insufficient.

The Supreme Court indicated that, although in a non-litigious procedure a preliminary ruling can be issued based on general rules (Article 318 §1 in conjunction with Article 13 §2 CCP), in this case, the respective application of this procedural instrument cannot mean its extension based on an unjustified interpretation. According to the Court, the argument for such precise interpretation of Article 318 §1 CCP is, first of all, the principle of a non-litigious procedure that is no dispute between the parties concerned. The Court disapproved of the opinion expressed in the literature that: "whether a given issue may be subject to adjudication in the form

of a preliminary ruling is its significance for the main claim and the need to issue a final ruling, which means the need to adjudicate *ad casum* on such possibility to particular types of cases (e.g. in the case concerning the establishment of the right-of-way) and the use of an argument of the lack of dependence between ‘grounds and amount’ is insufficient”. The Court justified this opinion mainly quoting the binding stand on the legal principle expressed in the resolution of seven judges of the Supreme Court of 26 February 1968, III CZP 101/67, and stated that approval of such a stand “would give a court a possibility of issuing preliminary rulings in many cases, regardless of the lack of the requirement of disputability of the grounds for the claim and its amount laid down in Article 318 §1 CCP”.

## GLOSS

The judicature recognises the provision of Article 318 §1 CCP as an exception to the principle of the trial continuity and integrity because it leads to the division of a trial into two separate substantive stages. At the same time, in accordance with the principle *exceptiones non sunt extendae*, this nature of the proceedings requires its precise interpretation, which should take into account the aim of the norm contained in it that is to serve the economics of trials.<sup>11</sup> This criterion allows former adjudication of the issues in dispute before adjudicating on the essence of a claim.

In the light of Article 318 §1 CCP, issuing a preliminary ruling is admissible and also justified when the grounds for a claim are, in accordance with the opinion of the first instance court, doubtful and subject to litigation and when the claim amount is also in dispute and its establishment involves laborious, often also costly, evidence-taking proceedings, which might turn out to be useless in case the petitioner’s claims were found groundless by the court of second instance.

The interpretation of “grounds for a claim” was the subject matter of opinions expressed in jurisprudence as well as in the Supreme Court judgements.<sup>12</sup> What follows is a stand that the term means a specific right or a legal relationship and not a legal or actual opinion, which a court wants to express in its ruling.<sup>13</sup>

In a non-litigious procedure, there are two types of preliminary rulings. The first group includes those that can be issued based directly on the provisions regulating a non-litigious procedure (e.g. Articles 618 and 688 in conjunction with Articles 618, and 567 §3 in conjunction with Articles 688 and 618 CCP). The second group concerns the possibility of issuing a preliminary ruling with a respective application of Article 318 via Article 13 §2 CCP.<sup>14</sup>

<sup>11</sup> [Sic:] the Supreme Court in the ruling of 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010, LEX No. 533567.

<sup>12</sup> See, justification of the resolution of the Supreme Court of 19 November 1957, 4 CO 15/57, OSN No. 4, item 114, 1958; the Supreme Court judgement of 28 June 1982, IV CR 230/82, OSNCP No. 2-3, item 42, 1983.

<sup>13</sup> Supreme Court judgement of 4 February 2000, II CKN 738/98, OSNC No. 7-8, item 146, 2000.

<sup>14</sup> See, M. Manowska, [in:] *Komentarz do art. 318 kodeksu postępowania cywilnego* [Commentary on Article 318 CCP], LEX Nb 6; and with respect to this issue: the Supreme Court resolutions of:

As concerns the claims of a cassation appeal, first of all it is necessary to examine whether it was admissible to issue a preliminary ruling in the case based on Article 318 §1 CCP and if it could apply to the party's claim concerning acquisitive prescription of servitude. This, on the other hand, raises a more general question about admissibility of preliminary rulings in a non-litigious procedure in cases other than those clearly listed under Title II, Book II of the Code of Civil Procedure.

