

# SUPREME COURT'S DECISION

delivered in Stockholm on 15 December 2021

Case no.

Ö 4545-21

## **PARTIES**

### **Appellant**

JV

### **Respondents**

1. Alektum Capital II AG

c/o Alektum Group

Box 11108

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Counsel: Attorney LN

2. Arvato Finance AB, company registration no. 556495-1704

c/o Gothia Inkasso

Box 1143

432 15 Varberg

3. Collector Bank AB, company registration no. 556597-0513

c/o Collector Bank AB, SCC

Box 11914

404 39 Gothenburg

Counsel: AC

4. Ifa Finance Dac, company registration no. 697313-1583

c/o Gothia Inkasso

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5. OPR-Finance AB, company registration no. 556707-7044

c/o Svea Inkasso AB

169 81 Solna

6. Qliro AB, company registration no. 556962-2441

c/o Lowell Sverige AB

412 93 Gothenburg

Counsel: AA

7. Resurs Bank AB, company registration no. 516401-0208

c/o Alektum Group AB

Box 11108

404 23Gothenburg

Counsel: Attorney LN

8. Sileo Kapital AB, company registration no. 556878-6403

Mailbox 1801

411 41Gothenburg

9. The Swedish Tax Agency

171 94 Solna

### **THE MATTER**

Attachment

### **RULING APPEALED**

Decision of the Göta Court of Appeal of 2021-07-12 in case ÖÄ 2415-21

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### **THE SUPREME COURT'S RULING**

The Supreme Court modifies the decision of the court of appeal and annuls the attachment of the HH 15:53 property and the mortgage deed on the property.

The Supreme Court affirms the court of appeal's secrecy order.

### **CLAIMS IN THE SUPREME COURT**

JV has claimed that the Supreme Court shall cancel the attachment of the HH 15:53 property and the mortgage deed on the property.

The Swedish Tax Agency has approved modification of the decision of the court of appeal.

Collector Bank AB has opposed modification of the decision of the court of appeal.

Qliro AB, Alektum Capital II AG and Resurs Bank AB have left the determination to the Supreme Court.

Arvato Finance AB, Ifa Finance Dac, OPR-Finance AB and Sileo Kapital AB have not commented.

The Supreme Court has decided that, until further notice, no measure may be taken to enforce the decision of the Swedish Enforcement Authority regarding attachment of the HH 15:53 property and the mortgage deed on the property.

## **REASONS FOR THE DECISION**

### **Background**

1. JV owns a property in Hanåsa outside Kalmar. The property comprises a residence for her and her children. For payment of JV's liabilities, the Swedish Enforcement Authority decided to attach the property and a mortgage deed on it. The district court and court of appeal have not modified the decision.
2. JV has stated that it cannot be deemed justifiable to attach and sell the property. She has referred to the fact that she has six children who live there, that several of them have special needs, and that it is not worth attaching the property for the limited surplus which a sale is estimated to generate.

### **The legal point of departure**

3. In principle, recourse may be had to all of the debtor's property by attachment provided it is not exempted by the exemption rules. As opposed to that which applies to cooperative housing and tenancy, a property may not be exempted from attachment as an exemption.
4. The fact that the matter involves a residential property may nonetheless be relevant when deciding whether the property will be attached and sold. As a

general rule, according to Chapter 4, Section 3, first paragraph of the Enforcement Code, it is a requirement that attachment is justified. Attachment may only take place if the amount that may be expected to be received, after deduction of costs that arise after attachment, yields a surplus that justifies the measure. In addition, according to the second paragraph of the section – with certain exceptions not relevant here – claims shall, in the first instance, be made against such asset which is attachable property as may be used for payment of the claim with the least cost, loss or other inconvenience for the debtor. Where there are various types of attachable property, real estate should, as a rule, be chosen last, particularly if it constitutes a residence.

### **What is at issue in the case**

5. The case primarily raises the issue regarding the justifiability assessment in Chapter 4, Section 3, first paragraph of the Enforcement Code in conjunction with attachment of a residential property and the relationship of the provision to the Convention on the Rights of the Child.

### **The justifiability assessment in conjunction with attachment of residential property**

6. The provision in Chapter 4, Section 3, first paragraph of the Enforcement Code according to which attachment must be justified is relatively flexible. The intention is to make it possible to take into account the circumstances in each individual case, e.g. the debt scenario, the character of the attachment and alternative courses of action, as well as the encroachment entailed in the attachment from a point of view of the debtor (*cf.* Government Bill 1993/94:50, p. 294 f.). According to the provision, attachment may, however, in principle, take place as soon as the amount expected to be received covers more than the costs that arise after the attachment.

7. This per se applies also to the issue of a residential property (*cf.* case NJA 2010, p. 397 I and II). In the event the provision is applied as a general exemption for residential properties, it would, in reality, entail that property was exempted from attachment to an extent greater than that which follows from the exemption laid down in the Act.

