2010/07/27 - PL. ÚS 19/09: INSOLVENCY PROCEEDINGS

HEADNOTES
A dispositive legal act cannot be the content of a legal fiction without violating the dispositive principle on which the civil trial is built, and ultimately also violating the principle of autonomous will [(judgment of the Constitutional Court Pl. ÚS 42/08 of 21 April 2009 (N 90/53 SbNu 159; 163/2009 Coll.)]. The provision of § 399, paragraph 2, the part of the second sentence after the semi-colon of the Insolvency Act, whereby the fiction of withdrawal of a petition for debt discharge denies a party to a bankruptcy proceeding the possibility of disposition of the proceeding, is inconsistent with Art. 2 par. 3 of the Charter and Art. 2 par. 4 of the Constitution of the Czech Republic, as well as with Art. 36 par. 1 of the Charter.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 27 July 2010, the Plenum of the Constitutional Court, composed of Court Deputy Chairwoman Eliška Wagnerová and Judges Stanislav Balík, Vlasta Formánková, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný and Michaela Židlická, ruled a petition from the High Court in Olomouc seeking the annulment of part of § 399 par. 2, the part of the second sentence after the semi-colon, of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the Insolvency Act), as follows:

The provision of § 399 in paragraph 2, the part of the second sentence after the semi-colon, of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the Insolvency Act), which reads: "if he does not appear without an explanation, or if the insolvency court does not find his explanation to be justified, he is deemed to have withdrawn the petition for debt discharge," is annulled as of the day this judgment is promulgated in the Collection of Laws.

REASONING

I. Recapitulation of the Petition

1. On 3 July 2009 the Constitutional Court received a petition from the High Court in Olomouc seeking the annulment of part of § 399 par. 2, the part of the second sentence after the semi-colon, of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the Insolvency Act). The contested provision constructs the legal fiction of withdrawal of a petition for debt discharge if a debtor does not, without an explanation, appear at a meeting of creditors called to discuss the manner of debt discharge and voting on the adoption thereof, or if the insolvency court does not find his explanation to be justified. This provision is then related to

§ 394 par. 2 of the Insolvency Act, under which the insolvency court takes cognizance of the withdrawal of the petition by a decision that is delivered to the person who filed the petition, the debtor, the insolvency administrator and the creditors' committee, and § 396 par. 1 of the Insolvency Act, under which the consequence of withdrawal of the petition for debt discharge is that the debtor's insolvency is handled in bankruptcy proceedings. In judgment file no. Pl. ÚS 42/08 of 21 April 2009, the Constitutional Court annulled part of § 394, paragraph 2, the part of the sentence after the semi-colon, which read: "an appeal is not permissible." The judgment was promulgated in the Collection of Laws on 9 June 2009 as no. 163/2009 Coll.

2. The petitioner stated that it is conducting insolvency proceedings, file no. KSOS 16 INS 4988/2008, 2 VSOL 87/2009, in which the insolvency court applied § 394 par. 2 of the Insolvency Act, in the wording in effect until 8 June 2009, as well as § 369 par. 1 (evidently meaning § 396 par. 1) and § 399 par. 2 of the Act. The insolvency proceeding was opened at the Regional Court in Ostrava – Olomouc branch (the "Regional Court") on 8 December 2008; the debtor filed a petition to permit debt discharge, together with the insolvency petition. In its resolution of 20 January 2009, ref. no. KSOS 16 INS 4988/2008-A-9, the Regional Court determined that the debtor was insolvent, appointed an insolvency administrator, and permitted resolution of the insolvency through debt discharge. At the same time it ordered a review hearing on 5 March 2009, which was to take place at 9:00 a.m. in the offices of the Regional Court, and it called a creditors' meeting for the same time and place, which was to take place immediately after the conclusion of the review hearing. Although the debtor was duly summoned, he failed to appear at the creditors' meeting, without providing an explanation. Therefore, on that date the Regional Court issued resolution ref. no. KSOS 16 INS 4988/2008-B--12, in which it took cognizance of withdrawal of the petition to permit debt discharge, opened a bankruptcy proceeding concerning the debtor's assets, and decided that the bankruptcy proceeding would be conducted as a simplified bankruptcy proceeding. The debtor contested this decision in full, in an appeal in which he claimed that he was prevented from attending the creditors' meeting by poor health, which he supported by a confirmation from his doctor of 10 March 2009. The debtor asked the petitioner to annul the resolution opening bankruptcy proceedings concerning his assets and to return the matter to the Regional Court for further proceedings, or that the petitioner itself rule on debt discharge by setting a payment calendar. According to the petitioner, it is also worth noting the content of the official record prepared after the creditors' meeting by the insolvency judge, according to which, on 5 March 2009 at 10:00 a.m. the debtor was in the law office of Mgr. K. in Šumperk, where he stated that he believed the review hearing and the creditors' meeting were to take place at the District Court in Šumperk.