The special nature of the introductory provisions laid down in Articles 567, 618 and 685 CCP differentiates them from preliminary rulings in the meaning of Article 318 §1 CCP. They adjudicate on their own on litigious issues that have prejudicial significance for the main case without referring the parties to the litigation mode.<sup>15</sup>

The Supreme Court, in the justification of its stand, rightly drew attention to the argument raised in the literature that "regardless of the concurrence of the name, the preliminary rulings issued in distributing proceedings are not rulings that are equivalent to preliminary rulings in the meaning of Article 318 §1 CCP. A court applies them to adjudicate on claims and secondary issues related to the main claim, which in case of dispute must be adjudicated before the main subject of the proceedings. The decisions included in them are final and prejudicial in relation to the main subject in dispute. Thus, unlike 'classical' preliminary rulings, they may also contain negative content. With the use of those rulings, a court issues a final and complete adjudication in the dispute and not only on the grounds for a claim like in general preliminary rulings. Thus, the subject of the ruling here is not only adjudicating on the grounds but a final solution to a given issue within the scope indicated in a special provision, which is important for the final adjudication in a distributing proceedings".<sup>16</sup>

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7 May 2010, III CZP 34/10, OSNC No. 12, item 160, 2010; 16 March 2007, III CZP 17/07, OSNC No. 2, item 20, 2008; 9 May 1967, III CZP 37/67, OSNCP No. 11, item 198, 1967; and the Supreme Court rulings of: 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010; 8 November 2013, I CSK 723/12, LEX No. 1439378.

<sup>15</sup> [Sic:] the Supreme Court ruling of 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010; See, the Supreme Court rulings of: 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010; 8 November 2013, I CSK 723/12, LEX No. 1439378; and 25 November 2009, III CSK 21/09, LEX No. 533567.

<sup>16</sup> See, K. Markiewicz, *Zasady orzekania w postępowaniu nieprocesowym* [Principles of adjudicating in a non-litigious procedure], Warsaw 2013, pp. 163–166; J. Gudowski, [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Commentary], Vol. III, Warsaw 2012, p. 76; W. Siedlecki, [in:] J. Policzkiewicz, W. Siedlecki, E. Wengerek, *Postępowanie nieprocesowe* [Non-litigious procedure], Warsaw 1980, p. 74; J. Krajewski, *Postępowanie nieprocesowe* [[Non-litigious procedure], Toruń 1973, pp. 56–57; K. Korzan, *Postępowanie nieprocesowe...* [Non-litigious procedure...], Warsaw 2004, pp. 181–182; A. Stempniak, *Postępowanie o dział spadku* [Proceedings concerning distribution of inheritance], Warsaw 2010, p. 412; M. Sychowicz, *Problematyka art. 618 k.p.c. (część I)* [Issues under Article 618 CCP (Part I)], *Nowe Prawo* No. 1, 1972, p. 54; I. Kunicki, *Glosa do uchwały SN z dnia 16.3.2007 r., III CZP 17/07* [Gloss on the resolution of the Supreme Court of 16 March 2007, III CZP 17/07], *OSP* No. 9, 2009, p. 644; T. Misiuk, *Problemy integracyjne postępowania działowego* [Issues related to combining the procedures in dissolution of co-ownership], Part 2, *Palestra* 1973, p. 6; J. Jagieła, *Dopuszczalność wydania wyroku wstępnego w procesie cywilnym. Zagadnienia wybrane* [Admissibility of a preliminary judgement. Selected issues], *Polski Proces Cywilny* No. 1, 2010, pp. 26–27; with respect to this issue, also compare the Supreme Court resolutions of: 28 April 2010, III CZP 9/10, OSNC No. 10, item 136, 2010, p. 30; and 16 March 2007, III CZP 17/07, OSNC No. 2, item 20, 2008.

