Corte costituzionale

JUDGMENT NO. 181 OF 2008

FRANCO BILE, PRESIDENT
PAOLO MARIA NAPOLITANO, AUTHOR OF THE JUDGMENT

JUDGMENT No. 181 YEAR 2008

In this case the Court examined the provisions of the law on bankruptcies governing applications by the insolvent debtor for discharge during the year following the order terminating bankruptcy proceedings, according to which the law did not provide for the notification of the creditors that such an application was pending. The Court recalled its prior case law that in discharge proceedings the minimum guarantees of a fair hearing must be respected, including the right to participate. Since the arrangements did not contain any provision enacted in order to ensure the said participation, the Court found that the legislation breached Article 24 of the Constitution and accordingly declared it unconstitutional.

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Franco GALLO, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 143 of royal decree No. 267 of 16 March 1942 (Provisions governing bankruptcies, arrangements with creditors and compulsory administrative liquidation[*]), as amended following the entry into force of legislative decree No. 5 of 9 January 2006 (Comprehensive reform of the rules governing bankruptcy proceedings pursuant to Article 1(5) of law No. 80 of 14 May 2005), commenced pursuant to the referral order of 13 July 2007 of the Venice Court of

[*] "Compulsory administrative liquidation" (*liquidazione coatta amministrativa*) is a form of compulsory liquidation which applies to certain categories of company, including banks, insurance companies and brokers.

Appeal relating to the challenge filed by P. A., registered as No. 760 in the Register of Orders 2007 and published in the *Official Journal of the Republic* No. 45, first special series 2007.

Considering the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Paolo Maria Napolitano in chambers on 16 April 2008.

The facts of the case

1.– By the referral order filed on 13 July 2007 the Venice Court of Appeal raised, with reference to Article 24 of the Constitution, the question of the constitutionality of Article 143 of royal decree No. 267 of 16 March 1942 (Provisions governing bankruptcies, arrangements with creditors and compulsory administrative liquidation), as amended following the entry into force of legislative decree No. 5 of 9 January 2006 (Comprehensive reform of the rules governing bankruptcy proceedings pursuant to Article 1(5) of law No. 80 of 14 May 2005).

1.1.– The referring court states that it was requested to rule on a challenge filed by A.P. against the order by which the ordinary court the *Tribunale di Vicenza* ruled inadmissible the application presented by the same for discharge. This order interpreted Article 150 of legislative decree No. 5 of 2006 as providing that Article 142 of the bankruptcy law, which introduced the institution of discharge into Italian law, should not apply in bankruptcy proceedings which, notwithstanding their conclusion after the reform came into force, were commenced prior to it.

The referring court by contrast considers that, given the substantive nature of the above legislative provision, the institution in question applies to procedures which were declared closed after the reform came into force, even if they were commenced beforehand.

1.2.– In the light of the above, having briefly illustrated the salient aspects of the new legal institute, which may release bankrupt natural persons from residual bankruptcy debts that are partially unsatisfied on termination of the bankruptcy proceedings, which may moreover have effects – albeit minor – also on pre-bankruptcy creditors who did

not participate in the procedure, the lower court points out that, under the terms of Article 143 of the bankruptcy law, discharge may be declared either at the same time as the termination of bankruptcy proceedings or, by a separate measure – issued subject to verification of compliance with the conditions provided for under Article 142 of the bankruptcy law and "having heard the bankruptcy trustee and the committee of creditors" – in cases in which the debtor has filed a request to that end within one year of the termination of bankruptcy proceedings.

The referring judge notes on this point that the provision in question, which does not stipulate that the participation in the above procedure involving the creditors in bankruptcy is necessary (whilst in its opinion a discharge ordered at the same time as the termination of bankruptcy proceedings is permitted, since in such cases the measure is taken on conclusion of a procedure in which the creditors have participated with the right to make representations) is on the other hand detrimental to the rights of the creditors if taken after the termination of bankruptcy proceedings following an application by the debtor; this is because the law does not provide for any procedure for notifying the creditors in bankruptcy of the commencement of a procedure which may, should the application be accepted, have substantive effects on them .

