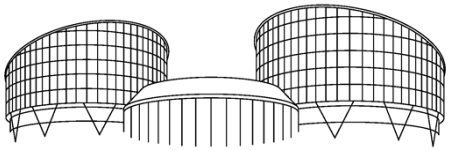

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF COMPCAR, S.R.O. v. SLOVAKIA

(Application no. 25132/13)

JUDGMENT

STRASBOURG

9 June 2015

FINAL

09/09/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of COMPCAR, s.r.o. v. Slovakia,

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

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Branko Lubarda, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 19 May 2015,

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

PROCEDURE

1. The case originated in an application (no. 25132/13) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 5 April 2013 by a private limited company established under the laws of Slovakia, COMPCAR, s.r.o. ("the applicant company").

2. The applicant company was represented by Mr M. Tkáč, a lawyer practising in Lipany.

The Government of the Slovak Republic ("the Government") were represented by their Agent, Ms M. Pirošíková.

3. The applicant alleged, in particular, that the quashing of a final and binding judgment in its favour following an extraordinary appeal on points of law lodged by the Prosecutor General further to a petition by the other party to the proceedings had breached its rights under Articles 6 § 1 of the Convention.

4. On 11 June 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company was established in 1995 and has its registered office in Prešov.

A. Background

6. In 2004 the applicant company bought real property registered on ownership certificate no. 5604 for the cadastral area of Južné mesto in the city of Košice. The seller was a State-owned enterprise ("the seller") acting through a receiver in insolvency.

7. Prior to the sale, in a decision (*uznesenie*) of 8 April 1998, the Košice Regional Court (*Krajský súd*) acting as an insolvency court had consented to the property being sold directly as opposed to through a public auction.

8. By way of an order (*opatrenie*) of 9 July 2004 the insolvency court approved the sale of the property to the applicant company because it had fulfilled the conditions for the sale as set out in the decision of 8 April 1998. It observed that the proposed price was adequate in view of all the circumstances, including the fact that there were municipal and other roads situated on the land in question.

9. The order of 9 July 2004 was not amenable to appeal. It became final and binding on the same day as it was issued.

10. On 28 July 2004 the sale was registered in the land registry. The title to the property was thereby effectively transferred to the applicant company.

11. The seller was subsequently dissolved and struck out of the companies register, whereby it ceased legally to exist.

B. Action

12. On 22 April 2008 the City of Košice ("the claimant") brought an action against the applicant company seeking a ruling that it was the owner of the property.

The claimant argued in principle that, by mistake, the property had not been registered as its own; that accordingly it did not belong to the seller; and that – consequently – the sale had been void.

13. The action was examined and dismissed on 27 February 2009 by the Košice I District Court (*Okresný súd*) and, following an appeal lodged by the claimant, on 8 October 2009 by the Regional Court.

The District Court held a hearing and took complex documentary evidence and oral submissions from the parties.

Both courts unanimously concluded that there was a non-rebuttable legal presumption, under Article 19 § 2 of the Insolvency Code (Law no. 328/1991 Coll., as applicable at the relevant time), that the property belonged to the insolvency estate and could be lawfully sold to third parties unless its exclusion from the estate had been claimed by way of a special action (*vylučovacia žaloba*), which had not happened in the present case. The applicant company had acquired the property in good faith and the present action could not be used to contest that.

14. The dismissal of the action became final and binding on 7 January 2010.

C. Extraordinary review

15. On 13 December 2010 the claimant filed a petition with the Office of the Prosecutor General ("the PG") requesting the latter to exercise his discretionary power to challenge the above-mentioned judgments by way of an extraordinary appeal on points of law (*mimoriadne dovolanie* – "extraordinary appeal").

16. Having decided to accede to the request and acting through his First Deputy, on 5 January 2011 the PG challenged the contested judgments in the Supreme Court (*Najvyšší súd*).

