

THE DIFFERENCE BETWEEN OLD AND NEW CLAIMS ALLEGED IN APPEAL

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ABSTRACT: *The transfer effect of appeals causes the claims to be transferred to the appeal court by all aspects and issues subject to verdict. According to the rule the range of appeals phase cannot be wider than the first phase. That is because the appeal is to judge again and this requires the higher level not to be judged more than what it is judges before. It is forbidden to bring up a new claim in the appeal phase in other words the appeals court judge cannot go beyond the first trial and the sentence review and the famous rule of prohibiting new claims in the appeal process should be followed. The involvement of the persons other than the parties involved in the initial stage is prohibited according to the rule and except in stipulated cases in the law will be accepted. This Article is predicted in 357 Civil Procedure Code.*

Keywords: *Claims, New Claims, Appeals, Transition Effects, Old Claim*

INTRODUCTION

Since the Court of Appeal is obliged to examine the issues that have been addressed by the initial court therefore the change of legal proceedings seems irrational. In fact, presenting a new claim in the Court of Appeal is against the two-level hierarchy foreseen in the law for the purpose of selection the related authority and avoidance of congestion and overcrowding in state superior courts. This research is important because it answers a main question in the civil procedure regarding how it is possible to distinguish new and old claims and identify them. The purpose of this research is to define a suitable solution for the judges of the courts of appeal.

1 IDENTIFYING THE LAWSUIT, CLAIM, REASON, PROOF OF A CASE AND THE NATURE OF THE APPEAL

1.1 lawsuit

Lawsuit is sometimes known as the claim which means the claim that is not alleged in the judicial proceedings or claims that during the verification of a quarrel is considered as a subordinate case; the lawsuits follow Article 142 of the New Law which provides: "... barter, peace, termination, refusal to defend claims... and so that are discussed ... for defend [1].

1.2 Claim

In jurisprudence: claim is known as to the prove declaration of someone in the position of having knowledge about the possession of a right over another in the attendance of the judge in the Judiciary House. The legal definition of claim is not different from the religious jurisprudence as it is said: claim includes a legal action whereby plaintiff presents a plea or claim in the court before a judge for sentencing and adjudication.

1.3 The reason

Whatever that convinces the conscience of the judge is called the reason in the science of law [2]. According to article 194 of the Civil Procedure Code enacted in 2000 "the reason includes the fact that the parties refer to in order to prove or defend the claim".

The right which is claimed but not proven is the same as the right that does not exist in the law, thus the importance of the reason is as far as hiring notes "the reason is the

value of the right" which means that the right in the absence of reason is like worthless merchandise or as pinion states "the reason makes the right alive" [3].

1.4 Lawsuit prove

Whenever believes to have a right over someone else he should prove it. The level of having knowledge about anything is called the prove level. In terms of procedure to prove means to bring reason for a claim based on the sequence of the effects. In other words, proving means the effect sequenced on a reason.

The means of proof are considered as the components of the reasons to prove the claim and these means based on some doctrines are of direct specific sense (confession evidence, etc.) that are not known as the same sense in the civil procedure law, however in the Civil Procedure Code (Articles 269-248) and the Civil Law (Section 4, Article 1258) are called as indirect general reasons (specific judicial emirate's). The means of proving a claim are the means used by the litigants to prove their claims through using the specialists and experts opinion in technical matters or local informants' information and witnessing the status of the dispute by the magistrate court.

1.5 Definition and Nature of Appeal

Court judges are not free from mistakes in the performance and despite the scientific and performance discipline they might be the origin of ignorance and uncertainty like all human beings. So for litigants the legal guarantees are needed so that using this insurance the party that he verdict has been issued against him wholly or partially would be able to object the verdict. The appeal is addressed by the same court that has investigated the claim or by the higher courts and references. On this basis, we can say, the ways to appeal a verdict are either derivative or rectificatory (Amendment) in the derivative case the appeal is performed by the same that issued the sentence which is obliged to handle and address the sentencing. As this court might refer to the previous verdict in appeal it is called the derivative, like protestation, fixed object and restoring the hearing in the case of rectificatory (Amendment) is performed by a court or higher reference in which the new decision may be different from the former one [4] such as appeal. There is another classification of objections of the verdicts based

on which the objection of the rule is divided into the general and extraordinary. Using the common (general) objections is free from any specific conditions. Unlike the common way, the extraordinary (unique, proprietary) way is not usually open to the litigants unless by the limited constraints within which the law is predicted. In other words using the extraordinary cases needs the legal violation or providing provisions that are predicted in the law and as long as the conditions required by the law are not obtained it is not possible to use this condition and ask for the appeal [5]. Some of these conditions are the third objection, appeal and retrial.

