A(n) (Im)Possible Interpretation on Article 145, Paragraph (2), Second Thesis, Civil Procedure Code

Angelica ROŞU[1]

Abstract: In this paper I have analysed the answers which the following questions might receive: Can the Court invested with solving a motion to change venue decide on solving a trial already solved? Which could be the consequences of crediting the idea that the answer is in the affirmative in any situation, without any distinction? The law issue submitted to the analysis was generated by the circumstance that the civil Courts when they are invested with solving a case whose venue changing is requested, either decide to suspend the case until the motion to change venue is solved, or give a hearing date in order to solve this request. In our opinion, it is necessary an intervention of the legislator, as in practice, art. 145, paragraph (2), Civil Procedure Code was interpreted differently.

Keywords: venue changing; impartiality; suspension of judging the case; lawful annulment of the decision

The law issue under analysis starts from a situation that becomes quite frequent in the practice of civil Courts of law, taking shape from the fact that the Courts, being approached for solving a case for which a motion to change venue was filed[2], either

[1] Associate Professor, PhD, "Danubius" University of Galati, Romania. Address: 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: rosuangelica@univ-danubius.ro.

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[2] *"The venue changing is presented as a form of judicial extension of competency, because the prolongation of the Court competency to which the case was changed to is the effect of the judicial decision which approved the motion to change venue*". Please see (Boroi & Stancu, 2015, p. 254) The Court will renounce judging a case in favour of other Court of the same rank, for reasons that put to doubt its impartiality. Accordingly, the venue change represents "*one of the procedure means which contributes to ensuring the effective character of judges' impartiality, the institutional guarantee of the right to a fair trial".* Please see to this effect Decision no. 558/2014 of the Constitutional Court, published in the Official Gazette of Romania no. 897/10.12.2014, by which it is allowed the exception of unconstitutionality of the provisions of art. 142, paragraph (1), first thesis and of art. 145, paragraph (1), first thesis from the Civil Procedure Code. In the same decision, the Constitutional Court, referring to its own jurisprudence, respectively Decision no. 333 from June 12th, 2014, published in the Official Gazette of Romania no. 533 from July 17th, 2014, as well as to the jurisprudence of the Human Rights European Court (Decision from October 1st, 1982, pronounced in

decide to suspend the case until the motion to change venue is solved, or give a hearing date for solving this request.

This hypothesis deals with the Court decisions invested with solving the case for which a motion to change venue is filed.

Consequently, according to both the provisions of the former Civil Procedure Code and especially the provisions of the actual Code, although the judgement of the case was not suspended by the Court invested with the motion to change venue, the simple notification towards the competent Court to solve this motion of the Court from where venue changing was requested produces a dilatory effect, to the effect of those presented, respectively of suspending the case, or most frequently, of granting a Court hearing date (or many more dates) for solving the motion to change venue.

Of course these "precaution" measures of the Courts had to have an explanation. Sometimes, the measures decided were justified on the grounds of ensuring each party that it would benefit from an impartial trial, which supposes inclusively giving them the possibility to check their assertions from the motion to change venue or making reference many times to the provisions of art. 145, paragraph (2), second thesis, Civil Procedure Code, meaning that, in case the Court will proceed to judge the trial, the decision given will be somehow lawfully dissolved by the effect of allowing the motion and, with the purpose of preventing the possibility to perform in this case acts submitted to annulment, a Court hearing date is given, being awaited the solution from the motion to change venue.

Is this last hypothesis a real possibility or does it come from an interpretation not in conformity with the will of the legislator of the presented text of the law?

In order to be able to answer to this question, a minimum rigour forces us to present the law texts that regulate the institution of trial venue change and mostly, the text that states the effects of allowing the motion to change venue.

Piersack Case against Belgium, paragraph 30), retains that "*The Magistrate's impartiality, as a guarantee of the right to a free trial, can be appreciated in a double sense: a subjective endeavour, that tends to determine the personal conviction of a judge in a certain case, that signifies a so-called subjective impartiality and an objective endeavour, with the purpose to determine if it offered guarantees sufficient for excluding any lawful doubt in its regard, this signifying the so-called objective impartiality"; "the subjective impartiality is presumed until the contrary; alternatively, the objective assessment of impartiality consists in analysing if, independently from the personal conduct of the judge, certain circumstances which can be checked bring forth some suspicions of lack of impartiality (The Decision of the Human Rights European Court from May 24th, 1989, pronounced in Hauschildt Case against Denmark, paragraph 47)".*

Thereby, according to art. 140, paragraph (1) and (2) Civil Procedure Code, *the venue change can be requested for lawful suspicion or public safety reasons.*

The suspicion is considered lawful in the cases when there is a doubt regarding the impartiality of the judges due to the trial's circumstances, to the parties' capacity or to some local conflict relationships.

