УДК 343.13
DOI 10.24147/2542-1514.2017.1(3).190-200

TO THE ADMISSIBILITY OF THE CIVIL LAW EXEMPTION OF PROPERTY FROM ARREST, IMPOSED IN THE CRIMINAL PROCEEDINGS: DOMESTIC AND FOREIGN EXPERIENCE

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The subject of paper deals with the legal nature of measures of criminal procedural compulsion in the form of seizure of property.

Methodological basis of the article is based on general scientific dialectical methods of cognition of objective reality of the legal processes and phenomena that allowed us to conduct an objective assessment of the state of legislation and law enforcement practice in the procedural aspects of the cancellation of the seizure of property in criminal proceedings of Russia.

The results and scope of it's application. It is submitted that the cancellation of the seizure of the property (or the individual limit) is allowed only on the grounds and in the manner prescribed by the criminal procedure law of the Russian Federation. However, the study found serious contradictions in the application of the relevant law. In particular, cases in which the question of exemption of property from arrest (exclusion from the inventory), imposed in the criminal case was resolved in a civil procedure that, in the opinion of the author of the publication, is extremely unacceptable.

On the stated issues topics analyzes opinions of scientists who say that the dispute about the release of impounded property may be allowed in civil proceedings, including pending resolution of the criminal case on the merits. The author strongly disagrees with this position and supports those experts who argue that the filing of a claim for exemption of property from arrest (exclusion from the inventory) the reviewed judicial act of imposing of arrest without recognition per se invalid. In this regard, the author cites the legal position of the constitutional Court of the Russian Federation, from which clearly follows that of the right of everyone to judicial protection does not imply the possibility of choice of the citizen at its discretion, techniques and procedures of judicial protection, since the features of such judicial protection is defined in specific Federal laws.

The author analyzes and appreciates Kazakhstan's experience of legal regulation of the permissibility of filing a civil claim for exemption of property from seizure imposed in criminal proceedings. The author notes that the new civil procedural legislation of the Republic of Kazakhstan, which came into force from 01 January 2016, clearly captures that consideration in the civil proceedings are not subject to claims for exemption of property from seizure by the criminal prosecution body.

Conclusions. Necessity of amendment to article 422 of the Civil Procedure Code of Russia: this article should not apply to cases of application of measures of criminal procedural compulsion in the form of seizure of property. Among other things, the author proposed additions to part 9 of article 115 of the Criminal Procedure Code of Russia.

Key words: measures of criminal procedural coercion, seizure of property, the abolition of the arrest, the release of property from arrest, exceptions to the inventory, civil procedure, legal practice, foreign experience, improve the legislation.

Информация о статье:
Дата поступления – 14 июня 2017 г.
Дата принятия в печать – 10 июля 2017 г.
Дата онлайн-размещения – 30 сентября 2017 г.

Article info:
Received – 2017 June 14
Accepted – 2017 July 10
Available online - 2017 September 30

I. Formulation of the problem. Certain aspects of the application of seizure of property regularly find their careful scientific reflection in the theory of the criminal procedure. Thus, questions of procedural nature, objectives and foundations of the coercive measures, the procedure of its implementation and execution are consistently highlighted as a special dissertation studies [1-4], and in many scientific publications [5-16]. However, one of the most difficult issues is how to cancel a seizure of property in criminal proceedings. Note that it clearly follows from part 9 of Art. 115 of the Code of Criminal Procedure that the arrest imposed on the property, or the individual restrictions to which it is subjected, are canceled on the basis of the decision, the definition of the person or body in charge of the criminal case, when applying this measure of procedural coercion is no longer necessary. The literal interpretation of this provision implies that the arrest imposed on the property, is canceled only in the criminal procedure. However, the same study revealed numerous cases of law enforcement, when the question of the release of property from arrest imposed in criminal proceedings was considered in civil proceedings by the application of other procedural rules. In this context, the position of V.A. Azarov and D.M. Nurbayev, according to which "the issue of restoration of the violated rights of the victim of the crime the legislator has not been given due attention, for that matter, and the delimitation of grounds and conditions for resolution of the dispute on property rights with the help of private law and public legal ways", is reasonable [17, p. 260].