3. The petitioner stated that in judgment file no. Pl. ÚS 42/08 the Constitutional Court stated the legal opinion that § 394 par. 2 of the Insolvency Act, the part of the sentence after the semi-colon, was unconstitutional because of its connection, in application, to the evidently unconstitutional part of § 399 par. 2 (the sentence after the semi-colon) of the Insolvency Act, which reads: "if he does not appear without an explanation, or if the insolvency court does not find his explanation to be justified, he is deemed to have withdrawn the petition for debt discharge." In that judgment the Constitutional Court emphasized that one of the fundamental

principles governing a civil trial is the dispositive principle. Withdrawal of the petition to permit debt discharge is a dispositive act by the debtor, and it follows from its nature that it cannot be the content of a legal fiction, i.e. it cannot be deemed that the debtor withdrew the petition when he did not in fact do so. Therefore, the fiction of withdrawal of the petition constructed by § 399 par. 2, the part of the second sentence after the semi-colon, of the Insolvency Act is, under the cited judgment, inconsistent with the nature of a civil proceeding.

4. Art. 89 par. 2 of the Constitution of the Czech Republic gives the general courts an obligation to decide in accordance with legal opinions stated in Constitutional Court judgments, not only in the particular matter concerned in a judgment, but also in matters that address similar or identical issues. In its judgment file no. III. ÚS 252/04 of 25 January 2005 (N 16/36 SbNU 173), the Constitutional Court emphasized the obligation, when deciding other cases of the same kind, to be guided by the "ratio decidendi," i.e. the controlling legal rules (grounds for decision) explained and applied in the judgment. Thus, the petitioner reflected the legal opinion of the fiction of withdrawal of a petition to permit debt discharge as stated in judgment file no. Pl. ÚS 42/08.

5. In support of the arguments contained in the judgment, the petitioner referred to the framework for withdrawal of a petition contained in § 96 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, (the "Civil Procedure Code"), in relation to which court practice concluded that a petition can be withdrawn only by an act which does not give rise to any doubts as to its content and meaning, and it is thus quite unquestionable that the party to the proceeding has no interest in having his petition addressed, and agrees that the court will not rule on this petition. While the Civil Procedure Code presumes an understandable and certain expression of will, without any conditions, the Insolvency Act allows the consequences of withdrawal to arise without the debtor's expression of will having met the conditions.

6. For these reasons, the petitioner concluded that § 399 par. 2, the part of the second sentence after the semi-colon, of the Insolvency Act is inconsistent with Art. 36 par. 1 and Art. 38 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter"). If the dispositive authorization of a party to the proceeding is replaced by a legal fiction, as a result of which, due to the party's inactivity, or even only on the basis of the court's evaluation, the entire proceeding is stopped, then according to the petitioner that construction is also inconsistent with Art. 2 par. 3 of the Charter. Therefore, in accordance with Art. 95 par. 2 of the Constitution of the Czech Republic and § 64 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") the petitioner submitted the matter to the Constitutional Court, asking that it annul § 399 par. 2, the part of the second sentence after the semi-colon, of the Insolvency Act as of a date that it sets in its judgment.

7. In conclusion the petitioner pointed to the fact that the insolvency proceeding cannot be interrupted, and that the consequences of opening bankruptcy proceedings concerning the debtor's assets arose by publication of the decision in the insolvency register, and proposed that the Constitutional Court address its

petition as urgent under § 39 of the Act on the Constitutional Court, because further steps within a bankruptcy proceeding may lead to changes that will make the originally permitted debt discharge impossible for the debtor. Moreover, according to the petitioner, a decision on this petition, if it is granted, may also be important for the insolvency proceedings of other debtors.

II. Conduct of the Proceeding and Recapitulation of the Statements of the Parties

8. In accordance with § 69 of the Act on the Constitutional Court, the Constitutional Court called on the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic, to respond to the petition.

