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DECISION 9/2015, KEY DECISION OF THE HIGH COURT OF CASSATION AND JUSTICE OF ROMANIA - IMPOUNDING CARS IS ILLEGAL

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DECISION 9/2015, KEY DECISION OF THE HIGH COURT OF CASSATION AND JUSTICE OF ROMANIA - IMPOUNDING CARS IS ILLEGAL

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Abstract

The article analyses the latest decision of the High Court of Justice of Romania, regarding impounding cars, a problem that was differently solved through the years by many of the Romanian courts. As a matter of fact, this decision considered in a correct manner that the procedure of applying the technical administrative measure, i.e. impounding the cars parked/ stationed illegally on the roads stipulated by article 64 and article 97 of GEO no. 195/2002, cannot be regulated by decisions of local councils. *By interpreting the current laws one may see that the complementary contravention sanction does not carry a repressive role, this role belonging to the main contravention sanctions. Their real role is a preventive one, such as removing a state of danger and preventing the perpetration of other acts prohibited by law. Even before this decision appeared we believed that, besides the fact that we dealt with a case of unjust enrichment, we were also faced with an unlawful act, impounding cars violating the right of property of the citizen because, the car being moved out of his control ,without their consent, and it entered, for a short period of time, in the custody of the impoundment company.*

We consider that the decision no 9/2015 became a revolutionary one and, in the same time, it has the role to promote an equable practice of courts in respect of this technical administrative measure.

Keywords :

technical administrative measure, regulation, plaintiff, unjust enrichment, contravention

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1. Introduction

By Decision no. 9/2015, the High Court of Cassation and Justice of Romania approved the referral in the interests of the law submitted by the Ombudsman and, by consequence, established the interpretation and the enforcement of the provisions of article 128, paragraph (1), article 134, article 135 of Government Emergency Ordinance no. 195/2002 regarding driving on public roads, republished with the subsequent amendments, in relation to the provisions of article 3, paragraph (1), article 5, article 36 paragraph (1), paragraph (2) letter d) and paragraph (6) letter a) pt. 13 of the Local Public Administration Law no. 215/2001, republished with the subsequent amendments, article 21 and article 24 of the Framework Law on decentralization no 195/2006, the procedure of applying the technical administrative measure, i.e. impounding the cars parked/ stationed illegally on the roads stipulated by article 64 and article 97 of GEO no. 195/2002, cannot be regulated by decisions of local councils.

According to jurisprudential orientation of most Romanian courts, the decisions of local councils taken so as to regulate the procedure regarding impounding cars parked illegally, the establishment and application of penalties are void, because these describe and sanction violations in the field of road traffic. The opinion of the Courts of law was that the decisions of local councils, with respect to regulating the procedure of impounding cars parked illegally, were taken exceeding the field of competence of local councils.

2. Cases in Romanian courts's practice

In one of the cases settled by the Court of Brasov in the previous years on a similar subject - namely impounding illegally a car (*civil decision no 520 R/ of April 15th of the Court of Brasov, administrative and tax department*) - it was observed that as per article 180 of Govt. Order 1391/2006, whenever a traffic agent comes upon a violation of road rules, they conclude a violation report (...), which must include the technical - administrative measure they have taken (...). As per article 97 paragraph 1 letter d of GEO 195/2002, republished, in the cases stipulated in the here above GEO, only a road police officer is entitled to order as technical - administrative measure impounding a car parked illegally.

Therefore, by interpreting all the laws mentioned above, the Court of Brasov considered that the decision of impounding the car should have been mentioned as technical – administrative measure in a violation report, based on which to have the disposition issued by the police officer from the

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County Police Inspectorate. In order to apply the regulation adopted by Decision of Local Council no. 573/2008 the county of Brasov outsourced this activity to a private company (a former commercial company), responsible for committing irregularities whilst performing impounding, being considered by the plaintiff of the law case the service provider company itself.

There were several cases where it was observed that the cars had their tires locked and were impounded by the agents of such a company without having a violation report drafted by the competent legal authorities, with the sanction of illegal parking, and without having a document drafted by the agents observing the contravention used against the petitioner.

In the here above case the plaintiff based her action both on unjust enrichment as well as on tort liability, both solutions being just in our view, to the extent that such companies had no legal competence to apply such technical and administrative measures, their actions being illegal and equivalent to impersonating legal authorities empowered by GO no. 2/2001 regarding the legal regime of contravention, i.e. Law No 195/2002, to apply sanctions.