The provisions of art. 142, paragraph (1) and (3), Civil Procedure Code, stipulate that: "*The motion to change venue on the grounds of lawful suspicion is of the competency of the Court of Appeal, if the Court from where the venue change is requested is a Court or a Tribunal from its circumscription. If the venue change is requested from the Court of Appeal, the competence of solving it belongs to the High Court of Cassation and Justice. The motion to change venue is submitted to the competent Court for giving a solution, Court which will notify at once the Court from where the venue changing was requested in regards to formulating the motion to change venue. When receiving the motion to change venue, the Court with capacity to solve it will be able to request the case file".*

According to the provisions of art. 143 and 144, Civil Procedure Code, *at the request of the party interested, the Court panel can decide, if case maybe, to suspend judging the trial, giving a bail amounting to 1,000 lei. For solid reasons, the suspension can be decided in the same conditions, without summoning the parties, even before the first hearing date. The conclusion on suspension is not motivated and is not subject to any way of attack. The measure of suspending the judgment of the trial will be communicated urgently to the Court from where the venue changing was requested.*

The motion to change venue is judged urgently, in the Council Chamber, with summoning the parties from the trial. The decision on the venue changing is given without motivation and it is final. The Court from where the venue changing was requested will be notified immediately on allowing or rejecting the motion to change venue.

According to art. 145 Civil Procedure Code, *in case the motion to change venue was allowed, the Court of Appeal sends the trial for being judged to another Court of the same rank from its circumscription. The High Court of Cassation and Justice will change the venue for judging the case to one of the Courts of the same rank found in the circumscription of any of the Courts of Appeal in the neighbourhood of the Court of Appeal in whose circumscription there is the Court from which the venue changing is requested.*

The decision will show to what degree the acts fulfilled by the Court before venue changing will be kept. In case the Court from where the venue changing was decided has meanwhile judged the trial, the decision given is lawfully annulled through the effect of allowing the motion to change venue.

Reporting to the content of paragraph (2), second thesis of art. 145, Civil Procedure Code, we observe that this text institutes the mandatory effect of the lawful annulment of the decision in case the Court from where the venue changing was decided has "*meanwhile*" judged the case.

In our opinion, this text cannot refer but only to the period between the trial venue changing and the decision being given, as well as the period after the trial judgement suspension given according to art. 143, paragraph (1), Civil Procedure Code, this being the only possible interpretation of the collocation "*meanwhile*" used by the legislator.

The interpretation is in agreement with the content of the text in which it is shown that "*in case the Court from where the venue changing was decided has meanwhile judged the trial*"; the start moment of the period reflected by the collocation "*meanwhile*" cannot be but the decision to change the venue or, as we have shown, the decision of suspension until the motion to change venue is solved.

The conclusion comes naturally from the circumstance that the Court invested with solving the motion to change venue could not decide to change the venue if the trial was solved (finally, because otherwise it is possible for the file to be subject to a new[1] motion to change venue in the way of attack), the motion to change venue supposing a trial in progress in order to be allowed.

In agreement with the provisions of art. 141, paragraph (1), Civil Procedure Code, *the venue changing due to a lawful suspicion or public safety reasons can be requested in any phase of the trial.*

Or, according to the doctrine[2], the phase of proper judgement (*cognitio*) ends by being pronounced a final decision.

[1] According to the provisions of art. 146, Civil Procedure Code, *trial's venue changing cannot be requested again, except for the case when the new motion is set up on circumstances unknown at the date of solving the previous motion or occurring after its being solved*.

[2] In agreement with the provisions of art. 141, paragraph (1), Civil Procedure Code, *the venue changing for lawful suspicion or public safety reasons can be requested in any phase of the trial.* Or, according to the doctrine, the phase of the proper judgement (*cognitio*) ends through giving a final decision. Please see (Boroi & Stancu, 2015, p. 4).

In these conditions, it appears the question which is the reason for which the text pointed out could lead to the interpretation (even isolated) that it is possible to change the venue of a trial finally solved, without making distinction if there was or not a request of suspension solved favourably.

First of all, we are bound to notice that the collocation "meanwhile" cannot be explained but in a deductive way and the issue if a finalised case venue can be changed remains to be clarified at all times by the Court notified with the motion to change venue.

