**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 Civil Board of the Supreme Court of the Republic of Azerbaijan as of 7April 2011 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of S.Bayramova*

**16 June 2012 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(reporter judge), Isa Nadjafov and Kamran Shafiyev,

with participation of the secretary I.Ismayilov,

applicant Samira Bayramova and her representative Mehman Jabrailov,

representative of respondent body – Gunel Tanriverdiyeva, employee of Staff of the Supreme Court of the Republic of Azerbaijan

specialist: Yusif Gumbatov, Head of Legal Sector of the State Committee of land management and cartography of the Republic of Azerbaijan

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on complaint of S.Bayramova concerning verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan as of 7 April 2011 to Constitution and laws of the Republic of Azerbaijan.

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

**DETERMINED AS FOLLOWS:**

 By the decision of Court of Terter area as of August 4, 2009 the claim of Yusif Hajiyev and Irada Shiraliyeva against Samira Bayramova, the Chairman of the Commission on Agrarian Reforms of the Terter area (hereinafter referred to as the CAR of the Terter area) and against Terter Regional Office of the State Committee on Land Management and Cartography of the Republic of Azerbaijan concerning recognition of the resolution of CAR of the Terter area dated October 14, 2005 and given out on the basis of its documents as invalid was rejected.

The Civil Board of the Court of Appeal of Ganja city (hereinafter referred to as the CB of the Court of Appeal of Ganja city) by its decision as of March 31, 2010 did not satisfy the appeal complaint by Y.Hajiyev and I. Shiraliyeva and upheld the judgment of the court of first instance.

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 August 11, 2010 the appeal made by Y.Hajiyev and I.Shiraliyeva was partially satisfied, the decision of CB of the Court of Appeal of Ganja city cancelled, and the case was sent to this court for reconsideration in appeal order.

By the decision of CB of the Court of Appeal of Ganja city as of November 11, 2010, Y.Hajiyev and I.Shiraliyeva's appeal complaint was satisfied, the decision of Terter district court as of August 4, 2009 was cancelled, the resolution of CAR of the Terter area as of October 14, 2005 in part regarding gratuitous transfer of the personal land plot (0.06 hectares) to T. Hajiyeva, Y.Hajiyev, S. Bayramova and their children J. Hajiyev and B. Hajiyeva was cancelled, the certificate on transfer of the land plot to property was nullified.

The CB of the Supreme Court by its decision as of April 7, 2011 did not satisfy the appeal of S. Bayramova and upheld the decision of CB of the Court of Appeal of Ganja city as of November 11, 2010.

By ruling of the Supreme Court of the Republic of Azerbaijan as of July 26, 2011 the additional appeal from the respondent S. Bayramova was not submitted for consideration of Plenum of the Supreme Court.

S. Bayramova in the complaint lodged to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), asked to verify compliance of decision of CB of the Supreme Court as of April 7, 2011 adopted with violation of norms of substantive and procedural law, with the Constitution (hereinafter referred to as the Constitution) and to laws of the Republic of Azerbaijan.

The applicant considers that courts violated her property right, a guarantee of legal protection of the rights and freedoms fixed in the Articles 29 and 60 of the Constitution.

In connection with the complaint, Plenum of the Constitutional Court notes the following.

From the circumstances of a civil case established by courts it follows that 0.06 hectares of the land plot were transferred by the resolution of CAR of the Terter area as of October 14, 2005 to the joint possession of Y.Hajiyev, S. Bayramova and their two children who were born from their marriage, and also Y.Hajiyev's sister T. Hajiyeva. By the resolution of the Regional Council of Workers’ Deputies of Terter region as of April 4, 1958 the land plot (0,06 hectares) which was in state ownership was transferred to Y.Hajiyev's father Jamil Hajiyev for unlimited use, and he on this land plot constructed a 2-roomed private house. J. Hajiyev died in 1984.

S. Bayramova married Y.Hajiyev in 1996 and since then lived in the house located in Terter city (Kara Karayev Street, 5), had joint household on the personal land plot, and since 2001 she was registered in this domiciliary. In the framework of land reforms which have been carried out in the Republic of Azerbaijan, on September 20, 2004 the chairman of CAR of the Terter area approved the list of personal land plots transferred as private property to citizens in the city of Terter. According to the sizes of personal land plots specified in the list, by the resolution of CAR of the Terter area No. 2 as of October 14, 2005 the personal land plots which were in lawful use of citizens in the city of Terter were transferred to them for private property.