He argued that the courts had erred in applying the said legal presumption which, in his view, only applied if the party concerned had been invited by the insolvency court to seek the exclusion of the property in question from the insolvency estate by the special action mentioned above and if that party had failed to act on the invitation. This had however not been the case in the present situation. Moreover, the PG argued that both the seller's receiver in insolvency and the insolvency court should have flagged up and treated the property as contentious, especially in view of the fact that there were public roads on it.

17. The applicant and the claimant were both given an opportunity to comment.

18. On 30 April 2012 the Supreme Court quashed the challenged judgments and remitted the case to the first-instance court for a new determination.

It referred to a precedent of 11 September 2009 in case no. 5Cdo 194/08, which had been published in the "Collection of Standpoints of the Supreme Court" in 2010 (issue 3/2010, item 25), according to which there were conditions attached to the legal presumption applied by the lower courts. The present case fell within one of the exceptions.

In particular, the Supreme Court concurred with the PG's argument that the presumption only applied on condition that the party concerned had been invited but had failed to seek to have the disputed items excluded from the insolvency estate.

However, according to the Supreme Court, there was an exception to that condition, in that the latter would only apply if there were circumstances casting doubt on whether the disputed items rightfully fell within the insolvency estate.

The Supreme Court found that, on the facts of the present case, the claimant had not been invited to seek to have the plots in question excluded from the estate. Moreover, there were reasons to doubt whether the seller

had actually been the owner of those plots and whether the property had belonged to the seller's insolvency estate.

As the receiver and the insolvency court had failed to flag up the property as being contentious, the presumption was not applicable and the sale contract was void.

Moreover, in the Supreme Court's assessment, in view of the circumstances, the applicant company could not be considered as having been the *bona fide* purchaser of the property.

The contested judgments were therefore wrong in law and had to be quashed.

19. Since then the case has been pending at the first instance.

D. Final domestic decision

20. On 3 August 2012 the applicant company lodged a complaint under Article 127 of the Constitution (Constitutional Law no. 460/1992 Coll., as amended) with the Constitutional Court (*Ústavný súd*).

The applicant company relied, *inter alia*, on Article 6 § 1 of the Convention and challenged the Supreme Court's decision.

In particular, it contended that the Supreme Court had wrongfully re-examined the lawfulness of the insolvency court's order of 9 July 2004, which was impermissible outside the framework of the insolvency proceedings. In any event, an extraordinary review of that order was also impermissible on account of the expiry of the applicable time-limits. In addition, the re-examination of that order was impermissible because it was in breach of the principle of *res judicata*.

Lastly, the applicant company disagreed with the Supreme Court's findings on the merits.

21. On 11 October 2012 the Constitutional Court declared the complaint inadmissible as being manifestly ill-founded. It found no constitutionally relevant arbitrariness, unfairness or irregularity in the Supreme Court's decision and reasoning or in the underlying procedure.

It added that, in so far as the applicant company could be understood as wishing to rely on the principle of *res judicata* with regard to the original insolvency proceedings, this principle did not apply in the present case because the insolvency proceedings had concerned the seller and not the claimant. Any rulings made in the insolvency proceedings therefore did not restrict the claimant from pursuing its own claims in the action at the origin of the present case.

The Constitutional Court's decision became final and binding on 2 November 2012.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Civil Procedure

1. Various provisions

22. Under Article 159 §§ 2 and 3, a ruling in a final and binding judgment is binding on the parties and all authorities. As soon as a matter has been resolved by force of a final and binding decision or a judgment, it may not give rise to new proceedings.

2. Appeals on points of law

23. The relevant provisions concerning appeals on points of law (*dovolanie*) are summarised, for example, in the Court's decision in *Ringier Axel Springer Slovakia, a.s. v. Slovakia* (no. 35090/07, §§ 65-68, 4 October 2011, with further references). Appeals on points of law have no automatic suspensive effect, as the power to suspend the enforceability of the impugned decision is entrusted to the Supreme Court (Article 243).

