**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Concerning interpretation of positions of article 372 of the Civil Remedial Code of the Republic of Azerbaijan about limits of appeal consideration from the point of view of requirements of articles 372.1 and 372.7 given Codes*

**20 May 2011 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Judges F.Abdullayev (Chairman), F.Babayev, S. Hasanova, J.Garajayev, R.Qvaladze (Reporter Judge), K.Shafiyev, I.Najafov, S.Salmanova and R.Ismaylov;

attended by the Court Clerk I.Ismayilov,

representative of respondent body – Mamedov Mamed judges of the Baku Appeal court, and Fuad Mamedov the main adviser of department of the Administrative and military legislation the Apparat of Milli Majlis( Parlament) of the Republic of Azerbaijan,

expert – Movsum Movsumov, The teacher of Chair of Civil process, the labor and ecological law of the Baku State University,

specialists - Bagir Asadov, judge of the Supreme Court of the Republic of Azerbaijan, Gazanfar Bayramli the deputy chief of department on maintenance of the state charge of the State Office of Public Prosecutor of the Republic of Azerbaijan,

has examined in open session via special constitutional proceedings in accordance with Article 130.VI of the Constitution of the Republic of Azerbaijan

Having heard a report of Judge R.Qvaladze and statements from representatives of the parties and opinion of experts, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan.

**DETERMINED AS FOLLOWS:**

The Production Association Azneft of the State Oil Company of Azerbaijan Republic filed a lawsuit in court against Sh.Gurbanov for demolition of illegally built structure in the protection zone of the oil well, vacation of the territory and eviction from the illegally built structure.

The lawsuit was allowed by a judgment of the Sabunchu district court of Baku city as of October 19, 2010.

Sh.Gurbanov having filed an appeal against the judgment with regard to case asked for discharge of the judgment and rejection of the lawsuit.

The Baku Court of Appeal regarding the appeal has established that though the Court of First Instance decided to allow the lawsuit in full, it didn’t express the part of the lawsuit concerning eviction of the defendant and other persons in the conclusive part of the judgment.

In consideration of these facts of the case and filing of the appeal by the defendant the Baku Court of Appeal in its petition to the Constitutional Court of Azerbaijan Republic (hereinafter referred to as the Constitutional Court) asked to interpret provisions of article 372 of the Civil Procedure Code of Azerbaijan Republic (hereinafter referred to as the CPC) about the limits of appeal proceedings in terms of requirements of articles 372.1 and 372.2 of this Code.

Regarding the petition the Plenary Session of the Constitutional Court considers important to study the essence and peculiarities of the appeal proceedings.

While the Constitution of Azerbaijan Republic (hereinafter referred to as the Constitution) fixed ensuring human and civil rights and freedoms as a supreme goal of the state, it guarantees settlement of any disputes connected with abuse of these rights and freedoms by courts (Articles 12&71 of the Constitution). Obligation of the state for ensuring of effective protection of rights and freedoms also requires availability of legal mechanisms aimed at elimination of judicial errors when delivering justice.

The right to relief at law fixed in Article 60 of the Constitution is based upon the guarantee of constitutional rights and freedoms. The CPC appearing as one of mechanisms of this category contains constitutional principles of delivery of justice and provides for effective protection of everyone’s rights and freedoms fixed in the Constitution.

And for this purpose the civil procedure legislation provides for the procedure rules of verification of legitimacy and validity of judicial acts by superior courts.

In accordance with these rules an appeal may be brought before the Court of Appeal against any sentences or judgments pronounced by the Court of First Instance which have not entered into effect.

Institute of appeal was reflected in the civil procedure legislation in the majority of states and two kinds of it (full and partial) were provided.

Meaning of appeal proceedings provided for in the current procedural law during the full appeal (France, Italy) consists in new hearing on the merits.

The purpose of full appeal consists in elimination of judicial errors and correction of defects committed by parties themselves. The parties have the right to submit new evidence that may change the justicement along with the evidence submitted to the Court of First Instance. In the result of such approach the Court of Appeal has to settle the case in full in spite of full judicial proceeding in first instance and has no right to return it to the Court of First Instance for new consideration. Facts of case are studied in full in appeals instance and the same actions are made for evaluation of evidence as in the Court of First Instance.

This institute enables the persons participating in proceedings to correct their errors and defects. This to some extent creates conditions for investigation of the truth and making a fair decision.

