

DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENSINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATISATION AGENCY OF KOSOVO RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODRNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU
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22 August 2012

SCC-09-0096

Claimant

M.A., from **XX**, represented by lawyer **XX**,

Vs.

Respondent

1. **XX**, SOE, **XX**
2. **XX**, **XX**

Both represented by Privatization Agency of Kosovo, Ilir Konusheci Street, No. 8, Prishtinë/Priština

The first Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters composed of the Presiding Judge Alfred von Keyserlingk, Judge Shkelzen Sylaj and Judge Ilmi Bajrami, after deliberation held on 22 August 2012, issues the following

Judgment

1. **The Claim is rejected as ungrounded**
2. **The Claimant is obliged to pay court fees in the amount of 150 Euros.**

Factual and Procedural Background

On 3 June 2009 the Claimant filed a claim for declaring null and void the sales contract dated 12 September 1964 he signed with the Respondent Agricultural Industrial Cooperative **XX** (SOE) (Page 9-11 of the file). He requests a judgment by which the Respondent is obliged to return the property subject to the contract i.e. 9 plots agricultural land, located in the Cadastral Zone Sushice, Gracanica/ë, with the total surface area of 2.87.00 ha, and he is obliged to return the purchase price.

The Claimant signed the above contract under intimidation by representatives of the SOE and representatives of the government. He has been threatened that otherwise he would be expelled from work and from the communist party. The conditions of the contract, also the purchase price, were not subject to any negotiations. He was not fairly compensated.

The Claimant alleges that the contract is null and void from the date on which it was signed because according to his opinion it was concluded in contradiction to the principles of the Constitution and the social moral. He claims that it violates principles of equality and freedom of negotiation and that it conflicts with article 103 of the Law on Obligations and article 8a of the Serbian Amendment of the Law on Real Estate Transactions (OG SRS 28/87). As the intimidation was carried out by representatives of government authorities it should not be considered only as threat in the sense of article 60 of the Law on Obligations, which would make the contract only relatively null and void. Instead it should be regarded as absolutely null and void from the very beginning.

In defence the Privatization Agency of Kosovo (PAK) on behalf of the Respondents submitted that the claim should be rejected as ungrounded. The PAK disputes that the contract is null and void in terms of Article 103 of the Law on Obligations. According to PAK's opinion the claim is time barred. It holds that pursuant to Articles 111 and 117 of the Law on Obligations the Claimant had one year after the threat was over to contest the contract on the grounds of deficiencies of will, a right which expired within 3 years after the date of signature. PAK holds that Article 8a of the Amendment of the Law on Real Estate Transactions (OG SRS 28/87) is not applicable law pursuant to the UNMIK Regulation 1999/24 On Law Applicable in Kosovo.

Legal Reasoning

The claim is ungrounded.

1.

The sales contract dated 12 September 1964 between the Claimant and the Respondent SOE (Page 9-11 of the file) was originally valid.

A contract is concluded by both parties forming and expressing the will to create the same legal result. The claimant and the partner of the sales contract of 12.09.1964 wanted that the sale of the immovable takes place and expressed this common will in the sales contract. The claimant cannot be equated with a person whose hand has been led with force to sign or who was exposed such violence that the formation of an own will was not possible. The threat to exclude him from work and from the communist party was influencing his will, but not making it virtually impossible for him to abstain from selling his land.

The plaintiffs assessment that the Constitution of the Socialist Federal Republic of Yugoslavia of 7 April 1963 (in the following: Constitution 1963), which than was valid also for the territory of today Kosovo did not allow the threat exerted on him is correct. To force the Claimant by threat to sell had the effect of an expropriation which the constitution would have allowed only if fair compensation would have been granted (Art 25 Constitution 1963). The threat to exclude him from work if he would not sell was a violation of his right to work (Art 36 Constitution 1963) and also other constitutional rights may have been violated by threatening the Claimant.

However this does not make the sales contract void. The legal system can choose between many options how to react on a breach of constitution. It can open the path to a Constitutional Court, it can give the inflicted party the right to revoke, or it can make the contract void from the very beginning or it can provide for financial compensation and so on. It may even abstain from imposing any legal consequence to a breach of the constitution which means to rely exclusively on the preparedness of the authorities to comply with the constitution and on the political ban of any breach. Neither the Constitution 1963 nor any law of the Socialist Federal Republic of Yugoslavia declared that contracts which have been concluded under an unconstitutional threat are per se invalid from the very beginning.

2.

The contract remained valid.

The Constitution 1963 did not offer to the Claimant the option to revoke the sales contract.

The Law on Obligations of the Socialist Federal Republic of Yugoslavia of 1 October 1978 (in the following: Law on Obligations 1978) regulates nullity of contracts and relatively void contracts and how to invoke nullity (Art 103 till Art 117 Law on Obligations 1978) but this law is not applicable retroactively (Art 1106 Law on Obligations 1978). Therefore also provisions of this law regarding prescription do not apply.

Art 8a of the Law of the Socialist Republic of Serbia of 23.7.1987 amending the Serbian Law on Transfer of Immovable Property of 1981 (in the following: Serbian Amendment of 23.7.1987) also does not lead to the invalidity of the sales contract of 12. 9. 1964.