According to this resolution T. Hajiyev, Y.Hajiyev, S. Bayramova, J. Hajiyev and B. Hajiyeva were granted the certificate “On transfer of the land plot into property” No. JN-429F, KOD 6110104.

 The court of cassation instance that considered case on invalidity of noted documents, having cancelled a judgment of appeal instance, specified in the decision that is not established, whether there was a land plot transferred to the possession by S. Bayramova in her lawful use or rent, whether the persons having the right for lawful use of the challenged land plot addressed to appropriate authority, and also the legal assessment of possibility of recognition of the property right of the died person to the land plot was not given.

In this regard Plenum of the Constitutional Court considers necessary to develop an essence and the purposes of the relevant norms of the Constitution and the land legislation regulating bases and rules of buying of property the personal land plots which are in continuous use of citizens when carrying out land reforms, and also a circle of the subjects possessing such opportunities.

The property in the Republic of Azerbaijan is inviolable and is protected by state. Everyone has the right to own property. No type of property shall be granted superiority.  Ownership rights, including private owners’ rights, is protected by law. Everyone might have 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 decision of court (the Articles 13 and 29 of the Constitution).

The property right is a conventional basic right and it is considered as one of the fundamental bases of the constitutional state and democratic society which incorporated the supreme human values.

The property right found its reflection in the Article 1 of the Minutes No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms" (hereinafter referred to as the Convention).

The legal position created in the Constitutional Court, in connection with the property right, consists that the content of this right should be understood, in view of provisions of Article 13 of the Constitution. The property as important institute of civil society is one of the main factors making a basis of development of economy. Therefore, the property, is declared inviolable under Article 13 of the Constitution and is protected by the state. The property right, acting as the basis of freedom of each individual of society, is an important condition for development of personality and free business. The state has to abstain from illegal intervention in effective implementation of the property right and prevent such actions (decision of Plenum of the Constitutional Court of December 16, 2011 concerning interpretation of Articles 107-2.1 and 107-5.1 of the Civil Code of the Republic of Azerbaijan).

The European Court of Human Rights (hereinafter referred to as the European Court) in connection with intervention in the property right noted that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The requirement of lawfulness, within the meaning of the Convention, demands compliance with the relevant provisions of domestic law and compatibility with the rule of law (decision of the European Court on the case of Kushoglu v. Bulgaria of May 10, 2007).

 Considering the issue from this point of view, Plenum of the Constitutional Court notes that till 1991 the land plots was only in a state ownership, and the rights of possession and use of citizens for the land plots were carried out only in the form of continuous use. It, in turn, provided duration of their rights for the land and the property which is on it. Recognition of the right of the owner of the house – the user of the land plot on whom the house is located, on continuous (termless) use of this land excluded the disposition this land plot from other non-state subjects. After adoption of the Constitution, the legislator in connection with emergence of private form of ownership, provided to citizens possibility of replacement of legal status with which they possess concerning the land (continuous use), other status.

 According to the Law of the Republic of Azerbaijan of July 16, 1996 “On Land Reform” (hereinafter referred to as the Law “On Land Reform”), establishing legal bases and an order of carrying out land reforms in the Republic of Azerbaijan, the purpose of land reform is formation of the new relations of ownership of land on the basis of the principles of economic freedom and social justice, development of market economy and an enterprise initiative, achievement of economic independence of the country, including, its food supply, and finally, increase of material well-being of the Azerbaijani people. Problems of land reform are ensuring definition of the state lands in the territory of the Republic of Azerbaijan, transfer of lands to a municipal and private property, the rights of owners for possession, use and the disposition of the land.

 The Article 9 of the Law “On Land Reform” established gratuitous transfer of lands, in order established by legislation, into property of citizens having individual houses which are in their lawful use, personal plots, individual, collective and cooperative gardens, gardens under the authority of the state country farm. The Article 10 of this Law provided an order of privatization of the lands which are in lawful use of citizens.

