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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-4-03

Date of judgment of 14 April 2003

Composition of court of Chairman Uno Lõhmus and members Tõnu Anton, Eerik Kergandberg, Ants Kull and Villu Kõve

Court Case Review of constitutionality of § 23 (4) of the Code of Enforcement Procedure

Basis of proceeding of Judgment of the Tallinn City Court of 29 January 2003

Court hearing Written proceeding

Decision **To declare that § 23 (4) of the Code of Enforcement Procedure (in the wording valid as of 1 March 2001 until 16 March 2003) was unconstitutional to the extent that it provided that the term for presenting objections be calculated as of the date when the bailiff sends the debtor a notice of receipt of an enforcement instrument.**

FACTS AND COURSE OF PROCEEDING

1. On 4 April 2002 the *OÜ Laanepüü (Laanepüü Plc.)* submitted a petition for the collection of debt of 139,222 kroons under the contract entered into with Heidi Kopper on 31 January 2002. The debtor was informed of the submission of enforcement instrument for enforcement pursuant to procedure established by law. The debtor presented no objections against the petition. On 24 April 2002, on the basis of the petition, bailiff Reet Vokk commenced an enforcement proceeding.

On 16 August 2002 the OÜ Laanepüü submitted a petition for the collection of additional 650,295 kroons from H. Kopper. On 6 September 2002 the bailiff sent a notice to the debtor about the increase in the amount of claim. According to the petition the claimant had, unilaterally, terminated the contract of 31 January 2002, which is the basis for collection of all payments. On 20 September 2002 the husband of the debtor took delivery of the notice, to impart it to his wife. On 2 October 2002 the debtor presented her objections to the bailiff against the commencement of the enforcement proceeding on the basis of the enforcement instrument, which is the basis for the increase in the amount of claim. The debtor submitted, simultaneously with the objections, a petition for the restoration of term for presenting objections on the ground that the debtor had received the bailiffs notice after the expiry of the term for presenting objections, provided by law.

2. By her decision of 14 October 2002 the bailiff dismissed the debtor's objections against the commencement of the enforcement proceeding. The bailiff did not form an opinion on the petition for the restoration of term. On 3 December 2002 the debtor filed an action with the Tallinn City Court for the recognition of the right of set-off on the basis of the right of claim, contesting, *inter alia*, the termination of contract of 31 January 2002.

On 6 December 2002 the debtor submitted to the bailiff a petition for the suspension of the enforcement proceeding. According to the petition the bailiff should suspend the enforcement proceedings, because an action is pending before a court, contesting the decision of the bailiff to commence the enforcement proceeding on the basis of the petition concerning the increase in the amount of claim. By her decision of 9 December 2002 the bailiff dismissed the petition for the suspension of the enforcement proceeding. Pursuant to the decision the suspension of a proceeding is the bailiff's right, not an obligation. On 9 December 2002 the bailiff conducted a compulsory auction of the debtor's property, in the course of which the debtor's property was sold to the claimant. The claimant's claim was set off against the purchase price.

3. On 25 November 2002 the debtor filed with the Tallinn City Court a complaint against the activities of the bailiff, requesting the cancellation of the bailiff's decision of 14 October 2002 and restoration of the term for presenting objections. On 23 December 2002 the debtor filed with the Tallinn City Court a complaint against the decision of the bailiff of 9 December 2002 refusing to suspend the proceeding, and for the cancellation of the auction of 9 December 2002. The debtor argued that the bailiff ought to have suspended the enforcement proceeding, because the commencement of the enforcement proceeding on the basis of increase in the amount of claim had been contested in court. The bailiff has not reasoned the dismissal of the petitions and did not use the right of discretion in accordance with the principles of the Administrative Procedure Act. As there was no basis for the enforcement proceeding concerning the increased amount of claim, there was no basis for the auction.

