



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF HÎRGĂU AND ARSINTE v. ROMANIA

(Application no. 252/04)

JUDGMENT

STRASBOURG

20 January 2009

FINAL

20/04/2009

This judgment may be subject to editorial revision.

In the case of Hîrgău and Arsinte v. Romania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Alvina Gyulumyan,

Egbert Myjer,

Luis López Guerra, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 16 December 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 252/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Romanian nationals, Mrs Maria Hîrgău and Mr Radu Arsinte (“the applicants”), on 12 November 2003.

2. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu.

3. On 10 January 2008 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1940 and 1938 and live in Oniceni and Cornu Luncii respectively.

1. Recovery of land

5. On 11 October 1995 the Fălțiceni Court of First Instance upheld an action by the applicants and authorised them to recover in co-ownership, as

their mother's heirs, a plot of land measuring 0.26 hectares situated in Cornu Luncii village, in a place known as Cotromanți.

The first page of that judgment states that it became final on 7 November 1995. That statement is accompanied by a signature and a stamp of the Court of First Instance. According to the Government, the judgment became final on 28 November 1996, when an appeal by G.M., a third party intervening in the proceedings, was dismissed as groundless. The Government did not submit either a copy of the alleged judgment of 28 November 1996 or any other document making reference to that judgment.

6. On 21 November 1995 the authorities granted third parties title to a plot of land measuring 0.15 hectares situated at Cotromanți. According to the Government, the land formed part of the plot of 0.26 hectares granted to the applicants by the judgment of 11 October 1995.

7. On 20 August 1997 the third parties sold that land to G.M.

2. Attempts by the applicants to enforce the judgment

8. On 6 May 1996 the applicants brought administrative proceedings against the local commission in Cornu Luncii responsible for the application of Law no. 18/1991 ("the local commission"), seeking to take possession of the 0.26 hectares of land at Cotromanți. On 21 November 1996 the Suceava County Court upheld the action and ordered the local commission to enable them to take possession of the land at Cotromanți. That judgment became final.

9. On 1 September 1997 the applicants brought proceedings against G.M. seeking annulment of the sale of 20 August 1997. On 13 December 2002 the Suceava Court of Appeal dismissed the action in a final decision, taking the view that G.M. had acted in good faith.

10. Between 1997 and 2003, according to the applicants, they lodged several criminal complaints against the mayor alleging abuse of authority and non-compliance with court decisions. The public prosecutor found no grounds which would justify initiating a criminal action against the mayor. On 25 November 1998 and 26 June 2001 these decisions were upheld by the senior prosecutor.

11. On 14 July 1998 the Court of First Instance, in an enforceable decision, upheld an action by the applicants and ordered the local commission to enable them to take possession of the 0.26 hectares of land at Cotromanți. It ordered the mayor, in his capacity as chairman of the local commission, to pay the applicants a pecuniary penalty of 3,000 Romanian lei (ROL) for each day's delay in enforcement.

12. On 8 January 2001 the County Court, by an enforceable decision, increased the amount of the daily pecuniary penalty to ROL 150,000 at the applicants' request, considering the mayor to be acting in bad faith and ignoring the law.

13. On 14 September 2001 the County Court, by an enforceable decision, allowed an action by the applicants and attached the accounts of the Cornu Luncii Town Council with the Fălticeni Treasury up to an amount of ROL 77,700,000 and, for the future, up to ROL 150,000 per day.

14. On 3 April 2003 the applicants lodged an action seeking, *inter alia*, to have the title of the third parties who had sold the land to G.M. declared partially null and void, in respect of a surface area of 0.13 hectares.

On 14 September 2006 the Court of Appeal, by a final decision, allowed the action taking the view, *inter alia*, that the land had belonged to the applicants' mother and therefore had been illegally included in the third parties' title.

15. On 5 June 2003 the bailiff, at the applicants' request, asked the court to authorise the seizure of up to ROL 172,750,000.

16. On 19 December 2003 the County Court, by a final decision, dismissed the request on the ground that the judgment of 8 January 2001 did not represent an enforceable title because the coercive fine was of a provisional nature and therefore it was only after enforcement of the obligation to enable the applicants to take possession that the actual amount of damage caused by the delay in enforcement could be established.

17. On 10 August 2006 the applicants brought proceedings to have the sale of 20 August 1997 declared partially null and void, in respect of 0.13 hectares of land, and to require G.M. to remove a fence built on that land.

18. On 4 January 2008 the Court of First Instance allowed the action, taking the view that G.M. had acted in bad faith when he purchased the land. That judgment became final on 27 May 2008.

3. Attempts by the authorities to enforce the judgment

19. On 13 February 1998 the local commission invited the first applicant to take possession of a plot of 0.26 hectares of land. She refused, as the land was not situated in the original location.

