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Home > Constitutional judgment 3-4-1-9-07

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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-9-07

Date of judgment 15 June 2007

Composition of court Chairman Märt Rask, members Indrek Koolmeister, Ants Kull, Julia Laffranque and Priit Pikamäe

Court Case Petition of the Tartu County Court to review the constitutionality of § 2521 of the Bailiffs Act.

Hearing Written proceeding

DECISION To satisfy the petition of the Tartu County Court and to declare § 25²¹ of the Bailiffs Act unconstitutional and invalid insofar as it establishes the bailiff's additional fee for a seizure act of an immovable in the amount of 0.5% of the value of the seized thing.

FACTS AND COURSE OF PROCEEDING

1. Tartu bailiff Reet Rosenthal commenced several enforcement proceedings against AS G.S.G. Oil on the basis of claims for fulfilment of OÜ Petroimpex and AS SEB Eesti Ühispank, wherein the total amount of claims was more than 9 million kroons. Both claimants had filed for fulfilment the contracts for the establishment of a mortgage, the underlying mortgage asset item of which was the registered immovable situated at Ravila Street 63, Tartu.

On 10 August 2006 the bailiff seized the immovable situated at Ravila 63, Tartu, belonging to the debtor. The immovable is a commercial one, the essential parts of which are a two-storied office building and a filling station. The value of the immovable was evaluated to be 15 million kroons.

2. On 8 September 2006, on the basis of §§ 21 and 25²¹ of the Bailiffs Act (hereinafter “the BA”), bailiff Reet Rosenthal decided on ordering payment of an additional fee of 75 000 kroons (88 500 kroons with VAT) to herself. The bailiff justified the ordering of payment of the additional fee by the act of seizure of the

debtor's immovable, performed on 10 August 2006.

3. The debtor – AS G.S.G. Oil – contested the decision on payment of additional fee in the Tartu County Court, requesting that the court annul the decision.

4. By its ruling of 8 March 2007 in civil matter no 3-06-29232 the Tartu County Court allowed the appeal of AS G.S.G. Oil and annulled the bailiff's decision on ordering the payment of additional fee, did not apply § 25²¹ of the BA and declared it unconstitutional.

5. The County Court transferred the ruling to the Supreme Court, thus initiating the constitutional review court proceedings.

JUSTIFICATIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDINGS

6. The Tartu County Court held that under § 25²¹ of the BA a bailiff is entitled to an additional fee every time he or she performs an act of seizure outside the bailiff's office. Taking into account the performed act, the formalities of the statement of seizure of property and the market price of analogous services, the additional fee of 85 500 is manifestly too big, it is excessively restricting the debtor's right of ownership, and thus, unfair. The Tartu County Court argues that § 25²¹ of the BA infringes the fundamental rights protected by §§ 14 and 32 of the Constitution and is also in conflict with § 113 of the Constitution.

7. The Riigikogu is of the opinion that the fact that in individual cases the bailiff's additional fee may be very big does not give rise to the conclusion that the 0.5% rate of additional fee provided for in § 25²¹ of the BA is disproportionately high and unjustifiably encumbering on a debtor. When evaluating the constitutionality of the bailiff's additional fee one has to take into account the role of the bailiff, including the requirement that he or she be independent and impartial in the performance of professional acts, that the bailiff hold office in his or her own name and at own liability, that the bailiff has no guarantees comparable to those of state public servants, and that the bailiffs' sources of income are limited due to restrictions related to office. § 25²¹ of the BA does take into account the debtors' interests, because the debtor has the possibility to discharge obligations voluntarily and with smaller expenses on enforcement, and the regulation under discussion influences the debtors to behave rationally with the aim of economising expenses. The fee has legal clarity and is logical.

8. The Chancellor of Justice is of the opinion that § 25²¹ of the BA is in conflict with § 113 of the Constitution to the extent that it is the agreement entered into by the participants in the proceeding or a decision of the bailiff that is decisive upon calculating the amount of the fee, and that it is in conflict with § 32 of the Constitution to the extent that the amount of the additional fee depends on the value of the immovable, irrespective of the actual amount of bailiff's work upon performing an act of seizure. The Chancellor of Justice's conclusions are based on the understanding that the bailiff's additional fee, provided for in § 25²¹ of the BA, is a state fee that should cover the expenses of the state upon performance of acts.

