Constitutional judgment 3-4-1-2-07

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-2-07
Date of judgment	2 May 2007
Composition of court	Chairman Märt Rask, members Indrek Koolmeister, Ants Kull, Julia Laffranque and Priit Pikamäe
Court Case	Petition of Tallinn Circuit Court to declare the fourth sentence of clause 3 of "Procedure for determination of land necessary for servicing a structure", approved by Government of the Republic Regulation No 144 of 30 June 1998, in the wording in force from 13 June 1999 until 17 October 2003, unconstitutional.
Contested judgment	Judgment of Tallinn Circuit Court of 8 February 2077 in administrative matter No 3-03-54
Hearing	Written proceeding
Decision	**To declare the fourth sentence of clause 3 of "Procedure for determination of land necessary for servicing a structure" approved by Government of the Republic Regulation No 144 of 30 June 1998, in the wording in force from 13 June 1999 until 17 October 2003 (incl.), unconstitutional.**

FACTS AND COURSE OF PROCEEDING

1. On 2 May 1997 AS Esmar submitted an application for privatisation of land by a right of pre-emption with Viimsi rural municipality government, wishing to privatise land around the AS Esmar main building and memorial complex Merelaine and around a technology centre under construction. On 23 December 1997 AS Esmar submitted an application for privatisation of land by a right of pre-emption around the complex of buildings of Pringi horticultural company.

2. By order No 509 of 30 June 2003 the Viimsi rural municipality government set the term of one year to AS

Esmar for putting into order of the abandoned and dilapidated technological centre. Also, the land necessary for temporary servicing of the structure was determined for one year. By order No 514 of 30 June 2003 the Viimsi rural municipality government also set the term of one year for putting into order the dilapidated and abandoned horticultural complex owned by AS Esmar, and the land necessary for temporary servicing of the structure was determined for one year.

3. In its action submitted to the Tallinn Administrative Court AS Esmar applied for the annulment of orders No 509 and 514 of the Viimsi rural municipality government.

4. By its judgment of 17 February 2006 the Tallinn Administrative Court dismissed the action of AS Esmar. The court found that the new wording of clause 3 of "Procedure for determination of land necessary for servicing a structure" approved by Government of the Republic Regulation No 144 of 30 June 1998, which was approved on 18 October 2003, provided that land necessary for servicing abandoned or dilapidated structures which substantially damage the surroundings or scenery shall be determined only if pursuant to § $6(3^1)$ of the Land Reform Act (hereinafter "LRA") a local government determines a date by which such structures must be put in order. As a dilapidated and abandoned structure is not deemed to be a structure and no land necessary for servicing it and subject to privatisation in the future was determined, the determination of temporary land necessary for servicing was not in conflict with the land readjustment requirements. It is not necessary to issue a construction permit or design criteria for the putting in order of objects.

5. AS Esmar filed an appeal with the Tallinn Circuit Court applying for the annulment of the Administrative Court judgment and for rendering a new judgment satisfying its appeal. In its appeal AS Esmar argued that it proceeded from § $6(3^1)$ of the LRA (in the wording of 30 June 2003) that upon setting a term to the owner of a structure for putting the structure in order, the same administrative act shall determine the land necessary for servicing the structure, which the owner of the structure would be able to privatise if the structure is put in order by the due date. By its order of 30 June 2003 the rural municipality government determined a date for putting the structure in order, yet it failed to expressly declare is position as to the possibility of privatisation of the land by a right of pre-emption after the structure has been put in order. The last sentence of § $6(3^1)$ of the Land Reform Act is applicable in the present dispute despite of the fact that on 30 June 2003 clause 3 of the procedure established by an act ranking lower than parliamentary Acts was not in conformity with the wording of § $6(3^1)$ of the LRA. If an act ranking lower than a parliamentary Act is in conflict with the latter the parliamentary Act shall be applied.

The Viimsi rural municipal government contested the appeal.

6. By its judgment of 6 February 2007 the Tallinn Circuit Court satisfied the appeal of AS Esmar, annulled the judgment of the administrative court and made a new judgment annulling the orders of the Viimsi rural municipality government of 30 June 2003. The court did not apply and declared unconstitutional the fourth sentence of clause 3 of "Procedure for determination of land necessary for servicing a structure", approved by Government of the Republic Regulation No 144 of 30 June 1998, in the wording in force from 13 June 1999 until 17 October 2003 (incl.).