4. On 29 January 2003 the Tallinn City Court rendered a judgment by which the action of H. Kopper was partly satisfied. The city court did not apply § 23(4) of the Code of Enforcement Procedure (hereinafter "the CEP") to the extent that it provides that the running of the term for presenting objections is calculated as of the sending of enforcement instrument. The court annulled the bailiff's decision of 14 October 2002 and returned the debtor's objections to the bailiff for the resolution of the issue of commencement of the enforcement proceeding. The court also annulled the decision of the bailiff of 9 December 2002 to the extent that it dismissed the petition for the suspension of the enforcement proceeding. The petition was returned to the bailiff for resolution of the issue.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

Justifications of the court

5. The Tallinn City Court formed an opinion that the bailiff's decision not to take into consideration the belated objections was not correct. The court found that the bailiff had violated the debtor's constitutional rights, including the right to be informed of the possibilities of using enforcement powers of a state against her and the right to present objections. The court found that proprietary claims based on a notarised

contractual relationship have been included in the list of enforcement instruments to be enforced under the Code of Enforcement Procedure for the reasons of speed and economy of commerce. The right to present objections, provided in § 23(4) of the Code of Enforcement Procedure, guarantees the debtor's right to rebut the use of enforcement powers of a state on the basis of a contract in a relationship where the parties have a legal dispute. The court found that § 23(4) of the CEP was in conflict with § 11 of the Constitution, because it allows for a situation where the exercise of a right, established by law, becomes impossible for reasons independent of a person. This regulatory framework allows for compulsory enforcement, based on a contract, without the right of appeal. In the court's opinion such a restriction is not necessary.

Reviewing the second claim of the complainant the court found that the enforcement proceeding should have been suspended to the extent that the commencement of the proceeding had been disputed in court. The non-suspension of the proceeding is not justified by the fact that the Code of Enforcement Procedure establishes the suspension of a proceeding as the bailiff's right and not as an obligation. Pursuant to § 14 of the Constitution the guarantee of rights and freedoms is the duty of the executive power. The consequence of the non-suspension of the proceeding is a situation where the debtor's property has been transferred to the claimant (a set off has been effected with the price of the sold property) to satisfy a claim concerning which the enforcement procedure has not been commenced lawfully.

Justifications of participants in the proceeding

6. Complainant H. Kopper is of the opinion that § 23(4) of the CEP does not guarantee a debtor the fair right to examine the enforcement instrument within reasonable time, if necessary, with legal assistance, and to decide whether to present objections or comply with the compulsory state enforcement. Instead of decision to voluntarily comply with enforcement procedure, based on the principle of speed and economy of commerce, this regulatory framework may result in a situation where a bailiff violates the inviolability of person's property by transferring the property in an enforcement proceeding without basis.

7. The Creditor OÜ Laanepüü does not agree with the opinion of the court and is of the opinion that § 23(4) of the CEP is not in conflict with the Constitution. § 23(4) of the Code of Enforcement Procedure does not exclude the right of appeal, instead it sets time limits. The possibility to exercise the right of appeal is guaranteed through restoration of term even if the term for exercising the right of appeal has expired for reasons independent of the debtor. The creditor argues that the special regulation is necessary because an enforcement proceeding is commenced in the interests of a claimant and consequently, in the enforcement proceeding the claimant's interests have to be observed first. The imposition of terms avoids a situation where an enforcement proceeding can not be commenced because it proves impossible to deliver the notice of receipt of an enforcement instrument to the debtor. A compromise has been reached in § 23(4) of the Code of Enforcement Procedure that allows all parties reasonable time to respond.

8. Bailiff R. Vokk contests the opinion of the Tallinn City Court and argues that § 23(4) of the CEP is not in conflict with the Constitution. The fulfilment of proprietary claims based on notarised contractual relationships directly, without a court judgment, is possible only if the parties have no dispute as to the content of the claim. The right of compulsory enforcement constitutes, in essence, provision of a remedy to a creditor. § 23(4) of the Code of Enforcement Procedure provides for the commencement of an enforcement proceeding without excluding the right to file an action with a court for contesting the content of a claim. That is why the allegation that § 23(4) of the CEP does not guarantee a debtor a fair possibility to examine the enforcement instrument within a reasonable time, if necessary, with legal assistance, and to objectively decide whether to present objections or to comply with compulsory state enforcement, is not justified.

