
THE JUDICIAL RECOVERY OF THE RURAL PRODUCER AS INDIVIDUAL ENTITY: LEGAL AND JURISPRUDENTIAL REQUIREMENTS

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ABSTRACT

The judicial recovery, which has the objective of making possible the maintenance of the production source, has increasingly attracted the attention of businessmen. This interest has also been verified by the rural producers. However, there is currently a discussion in the doctrine and jurisprudence of the legal requirements against the individual rural producer, notably whether or not this producer should be registered in the public agency of mercantile companies in the moment the application for judicial recovery is filed, as well as the ways to prove a regular activity over two years at least, according to the requirement established in the caput of art. 48, Law 11,101/2005. These issues have made it difficult for rural producers, individual entity, to access the recovery institute. Based on bibliographical and documentary research, the structure of judicial recovery was presented in this paper, as well as the concept of rural activity, a rural producer as individual and legal entities. In the final part, we pointed out the legal requirements for the acceptance of judicial recovery to the rural producer,

especialmente em um contexto jurisprudencial. Então, o balanço do estudo foi contextualizado, assim como os requisitos legais estabelecidos pela jurisprudência para a aceitação ao produtor rural, pessoa física.

Keywords: Judicial recovery; Rural producer as individual entity; Legal and jurisprudential requirements.

A RECUPERAÇÃO JUDICIAL DO PRODUTOR RURAL PESSOA FÍSICA: REQUISITOS LEGAIS E JURISPRUDENCIAIS

RESUMO

A recuperação judicial, que tem por objetivo viabilizar a manutenção da fonte produtora, tem despertado cada vez mais a atenção dos empresários. Esse interesse tem sido verificado ainda por parte dos produtores rurais. Entretanto, atualmente, há discussão na doutrina e na jurisprudência acerca dos requisitos legais em face do produtor rural pessoa física, notadamente se este deve ou não estar registrado, no órgão de empresas mercantis, quando da impetração do requerimento de recuperação judicial, assim como, a maneira como dar-se-á a comprovação de atividade regular há mais de dois anos, consoante exigência estabelecida no caput do art. 48 da Lei nº 11.101/2005. Essas questões têm dificultado o acesso do produtor rural, pessoa física, ao instituto recuperacional. Amparado em pesquisa bibliográfica e documental, apresentou-se neste trabalho a estrutura da recuperação judicial, assim como, o conceito de atividade rural e de produtor rural pessoa física e jurídica. Na parte final, apontou-se os requisitos legais para o processamento da recuperação judicial ao produtor rural pessoa física, notadamente em um contexto jurisprudencial. Com isso, restou contextualizado, neste trabalho, o instrumento da recuperação judicial, bem como, o seu cabimento e os requisitos legais estabelecidos pela jurisprudência para o deferimento ao produtor rural pessoa física.

Palavras-chave: *Recuperação judicial; Produtor rural pessoa física; Requisitos legais e jurisprudenciais.*

INTRODUCTION

After experiencing a period of PIB strong growth in the last decade, Brazil faces currently a hard economic and political conjuncture truly tumultuous, moreover due to the economic activity deceleration, high rates of unemployment and serious episodes of corruption, which have destabilized the country politically and economically. Despite this scenery, Brazil goes on offering to the investors a horizon of complex and onerous tributes, juridical insecurity, bureaucracy in excess, lack of efficient logistic infrastructure, excessive political and labor union influence in the economy and high costs in hiring hand labor. All this, in turn, reflects in the current economic and social rates in the country: in 2016 Brazilian PIB decreased 3,6% in relation to the previous year, and unemployment reached the expressive rate of 13,2% in the quarter ended in February 2017, with approximately 13,5 millions of unemployed workers (IBGE, 2017; IBGE, 2016).

In this context of economic recession, it has been recurrent in the corporation field the debate about the institute of the judicial recovery (NT: reorganization), which aims at the judicial reorganization of companies in situation of insolvency. And, according to recent survey carried out by economists of *Serasa Experian* (SERASA, 2016), the number of requests for judicial recovery hit historical records in the Country: only in 2016 first semester there were 923 files for request, that is, 87,6% over the records in the same period in 2015.

The mentioned survey pointed out that the result is the highest for the accumulate semester since 2006, after the entry in force of the Law 11.101/2005, which regulates judicial and extra judicial recovery (NT: reorganization), and bankruptcy of businessmen and companies.

One of the main reasons for this scenery, according to the research, is the combination of high interest rates and the country's prolonged political-economic recession, which imposes serious financial difficulties on companies, leading them to use the judicial recovery mechanism as a way to protect themselves from insolvency.

Another recent factor that contributed for the increase of the requests file for judicial recovery, were the consequences of the investigations on corruption triggered by the Federal Police and the Federal Public Ministry, in particular the so called "*Lava Jato*" operation.

In this scenery, large companies, especially in the oil, gas, civil

construction and infrastructure sectors suffered the financial impact of these investigations, as well as of the judicial decisions that have been imposed. Thus, the companies that did not end their activities were forced to cut costs, as well as to review business and strategies.

However, for many of these companies direct or indirectly affected by the “Lava Jato” operation, the efforts for readjustment of their business plan were not enough and, consequently, they were forced to resort to the judicial recovery institute (NT: reorganization) as a last attempt to prevent bankruptcy

As an example, according to information from the system of processes consultation of the Tribunais de Justiça / Courts of Justice from the States Minas Gerais, Rio de Janeiro, Paraná, Goiás, Bahia, Mato Grosso, Mato Grosso do Sul and Rio Grande do Sul, companies of the size of Sete Brasil, Grupo Schahin Engenharia (28 companies), Galvão Engenharia, Galvão Participações, Alumini, Mendes Júnior and OAS, have already requested judicial recovery.