In the literature, and also in the judicature, a difference in opinions occurred concerning the question whether a court may issue a preliminary ruling in a non-litigious procedure also in other cases based on appropriately applied provisions, in the meaning of Article 13 §2 CCP, Article 318 §1 CCP.

With respect to this question, the Supreme Court rightly indicted in the justification of its ruling that “The Code of Civil Procedure, striving to concentrate disputes between the parties to the proceedings concerning dissolution of co-ownership, division of joint property and distribution of an inheritance under one procedure, instead of introducing the norm that was in force before and making it possible to refer the parties to the proceedings to the litigation mode, introduced a new, formerly unknown in a non-litigious procedure, instrument of preliminary rulings. If there were no such provisions, the issues, as ones clearly not referred to a non-litigious procedure, would have to be heard in a trial (Article 13 §1 CCP). Even this circumstance indicates that the instrument of preliminary rulings cannot be extended over cases that the legislator did not envisage. Exceptions strictly defined in statute cannot constitute a general rule”. The arguments should be recognised as accurate.

In general, the Supreme Court admits the issue of a preliminary ruling in non-litigious procedures also in cases other than the above-mentioned or in the same cases but in different situations when there is a possibility and purposefulness of a preliminary ruling “as to the grounds”.<sup>17</sup> However, it is possible only in conditions that are required in case of a preliminary judgement, thus, if the subject of the proceedings concerns ruling of a claim amount or its establishment, and the claim is in dispute as to its grounds and its amount.<sup>18</sup>

The regulation laid down in Article 618 §1 CCP, providing for the issue of a preliminary ruling in the cases indicated in this provision, different from those under Article 318 §1 CCP, excludes the possibility of issuing, in accordance with Article 318 §1 in conjunction with Article 13 §2 CCP, a preliminary ruling in other cases departing from the scope of Article 318 §1 CCP, especially the possibility of

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<sup>17</sup> [Sic:] the Supreme Court in resolution of 9 May 1967, III CZP 37/67, OSNCP No. 11, item 198, 1967; the Supreme Court ruling of 21 October 1999, I CKN 169/98, OSNC No. 5, item 86, 2000.

<sup>18</sup> [Sic:] Also, W. Siedlecki, *Postępowanie nieprocesowe...* [Non-litigious procedure...], p. 76; by the same author, [in:] W. Berutowicz, Z. Resich (ed.), *System prawa procesowego cywilnego* [System of the civil procedure law], Vol. II: *Postępowanie rozpoznawcze przed sądami pierwszej instancji* [Preliminary procedure before first instance courts], Ossolineum, Warsaw 1987, p. 652; T. Misiuk, *Problemy integracyjne...* [Issues related...], p. 9; J. Gudowski, [in:] T. Ereciński (ed.), *Kodeks...* [Code...], Vol. III, Warsaw 2012, p. 76; K. Korzan, *Postępowanie nieprocesowe...* [Non-litigious procedure...], Warsaw 2004, pp. 181–183; B. Dobrzański, [in:] Z. Resich, W. Siedlecki (ed.), *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Commentary], Vol. I, Warsaw 1975, p. 804; J. Jodłowski, [in:] J. Jodłowski, K. Piasecki (ed.), *Kodeks postępowania cywilnego z komentarzem* [Code of Civil Procedure with a commentary], Vol. III, Warsaw 1989, pp. 854–855; I. Kunicki, *Glosa do uchwały SN z 16.3.2007 r., III CZP 17/07* [Gloss on the resolution of the Supreme Court of 16 March 2007, III CZP 17/07], No. 9, OSP 2009, p. 643; K. Markiewicz, *Zasady orzekania...* [Principles of adjudicating...], pp. 166–173.

issuing a preliminary ruling in the case concerning the establishment of transmission servitude.<sup>19</sup>

It is rightly raised in the literature that the structure of a preliminary judgement is determined by the possible separation of the two areas of jurisdictional activities: the establishment of the grounds and then, in the further course of a trial, adjudication on a sanction consisting, in case of allowance of a claim for performance, in its adjudication on a justified amount. The issuing of such a judgment always depends on a court's discretion: it is an establishing judgement within a lawsuit concerning awarding a claim amount, and its content may only be positive. However, if a ruling as to the grounds is to be negative, a court issues a final judgement dismissing the claim. A preliminary ruling cannot be issued if only the claim grounds are in dispute and there is no litigation concerning a claim amount or when the performance amount is established *ex lege*.

