Constitutional judgment 3-4-1-1-08

RULING
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-1-08
Date of decision	5 February 2008
Composition of court	Chairman Märt Rask, members Peeter Jerofejev, Eerik Kergandberg, Villu Kõve and Harri Salmann
Court Case	Petition of KREENHOLMI VALDUSE AKTSIASELTS for the declaration of unconstitutionality and invalidity of the Narva City Council regulation no 23 of 8 June 2006 “Approval of the price of water supply and waste-water disposal service”; the Narva City Government regulation no 847 of 29 June 2006 “Determination of the price of water supply and waste-water disposal service”; columns 3 and 4 of Table 1 of § 119 of the Narva City Council regulation no 30 of 3 August 2006 “Rules for use of public water supply and sewerage”, and §§ 12 and 13 of the Narva City Council regulation no 31 of 3 August 2006 “Procedure for price regulation of water supply and waste-water disposal service”.
Hearing	Written proceeding
CONCLUSION	**1. To dismiss the petition of KREENHOLMI VALDUSE AKTSIASELTS.** **2. To transfer the petition of KREENHOLMI VALDUSTE AKTSIASELTS to the Administrative Law Chamber of the Supreme Court for the preparation of the hearing of the petition for review referred to in section 5.2. of the petition.**

FACTS AND COURSE OF PROCEEDING

1. On 2 January 2008 the KREENHOLMI VALDUSE AKTSIASELTS submitted a petition to the Supreme Court for the declaration of unconstitutionality and invalidity of the Narva City Council regulation no 23 of

8 June 2006 “Approval of the price of water supply and waste-water disposal service”; the Narva City Government regulation no 847 of 29 June 2006 “Determination of the price of water supply and waste-water disposal service”; columns 3 and 4 of Table 1 of § 119 of the Narva City Council regulation no 30 of 3 August 2006 “Rules for use of public water supply and sewerage”, and §§ 12 and 13 of the Narva City Council regulation no 31 of 3 August 2006 “Procedure for price regulation of water supply and waste-water disposal service” (contested acts). Alternatively, bearing in mind the protection of its interests, the petitioner request that the Supreme Court render a judgment that it considers possible to render under the present circumstances, e.g. to transfer administrative cases no 3-06-1385 and 3-06-1789 for a new hearing. Thus, the petitioner in fact requests that the petition be regarded, alternatively, as a petition for review.

2. According to the petition, on 1 March 2002, the petitioner and Aktsiaselts Narva Vesi (hereinafter “PLC Narva Vesi) entered into a contract the object of which was the purchase of drinking water and provision of the service of waste-water treatment. The contract was valid until 31 December 2004. Although a new written contract has not been entered into, the PLC Narva Vesi continues to provide the services to the petitioner and the latter has paid for the services on the basis of earlier prices.

On 8 June 2006 the Narva City Council issued regulation no 23 “Approval of the price of water supply and waste-water disposal service”, by which it approved the prices of water supply and waste-water disposal in the administrative territory of Narva city for the PLC Narva Vesi. On 29 June 2006 the Narva City Government issued regulation no 847 “Determination of the price of water supply and waste-water disposal service”, by which it established the prices of water supply and waste-water disposal in the administrative territory of Narva city pursuant to the prices approved by regulation no 23. On 3 August 2006 the Narva City Council issued regulation no 30 “Rules for use of public water supply and sewerage”, and regulation no 31 “Procedure for price regulation of water supply and waste-water disposal service”, by which it determined the pollution groups exceeding limit values and corresponding fees. The petitioner contested the referred regulations in an administrative court. By its rulings of 8 August and 11 September 2006 the Tartu Administrative Court terminated the proceedings of the administrative cases, because these did not fall within the competence of administrative courts. By its rulings of 13 and 16 October 2006 the Tartu Circuit Court dismissed the appeals submitted against the rulings. On 11 December 2006 the Supreme Court refused to accept the appeals against the rulings. The petitioner has also had recourse to the Chancellor of Justice, who issued a recommendation to the Narva City Government to observe the principle of rule of law and good legislative practice upon establishing the price of water supply and waste-water discharge service.

On 25 July 2007 the PLC Narva Vesi filed an action with the Arbitration Court of the Estonian Chamber of Commerce and Industry for the commencement of an arbitration proceeding, in which it claims from the petitioner alleged arrears of 19 166 362 kroons and 98 cents, and a fine for delay. The referred amount mainly consists of the fees for water supply and discharge of waste-water as calculated on the basis of the contested acts. The Board of the Arbitration Court has held, on 18 September 2007, that the dispute was within their jurisdiction. On 24 January 2008 the Arbitration Court adopted a resolution stating that it was competent to adjudicate the dispute.

The petitioner is of the opinion that the contested acts in their conjunction are in conflict with the Public Water Supply and Sewerage Act and the Constitution. The contested acts disproportionately infringe the petitioner’s general right to equality (§ 12 of the Constitution) and freedom to engage in enterprise (§ 31 of the Constitution); and as far as the establishment of the fee for pollution exceeding limit values is concerned, the acts are in conflict with the principle of legal certainty. It is the imposed fee and the rates of fees for pollution exceeding limits that directly violate the rights of the petitioner.