And on the other hand the persons participating in proceedings being aware about availability of the right to new hearing of case within the full appeal may be not so interested in comprehensive trial of their cases in the Court of First Instance as well as during the collection and submission of evidence to the court of this instance. In case of full appeal the Court of Appeal replaces the Court of First Instance and decreases its procedural importance and influence.

In case of partial appeal (Austria and Germany) the process of proof is concentrated in the Court of First Instance and the Court of Appeal having considered a case again on the basis of evidence submitted by the parties in first instance must eliminate its errors and defects.

Obligation of the Court of Appeal consists in consideration of matter in contest free of circumstances bearing no relation to the fact of the matter in first instance and within the scope of appeal.

It was established at the Plenary Session of the Constitutional Court that presence of a number of conceptual problems was revealed in judicial practice in connection with provisions of the CPC concerning the limits of appeal proceeding.

First of all, in case if an appeal is lodged against a certain part of judgment of the Court of First Instance is the settlement of matters beyond the limits of trial in the Court of Appeal.

According to article 372.1 of CPC the Court of Appeal tries a case on the merits as a competent court on the basis of evidences available in case and additionally offered evidence.

Sometimes when interpreting a concept “on the merits” in this article one may come to a conclusion that in accordance with the rules of hearing the Court of Appeal in the Court of First Instance doesn’t limit oneself to the arguments specified in appeal and evaluate in full legitimacy and validity of judgment of the Court of First Instance.

At the same time, according to Article 372.6 of CPC the Court of Appeal verifies validity of judgment of the Court of First Instance in the part of its direct or indirect contestation.

If the Court of Appeal comes to a conclusion about verification in full scale of judgment of the Court of First Instance during the consideration in the part contested in an appeal then a question arises in the practice concerning the procedure by which this matter will be solved.

In some cases a conclusion may be made that whether it is a full or partial appeal against the judgment of the Court of First Instance the Court of Appeal considers the case in full scale. In appeals instance the case will be reconsidered, legitimacy and validity of judgment of the Court of First Instance will be verified, all actual facts and evidence significant for fair trial will be evaluated and verification of proper application of material and procedural norms by the court will be provided.

Another position is that Article 372.6 of CPC contains a special approach to the common concept of trial, so during the appealing against a certain part of judgment the Court of Appeal instance has no right to reconsider the case in full.

In connection with settlement of a matter raised in the petition, examination of availability of a kind of appeal in our country and its purpose is of great importance in terms of requirements of the civil procedural legislation. An important aspect of such examination consists in the limits of proceeding in the Court of Appeal.

Proceeding in the Court of Appeal begins on the basis of appeal (Article 357 of CPC).

In this connection first of all an object and subject of appealing should be determined. As follows from the analysis of Article 41 including Article 372 of CPC concerning proceedings in the Court of Appeal, the term Object of Appeal means a judgment of the Court of First Instance or its part and this object may be limited by appellate requirements.

The term Subject of Appeal means consideration of submitted requirements by the court and range of infringements committed during the settlement.

Thus, authorities of the Court of Appeal concerning verification of any judgment of the Court of First Instance which have not entered into effect should be determined both in terms of the object and the subject of an appeal.

Articles 371 and 372 of CPC determine the limits of proceeding in the Court of Appeal.

These limits may be divided into three groups:

limits when submitting new and additional evidences;

limits of verification of legitimacy and validity of judicial acts;

ban on presentation of new requirements not being the subject of proceeding in the Court of Appeal.

Limits for submission of evidence are provided for in Articles 371, 372.1 and 372.2 of CPC.

Articles 371 and 372.2 of CPC stipulate significant limitations concerning submission of new and additional facts and evidence.

Availability of a number of circumstances is compulsory for submission of this evidence:

- during the proceeding in the Court of First Instance proving that a person participating in the case has no opportunity to submit the evidence. Burden of proof of no opportunity and submission of new and additional evidence is imposed on the person filing a petition concerning verification of these evidence;

- the subject of petition for verification of new and additional evidence may be any person participating in the case, his(her) representative as well as a person whose rights are affected by the act contested, i.e. a person addressing with an appeal;

- new and additional evidence must meet the requirements of jurisdiction and admissibility. If any evidence doesn’t concern facts of the case or inadmissible in accordance with the requirements of law it may not be admitted;

- admission of a reason of failure of evidence before the Court of First Instance as a reasonable excuse by the Court of Appeal.

