**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 12 February 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Mushfig Bayramov*

**09 June 2011 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Rafael Qvaladze, Isa Nadjafov and Kamran Shafiyev (reporter judge),

with participation of the secretary I.Ismayilov,

representative of applicant Mushfig Bayramov, Javad Javadov,

representative of respondent body – Jafar Movsumov, adviser of the Department of Analytics and Systematization of Legislation of Staff of the Supreme Court of the Republic of Azerbaijan

examined in open judicial session via special constitutional proceedings the case on verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of 12February 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of M.Bayramov.

Having heard the report of Judge K.Shafiyev, speech of representatives of applicant and respondent body, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

From the complaint and materials of a civil case follows that by the order of R. Akhundov - director of state farm in Dzhalilabad area - No. 65/2 of 05.09.1993 and by the resolution of executive power of Dzhalilabad city as of 30.01.1994 Mushfig Bayramov was allotted the land plot of 0.06 hectares on the West side of the road leading to motel Goktepa to the address the city of Dzhalilabad, street 20 January, the plan of land-utilization of the land plot is developed and assigned to him. When in 2004 he decided to begin construction works, he knew that according to the order of the director of state farm (R. Akhundov) in Dzhalilabad area No. 26 as of 01.09.1995, the personal land plot of 0,06 hectares on South side of the house of Asker Feyruzov was allotted to Rufat Feyruzov.

M. Bayramov, having appealed to court of the Dzhalilabad area, brought the suit to R. Feyruzov and A. Feyruzov for restoration of his right of use on the personal land plot on the 20 January street of the city of Dzhalilabad, and cancellation of the order of the director of state farm - R. Akhundov of Dzhalilabad area No. 26 as of 01.09.1995. By judgment of the court of Dzhalilabad area dated 03.07.2007 the claim was satisfied.

By its decision the Civil Board of the Court of Appeal of Ali-Bayramli city (present Shirvan) (hereinafter referred to as the CB of the Court of Appeal of Ali-Bayramli city) dated 02.11.2007, upheld the judgment of court of the Dzhalilabad area as of 03.07.2007.

By the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the CB of the Supreme Court) as of 28.02.2008 the appeal of respondents R. Feyruzov and A. Feyruzov was satisfied, and the decision of CB of the Court of Appeal of Ali-Bayramli city dated 02.11.2007 was cancelled and a civil case was sent for reconsideration by court of appeal.

By the decision of Civil Board of the Court of Appeal of Shirvan city (hereinafter referred to as the CB of the Court of Appeal of Shirvan city) dated 15.09.2008 the decision of Dzhalilabad district court dated 03.07.2007 was cancelled, M. Bayramov's claim to R. Feyruzov and A. Feyruzov for restoration of a right of use on the personal land plot, cancellation of the order of the director of state farm R. Akhundov of Dzhalilabad area concerning allocation to R. Feyruzov of the land plot of 0,06 hectares No. 26 dated 01.09.1995 was not satisfied.

The CB of the Supreme Court by its decision dated 12.02.2009 did not satisfy the appeal of M. Bayramov and upheld the decision of CB of the Court of Appeal of Shirvan city dated 15.09.2008.

By the ruling of Chamber of the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) as of 05.04.2010 M. Bayramov's complaint was accepted for consideration at the Constitutional Court.

At a meeting of Plenum of the Constitutional Court the representative of respondent body having submitted the petition, declared that the additional appeal of M. Bayramov will be considered at a meeting of Plenum of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the Plenum of the Supreme Court) and for this reason asked to suspend the constitutional case procedure.

Procedure of case on M. Bayramov's complaint was suspended by ruling of Plenum of the Constitutional Court of 16.06.2010.

By the ruling of Plenum of the Supreme Court of 08.10.2010 the plaintiff's statement of M. Bayramov concerning revision of the judicial acts that entered into force on case on newly discovered facts, was rejected.

M. Bayramov in the repeated complaint lodged to the Constitutional Court asked to verify compliance of decision of the CB of Supreme Court as of 12.02.2009 to the Constitution and laws of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

According to the applicant, the courts of appeal and cassation instance that considered case, referring to Articles 66 and 67 of the Land Code of the Republic of Azerbaijan (hereinafter referred to as the Land Code), having come to conclusion that his rights for the land plot were not registered and for this reason their protection is not guaranteed, violated the rights for judicial providing of property, the rights and freedoms enshrined in the Constitution.

