**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

## On conformity of Article 316 of the Civil Code of the Republic of Azerbaijan to Constitution of the Republic of Azerbaijan

**15 July, 2011 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev (Reporter-Judge);

attended by the Court Clerk V.Zeynalov,

representative of the addressed body – Mahir Mammadov, senior adviser of Scientifically-analytical Department of the Staff of Ombudsman,

representative of respondent body – Vasif Amiraslanov, adviser of Department of Economical Legislation of Milli Majlis of the Republic of Azerbaijan,

expert – Server Suleymanli, senior lecturer of Chair of Civil Law of Baku State University,

has examined in open session via special constitutional proceedings in accordance with Article 130.VII of the Constitution of the Republic of Azerbaijan the constitutional case on the basis of inquiry of Ombudsman of the Republic of Azerbaijan of 21 April 2011 on conformity of Article 316 of the Civil Code of the Republic of Azerbaijan to Articles 13, 29, 147 and 149 of the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge K.Shafiyev and statements of the representatives of the parties and opinion of expert, studied materials and examined the case, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Ombudsman of the Republic of Azerbaijan addressed to Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) asking for verification of conformity of Article 316 of the Civil Code (hereinafter referred to as Civil Code) to Articles 13, 29, 147 and 149 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

Ombudsman submitting the inquiry to Constitutional Court of the Republic of Azerbaijan (further – the Constitutional Court) asks to verify the compliance of Article 316 of the Civil Code of the Republic of Azerbaijan (further – the Civil Code) to Articles 13, 29, 147 and 149 of the Constitution of the Republic of Azerbaijan (further – the Constitution).

According to Article 316 of the Civil Code in the event mortgagor refuses from claim or mortgage, creditor become an owner. Refusal has legal force only with condition of its recordation in the state register of immovable property or official register of movable property. In the event mortgagor refuses from claim or mortgage, creditor shall become an owner. Refusal has legal force only with condition of its recordation in the state register of immovable property or official register of movable property.

According to an inquirer, the provision of the specified article “the creditor becomes an owner” as a result of refusal of a mortgagor of a mortgage not in accordance with the norms of the civil legislation regulating institute of a mortgage. Because the mortgagor and the creditor are the same person formation of a mortgagor by the owner in view of his refusal of the requirement or a mortgage, can become a cause of infringement of the property right of a mortgage giver.

The Ombudsman consider that the provision of Article 316 of the Civil Code “the creditor becomes the owner” does not correspond to Article 13.1, parts I, II, III, IV of Article 29, Article 147, parts I, III and VII of Article 149 of the Constitution.

Plenum of the Constitutional Court in connection with inquiry notes the following.

According to parts I and II of Article 13 of the Constitution, in the Republic of Azerbaijan the property is inviolable and is protected by the state. Property may be in the form of state property, private property and municipal property.

In the constitutional state and democratic society the property is inviolable. Protection of property is in full regarded, as one of values inherent in the constitutional state. Having fixed the property right, the Constitution also guaranteed its providing with effective remedies. For this reason the property right is specified among basic rights and freedoms of the person and the citizen.

According to Article 29 of the Constitution everyone has the right to property.

No one form of property shall take precedence over others. The right to property, including the right to private property is protected by law. Everyone may have movable and immovable property. The right to property is including the right to possess, use, and dispose of property individually or jointly with others. No one may be deprived of his property without a court decision.

Implementation of the right to dispose of property which is one of important elements of the property right, as a result leads to change of accessory, situation or purpose of property. The right of the dispose of property is possibility of definition of a legal lot of a thing provided with the right. This right gives the chance for establishment of lot from the legal and actual point of view. The act of dispose is the legal fact directed on change of accessory, a condition or purpose of property. The right to dispose gives the possibility to the owner of conclusion concerning the property of the civil act, including the pledge or mortgage contract.

Mortgage – being an instrument for ensuring of execution of the obligation is a pledge of the immovable or movable thing registered in the official register.

Due to the mortgage of immovable things in civil law there are two systems: one system – hypothec, another – mortgage.

According to hypothec system the mortgage of an immovable thing covers all its cost and cannot be imposed on one part of cost of this thing. Mortgage holder by the applying of exaction on an immovable thing can claim providing the requirements at the expense of all money obtained from sale.

Feature of mortgage system consists that the section of cost of real estate on part is possible and the mortgage can be directed on one of the divided parts of cost of real estate. That is, there is no need for the obligatory accounting of all cost of real estate. In this system the requirement of the creditor can be guaranteed by one part of cost of real estate.

In Article 269 of the Civil Code the concept of the right of pledge and a mortgage is given. According to this article pledge and mortgage right mean property right of pledge in respect of pledge’s property, and at the same time, mean method of guarantee to pledge of debtor’s monetary or other obligations. Pledge and mortgage right consist of restriction of property rights. Pledge mean restriction of property rights to movable property (except for movable property being objects of mortgage). Mortgage of right is also possible is cases stipulated under this Code. Mortgage is mean restriction of property rights to immovable property as well as to movable property subject to registration in official register. Pledge and mortgage is additional (accessory) obligation for guaranteeing to pledgee (creditor) an execution of pledgor’s (debtor) primary right on article. Pledge and mortgage right to property should apply to everything relating to ownership right to property.

