**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 6 October 2011 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of A.Efendiyeva and N.Kerimova*

**5 October 2012 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant Afruz Efendiyeva and her representatives Faiq Aliyeva and Vusal Kazinzade, applicant Natavan Kerimova and her representative Muhtar Mustafayev,

representative of respondent body – Elkhan Kazimov, Head of Department of Staff of the Supreme Court 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 A.Efendiyeva and N.Kerimova concerning verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of 6 October 2011 to Constitution and laws of the Republic of Azerbaijan.

Having heard the report of Judge J.Garajayev, speech of representatives of applicants, respondent body and specialist, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

 By the decision of Yasamal district court dated December 6, 2010 the claim of Solmaz Agayeva against Afruz Efendiyeva (attracted as the respondent and the third party), and Baku city Territorial Administration of Real Estate State Register Service of the State Committee of the Republic of Azerbaijan on property issues (hereinafter referred to as the Baku Territorial Administration of Service) concerning recognition of succession right and property with respect to 3/6 (part of the House No. 96 on Bashir Safaroglu Street, Baku city) which remained opened, addressed to Surai Bagiyeva, recognition as invalid of Inheritance Certificates was partially satisfied. Counter claim of heir-at-laws A. Efendiyeva and Rasheed Bagiyev – Natavan Kerimova and Lala Bagiyeva to S. Agayeva and others concerning recognition of succession right and property were rejected.

By the decision of Civil Board of the Court of Appeal of Baku city (hereinafter referred to as the CB of the Court of Appeal of Baku city) as of May 26, 2011 A. Efendiyeva, N. Kerimova and L. Bagiyeva's appeal complaints were not satisfied, and the judgment of the first instance was upheld.

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) dated October 6, 2011 the appeals made by A. Efendiyeva and N. Kerimova were not satisfied, and the decision of CB of the Court of Appeal of Baku city was upheld.

By ruling of the Supreme Court of the Republic of Azerbaijan as of December 23, 2011 it was refused in presentation of the additional appeal from A. Efendiyeva for consideration of Plenum of the Supreme Court.

Applicants, having made the complaint to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), asked for verification of compliance of the decision of CB of the Supreme Court to Constitution (hereinafter referred to as the Constitution) and to laws of the Republic of Azerbaijan.

Proving the complaint it is noted that in the decision of CB of the Supreme Court some applied norms of the Civil Code of the Republic of Azerbaijan which was acting till September 1, 2000, (hereinafter referred to as the former Civil Code) were misinterpreted, as well as a number of the norms of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) which are subject to application were not applied.

Applicants consider that courts broke their property right, and guarantees for legal protection of their 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 according to the Registration Certificate (Series MN No. 121346) issued by Management of the Technical Inventory and Registration of the Property Rights of Baku city, the house No. 96 on Bashir Safaroglu Street (former Shors Street) of Baku city was in S. Bagiyeva's property. From official marriage of S. Bagiyeva and Aga Rashid Bagiyev six children (Nargiz, Sona, Badal, Bugs, Afruz and Solmaz) were born. A. Bagiyev died on June 29, 1960, and S. Bagiyeva - on June 30, 1993.

The Succession Right Certificate No. 2V-442 (notarized in the State Notary Office No. 5 of Baku city on December 30, 1997 after S. Bagiyeva's death) specified succession rights of S. Agayeva, A. Efendiyeva and N. Bagiyeva’s successor Rufat Sultanov with respect to 1/6 - part of the house No. 96 on Bashir Safaroglu Street of Baku city for everyone. The 3/6 part of the house was kept for S. Bagiyeva.

1/6 part of the challenged house was registered in the state register of real estate as a private property for S. Agayeva, 1/6 part for A. Efendiyeva, 1/6 part for R. Sultanov, and 3/6 part for S. Bagiyeva.

Subsequently the civil case according to the statement of claim of S. Agayeva to the Baku territorial administration of Service concerning recognition of succession and property right with respect to 3/6 - part of the challenged house belonging to S. Bagiyeva's testator was considered in the relevant judicial instances and the above decisions are issued.

Part V of the Article 29 of the Constitution guarantees a right of succession. This article of the Constitution in broad understanding, along with the right for the will, also guarantees the right to inheritance. Thus, the guarantee of a right of succession provides, on the one hand, transfer of inheritance, that is, possibility of the will, and with another - acceptance of inheritance and possession of it, being the successor.