The Constitutional Court in communication and the complaint considers necessary to analyze the relevant norms of the Constitution, civil and land legislation affirming the property right, regulating it bases and rules.

The property in the Republic of Azerbaijan is inviolable and is protected by state. The constitution provides the property right of everyone. Everyone is entitled to posses movable and immovable assets in property. Right of ownership envisages the rights of owner to own property on his/her own or together with others, to use the property and to make arrangements for it. No one can be deprived of his/her property without a decision of the court (Articles 13 and 29 of the Constitution).

The property right is the conventional basic right and considered as one of the cornerstones of democratic society, the constitutional state reflecting the supreme human values. The property right as universal value, is fixed in Article 17 of the Universal Declaration “On Human Rights”, and in Article 1 of the Protocol No. 1 to the Convention “On Protection of the Human Rights and Fundamental Freedoms”.

According to Article 152.1 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code), the property right means acknowledged right, protected by the state, of a subject to possess, use and dispose of property belonging to such subject at their discretion.

One of the main acts governing the land relations, execution by owners, users and tenants of the land of the duties connected with the land, and protection of the rights for the land, rational use of lands and their protection is the Land Code.

In the legislation, various bases of acquisition by citizens of the land plot are established. According to Article 49 of the acting Land Code, the right of private individuals and legal entities to private land ownership is the right to own, use and dispose of lands while observing limitations and other conditions established by law and an agreement. The right of private individuals and legal entities to private land ownership occurs on the basis of privatization, purchase and sale, inheritance, presentation, exchange of state and municipal lands, and other transactions pertaining to land, as well as the transfer into the charter (share) fund of legal entities.

According to Article 66 of the Land Code, provision, on the basis of any rights, of state and municipal land plots to legal entities and private individuals is carried out with permission of an relevant body of executive authority or municipality and on the basis of the agreement signed between the parties. The transition of all rights to lands owned privately to another person is carried out on the basis of the agreement signed between parties and certified by the notary office. The agreement establishes the rights and responsibilities of parties, the legal status of the land plot, obligations, limitations and servitudes, grounds for the termination of the agreement and other conditions for using and protecting the lands. The rights to land (with the exception of the rights to lease and use for a period of less than eleven months) shall, in an order established by legislation, be subjected to state registration with the state register of immovable property and provision of an excerpt from the register.

According to Article 67 of the given Code, State registration of rights to land is be carried out in an order established by legislation by means of the register of immovable property. State registration of rights emerging with the acquisition of land plots owned by the state and municipality, as well as the rights acquired as a result of transactions pertaining to land plots and other immovable property is mandatory. The state does not guarantee protection and inviolability of rights to land plots that have not been registered.

The rights to land plots appear after the establishment of borders of land plots, completion of their layout and dimensions, conclusion of an agreement on the provision of land plots and state registration in an established order (Article 68 of the Land Code).

Apparently, according to the land legislation, the property right to the land arises after the state registration.

Stating value of the state registration in emergence of the property right to real estate, Plenum of the Constitutional Court noted that the mechanism of a guarantee of the ownership right, fixed in the legislation of the Republic of Azerbaijan, is carried out on the basis of registration of real estate in the state register. Registration in the uniform state register of the data concerning real estate is important from the point of view of protection of interests both the state and owners. Recognition of the ownership right of the person on the corresponding real estate acquired on the lawful bases as a result of the state registration of real estate prevents violation and contest of this right. The state registration of real estate is estimated as a guarantee of authenticity and validity of the documents certifying the ownership right to property (decision of Plenum of the Constitutional Court of October 25, 2010 on interpretation of Article 178.8 of the Civil Code of the Republic of Azerbaijan).

But, linking of emergence of the property right to the land plot with the state registration does not exclude the rights of possession and use for the land which are a property right component. Thus, according to Article 146.1 of the Civil Code, the right of possession and use for real estate is formed from the moment of the notary verification of the transaction concerning this property or on the basis of other resolution possessing validity. The right for disposal according to Article 146.2 of the Civil Code accrued from the date of registration of such property on territorial basis in the state registry of immovable property.