Limitation in submission and verification of new and additional evidence in the Court of Appeal indicate lack of full appeal.

In connection with the limits of verification of legitimacy and validity of judicial acts the Plenary Session of the Constitutional Court notes that the Constitution of Azerbaijan Republic fixed the principles reflecting nature and essence of democratic state and providing guarantee of human and civil rights and freedoms. On the basis of principles fixed in the Constitution basic rights of participants of the civil procedure were reflected in basic principles of civil justice which have decisive importance for the whole civil justice including appeal justice and provide effective exercise of these rights (Articles 125&127 of the Constitution).

Adversarial principle and principle of optionality not specified directly but provided for in CPC take a special place among the principles of civil procedure.

Determination of the role of the court in exercise of adversarial principle and principle of optionality is of great importance.

In a number of its judgments the Plenary Session of the Constitutional Court explaining the essence of specified principles sets forth its position concerning the limits of proceeding in terms of these principles in the Court of Appeal (Resolution of the Plenary Session of the Constitutional Court on L.N.Binnetova’s appeal as of May 8, 2008; Resolution of the Plenary Session of the Constitutional Court on interpretation of articles 397.1 and 397.2 of the Civil Procedure Code of Azerbaijan Republic as of May 12, 2009).

The Plenary Session of the Constitutional Court considers necessary to note again that the principle of optionality is expressed in free disposal of rights connected with beginning, passing and termination of the process by the persons participating in the case.

According to this principle not a judge but the parties can make a decision on the beginning of a civil procedure, the range of its subject and termination of the civil procedure. The process is carried out depending on will and activity of the parties and not on public will of the court.

So, any suit may be filed only on the basis of application or complaint by any person (Articles 5.1 & 5.3 of CPC). Plaintiff has a right to disclaim an action, defendant has a right to plead no defense and parties can settle the case with amicable agreement (Articles 5.4, 52.1-52.3).

At the same time it should be taken into account that if such withdrawal of action, confession of action and amicable agreement contradict the law or abuse rights and interests protected by the law, the court shall not admit such actions and consider the case on the merits.

The principle of optionality is closely associated with the adversarial principle being one of the basic principles of the process.

The rule of “audiatur et altera pars” should be applied in order to provide awarding a fair, proper and reasonable judgment by court.

Fixation of the adversarial principle by CPC ensures protection of human and civil rights and freedoms in the civil procedure as well as fairness and legitimacy of judgment. According to the adversarial principle court is exempted from authorities not conforming to functions of justice.

The new procedural legislation gives preference to the parties’ rights when establishing and investigating facts of the case.

Thus according to Article 14.2 of CPC the court considers and uses only the evidence presented by parties.

However, legislator didn’t reject entirely the principle of procedural activity of court. The fact is not that the court must ascertain the truth by all means even under protest of parties, it is important for what purpose the court ascertains the truth. If the court’s activity doesn’t prevent or go beyond the scope of the adversarial principle but on the contrary promotes ensuring of this principle, such activity shall be recognized as permissible and even necessary in certain cases.

According to Article 9.3 of CPC in all cases judge must ensure the adversarial character of the proceeding. He must give reasons for his judgment only by means of the evidence, explanations of parties and documents discussed by them on the basis of the adversarial character of the parties. The court shall not substantiate its judgment by means of judicial evidence advanced by it based upon official status and without participation of the parties.

Thus a common peculiarity of the adversarial principle consists in the following:

- the court shall not collect evidence by itself, it shall ensure participation of the parties in the proceeding of adversarial character and presentation of evidence by them;

- the parties shall prove the facts they refer to by themselves and the court shall make a certain judicial conclusion on the basis of the facts presented.

Application of the abovementioned principles in the appeal proceeding always is carried out in full.

The principle of optionality shows itself in the appeal proceeding firstly only when the appeal proceeding begins on the basis of appeal. Should such appeal is not submitted the appeal proceeding may not be initiated. Secondly, the person filing an appeal establishes the limits of the proceedings in the case in appeals instance.

The limits of proceedings in case in the appeals instance are determined by the requirement “ne eat judex ultra petita partium” being the essence of the principle of optionality. This requirement is transformed into the rule “temtum devolutum quantum appelatum” at the stage of appeal against judgment.

Article 372.6 of CPC established the limits of proceedings in case in the appeals instance on the basis of appeal in the context of verification of reasonableness of judgment. And these limits are determined depending on arguments of such appeal.

