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Legal Problems in Normal Price

A Commentary on the Judicial Decision No. 324/2019 Issued by the Civil Expanded Commission of the Federal Cassation Court – Iraq, December 23rd, 2019

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Introduction

The Extended Commission of the of the Federal Cassation Court issued its decision No. 324/2019 on December 23rd, 2019 about the action of normal price which concluded that "The majority of this Commission considers that the claimant's action and the inheritance of their heirs to claim normal price is not based on a valid legal basis. Normal price in its content and truth is unspecified potential compensation resulting from the loss of the utility of real and one of its most important reasons is the act of constraint and one of its forms are aggression on the immovable of the others and the right to claim the normal price even it is a financial right.

However, the personal aspect of exercising or not exercising this right by the person who owns the immovable i.e. the claiming is initially relied upon on its existence and arise. Therefore, the owner's option not to claim or not to establish normal price for his/her constrained immovable during his/her lifetime entails the non-entry of undefined potential compensation (which is a price such as the constrained real in the owner's inheritance after his death, where he/she refrained from claiming the normal price during his/her lifetime because it is not permissible to inherit the undefined eventual right of the heirs because it is linked fatefully to the owner personally, and his/her choice not to claim where the personal option is not inherited to heirs because the owner's (inherited) about the claim during his lifetime of the normal price is considered to be permissible, donation and acceptance made by him/her with satisfaction. This silence is considered judicial presumption that is irrebuttable and cannot be contrary proved, as inferred from it that deceased premises or donates to claim normal price because the judicial presumption is to proof of an unknown fact from a known fact, and because normal price is a potential compensation, time element forms and establish this right which is past. In addition to demanding it as a personal right by the owner during his lifetime. And because it is more likely that the deceased will not be required during his lifetime to normal price such his/her constrained immovable is considered donation or permission, and in both of these two assumptions, the deceased is not entitled to the normal price because he/she agreed that others possess hand immovables.

Because the claimants' inherited during her lifetime did not claim normal price for her immovables, which was possessed by the defendant in addition to her job, thus she was satisfied not to claim normal price for the period claimed by the plaintiffs' heirs, so that their action of the normal price the inheritance of their inherited is not substantiated by the law and therefore, the action would be dismissed...". This decision was passed by the majority and based on multiple conclusions including

A. Not prosecuting normal price of the constrained immovable is considered either permission or donation.

B. Claim for the normal price is a potential compensation right.

I concluded from this introduction the following facts:

a) This right is not inherited.

b) The owner's silence to prosecute during his lifetime is acceptance and satisfaction of the reality of the situation.

c) That there is no legal basis for the action of normal price by offering two elements, time which is the past and demand on justice.

These conclusions on which the majority of the distinguished members of the above commission have concluded that this silence is judicial presumption that is an irrebuttable and cannot be contrary proved which has led the commission to reach a decision to dismiss the action. And we find that we are faced with more than one legal question raised by this decision, including: is potential right no inherited? Does filing a lawsuit is deemed permission or donation? To discuss this decision, we will examine terms from the above conclusions which they are judicial presumption, action demand of normal price and to what extent a personal option can be inherited.

First: Judicial Presumption

The above decision states that "the judicial presumption is to proof of an unknown fact from a known fact", and it considers silence as a judicial presumption that is irrebuttable and cannot be contrary proved. And therefore, we believe that the Iraqi Legislative Authority in the Law of Proof No. (107) of 1979 differentiates between legal presumption and judicial presumption where legal presumption is defined in article 98-I as "legislative authority inference of an uncertain fact from a certain fact", while it defines the judicial presumption in article (102-I) it "the judge's inference of an uncertain fact from a certain fact in in prosecution actions". In general, French Legislative Authority defines presumptions in article (1349) of the Civil Code as "presumption is findings that are obtained via using a known fact to conclude an unknown fact by law or by judge's discretion."

Some jurists believe that the judicial presumptions are distinguished by its diversity and not being restricted, because it varies as much as the multiplicity of facts [1], and the indication of the certain facts on the uncertain facts is not binding for the judge, so the antagonist can present the judge those certain facts that he/she wants to make them the basis to inferring what he/she claims [2]. One of the jurists considers that the judge's job in inferring the judicial presumptions is a mental act in which he/she uses his intelligence and logic. He concludes that this job should depend on inference in order to establish certain facts [3].