For other reasons that not the direct involvement in the “Lava Jato” operation, Hopi Hari, Bombril, Parmalat, Proema (Fiat auto parts manufacturer, GM, Honda and Mercedes-Benz), Carvajal Informações (owner of the portal guide Mais and of the telephone lists Listel and Editel), Amal (shipyard), Varig, Vasp, Passaredo Transportes Aéreos, OGX, OSX, Wind Power Energia, Leon Heimer, Celpa, Camisaria Colombo, Grupo Rede, GEP, BMart, Via Uno, Barred’s, Lupatech, Frigorífico Independência, Frigorífico Mondeli, Leão e Leão Ltda, Leader Magazine, Mabe and, recently the telecommunication company OI, also filed request for the recovery protection.

Only the OI judicial recovery, the largest in the country history, involve debts over sixty-five billion of reais, according to information contained in the process n. 0203711-65.2016.8.19.0001, in the 7th Entrepreneurial Court (*Vara Empresarial*) of Rio de Janeiro.

Specifically regarding the agribusiness, in addition to the problems already known, as, for example, the case of *i*) lack of efficient logistic infrastructure, *ii*) climate changes, *iii*) exchange rates changes, *iv*) taxes excess, *v*) complexity of tax and labor legislation, *vi*) barriers to international markets, *vii*) bank indebtedness *viii*) reduction in the credit supply, the scenario for the sector is still an expansion of economic activity. However, despite the sector increasing growth and its strategic relevance, it is correct to say that, on the other hand, the agribusiness is

not immune to the disasters in the political and economic scenario in the country, especially in the last three years.

Indeed, many rural producers have presented over-indebtedness and enormous losses in recent years, bordering on insolvency. Because of this, the judicial recovery (NT: reorganization) has increasingly attracted the attention of rural producers and business corporations operating in the various segments of agribusiness. It is the case, for example, of the companies Giovelli & Cia Ltda, Unialcol, Agrenco, Grupo Andrade, Infinity Bionergia, Dedini Indústria de Base, Santa Maria Agrícola, Energética Santa Elisa, Usina Carolo, Sociedade Agrícola Santa Mônica, Tonon Bioenergia, Renuka do Brasil, Sifco, Usina Global Goiás, Aralco, Abengoa, Agro São Gabriel, Usina São Fernando and Bom Jesus Agropecuária, which have already filed request for judicial recovery.

Only in the sugar cane sector, in the beginning of 2016, reached up to 79 the number of sugar, alcohol and energy plants in judicial recovery in the country, since 2008 (BATISTA, 2016). This number tends to grow if there are no changes in the economic frame.

Therefore, the companies, especially the rural ones, have used the recovery protection conferred by the Law n. 11.101/2005. However, with regards to the rural producers' natural person, with no mercantile register, and, therefore, not businessmen, there is no provision in the Law n. 11.101/2005 which allows the request for judicial recovery, as the mentioned Law disciplines the judicial, extrajudicial and bankruptcy of the debtor businessman, as well as of the debtor corporation, as provided in the article 1.

In this context, it is imperative that the great majority of the rural producers exercise their rural office in family, in the individual modality, with no commercial register, situation that can, in itself, prevent their access to this important legal instrument of recovery from temporary financial difficulties.

Another obstacle to the rural producer, without commercial register, to access the institute of the judicial recovery, is the imposition established in the *caput* of the art. 48 of the Law n. 11.101/2005, which requires the proof of the exercise of regular business activity for over two years at the file of request for the judicial recovery.

Thus, the current controversy in the doctrine and jurisprudence about the grant of the judicial recovery (reorganization) to the rural producer natural person is mainly on the need, or not, of his being duly registered

in the competent commercial board, when applying for the recovery, in addition to how to give proof of regular business activity for over two years, according the *caput* of the art. 48 of the Law n. 11.101/2005.

Therefore, this study is a qualitative approach that can be also be classified as bibliographical and documental. The information presented was obtained by means of the review of the scientific literature and the legislation, as well as from secondary data, governmental official information and political-economic newspaper articles. With this, in the first place, the main structural aspects of the institute of the judicial recovery (reorganization) will be introduced. Then in the sequence, the concept of rural activity and of the rural producer natural and juridical person. Finally, the necessary considerations about the requirements for the deferral of the judicial recovery to the rural producer natural (NT: or *physical*) person will be presented, especially in a legal, doctrinaire and jurisprudential context.

2. THE JUDICIAL RECOVERY

According to Domingues (2009), the Law n. 11.101, of 9 February 2005, which revoked the Decree-law n. 7.661/45, the Bankruptcy Law then in force introduced in the Brazilian legal system the institute of the judicial recovery (reorganization), giving to the companies in crisis effective means to reorganize the business, redesign the liabilities and recover from momentary financial difficulty. In fact, through the new Law the rigor of the institute of *concordata* (agreement) was replaced by the soft recovery of the companies, in the formats judicial, extrajudicial and especial, which guarantee the adoption, by the debtor businessman, of market solutions for the reorganization of the company, as well as of more flexible mechanisms for remission of debts and delay of payment periods. However, the legislator designed the judicial recovery for more complex situations which demand the involvement of all the creditors, and, consequently, a greater control by the Judiciary Power (DOMINGUES, 2009).

Thus, we are before a multidisciplinary institute, as the institute of recovery of the company before being a judicial process, is a business-to-business process, so that, its success will depend, substantially, not on the protection of the Judiciary Power, but, overall, on the *expertise* of the company in crisis in negotiating with their creditors, showing them the possibility of overcoming the momentary crisis (LAZZARINI, 2009).

