THE NOTION OF UNDUE PAYMENT OF THE AMOUNTS PAID IN RELATION TO THE COURT DECISIONS PRONOUNCED PURSUANT TO ART. 906 PARA. (2), RESPECTIVELY PARA. (4) CODE OF CIVIL PROCEDURE

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Abstract

Analyzing art. 906 para. (2), respectively para. (4) Code of Civil Procedure, there are a series of legal aspects that have the potential to bring into question issues that may generate different opinions. Thus, the court decisions pronounced pursuant to art. 906 para. (2) Code of Civil Procedure do not have the character of an enforceable title, being, in essence, the last chance of the debtor to fulfill his legal obligations, before being obliged to pay an overall amount, based on a court decision pronounced under art. 906 para. (4) Code of Civil Procedure. As such, any amount paid prior to the existence of an overall amount determined and calculated by the court, represents an undue payment and will have to be recovered accordingly. On the other hand, it will be analyzed to what extent there is the possibility for the courts to establish penalties for delay even if the debtor executes his obligations within the legal term of 3 months. Also, the analysis of the prescription of the debtor's right to action, in the situation of paying unjustified delay penalties, related to the provisions of art. 906 Code of Civil Procedure, is definitely useful and possibly susceptible to different interpretations.

Keywords: *undue payment, recovery, enforceable title, debtor, overall amount.*

1. Introduction

The Romanian legislator has always tried to provide a set of regulations as accurate as possible, but, as we all already know, it is literally impossible to regulate legal norms for absolutely every situation in which a subject could find itself at any given time. Therefore, there are methods of interpretation that even the courts frequently use, but also mechanisms for unifying the practice, in order to avoid contradictory solutions.

This article aims to analyze two paragraphs of art. 906 Code of Civil Procedure, more precisely para. 2 and 4, since it was necessary even the intervention of the High Court of Cassation and Justice to settle a series of opinions. We strongly appreciate that the study is of interest, especially since it has the potential to satisfy, to a certain extent, the wishes of the creditor, but, at the same time, it clarifies the fact that such an approach can lead to the excessive burden of the debtor.

As such, Decision no. 16/2017[1], but also Decision no. 39/2021[2], both being pronounced by the High Court of Cassation and Justice, the Panel for resolving legal issues, will be taken into account.

We consider that the court's arguments are at least interesting, and for a correct application of the legislation, in the situations provided by art. 906 para. 2 and 4 of the Code of Civil Procedure, the usefulness of the two decisions cannot be denied.

The decisions mentioned above can be understood completely and clearly by referring to a concrete factual situation.

2. Analysis of a concrete factual situation

Supposedly, the plaintiff formulates a request against the defendant in order obtain certificates stating his seniority in work, income and bonuses from which he benefited during the period when he was an employee of the defendant.

The latter, for reasons more or less independent of his own will (for example: the employer's archive was destroyed by a natural disaster), does not issue the requested documents, so the plaintiff naturally addresses the courts of justice in this respect. Both in the first instance and in the appeal, the obligation of the defendant to issue the certificates requested by the plaintiff is established and maintained. Thus, a final decision in this regard is born, meaning that, in this precise moment, the plaintiff has an enforceable title against the defendant.

The plaintiff, who has now become a creditor, addresses the bailiff in order to open an enforcement case against the defendant, who has become a debtor, since even at this moment the requested documents have not yet been transmitted.

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[1] Published in the Official Gazette of Romania no. 258 of April 13th, 2017, decision available on the scj.ro website, site consulted on February 3rd , 2022.

[2] Published in the Official Gazette of Romania no. 733 of July 27th, 2021, decision available on the scj.ro website, site consulted on February 3rd , 2022.

Therefore, the bailiff proceeds to send a summons to the debtor, through which he is informed to comply with the writ of execution. A person who does not specialize in legal studies may have difficulty knowing what would be the advantage of resorting to this approach, since we do not find ourselves in a situation of a clear claim from an economic point of view, so there is no definite, liquid and due.

We emphasize that the provisions of art. 663 of the Code of Civil Procedure specify the definition of each component element of a claim, as follows:

"*(1) Enforcement can only be done if the claim is certain, liquid and due.*

(2) The claim is certain when its undoubted existence results from the enforceable title itself.

(3) The claim is liquid when its object is determined or when the enforceable title contains the elements that allow its establishment.

(4) The claim is due if the debtor's obligation has matured or he has forfeited the benefit of the payment term[3]".

Consequently, the bailiff has no clarity of the exact amounts to be seized, thus only sends summons to the debtor, considering that the obligations we are referring to can only be fulfilled by the debtor.

However, there is an obvious advantage in enforcing the debtor in this particular situation, because, only after the opening of the execution file and the fulfillment of the term of 10 days from the communication of the summons / conclusion of approval from the bailiff, the creditor can address the courts of justice with an action based on the provisions of art. 906 para. 2 Code of Civil Procedure.