Another researcher believes that the judge's task in building his/her decision is based on the presumption that he/she forms from proofs presented to him, hence there is no problem to use documents that are irrelevant to the action or information that has not been discussed properly [4]. The court works according to its internal conviction and based on a comprehensive, objective examination of all the circumstances of the action [5], and in this sense French Cassation Court has ruled that the "judge's research scope is not specified, but it can extend to strange behaviors that the antagonists or one of them do not know if those behaviors are closely related to the fact needed to be proven in order to draw legal conclusions [6]."We agree with that the judiciary is free to weigh and evaluate facts, even if they are not directly linked to the antagonists or to the subject of the dispute, and this freedom is restricted to the fact that these presumptions must be important and accurate. And inferring these presumptions is left to the judge's foresight and wisdom. Regarding the above decision, we believe that it meant by the term unknown fact is uncertain fact, and the term known fact is certain fact. Although, the linguistic and terminological difference between the unknown and the uncertain on the one hand and the known and certain on the other hand, but the meaning cannot be carried except in the sense. Thus, the judge cannot define a term that has already been explicitly adopted by the legislative authority.

We also find that the decision concluded that silence is a judicial presumption that is irrebuttable and cannot be contrary proved. At this point, we would like to make it clear that Iraqi Legislative Authority did not discuss that the judicial presumption cannot be contrary proven, but rather clarified in article (101) of the proof law "The declaration and the oath may be accepted to rebuttal legal presumption that cannot be contrary proved in issues that are not related to public order." It is understood from this provision that the irrebuttable legal presumption that cannot accept contrary proved but accepts rebuttal by declaration and oath in issues that are not related to public order.

If we assume that the intention of the judges is to consider legal presumption and not the judicial presumption, and since proving that the claimant did not file a lawsuit during his lifetime is not related to prove that is valid or did not violate public order, it was better to make room to

rebuttal this concluded presumption, or that the judicial presumption was represented judicially by donation or the permission, which is uncertain of the silence - represented by not prosecuting the action of normal price- which is the certain fact in the action. And this is correct, but what makes this presumption irrebuttable and cannot be contrary proved, and what is the basis for that?

Second: Action Demand of Normal Price [7]

In article (738) of the Civil Code, the Iraqi Legislative Authority dealt with cases where the normal price is required "If the contractors do not agree on the price, how to estimate it or if it is impossible to proof the price, normal price shall be paid." The text includes two cases of normal price. First, the parties go silent about determine the price, as they did not agree on the price and left this to normal price. The intention of the Legislative Authority is not meant to address their differences because it disaffirms the lease contract due to vanishing the pillar of mutual consent. Second, the contractors agreed to determine the price, but it was impossible to proof its amount because of the lack of proof of the agreement upon it. There are cases were Iraqi Legislative Authority did not address, and all of which fall under constraint whether it is termination of the lease contract, its absence or its nullity. But does the claimant deserve the normal price?

Some jurists, believes that nullity of the lease contract occurs when the leaseholder occupies the leased immovable without legal basis, and accordingly the lessor has the right start immediately an action of ejectment, and he also has the right to claim compensation equal to the normal price due to the privation of the usage of his immovable. It is worth mentioning that this compensation is equal to normal price, and provisions of compensation are applied to it not provisions of normal price [8]. In relation to this issue, Egyptian Cassation Court concludes (...if the parties could not agree to determine the price, this leads to the nullity of the contract because of the absence of one of its pillars) [9]. Regarding the expiration of the lease contract, Iraqi Legislator Authority makes it clear in article (771) of the Civil Law that the leaseholder shall pay compensation if the immovable remains under his/her possession. But if staying is compelled or due to a reason out of his/her hand, he/she shall be obliged to pay the lessor the normal price.

In this regard, Iraqi Cassation Court ruled that (if the lease contract expired, the leaseholder shall quit the immovable, and if he/she keeps it under his/her possession unlawfully, he/she shall be obliged to pay the lessor the normal price) [10]. In another decision, the same court stated (if the lessor had been warned the leaseholder to quit at the end of duration of the lease contract, and the leaseholder replied refusing to quit and remained using immovable after expiration of the lease contract, he/she shall be obliged to pay the normal price) [11]. In fact, the first case is different where normal price is taken into account to determine compensation, and it is not normal price itself. Accordingly, we conclude that in cases of constraint immovable where the contract is null or not existed, compensation shall be deserved, and normal price shall be taken into account in determining this compensation.