According to point 1 of the Provision “On transfer into the ownership of citizens of the lands which are in lawful use of citizens (individual houses, personal plots, individual, collective and cooperative summer residences, summer residences consisting under the authority of the state country farm)" (hereinafter referred to as the Provision) approved by the Decree of the President of the Republic of Azerbaijan of January 10, 1997 No. 534, the lands occupied with the individual personal plots which are in lawful use or rent of citizens are gratuitously transferred by it to the possession in the order established by the legislation. The lands occupied with personal plots are transferred to the possession of citizens in that size in which were taken in their lawful use or rent.

Point 2 of Situation for transfer into the ownership of citizens of the lands submitted for privatization, including the personal land plots provided presentation by them of the statement and the copy of the document certifying lawful use of this site. Also, it should be noted that according to the legislation regulating this process, transfer to a private property of citizens of the land plots which are earlier transferred to them to continuous use wasn't limited.

Due to above-stated, Plenum of the Constitutional Court considers necessary to note that possibility of change of a legal status of the land plots; such kind that are in lawful use, successors of the lawful user of this land plot has to be established by courts according to the relevant legislation.

Thus it is necessary to consider that transfer of the land plots which are in continuous use to property of citizens within the special conditions established in the above acts testifies that the lands which are in continuous use arenot included in hereditary weight.

Along with it, execution of the duties fixed by the Law “On Land Reform” demands providing the rights of a private property of citizens for the personal land plots transferred in continuous use, and acceptances of all necessary measures by authorized government bodies for free acquisition by citizens of the right of a private property for the land plots. In this sense, transfer of the personal land plot by these government bodies to property of the persons registered there can be considered as one of the measures directed on effective implementation of land reforms.

Thus, the normative legal acts establishing a procedure of the rights and freedoms of the person and citizen consolidated by the Constitution and the international legal acts including, an order of buying of property, cannot deny or any other means illegally limit these rights and freedoms. The order of gratuitous transfer to a private property of the land plots which are in the state or municipal ownership should not create restriction to the persons interested in formation of this right and is conscientious, continuously using this site.

At the same time, according to the existing land legislation, the state guarantees protection and inviolability only of the registered rights for the land plots. It also found the reflection in the legal position expressed in the decision of Plenum of the Constitutional Court of June 9, 2011 according to M. Bayramov's complaint.

Apparently from the circumstances of a civil case established by courts, the authorized government body issued to S. Bayramova together with other family members the official document certifying their property rights to the personal land plot.

At cancellation of a judgment of appeal instance by court of cassation instance, due attention was not paid to the above-noted normative legal acts which were the basis of transfer of the challenged land plot to private property of S. Bayramova.

Along with the aforementioned, according to other legal position created by Plenum of the Constitutional Court, court of cassation instance by canceling the decision of the court of appeal, must clarify the law, directing the given court to correct resolution of the case, clearly and convincingly explain the essence of committed errors and how one should understand the rule of law(decision of Plenum of the Constitutional Court “On interpretation of Article 420 of the Civil Procedure Code of the Republic of Azerbaijan” of February 28, 2012).

According to a position of the European Court, at cancellation of the decision of the lowest judicial instance by the highest judicial authority, courts must, however, indicate with sufficient clarity the grounds on which they based their decision, and accurately to specify the circumstances which formed the basis for pronouncement of this decision. Otherwise, it is regarded as violation of the right for the fair trial provided by Article 6 of the Convention (decision of the European Court on case of Hadjianastassiou v. Greece dated December 16, 1992; decision on case of Garcia Ruiz v. Spain of January 21, 1999). Accurate justification of circumstances to which courts refer, is an indicator of that explanations of the persons participating in case are heard and they were given a legal assessment (decision of the European Court on case of Hirvisaari v. Finland dated September 27, 2001).

 But, in the decision of CB of the Supreme Court of August 11, 2010 the legal content of the norms of a substantive law applied on case was not interpreted, and not accurately stated how properly to understand these norms. At the same time, the Court of Appeal of Ganja city that reconsidered case in the decision at the solution of the instruction, in connection with the lawful user, noted in the decision of the Supreme Court did not use the available means provided to it by the procedural legislation for achievement of truth.