9. The Chamber of Deputies, through its Chairman, Ing. Miloslav Vlček, stated that the bill of the Insolvency Act was discussed in the first reading on 26 October 2005, as publication 1120, and was then assigned to the Constitutional Law Committee, which discussed it at its meetings on 1 December 2005 and 20 January 2006; it recommended passing it, as amended by a comprehensive amending proposal contained in Committee Resolution no. 235 (publication 1120/1), which also newly amended § 399 par. 2 of the Insolvency Act. The second reading of the bill took place on 27 January 2006, and the amending proposals presented in it were processed as publication 1120/2. The bill was approved in the third reading on 8 February 2006, as amended by the comprehensive amending proposal from the Constitutional Law Committee and other amending proposals. The Act was then signed by the appropriate constitutional authorities and promulgated in the Collection of Laws as no. 182/2006 Coll. The provision in question was not affected by later amendments to the regulation.

10. The Senate of the Parliament of the Czech Republic stated that the bill of the Act whose provision is proposed to be annulled was passed to it on 28 February 2006, and the Organization Committee assigned it for discussion, as publication no. 288, to the Constitutional Law Committee and the Committee for the Economy, Agriculture, and Transportation. The bill was discussed by both committees on 15 March 2006, and 22 March 2006; both recommended adopting the Act in the wording approved by the Chamber of Deputies. The bill was approved by the Senate at its 10th session, as resolution no. 416 of 30 March 2006; out of 54 senators present, 49 voted to adopt the Act, no one voted against, and 5 of those present abstained from voting. There was no discussion concerning the provision that is the subject of the proceedings before the Constitutional Court; discussion concerned the institution of debt discharge only as regards the possibility of applying it in the case of a legal person that is not an entrepreneur. Thus, in the approval process no opinion was stated that would either support or refute the petitioner's claim that § 399 par. 2 of the Insolvency Act is unconstitutional. The senate discussed the bill within the bounds of the competence provided by the Constitution of the Czech Republic and in the constitutionally prescribed manner; it acted on the basis of the majority belief that the Act was in accordance with the constitutional order of the Czech Republic and with its international obligations. It

is now up to the Constitutional Court to evaluate the constitutionality of the provision in question.

11. All parties to the proceedings agreed to waive a hearing, under § 44 par. 2 of the Act on the Constitutional Court.

III. The Text of the Contested Statutory Provision

12. The contested provision of the Insolvency Act reads:
§ 399
[…]
(2) The insolvency court shall deliver to the debtor and insolvency administrator, using personal delivery, a summons to the creditors' meeting pursuant to paragraph 1, with instructions that their presence is necessary. The debtor is required to take part in the meeting personally and answer questions from the creditors present; if he does not appear without an explanation, or if the insolvency court does not find his explanation to be justified, he is deemed to have withdrawn the petition for debt discharge.
[…]

IV. Petitioner's Active Standing

13. Under Art. 95 par. 2 of the Constitution of the Czech Republic, if a court concludes that a statute that is to be applied when adjudicating a matter is inconsistent with the constitutional order, it shall submit the matter to the Constitutional Court. Further specifics on this authorization are given in § 64 par. 3 of the Act on the Constitutional Court, under which a court may submit to the Constitutional Court a petition seeking annulment of a statute or of individual provisions thereof. The condition for addressing such a petition on the merits is that the wording of Art. 95 par. 2 of the Constitution of the Czech Republic must be met, meaning that the statute must be one that is to be applied in adjudicating the matter, i.e. the statute, or its provisions, that is proposed to be annulled is to be applied directly by the petitioner when resolving the particular dispute. The Constitutional Court found that this condition had been met, because the petitioner will review the justification for the debtor's appeal against the insolvency court's decision, issued precisely due to the effects of the legal fiction of withdrawal of the petition that is contained in the contested provision. The Constitutional Court verified the facts concerning the conduct of the insolvency proceeding in the Regional Court's file KSOS 16 INS 4988/2008, available electronically at https://isir.justice.cz (the insolvency register).