9. The Chancellor of Justice argues that § 23(4) of the CEP is not in conflict with the Constitution and that is why he does not support the petition of the Tallinn City Court to declare the referred provision unconstitutional.

The analysis of the regulatory framework of setting up and resolving objections of § 23(4) of CPE allows to come to the conclusion that this does not amount to a procedure of resolution of disputes on substance. The

form of the procedure as established in the Code of Enforcement Procedure is more characteristic of resolution of disputes concerning procedural rights. Pursuant to § 23(4) of the Code objections are prepared in the form of a complaint, to be resolved and appealed against under subsections (2) to (4) of § 77 of the CEP. § 77 entitled "Appeals against the activities of a bailiff" of the Code of Enforcement Procedure establishes the procedure for resolution of procedural issues pertaining to enforcement proceedings. This conclusion can be reached on the basis of the words of § 77(1) "against the bailiff's activities in executing an enforcement instrument or upon refusal to perform an execution activity [...], as well as on the basis of the procedure provided for in the section. Under § 77 of the Code of Enforcement Procedure a complaint shall be submitted within 10 days to the bailiff, who shall review it within 10 days. A complaint against a bailiff may be filed with a city or county court within 10 days. Under § 77(4) of the Code of Enforcement Procedure a county or city court shall resolve the complaint by a ruling, an appeal against which may be filed with a circuit court pursuant to the procedure provided in the Code of Civil Procedure. When adjudicating an appeal like this the court should apply provisions concerning proceedings on petition. Within such a procedure neither the bailiff nor the court can provide a binding solution to issues of substantive law pertaining to the claim.

The Chancellor of Justice agrees with the opinion of the city court that on the basis of the debtor's request the bailiff should have suspended the enforcement proceeding to the extent that the claim had been contested in action. Proceeding from § 14 of the Constitution, pursuant to which the guarantee of fundamental rights and freedoms is the duty of the legislative, executive and judicial powers and of local governments, the bailiff as a person holding a public law office, should have taken into consideration the request of the debtor to suspend the proceeding, in the interests of fair conduct of the enforcement proceeding. That is why the Chancellor of Justice is of the opinion that in the case under discussion the problem rests not in the constitutionality of § 23(4) of the CEP but in the application of the Code.

10. The Legal Affairs Committee of the Riigikogu was of the opinion that it was not right to make the term for presenting objections dependent on the sending out of the notice, and that it would be reasonable to make it dependent on the receipt of the notice. Such an approach is inherent to procedural codes and is used also in civil law. The Legal Affairs Committee announced that as the legislative proceeding of a bill amending the Bailiffs Act, the Code of Enforcement Procedure and the State Fees Act (1269 SE) was pending in the Committee, the Committee considered it necessary to initiate an amendment of § 23(4) of the CEP. The Riigikogu passed the bill, including the referred amendment, on 12 February 2003, and it will enter into force pursuant to general procedure.

The amendment reads as follows:

"II. The following amendments shall be made in the Code of Enforcement Procedure (RT I 1993, 49, 693; 2002, 83, 489):

§ 27. In the third sentence of subsection (4) of section 23 the words "Enforcement proceeding shall be commenced after two weeks as of the sending of the enforcement instrument to a debtor or an owner" shall be replaced by the words "Enforcement proceeding shall be commenced after two weeks as of the receipt of enforcement instrument by a debtor or an owner"."

11. The Minister of Justice argues that providing for the possibility of presenting objections in the Code does not have merely formal meaning. Hearing of the opinions of the participants in a proceeding is one of the most important elements in a society based on the rule of law, as this reflects the status of a person as an active participant in the communication between public authority and individual. Presenting objections is a subjective individual right granted by law, the objective of which is to increase the quality of administrative activity and to avoid later disputes as early as possible. This must be a real and efficient possibility.

