

Writ proceedings and irrefutability of writ

Nesipbala Kambarova, Saida Akimbekova, Kassym Kalmagambetov, Meruert Akimbekova

Caspian Public University, Seifullin Street, 521, Almaty, 050000, Kazakhstan

Abstract. Concepts, essence and procedural features of writ procedure and writ are studied in introduction to article “and writ”. Author defines distinctive features of writ proceedings that make it different from legal proceedings and writ from court decision and analyses such concepts as “contest about law”, “indisputable requirements”, “absence of denial from debtor part”. In main body author explain the essence of simplified form of legal proceedings and writ proceedings. In the conclusion author recommends to make changes to the structure of writ and to issue relevant law to give writ the irrefutable status and thus prohibit repeating proceedings of request of interested person already examined by the way of writ proceedings by the way of legal proceedings.

[Kambarova N., Akimbekova S., Kalmagambetov K., Akimbekova M. **Writ proceedings and irrefutability of writ.** *Life Sci J* 2014;11(6s):456-458] (ISSN:1097-8135). <http://www.lifesciencesite.com>. 95

Keywords: simplified proceedings, writ proceedings, writ, irrefutable requirements, contest about law.

Introduction

Writ proceedings and writ are different concepts because the first defines the type of proceedings and the second is court order regarding the requirement [1]. It is necessary to make brief review of writ proceedings before defining the idea of writ.

The main distinctive feature of writ proceedings is the absence of the contest about law. In other words this order of civil case examination of called irrefutable. In solving the problem of the presence of contest about law demand may be examined by the way of legal proceedings [2].

As the absence of contest about law in writ proceedings is the one of the distinctions of the essences of court order and writ it is necessary to define what the contest about law is.

According to A.M. Nekhoroshikh contest about law is disagreement between parties of protective legal relationship in the problem of rightfulness and the object of assertion of right [3].

According to N.K. Myasnikova the idea of the contest about law should not be identified only with disagreements of its parties because there may be no disagreements and inconsistency between opinions and persons may not only actively object the requirement but also decline to fulfill his (her) duties [4].

One should agree with M.M. Nenashev that “contest about law being complicated legal composition comprises two legal facts: claim of one person and non-fulfillment of it by the other person” [5].

In this proceedings understanding of the absence of the contest about law from legal point of view more likely presumes absence of denial from obliged part. In other words absence of the contest

about law means the situation when debtor does not deny his (her) duty although does not fulfill it actively. The term “contest about law” as well as “absence of the contest about law” is not applicable to writ proceedings. In this case it is more reasonable to speak about the absence of denial from defendant [6].

Main body

Writ proceedings in essence is simplified form of civil justice resulting from legal proceedings that becomes possible according to the law, effected by judge singly without summoning parties and without taking minutes of judicial sitting that is ended in issuing if writ that has the power of executive document [7].

According to E.G. Streltsova simplified justice as it follows from the term itself renounce in the first place strict procedural form. But procedural form is not just meaningless mechanical order of actions and it is not end in itself of civil justice [8].

According to L.A. Gros writ proceedings is not justice: there is no civil case, there are not parties respectively, no court examination and court order [9].

It is doubtful that writ proceedings are beyond the boundaries of justice is doubtful. Simplified procedure does not allow speaking about court examination but at the same time it represents a certain procedural order. Writ is issued regarding the essence of the claim basing on application of substantive law norms and is an act of law protection. At the same time writ proceeding should be understood and further developed as an alternative not to civil legal proceedings in general but to its full-scale character [10].

Penalty imposed on the base of properly finalized document usually in public order relies on the postulate that if a document is being finalized in legal order debtor providing it has sentenced himself (herself) to payment. These orders are issued without summoning debtor and are aimed on support of the mechanism of compulsory fulfillment that is nothing else than an order for executive powers actions.

It should be mentioned that there is procedural specifics of an order of court order issuing. There are the following:

2. writ is issued without court examination and summoning of parties to provide explanations on the essence of claims;

3. writ ceased to be mandatory for debtor part in case the latter appeal to the court regarding fulfillment of the writ;

4. writ may be canceled by court that issued it;

5. if debtor does not provide objections regarding fulfillment of writ after 10 days the judge provide recoverer second copy with official stamp for presenting it for fulfillment;

6. writ may be appealed only in by the way of review proceedings.

As law strictly defines, writ is a decree of a judge on a debt collection or demand for movables from debtor according proved by law demands of a recoverer that has a power of executive document. Writ is not issued on any other demands for example of non-material character.