3. Extraordinary appeals

24. Extraordinary appeals on points of law are regulated by the provisions of Articles 243e *et seq*.

25. The PG has the power to challenge a decision of a court by means of an extraordinary appeal. He or she may do so following the filing of a petition by a party to the proceedings or another person concerned or injured by the decision, provided that the PG concludes that: the final and binding decision has violated the law; the protection of the rights and legitimate interests of individuals, legal entities or the State requires that such an appeal be brought; such protection cannot be achieved by other means; and the matter at hand is not excluded from judicial review (Articles 243e § 1 and 243f § 2).

26. An extraordinary appeal may only be lodged against a ruling in a decision which has been contested by the party to the proceedings or the person concerned or injured by that decision (Article 243e § 2). Unless a statute provides otherwise, the PG is bound by the scope of the petition for an extraordinary appeal (Article 243e §§ 3 and 4).

27. Further conditions of admissibility of an extraordinary appeal are listed in Article 243f § 1. They comprise (a) major procedural flaws within the meaning of Article 237 (see, for example, *Ringier Axel Springer Slovakia, a.s. v. Slovakia*, no. 41262/05, § 62, 26 July 2011), (b) other errors of procedure resulting in an erroneous decision on the merits, and (c) wrongful assessment of points of law.

28. An extraordinary appeal is to be lodged with the Supreme Court within one year of the contested judicial decision becoming final and binding (Article 243g).

29. If the PG concludes, following the filing of a petition by a party to the proceedings or another person concerned or injured by the impugned decision, that there is a risk of considerable economic loss or other serious irreparable consequences, the extraordinary appeal may be lodged without stating the reasons for appeal. The reasons must then be stated within sixty days of the lodging of the extraordinary appeal with the Supreme Court, failing which the proceedings will be discontinued (Article 243h §§ 3 and 4).

30. If the extraordinary appeal is accompanied by a request that the enforceability of the contested decision be suspended, its enforceability must be suspended following the lodging of the extraordinary appeal with the Supreme Court (Article 243ha § 1).

The duration of such a suspension is regulated by Article 243ha § 2, pursuant to which the suspension ceases (a) when the request is dismissed or (b) with a decision on the extraordinary appeal, unless extended by the Supreme Court no later than one year from the lodging of the extraordinary appeal with it.

31. The provisions of Article 243h §§ 3 and 4 and Article 243ha §§ 1 and 2 mentioned in the two preceding paragraphs were introduced in the CCP by an amendment (Law no. 484/2008 Coll.) which entered into force on 28 November 2008.

32. A copy of the extraordinary appeal is to be sent to the parties to the proceedings for observations. The decision on the extraordinary appeal must be sent to the parties to the proceedings and to the PG (Article 243i § 1 and Article 243j).

4. Reform of the CCP

33. The results of the ongoing work to re-codify the rules on civil procedure are summarised in a 2013 green paper (*Návrh legislatívneho zámeru rekodifikácie civilného práva procesného*) of the re-codification commission under the auspices of the Ministry of Justice.

The green paper envisaged abolishing extraordinary appeals on the grounds that there are doubts as to their compatibility with the Convention, especially as regards the principles of equality of arms, legal certainty and *res judicata*. Extraordinary appeals are retained, albeit in a modified form, in the final text of the new Code of Civil Contentious Procedure (*Civilný sporový poriadok*).

B. Public Prosecution Service Act (Law no. 314/1996 Coll., as amended)

34. The Act determines the status and jurisdiction of the Public Prosecution Service ("the PPS"), the status and jurisdiction of the PG, the status of other prosecutors, and the organisation and administration of the PPS (section 1(1)).

35. The specific status of the First Deputy to the PG is regulated by section 9, which provides, *inter alia*, that the First Deputy represents the PG within a scope defined by the PG.

C. The Constitutional Court's practice concerning extraordinary appeals

36. In a decision (*uznesenie*) of 19 July 2000 in an unrelated case (no. PL. ÚS 57/99), the Constitutional Court dismissed a motion by the Supreme Court that certain provisions of the CCP concerning extraordinary appeals were contrary to the Constitution. That motion was lodged by the Supreme Court in the context of extraordinary appeal proceedings instituted by the PG concerning the review of an administrative decision on a restitution claim (see *Veselá and Loyka v. Slovakia* (dec.), no. 54811/00, 23 November 2004).