That is why the Minister of Justice is of the opinion that counting the term for presenting objections as of the sending out of an enforcement instrument may create a situation where, because of the expiry or shortness of term, a person lacks the possibility of exercising his subjective right guaranteed by law. The lack of a real

and sufficient term for presenting objections is in conflict with the principle of good administration, proceeding from § 14 of the Constitution. That is why the Minister of Justice is of the opinion that the third sentence of § 23(4) of the CEP is in conflict with the Constitution to the extent that it provides that the term for presenting objections is calculated as of the sending out of an enforcement instrument.

PERTINENT LEGISLATION

12. § 1(1)8) of the Code of Enforcement Procedure:

"The following are subject to enforcement under this Code (hereinafter enforcement instruments):

[...]

8) proprietary claims arising from notarised contractual relationships;

[...]"

13. § 23(4) of the Code of Enforcement Procedure (in the wording in force as of 1 March 2001 until 16 March 2003 - RT I 2001, 21, 113):

"§ 23. Commencement of enforcement proceeding

[...]

(4) If an enforcement instrument referred to in § 1(1)8), 10), 13) and 14) of this Code is submitted to a bailiff, the bailiff shall send the debtor or the owner of an immovable a notice of the receipt of the enforcement instrument, in which the bailiff shall refer to the right of presenting objections and explain the consequences of the failure to present objections. A copy of the enforcement instrument shall be appended to the notice. Enforcement proceeding shall be commenced after two weeks as of the sending of the enforcement instrument to a debtor or an owner if

1. the debtor or the owner of an immovable does not present objections to the bailiff, and
2. in addition to enforcement instruments referred to in § 1(1)13) and 14) of this Code the claimant also submits the contract under law of obligations entered into in unattested written form.

Objections shall be prepared in the form of a complaint, to be resolved and appealed against on the basis of subsections (2) to (4) of § 77 of this Code."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

14. The Tallinn City Court declared unconstitutional and did not apply § 23(4) of the CEP (in the wording in force as of 1 March 2001 until 16 March 2003) to the extent that the term for presenting objections is calculated as of the sending out of the enforcement instrument. In the conclusion of the judgment the court referred to §§ 3, 11, 14, 15 and 24 of the Constitution.

15. The Chamber shall start the checking of the conclusions of the city court by clarifying the meaning of § 23(4) of the CEP. Under § 23(1) of the Code of Enforcement Procedure a bailiff shall commence an enforcement proceeding after the receipt from the claimant of an application and enforcement instrument appended thereto. The commencement of an enforcement proceeding is usually preceded by a judicial or some other proceeding, in the course of which the parties have the possibility to present their objections. In the case of claims arising from notarised contracts, referred to in § 1(1)8), 10), 13) and 14) of the CEP, the bailiff shall, under § 23(4) of the CEP, send out a notice to the debtor, in which the bailiff shall refer to the right to present objections and shall explain the consequences of the failure to present objections. The bailiff shall send to the debtor, together with the notice, also a copy of the enforcement instrument, by which the debtor is informed of the claim against him or her and is given a possibility to protect himself or herself

against the enforcement instrument submitted for compulsory enforcement.

The judicial practice so far has recognised that there exists a principle in the enforcement procedure pursuant to which the bailiff must not assume the role of a court and assess whether the claim is justified. The bailiff only has to check whether the prerequisites of an enforcement proceeding have been fulfilled and whether the enforcement proceeding is permissible (*see judgment of the Civil Chamber of the Supreme Court of 16 October 2002 in case no. 3-2-1-119-02 - RT III 2002, 27, 304*). Thus, a bailiff can only review the objections pertaining to the permissibility of conducting an enforcement proceeding. If a debtor informs the bailiff that he or she does not admit the claim, the bailiff must not commence an enforcement proceeding, because he or she has no competence to assess the merits of the objections (*see judgment of the Civil Chamber of the Supreme Court of 17 April 2002 in case no. 3-2-1-40-02 - RT III 2002, 13,155*) In order to solve disputes arising from claims in enforcement instruments the claimant must file an action against the debtor with a court.

