

DIVISION OF SPOUSES PROPERTY AND INSOLVENCY PROCEEDINGS

Paul POPOVICI*
Lena STAN**

ABSTRACT: *The opening of an insolvency procedure impacts considerably the referred parties, indirectly affecting other people involved. We considered the case of a debtor's spouse who is in a state of insolvency and the case of admitted personal liability according to art. no. 138 of the Romanian Insolvency Proceedings Law. The obvious interest for a fraudulent division of goods can be traced back to the circumvention of some valuable assets from the enforcement procedure. The authors offer, in a succinct and practical manner, a few clues aiming the annihilation of such frequent fraudulent acts, together with some relevant French jurisprudential doctrine.*

KEYWORDS: *property division, spouses, insolvency, procedure*

JEL CLASIFICATION: *K 20, K 35, K 36*

Through complexity and unforeseen repercussion of its effects, insolvency procedure leaves a strong negative mark. No different is the situation of insolvency associated to divorce cases, especially considered from the procedural law point of view. Thus, if the divorce court ruling was pronounced before the initiation of the insolvency procedure, but the goods division was not required, after the opening of the procedure the division can be resolved only by the syndic-judge.

If the divorce process is started during the insolvency procedure, and its debtor right to administrate his business is revoked (a "forced withdrawal"¹), any request for division in divorce proceedings may be brought only by the special administrator, as

* Assistant Professor, "Dimitrie Cantemir", University, Cluj-Napoca Law Faculty; lawyer, Arad Bar, ROMANIA.

** Legal adviser, SC Expo Transilvania SA, Cluj-Napoca, ROMANIA.

¹ Regarding the withdrawal of the debtor's business administration right and even for its assets, see also the French Court of Cassation Decision, s. com., din 28.04.2009, with explanatory note by J. Souhami, in *La situation procédurale du conjoint in bonis*, in "Recueil Dalloz", no. 31/2009, p. 2144, pct. 3.

representative of the debtor in insolvency².

Let us bring into discussion some of the effects concerning the spouses decisions regarding existing insolvency procedure plan or any possible collective procedure.

Let us take for example the divorce decision (with the consent of the spouses, as a special focus) before the insolvency proceedings are initiated by one spouse, particularly the goods division enacted after the divorce. The case relevant for our interest is the case in which there is no real (intended) division between the spouses, only a conventional division expressed through an act of separation agreement between the spouses.

In the virtue of the separation agreement, the spouses will be able to decide freely on the division of community property to one group or another, certain quotas of allocation are not required to be met (of course, within the limits prescribed by law³), and the divorce court must respect the separation agreement, with no possibility to intervene⁴ whatsoever.

Foreseeing the insolvency proceedings that may involve one spouse, they may proceed to give significant property value in the lot of the other spouse, thus clearing the general pledge of creditors. In addition, if the division took place after the time of cessation of payments or a period close to this, obviously the act of sharing becomes a fraudulent and could fall under art. 79-93 of Law 85/2006. According to those provisions, the judicial administrator / liquidator is able to request annulment of fraudulent acts signed by the debtor to the detriment of creditors' rights in the three years prior to initiation.

Although at first glance we might say that the division of joint property of spouses after the dissolution of their marriage is a personal matter and should not be the subject of such a request, however, division has by its nature a patrimonial character, and in addition the effects of such an act is in some cases too harmful for creditors to be left out from analysis of the syndic-judge.

Thus, the act of division can be the object of an application for annulment brought by the judicial administrator / liquidator if it was signed during the suspect period or around that time, if there was the intention to defraud creditors' interests. Intention to defraud creditors may be inferred from the awareness of the non-debtor spouse regarding the cessation of future payments. The cessation refers to the company that is a future debtor in the proceedings⁵.

If the conditions established by the law are fulfilled, the syndic-judge may rule annulment of the act of property division, the separation agreement completed by both spouses.

In our opinion, through the cancellation of the separation agreement, goods will retroactively restore their status of common property, and the syndic-judge shall proceed to their share in the collective process of insolvency, with all its specific effects. The

² I. Ștefan, *Collective effects of bankruptcy proceedings on property relations between spouses*, in "Revista română de drept comercial", no. 4/2006, p. 86.

³ For example, in the case mentioned above, the Partnerships (LLC, partnership or society partnerships), securities acquired through ownership cannot be assigned to the husband who has not acted as associate in the society.

⁴ E. Florian, *Dreptul familiei*, Limes, Cluj-Napoca, 2003, p. 192-194.

⁵ A. Lecourt, *La délicate articulation du droit des procédures collectives et du droit de la famille*, in "Revue trimestrielle de droit commercial", no. 1/2004, p. 6.

annulment of the separation agreement act has no consequence whatsoever on the personal status of the spouses. They remain separated in fact and in law, therefore this decision does not affect them personally.

Contrasting this situation with the French law highlights more peculiarities of such occurrences.