As such, the creditor may request the courts of justice to oblige the debtor to pay a penalty from 100 lei to 1,000 lei, established on each day of delay, until the complete execution of the obligations provided in the enforceable title. However, this decision of the courts of justice cannot be qualified as an enforceable in any way, even if it can appear that way to an unformed eye. The High Court of Cassation and Justice, by Decision no. 16/2017, pronounced by the Panel for the resolution of certain legal issues, in paragraph 65, stated the following: "*Since the penalty is provisional, neither liquid nor enforceable, the conclusion is not susceptible to execution. Therefore, the legislator allowed the creditor to, within three months from the date of communication of the conclusion of the application of the penalties in which the debtor does not fulfill his obligation, to address again to the enforcement court with a request to fix the final amount, which the debtor must pay as a penalty*".

As such, any amounts paid pursuant to art. 906 para. (2) Code of Civil Procedure are not certain, liquid and due claims. Any other interpretation has no legal basis, especially since, in accordance with art. 521 para. (3) Code of Civil Procedure, "*the resolution given to legal issues is mandatory from the date of publication of the decision in the Official Gazette of Romania*", in this case from April 13th, 2017.

The only situation in which the subscription could have been forcibly executed is based only on art. 906 para. (4) Code of Civil Procedure, first thesis: "*If within 3 months from the date of communication of the conclusion of the application of the penalty, the debtor does not execute the obligation set by the enforceable title, the enforcement court, by decision given with the summoning of the parties, will fix the final amount due*". The bailiff will enforce only a certain, liquid and due claim, and will not proceed to calculate the debt owed to the creditor in this particular situation. The only amounts that the bailiff calculates are the execution expenses, meaning his own fee, and the updating with the inflation rate of the debt already established by the enforceable title, the latter only at the request of the creditor.

Consequently, we consider that the payment of the delay penalties, at the initiative of the debtor, prior to the existence of a decision based on art. 906 para. (4) Code of Civil Procedure cannot be taken into account, as long as we do not find ourselves in the hypothesis of an enforceable title, with a claim that can be qualified as certain, liquid and due. It is true that there is a possibility for the debtor to engage in such conduct precisely in order to cause the creditor to waive the introduction of another request for the purpose of establishing a definitive, final amount, representing penalties for each day of delay.

However, in the event that late payment penalties are paid in the above case, and the creditor continues the proceedings, there are two options, as follows:

A. the request is admitted and a global amount is established: in this hypothesis, we will find ourselves in the situation of an enforceable title, with a claim that can be qualified as certain, liquid and due, as established even by art. 906 para. (6) Code of Civil Procedure, in the sense that the decision given under the conditions of para. (4) of the same article is, in fact, enforceable.

B. the request is rejected, but we must take into account that this second variant offers two possibilities. Thus, in the situation of rejecting the request, but with the withholding of the amount already paid by the debtor as sufficient, then it results that the debtor does not have the right to a refund of the amounts paid.

However, if the creditor's claim is rejected and the court concludes that the debtor has managed to fulfill his obligations, without taking into account in

[3] See in this respect the provisions of art. 663 Code of Civil Procedure.

considerations the payments made by the latter, then we can easily state that in this particular case, there is an undue payment to the creditor.

Thus, at the moment when it was ascertained by a court's decision the fact that the debtor completed his obligations, meaning that he sent the necessary documents, within the term of 3 months established in thesis I of art. 906 para. (4) Code of Civil Procedure, it results that, from that exact moment, any payment made by the debtor became undue. If the plaintiff's claim had been accepted, the court would have calculated a definitive amount, from which the sums that had already been paid would have been deducted.

For these reasons, we consider that the prescription period can be viewed from two perspectives, as the case may be, depending on the introduction of a request for a global determination of a definitive amount. As such, in the event that no such action is introduced at all, the prescription period representing the material right of the debtor in order to recover the amounts paid voluntarily, will be calculated starting from the moment the payment is made.

However, in the situation where the request for establishing the final amount introduced by the creditor is rejected, without taking into account any payments, such as the fulfillment by the debtor of its obligations deriving from the enforceable title, we consider that the prescription period will not be calculated from moment of payment. Therefore, the 3 years of the general prescription period will be taken into account starting from the moment the courts of justice reject the action based on art. 906 para. (4) Code of Civil Procedure. Given that this decision cannot be subjected to any appeal, being final from the first instance, it results that the prescription period will be calculated from the moment when the courts rule on the request to establish a final amount, and not from the moment such decision is received by the debtor.

Considering the arguments above, we understand to bring into discussion the provisions of art. 2523 Civil Code, in the sense that "the prescription begins to run from the date when the holder of the right to action knew or, according to the circumstances, should have known its birth". However, the debtor knew and should have known the birth of the right to recover the amounts already paid only when the court finally concluded that the debtor had fulfilled its obligations by sending the necessary documents, not by any amounts of money paid.

