NO. V / 2001-2002

ISSN 1301-2746

ADALYA

SUNA-İNAN KIRAÇ AKDENİZ MEDENİYETLERİ ARAŞTIRMA ENSTİTÜSÜ
SUNA & İNAN KIRAÇ RESEARCH INSTITUTE ON MEDITERRANEAN CIVILIZATIONS

ADALYA

SUNA-İNAN KIRAÇ AKDENİZ MEDENİYETLERİ ARAŞTIRMA ENSTİTÜSÜ YILLIĞI
THE ANNUAL OF THE SUNA & İNAN KIRAÇ RESEARCH INSTITUTE ON MEDITERRANEAN CIVILIZATIONS

Yazışma Adresi / Mailing Address
Barbaros Mah. Kocatepe Sk. No.25
Kaleiçi 07100 ANTALYA-TURKEY
Tel: 0 (242) 243 42 74 • Fax: 0 (242) 243 80 13
akmed@akmed.org.tr
www.akmed.org.tr

Yapım / Production
Zero Prodüksiyon Ltd.

ISSN 1301-2746

Vehbi Koç Vakfı

İçindekiler

ADALYA V, 2001-2002

The Judgment on the Elmalı Hoard

Sait GÜRAN*

According to Articles 4 and 5 of Law No. 2863: The State has "absolute right of immediate possession" and sufficient "proprietary interest" on movable cultural properties requiring protection that are known to exist or may be discovered in the future.

The Elmalı Hoard[1] was excavated at a site near Elmalı in the southern Anatolia region, without permission, sometime around April 1984 and shortly after the excavation it was smuggled abroad and sold. The Hoard, as a collection, consists of approximately two thousand ancient Greek and Lycian coins, dating from the 5'th Century B.C. and includes fourteen decadrachms, a rare group of the highest denomination of classical Athenian coinage.

The Republic of Turkey, with the opinion and claim that the Elmalı Hoard is the "property" of the Republic, sought to recover the illegally excavated Hoard, in an "action of replevin" and "action for conversion", filed in December 1989, against the defendants[2] who acquired possesion of the Hoard, after it was smuggled out of Turkey. This case was reviewed by and heard before the United States District Court in the District of Massachusetts, in Boston.

The Republic of Turkey, as the plaintiff, claimed and based her case upon the thesis that according to Turkish law, which was the applicable law (Law No. 2863) in this case, all antiquities found in or on public or private lands in Turkey "are State property"; therefore she had a sufficient "proprietary interest" in the Hoard to have standing sufficient to open and prosecute this civil action.

The defendants, who purchased the Hoard from antique dealers in Germany, on the other hand, built their case on the ground that the basic change done by Article 5 of the Law No. 2863 in the final wording of the phrase defining the State's interest and right in antiquities[3] and Articles 24, 25, 64 established a new regime providing that antiquities "are

---

* Prof. Dr. Sait Güran, Istanbul University, School of Law, Department of Administrative Law, Beyazıt-Istanbul.

Expert witness – with Professor Bilge Umar - of the Republic of Turkey, as pointed out in the opinion of the Court.

1 In words of Mr. Özgen Acar: "The Hoard of the Century" (Cumhuriyet, June 12, 1994).

2 Oks Partners, Jonathan Kagan, Jeffrey Spier, William I. Koch, Spring Creek Art Foundation Inc.

3 Pre Law 2863 wording: Antiquities "**are State property**" (Devlet malıdır); Law 2863/Article 5: "**have the quality of State property**" (Devlet malı niteliğindedir.).

not State property; the landowner - finder **is the original owner** of antiquities"; consequently, the Republic of Turkey does not have proprietary interest in the Hoard.

The District Court, after reviewing the briefs exchanged by and between the attorneys of the parties, legal opinions submitted about Law No. 2863, with special reference to and focus on the "right of the Republic of Turkey, the State, on antiquities" by expert witnesses[4] and depositions taken and following a four-day hearing Judge Skinner ruled as follows:

Memorandum and Order on the Defendant's Motion for Summary Judgment on the Issue of Standing to Sue June 8, 1994.