Nevertheless, in the decision of Plenum of the Constitutional Court of January 15, 2010 according to V. Terekhin's complaint in connection with the right of possession, use and the order making a property right essence the following legal position is created: “As appears from provisions of the civil and land legislation, along with consent of the parties, the great importance from the point of view of buying of property this thing in full have a necessary condition of registration in the state register of real estate, in particular emergence of the right of the order it from the person. However, coordination of emergence of the property right to the land plot as real estate and protection of this right by the state with the state registration does not exclude possession of persons that acquired similar property according to legislation, the rights of possession and use which are a property right’s components”.

Along with stated, Plenum of the Constitutional Court also considers important to note the allocation bases to citizens of the land plots reflected in the legislation existing at allocation to M. Bayramov of the land plot.

According to Article 13 of the Land Code of Soviet Socialist Republic of Azerbaijan approved by the Law of Soviet Socialist Republic of Azerbaijan dated July 7, 1970 the transfer of the land plots to use is carried out by allocation of the land. The land plots are allocated in the order provided in Articles 18, 19 and 20 of this Code on the basis of the resolution of Council of Ministers of Soviet Socialist Republic of Azerbaijan or Council of Ministers of Nakhichevan SSAR, or resolutions of executive committee of the relevant Council of People's Deputies.

According to the Land Code acting at that time, the resolution of Council of Ministers of the Soviet Socialist Republic of Azerbaijan No. 183 dated April 20, 1989 the area was allocated as state farm to R. Akhundov from Dzhalilabad land fund, and in the documents approved by the same resolution allocation to M. Bayramov of the land plot was provided in amount of 0,06 hectares.

According to the resolution of Council of Ministers of Soviet Socialist Republic of Azerbaijan, the order of the director of state farm R.Akhundov as of 05.09.1993, and the resolution of executive representation of the city of Dzhalilabad as of 30.01.1994 the relevant land plot was allocated to M. Bayramov.

At the same time, transfer of the land plots to a private property of the citizens of the Republic of Azerbaijan who are constantly living in the Republic of Azerbaijan according to the petition of local executive authorities according to the resolution of regional, city councils of People's Deputies is also provided in provisions of the Land Code as of November 9, 1991 acting during allocation to M. Bayramov of the land plot.

According to the Article 9 of the Law of the Republic of Azerbaijan “On Land Reform” of July 16, 1996 (hereinafter referred to as the Law “On Land Reform”), the lands which are in lawful use of citizens for their individual houses, personal plots, individual, collective and cooperative summer residences, summer residences which are under authority of the state country farm are gratuitously transferred to the possession in the order established by the legislation.

According to point 1 of the Provision “On transfer of lands which are in lawful use of citizens for their individual houses, personal plots, individual, collective and cooperative summer residences, summer residences which are under authority of the state country farm in their property” approved by the Decree of the President of the Republic of Azerbaijan No. 534 dated January 10, 1997, the lands which are in lawful use or rent of citizens (lands which are in lawful use of citizens for their individual houses, personal plots, individual, collective and cooperative summer residences, summer residences which are under authority of the state country farm) are gratuitously transferred to their possession. Lands under individual houses, personal plots, individual, collective and cooperative summer residences, are transferred to the possession of citizens in that volume in what are received in lawful use or rent.

Apparently, the above-noted normative legal acts making the bases for allocation to M. Bayramov of the challenged land act were not applied by the courts that considered case to disputable legal relationship.

On the other hand, according to the Law of the Republic of Azerbaijan “On Reform of State Farms and Collective Farms” as of February 18, 1995 which was already acting during allocation to R. Feyruzov of the land plot by the order of the director of state farm R. Akhundov No. 26 dated 01.09.1995, transfer of lands to his using was carried out by the relevant commissions on an agrarian reform.

One of means of protection of the property right affirmed in the Constitution is the judicial ensuring of the rights and freedoms reflected in Article 60 of the Constitution. According to the legal position created by the Constitutional Court, the right for legal protection, being among basic rights and freedoms of the person and citizen, also acts as the guarantor of other rights and freedoms enshrined in the Constitution. Mentioned right, is not limited only by right to appeal to the court, it also provides the justice capable rationally restore the violated rights and freedoms.