Thus, the Supreme Court rightly concluded that "although neither in the literature, nor in the judicature there are doubts over the stand that a preliminary ruling can be issued in a non-litigious procedure based on the general rules (Article 318 §1 in conjunction with Article 13 §2 CCP), respective application of this procedural instrument in such a case cannot mean extending it in the course of unjustified interpretation". The argument raised in the literature that the principle of a non-litigious procedure is a lack of dispute between the parties to the proceedings is an argument for an even more precise interpretation of Article 318 §1 CCP in case of its relevant application to rulings on the essence of a claim issued in this mode, but does not rule out the application of this provision. Due to that, there is criticism of the stand expressed in the literature that "*argumentum a contrario* requires special carefulness and is justified not only when logical premises allowing a conclusion that the legislator's intention aimed at that end support it".<sup>20</sup>

In accordance with the opinion expressed in the literature, whether a given issue may be subject of adjudication with the use of a preliminary ruling depends on its significance for the main claim and the need to issue a final ruling. The adoption of this conception means a need to adjudicate *ad casum* on such possibility to particular types of cases (e.g. in the case concerning the establishment of the right-of-way) and the use of an argument of the lack of dependence between "the grounds and the amount" is insufficient.<sup>21</sup> The Supreme Court, it seems, rightly recognised this stand as inaccurate and indicated, first of all, its incompatibility with the binding opinion

<sup>19</sup> See, the Supreme Court ruling of 30 September 2004, IV CK 455/04, Biuletyn SN No. 2, 2005, p. 15.

<sup>20</sup> [Sic:] B. Dobrzański, *Glosa do uchwały SN z dnia 9 maja 1967 r., III CZP 37/67* [Gloss on the Supreme Court resolution of 9 May 1967, III CZP 37/67], OSPiKA No. 2, item 30, 1968.

<sup>21</sup> [Sic:] K. Markiewicz, [in:] *Kodeks postępowania cywilnego*. Vol. I. *Komentarz do art. 318* [Code of Civil Procedure. Commentary on Article 318], Legalis Nb 12; with respect to this issue, compare K. Markiewicz, *Zasady orzekania...* [Principles of adjudicating...], pp. 172–173; similarly J. Gwiazdomorski, *Glosa do uchwały SN z 10.5.1967 r., III CZP 31/67* [Gloss on the resolution of the Supreme Court of 10 May 1967, III CZP 31/67], *Nowe Prawo* No. 6, 1968, p. 1048, see the same point of view in the Supreme Court resolution of 9 May 1967, III CZP 37/67, OSNCP No. 11, item 198, 1967; similarly B. Dobrzański, *Glosa do uchwały SN z 9.5.1967 r., III CZP 37/67* [Gloss on the Supreme Court resolution of 9 May 1967, III CZP 37/67], OSPiKA issue 2, 1968, p. 65.



of the Supreme Court expressed in the resolution of seven judges, a legal principle, of 26 February 1968, III CZP 101/67. Its adoption would give a court a possibility of issuing preliminary rulings in many cases, regardless of the lack of premises of disputability of the claim grounds and its amount laid down in Article 318 §1 CCP.