In this action the Republic of Turkey seeks to recover a collection of antique Greek and Hellenic coins in the possession of the defendants which was illegally extracted from Turkish land in April 1984, smuggled out of Turkey in November 1984. The Republic refers to the stolen property as the Elmalı Hoard. It casts its claim under five rubrics:

(1) replevin under M. G. L. c. 247, § 7; (2) conversion; (3) violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq.; (4) violation of the Massachusetts Consumer Protection Act, M. G. L. c. 93A; and (5) breach of a constructive trust. The narrow issue raised by the defendants' present motion for summary judgment is whether the Republic has a sufficient proprietary interest in the Elmalı Hoard to give it standing to prosecute this case.

I held an evidentiary hearing to determine the nature of the Republic's proprietary interest under Turkish law. It is conceded that from the issuence of an imperial decree in 1906 up to the enactment of the Law on Protection of Cultural and Natural Antiquities in 1983 ("the 1983 law") ancient cultural objects, such as the coins in question, were the property of the state. They were referred to as "*devlet malıdır*" in the various controlling statutes, i.e. "state property". In the 1983 law they were referred to as "*devlet malı niteligindedir*", which is literally translated as "having the quality of state property". The Republic's two expert witnesses, professors of law at two Turkish universities, testified that the change in language signified no change in meaning. They offered in evidence a number of learned treatises to the same effect. Counsel for the Republic makes the very cogent point that even antiquities found on state-owned land are referred to as "having the quality of state property".

The defendants' experts, one American and one German professor of Turkish law, testified that the change in wording did effect a change from outright ownership to a lesser interest. Professor Baade expressed the distinction between (for instance) a car that has been purchased for the use by the police, which would be "*devlet malıdır*", and a car which was leased to the state for use by the police, which would be "*devlet malı niteliğindedir*". Even by the defendants' definition, therefore, the latter phrase embraces the right of possession. In view of this interpretation, in my opinion, any other distinction between these phrases is inconsequential in the context of this case.

---

[4] Expert witnesses for the plaintiff Republic of Turkey: Professors Wolfgang Wiegand, Ergun Özsunay, Bilge Umar, Ergun Özbudun, Tayfun Akgüner, Pertev Bilgen and Sait Güran; expert witnesses for the defendants: Professors Hans W. Baade, Christian Rumpf, Ali Ulku Azrak with Istar Tarhanlı and Metin Günday.

It is clear, as three of the four expert witnesses have testified, that persons learning of the existence of previously undiscovered "movable antiquities", such as the coins at issue in this case, must report the discovery to officials of the state within a specified time, and persons in possession of the antiquities are absolutely required to deliver them to the Ministry of Culture or an appropriate state museum, pursuant to Articles 4, 24 and 25 of the 1983 law, for purposes of evaluation and classification. If the Minister of Culture (or other qualified official) determines that the objects are deserving of protection by the state, the state keeps the objects, but pays a reward to the finder and the owner of the land where the objects were found, not to exceed the fair value of the find, as determined by state officials. This payment is specifically referred to as a reward, not as purchase money. See Article 64. This interpretation is confirmed by the plaintiff's experts and by the legislative history. If the state determines that the discovered objects are not worthy of state protection, they are returned to the finder, who is described as "the owner". If, however, the finder has not complied with the notice and delivery requirements of the 1983 law, the state may take permanent possession of the antiquities without the payment of any money at all, under Article 64 of the 1983 law, and indeed, the finder is liable to criminal penalties under Article 67.

The defendants argue that the Republic's interest is contingent upon the acceptance of the antiquities and the payment of the "reward". In view of the appropriation of such property from finders who do not comply with Article 4 of the 1983 law, however, this is an extremely doubtful proposition, notwithstanding the reference in Article 24 to the "owner" of property, which the state decides not to "purchase". In any case it is conceded that the Elmalı Hoard was never submitted to the state as required by Article 4, and the state would be entitled to keep it without payment if the state could secure possession of it.