In fact, the fundamental pillar of the judicial recovery is in the

art. 47 of the Law 11.101/2005, which, in turn, consecrate the principles *i)* of the company preservation, *ii)* of the social function and *iii)* of the stimulation to the economic activity, establishing that the judicial recovery (reorganization) has the purpose of making possible to the debtor to overcome the economic-financial crisis, in order to allow the maintenance of the producing source, of the workers' employment, and protection to the creditors' interests, thus promoting the company preservation, its social function and the stimulus to the economic activity.

For Luccas (2015), these nuclear principles that cover the institute of the judicial recovery seek to design the exact goals to which the Law was set, as well as all the points that must be considered so that the interests balance, to promote the recovery (reorganization) of the viable companies, is achieved.

This way, for an economy that depends so much on the corporations' activity, it is imperative that the State establishes a mean to protect and ensure the whole system, as on this depend directly the generation and sustainability of employment, the production of wealth, the circulation of income, the collection of taxes and overall the very growth of the country. Therefore, this is the protection nucleus of what is named the company social function (LUCCAS, 2015).

With regard to the company social function, Lima and Parentoni (2009, p. 276) point that:

[...] the expression social function "linked to the expressions 'enterprise', 'company', 'entrepreneur', 'entrepreneur society', 'group of companies', 'holding', 'subsidiary' and others that one may wish to add, translate the concern of our legislator with the function (with the functioning) of the corporations. The function or functioning must develop in a bona fide environment and with respect to the values and higher principles, consecrated by the Law, many of which enunciated in the 1988 Constitution of the Brazilian Republic. The legislator concern is manifested not only in the corporation and bankruptcy legislations, but also in many others, such as the tributary, labor, social security, anticompetitive and consumer protection.

With regard to the relevance of the stimulus for the economic activity, the Federal Constitution (CF/88) sets in the art. 170 its protection which, in turn, is represented, overall, in the valuation of the human labor and the free enterprise, and aims to ensure, among others, the reduction of the regional and social inequalities, as well as to seek the full employment.

There are no doubts, therefore, that the economic activity of companies in Brazil counts with the constitutional legal protection, with a role certainly relevant in the development of the economic order. Thus, the Magna Carta and the Law of the companies' recovery (Law n. 11.101/05), regarding the judicial recovery (reorganization), aims at the protection and development of the State (BORGES; BENACCHIO, 2015).

About the principle of the company preservation, Lazzarini (2009) says that, as expressly accepted in the Law n. 11.101/2005, it gives a new characteristic to the company, changing it from a condition limited to the shareholders' interest, to place it at the level of the public interest. Then, the company starts to be effectively considered as an institution and no longer a contractual relation, no longer depending on the shareholders' will so that, in case, it starts to meet other interests, such as: of the company social function, of the employees, of the creditors, of the Treasury, etc., which overlap the interest merely private of the shareholders (LAZZARINI, 2009).

In the jurisprudence field, the High Court of Justice (*Superior Tribunal de Justiça - STJ*) does not disregard these understandings, especially as it has been already set in repeated decisions, that the judicial recovery [reorganization] is guided overall by the principles of the preservation of the company, of its social function and of the stimulus to the economic activity, as the provision in the art. 47 of the Law n 11.101/2005 (AgRg CC 129079/SP, AgRg no REsp 1462032/PR, REsp 1173735/RN, CC 111645/SP).

In this direction it is worth to mention the important vote of the minister Nancy Andrighi in the appeal *Recurso Especial n. 1.166.600-RJ*, to whom the principle of the company preservation was taken as paradigm to be promoted on behalf of the public and collective interest, and not as support for mere private interests circumstantially involved, as the company in the quality of important instrument of productive organization involves within it multiple interests, among which stand out the interests of shareholders' (majority and minority), the creditors', the partners' and suppliers', employees', consumers' and the community's (in face of the taxes and jobs generation, and the market movement).

Following the same line, the minister Luis Felipe Salomão, of the High Court of Justice Private Law Second Section (*Segunda Seção de Direito Privado do Superior Tribunal de Justiça*), and one of the greatest experts in judicial recovery and bankruptcy in the country, stated that the

“rule, therefore, is to seek to save the company, as long as economically viable”, as well as that “the extreme measure of bankruptcy should only be decreed when it is not feasible to preserve the activity.” (SALOMÃO, 2015, p.15).

In fact, the idea is to preserve the economic source, because, directly, so is maintained the circulation of goods and services, as well as the employment and the taxes collection. This is the conclusion from the exposition of motives of the Law n. 11.101/05, by the then Minister of Justice, Maurício Corrêa, to whom the company recovery (reorganization) is adopted in order to protect the interest of the national economy and of the workers in the maintenance of their jobs (CORRÊA, 2005).

Sharing the same ideals, Bezerra Filho (2009) points out that the Law has placed as its first purpose the maintenance of the productive source and the maintenance of the workers’ employment and, consequently, the satisfaction of the creditors’ interests.

With the support of such illustrious jurists, it can be said, surely, that the judicial recovery (or reorganization) is not a deal to favor the businessman-debtor, but of giving effective recovery to the business, to the productive source, so as to maintain the employment, the income circulation, the taxes collection, as well the payment to creditors, and then giving continuity to the productive chain and the economic and social growth of the Country.

For all this, and considering the importance of the defense of citizenship, of the legal and economic order and of the adequation to the contemporary conditions of practices in the industry, commerce and correlate ones, it is correct to say that the new bankruptcy and company reorganization law is an important legal instrument which aims to ensure the rights of creditors, debtors and, above all, the source of wealth.