Common ways to complain a verdict delay the execution and have the suspension effect. Based on the paragraph 1 of article 306 New Civil Procedure Code "If the actual notification to the sentenced person is not possible and the legal notification is used, that notification shall be valid and the absentia rule will be enforced after the expiration of the moratorium". Also in accordance with article 347 NCPC "The appeal to reconsider the appealable verdicts that have recognized in the law would prevent the execution, although the court which issued the final verdict had announced it as final unless in some exceptions made by the law". In contrast the extraordinary ways do not necessarily suspend the implementation procedure. In other words, if under one of the conditions of the extraordinary way including third objection, appeal and retrial leads to the appeal the execution will not stop unless under the conditions prescribed by law.

1.5.1 The concept of transitional effect of the appeal

Appeal is one of the normal channels of objection of the verdict and it is eligible to the transition effects. The transitional effect of the appeal means that by the means of the appeal the case is transmitted from the lower court to the Court of Appeals with all subjects and related rule. In fact it should be mentioned that the appeal is the rejudgement and the audit and review of the rule of the lower court and the Court of Appeals must read analyze and re-examine the subjects, ruling and the protests of the appellant and the answer of the reader [6]. The Court of Appeals has the total authority over the present claim and can analyze it in all senses as the lower court, and order and rule in all its issues including the issue of subject, tax and the rules. The appeal investigation is not limited to the violation and break such as the penal investigation. The court, which handles objections, is capable of ruling the first order and it can reduce the initial order and prescribe a new sentence [4]. In this regard Article 358 of the new law holds: "If the appeals court considers the appellant's claim legitimate, it voids the initial rule and issues the appropriate sentence. Otherwise it rejects the appeal and approves the rule and refers the case to the lower court". Therefore the appeals court has the total authority over the assigned issue and it can make the attributed decision.

Since it is possible to issue a new reason in the appeal, the appellant can provide new reasons to approve his claim. So if the appellant provides new documents to prove his claim and the appealed remonstrated the authenticity of the document the court of appeals can issue the investigation to

verify the authenticity of the document. Therefore all the actions taken by the lower court to establish the issue the Court of Appeals is capable of performing the same actions. The Court of Appeals conducts the re-judgment through the audit and review of the lower court actions. Therefore, if the Court of Appeals determines that the lower court had the react perception of authenticity of documents, and their provisions are invoked, and the investigations of the witnesses was necessary and proportionate, and the discovery of the local paper and the examination was appropriate and they are performed properly and ... and finally it has implemented the issue under discussion properly, the Court of Appeals avoids to repeat the actions of the lower court and rejects the claims of the appellant and verifies the result of the lower court [6].

The Lawmakers in Article 332 NCPC has predicted the appealable dictums. The dictums counted in this article are among the decisive case dictums and they are only appealable if the verdict on principal case is appealable. These dictums include: petition annulment, petition rejection made by the court, lack of hearing, abandonment case, the lack of capacity of one of the parties predicted in the (A) to (D) paragraphs of Article 332. Therefore the lawmaker has not announced the preliminary dictums as appealable. What is certain is that these dictums are not appealable independently.

But, since to the court order may be issued based on one of the preliminary dictums or as the result of the implementation, if the dictum is appealable, the appellant can beside appeal the ruling to the appeal, make an objection against the preliminary dictum the result of which is among the directed reasons of the rule.

For example, if the lower court rule is issued based on the expert opinion the accused can make an objection in appealing the verdict referring to the fact that the point referred to the expert did not have the negative and technical point and the reason of his conviction is referring this problem to the expert so that the Court of Appeals would handle the case without referring to the expert's opinion (discrediting the dictum) [6].

In case of the decisive dictums, the Court of Appeals may derogate the rule due to the lack of jurisdiction of the lower court. In this case based on the Article 353 of the new law if the dictum rises the appeals rule and the Courts of Appeal finds it against the law it annuls it and refers the case to the court which issued the dictum.

Another issue is that whether the extraordinary ways including appeals and rehearsal justice meet the transition effect. In case of the Appeals it should be noted that unlike the appeals (revision) the filed appeal does not have the transfer effect. It means that it does not transfer the case to the Supreme Court with the same order addressed in the lower court not all matters and legal issues are raised in the Supreme Court, the Supreme Court can implement the inspect and monitor only on the issued raised and the issues considered as violations. But the nature of the dispute cannot be entered [4] because the appeal is not a "stage of the proceedings" in which the essential proceedings is performed such as the primitive stage or court of appeal but

it is a "regulatory process" in which the Supreme Court reviews the judgments of the lower courts.