If "title" is envisioned as a bundle of severable rights, the state has the biggest part of the bundle, and whatever attenuated rights remain in the finder depend upon strict compliance with the 1983 law. What is critical for the purpose of this case is that the Republic has an immediate and unconditional right of possession, which accrues immediately upon the discovery of the antiquities. This fact significantly distinguishes this case from the cases cited by the defendants.

The defendants offer a further theory that, despite a consistent policy of state protection of antiquities from 1906 to the present, there was an hiatus in the operation of the 1983 law which covered the period in which the Elmalı Hoard was unearthed. Anyone could take the Elmalı Hoard free of any restriction. This astonishing proposition is based on the fact that regulations implementing Articles 24 and 25 of the 1983 law were not enacted until August 1984, after the alleged removal of the Elmalı Hoard, and upon Temporary Article 2 of the 1983 law, which provides:

Within three months from the date the regulations related to this Act go into effect, natural and juristic persons, as well as collectors, can sell to the Government museums in accordance with Articles 24 and 25, the movable cultural and natural assets necessitating protection in their possession which specifying the origin of these assets; or they may take advantage of the provision of Article 24 of the Act by registering the assets in inventory books and by having them approved by the nearest museum.

Articles 24 and 25 and regulations related to them deal with the procedure for classification, evaluation and purchase of antiquities once they are submitted to the proper authorities. They in no way affect the substantive, immediate right of possession granted to the state by Articles 4 and 5.

Similarly, Temporary Article 2 does not derogate from the substantive obligations and rights established by Articles 4 and 5. Rather it appears to provide an inducement for persons who have acquired antiquities under circumstances, which they would rather not disclose, to bring themselves in conformity with the law without incurring possible liability, subject to a three months limitation.

Accordingly, it is my opinion that at all material times the Republic had, at the very least, an immediate, unconditional right of possession to the Elmalı Hoard. This is a sufficient interest to support an action of replevin, M.G.L.A. c. 247, § 7, and to support an action for conversion. *Evergreen Marine v. Six Consingments*, 806 F. Supp. 291, 296 (D. Mass. 1992). The other counts of the complaint may be vulnerable to dismissal for the various reasons assigned by the defendants. I do not consider these reasons at this time. The hearing was limited to consideration of the sufficiency of the Republic's proprietary interest in the Elmalı Hoard. On this limited point, I rule that the Republic had a sufficient proprietary interest, through its absolute right of immediate possession, to maintain all of the claims contained in its complaint. The defendant's motion for summary judgment based on the Republic's lack of a proprietary interest is accordingly denied.

Walter Skinner

United States District Judge

The Court, by ruling that the Republic of Turkey had standing to file this action of replevin, opened the gate for the Republic finally to recover possession of the coins unlawfully taken. As a result of this development, first, the defendants agreed to give the Elmalı Hoard back to its immediate owner, the Republic of Turkey, without further litigation, and secondly, the "Hoard of the Century" is being exhibited at the "Museum of Anatolian Civilizations", in Ankara.

Özet

Elmalı Definesi Kararı

2863 Sayılı kanunun 4. ve 5. maddelerine göre, varlıkları bilinen veya ileride meydana çıkacak olan korunması gerekli taşınır kültür varlıkları üzerinde, Devlet'in "doğrudan sahip olma mutlak hakkı" ve "mülkiyet hakkı" vardır.

1984 yılında, Antalya Elmalı civarında yapılan izinsiz bir kazıda bulunup yurt dışına kaçırılan ve iki bine yakın Yunan ve Likya parası ile İ.Ö. V. yüzyıla ait olan on dört dekadrahmiden oluşan Elmalı Definesi'ni, elinde bulunduran davalılardan, T.C. Devleti, "malik" sıfatıyla geri almak için istirdat davası açmıştır.