Therefore, the debtor has made an undue payment, as such he is entitled to a restitution of the amount that was unduly paid. It cannot be considered a natural obligation, but simply an undue payment, the situation in this case being fully in line with the provisions of art. 1341 para. (1) Civil Code. Also, it cannot be a question of a liberality or a business management, as long as the provisions of art. 1341 Civil Code are very clear in this respect, showing unequivocally that the one who pays without debt has the right to a restitution.

According to the provisions of art. 1635 para. (1) of the Civil Code, the restitution of benefits takes place whenever someone is required, by virtue of the law, to return the goods received without right. The legislator expressly provided by art. 1636 of the Civil Code the fact that the right to restitution belongs to the one who performed the service subject to restitution.

From the interpretation of the legal texts above, we can conclude that the undue payment represents the execution by a person of an obligation to which he was not been obliged and which he performed without the intention to pay the debt of another. As such, making an undue payment gives rise to a legal report under which the person who made the undue payment has the right to claim a refund of what he paid in error, and the person who received the payment has the obligation to return the benefit.

Therefore, the obligation to reimburse the undue payment arises if the following conditions are cumulatively met: the service performed is to be made as payment; the payment is not due, meaning that the debt for which the payment was made does not legally exist in the relationship between the payer and the payee; the payment was made in error, in the sense that the payer believed he was the debtor of the payee.

In addition, the particularity of this situation is represented by the fact that the conclusions pronounced pursuant to art. 906 para. (2), respectively art. 906 par. (4) Code of Civil Procedure are not subject to appeal. They are separate actions, separate litigation, so that we do not find ourselves in the classic situation presented by art. 2525 Civil Code, which in our opinion does not exclude by default the application of the same reasoning.

The legal norms should be considered in the sense of their application, not in order to exclude them from application. In the absence of a specific regulation for this particular situation, then there should be applied the closest regulation, as a principle of application and reasoning, meaning the optics provided by the provisions of art. 2525 Civil Code. Since, in the end, the action based on art. 906 para. (4) Code of Civil Procedure has been rejected, we deeply conclude that the decision pronounced on art. 906 para. (2) was left without object, and no new request could be brought to establish a final amount, considering primarily the doctrine of *res judicata*. Although the initial decision is not enforceable, by rejecting the creditor's request for a definitive amount, the courts virtually invalidate any previously established obligation as a penalty due on each day of delay.

Reading art. 2528 para. (2) Code of Civil Procedure, we note that the provisions of par. (1) of the same article shall also apply to undue payment. Thus, according to art. 2528 para. (1) Code of Civil Procedure, "the prescription of the right to action in repairing a damage (...) begins from the date when the damaged party knew or must know both the damage and the person responsible for it". Thus, the debtor does not know the nature of the damages, therefore the undue payment, nor the one who is responsible for it, until the moment when the creditor's request for fixing a definitive amount is rejected by the courts of justice.

Moreover, we also note the Decision no. 39/2021 pronounced by the HCCJ, Panel for resolving legal issues, which expressly states in para. 71 that: "The opinion of the court is limited to the specification that art. 906 para. (4) of the Code of Civil Procedure is likely to be interpreted in the sense that it is possible to fix the definitive amount due to the creditor as a penalty, if the debtor fulfills the obligation provided in the writ of execution prior to the end of 3 months".

3. Conclusions

By Decision no. 16/2017, the Panel for resolving legal issues within the HCCJ clarified the fact that the decisions based on art. 906 para. (2) Code of Civil Procedure are not enforceable in any way and, practically, do not represent anything other than an ultimatum granted to the debtor for the fulfillment of his obligations.

Until the publication of the Decision no. 39/2021, pronounced by the Panel for resolving legal issues within the HCCJ, the abovementioned Decision no. 16/2017 could have been interpreted in the sense that the debtor would not be obliged to pay the delay penalties, in the definitive amount, if he fulfills his obligations deriving from the enforceable title within 3 months from the communication of the decision based on art. 906 par. (2) Code of Civil Procedure. However, the HCCJ has correctly clarified this situation, in the sense that the courts of justice have the possibility to impose on the debtor penalties for delay, if it deems it necessary, even if he completes his obligations in the 3 months period. We strongly consider that such an interpretation is more than welcome, precisely because the debtor should have fulfilled his obligations much earlier, ideally, but by the passivity he showed, it is likely that he harmed the creditor, at least by the fact that it forced him to resort to all these legal proceedings.

References

- Decision no. 16/2017, pronounced by the HCCJ, the Panel for resolving legal issues;
- Decision no. 39/2021, pronounced by the HCCJ, the Panel for resolving legal issues;
- Law no. 134/2010 on the Civil Procedure Code, with subsequent amendments;
- Law no. 287/2009 on the Civil Code, with subsequent amendments;
- https://scj.ro/.