Arguments of appeal are reflected in the arguments connected with the part of judgment contested by a party. In case of full contestation arguments of appeal must concern its groundlessness in all parts, and in case of partial contestation they must concern the groundlessness of such contested part of judgment. These arguments determine the object of appeal.

According to the first sentence of Article 372.6 of CPC the Court of Appeal shall verify the reasonableness of judgment of the Court of First Instance in the part of its direct or indirect contestation.

The Plenary Session of the Constitutional Court notes again that according to the principle of optionality and the adversarial principle special interests and rights of any person shall determine the subject and limits of verification.

It should be taken into account that as long as the parties decide the destiny of proceeding in accordance with the principle of optionality the proceeding shall be initiated and stopped on initiative of the persons participating in the case, the matter of appropriateness of hearing of the case shall be contested only in appeals submitted by the persons concerned, such appeal may be withdrawn freely and interests of applicant may not be pushed to the sidelines.

So, the Court of Appeal verifies judgments of the Court of First Instance only in its contested part. In this connection the Court of Appeal shall not touch uncontested parts of such judgment. Reversal or change of the judgment in the part uncontested by the parties not disputing its reasonableness shall be regarded as violation of the principle of optionality and the adversarial principle.

In case of partial contestation of judgment of the Court of First Instance the Court of Appeal has a right to express its attitude in its judgment only towards the part concerned.

As follows from the second sentence of Article 372.6 of CPC, if any appeal is aimed at reversal of judgment or if the subject of dispute is indivisible according to arguments of appeal and protests against it, the Court of Appeal verifies judgment of the Court of First Instance in full scale.

As follows from this provision, legislator associates the full verification of reasonableness of judgment of the Court of First Instance by the Court of Appeal not only with the appeal but also with any protest brought against it in case of indivisibility of the subject of dispute.

The issue of indivisibility of the subject of dispute in all cases shall be determined by the court taking into consideration the arguments presented by the parties in their appeals and protests.

In view of the aforesaid the Plenary Session of the Constitutional Court came to a conclusion that in accordance with article 372.1 of CPC in cases provided for in article 372.6 of this Code the Court of Appeal shall verify the reasonableness of judgment of the Court of First Instance only in its contested part in the scope of arguments of appeal.

The Court of Appeal may go beyond the limits of arguments of appeal in accordance with legitimacy interests.

In terms of the case in point legitimacy interests mean proper substantive and procedural enforcement.

According to Article 2.2 of CPC one of the main goals of civil proceedings is consolidation of legitimacy. In connection with the case in point the court’s mission is to provide proper application of provisions of the Constitution of Azerbaijan Republic, laws and other regulatory legal acts (article 2.1 of CPC).

Fulfillment of this mission by the court should not depend on the position reflected in appeal of the person participating in the case. As the court bears the direct responsibility for enforcement of law legal proposition of the party will in no case be compulsory for judge.

That’s why legislator established in article 372.7 of CPC that the Court of Appeal must verify observance of rules of substantive and procedural law by the Court of First Instance irrespective of arguments specified in appeal.

Articles 385-387 of CPC stipulate the grounds for reversal of judgment of the Court of First Instance in appeals instance and among them there is violation of rules of substantive and procedural law or improper substantive and procedural enforcement.

According to the requirements of the civil procedural legislation the rules of substantive law are considered as violated or improperly enforced in the event that the Court of First Instance commits an error in law enforcement, doesn’t enforce any law or other regulatory legal acts to be enforced or misinterprets the law (Article 386 of CPC).

Committing an error in law enforcement is that the court doesn’t enforce the legal norm regulating the contested issue during the settlement of the case.

Non-enforcement of any law to be enforced means non-specifying the rule of substantive law to be enforced in the judgment of the court and settlement of the case in contravention of the current legislation norms. These violations also include enforcement of any dead law, international treaties not ratified in the manner prescribed by law, etc.

Misinterpretation of law occurs if any law to be enforced was enforced but its essence and content were misunderstood and therefore the court arrived to a wrong conclusion concerning the parties’ rights and freedoms.

Another important issue concerning proper determination of the limits of appeal proceeding should be considered along with the aforesaid.

As it is known, according to articles 88, 217, 218 of CPC as well as to the adversarial principle the court shall come to a legal conclusion on the basis of the facts presented by the parties. That’s why the Court of Appeal has a right to verify observance of rules of procedural law only in the part of contestation of reasonableness of judgment passed by the Court of First Instance. Otherwise article 327.6 of CPC would become meaningless.