9. The Minister of Justice is of the opinion that § 25²¹ of the BA is not a provision relevant for the adjudication of the matter. § 25²¹ of the Bailiffs Act establishes the ground and the rate of bailiff's additional fee, yet it is applicable only in conjunction with § 23(3) and § 25²⁰ of the BA, which are of decisive importance for the adjudication of the dispute, yet the county court had failed to take these into account. The Minister of Justice argues that the additional fee can be charged only in the amount which is in proportion to the amount payable to the claimant within enforcement proceedings. The bailiff's additional fee can be collected only together with the basic fee. As in the case under discussion the bailiff could not claim the basic fee, she had no right to demand the additional fee. Upon adjudicating the matter the court should have applied several provisions of the Bailiffs Act in their conjunction, and should have done that in favour of the obligated person, and thus no question of constitutionality of the norm establishing the amount of additional fee would have arisen.

10. AS G.S. Oil is of the opinion that § 25²¹ of the BA is not in conformity with §§ 14, 32 and 113 of the

Constitution, because it allows bailiffs to demand additional fees, the amount of which, provided by law, is not sufficiently clear and predictable, as it is based on the market value of property, which is a variable, and is not based on the cost principle, and constitutes, thus, a disproportionate restriction on the debtor's right of ownership.

11. Bailiff Reet Rosenthal is of the opinion that § 25²¹ of the BA is not unconstitutional. The additional fee for an enforcement act becomes collectible after the performance of the act. § 23(3) of the BA is not a norm applicable to bailiffs' additional fees. The fact that a bailiff can no longer demand the basic fee does not mean that he or she loses the right to receive additional fees. § 25²¹ of the BA is clear in the legal sense. The content of the norm can be determined on the basis of the price of the seized thing. It has to be taken into account that § 8 of the Code of Enforcement Procedure requires that a bailiff explain the rights and obligations of participants in the enforcement proceedings, including the issues relating to bailiff's additional fee, to the participants. The amount of the additional fee for an act of seizure is proportional. Within the enforcement proceedings the debtor has the possibility to discharge an obligation voluntarily, thus avoiding the expenses related to the seizure of an immovable. Performance of an act of seizure entails greater responsibility and liability for the bailiff. It is also a more difficult act of enforcement. Other rates, dependent on the value of property, can be found in the legal order. Thus, for example, pursuant to § 141(1) of the Code of Civil Procedure a security for securing the action is 5% of the value of the usual value of that which is claimed, but not lower than 500 kroons and not higher than 100 000 kroons. Also, the State Fees Act contains rates dependent on the transaction value. The bailiff is of the opinion that the valid regulation of the enforcement procedure guarantees sufficient protection to the fundamental rights of debtors.

CONTESTED PROVISION

12. § 25²¹ of the Bailiffs Act provides as follows:

“§ 25²¹. Additional fee for seizure act

(1) A bailiff shall receive an additional fee in the amount of 0.5% of the value of the seized thing for a seizure act performed outside of the bailiff's office which consists of the seizure of movables in the possession of an obligor, or for a seizure act relating to an immovable.

(2) The decision on ordering payment of additional fee shall be issued after the seizure act and evaluation of the property. In case of a dispute concerning the seized property or its price, the decision on ordering payment of additional fee shall be issued after the end of the dispute provided that the property remains seized and has been evaluated.”

OPINION OF THE CHAMBER

13. First, the Constitutional Review Chamber is going to analyse the admissibility of the petition of the Tartu County Court (I). Thereafter the Chamber shall give its opinion on whether the contested provision, insofar as it provided for a bailiff's additional fee of 0.5% of the value of the seized immovable, is in conformity with the guarantees established in §§ 32 and 113 of the Constitution, and thereupon the Chamber shall adjudicate the petition of the Tartu County Court (II).

I.