In its decision, the Constitutional Court observed, *inter alia*, that the extraordinary appeal was an extraordinary means for ensuring that judicial decisions were not only formally final but also substantively correct. A clear discrepancy between the degrees of respect shown for those two principles in an individual case could justify an interference with the former principle for the benefit of the latter. However, that would be so only in instances of a striking violation of constitutional principles of procedure, the principle of a fair trial or a denial of justice, which were not amenable to correction by other means.

According to the Constitutional Court, for an extraordinary appeal to be acceptable its use had to be limited to instances of the most serious errors in procedure or the outcome of the procedure (linked to either factual or legal assessment), and to instances where other available legal remedies had been exhausted.

Moreover, the Constitutional Court held that by virtue of his power to lodge an extraordinary appeal, the PG was a statutory intermediary for ensuring protection of the rights of the parties and other persons concerned or injured by the contested decision.

37. In a decision of 29 October 2003 in an unrelated case (no. IV. ÚS 197/03) concerning an individual complaint, the Constitutional Court held, *inter alia*, that in extraordinary appeal proceedings before the Supreme Court the PG did not have the standing of a party to the proceedings as

such, but rather had a *sui generis* standing, similar to that of the parties. In such proceedings, the PG had no subjective interest of his or her own. Rather, the protection from unlawful final and binding decisions pursued in those proceedings served the general interest.

38. In a decision of 3 June 2008 in another unrelated case (no. IV. ÚS 180/08) concerning an individual complaint, the Constitutional Court observed, among other things, that individuals and legal entities that had petitioned the PG to lodge an extraordinary appeal had no legal claim to have such an appeal lodged and that, conversely, the PG was under no legal duty to accommodate the request. It was within the PG's entire discretion to decide whether or not to lodge an extraordinary appeal. The extraordinary appeal was an extraordinary remedy. There was no legal right to have it lodged on one's behalf. A petition for an extraordinary remedy did not enjoy constitutional protection and was not covered by the catalogue of fundamental rights.

III. RELEVANT EUROPEAN TEXTS

A. Venice Commission's Report on the Independence of the Judicial System

39. The report was adopted by the European Commission for Democracy through Law ("the Venice Commission") at its 82nd Plenary Session (12-13 March 2010).

40. In section III 9. entitled "Final character of judicial decisions", the report refers to Principle I(2)(a)(i) of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges, which provides:

> "decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law".

The relevant part of the report continues:

> "It should be understood that this principle does not preclude the re-opening of procedures in exceptional cases on the basis of new facts or on other grounds as provided for by law.
>
> 66. While the [Consultative Council of European Judges] concludes in its Opinion No. 1 (at 65), on the basis of the replies to its questionnaire, that this principle seems to be generally observed, the experience of the Venice Commission and the case law of the [Court] indicate that the supervisory powers of the Prokuratura in post-Soviet states often extend to being able to protest judicial decisions no longer subject to an appeal.
>
> 67. The Venice Commission underlines the principle that judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal."

B. Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system

41. The Recommendation was adopted by the Committee on 19 September 2012 and its relevant part reads as follows:

> "Recalling also that every member of the Council of Europe has accepted the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of the human rights set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);
>
> ...
>
> 2. Where the national legal system provides public prosecutors with responsibilities and powers outside the criminal justice system, their mission should be to represent the general or public interest, protect human rights and fundamental freedoms, and uphold the rule of law.
>
> **C. Common principles**
>
> 3. The responsibilities and powers of public prosecutors outside the criminal justice system should in all cases be established by law and clearly defined in order to avoid any ambiguity.
>
> 4. As in the criminal law field, public prosecutors should exercise their responsibilities and powers outside the criminal justice system in full accordance with the principles of legality, objectivity, fairness and impartiality.
>
> ...
>
> 11. Where the public prosecutor is entitled to make a decision affecting the rights and obligations of natural and legal persons, such powers should be strictly limited, defined by law and should not prejudice the parties' right to appeal on points of fact and law to an independent and impartial tribunal. The public prosecutor should act independently from any other power and his or her decisions should be reasoned and communicated to the persons concerned.
>
> ...
>
> *In relation to the principles of legal certainty and* res judicata
>
> 22. In order to comply with the principles of legal certainty and res judicata, the grounds upon which the public prosecutor may seek a review of the final decision of a court should be limited to exceptional cases and the review processed within a reasonable time limit. Except in cases where the review does not concern the rights and obligations of the parties, as set out in the decision under review, the parties to the original proceedings should be informed of the review and, should they so wish, given the opportunity to be joined to the proceedings."

C. Opinion No. 3 (2008) of the Consultative Council of European Prosecutors (CCPE) on "The role of prosecution services outside the criminal law field"

42. The Opinion was adopted by the CCPE at its 3rd plenary meeting (15-17 October 2008). In addition to the mattes mentioned above, the relevant part of the summary of recommendation reads as follows:

> "The CCPE is of the opinion that States where prosecution services have non criminal competences should ensure that these functions are carried out in accordance with the principles governing a democratic state under the rule of law and in particular that:
>
> a. the principle of separation of powers is respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights;
>
> b. the respect of impartiality and fairness characterises the action of prosecutors acting outside the criminal law field as well;
>
> c. these functions are carried out 'on behalf of society and in the public interest', to ensure the application of law, respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;
>
> d. such competencies of prosecutors are regulated by law as precisely as possible;
>
> e. no undue intervention in the activities of prosecution services occurs;
>
> f. when acting outside the criminal law field, prosecutors enjoy the same rights and obligations as any other party and do not enjoy a privileged position in the court proceedings (equality of arms);
>
> g. the action of prosecution services on behalf of society to defend public interest in non criminal matters does not violate the principle of binding force of final court decisions (res judicata) with some exceptions established in accordance with international obligations including the case-law of the Court;
>
> h. the obligation of prosecutors to motivate their actions and to make these motivations open for persons or institutions involved or interested in the case;
>
> ...
>
> j. the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field is followed closely in order to ensure that the legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments".

THE LAW

I. PRELIMINARY ISSUES

43. The Government argued that, in so far as the applicant company had sought to challenge the existing statutory framework for extraordinary appeals, its constitutional complaint had not been an effective remedy for the purposes of Article 35 § 1 of the Convention and, consequently, its complaint before the Court had been lodged belatedly.

They also submitted that, following the quashing of the ordinal judgments by the Supreme Court, the proceedings in the applicant company's action were still pending before the first-instance court. A complaint about their outcome was thus premature. In that connection, they referred to the Court's decision in *Michaela Huserová, Administrator in Bankruptcy of Union banka, a.s. in liquidation and Stroden Management Limited v. Slovakia* ((dec.), no. 760/04, 9 November 2010).

44. The applicant company disagreed and reiterated its complaint. It submitted that its application had been introduced within six months of the final domestic decision, that is the Constitutional Court's decision of 2 November 2012 (see paragraph 21 above).

45. The Court observes that part of the present application concerns the mere existence of the concept of the extraordinary appeal, which in the applicant company's view was incompatible with the guarantees of legal certainty. It considers that, with regard to that part of the application, the Government's inadmissibility objection does not need to be dealt with separately because it is in any event inadmissible on the following grounds.

46. The Court reiterates that in proceedings originating in an application lodged under Article 34 of the Convention it has to confine itself, as far as possible, to the examination of a concrete case before it. Its task is not to review domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Accordingly, Article 34 does not provide individuals with a remedy in the nature of an *actio popularis* (see, for example, *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28; *Slivková v. Slovakia* (dec.), no. 32872/03, 14 December 2004; and *Fruni v. Slovakia*, no. 8014/07, § 133, 21 June 2011).