The provision reads as follows:

A contract on transfer of immovable property shall be null and void if it was concluded under pressure and by the use of violence, or under such conditions and in such circumstances that threatened or failed to secure the safety of people and property, the exercise of protection of rights, freedoms and responsibilities of the man and citizen, or the legality and equality of nations and ethnic groups.

The provisions of paragraph 1 of this section shall also apply to contracts on transfer of immovable property concluded prior to the coming into effect of this law.

This Article is not applicable on the contract of 12.9.1964.

The Transfer of Immovable Property has been regulated by Law in the year 1981 in Serbia by the Serbian Assembly (Serbian Official Gazette 43/81, in the following: Serbian Law on Transfer) and in the same year in Kosovo by the Kosovo Assembly (Kosovo Official Gazette 45/81, in the following Kosovo Law on Transfer). The Serbian amendment of 23.7.1987, according to its Art.1, only amended the Serbian Law on Transfer. The Serbian Legislator also had no power to amend a law of another legislature. So the Kosovo Law on Transfer remained without the amendment of Art 8a of the

Serbian legislation. The result was that according Kosovo Law contracts which have been entered under threat remained valid and under Serbian Law they became invalid.

However Art 12 of the Serbian Amendment of the Serbian Law on Transfer stipulates that Art 8a of the Amendment shall be equally applied in the entire territory of the republic of Serbia. This means according to Kosovo Law Art 8a was not applicable in Kosovo and according to Serbian Law it was applicable. The Serbian constitution of 1974 although requiring that provincial law must not deviate from the law of the Republic of Serbia (Art 228 of the Constitution 1974) does not resolve the conflict by just stating that the Law of the Republic of Serbia prevails but requests that the provincial Law is applied till the Constitutional Court of the republic of Serbia has decided on the conflict (Art 229 of the Constitution 1974). As such decision has not been issued Art 8a of the Serbian Amendment of 23.7.1987 does not apply in Kosovo.

The contract of 12.9.1964 by which the Claimant lost his ownership remains valid. Therefore the claim under the presently applying law had to be dismissed as ungrounded.

3.

But even assumed Art 8a of the Serbian Amendment of 23.7.1987 would apply in Kosovo the invalidity of the contract of 12.9.1964 could today not anymore be invoked. It would be forfeited. The claim pleading for invalidity has been submitted to the court 45 years after the contract and 22 years after the Serbian Amendment has been passed. There may have been years in which the original threat which caused the Plaintiff to accept the contract continued to exist, preventing the Claimant from claiming invalidity. However the claimant did not till 2009 have to fear to lose his work or to be excluded from his party when he challenges the contract of 1967. The legal community, above all the present possessor of the immovable, could trust that a right not executed for so many years will remain unexecuted. This trust deserves protection and the protection takes place by assuming forfeiture.

4.

This does not mean that the plaintiff who suffered illegal treatment when he has been threatened in order to sign the sales contract must remain without any legal satisfaction. It is up to the legislator to follow Martti Ahtisaari's Comprehensive Proposal for Kosovo Status Settlement - according to Article 143 of the Constitution of Kosovo directly applicable and even superseding the Constitution itself - which explicitly requests that Kosovo addresses the property restitution (Article 6 of Annex VII of the Comprehensive Proposal). Before a Kosovo law regulating the issues of property restitution is passed the court cannot give legal relief to the claimant.

Court fees

Pursuant to Section 12 Special Chamber Law and in accordance with the Special Chamber's Additional Procedural Rules regarding Court Fees as in force from 13 December 2010, Chamber's fees are on the basis of Section 10 of Kosovo Judicial Council Administrative Direction No. 2008/02(ADJ) are as follows:

The amount of fee for filing the claim as governed by Section 10.1 ADJ is 75 Euros, as the Specialized Panel considers the value of claim is 15.000 Euros taking into account the size of the land in question. Section 10.12 ADJ determines that for decision of the first instance based on the value of the object the fee shall be paid according to tariff's number 10.1 which amounts to 75 Euros.

Court Fee Tariff Section 10.1 (filing of the claim)	75 Euros
Court Fee Tariff Section 10.12 (decision)	75 Euros
Total	150 Euros

The costs of the proceedings shall be borne by the unsuccessful party, here the Claimant. The Claimant have already paid the sum of 50 Euros, thus the Claimant shall pay the Special Chamber the remaining sum of 100 Euros.

Legal Remedy

An appeal may be filed against this Decision within 21 days with the Appellate Panel of the Special Chamber. The Appeal should be served also to the other parties and to the Trial Panel by the Appellant within 21 days. The Appellant should submit to the Appellate Panel evidence that the Appeal was served to the other parties.

The foreseen time limit begins at the midnight of the same day the Appellant has been served with the written Decision.

The Appellate Panel rejects the appeal as inadmissible if the Appellant fails to submit it within the foreseen time limit.

The Respondent may file a response to the Appellate Panel within 21 days from the date he was served with the appeal, serving the response to the Appellant and to the other parties.

The Appellant then has 21 days after being served with the response to his appeal, to submit his response to the Appellate Panel and the other party. The other party then has 21 days after being served with the response of the Appellant, to serve his rejoinder to the Appellant and the Appellate Panel.

Alfred Graf von Keyserlingk
Presiding Judge