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THE JUDGE'S ACTIVE ROLE AND THE PRINCIPLE OF THE AVAILABILITY OF THE PARTIES IN A CIVIL LAWSUIT

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Abstract: *The main aspects through which the active role of the judge is manifested and which can be, at the same time, perceived as limitations of the principle of the availability of parties in a civil lawsuit are: the right of the court to set in order for the evidence to be considered useful in finding the truth, apart from the evidence proposed by the parties and sometimes against the ones commonly supported by the parties; the possibility of the judge to demand explanations regarding the actual situation from the parties and the motivation de jure that the parties invoke in advocating their demands and defenses, as well as subjecting to debate any circumstances de facto or de jure, even though they are not comprised in the summons or in the statement of defense; the enforced introduction of other people in the cause; legal classification of the deeds and facts inferred from the judgment made by the judge.*

Key words: *judge, active role, Civil Code, court.*

1. Introduction

The judge's active role must be analyzed in correlation to the principle of availability which governs the civil lawsuit, an established principle in the current Civil Code article 9 and which, in essence, establishes that the object and the limits of the process are settled through the demands and the defenses of the parties.

This specific principle of the civil procedure cannot be derogated from on the grounds of the active role of the judge without a special legal disposition.

Under the influence of the previous Civil Procedure Code, starting from the provisions of article 129 from the Civil Procedure Code from 1865, its doctrine [1], stipulated that the main aspects through which the active role of the judge is manifested and which can be at the same time perceived as limitations of the principle of availability of the parties in the civil lawsuit are:

a). the right the court of law has to set in order the evidence which is considered useful in finding the truth, apart from the evidence proposed by the parties and sometimes even against the one commonly supported by the parties.

In this sense, article 129, paragraph (5) from the 1865 Civil Procedure Code stipulated that: "*The judges have the duty to insist, using all the legal means, on preventing any mistake regarding finding the truth in the cause on the grounds of the*

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established facts and the correct enforcement of the law with the purpose of giving a solid and legal sentence. They will be able to set in order the management of the proofs that they consider necessary, even if the parties are against."

Starting from this text of the law, it was proved that the court of law has the possibility to doubt even the truthfulness of those facts which are not contested by the parties, namely those on which the parties in the lawsuit agree, demanding the parties to propose evidence or order them ex officio in order for them to be proven.

Thus, it was proved that in enforcing the provisions of article 129, paragraph (5) from the 1865 Code of Civil Procedure, on conditions that the evidence be ordered ex officio by the court of law are legal (*for example, the court will not be allowed to order the proof with interrogation in a matter in which it would be inadmissible*), conclusive and discussed by the parties, the court of law has the possibility to dispose the management of the evidence considered necessary in finding the truth at any moment of the debate, not being limited in the same manner as the parties, to a certain time in the lawsuit.

In what concerns the judge exercising an active role when it comes to ordering the administration of certain evidence ex officio, it was proved that this is only a capacity and not an obligation [2], therefore neither the parties nor the judicial review court will be able to invoke in their means of appeal the issue of the judge not exercising his/her active role in the matter of evidence.

A similar text regarding the exercising of the judge's active role to rule ex officio the administration of evidence it is also to be found in the current Civil Procedure Code, which rules in article 22, paragraph (2) that: *"The judge has the duty to insist using all the legal means on preventing any mistake regarding the finding of the respective truth, based on establishing the facts and by correctly enforcing the law with the purpose of reaching a solid and legal verdict. To this effect, regarding the practical situation and the motivation de facto that the parties invoke, the judge has the right to… rule the administration of the evidence that they consider necessary, as well as other measures provided by the law, even if the parties go against."*

It is to be noticed that the text of article 129, paragraph (5) from the old Civil Procedure Code is similar to the one of article 22, paragraph (2) from the current Civil Procedure Code, hence the appreciation that the doctrine put forward remains the same with regard to its applicability.

Moreover, it is proved in the current regulation that *"the judge is in the right"*, wherefrom we deduce that the doctrinaire consideration that the court has the right and not the obligation to exercise its active role in what concerns administrating the evidence ex officio stands perfectly valid.

b). the possibility that the judge ask for explanations from the parties regarding the practical situation and the motivation de jure that the parties invoke in sustaining their claims and their defenses, as well as discussing with the parties any circumstances de facto or de jure, even if they are not included in the summons or the statement of defense.