47. The Court notes that there is an ongoing process of reform of the procedural rules in Slovakia, with particular attention being paid to extraordinary appeals.

It is also aware of the particular sensitivity in Convention terms of the extraordinary appeal in certain specific types of proceedings in Slovakia (see *López Guió v. Slovakia*, no. 10280/12, §§ 66 and 108, 3 June 2014).

However, in view of the above-mentioned parameters of its jurisdiction, the Court will confine its examination of the present case with reference to

the applicant company's specific situation and the concrete repercussions of the impugned legislative provisions and their implementation on the applicant company only.

48. Conversely, in so far as the applicant company may be understood to be challenging the existing legislative framework *in abstracto*, the relevant part of the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

49. As regards the remainder of the application, which concerns the repercussions of the extraordinary appeal in the present case *in concreto*, the Court observes that the impugned decision of the Supreme Court quashed the judgments in the claimant's action and that it also impacted on matters that had been resolved in the underlying insolvency proceedings.

50. The Court notes that that the Government have considered that part of the application as being premature. The Court acknowledges that since the Supreme Court's decision, the claimant's action has again been pending before the ordinary courts. Nevertheless, it considers that, on the legal questions of principle, the Supreme Court predetermined the outcome of the claimant's action. In any event, the Supreme Court quashed the judgments that had dismissed the claimant's action with final effect.

51. In these circumstances, the Court considers that the remainder of the present application concerns not the ultimate outcome of the claimant's action but rather the precise fact that a final and binding judgment in the applicant company's favour was quashed, with the effect that a judicially resolved matter was remitted to the first-instance stage.

52. In so far as the Government sought to compare the present case with another case referred to by them (see paragraph 55 above), the Court observes that, in that other case the part of the application which was declared inadmissible for being premature concerned a complaint which had been phrased in general terms under Article 1 of Protocol No. 1, that complaint having been submitted by one of the applicants, who had acquired the property in question only after a final and binding judgment concerning that property had been quashed.

53. It thus appears that the Government's aforementioned argument is unrelated to the facts of the present case and that their prematurity plea is not applicable, as a result of which it must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

54. The applicant company complained that a final and binding decision in its favour had been quashed following an extraordinary appeal lodged by the First Deputy PG, in violation of its right to a fair hearing under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

1. Lodging of the extraordinary appeal by the First Deputy PG

55. The applicant company argued, among other things, that the extraordinary appeal had been lodged by the First Deputy PG and not the PG himself, a procedure which had no basis either in statute or in the Constitution.

56. In reply, the Government pointed out that the lodging of the extraordinary appeal through the First Deputy PG had had a legal basis in section 9 of the PPS Act (see paragraph 35 above) and that it had been fully in compliance with the applicable rules.

57. The applicant company disagreed and reiterated its complaint.

58. The Court observes that, under section 9 of the PPS Act, the First Deputy to the PG has the power to represent the PG in matters delegated to him or her by the PG. It concludes that, in so far as the complaint has been substantiated, there is no indication that the lodging of the extraordinary appeal in the present case was beyond the mandate of the First Deputy to the PG under the said provision.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Remainder of the complaint

59. The Court notes that the remainder of the applicant company's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

60. The applicant company argued that the question of the lawfulness of its acquisition of title to the property concerned had been the subject matter of the final and binding order of 9 July 2004 and that, in the proceedings leading up to the quashed judgments, the Supreme Court had had no jurisdiction to examine that question as a preliminary matter. Doing so had been incompatible with the principles of legal certainty, *res judicata*, and the rule of law, especially given that the Supreme Court's decision had essentially been motivated merely by a legal view on the substance that differed from those of the lower courts.

61. In reply, the Government summarised the applicable procedural framework and pointed out that, when dealing with the claimant's action of 22 April 2008, the lower courts had committed an error of law. This was evidenced by the Supreme Court's subsequent judgment of 11 September 2009 (see paragraph 18 above). A correction of the judgments in the applicant company's case had been called for in order to ensure case-law consistency. Moreover, in dealing with the PG's extraordinary appeal, the applicant company had had an opportunity to present its observations.