20. On 10 November 2003 the Town Council certified in an official record that the first applicant had refused to take possession of 0.35 hectares of land at Cotromanți, as that land was the subject matter of court proceedings.

21. According to the Government, on 20 July 2006 the local commission made a fresh attempt to enable the applicants to take possession, but was hindered by G.M., who had title to part of the land.

22. On 24 March 2008 the local commission invited the first applicant to its headquarters with a view to enforcing the 1995 judgment. As the judgment of 4 January 2008 had not become final at the time, the parties agreed to adjourn enforcement until it had become final.

23. On 14 August 2008 the Town Council certified in an official record that the applicants had been able to take possession of, *inter alia*,

0.26 hectares of land at Cotromanți. The applicants signed the official record.

II. RELEVANT DOMESTIC LAW

24. The relevant domestic law is summarised in the judgments in *Sabin Popescu v. Romania* (no. 48102/99, §§ 42-46, 2 March 2004) and *Drăculeț v. Romania* (no. 20294/02, § 29, 6 December 2007).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION AND OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

25. The applicants complained that the non-enforcement of the judgment in their favour had infringed their rights guaranteed by Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention, which, in so far as relevant, read as follows:

Article 6 § 1

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

Article 1 of Protocol No. 1

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

26. The Government contested that argument.

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

28. The Government submitted that the authorities had fulfilled their tasks arising out of the obligation to enforce. The delay in enforcement had been due to objective reasons, namely valid property titles issued to third parties, as well as the conduct of the applicants, who had not accepted either an alternative plot of land or even their own land on 10 November 2003. They also considered that, while it was true that the local commission had issued a property title to third parties in respect of the disputed land, that title had been issued before the 1995 judgment became final. The applicants had been informed of the circumstances preventing them from taking possession; knowing about the dispute over the land since 1995, it had been open to them to facilitate the taking of possession by commencing at an earlier date the proceedings they had brought in 2003 seeking to have the third parties' title to the land declared null and void.

29. In their supplementary observations of 16 September 2008 the Government submitted that on 14 August 2008 the applicants had been able to take possession of their land; thus, the judgment of 11 October 1995, which became final only on 28 November 1996, had been enforced. Following the proposal of the local commission, the county commission responsible for the application of Law no. 18/1991 would issue the applicants with title to the land.

30. The applicants disagreed. In particular, they submitted that the judgment of 11 October 1995 had become final on 7 November 1995, as proved by the stamp of the Court of First Instance on its first page. Moreover, the mayor had an obligation under Law no. 18/1991 not to assign disputed land before a final judgment.

31. The Court notes that the judgment of 11 October 1995 authorised the applicants to recover their property. It thus conferred on the applicants a legitimate expectation of being able to take possession of the land referred to in that judgment and of subsequently obtaining title to the land, as provided by the internal legislation (see the relevant domestic law in *Drăculeț*, cited above, § 29). Although on 14 August 2008 the applicants were able to take possession of their land (see paragraph 23 above), they have yet to receive a document of title to the land. Having regard to the fact that the administrative proceedings are still pending, the Court cannot accept the Government's argument that the above-mentioned judgment has

been enforced. In order for the applicants to fully enjoy the prerogatives conferred by the ownership of their land, they must have not only *de facto* possession, but also a document of title certifying their ownership.

32. The Court considers therefore that although the authorities have an obligation to enforce court judgments, in this case by restoring the relevant land to the applicants, the judgment of 11 October 1995 remains unenforced to date. That judgment is nevertheless still valid, no proceedings having been instituted under Romanian law to have it varied or annulled by the domestic courts. Apart from enforcement, it is only by means of such annulment or amendment by courts with an equivalent obligation that the continuing situation of non-enforcement may come to an end (see *Sabin Popescu*, cited above, § 54).

33. The Court has previously held that an action seeking to have the ownership titles issued to third parties declared null and void is a separate matter from the non-enforcement issue and is not a remedy capable of leading directly to enforcement of the judgment (see *Croitoriu v. Romania*, no. 54400/00, § 22, 9 November 2004, and *Sabin Popescu*, cited above, §§ 56-60). Having regard to its case-law on the subject (see *Pântea v. Romania*, no. 5050/02, § 36, 15 June 2006), the Court considers that, in the present case, the authorities failed to inform the applicants by means of a formal decision of the alleged objective impossibility of *ad litteram* performance of the above-mentioned judgment and to take all necessary steps for its enforcement. Moreover, the national courts never ruled that the *ad litteram* enforcement of the judgment of 11 October 1995 was bound to fail due to the fact that third parties had the title to the plot of land in question.

