



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 36211/03
by Vardan POGHOSYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 5 October 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr C. BÎRSAN,

Mr V. ZAGREBELSKY,

Mrs A. GYULUMYAN,

Mr DAVID THÓR BJÖRGVINSSON,

Mrs I. ZIEMELE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 21 October 2003,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Vardan Poghosyan, is an Armenian national who was born in 1932 and lives in Yerevan. He was represented before the Court by Ms L. Hakobyan, a lawyer practising in Yerevan. The Armenian Government (“the Government”) were represented by their Agent,

Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On an unspecified date, the applicant instituted civil proceedings against three individuals, A., P. and H., seeking to recover certain property and damages for lost profit.

On 21 June 2002 the Avan and Nor Nork District Court of Yerevan (*Երևանի Ավան և Նոր Նորք համայնքների աստիճին ատյանի դատարան*) partially granted the applicant's claim and ordered that the property belonging to him be returned. His claim for damages was rejected.

On 26 August 2002 the Civil Court of Appeal (*ՀՀ քաղաքացիական գործերով վերաքննիչ դատարան*) upheld this judgment.

On 25 October 2002 the Court of Cassation (*ՀՀ վճարելի դատարան*) quashed this judgment in its part concerning damages and remitted for a new examination.

On 26 March 2003 the Civil Court of Appeal partially granted the applicant's claim for damages and awarded him 1,238,160 Armenian drams (AMD) (approx. EUR 1,960 at the material time) to be paid jointly by the co-defendants.

On 25 April 2003 the Court of Cassation upheld this judgment in the final instance. The judgment entered into force.

On 7 May 2003 the Court of Appeal issued a writ of execution.

On 12 May 2003 the Department for the Enforcement of Judicial Acts (the DEJA) (*Դատական ակտերի հարկադիր կատարումն ապահովող ծառայություն*) instituted enforcement proceedings. On the same date, the Bailiff (*հարկադիր կատարող*) made a decision to arrest any immovable and movable property belonging to the co-defendants. On 18 May 2003 the Bailiff made inquiries with various public authorities, seeking to disclose such property.

On 23 May 2003 and 18 June 2003 the Bailiff was informed by the vehicle registration authorities that no cars were registered in the co-defendants' names. On 2 and 12 June 2003 the Bailiff was informed by the tax authorities that the co-defendants were not registered as tax payers.

On 19 June 2003 the Bailiff visited the co-defendants for enforcement purposes and the same day drew up records on the failure to disclose any movable property to be confiscated. As to immovable property, the only such property disclosed was a quarter share in a flat belonging to co-defendant P. Another share in the same flat belonging to co-defendant A. had been already confiscated by the courts for him to be able to meet

another judgment debt. On 8 July 2003 the Bailiff decided to arrest the share in the flat belonging to defendant P.

By a letter of 11 July 2003 the Bailiff instructed the applicant to apply to the relevant court, to have this share severed and confiscated in accordance with Article 200 of the Civil Code.

On 15 August 2003 the applicant lodged an application with the Avan and Nor Nork District Court of Yerevan addressed to the President and the judge who had presided over his case, with the following content:

“To: The President of the Avan and Nor Nork District Court, [Mr. K], and the judge who had presided over the trial, [Mr. B.]

From: [The applicant (address)]

15.08.03 Application-claim

Dear [Mr. K. and B.],

A sum of 1,238,160 drams was awarded to me by a final judgment made against [co-defendants A., P. and H.]. The court seized the flat ... belonging to the above mentioned persons. However, the DEJA has been informed in writing that by a judgment of 20 August 2002 ... [co-defendant A.] lost his ownership in respect of this flat, despite the fact that this flat should have been seized [already] on 5 August 2002. For this reason, the DEJA instructs me to have the share in the flat belonging to [co-defendant P.] severed and confiscated by applying to [your court].

Based on the above, I ask you to fulfil the instruction given by the DEJA.”

Attached to this application were a copy of the judgment of 26 March 2003 and the Bailiff's letter of 11 July 2003.

By an undated letter the Acting President of the Avan and Nor Nork District Court of Yerevan (*Երևանի Ավան և Նոր Նորք հասայնքների ատաղին ատյանի դատարանի նախագահի ժամանակավոր պաշտոնակատար*) informed the applicant that:

“In reply to your application I would like to inform you that the court examines civil cases and issues judgments, following which [the DEJA] enforces these judgments on the basis of execution writs.”