Therefore Appealing lacks the transition effect. Obviously a new claim in the Supreme Court is not permitted. In the appeal stage although there is transfer effect but new claims will not be accepted and it should be permitted in the appeals level not only the new claims are permitted but also providing new evidence and reasons are prohibited as well.

1.5.2 the range of transition effects of the appeal and the possibility to limit it

Appeals have transition effects. However, due to the transitional effect causes the case to be referred to the Court of Appeals by all its aspects but the range cannot be wider than the lower level. The Court of Appeals cannot be involved in the issues more than the ones addressed in the lower court. Secondary Judges are not involved in the issues discussed by the initial judges. To determine the effect of the transitional appeal in each case the appeal of the sentenced (appeler) must be noticed.

The Court of Appeal addresses the case based on the appeal and the objections listed in the petition. The appeler can direct his objection against a part or the whole first rule [7]. Article 349 NCPC mentions: In the Appeals section only the part being appealed and ordered in the lower court will be addressed. However, if in the lower court the subjective examination is not performed and no order is issued, the court of appeal is not authorized to address the issue subjectively because the higher competence of the higher court over the lower court is inherited and the higher court does not have the jurisdiction to address this case [8].

Therefore, if the appeals does not addresses certain parts of the verdict; the transitional effect acts on whatever being sentenced in the lower stage and if some certain parts of the verdict are addressed the appeal will be restricted to them. The transitive effect is not transferable to all subject matters and its effect can be limited to the rule known as "Tantumdevolutum quantum appellatum" [4]. The use of this rule means that the appeals only have the transition effect only within the areas contented in the petition". Limiting the transition effect of the appeal is possible everywhere but in cases that the sentenced items in the initial rule are not separable i.e. Such that objection to one part requires the indirect objection to another part. For example if someone is sentenced to pay the amount of principal and minor, appeals and wants to change it into money his appeal is necessarily includes the minor as well.

2 Differences between new claims and the old claims in the appeals

The new claim is a claim that following the previous case one of the parties raises a new claim linked to that first one, which must be related to that otherwise it will be independent. The NEW claim is the one which is not recorded in the lower court and it is raised for the first time as the Court of Appeal [9]. In fact a claim is deemed as NEW when one of the principles (the parties, the subject or the cause) is different from the initial claim raised in the lower stage. About the claim being old or new, it must be referred to the recovery of the claim in principle which means that the old claim addressed in the lower court is

considered as the old claim in term of time. The old claim means the claim that has been investigated in the lower court and it is not presented in the Court of Appeals for the first time. In fact claim is deemed as old if it is not different from the claim raised in the lower court.

Under the current French system classification the new claim is the one that changes the parties, their condition or the subject of the claim, in contrast a simple change in the claim, reasons or the causes of the rule in the content listed in Article 565 of the mentioned Act (Article 464 CPC former France) does not attribute "newness" to a claim Article 565 stipulates that, if the new claims have the same purpose followed in the lower stage, they are not considered as the new claims even if their legal principles are different.

A claim may be considered as new under some credits: A) the validity of the cause and origin of the dispute: For example, an object might be deemed as the loan but in the appeal it is considered as the deposit. B) Demanded Credit C) The change in the parties of the claim. The new claims should not be confused with new reasons. The reasons are the facts used to prove the claim of the plaintiffs and the prescribing the claim rights. Presenting new reason is not only allowed in the appeal but is necessary.

Article 362 of new law mentions cases in which raising a new claim is possible and regarding these claims the plaintiff has a right to refer to new reasons based on the new claims raised to defend himself.

For example, under paragraph 1 of Article 362 charging the same cost the price of which was ordered in the initial stage of asking the price of the object discussed in the lower rule is not a new claim and it can be raised in the court of appeals. For example, the initial plaintiff may ask the same item that has asked its price in the lower stage and he can provide the new reason to prove his right. Also the lower defendant can refer to new reason to defend himself.

But other than those mentioned above, the plaintiff cannot bring reasons for a claim not mentioned in the initial stage which is a new claim and it cannot be raised in the appeal because when a new claim is forbidden in the appeal stage presenting a new reason to defend it is impossible.

2.1 The possibility of new claims in appeal by the parties to the dispute and third parties

New claim in the appeal stage is raised by the litigants (the appeler or appealed) or by the third party.