14. The Tartu County Court requests the review of constitutionality of § 25²¹ of the Bailiffs Act, having taken the view that the rate of bailiff's additional fee for an act of seizure of a thing, provided for in this provision, excessively restricts the debtor's right of ownership in the light of the nature of an act of seizure, the formalities of the legal instrument of seizure of property and the market prices of analogous services. The county court argues that at the same time § 25²¹ of the BA violates the requirement of fair proceeding, arising from § 14 of the Constitution, and the requirements to payments under public law.

15. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the provision

the constitutionality of which the Supreme Court reviews within concrete norm control, must be relevant. In order to examine the permissibility of constitutional review of § 25²¹ of the BA it must first be ascertained whether § 25²¹ of the BA amounts to a norm relevant from the point of view of the dispute on the basis of which the present constitutional review case was initiated.

16. Pursuant to the Supreme Court practice a norm is relevant if it is of decisive importance for the adjudication of the case. Thus, for the exercise of concrete norm control of § 25²¹ of the BA, this has to be the norm on the basis of which the bailiff was to order the payment of additional fee.

17. According to the facts of this dispute bailiff Reet Rosenthal seized the immovable belonging to AS G.S.G. Oil and ordered the payment of additional fee to herself for the performance of this act on the basis of §§ 21 and 25²¹ of the BA. Pursuant to § 25²⁰(2) of the Bailiffs Act the additional fee shall be collected from the debtor, i.e. in the enforcement proceeding under discussion AS G.S.G. Oil. The latter filed an appeal against the decision ordering the payment of additional fee to the bailiff. If § 25²¹ of the BA is unconstitutional, the court shall annul the bailiff's decision ordering the payment of an additional fee. Consequently, § 25²¹ of the BA is relevant and the petition of the county court is admissible.

18. The Chamber does not agree with the opinion of the Minister of Justice that § 25²¹ of the BA is not a norm having decisive importance for the adjudication of the matter. The additional fee for an act of seizure of an immovable, payable to a bailiff, unambiguously arises from § 25²¹ of the BA, and that is why the Chamber has no doubts as to the relevance of the norm.

As the Tartu County Court has brought forward the constitutionality of bailiff's additional fee, established in § 25²¹ of the BA, only in relation to an act of seizure of an immovable, the Supreme Court shall confine its constitutional review only to that aspect.

II.

19. The Tartu County Court is of the opinion that § 25²¹ of the BA excessively restricts the right of ownership of AS G.S.G. Oil, violating, at the same time, the requirements of § 13 of the constitution.

20. § 32 of the Constitution is a general norm protecting proprietary rights, the sphere of protection of which includes, in addition to movable and immovable things, the monetarily appraisable rights and claims. The term "property" also embraces money (see judgment of the General Assembly of the Supreme Court of 17 June 2004, in matter no 3-2-1-143-03 – RT III 2004, 18, 211, point 18).

21. It proceeds from § 9(2) of the Constitution that 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. In conformity with the aims of legal persons and with the idea of protection of ownership right, what is established in § 32 of the Constitution also extends to legal persons (see also the referred judgment of the General Assembly of 17 June 2004, in matter no 3-2-1-143-03, point 18).

22. Consequently, the bailiff's additional fee of 0.5% of the value of the seized thing, collectable from AS G.S.G. Oil within enforcement proceedings under § 25²¹ of the BA, constitutes an infringement of AS G.S.G. Oil's freedom to possess, use and dispose of its property, guaranteed by § 32(2) of the Constitution. The bailiff's additional fee constitutes a public law financial obligation, and thus the referred infringement of ownership right simultaneously falls within the sphere of protection of § 113 of the Constitution, and must meet the requirements proceeding from the latter provision.

23. It proceeds from §§ 32 and 113 of the Constitution that public law financial obligations, restricting the right of ownership, must be provided by law. Thus, restrictions of ownership of the referred kind may not be provided by acts ranking lower than laws. This requirement has been met in the present case.