II. Analysis and critical assessment of judicial practice. For greater clarity there specific examples. So, K. filed a lawsuit against the IFTS to release from the arrest of property - several cars, watches and jewelry, imposed by the decision of the district court in the criminal case in order to ensure the enforcement of the sentence in the part of civil action (Art. 115 of the Code of Criminal Procedure). Refusing to K. in satisfying the claim, the court of first instance proceeded from the fact that the claimant did not provide evidence of the acquisition of the arrested property for money that was not co-acquired with M., but the claimant did not claim to divide the jointly acquired property by the plaintiff. Verifying the legality of such a court decision, the court of appeal instance noted: when considering the claim by K. the court did not take into account the norms of paragraph 1 of Part 1 of Art. 134 of the Code of Civil Procedure of the Russian Federation and Art. 115 of the Code of Criminal Procedure. By virtue of paragraph 1 of Part 1 of Art. 134 CPC the Russian Federation the judge refuses acceptance of the statement of claim if it is subject to consideration and the permission in other judicial order. In view of the fact that the arrest on the above-mentioned property, in respect of which the plaintiff claimed claims, was imposed by a court in the framework of a criminal case, which in essence has not yet been examined by the court, the court of first instance had no legal grounds for considering the statement of claim of K. as civil Legal proceedings, in this connection the decision of the lower court cannot be recognized as legitimate and justified and it is subject to cancellation. From that situation is also indicated that the commercial bank "E" went to court with a claim to the Department of Internal Affairs of the Russian Federation subjects, as well as CJSC MCD "E" for the release of property from seizure. In support of the claimed requirements, he pointed out that at the request of the investigator for the purposes of securing civil actions, arrest was imposed on non-residential premises. The sentence of the district court F. was found guilty of committing a crime under part 3 of Art. 30, part 1 of Art. 201 of the Criminal Code, but the issue of the fate of the arrested property in the verdict is not allowed. The Court of First Instance of the OJSC "E" claims satisfied, the property was released from the arrest. Nevertheless, considering the appeal of the Department of Internal Affairs on the subject of the Russian Federation, the court of higher instance noted: this measure of procedural coercion is applied for the period of the proceedings in the criminal case, with the court, within the meaning of Art. 397 of the Code of Criminal Procedure, in order to clarify doubts and ambiguities in the stage of execution of the sentence, judicial decisions can be made, including the abolition of measures to secure civil action. Since the demands for the removal of property seized by the court in the framework of criminal proceedings are claimed by OJSC E, they are subject to review according to the norms of the Code of Criminal Procedure of the Russian Federation (Part 9, Article

115) - the decision of the court in civil proceedings is subject to cancellation, and the proceedings in cessation. Thus, it follows with certainty that the seizure of property in criminal proceedings is subject to cancellation solely in criminal procedure, regardless of whether the criminal case is at the stage of preliminary investigation or the verdict is pronounced, but the issue the withdrawal of al ECTA with property court is not properly resolved, for various reasons, as, in addition to the above examples show, and other court decisions.

Nevertheless, the law enforcement practice knows the existence of unmodified court decisions, in which courts insist that the issue of removal from the property of criminal procedural arrest is subject to consideration in the civil procedure, first, misinterpreting the relevant norms of law, and, secondly, referring, at the same time, to questionable unexplained clarifications of the highest judicial instances. So, the decision of the district court passed in the course of consideration of the criminal case denied the application of S. to cancel the imposed arrest on the car in connection with the institution of a criminal case against F. on charges of fraudulent actions. The appeal court of the regional court left the ruling of the district court unchanged. In the appeal C raised the question of abolishing held court decisions, pointing out that according to the decision of the district court in civil proceedings between the former spouses made division of joint marital property, and it recognized the right of ownership to the above passenger car. The Presidium, having examined the case materials and discussed the arguments cited by the applicant S. in the complaint, found the cassation complaint to be partially satisfied. In the opinion of a higher court, the courts failed to take into account and explanation contained in para. 1 of the Decree of the Plenum of the Supreme Court of 31.03.1978 № 4. The appeal court considered that the Resolution of the Plenum is a force in the territory of the Russian Federation and does not contradict national law. By virtue of this act, all disputes on the release of property from arrest courts are considered according to the rules of the proceedings, regardless of whether the arrest was imposed in the order of applying measures to secure the claim, foreclosure on the property of the debtor in pursuance of a decision or sentence of the court imposed, including in the preliminary Investigation. In connection with the foregoing, the appeal of the regional court was quashed. At the same time, we cannot agree with this court decision of the court of cassation for the following reasons. First, in fact, in paragraph 1 of the Resolution of the Plenum of the Supreme Court of the USSR of 31.03.1978 No. 4 "On the application of legislation during the consideration by courts of cases on the release of property from arrest (exclusion from inventory)" it is recorded that disputes on the release of property courts are examined by Rules of the proceedings, regardless of whether the arrest was imposed in the order of foreclosure on property in pursuance of a decision or sentence of the court. Meanwhile, in Resolution of the Plenum of the Supreme Court of the Russian Federation of 22.04.1992 No. 8, it is noted that, before the adoption of the relevant legislative acts of Russia, explanations on the application of the norms of the former USSR contained in the decisions of the Plenum of the Supreme Court of the USSR can be applied in a part that does not contradict the Constitution and the legislation of the Russian Federation. In the development of this provision, paras. "In" paragraph 2 of Resolution of the Plenum of the Supreme Court of the Russian Federation of 20.01.2003 No. 2 clearly emphasizes the attention of the law enforcer that the decisions of the Plenum of the Supreme Court of the USSR containing explanations on the application of civil procedural legislation are not applicable in the territory of the Russian Federation. Furthermore, an indication of the appeal court in the above practical example of the need to release assets and by the arrest of the criminal procedure in the order of action proceedings, appears to be contrary to Art. 442 of the Code of Civil Procedure of the Russian Federation, to which the courts constantly refer in support of the legitimacy of their position. So from part 2 of Art. 442 of the Code of Civil Procedure of the Russian Federation it follows that the dispute, related to the ownership of the property foreclosed, declared by the persons who did not take part in the case, is considered by the court according to the rules of the proceedings. Moreover, in the second paragraph of this rule, it is prescribed that claims for the release of property from arrest (exceptions from the inventory) are made against the debtor. In part 1 of Art. 442 of the Code of Civil Procedure of the Russian Federation, among other things, it is recorded that if the bailiff-bailiff

