Johanna Schmidt-Räntsch - Collection of Decisions

Federal Court of Justice, Fifth Civil Division,
Default judgement of 26 March 1999 - V ZR 368/97
published in BGHZ 141, 179, among others
Marginal numbers: not official

Official headnotes:

1. A conviction for transfer of ownership is not precluded by the impossibility of performance only if the debtor is still registered as the owner in the land register at the time of the last oral hearing.
2. If ownership has been transferred to a third party in the land register, the creditor who nevertheless demands transfer of ownership from the debtor who is no longer entitled to it must demonstrate and prove that this will be effective.

Tenor

On appeal by the defendants, the judgment of the 8th Civil Division of the Thuringian Higher Regional Court in Jena of 28 October 1997 is set aside with regard to costs and insofar as the defendants have been ordered to transfer the properties entered in the land register on page #.

To the extent of the annulment, the matter is referred back to the Court of Appeal for further hearing and decision, including on the costs of the appeal proceedings. The judgment is provisionally enforceable.

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Facts

1 The defendants are each 1/6 heirs of their mother, who died on##.##.1985. She was the heir of her husband, who died on ##.##.1983. [He] was the owner of eight agricultural properties, which were entered in the land register on page 30# and encumbered with a land

reform restriction notice that was deleted from the land register on ##.##.1992.

2 By notarised contract dated ##.##.1993, the defendants sold the properties to P., transferred them to him and approved the entry of a priority notice of conveyance. The priority notice was entered in the land register on ##.##.1993.

3 In response to the application for transfer of ownership received on##.##.1994, the Land Registry notified the plaintiff [i.e. the competent Land [federal state]] of the intended legal changes in a letter dated ##.##.1994. The plaintiff objected to the decision in a letter dated ##.##.1994. On ##.##.1995, the purchaser was entered as the owner and a priority notice in favour of the plaintiff was entered for transfer of ownership.

4 Among other things, the plaintiff requested that the defendants be ordered to declare the transfer of ownership free of charge of the eight plots of land specified in detail and entered in the land register of #., page #. The action was successful in the lower courts.

5 The action was successful in the lower courts. The appeal is directed against this.

Reasons for the decision

I.

6 The Court of Appeal considers the plaintiff to have active legal standing and the defendants to have passive legal standing. It believes that the sale of the properties and the transfer of ownership in the land register do not preclude a conviction for transfer of ownership. This is because the purchaser "may" only be the registered owner due to the registered priority notice securing the plaintiff's claim.

7 This does not stand up to review. This is to be recognised by default judgement (Sec. 331, 557 ZPO[Code of Civil Procedure]). In this respect,

however, the judgement is not based on default, because it would have been issued without default (BGHZ 37, 81 f).

II.

8 1. The Court of Appeal correctly finds that the defendants are not eligible for allocation and that the plaintiff has priority rights pursuant to Art. 233 Sec. 11 par. 3 in conjunction with Sec. 12 pr. 2 No. 2 lit. b EGBGB [i.e. Law to Introduction of the German Civil Code]. The appeal does not raise any objections in this regard.

9 2. On the other hand, it rightly asserts that the priority notice registered in favour of the plaintiff was already entered at the beginning of ## 1995, i.e. more than three months before the action was brought, in accordance with Art. 233 Sec. 13 par. 5 sentence 1 EGBGB in the version of the Register Procedure Acceleration Act of 20 December 1993 (BGBl [i.e. Federal Official Journal]. I p. 2182), so that the disposal of the properties became effective vis-à-vis the plaintiff at least from that point in time (MunchKomm-BGB [i. e. Munich Commentary of German Civil Code]/Wacke, 3rd edition, Sec. 883 marginal no. 48). The Court of Appeal also overlooked the fact that, even before the priority notice was entered in favour of the plaintiff, a priority notice in favour of the purchaser had already been entered in the land register on 16 April 1993, with the result that the transfer of ownership to the purchaser had already become effective vis-à-vis the plaintiff for this reason alone.

10 3. Finally, the contested decision cannot stand also because it orders the defendants to perform an impossible task.

11 a) According to established case law, it is inadmissible to order a performance whose impossibility is undisputed between the parties or has been established (Senate, BGHZ 62, 388, 393; 97, 178, 181; BGH, judgment of 4 November BGH, judgement of 4 November 1971, VII ZR 175/69, NJW 1972, 152). According to Sec. 275 par. 2 BGB [i. e. German Civil Code], objective impossibility is equivalent to inability. If the debtor has sold the item owed, performance is not impossible simply because the debtor no longer has power of disposal over the item and also has no claim to it (Federal Court of Justice, judgement of 9 October 1974, II ZR 113/72, NJW 1974, 2317). Rather, impossibility only exists if it is established that

the debtor can no longer obtain the power of disposal and cannot influence the item in order to satisfy the asserted claim (Senate, BGHZ 62, 388, 393; judgement of 20 November 1981, V ZR 155/80, WM 1982, 206, 208; of 7 October 1983, V ZR 261/81, NJW 1984, 479). As long as there is a possibility that the third party grants the debtor the power of disposal again or consents to the disposal, his inability to pay is not established (BGHZ 131, 176, 183; Staudinger/Löwisch, BGB [i.e. Staudinger Commentary of the German Civil Code] <1995>, 275 marginal no. 50).