As evident, the right of pledge and a mortgage has double character, on the one hand creates at the pawnbroker the real right, and with another is a way of ensuring execution of the main obligation of the debtor.

The mortgage arises owing to the contract. According to the mortgage contract one party (mortgage giver) for the purpose of ensuring execution of the main obligation puts the immovable or movable thing being in its property in a mortgage, in case of not other party (mortgagor) has the right in case of non-execution by the debtor of this obligation to have executions by the debtor of this obligation satisfaction from cost the put or burdened mortgage of a thing mainly before other creditors of the person.

As evident, two parties participate in the contract of a mortgage: mortgage giver and mortgagor. Only its owner can be mortgage giver of a thing and he usually acts to quality of the debtor according to the main obligation. The second party – a mortgagor – the person who has the right to a mortgage, him also call the creditor. The creditor of a mortgage (mortgagor) is understood as the person who for ensuring execution of monetary or other obligation before it of the debtor possesses power to direct the requirement of a thing which is a mortgage subject, to provide this requirement at the expense of the specified thing. In all cases the creditor and a mortgagor are the same person, that is as an mortgagor the creditor can act only.

Basic purpose of the right of pledge and mortgage is that at non-execution by the debtor (the depositor or a mortgage giver) the obligation the creditor (the pawnbroker or a mortgagor) at compensation of the debt from cost the put or burdened mortgage of a thing has the right of advantage before other creditors.

In the civil legislation of the Republic of Azerbaijan a number of the rights and duties of a mortgage giver and a mortgagor are provided.

Refusal of a mortgagor of the claim or mortgage, being an important and integral part of institute of a mortgage it is specified in civil law as one of basic rights of a mortgagor. The essence of institute of refusal of the requirement or mortgage is that the mortgagor (creditor) can refuse the claim provided with a mortgage, or the mortgage which has resulted of it. As a result of such refusal the legal status of the property put in a mortgage is established also. In civil law, as a rule, as a result of refusal of the claim or a mortgage the mortgage is got by the owner.

According to an essence of institute of a mortgage acquisition by the owner of a mortgage as a result of refusal of the claim or a mortgage, it is provided also in the civil legislation of a number of foreign countries. For example, according to paragraph 1668 of the German Civil Code, at refusal of the creditor of a mortgage, the mortgage is got by the owner. In paragraph 1665 of the Code it is also noted that at refusal of the creditor of a mortgage, the debtor is exempted from execution of the obligation, however, if the creditor does not refuse a mortgage, the claim could be compensated at the expense of it.

In the same time, according to Article 2180 of the Civil Code of France the act of refusal is one of the bases of the termination of mortgage legal relations.

The analysis of institute of refusal of a mortgage in the civil legislation of a number of the countries shows that refusal of the creditor of the claim and a mortgage to become the reason of transition of a mortgage for the owner and, in this regard, emergence at the last a mortgage.

In Article 308.2 of the Civil Code the concept of a mortgage of the owner is opened. According to the present article owner’s hypothecation is mean a situation where claim of hypothecation existing for guaranteeing does not arise, it is terminated or upon transfer to owner of that claim —hypothecation also transfers to him. In this the sequence of other rights is not changed.

Despite it in the civil legislation of the Republic of Azerbaijan the institute of refusal of the requirement or a mortgage, is defined not as the general order created in civil law. So, according to this order, in a case when the mortgagor (creditor) abandons the claim or from a mortgage instead of mortgage acquisition by the owner, the creditor according to Article 316 of the Civil Code becomes an owner.

Plenum of the Constitutional Court notes that the civil legislation of the Republic of Azerbaijan does not allow transition of the property right to a thing being a subject of a mortgage, directly to the creditor (mortgagor). So, according to Article 319.1 of the Civil Code in the event debtor has delayed performance of obligation performance of which is guaranteed by hypothecation of property, mortgagor has the right to sell property burdened with hypothecation from public auction. In the event of non-compliance or delay by debtor of the obligations secured by mortgage, agreement of transfer of property rights directly to creditor should be deemed as invalid.

As evident, in a contradiction with the essence of institute of a mortgage reflected in civil law and refusal of a mortgage, Article 316 of the Civil Code provided property transition directly to the creditor.

From this point of view, Plenum of the Constitutional Court considers that transformation of the creditor into the owner as a result of refusal of a mortgagor of the claim or of a mortgage is not in accordance with the general requirements of civil law, including, with an essence of institute of a mortgage and application of specified article can lead to violation of the property right of the mortgage giver fixed in the Constitution.

Plenum of Constitutional Court notes that the inquiry of Ombudsman concerning Article 316 of the Civil Code is directed on protection of the property rights of subjects of the civil law reflected in Constitution and the civil legislation as a result of application of this Article in the future.

Considering the above mentioned, Plenum of Constitutional Court comes to conclusion that the adjust of Article 316 of the Civil Code in accordance with essence of institute of a mortgage and the legal position created in this Decision of Plenum must be recommended to Milli Majlis of the Republic of Azerbaijan.

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

**DECIDED:**

1. To recommend to Milli Majlis of the Republic of Azerbaijan to adjust Article 316 of the Civil Code in accordance with an essence of institute of a mortgage and legal position created in this Decision of Plenum of Constitutional Court 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 can not be cancelled, changed or officially interpreted by any body or official.