16. Under § 14 of the Constitution the state has the duty to guarantee persons' rights and freedoms. The guarantee of rights and freedoms does not mean only that the state shall refrain from interfering into fundamental rights. Under § 14 of the Constitution the state is obliged to establish proper procedures for the protection of fundamental rights. The court procedure as well as administrative procedure must be fair. This means, *inter alia*, that the state must establish a procedure to guarantee efficient protection of persons' rights.

17. Under § 1(1)8) of the Code of Enforcement Procedure the bailiffs enforce also the proprietary claims arising from notarised contracts. To execute the enforcement instruments bailiffs are entitled to make a claim for payment against the assets of the debtor through the seizure or sale of property (§ 28(4)1) of the CEP). By the seizure or sale of debtor's property the bailiff interferes with the debtor's right of ownership, guaranteed by § 32 of the Constitution. On the other hand, making a claim for payment against the assets of the debtor can be regarded as the protection of creditor's proprietary rights and as performance of the state's duty to the creditor under § 14 of the Constitution.

The protection of fundamental rights of one person may result in the restriction of the fundamental rights of another. In such cases it is necessary to strike a reasonable balance between the fundamental rights. The procedures for the protection of fundamental rights, established pursuant to § 14 of the Constitution, must aim at establishing such balance.

18. The Code of Enforcement Procedure guarantees to creditors the right to involve public authority in the protection of their proprietary rights. At the same time the state has the duty of guaranteeing also the procedural protection of debtors' right of ownership. The aim of § 23(4) of the Code of Enforcement Procedure is to offer a debtor the possibility to present objections against commencement of an enforcement proceeding, if the debtor considers the claim to be without a basis.

19. The Chamber is of the opinion that the two-week term is sufficient for presenting objections. The court, nevertheless, is of the opinion that the beginning of the running of the term, as established by § 23(4) of the CEP, does not guarantee sufficient protection to debtor's proprietary rights. A debtor is allowed a two-week term for weighing, if necessary with legal assistance, and prepare objections against the claim filed. Making the beginning of the running of the term dependent on sending out a notice does not ensure that the debtor shall in fact have two weeks for taking the referred actions.

The discussed regulatory framework did not guarantee a debtor the possibility to protect his or her proprietary rights by presenting objections. This was so, for example, when a debtor received the bailiff's notice after the expiry of the two-week term or immediately before the expiry date.

20. In the case under dispute the debtor, for reasons independent of her, learned about the intent of commencing an enforcement proceeding after the expiry of the term for presenting objections. Thus, the debtor had no possibility to avail herself of the procedure, provided by the Code of Enforcement Procedure, for the protection of her proprietary rights. The Code of Enforcement Procedure provides for no other

protection mechanisms of the debtor.

21. The Chamber is of the opinion that the speed of enforcement procedure is important for the protection of creditors' proprietary rights. Calculation of the term for presenting objections as of the receipt of the notice is a suitable and necessary measure to guarantee speedy conduct of the procedure and efficient protection of the creditors' rights. The court is, nevertheless, of the opinion that the regulatory framework under discussion is not reasonable. From the perspective of the protection of creditors' proprietary rights the delay of commencement of an enforcement proceeding for a few days or weeks is not, as a rule, of decisive importance. But the lack of a possibility to present objections may put a debtor in an extremely unfavourable situation.

In this context it is necessary to take into account that the issue is not the execution of a court judgment, in the case of which the existence of creditor's proprietary claim has been ascertained by a court judgment having the force of law, but extra-judicial compulsory enforcement of a proprietary claim that may prove disputable.

22. The Chamber is of the opinion that the calculation of the term for presenting objections as of the sending out of the notice disproportionately restricts the proprietary rights of debtors and is in conflict with §§ 32 and 14 of the Constitution in their conjunction.

23. The disputed provision of the Code of Enforcement Procedure has become invalid and the calculation of the term is now regulated by the new wording of § 23(4) of the CEP, in force as of 17 March 2003 (RT I 2003, 23, 146). Under the new wording the term is calculated as of the receipt of the notice.

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