The referring court therefore considers that, in view of the absence of any requirement for the creditors in bankruptcy to participate in discharge proceedings (or at the very least to be notified, by appropriate means, of the commencement of the procedure in order to allow them to participate therein), there are serious doubts over the constitutionality of Article 143 of the bankruptcy law with regard to the right to take legal action in order to protect one's own rights, contained in Article 24 of the Constitution, since any creditors affected by the measure requested by the debtor are not guaranteed the possibility to participate in the procedure and to make representations.

Furthermore, the breach of a constitutional right is not remedied by the conferral on unsatisfied creditors of the right to challenge the discharge measure. In fact, the referring court notes that – having overcome "the albeit legitimate reservations regarding both the mandatory nature, in relation to proceedings commenced pursuant to an application by the debtor after the termination of bankruptcy proceedings, of the

mechanisms put in place by the law in order to publicise the termination of bankruptcy proceedings [*sic*: the order accepting the application for discharge], as well as their capacity to ensure an effective (given the very strict time limits for appeals) awareness of the measure – the fact nevertheless remains that the full exercise of the creditors' right to a defence is precluded in the proceedings at first instance".

2.– The President of the Council of Ministers intervened in proceedings, represented and advised by the *Avvocatura Generale dello Stato*, arguing that the question was inadmissible or unfounded.

2.1.– As a preliminary matter, the state representative argues that the question is not relevant in the proceedings before the lower court on the grounds that, since there was no request for intervention by creditors whose debts were entered in the statement of liabilities, or in any case since the latter did not make any complaints averring the alleged infringement of their right to a defence, the referring court was not called upon to "rule on questions with regard to which it doubts the constitutionality of the contested provision". It follows from this that the question is inadmissible.

It is moreover argued to be groundless on the merits. The *Avvocatura Generale dello Stato* point out, in the first place, that the referring court did not consider whether or not there was an actual right which would enable, or prohibit, interventions by third parties in the discharge proceedings. Since such interventions would have sought protection for an individual right, had they occurred they would have been admissible.

However such protection cannot imply the need for the creditors to participate in the procedure, since it is sufficient, in order to ensure compliance with Article 24 of the Constitution, that they be granted the right to intervene.

Furthermore, the argument concerning the absence of any measures publicising the fact that discharge proceedings are pending is not significant either; in fact, since the procedure must be commenced in a specific *forum* and within precise time limits, the requirement incumbent upon the creditors who have not been entirely satisfied to ascertain whether any application for discharge has been filed by the debtor is not excessively onerous. In such cases, should the application be filed, the creditors, using normal diligence, will be able to intervene in proceedings in order to protect their rights.

Conclusions on points of law

1.– The Venice Court of Appeal questions, with reference to Article 24 of the Constitution, the constitutionality of Article 143 of royal decree No. 267 of 16 March 1942 (Provisions governing bankruptcies, arrangements with creditors and compulsory administrative liquidation), as amended following the entry into force of legislative decree No. 5 of 9 January 2006 (Comprehensive reform of the rules governing bankruptcy proceedings pursuant to Article 1(5) of law No. 80 of 14 May 2005), insofar as, in cases involving discharge proceedings commenced pursuant to an application by the debtor during the year following the order terminating bankruptcy proceedings, not only does it not require, to quote the referral order, "that the creditors in bankruptcy participate in proceedings for the discharge from debts, but also does not even provide for […the] notification of the same, by appropriate means, of the commencement of the proceedings".

In the opinion of the referring court, the failure to make this provision infringes the constitutionally guaranteed right to a defence before a court of law, not simply because the law does not provide that the creditors in bankruptcy who have not been entirely satisfied in bankruptcy proceedings must necessarily participate in the discharge proceedings, but rather because, as a result of the failure to give timely notification to the same that the proceedings are pending, they are not able to obtain protection through the courts of their right to the enforcement of the residual debts claimed.

2.– As a preliminary matter, the Court rejects the intervener state representative's claim that the question is inadmissible.

2.1.– The intervener bases its argument on the fact that there were no applications for intervention in the discharge proceedings *de qua agitur* by the creditors whose debts were entered in the statement of liabilities and who have not been entirely satisfied, in other words that no express challenges were made by those individuals averring the infringement of their right to a defence due to the absence of publicity measures notifying them that the proceedings were pending.

The intervener infers from this that the question of constitutionality is irrelevant in the proceedings before the lower court, since the referring court need not apply the contested provision.