The old Civil Procedure Code stipulated in article 129, paragraph (4) the following: *"Regarding the practical situation and the motivation de jure that the parties invoke in supporting their claims and their defenses, the judge has the right to ask them to present oral or written explanations, as well as to ask them to debate any circumstances de facto or de jure, even if they are not mentioned in the summons or the statement of defense."*

A similar text can be found in article 22, paragraph (2) from the current Civil Procedure Code: *"Regarding the situation de facto and the motivation de jure that the parties invoke, the judge has the legitimate right to ask them to present oral or written explanations as well as to ask them to debate any circumstances de facto or de jure, even if they are not mentioned in the summons or the statement of defense."*

Starting from this regulation, it was stipulated in the doctrine that the judge has the possibility to bring under the parties' debate only those circumstances de facto or de jure which are set within the limits of the procedural frame established by the parties considering the object and the people among which the procedural legal relationship already agreed upon by the parties was established.

Thus, it was proved that if the possibility of the claimer to increase his/her iota for the object of his/her demand was taken into consideration or that of showing him that he/she has the possibility to introduce a third party in the lawsuit, there would be the risk, depending on the practical situation in the test case, to consider this attitude of the judge as a prejudgement or a violation of the principle of the availability of parties which rules the civil suit.

Moreover, it was considered that the court is held by the cause of the summons or the procedural act having the same judicial character (e.g. the counterclaim, the voluntary intervention claim), without having the possibility to change the basis of the claimer's demand without the consent of the person having the quality of claimer.

Most of the doctrine, when referring to the cause of the summons, defines it as the practical situation interpreted from a legal point of view.

Thus, it was proved that the court must assess the practical situation, taking into account the circumstances which have been proven, and in order to solve the litigation between the parties, it will enforce the text of law adequate to the practical situation as it results from the evidence taken, without having the possibility to change the legal classification, e.g. if the claimer has wrongly substantiated his/her claim on the tort liability, it will not be possible for the verdict to be reached on the grounds of contractual liability.

And as the two forms of liability could not be cumulated, the court was forced to dismiss the action considering that the claimer substantiated his\her own claim on tort liability, even though the case met the conditions of a contractual liability.

Regarding this matter, other examples were given in the doctrine in order to understand the extent to which the judge's active role could go from the above mentioned point of view.

For example, it was proved that if the invalidation of a contract is required on the grounds that the claimer's consent was vitiated, the court cannot decide the invalidation of the contract for failure to comply with the formal issues, even if this aspect results from the evidence taken, equally, if the claimer requests that the culprit pay a certain sum of money that he/she borrowed, the court cannot allow that sum of money as the price of a sale.

It was considered that in these situations, *iura novit curia* rule is not likely to lead to the solution according to which the judge could change ex officio the cause of summons because it is understood by this law that the judge is not influenced by the text of law indicated by one of the parties, but he/she has to apply that text of law which corresponds to the practical situation legally qualified by the party to the extent to which that practical situation is confirmed by the evidence taken in the cause.

c). forcefully introducing other people in the cause

We observe that in the current regulation, the court has the possibility to introduce ex officio other people in the civil lawsuit (article 22, paragraph (3) in the current Civil Procedure Code).

The people introduced in the cause in this manner will have all the rights that the claimer or the culprit have in the lawsuit, depending on the position they acquire following their involvement in the lawsuit.

That is why article 22, paragraph (3) stipulates that: *"The people introduced in the cause in this manner will have the possibility, according to the case, to discontinue the proceedings or the claimed right, to acquiesce the demands of the claimer or to end the lawsuit through a transaction."*

The current Civil Procedure Code stipulates in articles 78-79 the conditions, the term and the procedure of the forced introduction, ex officio, of other people in the lawsuit in a subsection entitled *"Forced introduction in the cause, ex officio, of other people"*.

Therefore, according to article 78, paragraph (1), *"In special cases, stipulated by the law, as well as in the court procedures, the judge will rule ex officio the introduction of other people in the cause, even if the parties are against this."*

Thenceforth, paragraph (2) stipulates that *"In legal matters, when the legal relationship in the lawsuit imposes that, the judge will raise for discussion of the parties the need to introduce other people in the cause. If neither of the parties requires the introduction of a third party in the lawsuit, and the judge considers that it cannot be settled without the participation of the third party, he/she will dismiss the summons without ruling on the merits."*

The law distinguishes two situations:

- in the non-contentious procedure, as well as in the cases especially provided for in the law, the court can rule the forced introduction in the lawsuit of other people, even against the will of the parties.

This provision is not an absolute novelty keeping in mind that in the old regulation, the doctrine stated that in the non-contentious procedure, the court has the possibility to cite not only the claimer, but also other people during the lawsuit, if he/she considers their presence necessary after analyzing the bill.