makes a violation of the federal law during the seizure of property, the debtor's application to cancel the seizure of property is considered by the court in the manner provided for in art. 441 of the Code of Civil Procedure of the Russian Federation. These provisions clearly indicate that they apply only to the scope of the law on enforcement proceedings, but not in the scope of the law of criminal procedure. This confirms, in particular, the wording of the law, such as the "release of property from seizure", "exclusion of inventory," "the debtor", "creditor", which is characteristic of the terminology of the Federal Law on 02.10.2007 number 229-FZ "On Enforcement Proceedings" (hereinafter - the Federal Law "On Enforcement Proceedings") (Article 39, 80, 104, 119.), And taken to its implementation of departmental acts. In addition, from part 1 of Art. 119 of this Federal Law, it follows that in the event of a dispute related to the ownership of the property foreclosed, the interested parties are entitled to apply to the court for the release of property from seizure or exclusion from the inventory, which once again confirms the idea that there are no grounds For the application of art. 442 of the Code of Civil Procedure of the Russian Federation for criminal procedural legal relations. Among other things, this is evidenced by the p. 51 Resolution of the Plenum of the Supreme Court number 10 of the Plenum of the Russian Federation № 22 from 29.04.2010, by which th disputes the release of property from seizure are considered in accordance with jurisdiction over cases according to the rules of action proceedings, regardless On whether an arrest was made in order to secure a claim or in the order of foreclosure on the property of the debtor in fulfillment of executive documents. Thus, as can be seen from this explanation, joint plenums higher courts excluded previously contained position of Plenum Resolution of the Supreme Court of 31.03.1978 № 4 that the release of the assets and the arrest is carried out in civil law regardless of applied whether he is in pursuance of a decision *or judgment of the court, including in the framework of the preliminary investigation.*

This means that the other measure of procedural coercion we are analyzing is subject to cancellation solely in the course of criminal proceedings, all the more so when the provisions of Part 1 of Art. 119 of the Code of Criminal Procedure provide the right to apply to the court with a petition (including the cancellation of the seized property seizure or the removal of certain restrictions) and other persons whose rights and legitimate interests are affected during the pre-trial or judicial proceedings. In this connection, we cannot agree with the opinion of N.P. Kirillova and I.I. Lodyzhensky that the dispute on the release from seizure of property may be settled in civil proceedings, including pending resolution of the criminal case on the merits, in cases where the interest for us a measure of procedural coercion applied on the basis of Art. RF CCP 115 [18 , p. 197] . Controversial is smiling and inference Y. Elmasheva about that "if the arrest of appeal directed only to the definition, the establishment of civil rights and obligations related to the arrested property, the challenge, and, in fact, confirmation of property claims of a particular owner is quite admissible in civil proceedings" [19, p. 18]. We were also impressed by the attitude of N.V. Ostroumova, according to which a claim for release of property from seizure (exclusion from the inventory), in fact, reviewed judicial act to arrest without invalidating [20, p. 117] .