2.2.– The challenge is irrelevant: in reality the referring court – questioning the constitutionality of the contested provision precisely insofar as it does not provide that the creditors in bankruptcy not entirely satisfied in bankruptcy proceedings be notified that the discharge proceedings, which seek to obtain a declaration that the part of the debt still unpaid following the division of the insolvency estate is unenforceable, are pending – presupposes that these creditors did not participate in the proceedings since they were unaware that they were pending. In contrast to the arguments of the *Avvocatura Generale dello Stato*, far from establishing the relevance of the present question of constitutionality, the eventual intervention in the proceedings concerned by the creditors would by contrast render the question irrelevant, since on the facts there would not have been any real infringement of the right to a defence, in contrast to the case examined by the lower court.

3.– On the merits, the question is partially well founded.

3.1.– It is important to point out that through the institution of discharge, which is entirely new within our legal order, Parliament intended to enact legislation applicable after the closure of the bankruptcy to any debts for which, following the termination of bankruptcy proceedings, the insolvent individual is still liable as a result of the debtor's incomplete fulfilment of his obligations.

Where particular prerequisites are satisfied – which it is not necessary to examine since they are not subject to any challenge by the referring court – and where the debtor files an appropriate application to the court with jurisdiction over the bankruptcy (an application which may be filed whilst the bankruptcy proceedings are pending or within one year of the publication of the order terminating bankruptcy proceedings), having consulted the bankruptcy trustee and the committee of creditors, according to the provisions currently in force contained in Article 143 of the bankruptcy law, the court is called upon to declare the residual bankruptcy debts unenforceable against the applicant.

The literal meaning of the provision cited above does not leave space for any doubts that discharge has the effect of precluding the right of creditors in bankruptcy who have only been partially satisfied to claim, following the termination of bankruptcy proceedings, payment of the residual debt by the "debtor already declared bankrupt".

It is therefore clear that the application of such a measure has a detrimental effect, in substantive terms, on the subjective position of the creditors in bankruptcy who have not been entirely satisfied.

The referring court complains that, where the application is filed during the year after the termination of bankruptcy proceedings, this negative effect may occur even in the absence of any, even potential, involvement of the individuals affected by this decision (i.e. the creditors) in the court proceedings seeking to obtain a declaration of discharge.

When drafting the bankruptcy law reform and regulating, through the contested Article 143 of the bankruptcy law, the structure of discharge proceedings, Parliament did not in fact stipulate that the application commencing the proceedings should be notified to the creditors in bankruptcy who have not been entirely satisfied, in order to enable them, should they see fit, to intervene in the proceedings with a view to protecting their position by challenging the application for discharge.

3.2.– Insofar as it concerns the creditors whose debts were entered in the statement of liabilities, who have thus shown an interest in participating in the bankruptcy procedure, are considered by the authorities charged with its correct progression to deserve protection, and whose particulars and residence are therefore known, this omission violates Article 24 of the Constitution.

Indeed, this court has held on various occasions that the constitutionality of court proceedings, which discharge proceedings certainly are, is measured, amongst other things, against the steadfast respect for the minimum guarantees of a fair hearing, the first and most fundamental of which consists in the requirement that both the plaintiff as well as the respondent participate or be placed in a condition to participate in the proceedings (see specifically order No. 183 of 1999).

The right to participate is, generally speaking, guaranteed as far as the respondent party is concerned through measures publicising the writ by which the proceedings are

commenced; whenever this is possible, where the potential respondent parties may be identified and their number is reasonably limited, these publicity measures are considered to be suitable for this purpose where they are brought directly to the attention of every individual respondent party, or at the very least are made knowable to them.

It is entirely clear that the contested legislation does not contain any provisions enacted in order to ensure the said participation – through notification, or through the taking of measures such that the creditors are presumed to be aware, that the procedure is pending – and thereby breaches Article 24 of the Constitution.

3.3.– Moreover, this omission cannot be justified – on the grounds that this choice falls within the sphere of Parliament's discretion over the specific form of procedural regulations – by the requirements of speed and efficiency which characterise various aspects of bankruptcy proceedings. On this point it is sufficient to note that the legislative provision under examination by this Court expressly involves cases in which the bankruptcy procedure has already terminated with an order closing the bankruptcy proceedings, and hence it would be manifestly arbitrary to prolong the effects of the above requirements beyond their reasonable limit.