12 b) The burden of proof and presentation for the facts from which the impossibility of performance arises is governed by the general rules (Staudinger/Löwisch, BGB <1995>, Sec. 275 marginal no. 60). According to these rules, the party asserting a claim bears the burden of presentation and proof for the facts justifying the claim , while the opposing party must present and prove the facts that prevent, destroy or inhibit the claim (BGH, judgement of 20 March 1986, IX ZR 42/85, NJW 1986, 2426, 2427; Senate judgement of 13 November 1998, V ZR 386/97, NJW 1999, Senate judgement of 13 November 1998, V ZR 386/97, NJW 1999, 352, 353). If the impossibility as in the case of claims under Sec. 280, 281, 325, 326, 327, 347, 989 BGB is a prerequisite for the claim, it will often not be possible for the creditor to present circumstances from which it follows that a reacquisition of the object owed by the debtor is excluded. The facts relevant to this assessment are largely based on the legal and factual relationships between the debtor and the purchaser, which are regularly not or not sufficiently known to the creditor, who bears the burden of proof, whereas the debtor can readily provide more detailed information on this matter based on his own knowledge. In these cases, the Senate has therefore assumed that the resale indicates impossibility, unless the debtor demonstrates that he is willing and able to perform (Senate judgements of 1 October 1992, V ZR 36/91, NJW 1992, 3224, 3225; of 29 January 1993, V ZR 160/91, WM 1993, 1155, 1156; Staudinger/Löwisch, BGB <1995>, Sec. 275 marginal no. 50).

13 c) If the creditor asserts a claim for performance and the debtor objects that he has sold the item, he must in principle also explain and, if necessary, prove that performance is not (or no longer) possible for him, either legally or in fact. The lack of power of disposal does not in itself indicate impossibility. The lack of power of disposal does not in itself indicate impossibility. Rather, according to Sec. 283 BGB, the creditor may set the debtor a reasonable deadline for performance and thus obtain

compensation in a simplified manner (BGHZ 56, 308, 312). This The debtor may not deprive the creditor of this option solely by referring to the resale, even though it is possible and reasonable for him to argue the question of regaining the power of disposal or justified access to the sold item after the judgment has become final.

14 These principles apply to the sale of real estate both to the claim for surrender and to the claim for transfer of ownership (cf. Senate judgment of 20 November 1981, V ZR 155/80, WM 1982, 206, 208) or the submission of a declaration of cancellation (cf. Senate judgement of 2 October 1987, V ZR 140/86, NJW 1988, 699, 700). However, there is a special feature here in that the declaration owed is deemed to have been made the judgment becomes final (Sec. 894 ZPO) and the possibility of proceeding under Section 283 BGB is ruled out (BGHZ 53, 29, 34; MunchKomm-BGB/Emmerich, 3rd ed., Sec. 283 marginal no. 13; Staudinger/Löwisch, BGB <1995>, Sec. 283 margin no. 7). However, if, after the judgement has become final, the debtor no longer has the opportunity to obtain the legal power to make the declaration owed because the declaration is already deemed to have been made, the impossibility of doing so does not preclude an order to make the declaration only if the debtor is still registered as the owner in the land register at the last oral hearing. If, on the other hand, the ownership has already been transferred at this point in time as is the case here it is generally clear that the debtor is no longer able to effect an effective transfer of ownership, so that the debtor cannot be ordered to do so (see Senate, BGHZ 136, 283, 285; judgement of 23 January 1998, V ZR 272/96, NJW 1998, 1482, 1483 and of 17 December 1998, V ZR 200/97, WM 1999, 448, 449), unless the transfer of ownership became effective despite the debtor's lack of legal authority, e.g. pursuant to Sec. 185 par. 1 BGB (cf. Senate judgement of 23 January 1998, V ZR 272/96, NJW 1998, 1482 = DNotZ 1999, 40 with note by Einsele), pursuant to Sec. 185 par. 2 BGB (cf. Senate judgement of 2 October 1987, V ZR 140/86, loc. cit.) or pursuant to Sect. 883 par. 2 and 888 BGB. However, it is incumbent upon the creditor who demands further performance to demonstrate this exceptional circumstance.

15 Since the plaintiff has not presented such arguments, the appeal judgement must be set aside to the extent challenged. The case must be referred back to the appeal court in order to give the plaintiff the opportunity to take account of the legal argument not previously considered in the proceedings, if necessary by amending the claim.