In one of its decisions the Court of Appeal of Craiova also cancelled the Decision of the Local Council of Craiova by which the regulation regarding the organization and activity of impoundment, transportation and storage of illegal parked cars had been approved. The legal arguments of the Court were founded precisely on the fact that outsourcing the activity of observing and sanctioning illegal stopping and parking as well as ordering impounding cars in favour of public servants other than the road police and other categories of civil servants, whose jurisdiction over offences to driving on public roads, is recognized by the special law on the organization, is contrary to GEO 195/2002." (*Decision no. 1977, taken for file no. 9809/63/2010 during the public meeting of 31.05.2011, The court of Appeal of Craiova*).

Such measures were initially taken based on the provisions of G.O. no. 147/1992 regarding blocking, impounding, storing and releasing vehicles or trailers parked illegally on public roads, but, as per article 2 of the here above law, observing illegal parking of vehicles or trailers is made only by police officers or non-commissioned officers, by mayors as well as by persons empowered by the Local council who also apply the sanction.

By interpreting the current laws one may see that the complementary contravention sanction does not carry a repressive role, this role belonging to the main contravention sanctions. Their real role is a preventive one, such

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as removing a state of danger and preventing the perpetration of other acts prohibited by law. The letter of the law shows that complementary sanctions do not play an independent role but they are bound to a main contravention sanctions, therefore their legal route depends on the one of the main sanction as per the principle of „accesorium saequitur principale," being natural that the legal status of a secondary complementary sanction to follow the main one so that a car should not have been impounded without having had a previous main contravention sanction.

3. The problem of the unjust enrichment

Certainly in such cases the unjust enrichment cause was rightfully invoked, currently stipulated by the provisions of article 1345 of the Civil code, especially since there were all the prerequisites to promote an "actio de in rem verso", namely the existence of evidence that the patrimony of the defendant increased and the patrimony of the plaintiff decreased, a direct link between the increase of the patrimony of the defendant and the decrease of the patrimony of the plaintiff and, maybe the most important thing, the existence of a legal condition which lies in the fact that the enrichment and the corresponding impoverishment lacks a just cause, i.e. a legal term to justify it.

Since a private company cannot impound and store, on its behalf, a car identified as parked illegally on the public road but acting as the contractor of the local public authority and only on its behalf and interest (*Tudoriu, www.avocat.net, 2009, Mihailescu, 2013*), it is clear that asking the car owner for money in return of releasing their car from impoundment is illegal and abusive, the amount of money being illegally cashed out by the impoundment company. Therefore, it was both an impoverishment of the owner as well as an unjustified enrichment of the company with no legal basis.

Besides the fact that we are dealing with a case of unjust enrichment, we are also faced with an unlawful act, impounding cars violating the right of property of the citizen because, the car is being moved out of his control without their consent and it enters, for a short period of time, the custody of the impoundment company. In addition, from the point of view of the European Court of Human Rights of Strasbourg this act was qualified as abusive, ECHR deciding that this violates the fundamental right of property as well as the benefit of the doubt mentioned in article 6 of the European Convention of Human Rights.

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Or, as per the Convention, which contain in its first article of Protocol 1, the backbone of the right of ownership, every natural or legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The European Court of Human Rights and, previously, the Committee established the range of applicability of article 1 of Protocol 1 by a succession of decisions where it was shown, in principle, what the types of rights guaranteed by the conventional text were, in other words, what the meaning of the autonomous notion of "goods" was.

Thus it was decided that as per the meaning of the Convention in the range of the meaning of the notion of "goods" first of all we have the right of ownership over movable and immovable property as well as other real rights*,(Filipescu vs. Romania, 16. 02. 2009*) a fact which is also highlighted in *Vasile vs. Romaniei* ,(case 40162/2002) where the Court confirmed that violating the right of undisturbed possession means property infringement in its jurisprudential vision, which confirms our theory based on which vehicle impoundment equals the illegal dispossession of the goods of the owner or the periodic disturbance of possession, implicitly the violation of the right of possession under the ECHR jurisprudence.

Based on these legal issues we can consider the admission of the appeal in the interest of the law by the High Court of Cassation and Justice as welcome as it can be, which will ensure from now on an equable practice of courts in respect of this technical administrative measure.

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