Nor can the court accept the state representative's assertion that, given the relatively short time limit – one year after the termination of bankruptcy proceedings – before which an application for discharge may be filed by a debtor who has already been declared bankrupt, there is no real infringement of the creditors' right to a defence, since the latter may, using normal diligence and through regular access to the court offices where the application is to be filed, be made aware whether or not the procedure is pending.

In fact, a requirement to obtain information of this nature comfortably exceeds the bounds of diligence which may ordinarily be required, as is clear when one considers the fact that in cases involving a bankruptcy, given the wide distribution of the various creditors, it is not infrequent that the place of residence of each of the creditors in bankruptcy does not coincide with the location of the competent court for the discharge, which is the same as the court where the bankruptcy proceedings were celebrated; this

situation would impose, in an unjustifiably vexatious manner, regular access by the creditors of the bankrupt party to a court which may not be the court with ordinary territorial jurisdiction for these parties.

3.4.– Similarly, the fact that the last sub-section of Article 143 of the bankruptcy law provides for the possibility of creditors who have not been entirely satisfied to challenge, pursuant to Article 26 of the bankruptcy law, the order of discharge cannot be regarded as satisfactory for the purposes of the protection of the constitutional right to a defence. Indeed, regardless of both the very strict time limits within which it may lawfully be exercised as well as the problematic constitutionality of a form of judicial protection of an exclusively appellate nature (in which therefore the burden of proof is placed on the appellant) – and not, as is otherwise the case, as an respondent or defendant – this right can only be made effectively enforceable in cases in which those who have an interest in making use of it are aware of the existence of a measure subject to challenge; given the failure to provide information regarding the commencement of the discharge proceedings, this eventuality does not have an adequate foundation in fact.

4.– It is important to consider at this juncture that the fact that the last sub-section of Article 143 of the bankruptcy law, mentioned above, refers to the challenge – a typical element of procedures celebrated in chambers – as a vehicle for contesting the discharge measure, means that the related proceedings are to be celebrated under this model. By applying to this model the specific rules laid down in Article 143 of the bankruptcy law, which provides for the preliminary formality of consulting both the bankruptcy trustee as well as the committee of creditors (bodies which however have ceased to exist following the termination of bankruptcy proceedings), it follows that the court must schedule at least one hearing in which the above activity may be carried out.

The Court therefore finds, having examined the rules governing proceedings in chambers, that the notification to the interested parties of the application, and of the subsequent order by which the court schedules the hearing in chambers for the discussion of the application, is a necessary mechanism for publicising the fact that proceedings are pending which affect their interests.

Taking into account the *petitum* set out in the referral order of the Venice Court of Appeal, relating to cases involving discharge proceedings commenced pursuant to an application filed within one year of the order terminating bankruptcy proceedings, the Court therefore finds, in accordance with the procedural model described above, that Article 143 of the bankruptcy law is unconstitutional insofar as it does not provide for the notification, by the applicant and in the forms provided for under Articles 137 *et seq* of the Code of Civil Procedure (including, where the prerequisites are satisfied, also those falling under Article 150 of the Code of Civil Procedure), of co-creditors who have not been entirely satisfied, of the application by which a debtor who has already been declared bankrupt requests, during the year following the order terminating bankruptcy proceedings, a discharge from the residual debts with the same creditors, as well as the order in which the court sets a date for the hearing in chambers.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 143 of royal decree No. 267 of 16 March 1942 (Provisions governing bankruptcies, arrangements with creditors and compulsory administrative liquidation), as amended following the entry into force of legislative decree No. 5 of 9 January 2006 (Comprehensive reform of the rules governing bankruptcy proceedings pursuant to Article 1(5) of law No. 80 of 14 May 2005) is unconstitutional, exclusively insofar as, in cases involving discharge proceedings commenced, pursuant to an application by a debtor already declared bankrupt, during the year following the order terminating bankruptcy proceedings, it does not provide for the notification, by the appellant and in the forms provided for under Articles 137 *et seq* of the Code of Civil Procedure, of co-creditors who have not been entirely satisfied, of the debtor's application for a discharge from the residual debts with the same creditors, as well as the order in which the court sets a date for the hearing in chambers.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 19 May 2008.

Signed:

Franco BILE, President

Paolo Maria NAPOLITANO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 30 May 2008.

The Director of the Registry

Signed: DI PAOLA