In a recent decision of the Iraqi Federal Cassation Court, it ruled that (the normal price is a compensation for utility, which stands for interest and therefore the interest is not valid for the frozen interests and for that reason there are no interests on the normal price) [12]. This decision which we examine represents a case of constraint without lease contract. If the action of the claimants has point of view, they shall be compensated with consideration to the normal price. Compensation is the means of the judiciary to remove damage or to reduce it, and furthermore it is general penalty of arising civil responsibility, and it is not a punishment of responsibility against damage act [13]. The above decision stated in one of its sentences "... in its content and truth, normal price is unspecified potential compensation resulting from the loss of the utility of the real. And one of its most important reasons is the act of constraint". The question arises about the intention of the term "potential compensation", since we concluded previously that compensation in this action is compensation that takes into account the normal price, so do the judges mean that compensation is potential because it has not yet been ruled and to the possibility that the action may be dismissed?.

Thus, potential may apply to all legal terms that are the subject of judicial actions, so ejectment is potential, normal price is also potential and so on. Therefore, it is concluded that all judicial compensation actions are potential, and the intention of the word potential may mean that the compensation is for potential damage, and this is not accurate because the potential damage is the damage that has not yet occurred which differs from the future damage that civil responsibility shall not arise upon it until such potential becomes certain, thus there is no compensation for it unless it is actually realized. We may be very distant from the damage realized in the constraint immovable action which represented in the loss of utility and potential damage, so we believe that compensation in the action of normal price is a compensation for actual damage, and potential in both of the above-mentioned meanings is either

an augmentation or a mistake in describing the damage.

As for it is not specified, this does not make it out of judicial demands or make the action lack of legal basis, on the contrary, normal price actions of claiming compensation of loss of utility are determined indirectly, taking into account the price of its counterparts to determine the amount owed.

Third: Inheriting of a Personal Option

The decision in question stated that the personal option is not inherited due to the claimant's silence during of his/her lifetime, and this silence is considered a personal option, therefore this option is not inherited. So, we believe that the option to file a lawsuit is a right for the claimant which is personal as a general principle. However, Iraqi Legislative Authority explained in article (5) of the of Civil Procedure Law No. (83) of 1969, "It is allowed that one of the heirs to be antagonist in the action brought against the deceased or for the deceased, but the antagonist is one of the heirs." Iraqi Legislative Authority clarifies the rights entrusted on the deceased or for him/her, taking into consideration the legal Islamic rule (No inheritance except after paying the debts), so the right after death is related to money and not to heritage [14], but can the rights of the deceased upon others be included in the inheritance?.

Inheritance means inheritance that is left behind the deceased. It is defined by the Shafi'i as "all that one had during his life, and he/she left after his/her death like money, rights or competence. In addition to everything that become part of his/her property after his/her death due to acts done during his/her life." As for the Maliki and Hanbali, inheritance is a right that accepts partitioning, which is proved to whom be deserved after the death of whoever had it. In light of the above and according to the three jurists - except Hanafi [15]- inheritance includes money and rights that the deceased left behind, and their argument for that is the noble Messenger -peace be upon him- "Whoever left money or right; it shall belong to forced heirs…".

As for the Hanafi and Dahiri, inheritance means what is left by the deceased of money and financial rights that are free from any rights of others to have any part of this inheritance, and it includes Diya (Diya is an Islamic term used in the civil law to compensate damage resulting from killing whether it is intentional or unintentional, and it is predetermined by a competence authority in the state) and also includes the penalty which turns into money after forgiveness of the guardian so, deceased's debts are paid and his/her testament is carried out. And consequentially, the inheritance according to Hanafi and Dahiri includes what the deceased left behind of financial properties or immovables whether they were under his/her control, under his/her attorney control, under a trustee control such as leaseholder and debtor or under control of a violator or a burglar.

It also includes what is related in money such as the debts on others. According to Hanafi and Dahiri, Inheritance does not include personal options and rights related to the of the inherited (the owner) personally and his/her will. They did not count the utilities as money; they restricted the inheritance to money and joined whatever is similar to it [16]. Others defined inheritance as "money and rights left by one after his/her death". Regarding utilities, jurists were divided between consider them part of the inheritance or not. Hanafi excludes utilities from money because financial elements are not proven in them, like the cases in residency of houses and riding cars, and therefore these utilities do not pass on from the deceased to the heirs and do not be part of the inheritance. While most of jurists count utilities as an element or part of the inheritance explaining that possession is not required, and money is assessed and valued for its utilities [17] which we, the researchers, support and believe that utilities are part of the inheritance and therefore it can be passed on to the heirs.