Davalılar, bu davada, 2863 sayılı kanunun, T.C.'ne, paralar üzerinde mülkiyet hakkı vermediğini, bu nedenle, ancak malın malikinin açabileceği istirdat davasını açmağa T.C.'nin "yeterli sıfatı"nın olmadığını ileri sürmüştür. Bu iddianın hukuksal temeli olarak davalılar, 2863 sayılı kanunun özellikle 5. maddesinde yapılan metin değişikliği ile madde 24, 25 ve 64'e dayanarak, yeni bir rejimin geldiğini ve bunları Devlet malı olmaktan çıkartarak, Türk Hukuku'nda, definenin "gerçek sahibi"ni, artık, arazi sahibi - bulan kişi ikilisi şeklinde değiştirdiği tezini ileri sürmüştür.

Türkiye Cumhuriyeti de, anılan değişiklik ile maddelerin, 1906'dan beri gelen kuralda anlam farkı yaratmadığını, 2863'ün de, Devlet'in malik olma hakkını kabul ettiğini ifade etmiştir.

Davaya bakan Boston İlk Derece Federal Mahkemesi, 8 Haziran 1994 günü verdiği kararda, davalıların tezini reddederek, T.C.'nin istirdat (geri alma) davası açmak için yeterli sıfatının bulunduğuna hükmederken, "**2863'ün hukuksal rejimini**" şu açıklamalarla ortaya koymuştur:

a) İmparatorluk Dönemi'nde yayınlanan 1906 tarihli Asar-ı Atika Nizamnamesi'nden 2863 sayılı kanuna kadar, dava konusu paralar niteliğindeki eski kültürel eserler, Devlet malı olmuştur; ve pek çok kanunda da, bunlar, "devlet malıdır" şeklinde ifade edilmiştir.

b) 1983 tarihli 2863 sayılı kanunda "Devlet malı niteliğindedir" yazılımı kullanılmış ise de T.C.'nin, Türk Üniversitelerinde hukuk profesörü olan her iki bilirkişisi, yetkin ders kitaplarını da kanıt göstererek, metin değişikliğinin, anlam değişikliği yaratmadığı beyanında bulunmuştur.

c) Dört bilirkişiden üçü, bulucuların, davadaki paralar gibi, daha önce çıkartılmamış olan taşınır eski eserlerin varlığını öğrenince, durumu, belli süre içinde yetkili makamlara bildirmek zorunda olduğunu; resmî makamların, bunları, korunması gerekli kültür eseri sayması halinde, Devlet'in bu nesneleri alacağını ve karşılığında, satın alma bedeli değil,

ödül vereceğini beyan etmiştir (Madde 4, 24, 25). Kanunun, gerekçesi ve TBMM'ndeki görüşmeler de bu yorumu doğrulamaktadır.

d) Önemli olan bir nokta da, bulucuların, 4. Maddede'ki bildirim ve teslim koşullarına uymadığı takdirde, Madde 64 gereğince, Devlet'in, taşınırın daimî sahipliğini, herhangi bir karşılık ödemeden edinebilmesidir. Nitekim, olayda, Elmalı Definesi, resmî makamlara, Madde 4 uyarınca hiç bir zaman bildirilmediği ve teslim olunmadığı, bu nedenle de, Devlet'in, defineyi ele geçirdiğinde, onu, herhangi bir ödemede bulunmaksızın edinebilme (istirdat) hakkının bulunduğu da kabul edilmektedir.

e) Son olarak, Madde 24 ile 25 ve ilgili yönetmelikler, bu paralar gibi eski eserlerin, yetkili makamlara teslim edildikten sonra yapılacak olan sınıflandırma, değerlendirme ve satın alma işlemlerini düzenlemekte olup; bu hükümler, Devlet'e, Madde 4 ve 5 ile tanınan "doğrudan mülkiyet hakkı"na, hiç bir şekilde dokunmamaktadır.