3. REQUIREMENTS FOR THE PROCESSING OF THE JUDICIAL RECOVERY

The art. 48, § 1st of the Law 11.101/2005, provides as a rule that the judicial recovery (reorganization) can only be requested by the debtor businessman or company (art. 1st), as well as by the surviving spouse, the heirs of the debtor, the administrator of the inventory or the remaining partner. Likewise, the art. 122, sole paragraph, of the Law 6.404/76, which provides on the corporations, set that, in case of urgency, the bankruptcy

or request for the agreement can be filed by the administrators, with the agreement of the controlling shareholder, if there is one, immediately convening the general meeting, to express its opinion on the matter.

However, the Law excluded from the judicial recovery process the public company and the mixed capital company, public or private financial institution, credit cooperative, consortium, supplementary pension entity, health care plan operating company, insurance company, capitalization company and other entities legally equivalent to the former, which have specific legislation to deal with the liquidation in case of insolvency (art. 2º).

With regards to cooperatives, the art. 2nd, II, of the Law n. 11.101/2005, excluded expressly the credit cooperative from the list of those legitimated for the grant of the judicial recovery. However, nothing has been mentioned about the rural cooperative.

There is currently wide discussion in the doctrine and in the jurisprudence about the possibility or not of granting judicial recovery to the rural cooperatives, especially due to their legal regime and specific legislation. However there are decisions both granting and denying the judicial recovery to the cooperatives¹. Those which deny it, are supported mainly by the argument that the cooperatives are not subject to bankruptcy as they have civil nature and do not practice corporate activities, therefore their form of liquidation is that one provided by the Law 5.764/71. On the other hand, those who grant the reorganization, support the understanding that there is no express prohibition in the Law n.º11.101/2005 regarding the rural cooperatives, contrary to what occurred with the credit cooperatives. Therefore, if the legislator option was to exclude the rural ones there would be direct prohibition in this direction.

With these observations related to the legitimate, in the sequence the recovery Law sets that can request the judicial recovery the debtor businessman that, at the time of the request: *i)* regularly pursuit the activities for more than two years; *ii)* has not been in bankruptcy and, if had been, the liabilities arising then are now extinct by final judgment; *iii)* not having obtained grant for judicial recovery less than five years ago; *iv)* not having obtained grant for judicial recovery less than five years ago; and, *v)* Has not been convicted or does not have, as administrator or controlling partner a person who has been convicted for any of the crimes provided for in the

¹ Denying: TJSP: Ap. 9162268-38.2006.8.26.0000; TJMG: 0319705-88.2011.8.13.0000; STJ: REsp 1.202.225/SP; STJ: AgRg no REsp 999.134/PR; Granting: Nº. 019.011.000925-5/1ª Vara Cível de Alpinópolis/MG; 0045061-40.2010.8.21.0011/3ª Vara Cível da Comarca de Cruz Alta/RS.

recovery and bankruptcy law (art. 48 of Law n. 11.101/2005).

All the requirements above are cumulative; therefore, it is not up to the debtor businessman or company to choose which one should be complied with in order to file the request for the judicial recovery. The noncompliance with any of the requirements listed above will result in the rejection of the processing provided by art. 52 of the company recovery law.

In addition, it is worth to remind that the grant for judicial recovery occurs only with the confirmation of the submitted plan (art. 58, *caput*), and not only with the deferral of the request processing (art. 52, *caput*), which is the judicial order that effectively inaugurates the reorganization process due to the fulfillment of the requirements listed in the art. 51 of the recovery/reorganization law. Corroborating this, the following precedent of the Court of Justice of the State of São Paulo: AI nº 537.763.4/7. Des. José Roberto Lino Machado. Special Chamber on Bankruptcy and Judicial Recovery of Private Law/*Câmara Especial de Falências e Recuperação Judicial de Direito Privado*, 08/08/2008.

Therefore, even if the debtors businessman or company apply for the judicial recovery and it is deferred, at first, that is, the processing does not mean that a new request cannot be applied within less than a five years term, in case the former process (with just the processing deferral) is extinct, for example. This happens because the term should be computed only from the moment the recovery plan is effectively confirmed and granted the judicial recovery / reorganization, according to the provisions of the art. 58 of the Law 11.101/2005.

4. CREDITS SUBJECT TO OR EXCLUDED FROM THE JUDICIAL RECOVERY

According to the provisions of the art. 49 of the Law n.º11.101/2005, the credits existing at the date of the request, even not overdue, are subjected to the judicial recovery/reorganization, not being subject to its effects the credits after the application for reorganization. However, the third paragraph of the above mentioned article makes some exceptions when establishes that, in the case of the creditor holding the position of fiduciary owner of movable or immovable property, commercial lesser, owner or promising seller of real estate whose respective agreements contain clauses of irrevocability or irreversibility, including in real estate

developments, or owner in a sales agreement with domain reservation, the credit shall not be subjected to the effects of the judicial recovery/reorganization, and the rights of property over things and contractual conditions will prevail

This is also the confirmed understanding of the High Court of Justice / Superior Tribunal de Justiça (CC 131656/PE, AgRg no REsp 1306924/SP, AgRg nos EDcl na MC 022761/MS).

However, it is not allowed, during the period of 180 days, as the provision in the § 4th of the art. 6th of the Law n. 11.101/2005, that it may occur the sale or withdrawal from the debtor's premises of the essential capital goods for its business activities. Moreover, on this matter there are several judicial decisions stating that these goods should remain in the company, for undetermined period, in case there is evidence that they are essential for the development of the debtor's activities (AgRg no AREsp 511601/MG, AgRg no CC 127629/MT, CC 139190/PE, CC 137003/PA).