Plenum of the Constitutional Court in connection with legal regulation of a right of succession showed in the previous decisions that the inheritance institute in a certain degree reflects in itself specific features of both groups of norms (family and labor). So, this feature of institute of a right of succession proves, as in a binding character of considerable part of the rules relating to it, and in restriction with special conditions of freedom of the contract (decisions verification of conformity of Article 1193 of the Civil Code of the Republic of Azerbaijan to parts I and II of Article 13 and parts I, II of Article 29 of the Constitution of the Republic of Azerbaijan” of October 20, 2011; “On interpretation of Article 1203.1 of the Civil Code of the Republic of Azerbaijan” of December 13, 2011).

The former Civil Code caused receiving of inheritance as acceptance of it by the successor. The successor was considered as accepted the inheritance in case then he entered the actual management of hereditary property or possession of inheritance, or submitted the statement for acceptance of inheritance to notarial body for a place of opening of inheritance. The code provided commission of these actions within six months from the date of opening of inheritance (Article 552). In compliance with Article 553 of the Code, the term for acceptance of inheritance established by Article 552 of this Code could be prolonged by court in case of recognition of the reasons of its omission as valid. The inheritance could be accepted and after the expiration of the specified term without appeal to the court in the presence of consent of all successors who accepted inheritance.

Here it is necessary to consider that the right of succession specified in part V of the Article 29 of the Constitution, and legally settled by civil legislation provides state guarantee on transition of property belonging to deceased person (testator) to other persons (successors). This right unites in itself the right of the testator to dispose of the property, and the right of successors to receive this property. Opportunity to dispose, the property belonging to the owner, on the basis of the right of succession including two above-mentioned rights follows from part III of Article 29 of the Constitution, and it makes a basis of freedom of the will.

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 of May 10, 2007 on the case of Kushoglu v. Bulgaria).

Approaching a issue from such point of view, Plenum of the Constitutional Court notes that in case of acceptance by the successor of part of hereditary property on the bases provided by the civil legislation (inheritance under the law or the will), it has to be regarded, as acceptance of all or the inheritance share which is due to him (irrespective of in what it is expressed and where is). It confirms earlier expressed will of successors for acceptance of the inherited property, and provides duration of their property rights to this property acquired on legal grounds, and implementation of these rights without introduction of unreasonable restrictions.

In point 6 of the decision of Plenum of the Supreme Court of the Republic of Azerbaijan for No. 5 of 1979 “On some issues of application by courts of the law on inheritance” it is specified that according to Article 552 of the CC, the successor who accepted part of hereditary property is considered as the one that accepted all or the part of property which is due to him/her irrespective of where there is another part of inheritance.

Due to the specified, Plenum of the Constitutional Court considers that at application the provisions of the above-noted articles have to be interpreted from the point of view of the constitutional obligations assigned to the state in the field of providing a right of succession according to part V of Article 29 of the Constitution.

Thus it is necessary to consider that implementation of these obligations is aimed at providing the principle of social justice making a basis of a right of succession, and not deprivation according to formal requirements any of successors in the future of the property right to actually accepted hereditary property.

It should be noted that the Constitution, along with the rights and freedoms, also establishes the duties following from them, and does not exclude possible lawful and reasonable interventions in implementation of the rights. However, lawful intervention in any right, including, in the property right has to be proportional, carried out at achievement of fair balance between common interests of the state or society and protection of constitutional rights of the individual.

In the decision of the European Court of June 19, 2001 on case of Zwierzyński v. Poland it is established that any interference with the property must also satisfy the requirement of proportionality. The Court reiterates that an interference must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights  (§71). In the decision of court adopted on another case it is specified that an interference must achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (decision of March 29, 2010 on case of Depalle v. France, §83).

But articles applied by courts on case were not interpreted according to the specified principles (social justice and proportionality), acceptance since 1997 by A. Efendiyeva of part of hereditary property actually by giving in notary office of the statement, and maintaining this property in its property was not regarded as acceptance of all hereditary property inherited by successors from S. Bagiyeva's testator irrespective of where it is and in what it is expressed. Similar approach led to violation of the property right of A. Efendiyeva provided in Article 29 of the Constitution.

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

In the Constitution as the basic principles of administration of justice are fixed impartial, fair, consideration of the case observing legal equality of the parties, on the basis of the facts and according to the law (Article 127.2), implementation of legal proceedings on the basis of the principle of competitiveness (Article 127.7).

According to these provisions, justice is carried out on the basis of competitiveness, equality of the parties and the facts. The judge is obliged to provide the principle of competitiveness of process in all cases, to prove the decision only the arguments considered on the basis of the principle of competitiveness of the parties, explanations of the parties and documents. The court estimates proofs after impartial, comprehensive and full consideration of the available proofs and according to norms of the right, applied to these proofs. The judgment has to be lawful and reasonable. The decision has to be proved according to the established valid facts of the case and legal relationship of the parties (Articles 9.1, 9.3, 88, 217.1 and 217.3 of the CPC).