OPINION OF THE COURT AND OF PARTICIPANTS IN THE PROCEEDING

7. The Tallinn Circuit Court is requesting that the fourth sentence of clause 3 of "Procedure for determination of land necessary for servicing a structure", in the wording in force from 13 June 1999 until 17 October 2003 (incl.), be declared unconstitutional due to conflict with the Constitution.

The court is of the opinion that due to the fact that pursuant to the fourth sentence of clause 3 of the procedure the land necessary for servicing a structure shall not be determined before the structure is put in order by a due date, the provision was -- in the wording in force at the time of issuing the contested order, that is on 30 June 2003 -- in conflict with § 6(31) of the LRA, which provides that the land necessary for servicing a structure, which the owner of the structure will be entitled to privatise after the structure has been put into order, shall be assessed when the local government designates a due date for putting the structure in

order.

Pursuant to § 87(6) of the Constitution the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of law. As the fourth sentence of clause 3 of the procedure, approved by a regulation of the Government of the Republic, in the referred wording is not in conformity with the law, it is also in conflict with § 87 (6) of the Constitution.

8. The Minister of the Environment, acting as the representative of the Government of the Republic, is of the opinion that at the time of issue of the contested order the fourth sentence of clause 3 of the procedure was in conflict with § 6(3^1) of the LRA, and the minister underlines that the fourth sentence of clause 3 of the procedure was in conflict with § 6(3^1) of the LRA during the period between 16 July 2000 and 17 October 2003 (incl.), and not as of 13 June 1999. This is due to the fact that although the new wording of clause 3 of the procedure for determination of land necessary for servicing a structure entered into force on 13 June 1999, the referred procedure was, at the time it was established, in conformity with § 6(3^1) of the Land Reform Act, which was in force since 22 March 1999. The conflict was created on 16 July 2000, when the amendments to the Land Reform Act entered into force, supplementing § 6 (3^1) of the Land Reform Act. On 18 October 2003 the new wording of clause 3 of the procedure entered into force, which is in conformity with § 6(3^1) of the Land Reform Act.

9. AS Esmar completely shares the opinion of the Tallinn Circuit Court. It must be unambiguously clear for subjects entitled to privatise land by a right of pre-emption how much land he will be entitled to privatise after having fulfilled the obligation imposed by an administrative authority.

10. The Viimsi rural municipality council is of the opinion that the finding of the Tallinn Circuit Court that the fourth sentence of clause 3 of the procedure, in the wording in force at the time of issue of the contested order, was in conflict with § 6(3^1) of the LRA, is not correct. It is not reasonable to declare unconstitutional an act that is no longer valid anyway.

11. The Chancellor of Justice is of the opinion that the fourth sentence of clause 3 of the procedure was – in the wording in force from 13 June 1999 until 17 October 2003 (incl.) – in conflict with the Land Reform Act and, therefore, also with §§ 3(1) and 87(6) of the Constitution.

Proceeding from §§ 7(5), 9(9), 10(3) and 22^1(6) of the LRA the authority of the Government of the Republic is limited to establishing the procedure for determining the area and boundaries of land necessary for servicing a structure, and the bases for determining the land necessary for servicing a structure must proceed from the Land Reform Act. Thus, the Government of the Republic has no right to restrict the grounds for determining the land necessary for servicing a structure, established in § 6(3^1) of the LRA, or to impose further conditions in comparison with those provided by law. By establishing in the procedure that the land necessary for servicing a structure shall be determined only after the structure has been put into order, the Government of the Republic has, by a lower ranking act, imposed an additional condition which has to be met for the determination of land to be privatised. As this condition does not proceed from the law, the Government of the Republic has exceeded its authority.

12. The Minister of Justice is of the opinion that the fourth sentence of clause 3 of the procedure, in the wording in force until 17 October 2003 (incl.), was in conflict with § 87(6) of the Constitution.

CONTESTED PROVISIONS

13. Clause 3 of "Procedure for determination of land necessary for servicing a structure", approved by Government of the Republic Regulation No 144 of 30 June 1998, in the wording in force from 13 June 1999 until 17 October 2003 (incl.), reads as follows:

"The land necessary for servicing temporary structures or plantations shall be determined in the cases established in the Land Reform Act. Land necessary for servicing dilapidated or abandoned structures which substantially damage the surroundings or scenery shall not be determined. For putting in order or removing

the structures enumerated in the previous sentence the local government shall designate a due term, which shall not be less than one year. The land necessary for servicing the structures which have been put into order by the due date shall be determined pursuant to the provisions of this procedure. The land necessary for servicing the structures referred to in § 14(1) of the Law of Property Act Implementation Act (RT I 1993, 72/73, 1021; 1999, 44, 510) shall be determined after the permit for the use of the construction works has been issued."