On 8 September 2003 the applicant lodged an application with the Civil Court of Appeal addressed to judge K. who had presided over his case, with virtually the same content. At the end the applicant added:

“I ask you to issue a decision to sever and confiscate the share belonging to [co-defendant P.], since, after having applied to the first instance court, I have received a meaningless reply.”

On 19 October 2003 the applicant complained to the President of the Civil Court of Appeal that:

“As instructed by the [relevant] branch of the DEJA, I applied to your court seeking to have a share in a flat belonging to [co-defendant P.] severed and confiscated, since, after having applied with this request to the Avan and Nor Nork District Court, I have

received an indefinite reply. However, your judge [K.] avoids giving any written reply, whether positive or negative.”

By a letter of 23 October 2003 judge K. replied that the Appeal Court had no competence to deal with obstacles arising in the enforcement stage and advised the applicant to apply to the relevant first instance court.

On an unspecified date, following the communication of the present application to the respondent Government, i.e. 25 February 2005, co-defendant P. voluntarily paid the sum of money he owed to the applicant.

On an unspecified date, the Bailiff decided to terminate the enforcement proceedings.

B. Relevant domestic law

1. The Law on the Enforcement of Judicial Acts (ՀՀ օրենքը «Դատական ակտերի հարկադիր կատարման մասին»)

According to Article 34, the Bailiff must implement the enforcement activities within two months from the date of receipt of the execution writ, which does not include the period when the enforcement activities are in the process of an auction or the period required for finding the debtor or disclosing any property belonging to him, unless the law prescribes a shorter period for the enforcement or an immediate enforcement.

2. The Civil Code

According to Article 200 §§ 1 and 2, if a co-owner of a shared or joint property does not have other sufficient means, the creditor can seek to have the debtor's share severed from the common property in order to have it confiscated. If it is impossible to sever the share in kind or if the other co-owners of the shared or joint property object to it, the creditor can require the other co-owners of the common property to buy the debtor's share at the market price in order to pay the debt. If the other co-owners of the common property refuse to buy the debtor's share, the creditor can have the debtor's share in the common property confiscated through court proceedings and sold at a public auction.”

3. The Code of Civil Procedure (CCP) (as in force at the material time)

According to Article 3, the court institutes civil proceedings only on the basis of a claim or an application.

Article 87 §§ 1, 2 and 3 provides that an application to court must be submitted in writing. The application must contain: 1) the name of the court applied to; 2) names and addresses of the parties; 3) the sum sought, if the claim has a value; 4) circumstances on which the claims are based;

5) documents substantiating the claims; 6) an estimate of the contested sum or the sum to be confiscated; 7) the applicant's demands, and if several defendants are sued, the applicant's demands directed against each of them; and 8) a list of attached documents. The application may also contain other relevant information, if they are necessary for the proper determination of the case, as well as the applicant's motions. The application must be signed by the applicant or an authorised representative.

According to Article 92 §§ 1, 2, 3 and 4, the judge shall return the application if, *inter alia*, the requirements contained in Article 87 as to its form and substance have not been complied with. The court shall adopt a decision to return the application within three days of its receipt. If the application is returned, the applicant could re-apply after having corrected its defects. If disagreeing with the decision to return the application, the applicant can apply to the president of the court for a review, within three days of its receipt. The president of the court shall examine the application within three days and adopt a decision on it.

Article 144 §§ 1 and 2 provides that a judicial act, which does not determine the case on its merits, shall be adopted in the form of a decision. A decision adopted as a separate document shall contain: 1) the name of the court, its composition, the case number, the date, the subject of the dispute; 2) the names of the parties; 3) the question to be decided; 4) the reasons which led to the court's conclusions, including references to laws and other legal acts; 5) the conclusion on the question being decided; and 6) the procedure and time-limit for lodging an appeal, if the decision is subject to appeal.

4. *The Law on the Procedure for Examination of Proposals, Applications and Complaints of Citizens* (ՀՀ օրենքը «Քաղաքացիների առաջարկությունները, դիմումները և բողոքները քննարկելու կարգի մասին»)

According to Article 1, this Law regulates the relations connected with the examination, in a procedure and within the time-limits prescribed by law, of proposals, applications and complaints of citizens and legal persons by the State, public and other authorities, the local self-government, the relevant officials and organisations, with the response to the facts of violations of rights and lawful interests of citizens and legal persons, and with the elimination and prevention of such violations. This Law does not apply to the procedure for the examination of proposals, applications and complaints of citizens prescribed by the Code of Criminal Procedure, the Code of Civil Procedure, the labour and other laws.