The legal position of Plenum of the Constitutional Court on this matter consists that the doctrine of a constitutional right recognizes the principle of legal certainty as one of the basic elements of rule of law that found the reflection in a preamble of the Constitution of the Republic of Azerbaijan. The principle of legal certainty, along with other requirements, provides clarity and definiteness concerning existing legal situation in the most general sense. From this point of view, all necessary issues on the case resolved in the decisions adopted by courts it has to be cleared up, the contradictory moments have to be eliminated. In the judicial acts that are taken out on behalf of the Republic of Azerbaijan there should not be provisions calling into question the fair solution of case, making a contradiction and influencing the right of constitutional and legal protection of participants on dispute (decision of Plenum of the Constitutional Court according to N. Abilov's complaint of June 13, 2008).

Plenum of the Constitutional Court notes that in the solution of the issues connected with the property right of the persons which got the property right to hereditary property in the order established by the law, and registered it courts are obliged not to proceed from formal reasons, to study similar questions completely and comprehensively with use of all possible means provided to them by the legislation.

Thus, from the circumstances of a civil case established by courts it is evident that court of the first instance, being based on continuous accommodation of S. Agayeva in the challenged house, regarded this circumstance as the actual acceptance of hereditary property by her.

In this regard, without execution by court of the obligations for an assessment of the arguments which are put forward in court of the first instance assigned to it, concerning A. Efendiyeva and N. Kerimova's not accommodation in the specified house after acquisition of a right of succession by S. Agayeva on part of hereditary property and proofs to the relevant documents the decision of December 6, 2010 was adopted.

Concerning these arguments repeated by applicants in the appeal complaint, the court of appeal instance motivated the actual acceptance of hereditary property of S. Agayeva not by accommodation in the challenged house, and transfer of this house to other persons to rent. The court of appeal instance established this circumstance on the basis of indications of the witnesses interrogated in court of the first instance and during appeal trial.

Court of appellate instance, as a court of full authorities, considers case and evidence present in case or additionally submitted evidence on merits (Article 372.1 of the CPC). On sense of the specified norm, the court of appeal instance gives a legal assessment to demands and protests of the parties, establishes their rights and duties, considers case by trial on the facts. For this purpose, the court of appeal instance uses the evidence presented to court of the first instance, and the new evidence presented to it in the order established by Article 371 of the CPC. In Article 385.1.1 of the Code violation or the wrong application of norms of the material right or norms of the procedural right is provided as one of the bases to cancellation of the decision of court in an appeal order.

Thus, according to the Article 76.1 of the CPC, proofs are any actual data on the basis of which in the order determined by the Code, the court establishes existence or absence of the circumstances proving requirements and/or objections of the parties, and other circumstances important for correct resolution of case. According to the Article 81 of this Code, circumstances of case should be proved by certain means of proof in accordance with law or other legal normative acts but not by any other means.

But the court of appeal instance which considered the this case within the powers did not pay attention that the actual management of hereditary property from S. Agayeva was established only on the basis of the lease contract, and made the decision incompatible with requirements of Articles 76.1 and 81 of the CPC.

According to the Article 416 of the CPC establishing a basic purpose of court of cassation instance and limits of consideration of matter in this instance, this court shall verify correct application by court of appeal instance of material and procedural norms of law. Court of cassation instance, during consideration, had 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 to court of appeal instance. Violation or incorrect application of material and procedural norms of law is a ground for repeal of decision or ruling of court of appeal instance (Articles 417.1.3 and 418.1 of the CPC).

Thus, the court of cassation instance which considered a civil case according to the appeal of A. Efendiyeva and N. Kerimova did not pay due consideration to the wrong interpretation of norms of a substantive law and non-use of norms of a procedural law, court of appeal instance, as a result adopted decision of October 6, 2011 which is not correspond to the requirements of Articles 416, 417.1.3 and 418.1 of the CPC. It, in turn, led to violation of the property rights and legal protection of A. Efendiyeva provided in Article 29 and in Article 60.1 of the Constitution and the right for legal protection of N. Kerimova provided in Article 60.1 of the Constitution.

According to the above-mentioned, Plenum of the Constitutional Court comes to conclusion that the decision of CB of the Supreme Court as of October 6, 2011 has to be considered as void in view of its discrepancy with the Articles 29.5 and 60.1 of the Constitution, 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 October 6, 2011 on the civil case in connection with the claim by Solmaz Agayeva against Afruz Efendiyeva, attracted as the respondent and the third party, to the Baku territorial administration of Service of the state register of real estate of the State Committee of the Azerbaijan Republic concerning property due to its discrepancy with the Articles 29.5 and 60.1 of the Constitution, 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 terms established by 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.