In the terms of the art. 49, § 4th, of the Law n. 11.101/2005, it is not subjected to the judicial recovery/reorganization the amount, in national currency, due to advance to foreign exchange related to contract of export, provided that the operation total period, included occasional delays, does not exceed the provisions in the specific rules of the competent authority

About these exceptions, Salomão (2015) says that part of the doctrine has named it “banking lock”, or “*trava bancária*”, – that is, the credits non-subjected, or only partially subjected, to the concourse in the recovery/reorganization and in the bankruptcy, especially those originated from bank operations (art. 49, § 3rd and § 4th, 85 and 86, II, of the LF/Bankruptcy Law).

In addition, the tax credit, except in the case of installment, are not subjected to the judicial recovery/reorganization procedures (art. 6th § 7th, of the Law n. 11.101/2005), but only to bankruptcy (art. 83, III, of the Law n. 11.101/2005). However, the acts that imply constriction or alienation of the debtor's assets shall be submitted to the court where the reorganization is processed (STJ: EDcl no REsp 1505290/MG, AgRg no CC 136040/GO).

5. THE CONCEPT OF RURAL ACTIVITY AND OF RURAL PRODUCER NATURAL AND JURIDICAL PERSON

Rural activities in Brazil, generally speaking, are economically exploited by the large size rural and agro industrial producers, here inserted in the agribusiness, with vocation mainly for the external market production, and/or by the family farmers, which predominantly use the hand labor from their own family nucleus, in general in small or medium size rural properties, and aiming at their own subsistence and the regional market.

In this context, the Normative Instruction SRF 83, of 11 October 2001, from the *Secretaria da Receita Federal*/Federal Revenue Office, which provides about taxation of the results of the rural activity of individuals (NT: natural persons), sets in its art. 2nd to consider rural activity: i) agriculture; ii) livestock; iii) extraction and exploitation of plants and animals; iv) beekeeping; v) poultry farm; vi) rabbit breeding; vii) swine farming; viii) sericulture; ix) fish farming and other small animals culture; x) fish catch with handcraft features; xi) transformation of products resulting from the rural activity, without changing the characteristics of the fresh product (*in natura*), made by the farmer or the breeder himself, using only raw material produced in the exploited rural area, such as a) processing of agricultural, zoo technical and forestry products; and b) production of herd embryos in general, fingerlings and tadpoles, in rural property, regardless of their destination (reproduction or commercialization).

It is also considered rural activity, as the provisions in the art. 59 of the Law n. 9.430, of 27 December 1996, the cultivation of forests that are designed for cutting for commercialization, consumption or industrialization.

On the other hand, it is not considered rural activity, according to the art. 4th of the Normative Instruction SRF n. 83/2011: i) products industrialization; ii) marketing of rural products from third persons and the purchase and sale of livestock with permanence in the power of the taxpayer for less than 52 days, when in confinement regime, or 138 days, in other cases;; iii) processing or industrialization of fresh fish [*in natura*]; iv) gain by a herd owner, delivered by written contract, to other contracting party for the specific purpose of breeding, even if the yield is predetermined in number of animals; the revenues from rental or leasing of machinery, agricultural equipment and pasture, and the provision of

transportation services for third-party products; v) revenues from the sale of mineral resources extracted from rural property; vi) revenues from the sale of agricultural products received in inheritance or donation, when the heir or donate does not explore rural activity; vii) financial income from investment of resources in the period between two production cycles; viii) values of prizes won in any way by animals participating in contests, competitions, fairs and exhibitions; ix) Prizes received from entities that promote equestrian competitions by owners, breeders and professionals of turf; and, x) revenues from the operation of rural tourism and hotel farm.

With regard to the concept of rural producer, the incise I of the art. 165 of the IN RFB n. 971/2009 define it as the physical or juridical person, owner or not, that develops, in urban or rural area, the agricultural, fishing or silvicultural activity, as well as the extraction of primary products, vegetable or animal, permanently or temporarily, directly or by means of intermediate agent.

With regards to the rural producer physical/natural person, the items 1 and 2 of the line “a” of the incise *above* establishes that this person, in the condition of owner, partner, tenant or lessee, artisanal fisherman, borrower (commodatary) or similar, that exercises the activity individually or in regime of family economy, even with the occasional help of third persons, as well as of the respective spouses or partners and their children over 16 (sixteenth) years, or assimilated thereto, provided there is evidence they work together with the family group. In the same direction those who exploit agricultural activity or fishing in the condition of natural person, permanently or temporally, directly or by means of intermediate agents and with the help of employees, used under any title, even if not continuously.

With regards to the concept of rural producer juridical person, the items 1 and 2 of the line “b” of the above mentioned incise establish that it is the one constituted under the form of individual firm or business (NT: individual company/corporation), thus considered by the art. 931 of Law of 2002 (Civil Code), or association/company, with the purpose only of rural production activity, complying with the provisions of the incise III of § 2nd of the art. 175 of the IN RFB n. 971/2009. It is also considered rural producer juridical person the agro industry (22-A of Law n. 8.212/91) which develops the activities of rural production and of industrialization of its own rural production and that one acquired from third persons, as well as those that maintain slaughter of animals of their own production and those acquired from third person (art. 165, § 3rd, IN RFB n. 971/2009).

6. THE JUDICIAL RECOVERY / REORGANIZATION OF THE RURAL PRODUCER NATURAL PERSON (NT: ALSO PHYSICAL OR INDIVIDUAL PERSON)

As already emphasized in this study, the judicial recovery or reorganization can be filed by the one who fulfills the concept of individual/businessman or company/corporation, named simply debtor, as in the provision in the art. 1st of the Law 11.101/2005.

The concept of businessman, in turn, is defined by the Civil Code, in the provision of its art. 966, to consider “businessman the one who exercises professionally organized economic activity for the production or circulation of goods or services”.