14. For completeness, the Constitutional Court notes that a conclusion that the petitioner is authorized is not inconsistent with the opinion stated in judgment file no. Pl. ÚS 42/08, in which the Constitutional Court stated that the same petitioner did not have active standing to submit a petition seeking the annulment of part of § 399 par. 2 of the Insolvency Act (point 22 of the judgment). That legal opinion arose in a particular procedural situation, where annulling the provision in question was not part of the proposed judgment of the petition, and, especially, where the

Constitutional Court addressed the issue of whether it is even in the petitioner's competence at all to rule on the appeal on the merits. In other words, as regards judgment file no. Pl. ÚS 42/08, the petitioner was in a situation where it had to address the issue of permissibility of an appeal, and not the issue of justification of the appeal, and therefore at that time it was not directly applying the contested provision. Of course, in the presently adjudicated matter, as already explained, the situation was different.

V. Constitutional Conformity of the Legislative Process

15. In a proceeding on a petition seeking the annulment of a statute or part thereof, the Constitutional Court reviews whether the contested legal regulation was adopted and issued within the bounds of the competence provided by the Constitution of the Czech Republic and in a constitutionally prescribed manner (§ 68 par. 2 of the Act on the Constitutional Court). As the constitutional adoption of the contested part of the Insolvency Act was not questioned by any of the parties to the proceeding, the Constitutional Court verified the constitutional conformity of the legislative process only formally, using publicly available sources (http://www.psp.cz), and found that all the prescribed procedures were observed during the adoption of the contested legal regulation. Regarding the conduct of the legislative process, one can refer in full to the recapitulation provided by the parties to the proceeding (points 9 and 10 of this judgment).

VI. The Constitutional Court's Legal Review

16. The provision of § 399 par. 2 of the Insolvency Act imposes on a debtor for whom debt discharge has been permitted, an obligation to take part in a creditors' meeting and answer their questions; in the event of the debtor's unexplained absence, the statute imposes a penalty in the form of the fiction of withdrawal of the petition, and the resulting effects. As a result of applying this fiction, the debtor loses the opportunity of resolving his insolvency through debt discharge, and bankruptcy proceedings are opened against him (§ 396 par. 1 of the Insolvency Act). The insolvency court takes cognizance of the withdrawal of the petition by a resolution (§ 394 par. 2 of the Insolvency Act).

17. The Constitutional Court has already considered the complex of provisions regulating the consequences of a debtor who has been permitted debt discharge missing the creditors' meeting, in judgment file no. Pl. ÚS 42/08, published as no. 163/2009 Coll., in which it annulled § 394 paragraph 2, the part of the sentence after the semi-colon, of the Insolvency Act, which ruled out an appeal against a decision in which a court took cognizance of withdrawal of a petition. In the cited judgment, the Constitutional Court stated that, in terms of preserving the insolvency debtor's right to a fair trial, it appears necessary that a remedy exist against a court decision issued on the basis of the fiction of withdrawal of a petition under § 399 par. 2 of the Insolvency Act, both for purposes of correcting obvious errors that may appear in the court's actions (e.g., the debtor's explanation is filed in a different file), and because the effects of the fiction may

arise as a result of the insolvency court's evaluative judgment (if the insolvency court does not find the explanation to be justified).