8. At the same time, the legislation proceeds on the basis of the view that compelling reasons are necessary in order to be able to attach a residence (*cf.*, also, Article 8 of the European Convention on Human Rights). It is relevant when a determination is to be made as to the order in which recourse shall be had to the debtor's property (see case NJA 2013, p. 1241) as well as when a determination is to be made whether attachment is justified in accordance with Chapter 4, Section 3, first paragraph. Accordingly, a small surplus may not always be sufficient in order for an attachment of the residential property to be deemed justified. The amount of the anticipated profit must be such that the attachment appears to be justified in light of the interests of the debtor or third party not to be driven from their home (*cf.* the "*Attached Residential Property*" case, case NJA 2018, p. 9, para. 11).

### **The justifiability assessment and the Convention on the Rights of the Child**

9. The Convention on the Rights of the Child is currently part of Swedish law. One notion in the incorporation of Articles 1–42 as law is to make clear that the rights under the Convention are to be taken into account in balancing considerations and assessments involving children; this also applies to existing legislation (see Government Bill 2017/18:186, pp. 74 and 86).

10. Within the context of the justifiability assessment which is to be made in accordance with Chapter 4, Section 3 of the Enforcement Code, consideration is to consequently be given as to whether the relevant attachment would be incompatible with the rights assured to a child in

accordance with the Convention on the Rights of the Child. According to Article 3 (1) of the Convention, the best interests of the child shall be a primary consideration in actions concerning children. An important aspect in this context is the possibility for the child to be able to grow up in a secure and stable home environment, the basic requirement which is expressed in several articles of the Convention.

11. A child's need to feel secure in life may thereby be deemed to be a legally protected interest subject to special consideration in the assessment of whether it is justifiable to attach a residential property. In addition, consideration was previously given to third parties in the application of Chapter 4, Section 3 in parallel with the debtor's interest in not being driven from the home. However, the Convention on the Rights of the Child has concretised and even, to a certain extent, enhanced the significance of a child's own interests in the assessment of justifiability. The best interests of the child are always to be investigated, taken into consideration and assessed.

12. Legal consideration in accordance with Chapter 4, Section 3 may lead to a situation in which the interests of the child must nonetheless give way. The fact that special consideration is to be given to the relevant child's need for security does not mean that it is always to be decisive in the justifiability assessment. It follows from Article 3 (1) of the Convention on the Rights of the Child that the child's best interests are to be balanced against other interests and rights. Inherent in the attachment-law legislation is that considerable regard is to be had to the creditor's interests in enforcement. The weight to be ascribed to this creditor's interest in an individual case depends primarily on the expected surplus in conjunction with a sale, but also circumstances such as other available enforcement alternatives, the amount of the attachment claim, and the importance of the attachment otherwise for the creditor.

13. In the assessment of whether, according to Chapter 4, Section 3, it is justifiable to attach a property in which a child resides, a child's own interest and protection of its home environment shall thus be balanced against the interest of being able to exploit the economic value inherent in the property in order to satisfy the creditor. In parallel with the interests of the child, regard shall also be given to the debtor's interest in the residential property not being attached.

14. This balancing of interests is not to be carried out in a standard way but, rather, the weight of the opposing interests may be assessed case-by-case on the basis of the circumstances at the time attachment becomes relevant. It is a responsibility of the Swedish Enforcement Authority to consider and closely investigate how much an attachment would interfere and the negative consequences it would have for a child.

#### **The assessment in this case**

15. JV's six children, of whom five were under the age of eighteen at the time of attachment, live in the house. Some of them have disabilities and special needs. By all appearances, the family has resided there for a long time, and the children have their friends and go to school in the area. JV has thoroughly described the substantial difficulties there are for them to find another reasonable residence for the family with a rent she can afford. The investigation shows that all children would be negatively affected to a high degree if they were torn from their habitual home environment. A forced sale of the property would be a clear departure from what is best for them. This fact is to weigh heavily in the justifiability assessment.

16. The current attachment pertains to liabilities totalling just over SEK 250,000 to nine different creditors, the Swedish Tax Agency and, principally, finance companies. The property, in which the house is in poor condition in certain respects, is valued at approximately SEK 700,000. After payment is



made to creditors with rights of priority, the surplus for the attachment creditors would be a little more than SEK 85,000 combined.

17. The only alternative to attachment of the property is garnishment of JV's salary. Currently, she is subject to a wage garnishment in the amount of approximately SEK 8,000 a month. In the event the property is not attached and sold, wage garnishment will need to continue for a long period of time, in excess of four years, in order for the attachment claims to be paid off.

18. A sale of the property would thus render in total a surplus of not more than just over SEK 85,000 for the nine creditors. When the best interests of children are affected, a greater surplus is normally required than is otherwise the case in order for the measures to be deemed justified. In addition, as regards most of the creditors, the surplus would only be sufficient to pay less than half of the still quite limited claims. In addition, the fact that the matter involves creditors who – depending on existing conflicting interests - may need to accept some delay in payment merits some consideration.

19. In a balancing the interests of the children in not being forced to leave their home environment and the interests of the creditors of now being able to exploit the economic value of the property, an attachment of the property cannot be deemed justified.

20. Accordingly, attachment of the property and the mortgage deed is annulled.

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Justices of the Supreme Court Gudmund Toijer, Ann-Christine Lindeblad, Dag Mattsson (reporting Justice), Eric M. Runesson and Stefan Reimer participated in the ruling.  
Judge referee: Anna Eberstål