And this can be done according to the provisions of article 355, Civil Procedure Code which ruled that the court can dismiss the bill if it considers from its content or from the objections raised by the cited people or those who intervene in the lawsuit that the bill has a contentious nature. This leads to the conclusion that the court can also cite third parties to the lawsuit, not only the claimer.

- the second situation regulated by article 78, paragraph (2) is a novelty, in the sense that the doctrine present in the old regulation, as shown above, considered that an eventual discussion between the parties regarding the possibility of involving other people in the lawsuit would be equivalent to a prejudgment and an inobservance of the availability principle.

The current Civil Procedure Code expressly rules that in case of litigation, the judge can bring forward the necessity to involve other people in the lawsuit, but only when the legal relationship imposes this.

Unlike the first situation, the judge cannot rule the involvement in the cause of a third party if the other parties are against, so in such a situation, if the court considers that the cause can be settled without the participation of the third party, it will dismiss the action on that score, without ruling on the merits.

Still, the court will be allowed to rule the involvement in the cause of the third party

when one of the parties is against while the other one requests this.

The third party can be involved in the lawsuit until the moment when the inquiry is over, before starting the debates.

Still, when the necessity of involving other people in the cause is observed when deliberating, the court will redocket the pending case, ruling that the parties are cited.

If the court observes the fulfillment of legal conditions to introduce the third party in the lawsuit, the court gives an interlocutory sentence which can only be appealed together with the initial case.

But if the court dismisses the bill on the grounds that the cause cannot be judged without the third party, it passes a sentence that can only be appealed.

Article 79 in the Civil Procedure Code stipulates the legal proceedings in case of forced introduction, ex officio, of other people by the court providing that: "the one introduced in the lawsuit will be cited, and will receive together with the citation, a copy of the decision stipulated in article 78, paragraph (3), the summons, the statement of defense, as well as the enclosed documents.

He/she will also be communicated through the citation the due date until he/she will be allowed to present the exceptions, proofs and the other means of defense that he/she plans to use; the term will not be longer than the trial date given by the court."

From these dispositions it is to be understood that the court will allow the third party a shorter term than the trial date in order for him/her to lay down his/her exceptions, proofs and the other means of defense that he/she plans to use, whereas the term granted to the third party will not be shorter than the one established in the cause.

The same article of the law stipulates in paragraph (2) that the third party *"will take the proceedings in the exact state in which they are at the moment he/she was introduced in the trial."*

At the request of the one introduced in the lawsuit, the court can rule that evidence should be presented again.

d). the legal classification of acts and deeds submitted for trial

As shown above, in the light of the old regulation, it was considered that the court cannot proceed to a re-classification of the action, in the sense that we cannot change ex officio the cause, understood as the basis of the claimer's demands or as a legally classified practical situation.

Moreover, even bringing forward to the parties a possible legal re-classification of the lawsuit can be interpreted as a prejudgment or an inobservance of the availability principle.

In the current Civil Procedure Code, article 22, paragraph (4) stipulates that: *"The judge gives or establishes the legal classification of the acts and deeds submitted for trial even if the parties gave them another name. In this case, the judge is compelled to bring forward to the parties the exact legal classification."*

From this text of the law, it is understood that the judge can legally classify the acts and deeds submitted for trial in case the parties do not give such a qualification, or can re-establish the legal classification given by the parties in case he/she considers that this has not been properly done by the parties.

2. Conclusions

The accurate legal classification done by the judge for the acts and deeds submitted to trial must always be brought forward to parties in order to conform to the principle of contradiction in a lawsuit.

We deduce from paragraph (5) of the same article that if the parties agree on the

legal classification made by the court or there is no special agreement between them regarding the legal classification and the question of law on which they decided to limit the debates, the court will have the possibility to pass a sentence starting from the legal classification made ex officio.

If there is a special agreement between the parties regarding the legal classification and the questions of law on which they decided to limit the debates, the court cannot alter the name or the legal grounds of the action on condition that the parties' right are such that they can dispose of according to the law and their agreement does not infringe upon the rights or legitimate interests of the third parties.

Also, the court will have the possibility to change the name or the legal grounds in spite of the parties' agreement on the legal classification and the legal grounds, even if the parties can dispose of these rights, in the situation in which through this agreement they would infringe the rights and the legitimate interests of others.

It can also be observed that paragraph (5) of article 22 in the current Civil Procedure Code refers only to the situation in which there is a special agreement of the parties, so it cannot be submitted for trial and there cannot be a tacit agreement which results from the parties' attitude.

Taking into consideration the written ones, I consider that the current Civil Procedure Code has enhanced the active role of the judge, at the same time limiting the principle of availability of the parties in the lawsuit in considering certain general interests as justifying such limitations.

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