The CB of the Supreme Court in the decision of April 7, 2011 did not satisfy the appeal of S. Bayramova, with reference to articles noted in the decision of CB of the Court of Appeal of Ganja city of November 11, 2010, and the instruction on observance of requirements of the procedural legislation upheld this decision.

Apparently, as a result the courts considering case did not interpret comprehensively above-noted normative legal acts making the basis for transfer of the disputable land plot to a private property of S. Bayramova and other family members and thus the property right of S. Bayramova provided by Articles 13 and 29 of the Constitution violated.

One of remedies of property, fixed by the Constitution is the judicial guarantee of rights and freedoms specified in the Article 60 of the Constitution. On the legal position created by Plenum of the Constitutional Court in a number of the decisions, the right for legal protection, being among basic rights and freedoms of the person and citizen, also acts as a guarantee of other rights and freedoms enshrined in the Constitution. This right is not limited only by an appeal to court, and also provides the justice capable of effective restoration of violated rights and freedoms (decision of Plenum of the Constitutional Court as of November 3, 2008 according to E.Khakimov's complaint).

 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 (decision of Plenum of the Constitutional Court as of June 9, 2011 according to M. Bayramov's complaint).

According to Article 416 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) establishing a basic purpose of court of cassation instance and limits of consideration of the case in this instance, this court verify the correctness of application of norms of the substantive and procedural law by court of appeal instance. Court of cassation instance having considered case has the right to cancel the decision or ruling of court of appeal instance completely or in part and to direct the case for new consideration in court of the first appeal instance. Violation or the wrong application of norms of the substantive procedural law is the basis for cancellation of the decision or ruling of court of appeal instance (Articles 417.1.3 and 418.1 of the CPC).

The decision of CB of the Supreme Court as of August 11, 2010 established circumstance which was not put forward by the parties in court of appeal instance, and according to it was not a trial subject, and also was not challenged by the appeal of Y.Hajiyev and I. Shiraliyeva. Thus, the court of cassation instance considered that the negligence on behalf of the court of appeal instance to issue of recognition of the property right of the deceased sister of claimants T. Hajiyeva with respect to the disputable land plot led to violation of norms of substantive and procedural law.

According to the CPC the Court of Cassation does not have the power to verify the legitimacy of judicial acts within non-challenged part of appeal. In this sense, the checking of an undisputed part by the Court of Cassation, on its own initiative, is contrary to the principle of disposition deriving from Article 60 of the Constitution and Article 4 of the CPC (decision of Plenum of the Constitutional Court of February 28, 2012 “On interpretation of Article 420 of the Civil Procedure Code of the Republic of Azerbaijan”).

Court of appeal instance, repeatedly considering case, followed the instruction of court of cassation instance given with excess of the powers and gave a legal assessment to the not challenged fact on case (about possibility of acquisition of the property right by the late T. Hajiyeva).

The court of cassation instance which repeatedly considered a civil case according to S. Bayramova's complaint did not pay due consideration to the wrong application of norms of a substantive and procedural law by court of appeal instance, and as a result adopted the decision of April 7, 2011 which is not in accordance with Articles 416, 417.1.3 and 418.1 of the CPC. It, in turn, led to violation of the principle of effective restoration of the rights based on the fair trial by independent court which is one of important elements of the judicial guarantee of the rights and freedoms fixed by Article 60.1 of the Constitution.

According to the above, Plenum of the Constitutional Court comes to conclusion that the decision of CB of the Supreme Court as of April 7, 2011 on the given case has to be considered as invalid because of discrepancy with the Article 13, Article 29, Article 60.1 of the Constitution, and with the Articles 416, 417.1.3, 418.1 of the CPC, 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 as null and void the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan dated April 7, 2011 related to the claim from Y.Hajiyev and I. Shiraliyeva's against S. Bayramova and others on cancellation of the Decision of Commission on Agrarian Reforms of Terter area and recognition of the certificate granted on its basis as invalid in connection with its discrepancy with the Article 13, Article 29, Article 60.1 of the Constitution, and with the Articles 416, 417.1.3, 418.1 of the Civil Procedural Code of the Republic of Azerbaijan. To reconsider case according to the present decision, in order and the 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.