Article 4 provides that the State authorities, the local self-government and the relevant officials are obliged, *inter alia*, to admit and to examine, within the scope of their competence and in the procedure and within the

time-limits prescribed by law, the proposals, applications and complaints of citizens, to reply to them and to take other relevant measures.

COMPLAINT

The applicant complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 about the failure of the authorities to enforce the judgment of 26 March 2003. In particular, he submitted that the judgment could not be enforced because of the failure of the domestic authorities to act effectively and to co-ordinate their behaviour. On one hand, the Bailiff instructed him to apply to the relevant court to have the share in a flat belonging to co-defendant P. severed and confiscated, while, on the other hand, the courts did not examine his relevant application dated 15 August 2003.

THE LAW

The applicant complained that the failure of the domestic courts to examine his application of 15 August 2003 resulted in the impossibility to have the judgment of 26 March 2003 enforced. He invoked Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 which, insofar as relevant, read as follows:

Article 6 § 1 of the Convention

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

Article 1 of Protocol No. 1

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

1. The parties' submissions

(a) The Government

The Government argued that the domestic court had never refused to examine the applicant's application of 15 August 2003. According to Article

3 of the CCP, the court institutes civil proceedings only on the basis of a “claim” or an “application”, the former for adversary proceedings and the latter for special proceedings. Thus, proceedings seeking to sever a share of a debtor in a common property can be instituted only on the basis of a “claim” filed in conformity with the requirements of Article 87 of the CCP. However, the document filed by the applicant on 15 August 2003 failed to meet these requirements in terms of both its form and substance. In such circumstances, the court was not authorised to institute civil proceedings and to examine the applicant's “application-claim”.

Further, Article 92 of the CCP provides that an application must be returned if the requirements contained in Article 87 have not been complied with. In the present case, however, the court did not even have the right to apply Article 92 and to return the applicant's “application-claim” since the court is only entitled to return a “claim”, whereas the applicant did not file a “claim” within the meaning of the civil procedure legislation. On the other hand, the court does not have the right to leave without an answer any application submitted in any form. If an application does not meet the requirements of the civil procedure legislation, the court must then take the application into consideration in accordance with the Law on the Procedure for Examination of Proposals, Applications and Complaints of Citizens, which is what happened in the present case. The court considered the document filed by the applicant as an “application” within the meaning of this Law and replied in accordance with the procedure prescribed by it.

The Government further argued that the Bailiff had duly instituted the enforcement proceedings and on the same day decided to seize any movable and immovable property belonging to co-defendants. Then the Bailiff took all the necessary measures to disclose any property or income of the co-defendants. The only such property disclosed was a quarter share in a flat of co-defendant P. The applicant was the only person who had the right to apply to the courts asking to confiscate this share under Article 200 of the Civil Code, which he failed to do. Thus, the non-enforcement of the judgment of 26 March 2003 was not the result of any State omission but the result of a private person's insolvency and the applicant's failure to file a claim that could be treated under the civil procedure legislation. There has not, therefore, been a breach of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

In any event, if the Court were to conclude that the domestic court did refuse to examine the applicant's application of 15 August 2003, the applicant did not exhaust the domestic remedies because he was entitled to appeal against this decision, which he failed to do. Furthermore, he had and still has the right to re-apply to the courts with a proper claim under Article 200 of the Civil Code which will provide the basis for the Bailiff to resume the enforcement proceedings. Finally, the applicant failed to appeal against the Bailiff's decision to terminate the enforcement proceedings.