24. The aim of the bailiff's additional fee, provided by § 25²¹ of the BA, can be induced from § 25²⁰ of the

BA, from the nature of the additional fee and from the explanatory letter to the Bailiffs Act Amendment Act 670 SE I. The aim is to compensate a bailiff for enforcement acts which are complex in the technical and legal senses or time consuming, and to motivate bailiffs to perform complex acts involving great responsibility. The bailiff's additional fee for an act of seizure is not, in essence, a tax; it resembles a fee meant to compensate for the costs of a concrete performance in public law.

25. In addition to the requirement that restrictions be provided by law, §§ 32(2) and 113 of the Constitution require that restrictions on ownership right be proportional. Next, the Chamber shall analyse whether the ownership restriction imposed by § 25²¹ of the BA is suitable, necessary and proportional in the narrow sense for the achievement of the desired aim.

26. § 25²¹ of the Bailiffs Act establishes that a bailiff shall receive an additional fee for a seizure act in the amount of 0,5% of the value of the seized thing. Pursuant to § 142(1) of the Enforcement Procedure Act, in order to seize an immovable, a bailiff shall record an immovable and its accessories and other objects to which a mortgage extends, shall prohibit their disposal and have a prohibition on the use of the immovable be entered in the land register. Pursuant to § 143 of the same Act, instrument of seizure of an immovable shall set out the enforcement instrument on which the claim for payment is based, information concerning the immovable in the land register, the accessories and essential parts of the immovable, the price of the immovable, as well as the dimensions of buildings and the number and purposes of rooms. The Chamber is of the opinion that the additional bailiff's fee, provided by § 25²¹ of the Bailiffs Act, is a suitable measure to compensate a bailiff for the expenses related to seizure of an immovable. Thus, § 25²¹ constitutes a suitable restriction on the ownership right of a debtor.

27. The Chamber also holds that § 25²¹ of the BA constitutes a necessary restriction on a debtor's right of ownership, because – as appears from the opinions of bailiff Reet Rosenthal and the Minister of Justice – in certain cases the right to basic fee may not be created in the enforcement procedure, whereas it is clear that a bailiff incurs certain expenses in relation to seizure of an immovable.

28. The bailiff's additional fee is, by nature, similar to a state fee, and consequently the rate thereof must be established on the basis of the cost principle. The Chamber admits that based on the purpose of an act, the benefits received as a result of the act, or material public interest and, above all, based on social or economic policy considerations, the rate of a state fee may be established on different basis than the cost principle (§ 4(2) of the State Fees Act). Bearing in mind the aim of the bailiff's fee (see point 24 of this judgment) the establishment of the bailiff's additional fee on different basis than the cost principle is not justified. Thus, in order to evaluate the proportionality of the restriction on the debtor's freedom to the use, dispose of and possess his property in the case under discussion, it is to be determined whether the rate of the bailiff's additional fee for a seizure act, established in § 25²¹ of the BA, matches the complexity of acts performed upon the seizure of an immovable and with the time they consume.

The legislator has established a fixed rate of the bailiff's additional fee for an act of seizure of an immovable, that is 0.5% of the value of the seized thing. Consequently, the regulation concerning the bailiff's additional fee for an act of seizure of an immovable does not make it possible in any way to take into account, when determining the amount of the additional fee, the complexity of the seizure of a concrete thing or the time spent on the seizure. The Chamber is of the opinion that a regulation of this kind does not guarantee the proportionality of the restriction on a debtor's right of ownership.

The Constitutional Review Chamber holds that the bailiff's additional fee for a seizure act in the amount of 0.5% of the value of the seized thing, as established in § 25²¹ of the BA, is not a proportional restriction on the right of ownership of a debtor in the enforcement procedure.

29. As the restriction on the right of ownership of a debtor in the enforcement procedure, established by § 25²¹ of the BA, is not in conformity with § 32(2) in conjunction with § 113 of the Constitution, the Chamber does not consider it necessary to analyse the other allegations of the Tartu County Court concerning the unconstitutionality of § 25²¹ of the BA.

30. On the basis of the foregoing the Constitutional Review Chamber hereby satisfies the petition of the Tartu County Court and declares § 25²¹ of the BA unconstitutional and invalid insofar as it establishes the bailiff's additional fee for a seizure act of an immovable in the amount of 0.5% of the value of the seized thing.

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