When verifying the propriety (validity) of substantive enforcement there is a compromise between the discretion of a party and a provision “jura novit curia”.

The Court of Appeal has no right to verify on its own initiative the legal evaluation made by the Court of First Instance in respect of the dispute. However, in the event that any appeal is connected with wrong substantive enforcement or misinterpretation of the rule of substantive law or wrong legal evaluation of dispute the Court of Appeal shall carry out a new legal evaluation of such dispute.

Thus, limits of authorities for verification by the Court of Appeal both in respect of the object and the subject of an appeal shall be established in the appeal.

According to “jura novit curia” provision the Court of Appeal shall not depend on the legal proposition of an appeal during such evaluation and may not reverse or change a judgment on any grounds not specified in the appeal.

Article 387 of CPC stipulates procedural grounds for reversal of judgment of the Court of First Instance.

Procedural irregularities provided for in this article of CPC may be divided into two groups. The first group includes the procedural irregularities giving occasion to reversal of judgment of the Court of First Instance. Such irregularities are called gross breaches. They are specified in articles 387.2.1-387.2.7 of CPC and give occasion to reversal of judgment of the Court of First Instance irrespective of arguments of appeal.

The second group includes the procedural irregularities which may not give occasion to reversal of judgment of the Court of First Instance. They may be called relative breaches.

According to article 387.1 of CPC any breach or improper procedural enforcement gives occasion to reversal of judgment provided that such breach resulted in awarding a wrong judgment.

Depending on specific facts of case the Court of Appeal decides whether any procedural irregularity gives occasion to reversal of judgment of the Court of First Instance or not. Insignificant procedural irregularities committed during the proceeding in the Court of First Instance will not give occasion to reversal of judgment if they have no effect upon the final judgment.

It should be also taken into account that any valid, legal and reasonable in terms of facts judgment of the Court of First Instance may not be reversed only on the formal grounds (article 385.2 of CPC).

Thus the Court of Appeal verifies observance of the rules of procedural law irrespective of the object and subject of appeal.

According to the aforesaid, the Plenary Session of the Constitutional Court arrives to a conclusion that:

- in accordance with article 372.1 of in cases provided for in article 372.6 of this Code the Court of Appeal shall verify the reasonableness of judgment of the Court of First Instance only in its contested part in the scope of arguments of appeal;

- in accordance with articles 372.1 and 372.7 of CPC the Court of Appeal verifies observance of rules of substantive law in the contested part of the judgment passed by the Court of First Instance. Within these limits the Court of Appeal shall not depend on any arguments relating to the legal proposition of an appeal and may reverse or change a judgment on the grounds not specified in the appeal and connected with violation of the rules of substantive law;

- in accordance with articles 372.1 and 372.7 of CPC in cases provided for in Article 387 of this Code the Court of Appeal verifies observance of the rules of procedural law by the Court of First Instance irrespective of arguments of an appeal. Any valid, legal and reasonable in terms of facts judgment of the Court of First Instance may not be reversed only on the formal grounds.

In accordance with Article 130, p.VI of the Constitution of Azerbaijan Republic and Articles 60, 63, 65-67&69 of the Law of Azerbaijan Republic on the Constitutional Court the Plenary Session of the Constitutional Court of Azerbaijan Republic

**DECIDED:**

1. In accordance with Article 372.1 of the Civil Procedural Code of Azerbaijan Republic in cases provided for in article 372.6 of this Code the Court of Appeal shall verify the reasonableness of judgment of the Court of First Instance only in its contested part in the scope of arguments of appeal.

2. In accordance with articles 372.1 and 372.7 of CPC the Court of Appeal verifies observance of rules of substantive law in the contested part of the judgment passed by the Court of First Instance. Within these limits the Court of Appeal shall not depend on any arguments relating to the legal proposition of an appeal and may reverse or change a judgment on the grounds not specified in the appeal and connected with violation of the rules of substantive law.

3. In accordance with articles 372.1 and 372.7 of CPC in cases provided for in Article 387 of this Code the Court of Appeal verifies observance of the rules of procedural law by the Court of First Instance irrespective of arguments of an appeal. Any valid, legal and reasonable in terms of facts judgment of the Court of First Instance may not be reversed only on the formal grounds.

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

5. 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’.

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