2.1.1 Possibility of new raising claims by third parties

Pursuant to Article 130 of new law the third party can enter into the claim in the appeal stage before the end of the hearing. The exception is prescribed by the law due to the following reasons: First: The case is among the branches of the main claim and the related appendix and obviously the court that has addressed the original claim, can address the appendix easily. Second: Adopting this case involves the preservation of the individuals' personal rights, and preventing inconsistent verdicts and waste of time. Since the involvement of third parties in the case is for contribution or taking part in defends, that is why their involvement in the case contributes to find the truth and facilitates solving it [4]. The license of entering the third

party into the appeals does not include his negligence about the lower court prosecution and even if he represents one of the parties in the lower court according the Article 130 of the corresponding lay can be introduced to the appeals as the third party originally, therefore the entrance of the person who had the guardianship of a minor is permitted into the appeals as the third person [6].

Article 135 of the new law provides: each one of the litigants that require the attendance of a third party shall express his reasons and obtains the approval of the court within three days after the session either in the lower or the Court of Appeals. In the case of third draw the litigants of the case (major parties) draw a third party into their claim in case that they are afraid that after the end of the case the rule issued on them would be related to the rights of that person and he would deny that rule or perhaps appeals to that rule as the third party [4]. In the third draw unlike the entry of third parties, the litigants are interested to force someone into the case who is out of it and probably he does not want to enter the case. Such as the case that someone has bought a house and the other party who is the owner of the house raises the case the buyer who is the defendant draws the seller of the house into the case to answer the plaintiff. Usually drawing the third party is performed by the defender but this does not mean that the plaintiff is incapable of drawing the third party but the plaintiff may draw the third party for example when someone believes to have the assistance right in a property and raises a case against the owner and in the proceedings notices that he is not the owner of six dengue, hence he draws the rest of the owners so that he would share them in the case and the issued decree will be enforced against all owners [10].

2.1.2 the possibility of new claims by the parties to the dispute

Article 362 of the New Law stipulates "the new claim is not heard in the appeal. However the following cases are not considered as new claim.

Price asking of the judgment debt the item of which was the subject of the lower rule or asking the same thing the price which was discussed in the lower court.

The claim of rent and the rest of it as installments and the fair equivalent remuneration and the debts the maturity of which is discussed in the lower court prosecution and other miscellaneous such as damage that is bestowed to the claim during the prosecution or after the rule and the time of which is matured after the verdict.

The change of the demand from the specified rent into the fair equivalent remuneration and vice versa.

Pursuant to paragraph 1, Article 362 of the New Rule asking the price of the judgment debt the exact items is the subject of the lower court verdict is not considered as a new claim in the appeal. For example the usurper should return the property of the usurped as the original item and if the original item is damaged, he should pay the price of the similar item and if he rejects to return the original for any other reason he should pay a substitute.

Pursuant to paragraph 1 Article 362 of the New Law claiming the cost of an original item that is ruled in the initial phase of the judgment is not considered as an appeal.

For example in the lower petition the plaintiff asked the price of a pair of Kashan rugs which was rejected by the lower court but then during the prosecution he notices that the defendant has a pair of rugs and he asks for the pair of the rugs in the appeal.

In accordance with paragraph 2 Article 362 of the New Law and considering the upper part of the law The claim of rent and the rest of it as installments and the fair equivalent remuneration and the debts the maturity of which is discussed in the lower court are not considered as a new claim and they are allowed to be discussed in the appeal, Pursuant to Article 142 of the New Law (Article 285 former Law) "The claims of purchase, peace, termination, and so that are raised to defend the main claim are not considered as the counterclaim and there is no need to file a separate petition."In accordance with Article 18 "inclusion, barter or any other statements that is considered as defend are not Tari case". Therefore, if the defendant has asserted in his defense that the demand is cleared by the demand of the plaintiff or the deals is terminated or the signature in the document presented by the plaintiff is not his or the peace between the plaintiff and the defendant is forced to be terminated and... These are all considered as defends not new claims so they can be presented in the appeal session.

CONCLUSION

One of the effects of the appeal is the transmission effect which means that the claim with all the subjects and rules are transformed into the Court of Appeals. Therefore, the Court of Appeals has the complete power over the cases. With regard to the provisions of Articles 7 and 362 of CPC the issue has not been raised in the lower court and it is not investigated or adjudicated, its discussion is prohibited in the appeal. Therefore, the parties are faced with the limitation of discussing a new claim in the appeal. In fact a claim is considered new when of its basis (the parties, Subject, reason) is different from the claim discussed in the lower stage. The authority range of the Court of Appeals to discuss an appeal is determined by the petition of appeal of the sentenced and the rule of the lower court.

In the appeal stage, the plaintiff can use new reasons to prove his claim and the defender can use new reasons to defend him. However, the reference to new reasons is acceptable regarding the claims discussed in the lower stage. Also providing new evidences is permitted if to prove the rights and defenses that can be discussed in the appeal.

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