Ayway, in the case when it was decided by the venue changing Court to suspend the trial according to article 143, Civil Procedure Code and, in spite of that, the judge proceeded to judge the case, we consider that the lack of object of the venue changing motion cannot be invoked.

In this last hypothesis, we consider the judge invested with the motion to change venue will be able to decide trial venue changing, even if a decision was given in the case, the decision given being the consequence of not complying with the competent Court's decision to solve the motion to change venue[1].

On the other hand, in order to identify the source of the possible wrong interpretation, it is necessary to check the content of this text before the change

[1] To this effect there is also the practice of the High Court of Cassation and Justice, respectively Decision no. 2877/2005 pronounced on the date of May 13th, 2005, where it is mentioned: "*Cluj Court of Appeal, Contentious Administrative and Commercial Division acted wrongly when judging the case for which the motion to change venue was filed, giving the civil decision no. 665 from April 26th, 2005, because at this moment, the Conclusion from the date of April 8th, 2005, given by the High Court of Cassation and Justice, was lawfully effective, according to which it was decided to suspend the judging in the file no. 13105/2004, until the date the request to change venue was solved. The measure of suspending the judging of the cause was communicated to the Court, and this measure of suspension is mandatory, being no possibility to fulfil any procedural act until the venue changing motion was solved, and in case there were committed procedural acts or the case had been meanwhile judged, the procedural acts fulfilled after the suspension and the decision are going to be annulled. In this context, the decision given by Cluj Court of Appeal, Commercial and Contentious Administrative Division, respectively the Civil Decision no. 665 from April 26th, 2005, is going to be annulled, being given a maximum legal efficiency to the measures decided regarding the suspension of judging the case and the Court to which it will be decided to send the venue change motion will have to proceed hereinafter with judging the case.*
For these legal reasons, the motion to change venue is going to be allowed, motion which is the object of file no. 13105/2004 of Cluj Court of Appeal, Commercial, Contentious Administrative and Fiscal Division, to Iasi Court of Appeal, maintaining the procedural acts performed up to the date of April 8th, 2005, inclusively, and annulling the procedural acts performed after the date of April 8th, 2005, including the Civil Decision no. 665 from April 26th, 2005, given by Cluj Court of Appeal, Commercial, Contentious Administrative and Fiscal Division". The Decision is given according to the former civil procedure law, but the reasoning of the Court remains valid.

occurred through Law no. 76/2012 for putting to practice Law no. 134/2010 on the Civil Procedure Code[1].

According to article 40, paragraph (5), Civil Procedure Code from 1865, *in case the Court has made procedural acts or has meanwhile judged the cause, the procedural acts fulfilled* ***after the venue changing*** *and the decision given are lawfully annulled through the effect of allowing the motion to change venue.*

We therefore observe that the text comprised the same collocation "meanwhile", but with the assignation that it expressly indicated that there are annulled those procedural acts fulfilled after the venue changing, as well as the decision given.

Comparing these two law texts, we observe that there are no substance differences, but only of nuance: while article 40, paragraph (5), Civil Procedure Code from 1865, expressly provides that only the acts fulfilled after the venue changing, as well as the decision given, will be lawfully annulled, art. 145, paragraph (2), Civil Procedure Code shows that "*in case the Court from where the venue changing was decided has meanwhile judged the trial, the decision given is lawfully annulled by the effect of allowing the motion to change venue",* being able to conclude logically that this last "meanwhile" cannot refer but to the period after the venue changing is decided.

In these conditions, we should identify the source of this confusion, being known the fact that in the previous practice according to the former Civil Procedure Code, the practice of the venue changing Court (of High Court of Cassation and Justice – being exclusively competent in solving the motions to change venue) was to reject the motion to change venue on grounds of being without object, in case the trial whose solving was requested was solved, in the period from introducing the motion to change venue and up to the Court decision regarding this request[2].

[1] This law was published in the Official Gazette of Romania no. 365 from May 30th, 2012 and it entered into force on the date of February 13th, 2013.