Another clear and explicit question is arising. Generally, are rights inherited? And particularly, is the right to file an action can be inherited? Let us assume that rights are not inherited, and there was an abuse prior to the death of a person like dishonesty by a partner or theft which affects and reduces the money, so do the heirs have the right to prosecute for compensation against this abuse? We believe that heirs have the right to bring suit against any abuse impacts the inheritance unless it is proven that the deceased has submitted explicitly or implicitly a renunciation of the action, and this may be the conclusion on which the above decision was based on that the personal option is not inherited, where the claimant's silence of bring the suit during his lifetime is explained as permission or donation.

Permission comes in the sense as donation which is the permission of a person given to another one to use his/her money, to consume it or own it [18], and donated utilities are permission and not ownership. The judges concluded in the above decision the permission and donation from the silence of the claimant to bring the suit during his lifetime, considering this silence as an acceptance of the reality. Legal systems were influenced by the theory of apparent and internal will, some of which adopted the first type of will and some the second. Determining what legal system does

a state has been adopted is important because it helps to determine different legal implications, such as the possibility or the inability to examine the intentions of the contractors; in other words, restricting or releasing the judge's hand in verifying the will of the contractors. The Iraqi Legislative Authority, like most authorities, has been depended on apparent will as a general principle, and as an exception has been depended on silent to express the internal will from which acceptance is concluded. Article (81) stipulates: "1- No saying may be referred to a silent person, but silence in the context of a need for a statement is considered saying. 2. Particularly, silence is considered acceptance if there was prior dealing between the contractors, and this dealing is connected with offer or the offer resulted in a benefit for the sake of the addressed person, likewise the silence of the buyer after receiving the goods purchased is considered saying based on the terms stated in the price list".

Jurisprudence cited cases [19] in which silence is used and considered acceptance. The closest of these cases to the decision in question is the case of the lease contract where silence of both the hirer and the leaseholder with a contract between them is considered by some of the jurisprudence as a case of silence. In previous research [20], Dr. Bashar Adnan Malkawi believes -and the second author supports him- that this is violation of an explicit text in the Iraqi Civil Code; article (780) of this code considers contractors' acceptance for the continuation of the expired lease contract is tacit acceptance. When the contract expires and is not renovated or the will tends to declare a desire to continue the execution of the contract, the second case may be expressed explicitly or implicitly, and tacit acceptance is realized by acceptance and consent of contracting parties regarding the current situation without any declaration from the will to terminate the previous contractual relationship. And this is not a silence of will, but it is a way taken by the will that cannot be questioned as an indication of acceptance where execution of the contract is a tacit acceptance [21].

The researchers are aware of the distance between the length of the lease contract and the judicial decision in question, since the latter is a case of constraint immovable by the circle of defendant. Though we would like to add that some of the judges wanted to state that silence - the claimant's silence - can be understood as acceptance of the current situation of the constraint case. This contains two points: first, the silence in the context of a statement which is an acceptance is subject to the general provisions of issuing acceptance which must be at the time of contracting. Second, the case from which the acceptance is concluded from claimant's silence is a presumptive case extending to claimant's death.

In general principle, justice granting to claimant to choose the time of trial is conditioned that the competent court shall be the defendant's domicile court. However, the choice of the time of litigation by the claimant is restricted by certain procedures. Legislative Authorities has taken into account the prescription delay of the right to claim, and the prescription delay varies according to the policies of the Legislative Authorities, relying further on the different of the right claimed, setting out what could be considered a general principle of fifteen (15) years as prescription delay. There are some exceptions divided between different delays such as one and three years, and the possibility of dismissing the action via pretext the prescription delay is determined by time. As for death, Legislative Authorities do not address it as the end of life; it is the limit at which the legal personality of the human being ends, so if we accept that the claimant's silence is considered a permission and a renunciation of the prosecution, then this is potential assumption, due to the fact that the claimant has the option as long as the prescription delay does not expire.

The claimant may have set a date for the proceedings, but death prevented him from that, and this is also an assumption. Since the judicial decisions must be based on certain facts as their reasons, and the fact that the subject of the action affects inheritance, then the researchers support that the prosecution is a personal right.

However, utilities are elements of money which increases it and impact its value, and it is illogical to explain non- prosecuting by the inherited (the owner) as a permission and donation by him/her towards the constrained. If normal price is a compensation for material damage in the context of delictual responsibility, then does this decision extend to the fact that no compensation right is inherited for a delictual responsibility that not claimed by the deceased?

Conclusion

We conclude that claim -which can be proven in court- which increases the inheritance of inherited (the owner), entitles the heirs or one of them to file the summons of addition to the inheritance, and therefore the action of the heirs in this decision is based on law.

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