With regards to the concept of company/corporation /association, the art. 982 of the mentioned Code determines that, except for the express exceptions, it is considered corporation/association/company the one which purpose is the exercise of business activity subject to register (art. 967); and, simple, the others. Besides, independently of its object, the company is considered a corporation; and simple, the cooperative.

On the other hand, the art. 967 of the Civil Code impose the mandatory registration of the businessman in the Public Register of Mercantile Companies of the respective headquarters, before the beginning of its activity.

Furthermore, the *caput* of the art. 48 of the Law n.º11.101/2005 sets that the judicial recovery/reorganization can be filed by the debtor that has exercised regularly the activities for more than two years. Therefore, from an express and literal interpretation of the legal provisions above, only the debtor businessman and/or debtor company/corporation, duly regularized before the competent bodies, for more than two years, can file a request for judicial recovery/reorganization.

The nuclear issue in this study concerns: *i)* to the possibility, or not, of the rural producer, not registered in the commercial register board, and or *ii)* registered less than two years ago, to file a judicial recovery/reorganization. That is, in the first hypothesis, the rural producer has no commercial register at the moment of filing for the reorganization, and in the second, there is the registration, however for less than two years.

These questioning occur exactly because there is no provision in the Law that expressly allow the rural producer natural person, not registered in the commercial registration board, to file for reorganization,

as the mentioned Law rules the business and the company judicial recovery/reorganization (art. 1st, Law n. 11.101/2005; arts. 966, 967, 968 and 982, of the Civil Code).

However, as seen in the concept of rural activity and, moreover, of rural producer, not yet registered in the competent commercial board, there are no doubts as that person in fact practices company actions, mainly when exercising rural activities jointly with business operations, in order to obtain profit, situation that, indisputably, configures the management of a company cell (GUTIERREZ, 2016).

In fact, the great majority of the rural producers exercise their work within the family environment, in the condition of natural person and with no legal registration in any commercial board.

With regards to the juridical nature of the rural producer, Pereira Calças (2009) affirms that the current Civil Code does not require either from the farmer or the rancher a mandatory registration in the competent commercial board (arts. 966 and 967). However, the art. 971 sets that the businessman whose rural activity is its main profession can register in the company's public registration board in their respective headquarters, then, after duly registered, it will be equated for all purposes to the trader subject to registration.

With this in mind, the rural producer must register the mandatory business books in the commercial board and prepare the annual balance sheet and economic result ((art. 1.179 of CC), becoming equated to the juridical person for the purpose of income taxes (art. 150, I, Decree n. 3.000/99) and, consequently, subject to bankruptcy, if characterized the hypothesis of the art. 94 of Law n. 11.101/2005, as well as to the reorganization, in the terms of art. 48 of Law n. 11.101/2005.

In this sense, the Court of Justice (*Tribunal de Justiça*) of the State of São Paulo has already consolidated the understanding that the rural producer cannot benefit nor loss through the discipline of reorganization/judicial recovery and bankruptcy, if not duly registered in the competent public registration board, as its equation as businessman only occurs with that registration (appeal *Agravo de Instrumento* n° 9031524-47.2009.8.26.0000. Rel. Des. Lino Machado, 06/07/2010).

Effectively, what the Law intends with the mentioned registration is to inhibit the opportunists or people hungry for risks to benefit from the reorganization system, as well as to obtaining advantage or benefit by those who venture and assume risks, exercising economic activity without being

legally registered, as the provisions in the Civil Code for any businessman, natural or juridical person (SZTAJN, 2007).

Therefore, if there is no effective business registration, the rural producer, natural person/individual, will not equate the businessman for the purposes of the art. 1st of the Law n. 11.101/2005.

Further, it is important to clarify that the rural producer registration in the Juridical Persons National Cadastre/*Cadastro Nacional das Pessoas Jurídicas* (CNPJ), in itself, does not equate, in fact or legally, to the condition of business for the purpose of the right to the reorganization / judicial recovery. On the other hand, this is currently the understanding of the Courts of Justice, as the example of judgment in the Court of Justice of the State of São Paulo, where the rural producer registration in the CNPJ does not equate it to businessman for legal purposes (A.I. n° 6481984200. Des. Manoel de Queiroz Pereira Calças. Chamber Reserved to Bankruptcy and Reorganization/*Câmara Reservada à Falência e Recuperação*. Publication: 15/09/2009).

Besides the registration in the company's public registration board, the *caput* of art. 48 of Law 11.101/05 requires that, at the time of the file for request, this registration has occurred within a period of more than two years. In this respect, a current jurisprudence considers that an express and literal interpretation of the *caput* of the article 48 must prevail; therefore, the rural producer should give evidence of the registration in the company's public registration board for more than two years, cumulatively, when filing for the reorganization.

An example of this is the decision in the appeal of 15 June 2016 from the Court of Justice of the State of Mato Grosso (*Agravo de Instrumento* n. 0084928-42.2016.8.11.0000), which did not admit, in the case of the reorganization of the Bom Jesus Agropecuária Ltda., the processing of the reorganization with regards to the rural producers, natural persons, that filed for it, as it has not been proven the biennial period provided for in the legislation (art. 48, *caput*, and art. 51, V, both in the Law n. 11.101/2005).

In this specific case, the Court of Justice of the State of Mato Grosso understood that despite the rural producers had proven the existing business registration, on the other had was proven that the formalization had occurred approximately two months before filing the request for reorganization, thus contrary to the legal requirement of two years.