62. The applicant company stressed that the extraordinary appeal had been lodged by an entity that had been external to the proceedings, not a party to them, and that the parties to the proceedings had had no direct access to such a remedy. It submitted also that the principle of legal certainty in the present case had been violated, in particular because, following the extraordinary appeal, the Supreme Court had quashed final and binding judicial decisions with the attendant effect of interfering with the jurisdiction of the courts in the original insolvency proceedings. As a result, the applicant company's right of access to a court had been violated. Moreover, the applicant company considered that the substantive position taken by the ordinary courts in the original round of proceedings had been correct and that the position taken by the Supreme Court and the Constitutional Court had been erroneous.

2. The Court's assessment

(a) General principles

63. The Court observes that the relevant Convention principles have been summarised in its judgment in the case of *Giuran v. Romania* (no. 24360/04, §§ 28-32, ECHR 2011 (extracts), with further references) as follows:

- The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, the relevant part of which declares that the rule of law is part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue their ruling should not be called into question.

- That principle does not allow a party to seek the reopening of proceedings merely for the purpose of a re-hearing and a fresh decision on the case. The mere possibility of there being two views on the subject is not a ground for re-examination.

- Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character. Higher courts' powers to quash or alter binding and enforceable judicial decisions should be exercised for the purpose of correcting fundamental defects. That power

must be exercised so as to strike, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of justice.

- The relevant considerations to be taken into account in this connection include, in particular, the effect of the reopening and any subsequent proceedings on the applicant's individual situation and whether the reopening resulted from the applicant's own request; the grounds on which the domestic authorities overturned the judgment in the applicant's case; the compliance of the procedure at issue with the requirements of domestic law; the existence and operation of procedural safeguards in the domestic legal system capable of preventing abuses of this procedure by the domestic authorities; and other pertinent circumstances of the case. In addition, the review must afford all the procedural safeguards of Article 6 § 1 and must ensure the overall fairness of the proceedings.

- In a number of cases the Court, while addressing the notion of "a fundamental defect", has stressed that merely considering that the investigation in the applicant's case was "incomplete and one-sided" or led to an "erroneous" acquittal cannot in itself, in the absence of jurisdictional errors or serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice, indicate the presence of a fundamental defect in the previous proceedings.

64. On the same matter, the Court has also held that the review of final and binding decisions should not be treated as an appeal in disguise and that the principle of legal certainty may be set aside in order to ensure a correction of fundamental defects or miscarriage of justice (see, for example, *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX) and to rectify "an error of fundamental importance to the judicial system", but not for the sake of legal purism (see *Sutyazhnik v. Russia*, no. 8269/02, § 38, 23 July 2009).

(b) Application of these principles in the present case

65. The Court observes that the applicant company essentially contended that one of the effects of the Supreme Court's decision had been improperly to interfere with the insolvency proceedings. As the Court has noted above, the proceedings on the merits of the claimant's action for determination of ownership of the items acquired by the applicant company in the insolvency proceedings are still pending. However, by its decision, the Supreme Court resolved fundamental legal questions obtaining in the proceedings in the claimant's action and, thereby, to a significant extent predetermined their outcome.

66. The Court considers that, in so far as the lawfulness in terms of domestic law of the Supreme Court's judgment and its repercussions on the

insolvency proceedings are concerned, its power of review is limited (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

67. However, from the Convention perspective, the Court finds it significant that the Supreme Court quashed the judgments by which the claimant's action had been dismissed with a final and binding effect.

It acknowledges that the dismissal of that action had the force of a *res judicata* and that, as such, it was quashed following the application of an extraordinary remedy.

It therefore remains to be ascertained whether the interference with the completed proceedings in the claimant's action, which in turn had repercussions on the matters determined in the insolvency proceedings, was compatible with the guarantees of Article 6 of the Convention, in particular with the principles of the rule of law and legal certainty inherent in that provision.