18. At the same time, the Constitutional Court critiqued the construction of the legal fiction contained in § 399 par. 2 of the Insolvency Act: "The civil proceeding rests, among other things, on two fundamental principles – the dispositive principle, and the adversarial principle. The close relationship between substantive private law and public civil procedure law is best expressed through the dispositive principle. The meaning and purpose of civil procedure law is to protect subjective private rights, i.e. public civil procedure law serves private substantive law, and if it does not fulfill that role, it loses its meaning. The functional connections between private substantive love, which is based on the autonomous will of parties to private law relationships, and public civil procedure law and reflected in procedural law primarily through the dispositive principle, which governs civil trials. The dispositive principle is a specific reflection of private law autonomous will in the area of a civil trial. The parties have the right, in accordance with the dispositive principle, to freely handle both the proceeding and the subject matter of the proceeding. Procedural rights, which are derived from the dispositive principle, are reserved exclusively to the bearers of these rights through dispositive procedural acts; it follows from the nature of these dispositive procedural acts that they cannot be the subject of a legal fiction, i.e. it cannot be specified that someone withdrew a petition even though he did not do so. The legal construction of the fiction of withdrawal of a petition for debt discharge is inconsistent with the nature of a civil trial, which applies not only to an adversarial civil trial, but to any kind of civil court proceeding, i.e. including an insolvency proceeding. A dispositive legal act cannot be the content of a legal fiction without violating the dispositive principle on which the civil trial is built, and ultimately also violating the principle of autonomous will. As the Constitutional Court stated, e.g. in judgment file no. I. ÚS 167/04, of 12 May 2004 (N 70/33 SbNU 197), autonomy of will and free individual action is guaranteed at the constitutional level by Art. 2 par. 3 of the Charter of Fundamental Rights and Freedoms. Art. 2 par. 3 of the Charter must be understood in two senses. Its first dimension represents a structural principle, under which state power can be exercised vis-à-vis the individual and his autonomous sphere (including autonomous volitional expression) only in situations where the individual's conduct violates an expressly formulated prohibition provided by law. However, such a prohibition must also reflect only the requirement consisting of preventing the individual from interfering in the rights of third parties, and in promoting the public interest, if it is legitimate and proportional to such limitation of the individual's autonomous behavior. This principle must be understood as an essential requirement of every democratic state governed by the rule of law (Art. 1 par. 1 of the Constitution of the Czech Republic). Art. 2 par. 4 of the Constitution has a similar content. In its second dimension, Art. 2 par. 3 of the Charter functions as an individual's subjective right to have the state power respect the autonomous expression of his personality, including volitional expression that is reflected in his specific behavior, provided such behavior is not expressly forbidden by law. Art. 2 par. 3 of the Charter, in its second dimension, where it functions as an individual's fundamental right, must be applied directly. This dimension does not mean mere that it radiates into ordinary law, but is a subjective right that is in effect directly vis-à-vis the state power. Therefore, state bodies are required, when applying ordinary law, to interpret the

norms of that right, which reflect Art. 2 par. 3 of the Charter and Art. 2 par. 4 of the Constitution as an objective constitutional principle, so as not to interfere in the individuals' subjective right to autonomy of the will, which is also guaranteed by Art. 2 par. 3 of the Charter in its second dimension.'. The obligation to respect the autonomy of the will applies not only to the bodies that interpret and apply the law, but undoubtedly also for legislators. Therefore, on one hand the attempt to speed up a proceeding is desirable, but on the other hand it cannot take such a form that, by replacing a procedural act by a party it actually takes away his possibility to act freely. Therefore, mature legal orders use, e.g. the institution of presumptions only when determining the factual state of affairs, i.e. in clarifying and determining the decisive factual circumstances. Thus, institutions that accelerate the process (e.g. a default judgment or preclusive deadlines) are used only in an area to which the adversarial principle applies, and it is not possible, in the interests of speeding up the proceeding, to use these means for disposition of the proceeding and the subject matter of the proceeding. It is not a function of a legal fiction to make certain decisive facts more probable, all the more so a fiction cannot apply to a party's fundamental right to disposition of the proceeding and the subject matter of the proceeding (further, see Macur, J. Rozsudek na základě fikce uznání nároku podle ustanovení § 114b o. s. ř. [Decision on the Basis of the Fiction of Recognizing a Claim under § 114b of the Civil Procedure Code] Bulletin Advokacie, no. 2/2002, pp. 28–36)." (point 20 of Constitutional Court judgment file no. Pl. ÚS 42/08).

19. The Constitutional Court also emphasized that the fiction of withdrawal of a petition for debt discharge is unacceptable from a constitutional law viewpoint even more so because it is not a mere procedural act whereby the party acts for disposition of the proceeding, but it has fundamental substantive law consequences for debtor and creditor (the subsequent opening of bankruptcy proceedings). It was only the petitioner's lack of active standing in the proceeding under file no. Pl. ÚS 42/08 that prevented the Constitutional Court from then canceling the now contested part of § 399 par. 2 of the Insolvency Act (cf. point 22 of the cited judgment).

20. The Constitutional Court had no reason to diverge from the abovementioned conclusions; therefore, it stated that § 399, paragraph 2, the part of the second sentence after the semi-colon of the Insolvency Act, whereby the fiction of withdrawal of a petition for debt discharge denies a party to a bankruptcy proceeding the possibility of disposition of the proceeding, is inconsistent with Art. 2 par. 3 of the Charter and Art. 2 par. 4 of the Constitution of the Czech Republic, as well as with Art. 36 par. 1 of the Charter, wherefore it ruled, under § 70 par. 1 of the Act on the Constitutional Court, that this provision is annulled as of the day this judgment is promulgated in the Collection of Laws.