However, for a second jurisprudence understanding, it does not mean that the farmer who has made the choice of the commercial register

less than two years before and before filing for judicial reorganization cannot demonstrate by other evidence the exercise of the rural business in the period required by the rule. A practical example is in the process n. 1001565-26.2016.8.26.0291, before the 2nd Civil Court of the District of Jaboticabal/SP. In this case, the rural producers that have exercised over thirty years the cultivation of sugarcane, peanuts, rice and soybeans, and which had been registered with the Commercial Board of the State of São Paulo for less than two years, contrary, at first, to the provision of the *caput* of art. 48 in the Law n. 11.101/2005, have obtained legal approval authorizing the processing of the application for judicial recovery/reorganization,

For this jurisprudential understanding, therefore, there must be the business register prior to file for the reorganization. However, the evidence of the regularity of the company activity, for the minimum biennial set in the *caput* of art. 48 of the Law n. 11.101/2005, must be measured by the observation of the maintenance and continuity of the professional exercise (material criterion), and not only from the proof of the existence of the company or businessman registration for that period of time (formal criterion).

This is the current understanding adopted by the Court of Justice of the State of São Paulo (appeal A.I. n° 2037064-59.2013.8.26.0000. Des. José Reynaldo – 2nd Reserved Chamber of Business Law/2ª *Câmara Reservada de Direito Empresarial* – 22/09/2014).

There is still a third understanding, which defends that the registration in the company's public registration board is not essential condition for granting the reorganization to the rural producer/farmer, as this one is not obliged to the registration (art. 971 of the Civil Code), as well as the legal quality of businessman is not conferred by the formality with the board of the mercantile companies, but, rather, by the effective exercise of the professional activity, which is why it will be faced with the merely declaratory and not constitutive effect of the record.

The defenders of this opinion also mention the statement N. 198, approved at the Third Journey of Civil Law held by the Center for Judicial Studies of the Federal Justice Council, which says that the registration of the businessman at the Board of Trade is not a requirement for its characterization, accepting the exercise of the activity without such action. The irregular debtor/businessman that meets the requirements of the art. 966, complies with the rules of the Civil Code and of the commercial legislation, except for that in which they are incompatible with the condition

or in face of express provision to the contrary.

Defenders of this third current also emphasize that the art. 2nd of the Law 11.101/2005 excludes expressly from its incidence only the public companies, the public held private companies' government controlled, financial institutions, consortiums, insurance and similar others, so under the terms of these exceptions, the other natural and legal persons, who hold the status of businessmen in fact, would be protected.

Finally, it is noted that the positive principles in the art. 47 of the Bankruptcy Law and Company Reorganization/*Lei de Falência e Recuperação de Empresas* aim especially at the maintenance of the producer source and the preservation of the labor relations involved, that is why it is not possible, through an express and literal interpretation of the norm, to lose sight of the purposes that effectively guide the reorganization /judicial recovery.

To this third current, therefore, despite the lack of the rural producer registration in commercial public registrations boards, it is necessary to protect the economic and social interests aimed at by the legislator, which effectively are the purposes of the judicial recovery/ reorganization, an institute aimed at preserving the company, at the observation of its social function and at the stimulus of the economic activity.

All the arguments above, which guide the third current, guided the vote of the Minister of the High Court of Justice/*Superior Tribunal de Justiça* Nancy Andrighi, in the judgment of the appeal *Recurso Especial* 1.193.115/MT (2010/0083724-4), in which rural producers, deprived of company registration at the time, filed for the reorganization. In this case, the rural producers, natural person, obtained the company registration only 55 days after filing the request.

However, despite the relevant arguments presented by the Minister, the prevailing vote was the view advocated by the minister Sidnei Beneti, in the sense that it is impossible to dismiss the express and literal provision of the art.48 of the Law 11.101/2005 only in view of the generic principle of the company preservation (art. 47), as the documents are essential to the legal characterization of the status of businessman and, furthermore, for the special qualification to file for the judicial recovery/ reorganization.

In addition, the minister Sidnei Beneti registered in his vote that, in case the evidence of the businessman condition was dismissed, the door would be open for the attempt of insertion, in the judicial recovery system,

of factual business situations under the most absolute lack of commercial formality, with the notorious consequences of acting outside the law. Besides, according to the minister Sidnei Beneti the jurisprudence has already dismissed the proof of registration during all the minimum period of two years, but has never dismissed the legal requirement of documented evidence of the businessman condition.

In the same direction, and following the minister Sidnei Beneti's vote, the minister Paulo de Tarso Sanseverino added in his vote that, at the moment of admitting the judicial recovery/reorganization of non-registered farmers, actually a relevant precedent will be open in our Country, where the agricultures has a significant weight in the economy. Therefore, it is necessary to stimulate the registration and regulations of agro companies by the Brazilian farmers, as it is already allowed by the Civil Code, included in order to become more professional this activity, which is fundamental for the Brazilian economy.

For these reasons, after the minister Sidnei Beneti's vote, which was followed by the ministers João Otávio de Noronha, Paulo de Tarso Sanseverino and Ricardo Villas Bôas Cueva, diverging from the position adopted by the judge rapporteur minister Nancy Andrighi, of the High Court of Justice Third Panel of Private Law/*Terceira Turma de Direito Privado* of the STJ, by majority, dismissed the appeal *Recurso Especial* 1.193.115/MT.

However, there was not the necessary jurisdictional discussion about the application, or not, of the Bankruptcy and Judicial Recovery/Reorganization Law to the rural producers, independent of the mercantile registration. Thus, it was reaffirmed that it is necessary, for the purpose of judicial reorganization, the proof of registration at the Commercial Registry, not substituted by any other registration or registration with a different public entity.

