A first ranking mortgage does not prevent a creditor from accelerating loan maturity due to debtor insolvency

(Supreme Court Judgment no 382/2025 of 13 March)

An interpretation of Article 1129(1) of the Civil Code following Supreme Court Judgment No. 382/2025 of 13 March.

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1. The 'cassation' judgment

The judgment made on statutory appeal stated that the insolvency of the defendant borrowers had not been proven and that therefore forfeiture of the to-term benefit under Article 1129(1) of the Civil Code (when the debtor, "after contracting the obligation, has become insolvent, unless he guarantees repayment of the debt") was inappropriate. And it justifies it in this way: "... the mortgage securing the loan has not been cancelled and therefore subsequent registered seizures in no way affect it, so that as the lender is still the holder of the mortgage, the claim must be dismissed. The burden of proving insolvency falls on the party bringing the action based on insolvency, which has not been the case". The Supreme Court, in cassation, upholds this judgment.

It is case law contained in Supreme Court Judgment no. 39/2021 of 2 February, which

in turn refers to Judgment no. 432/2018 of 11 July, of the same court, that, when any of the circumstances envisaged in Article 1129 of the Civil Code (CC) occur, the creditor is entitled to demand full performance of the obligation. Maturity is not accelerated automatically, but an extrajudicial notice from the creditor is sufficient, and the creditor may then demand payment at court of the outstanding capital and the due and unpaid instalments if the debtor does not voluntarily comply. Among the cases that allow the creditor to accelerate the maturity of the obligation is the debtor's supervening insolvency (Art. 1129(1) CC). The precept does not require a prior adjudication of insolvency (Supreme Court Judgment no. 698/1994 of 13 July), and it is sufficient to establish the lack of regular fulfilment of the enforceable obligations (*cf.* Art. 2 of the Insolvency (Recast) Act).

The creditor may accelerate the first ranking mortgage loan, even if he has not yet enforced the security

In the event of loss of debtor solvency after the obligation secured by mortgage has arisen, in order to avoid accelerated maturity it would be necessary for the debtor to *offer a new guarantee* against the default that has already occurred, without in any other case requiring the creditor to wait for the end date of the loan in order to enforce his claim. Indeed, Article 1129 CC refers to obligations subject to a term for their performance and must be understood to be applicable when consecutive terms for repayment have been established and there is a default of sufficient importance to reveal the lack of certainty of repayment. All the cases expressly established in Article 1129 (supervening insolvency, non-granting of the committed guarantees, reduction or disappearance of the guarantees) are based on the risk that they pose for the creditor to see his claim satisfied, a risk that will already have materialised when the debtor has defaulted on the consecutive payment of several instalments of the loan and does not proceed to repair the situation.

The facts established at first instance show that, when the creditor requested forfeiture of the to-term benefit, there was a manifest risk for the creditor of seeing his claim unpaid, insofar as the borrowers owed fifty-five overdue monthly instalments, i.e. they had not paid for more than four and a half years, and in addition had their assets mortgaged and seized. In Supreme Court Judgment no. 1111/2024 of 16 September, we considered that the requirement of debtor insolvency for the loss of the to-term benefit is clearly met in the case of insolvency proceedings, without, on the other hand, Article 1129 CC subordinating a finding thereof to prior adjudication of insolvency. In our case, it is clear that there has been a general default in payments which shows an impossibility to meet obligations as they become due. This is indicated not only by the non-payment of the fifty-five monthly instalments, but also by the claims that justified the executions on the defendants' property. In any event, the view taken in the

Mere aggravation of the insolvency already existing at the time of the creation of the charge does not allow for accelerated maturity.

judgment under appeal, which excludes the finding of supervening insolvency merely because the mortgage had not been taken out previously, is contrary to the case law cited, provided that the facts established, including the significant number of unpaid instalments, prove the risk of non-payment of the instalments pending maturity.

2. Conclusion

It is true that, if the creditor has a secured claim (even if the debt is covered by the "value of the security", i.e. the claim is *in the money*), the debtor cannot avoid the effects of the to-term forfeiture by appealing to the existence of that security because the guarantee referred to in Article 1129(1) (avoiding to-term forfeiture) must then be *another additional guarantee* Therefore, the "insolvency" referred to in the rule is not the personal insolvency of the secured creditor, but the insolvency which, under legal conditions, would affect the rest of the creditors and would be the cause of insolvency proceedings. That is to say, it would not even be necessary (contrary to what the Supreme Court judgment might suggest) for the volume of unpaid debts and the amount of the outstanding debt to generate a debt that could endanger the consistency of the mortgage. Correspondingly, it should also be noted that the "insolvency" that causes forfeiture of the to-term benefit must be "supervening" on the date of the creation of the guarantee. If the insolvency already existed at that time, the to-term benefit is not forfeited, even if time has made the insolvency greater. Finally, security may have lost value to the point of not covering the principal and interest on the debt; it should be noted that the creditor - except in the event of debtor insolvency in the first case of the aforementioned Article 1129 - cannot then request acceleration (unless the existing guarantee is supplemented) because the guarantee that is no longer *in the money* is not a "disappeared" guarantee in the terms of Article 1129(3), unless the "decrease" in the value of the guarantee comes from the guarantor's "own conduct". Is it a case of "own conduct" that the debtor has subsequently become over-indebted to third parties? No, because over-indebtedness does not affect the value of security, which continues to take precedence over all subsequent charges.