III. The legal position of the Constitutional Court of the Russian Federation

In the context of the above, the Russian Constitutional Court in its judgment of 29.06.2004 number 13-P rightly pointed out that "criminal procedure is an independent sphere of legal regulation and the legal form of criminal procedure relations is criminal procedure law as a separate branch in the system of legislation of the Russian Federation", and federal legislator has the right to set the priority of the criminal Procedure Code of the Russian Federation over other federal laws regulating criminal procedure. We note that we analyzed other court rulings implied that the courts in civil proceedings improperly released the property from under the Criminal Procedure arrest (including, referring to the invalid the previously mentioned Resolution of the Plenum of the Supreme Court of 31.03.1978 number 4, or by using its wording), and in the same judgment at all, it was noted that the court, stopping production in the civil case of withdrawal from the property of the criminal procedure of arrest, and referring to Art. 134, 220 RF CPC, Art. 115 Code of Criminal Procedure – limited L. in choosing how to protect his rights. Meanwhile, in the light of the above,

we call attention to the legal position of the Constitutional Court of Russia, expressed in its Resolution of 7/3/2017 number 5-P, according to which "the right of everyone to judicial protection of his rights and freedoms does not imply a choice of a citizen in its sole discretion method is only in and recourse procedures, particularly with regard to which certain types of proceedings and types of cases determined on the basis of the RF Constitution, federal laws". The study also found a case in which a higher court upheld and justified the judgment of a lower court for seizure of property, denying the appeal of MS, however, contrary to the foregoing, as well as the requirements of Art. 115 Code of Criminal Procedure, wrongly made a reservation, that "the issue of withdrawal of the arrest with the property may subsequently be resolved as an investigator, and the court when considering the merits of the case *or in civil proceedings*".

IV. About the necessity of perfection of civil and criminal procedural legislation. Thus, with regard to the above judicial practice in order to eliminate the contradictions in it becoming available, as well as based on their approach to the problems under consideration would have thought it desirable to supplement Art. 422 GIC RF footnote to read as follows *"This article does not apply to the use of measures of criminal procedure compulsion in the form of seizure of property under which the abolition of arrest on the property (or certain restrictions associated with it) is made only as in the manner prescribed by part nine of article 115, paragraph eleventh part one of article 299 of the Russian Federation Code of Criminal procedure"*. At the same time, we think it necessary to supplement para. 9 Art. 115 Code of Criminal Procedure by the following provision: *"Seizure of property is canceled in the case of an interested person, not bearing under the law material liability for suspect actions of the accused, the application and materials to it, confirming that the said property as the property belongs to that person, for the unless such coercive procedural measure applied in accordance with the third part of this article. The dispute over the property belonging particular person can also be resolved in the manner prescribed by the civil legislation, including on the basis of a court decision".*

V. The study of foreign experience of respective relations and practice of its application. Art. 23 of the Criminal Code of Kazakhstan of 31.10.2015 number 377- V, which entered into force on 1 January 2016, stipulates that the consideration in civil proceedings is not subject to claims for the release of property from seizure (exclusion from the inventory) in respect of the property of persons imposed: 1) criminal prosecution authority in the investigation of the criminal case ; 2) on the basis of the judgment (ruling) the confiscation of property, which specifies the items to be confiscated, as well as on the treatment of the income of state property illegally obtained or purchased with funds obtained by illegal means, as well as being a tool or means of committing criminal offense; 3) on the basis of a court ruling on the subject of the confiscation of instrumentalities or administrative offense. Of interest is the fact that the previously operated Criminal Code of 13.07.1999 number 411- I in the Art. 24 "Jurisdiction of civil cases to courts", and in Art. 240-6 "Protection of the rights of others in the performance of the solution" did not have a reservation that claims on the release of the arrest of the property (an exception and from the inventory) to be considered exclusively in the manner prescribed by Code of Criminal procedure 1997, however, the Kazakhstani judicial practice of applying the provisions of the civil procedure law (in the face of higher courts) clearly adhered to these regulations, despite their lack of official RK CPC 1999 give a concrete example of the application.

VI. Conclusion. Thus, we conducted a scientific study which has shown that the cancellations and the seizure of property takes place only in the framework of criminal proceedings and the existing jurisprudence which allows release from arrest is based on an incorrect interpretation and application of domestic law in civil proceedings.

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Библиографическое описание статьи Каштанова Н.С. К вопросу о допустимости гражданско-правового освобождения имущества от ареста, наложенного при производстве по уголовному делу: отечественный и зарубежный опыт / Н.С. Каштанова // Правоприменение. – 2017. Т. 1, № 3. – С.190-200 . – DOI: 10.24147/2542-1514.2017.1(3).190-200.	***Bibliographic description*** Kashtanova N.S. To the admissibility of the civil law exemption of property from arrest, imposed in the criminal proceedings: domestic and foreign experience. *Pravoprimenenie = Law Enforcement Review*, 2017, vol. 1, no. 3, pp. 190-200 . – DOI: 10.24147/2542-1514.2017.1(3).190-200. (In Russ.).