Despite the divergence above reported, rural producers have had favorable decisions based on the second case-law, consolidated in the Court of Justice of the State of São Paulo, in the sense that the rural producer must prove the public register of commercial companies, as well as that it occurred in the period prior to the file for judicial recovery/reorganization. However, the proof about the exercise of its professional activities, for a period over two years, must be measured by the observation of the maintenance and continuity of the professional exercise, and not only from the objective evidence of the existence of a businessman or company

registration for that time span.

For all these reasons, we share this same view, which is why we are joining the second case-law.

7. THE PROJECT OF LAW N.º 6.279-a

It is worth to highlight the Project of Law n. 6.279-a/2013, from the federal deputy Jerônimo Goergen (PP/RS), which aims to change the Bankruptcy and Judicial Recovery/Reorganization Law in order to allow the rural producers, natural persons, to prove the deadline established in the *caput* of the art. 48, through their income tax return.

The justification for the project, according to the author, is the fact that entering the corporate legal system - that will permit the rural producer to use the legal reorganization in the form that is now set in the Law 11.101-2005 –art. 971, of the Civil Code, - besides not having become popular among the farmers, also gives conditions of the reorganization to the previous registration in the commercial board, within two years This creates a gap in the Brazilian legislation, which has no mechanisms for overcoming the crisis of the farmer who had not opted for the registration in the Commercial Board (CÂMARA DOS DEPUTADOS, 2016).

Currently the Project is carried out through the various committees in the Chamber of Deputies and, in case of being approved, the understanding now approved by the Court of Justice of the State of São Paulo will become positive, thus making feasible the grant o the judicial recovery/reorganization for the rural producer.

CONCLUSIONS

In times of political-economic crisis, the demand for the institute of the judicial recovery/reorganization has had exponential growth, especially as the last resort to prevent bankruptcy. Therefore, no doubt the reorganization/judicial recovery is an important instrument of judicial administration of a businessman's situation of economic-financial crisis, which can be a feasible solution for the maintenance of the debtor's producer source, of employments and of the creditors' interests. Thus, it is an institute for protection of social and collective rights, as the principles of the social function, company preservation and economic stimulus, inserted in the art. 47 of the Law n. 11.101/2005.

So, in the course of the current study it was possible to delineate the main structural aspects of the institute of the judicial recovery/reorganization, as well as the necessary requirements for the deferral of the reorganization protection to the debtor rural producer, especially those not registered in the public commercial boards.

It was also seen that the central point of the controversy about granting the judicial recovery/reorganization to rural producer/farmer, natural person, is concerned with the need, or not, of being registered in the commercial companies' public board, as well as, the means through which is possible to prove the existing regular activity for the period of two years previously to the file for recovery/reorganization.

In this context, it was seen that for the first jurisprudential current, an express literal interpretation of the *caput* of the article 48 of the Law n. 11.101/2005 must prevail and, therefore, the rural producer debtor must prove, objectively, when filing for the judicial recovery, its registration in the competent public commercial board, as well as that this registration occurred at least two years previously. This is the understanding of the Court of Justice of the State of Mato Grosso.

However, for the second jurisprudential current, to which we are affiliated, and which is based on the consolidated understanding of the Court of Justice of the State of São Paulo, there must be the company registration before the file of the request, for the minimum biennial; however, the proof of the company regular activity, for the minimum biennial established in the *caput* of the art. 48 of the Law n. 11.101/2005, can be assessed by the maintenance and continuity of the professional exercise, and not only from the proof of the existing registration of the debtor businessman or company for that time span.

In turn, for the third jurisprudential current, defended by the minister Nancy Andrighi, of the High Court of Justice, in the appeal *Recurso Especial* 1.193.115/MT, the registration of companies /corporations in the public commercial board is no essential condition for granting the judicial recovery/reorganization to the rural producer/farmer, as this one is not obliged to this registration, as well as what must be protected are the economic and social interests aimed by the legislator, which are effectively the objectives of the judicial recovery/reorganization, an institute aimed to the companies preservation, to the observation of their social function and to the stimulus of the economic activity.

However, in the High Court of Justice / STJ, prevailed the

understanding defended by the minister Sidnei Beneti, which was followed by the ministers João Otávio de Noronha, Paulo de Tarso Sanseverino and Ricardo Villas Bôas Cueva, in the sense that it is impossible to exclude the express and literal provision of the art. 48 of the Bankruptcy and Companies Judicial Recovery Law, having in view that the documents are essential to the legal characterization of the business status, especially for the specific qualification to file the request for the judicial recovery /reorganization. In addition, the minister Sidnei Beneti recognized that the jurisprudence has dismissed the requirement for the registration proof during the whole period of at least two years, but has never dismissed the legal document proof of the business condition.

Despite the result pointed by the High Court of Justice/STJ in the judgment of the appeal REsp 1.193.115/MT, there was not the expected jurisdictional discussion about the application, or not, of the Law n. 11.101/2005 to the rural producer/farmer non-registration in the competent commercial board. Thus, it was only reaffirmed the understanding that it is necessary, for the purposes of the judicial recovery/reorganization, the proof of the registration in the Commercial Board, not substituted for any other kind of registration or register in different public organ.

Therefore, in conclusive synthesis, according the STJ, currently there are no legal means for the rural producer/farmer, not registered in the commercial board, to have access to the institute of the judicial recovery/reorganization. With regards to the proof of the business activity required in the caput of the art. 48 of the Law n. 11.101/2005, there is the understanding, according jurisprudence of the TJMT, that the proof can be made at the file of the request, by means of proof of existing commercial registration for at least two years. On the other hand, according to the TJSP, the rural producer natural person that has opted for the commercial registration for at least two years previously to the file for the judicial recovery/reorganization, can present other proof of the effective exercise of the rural activity in the required period.

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