(b) The applicant

The applicant submitted that the Government's allegation that the CCP was not applicable to his application of 15 August 2003 was ill-founded. By claiming that this application fell within the scope of the Law on the Procedure for Examination of Proposals, Applications and Complaints of Citizens, the Government simply attempted to find a legislative ground for the reply of the Acting President of the Avan and Nor Nork District Court of Yerevan. Even assuming that the Acting President was governed by the above Law, he was obliged to expressly indicate that he considered the application not as a “claim” in the sense of the CCP and that he was replying to it on the basis of this Law. Receiving such a reply, the applicant would have been able to re-apply to the court, clarifying his request in compliance with the requirements of the law. Because of such a legally non-intelligently formulated reply the applicant was not only deprived of the possibility to re-apply but also of the possibility to appeal against the court's act, whether in accordance with the CCP or the above Law. It is true that his application of 15 August 2003 did not comply with the requirements of Article 87 in terms of both form and substance. However, the judge, who had obviously understood the applicant's request, was obliged, in accordance with Article 92 of the CCP, to indicate in his reply the circumstances preventing the examination of this request by the court, i.e. the defects of his application that had to be corrected, thus assisting him – an old disabled man who had no legal assistance – in the implementation of his right to court. However, the court failed to adopt a decision on returning or rejecting the claim, not even grounding its reply with any legal norm.

As to the alleged non-exhaustion, the applicant submitted that he had no remedy to exhaust in respect of the reply of the Acting President of the Avan and Nor Nork District Court of Yerevan. The Government's statement that he could appeal against the decision refusing to examine his application was groundless because there was no such decision adopted. As to the possibility of re-applying to the court, the categorical nature of the content of the above reply deprived him also of this possibility. He could be required to re-apply only where the court, in a manner prescribed by Article 92 of the CCP, had adopted a decision to return the application, indicating its defects, after correcting which he could have re-applied. However, the court failed to do so and, moreover, indicated in its reply that the issue raised in the application was not within its competence, which created a deadlock situation for him.

2. The Court's assessment

The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the

“right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6 (see *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, p. 510, § 40; *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III).

It is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment debt (see *Burdov*, cited above, § 35). However, a State cannot be held responsible for the lack of funds of the defendants who are private persons and its responsibility extends no further than the involvement of State bodies in the enforcement proceedings (see *Balyuk v. Ukraine* (dec.), no. 17696/02, 6 September 2005). In the present case, the applicant won a case against private persons and was awarded a sum of money. It has not been disputed that, following this, the DEJA duly instituted the enforcement proceedings and undertook all the necessary measures to disclose any property owned by the co-defendants which could be used towards their judgment debt. The only such property disclosed was a quarter share in a flat co-owned by co-defendant P. For this share to be severed and confiscated, the applicant himself was supposed to apply to the courts with a relevant claim, which he was instructed to do by the DEJA. However, his attempt to institute the relevant proceedings was unsuccessful, so the compulsory enforcement of the judgment received no continuation. It remains, therefore, to be determined whether the failure of the applicant to institute proceedings was the result of State omission or the applicant's own actions.

The Court notes that both the Government and the applicant admitted that the applicant's application of 15 August 2003, in which he was requesting the Avan and Nor Nork District Court of Yerevan to fulfil the instruction of the DEJA, did not comply with the relevant procedural requirements contained in Article 87 of the CCP in terms of both its form and substance. The Court does not, however, agree with the Government that this application was not supposed to be treated under the provisions of the CCP, namely its Article 92. Such an approach would render this Article practically useless and void of any meaning. Moreover, nothing in the reply of the Acting President of the District Court suggests that it was given in

accordance with the Law on the Procedure for Examination of Proposals, Applications and Complaints of Citizens, as claimed by the Government. Thus, it follows that, by giving a reply of a general nature as opposed to adopting a reasoned decision as required under the above Article 92, the Acting President of the Avan and Nor Nork District Court of Yerevan did not treat the applicant's application with sufficient diligence, failing to assist him in correcting its defects.

Nevertheless, as rightly pointed out by the Government, this did not prevent the applicant from re-applying to the same first instance court at any point with a properly drafted claim that would satisfy the requirements of the above Article 87. It was open to him to seek legal assistance for that purpose, which would have allowed him to correct the defects of his initial application and to successfully institute the relevant proceedings. The applicant, however, failed to do this and instead continued to apply with his initial application to the Civil Court of Appeal which was not, in any event, even competent to deal with it. The Court of Appeal, moreover, informed the applicant in its letter of 23 October 2003 about the possibility of applying to the first instance court but he again failed to do so. Thus, the Court concludes that the applicant himself failed to take all the possible and accessible measures to advance the enforcement of the judgment of 26 March 2003.

It follows that the applicant has failed to exhaust domestic remedies and that the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President