At the same time, this right, being fixed in the international legal acts, is perceived as rational restoration of the rights on the basis of right judgment trial by independent courts (Article 8 of the Universal Declaration “On Human Rights”, Article 2 of the International Covenant “On Civil and Political Rights”, Article 6 of the Convention “On Protection of Human Rights and Fundamental Freedoms”).

Plenum of the Constitutional Court considers necessary to note that Article 60 of the Constitution, guaranteeing the rights and freedoms of everyone, also includes the exact observance of a procedural order of consideration of the address (complaint) in various judicial instances. For this purpose the legislator for ensuring of justice and legality of judicial acts in the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Procedure Code) determines the rights by civil cases and obligations of court participating in case of persons and other participants of process regulates procedural rules of civil legal proceedings. Proceeding from these rules directed on implementation of the rights and duties of participants of process, to fair resolution of case and finally ensuring the right of the appeal of judicial acts serves in an appeal and cassation order for objective and comprehensive verifying of legality and validity of the adopted judicial acts.

The courts considering a civil case concerning restoration of a right of use of M.Bayramov on the personal land plot in a contradiction with the above-noted principles of Article 60 of the Constitution, being content with the instruction that protection of the rights for the land are not guaranteed in view of not passing of the state registration, did not give a legal assessment to legal basis of finding of the challenged land plot in his use. At the same time, courts did not express the attitude towards argument about, whether there were for the director of state farm of R. Akhundov powers to issue the order No. 26 of 01.09.1995 on allocation to R.Feyruzov of the land plot containing in the claim requirement of the applicant, and then and in the appeal.

Apparently, the decision of the CB of Court of Appeal of Ali-Bayramli as of 02.11.2007 was cancelled by the decision of the CB of Supreme Court dated 28.02.2008, and directed on appeal revision with the indication of that protection of the rights of M.Bayramov for the land is not guaranteed as these rights were not registered. The CB of the Court of Appeal of Shirvan, considering this instruction, in the decision of 15.09.2008 came to conclusion that M.Bayramov has no right of use to the challenged land plot. Thus, courts, both cassation, and appeal instance, without having attached significance to, whether both orders on allocation of the challenged land plot according to the legislation of that period were issued, did not apply subjects to application of Article 146.1, 146.2, 152.1 of the Civil Code, Article 49 of the Land Code, Article 9 of the Law “On Land Reform”, misinterpreted Articles 66 and 67 of the Land Code.

According to the civil procedural legislation, the court of cassational instance verifies correct application by court of appellate instance of material and procedural norms of law. Court of cassation instance, considering case, can direct case to court of appeal instance on revision, having cancelled the decision or definition of court of appeal instance in whole or in part. Violation or the wrong application of norms of a substantive and procedural law is the basis for cancellation of the decision and definition of court of appeal instance (Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code).

The court of cassation instance which considered case for the second time on the appeal of M.Bayramov did not pay due consideration to the wrong application of norms of a substantive and procedural law by court of appeal instance therefore adopted the decision of 12.02.2009 which did not correspond to requirements of the Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code. It, in turn, led to violation of the principle of rational restoration of the rights on the basis of the fair trial by independent court which is one of important elements of judicial ensuring the rights and freedoms enshrined in Article 60.1 of the Constitution.

According to the above, Plenum of the Constitutional Court considers that the decision of Civil Board of the Supreme Court on a civil case concerning restoration of a right of use of M.Bayramov on the personal land plot of February 12, 2009 has to be considered as void in view of discrepancy with the Article 29, Article 60.1 of the Constitution, Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code and case has to be reconsidered according to the present decision, in order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize the decision of Civil Board of the Supreme Court on a civil case concerning restoration of right of use of M.Bayramov with respect to the personal land plot as of February 12, 2009 as null and void due to its discrepancy with the Articles 29 and 60.1 of the Constitution, the Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code of the Republic of Azerbaijan. To reconsider case according to this decision, in order and terms established by the civil procedure legislation of the Republic of Azerbaijan.

 2. The decision shall come into force from the date of its publication.

 3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

 4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.