The petitioner argues that it has no other effective remedy to ensure its right to judicial protection, as established in § 15 of the Constitution, than to file a petition with the Supreme Court. Administrative courts have refused to hear the actions filed against the contested acts, claiming that these are acts of general application. Neither is it possible to effectively seek protection to its rights through the Arbitration Court or the possible procedure of appeal against the Arbitration Court’s ruling. The Narva City Government has taken no actual steps to follow the recommendation of the Chancellor of Justice.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

3. § 15(1) of the Constitution recognises every person's right of recourse to the courts if his or her rights and freedoms are violated, and to petition – while his or her case is before the court for any relevant law, other legislation or procedure to be declared unconstitutional. According to § 9(2) of the Constitution, the rights, freedoms and duties set out in the Constitution shall extend to legal persons in so far as this is in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties. The right of recourse to the courts, established in § 15(1) of the Constitution, due to its nature and being an element of the principle of a state based on the rule of law, extends also to legal persons.

4. Under the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") the possibilities of submitting individual complaints to the Supreme Court are limited. Thus, a person whose rights are violated by a resolution of the Riigikogu, the Board of the Riigikogu or the President of the Republic, may contest the resolution in the Supreme Court (§§ 16 to 18 of the CRCPA). A complaint against a resolution or a measure of an electoral committee may be submitted by a political party, election coalition or an individual (§ 37 of the CRCPA). The Constitutional Review Court Procedure Act does not expressis verbis provide for a possibility to submit individual complaints for the review of constitutionality of legislation of general application.

5. On the basis of §§ 13, 14 and 15 of the Constitution, and the application practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the general assembly of the Supreme Court has held that the Supreme Court can only refuse to hear a person's complaint if the person can avail itself of some other effective remedy for the exercise of the judicial protection guaranteed by § 15 of the Constitution (see e.g. judgment of the general assembly of the Supreme Court of 17 March 2003 in case no 3-1-3-10-02 – RT III 2003, 10, 95, paragraph 17). The right to judicial protection, established in §§ 13 to 15 of the Constitution, embraces the right of a person to submit an action with a court if his or her rights and freedoms are violated, as well as the obligation of the state to establish for the protection of fundamental rights proper judicial procedures, which are fair and ensure effective protection of persons' rights (see e.g. judgment of the Constitutional Review Chamber of the Supreme Court of 14 April 2003 in case no 3-4-1-4-03 – RT III 2003, 13, 125, paragraph 16).

On the basis of the aforesaid the Supreme Court can refuse to hear a petition if the person can avail himself of some other effective remedy to ensure the judicial protection guaranteed by § 15 of the Constitution.

6. If the dispute between the PLC Narva Vesi and the petitioner were before a court, the petitioner could raise the issue of constitutionality of the contested legislation within the court proceeding, and the court could refuse to apply the acts due to the unconstitutionality thereof and, thereby, initiate a constitutional review proceeding in the Supreme Court (§ 9(1) of the CRCPA). In the present case the dispute over the debt-claim is being adjudicated by way of an arbitration proceeding. Neither the Code of Civil Procedure nor other legislation give an arbitration tribunal the right not to apply relevant legislation of general application and declare it unconstitutional.

This divergence form the right of every person to petition, while his or her case is before the court, for any relevant law, other legislation or procedure to be declared unconstitutional – as established in the second sentence of § 15(1) of the Constitution – is justifiable in the arbitration proceedings by voluntary waiver of the right of every person to have a recourse to the courts in the case of violation of rights and freedoms (the first sentence of § 15(1) of the Constitution). Parties to a relationship in private law have extensive possibilities of disposing of this relationship, including possibilities for the resolution of disputes arising from this relationship. When entering into an arbitral agreement the parties must inevitably take into account that this will exclude, to a substantial extent, the review of constitutionality of applicable norms by the courts. Provided that an arbitral agreement is valid and that the arbitration tribunal is competent to adjudicate the dispute, the parties have, in a manner permissible in relationships in private law, waived the possibility of adjudication of the dispute by a court, and by doing this, they have, at least in part, waived the ways of

protection of fundamental rights which can be exercised solely in the courts.

7. Although an arbitration tribunal can not initiate the declaration of unconstitutionality of a norm, it is not always strictly bound by an applicable norm when adjudicating a dispute. Thus, for example, § 6(2) of the Law of Obligations Act provides that nothing arising from law, a usage or a transaction shall be applied to an obligation if it is contrary to the principle of good faith.

8. It can not be excluded that the petitioner will be able to submit the allegations about unconstitutionality of the contested acts in the petition for annulment of a decision of an arbitral tribunal, which shall be heard by a circuit court as the first instance court in such matters according to § 755(4) of the Code of Civil Procedure. According to § 751(2)2) of the Code of Civil Procedure the court shall annul a decision of an arbitral tribunal based on the request of a party or at the court's initiative if the court establishes that the decision of the arbitral tribunal is contrary to Estonian public order or good morals.

9. When a petitioner has entered into an arbitral agreement, he or she has voluntarily waived an essential amount of guarantees applicable upon adjudication of cases by judicial procedure, including the possibility of review of constitutionality of applicable legislation. That is why the described procedure guarantees sufficiently effective possibilities to a petitioner for the judicial review of alleged violations of fundamental rights. On the basis of the aforesaid, the opinion of the petitioner that it has no other possibilities for the protection of its fundamental rights than to have a recourse to the Supreme Court by way of constitutional review, is erroneous. Consequently, the petition is not permissible and the Supreme Court can not adjudicate it on the merits. This is why the petition shall be dismissed.

10. The petitioner points out in section 5.2 of the petition that if the petition can not be satisfied, it should be regarded as a petition for the review of the administrative cases. As the Constitutional Review Chamber of the Supreme Court hereby dismisses the petition and the Chamber is not competent to hear such petitions for review, the Chamber hereby transfers the referred petition, on the basis of § 78 of the Code of Administrative Court Procedure, to the Administrative Law Chamber of the Supreme Court for the preparation of the hearing of the petition for review.