It is important to mention this fact, since, unlike in Romanian law system, in the French law the divorce decision of a court when there is consent of the spouses (*divorce sur demande conjoint*) has an indivisible character with the separation agreement i.e. the pronouncement of divorce and “approval” of sharing agreement cannot be dissociated⁶. Therefore, if in the collective proceedings the division or liquidation of the community is being discussed we must put into question the very existence of the divorce. Therefore, if the division act may have a fraudulent character, the trial of such an application requires special attention, because of the indivisible links between the two⁷.

Returning to the remedies of the debtor’s insolvency administrator for debtor patrimony reunification, we should mention that French law of insolvency and creditors’ representative or the receiver can operate in the way of a reported action, requiring the bringing to the list of creditors of the goods of the non-debtor spouse, goods as personal assets, but with resources from the debtor or its business activities (art. L624-6 C. Com. fr.)⁸.

Regarding this lawsuit, French doctrine shows that this action attempts to cover a simulation, in which the receiver tends to show that the non-debtor spouse bought for the other spouse (*prête-nom de son conjoint*)⁹. If it turns out that the financial resources to purchase the property came from the business which is managed by the debtor spouse, is presumed (automatically) that the other spouse is a simple intermediate buyer (he borrowed the name), and on this basis the court shall order bringing the asset to the table of creditors. The proof can be made with any proves, including the assumptions or statements of witnesses¹⁰.

However, the solution should remain an exception, since the principle is the protection of the own property belonging to the non-debtor spouse and that the civil action cannot be directed against one’s own goods¹¹.

For example, a decision of the French Court of Cassation in 2003 shows that a house built on the wife’s land, during marriage and funded from the community money, is, in turn, the wife’s own good, without any sult obligation or reward and is therefore inadmissible the report of that property to the list of creditors¹².

Regarding the quality of her’s own good, the Court holds that the house, although

⁶ F. Terré, D. Fenouillet, *Les personnes. La famille. Les incapacités*, Dalloz, Paris, 1986, p. 503-508.

⁷ For example, in French jurisprudence, the first decision to cancel an agreement made into liquidation during the suspect period was given in 2000 (I. Goaziou-Huret, *Divorce et procédures collectives*, in “Revue trimestrielle de droit commercial”, no. 4/2002, p. 635-638).

⁸ Art. L624-6 C. com. fr.

⁹ French Court of Cassation decision, cited above, in “Recueil Dalloz”, no. 31/2003, p. 2167.

¹⁰ For example, if the date of purchase the property, the buyer spouse did not have sufficient financial resources, it is presumed that the asset purchase was financed by the other spouse, merchant. In this regard, see also the French Court of Cassation decision, cited above, in “Recueil Dalloz”, no. 31/2003, p. 2168.

¹¹ For some critics and comments regarding action in the report, see also <http://www.oboulo.com/epoux-in-bonis-face-procedure-collective-ouverte-son-conjoint-100777.html>

¹² “Recueil Dalloz”, no. 31/2003, p. 2167

built with resources from a loan contracted by both spouses, has acquired the status of the wife's own good "by accession"¹³.

CONCLUSIONS

In light of what was shown above, one cannot exclude the hypothesis of a simulated¹⁴ division of goods that has the purpose of defrauding the creditors of the spouse who is in an insolvency situation, or to whom the civil responsibility has to be involved according with the stipulation of the art. 138 from the Insolvency Proceedings Law¹⁵. The simulated character of the transaction/division of goods can be determined through assessing some external circumstances, such as the fact that the two ex-spouses have still the same domicile and go on living in the same house¹⁶. Another element that can certify the fraud consists of a higher percentage obtained by the creation of the common patrimony.

Generally speaking, the transactions whose effect is the severe diminishing of the creditors' general deposit (and which are correlated to the growth of another's depositing according to Lavoisier's principle) can be suspected by undervaluation¹⁷.

Such divisions of goods are struck by absolute annulment in according with the stipulations of art. 1179, 1236, 1238 from the New Civil Code, referring to an illicit cause¹⁸.

So, in our opinion, through the cancellation of the separation agreement, goods will retroactively restore their status of common property, and the syndic-judge could proceed to their share in the collective process of insolvency, with all its specific effects.

¹³ For details of the argument of the Court of Cassation decision, see "Recueil Dalloz", no. 31/2003, p. 2167-2169.

¹⁴ For details on simulation, see F. A. Baias, *Simulația. Studiu de doctrină și jurisprudență*, Rosetti, București, 2003.

¹⁵ For details, see I. Adam, C. N. Savu, *Legea procedurii insolvenței. Comentarii pe articole*, CH Beck, București, 2006, pp. 757-803.

¹⁶ "The defendants live together, have excellent relations, household witnesses reportedly heard together concerned" și „jointly contribute to social events sociale” – C. Ap. Galați, S. Civ., dec. civ. no. 32 R / 15.01.2009 (taken by Jurindex).

¹⁷ For others examples, see R. M. Trif, *Desfacerea căsătoriei prin divorț și partajul bunurilor comune ale soților*, Hamangiu, București, 2007.

¹⁸ C. Ap. Galați, S. Civ., dec. civ. no. 32 R / 15.01.2009.