V.I. Reshetnyak considers writ as unmotivated court order issued on the behalf of the state in cases presumed by law, that impose a certain behavior for obliged person for recovery or protection of violated civil rights and protected by law interests based on documents provided by applicant and the fact of the absence of a debtor's denial that has procedural value [11].

As G.L. Osokina thinks that the legal nature of writ is analogous to those that court decision has [12]. This point of view is questionable because court decision is made after proceeding and solving of the case in essence, i.e. after the stage of court examination. In writ proceedings there is no examination stage.

G.L. Osokina said "content of writ as procedural document is non-occasionally (art. 146 of CPC RK) the light copy of introductory, motivating and resolute parts of court decision" [13].

One should agree with S.K. Zaiganova that simplification of court procedures should not be achieved by simplification of content and forms of legal acts. So it is necessary to introduce the rule of obligatory motivating of writs. Judge should point out not only the norm of applied law but provide

assessment of evidence and the reasons of passing writ [14].

On initial stage of proceedings writs just the project of resulting court order that is finalized in this form for acceleration of proceedings due to high degree of evidence reliability provided by recoverer [15]. It became the act with the power of court decision only after its approval by court (it is expressed by presenting the writ to recoverer) when actual facts of the case are checked.

According to O.N. Zdrock up to this moment writ in its legal consequences has the same value as in other types of proceedings initiation of proceedings because it testifies that there are the reasons for case examination by the way of writ proceedings [16].

Conclusion. Writ is authoritative order of a court of original jurisdiction issued on the base of demands of material character according to legally set procedural form by judge singly in decision room that contains final conclusion and being executive document.

Resume

Writ proceedings now is simplified type of proceedings and writ is an order of a court of original jurisdiction that legally has the same power that court decision but in practice is not those because writ has no irrefutability quality. To add writ the power of court decision it is necessary to make corrections to the article 146 of CPC RK, namely define the parts of writ (introductory, descriptive, motivating and resolute) and their content. Legal demand for motivating part and the motivating feature respectively allows avoiding repeated examination claimed by the way of writ proceedings by person concerned by the way of legal proceedings.

Corresponding Author:

Dr.Kambarova Nesipbala
Caspian Public University
Seifullin Street, 521, Almaty, 050000, Kazakhstan

References

1. writ. Date Views 03.12.2013 www.legal-dictionary.thefreedictionary.com/writ.
2. Paterson, T.J.M., 2010. Eckard's Principles of Civil Procedure in the Magistrates' Court. Juta.
3. Neckhoroshikh, A.M., 2004. Writ as a form of protection in civil proceedings. Arbitraty and Civil Process., 3: 3-6.
4. Myasnikova, N.K., 2002. Suit types in civil proceedings. Saratov: Saratov State Law Academy, pp: 92.

5. Nenashev, M.M., 2006. To discussion about the essence of contest about law. *Arbitraty and Civil Process*, 3: 4-16.
6. Peté, S, 2011. *Civil Procedure: A Practical Guide*. 2 ed. Oxford University Press,
7. writ. Date Views 03.12.2013 www.legal-dictionary.thefreedictionary.com/writ.
8. Streltsova, E.G., 2005. The autonomy of will and procedural form. 8. *Civil proceedings reformation in court of original jurisdiction in the states of Baltic states and Central Europe*. Oxford University Press: 222-224.
9. Comments to civil procedural code of RF, 2003. Moscow: TON - DEKSTRO, pp: 864.
10. "Glossary of Terms", Shelby County Criminal Court Clerk, s.v. "capias", retrieved on 30 Jun 2009:
11. Reshetnyak, V.I., 1996. Orders of a court of original jurisdiction on civil cases, PhD thesis, MSU, Moscow.
12. Osokina, G.L., 2007. *Civil proceedings*. Special part. Moscow: Norma, pp: 960.
13. Zagainova, S.K., 2006. Improvement of norms on court acts in SPC of RF. The problems of suit and suit form of violated rights protection, *Kuban State Agricultural Unoversity* (issue 4444), pp: 68-69.
14. Stein, Jacob. 2012. Collecting on judgments. Retrieved February 23. www.maximumassetprotection.com/publications/whitepapers/Collecting-on-Judgements.pdf.
15. Zdrock, O.N., 2004. Stages of writ proceedings (comparative analysis of CPC of RG and Belarus). *Innovations of civil procedural law, TC Velbi* (issue 4444), pp: 140-148.

4/24/2014