[2] Please see Conclusion no. 670/2013 of the High Court of Cassation and Justice given on the date of February 12th, 2013, in the File no. 7631/1/2012, available on the Internet: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=94033. We mention that in this case, the petitioner requested the motion to change venue to be allowed, the Prosecutor had given conclusions of rejecting the motion as being without object, and the solution was the rejection, without taking into consideration the lack of object of the request. Indeed, according to art. 40, paragraph (4), Civil Procedure Code, the decision on venue changing is given without motivation and is not submitted to any way of attack. We consider that the requirement of the law to be given without motivation does not refer but to the reasons invoked in the motion, the Court being able to

Checking the content of art. 140, paragraph (1) and (2), Civil Procedure Code, in the initial form of the new Civil Procedure Code, it had the following content: *in case the motion to change venue is allowed, the trial is send to other Court of the same rank in order to be judged. The decision will show the degree in which the acts fulfilled by the Court before the venue changing are going to be kept. In case the Court from where the venue changing is decided has committed procedural acts or has meanwhile judged the case, the procedural acts fulfilled* ***after the motion to change venue was filed and the decision give*** *are lawfully annulled by the effect of allowing the motion to change venue.*

Accordingly, this text refers to committing the procedural acts after the motion to change venue was filed **and the decision given after this moment.** From the text, it results that the collocation *"meanwhile*" refers to the moment of filing the motion to change venue and not to the venue changing granted, already approved by the Court[1].

From the point of view of its initial content, the actual art. 145, paragraph (2), second thesis, Civil Procedure Code, does not seem so clear and predictable for the Judge that knows there is filed a motion to change venue in the file. For him/her, it is clear only that the decision he/she will give can be lawfully annulled by the effect of allowing the motion to change venue.

On the other hand, in case it would be considered a motion to change the venue of a trial is allowable, although, at the date of the investigation and of the decision given by the competent judge in the motion to change venue, it was finally solved, it would come for certain to a consequence which is as obvious as it is dangerous, namely that of infringing res judicata of a decision[2], meaning the Court invested

consider that the motion has no object. We point out that even under the effects of the actual Code, the decision on the venue changing is given without motivation (art. 144 para (2) the actual Civil Procedure Code), circumstance which in our opinion does not impede the motivation of the solution to annul the venue changing motion for not paying the stamp duty, for example. To this effect, please see the Concusion no. 2900 given on the date of September 25th, 2015, by the High Court of Cassation and Justice, in the File no. 2752/1/2015. Moreso, the fact that in the Code it is provided the necessity to notify the Court from where the venue changing was requested, at once, regarding the allowance or rejection of the motion to change venue, cannot lead to the conclusion that in the case there cannot be given other solutions but those of allowace or of rejection.

[1] Under the effects of the previous regulation, there were lawfully annulled all acts fulfilled, respectively the decision given after the motion to change venue was allowed. Please see (Leș, 2011, p. 240). This author points out that: „*the text therefore declares as lawfully annulled, through the effect of allowing the motion to change venue, all procedural acts – including the decision – brought to fulfilment after the motion to change venue was filed"*.

[2] Please see (Tăbârcă & Buta, 2007, p. 181).

with the motion to change venue, deciding to allow the motion to change venue of a solved trial, implicitly annuls the decision given in the case.

Implicitly, it should be recognised the fact that by promoting a motion to change venue, it makes possible the annulment of a decision, of course if it is considered that the impartiality of one/more magistrates was affected. But this lack of impartiality must be seen from the point of view of the decision already given, circumstance which transforms the venue changing Court in an instrument which makes possible annulling a decision entered in *res judicata*.

This situation, corroborated with the circumstance that the magistrates are exonerated from the obligation to motivate the decision given in the venue changing, makes the motion to change venue a dangerous instrument, the party who lost the trial receiving "a second chance" to have analysed his/her case.

This "second chance" must be analysed from the point of view of the further conduct of the party that invested the Court with a motion to change venue, being unconceivable to support a motion to change venue for a trial in which the party has won.

Accordingly, in case the party which receives an unfavourable solution will reinforce the formulated motion to change venue of the trial, while, in the situation the trial is won, one of the essential conditions of exercising the civil action is missing, namely the one of interest, which must subsist also at the moment the venue changing motion is solved.

For the other party, which considered there are no reasons of lawful doubt in the case and did not formulate a motion to change venue, but who lost the trial, this "second chance" does not exist anymore, not being the holder of the motion to change venue.

The intent of the legislator was not to change the venue changing institution into a "trick" at the hand of the litigants, reason for which article 140 Civil Procedure Code (the actual article 145, paragraph (2), second thesis) was amended, receiving the content announced previously.

We appreciate that, against the consequences which such a solution can produce, it was necessary that the legislation would expressly provide the impossibility to change the venue of the solved trial, if the venue changing Court did not decide trial suspension in the case and moreso, the situation when trial suspension was not

requested, on one hand, or to define clearly the collocation "meanwhile" by taking into consideration the factual hypotheses previously announced.

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