It is the fourth sentence of the above clause that is relevant for the purposes of the constitutional review proceedings:

"The land necessary for servicing the structures which have been put into order by the due date shall be determined pursuant to the provisions of this procedure."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

14. To adjudicate the matter the Constitutional Review Chamber shall first analyse whether the norm contested by the Tallinn Circuit Court is relevant (I). Next, the Chamber shall give its opinion on the lawfulness of the contested norm and shall resolve the petition of the Tallinn Circuit Court concerning the declaration of unconstitutionality of the fourth sentence of clause 3 of "Procedure for determination of land necessary for servicing a structure", approved by Government of the Republic Regulation No 144 of 30 June 1998, in the wording in force from 13 June 1999 until 17 October 2003(incl.) (II).

I.

15. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which is examined by the Supreme Court by way of concrete norm control must be relevant. According to the established practice of the Supreme Court a norm is relevant if it is decisive for the outcome of the case. A provision is of a decisive importance when in the case of unconstitutionality of the provision a court should render a judgment different from that in the case of constitutionality of the provision (see judgment of 17 June 2005 of Constitutional Review Chamber of the Supreme Court in case No 3-4-1-2-05 – RT III 2005, 24, 248, point 25).

16. By orders No 509 and 514 of 30 June 2003, the Viimsi rural municipality government set the term of one year for putting in order the dilapidated and abandoned structures belonging to AS Esmar and the land necessary for temporary servicing of the structure was determined for one year, whereas the rural municipality government failed to determine the land that the persons would be able to privatise after the structure has been put into order.

17. Pursuant to § 6(3^1) of the Land Reform Act, in the wording which entered into force on 16 July 2000, abandoned or dilapidated structures which substantially damage the surroundings or scenery shall be put into order or removed by the owner by the due date determined by the local government, whereas the term shall not be less than one year. Structures which are not put into order or removed by the due date shall be expropriated on the basis of the provisions of clause 3(1)8) of the Immovables Expropriation Act. If a local government designates a due date to the owner of the referred structure by which the structure is to be brought into order, land necessary for servicing the structures is assessed and the owner of the structure has the right to privatise the land after bringing the structure into order.

Clause 3 of the procedure, in the wording in force from 13 June 1999 until 17 October 2003 (incl.), established that no land was to be determined for servicing the dilapidated or abandoned structures. The local government was to set a date by which the referred structures were to be put into order or removed, whereas the term may not have been less than one year, and the land necessary for servicing the structures put into order by a due date was to be assessed pursuant to the procedure for determining land necessary for servicing a structure.

18. Thus, pursuant to the Land Reform Act the land subject to privatisation is assessed when a due date is set to a person for putting the structure in order, and the right to privatise the land thus assessed is created after putting the structure in order. Pursuant to the contested provision of the procedure the land was assessed only after the structures had been put into order.

The orders of 30 June 2003 of the Viimsi rural municipality government were based on the contested provision. If the referred provision is unconstitutional and invalid, the orders of the Viimsi rural municipality government of 30 June 2003 would be unlawful; and if the contested provision of the procedure is invalid it would have been necessary, upon setting the due date for putting the structure in order also to assess the land which the subject of the order (AS Esmar) would have been entitled to privatise after putting the structure into order, as established in § 6(3^1) of the LRA. That is why the fourth sentence of clause 3 of the procedure in the wording in force from 13 June 1999 until 17 October 2003 (incl.) has to be deemed relevant.

II.

19. § 3(1) of the Constitution establishes the principle that the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. It proceeds from § 87(6) of the Constitution that the Government of the Republic may issue regulations and orders on the basis of and for the implementation of law, that is on the basis of norms delegating authority, set out in Acts. Pursuant to § 90(1) of the Administrative Procedure Act a regulation may be issued only upon existence of a provision delegating authority which is set out in an Act, and in accordance with the limits, concept and objective of the provision delegating authority.

20. An Act must contain a norm delegating pertinent authority for the executive to be able to issue legislation of general application, and the provision must specify the administrative authority authorised to issue legislation as well as a clear purpose, content and extent of the right to issue regulations (judgment of the Constitutional Review Chamber of 20 December 1996, in matter No 3-4-1-3-96 – RT I 1997, 2, 28, part III of the judgment).