34. The Court notes the divergence between the parties in the present case as to the moment when the judgment of 11 October 1995 became final. Notwithstanding the Government's failure to substantiate their allegation, the Court reiterates that by transferring a part of the disputed land to a third party when court proceedings are pending and before the question of ownership had been finally settled by the courts, the State deprived the applicants of any possibility of recovering possession (see, *mutatis mutandis*, *Străin and Others v. Romania*, no. 57001/00, §§ 39 and 43, ECHR 2005-VII). Even if the Government's allegations were to be accepted, the Court is still deeply concerned about the fact that the administrative authorities issued title for the benefit of a third party before the legal status of the property had been finally decided.

35. The Court considers that when two ownership titles co-exist in respect of the same property, any attempt by the applicants to enjoy their possession is bound to fail (see *Ioan v. Romania*, no. 31005/03, § 54, 1 July 2008). Therefore, it does not consider it unreasonable that the applicants refused to take possession of their land while a dispute as to its ownership was pending.

36. The Court has frequently found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in cases raising issues similar to the ones in the present case (see, among others, *Sabin Popescu*, cited above, and *Dragne and Others v. Romania*, no. 78047/01, 7 April 2005).

37. Having examined the material submitted to it, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. There has accordingly been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

39. The applicants sought enforcement of the judgment of 11 October 1995. They also claimed 12,318 euros (EUR) for the loss of profit or any benefit from their possession since 1995, representing the value of the vegetables that could have been cultivated, and EUR 18,831.08 in respect of non-pecuniary damage, representing the equivalent, from 11 October 1995 onwards, of the pecuniary penalty fixed by the judgment of the Suceava County Court of 8 January 2001.

40. The Government noted that the applicants had already been able to take possession of the 0.26-hectare plot of land at Cotromanți. Regarding the loss of profit, it had not been supported by documents. Further, they considered that the finding of a violation would constitute in itself sufficient just satisfaction for any non-pecuniary damage which the applicants might have suffered. The coercive fine had the nature of a civil penalty, with the purpose of guaranteeing performance of an obligation and not of granting compensation; the applicants had the possibility of requesting the court to convert it into damages for delayed enforcement.

41. The Court reiterates that, where it has found a breach of the Convention in a judgment, the respondent State is under a legal obligation to put an end to that breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI).

42. The Court considers, in the circumstances of the case, that the *ad litteram* enforcement of the judgment of 11 October 1995 would place the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1. In this connection, the Court observes that the applicants have been enabled to take possession of their land and that they have agreed to this course of action. Therefore it holds that the respondent State is to provide the applicants with title in respect of that land.

43. Having regard to the fact that the applicants have been enabled to take possession of their land and that it has ordered *restitutio in integrum* as reparation under Article 41 of the Convention, the Court considers that the applicants have recovered the loss sustained (*damnum emergens*) (see *Sabin Popescu*, cited above, § 91).

44. As regards the amount of money alleged by the applicants for the loss of profit or any benefit (*lucrum cessans*) from their possession since 1995, the Court notes that the applicants did not submit any supporting documents to substantiate their claim. In the absence of any evidence, the Court will not speculate as to the loss of profit or any benefit and, therefore, will not make an award under this head (see *Dragne and Others v. Romania* (just satisfaction), no. 78047/01, § 18, 16 November 2006).

45. As regards the amount alleged by the applicants as the equivalent of the periodic pecuniary penalty, the Court reiterates that under Romanian law a coercive fine is of a provisional nature and therefore cannot be enforced in the absence of a new court decision establishing the actual level of damage caused by the delay in enforcement (see *Gavrileanu v. Romania*, no. 18037/02, § 66, 22 February 2007). In the present case, as the applicants have not made full use of the judicial mechanism of the coercive fine, the Court will not speculate as to its amount and, therefore, will not make an award under this head.

46. The Court considers that the serious interference with the applicants' right of access to a court and with the peaceful enjoyment of their possessions has caused a moral prejudice to the applicants. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards them jointly EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

47. The applicants did not expressly claim costs and expenses, but submitted invoices for payment of translation, fax and postal expenses to the Court, in a total amount of ROL 1,184.

48. The Government pointed out that the applicants had not made an express claim in this respect.

49. Having regard to the fact that the applicants submitted invoices for costs and expenses incurred in the Strasbourg proceedings, the Court considers that they did make, in substance, a claim in this respect. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 320 for the proceedings before the Court.

C. Default interest

50. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1;
3. *Holds*
 - (a) that the respondent State shall ensure, by appropriate means, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the enforcement of the judgment of 11 October 1995 of the Fălticeni Court of First Instance by providing the applicants with a document of title to their land;
 - (b) that the respondent State is to pay the applicants jointly, within the same three months, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 320 (three hundred and twenty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President