68. From that perspective, the Court observes that the Government sought to justify the Supreme Court's intervention in the present case by citing what they termed an "error of law" committed by the lower courts. In their view, that error had to be corrected following the lodging of the extraordinary appeal for reasons of consistency. In particular, the error consisted of applying a legal presumption under Article 19 § 2 of the Insolvency Code in circumstances which excluded its application under subsequent case-law.

69. In that respect, referring to the case-law cited above, the Court is unconvinced that the error imputed to the lower courts constituted "circumstances of a substantial and compelling character", a "fundamental defect or miscarriage of justice" going beyond the "mere possibility of there being two views on the subject" and responding to "an appeal in disguise".

70. For that matter, the Court observes that neither the domestic courts nor the Government themselves appear to have raised any argument to that effect.

71. In so far as the domestic courts and the Government relied on the judgment of 11 September 2009, the Court observes that it was not published until 2010, while the decision on the claimant's appeal in the present case had already been taken on 8 October 2009 (see paragraph 13 above).

72. Moreover, the Court notes that the matters resolved in the present case by the District Court and the Regional Court with the force of a final and binding judgment were preceded by a final judicial determination of related matters in the insolvency proceedings and the subsequent administrative proceedings concerning registration of the applicant company's title to the property concerned in the land register.

73. The Supreme Court's quashing of the lower courts' judgments set at naught the entire judicial process which preceded it. That process had not only ended in a final and binding decision that had thus been *res judicata*,

but that decision had also partly been executed (see *Brumărescu v. Romania* [GC], no. 28342/95, § 62, ECHR 1999-VII).

74. In addition, the Court finds it of relevance that, in the original round of proceedings, the lower courts had directly addressed the legal presumption, the application of which was then challenged by the PG in his subsequent extraordinary appeal; that they had both arrived at the same conclusion; and that, in so far as substantiated, the fairness of the underlying proceedings was beyond reproach. The PG's extraordinary appeal can thus only be seen as a further appeal or, in other words, an appeal in disguise in terms of the Court's above-cited case-law.

75. Furthermore, in assessing the specific repercussions of the extraordinary appeal and the decision on it on the applicant company's Convention rights, the Court finds it useful to note the applicable statutory time frame provided for in Article 243g of the CCP. Under that provision, an extraordinary appeal may be lodged within one year of the contested judicial decision becoming final and binding (see paragraph 28 above).

76. On the facts of the concrete case, the extraordinary appeal was lodged on 5 January 2011, which was at the very end of a one-year period after the contested judgments had become final and binding on 7 January 2010 (see paragraphs 14 and 16 above). It was decided upon on 30 April 2012 (see paragraph 18 above), which was more than two years and three months later.

77. In the Court's view, the delay between the judgment becoming final and binding and its being deprived of that effect is all the more important as the impugned Supreme Court decision of 30 April 2012 had repercussions on matters resolved in the insolvency proceedings and in the ensuing administrative proceedings concerning registration of the title of the property as far back as 2004 (see paragraphs 9 and 10 above).

78. The foregoing considerations, linked to the reasons behind the quashing of the final and binding judgments on the claimant's action as well as the relevant time frame are sufficient to enable the Court to conclude that the Supreme Court's decision was incompatible with the principle of legal certainty and as such in breach of the applicant company's right to a fair hearing.

There has accordingly been a violation of Article 6 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant company claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

81. The Government contested the claim for being excessive.

82. The Court awards the applicant company EUR 7,500, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Default interest

83. The Court considers it appropriate that the default interest rate 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 inadmissible in so far as it seeks to challenge the existing legislative framework *in abstracto* and in so far as it concerns the complaint that the extraordinary appeal was lodged by the First Deputy to the Prosecutor General and not the Prosecutor General himself;

2. *Declares* the remainder of the application admissible;

3. *Holds* that there has been a violation of Article 6 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Josep Casadevall President