21. Pursuant to §§ 7(5), 9(9), 10(3) and 22^1(6) of the LRA the authority of the Government of the Republic is limited to establishing the procedure for determining the area and boundaries of land necessary for servicing a structure, and the bases for determining the land necessary for servicing a structure must proceed from the Land Reform Act. Thus, the Government of the Republic has no right to restrict the grounds for determining the land necessary for servicing a structure or to impose further conditions in comparison with those established in § 6(3^1) of the LRA. By establishing in the procedure that the land necessary for servicing a structure shall be assessed only after the structure has been put into order the Government of the Republic has, by a lower ranking act, imposed an additional condition which has to be met for the determination of land to be privatised. As this condition does not proceed from the law, the Government of the Republic has exceeded its authority. Thus, the fourth sentence of clause 3 of the procedure is in conflict with § 6(3^1) of the LRA and, therefore, also with §§ 3(1) and 87(6) of the Constitution.

22. § 6(3^1) of the Land Reform Act was enacted on 22 March 1999 and it established that for the purposes of the Land Reform Act, roads and lines which enabled the intended use of land to be returned were not constructions. Temporary structures or constructions and abandoned or dilapidated structures which substantially damage the surroundings or scenery were also not deemed to be structures. Such structures were to be put into order or removed by the owner by the due date determined by the local government. The term was to be not less than one year. Structures which were not put into order or removed by the due date were to be expropriated on the basis of the provisions of clause 3 (1) 8) of the Immovables Expropriation Act. By the amendment which entered into force on 16 November 1999 the word “lines” in the first sentence was replaced by words “utility networks and constructions”, and § 6(3^1) of the LRA was in force in this wording until 15 July 2000 (incl.).

On 13 June 1999 the new wording of clause 3 of the procedure for determination of land necessary for

servicing a structure entered into force, pursuant to which the land necessary for servicing temporary structures or plantations was to be determined in the cases established in the Land Reform Act. Land necessary for servicing dilapidated or abandoned structures which substantially damage the surroundings or scenery was not to be determined. For putting in order or removing the structures enumerated in the previous sentence the local government was to designate a due term, which was to be not less than one year. The land necessary for servicing the structures which have been put into order by the due date was to be determined pursuant to the procedure for determination of land necessary for servicing a structure.

The Chamber considers it necessary to point out that although the judgment has several times referred to the fourth sentence of clause 3 of the procedure in the wording in force from 13 June 1999 until 17 October 2003 (incl.), there was no conflict between § 6(3^1) of the LRA and the fourth sentence of clause 3 of the procedure between 13 June 1999 and 15 July 2000 (incl.). On 16 July the amendments to the Land Reform Act entered into force, supplementing § 6(3^1) of the Land Reform Act with the sentence providing that if a local government designates a due date to the owner of a dilapidated and abandoned structure which substantially damages the surroundings or scenery by which the structure is to be brought into order, land necessary for servicing the structures is assessed and the owner of the structure has the right to privatise the land after bringing the structure into order. At the same time the fourth sentence of clause 3 of the procedure remained in force in the unamended wording until 17 October 2003, stipulating that land necessary for servicing a structure shall be assessed only for the structure put into order by a due date. On 18 October 2003 the new wording of clause 3 of the procedure entered into force, providing that land necessary for servicing a dilapidated or abandoned structure which substantially damages the surroundings or scenery shall be assessed only if the local government, under § 6(3^1) of the Land Reform Act, sets a due date for putting the structure into order.

23. Pursuant to § 152 of the Constitution it is the conflict with the Constitution that serves as a basis for the Supreme Court to declare a law or other legislation invalid and which the Supreme Court has to examine in conformity with § 5 (2) and § 6(1)3) of the Constitutional Review Court Procedure Act. Pursuant to § 93(1) of the Administrative Procedure Act a regulation is valid until it is repealed by an administrative authority or the Supreme Court, or until expiry, or until repeal of the provision delegating authority. As in the present case the Government of the Republic itself has amended the contested regulation so that the valid wording of the regulation no longer contains the contested provision, that is it is no longer valid, the Supreme Court can not declare it invalid. That is why the Chamber confines itself to the finding of unconstitutionality of the contested provision of the procedure approved by a regulation of the Government of the Republic (see judgment of the Constitutional Review Chamber of 27 May 1998, in matter No 3-4-1-4-98 – RT I 1998, 49, 752) and of the ex tunc inter partes effect.

24. On the basis of the aforesaid the Supreme Court declares the fourth sentence of clause 3 of “Procedure for determination of land necessary for servicing a structure“, approved by Government of the Republic Regulation No 144 of 30 June 1998, in the wording in force from 13 June 1999 until 17 October 2003 (incl.), unconstitutional.

Märt Rask, Indrek Koolmeister, Ants Kull, Julia Laffranque, Priit Pikamäe

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