The Supreme Court decided in this resolution that a preliminary ruling in the case concerning the establishment of the acquisition of an inheritance is inadmissible. The Supreme Court also explained that the essence and the nature of a claim to establish the acquisition of an inheritance oppose the division of this claim into the grounds and the amount. Thus, Article 318 §1 CCP should be recognised as useless in the proceedings concerning the acquisition of an inheritance. The justification of the resolution provides a conclusion that a preliminary ruling adjudicating on prejudicial matters may be issued only in the distributing proceedings and not other cases heard in this mode. Secondly, in order to make it possible to issue a “classical” preliminary ruling in a non-litigious procedure, the requirements laid down in Article 318 §1 CCP in conjunction with Article 13 §2 CCP must be met. The instrument of preliminary rulings cannot be extended over cases the legislator did not envisage, which means that exceptions strictly defined in statute cannot constitute a general principle.<sup>22</sup>

## CONCLUSIONS

The application of the provisions concerning litigation in a non-litigious procedure is appropriate and must respect the specificity of this procedure.

Preliminary rulings concern their own independent subject of adjudication. They are independent adjudications on the grounds of prejudicial issues.

Relevant application of Article 318 §1 CCP in a non-litigious procedure is admissible only in situations under this provision, i.e. when in the case heard in a non-litigious mode, a court, based on premises, must establish the existence of a given legal relationship or a right, and adjudicate on a claim performance, and both the claim grounds and its amount are in dispute.<sup>23</sup>

The right to acquisitive prescription of servitude claimed by the party to the proceedings, in the light of the ruling discussed in the gloss, does not constitute an element of grounds for the petitioner’s claim to establish transmission servitude (Articles 305<sup>1</sup>–305<sup>2</sup> CC), and thus, this factual state, as the Supreme Court rightly held, does not materialise a hypothesis of a norm resulting from Article 318 §1 in conjunction with Article 13 §2 CCP.

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<sup>22</sup> Compare, e.g. the Supreme Court ruling of 8 November 2013, I CSK 723/12, LEX No. 1439378.

<sup>23</sup> Compare, the Supreme Court resolution of 16 March 2007, III CZP 17/07, OSNC No. 2, item 20, 2008.

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## GLOSS ON THE SUPREME COURT JUDGEMENT OF 21 JULY 2016, II CSK 604/15 – ADMISSIBILITY OF ISSUING A PRELIMINARY RULING BY A COURT IN A NON-LITIGIOUS PROCEDURE

### Summary

The use of regulations on litigation in a non-litigious procedure is a corresponding application and must respect the specificity of that procedure. The preliminary rulings have their own independent object of adjudication and are independent substantial judgements on prejudicial issues. Respective application of Article 318 of the Code of Civil Procedure in a non-litigious procedure is admissible only in situations concerning that provision, i.e. when a court hearing a case in a non-litigious mode must, based on prerequisites, establish the existence of a given legal relationship or right and rule a claim amount where the claim grounds as well as the claim amount constitute a matter in dispute.

Keywords: non-litigious procedure, preliminary rulings

GŁOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 21 LIPCA 2016 R.,  
II CSK 604/15 – DOPUSZCZALNOŚĆ WYDANIA PRZEZ SĄD POSTANOWIENIA  
WSTĘPNEGO W POSTĘPOWANIU NIEPROCESOWYM

Streszczenie

W postępowaniu nieprocesowym stosowanie przepisów o procesie jest stosowaniem odpowiednim i musi respektować specyfikę tego postępowania. Postanowienia wstępne mają własny, samodzielny przedmiot orzekania, są samodzielnymi rozstrzygnięciami merytorycznymi zagadnień prejudycjalnych. Odpowiednie stosowanie art. 318 k.p.c. w postępowaniu nieprocesowym jest dopuszczalne tylko w sytuacjach odpowiadających dyspozycji tego przepisu, to jest wówczas, gdy w sprawie rozpoznawanej w trybie nieprocesowym sąd przesłankowo musi ustalić istnienie określonego stosunku prawnego lub prawa i zasądzić roszczenie, a sporne są zarówno sama zasada, jak i wysokość roszczenia

Słowa kluczowe: postępowanie nieprocesowe, postanowienia wstępne