**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OFTHEREPUBLICOFAZERBAIJAN**

*On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 04 October 2010 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of T.Mansurov*

**05 December 2011 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant Teymuraz Mansurov and hisrepresentative Aliabbas Rustamov,

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 04 October 2010 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of T.Mansurov.

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 the apartment No. 17 located in building 22/1 (36 quarter of Sumgait city) Teymuraz Mansurov had got on the basis of the purchase & sale contract.

The above-mentioned contract dated January 26, 2006 was signed on behalf of the owner of housing Sara Javadova by proxy by her son – Tofik Agabalayev.

Other son of S. Javadova – Oktay Agabalayev, having appealed to court of the city of Sumgait, submitted a claim for recognition of a right of succession, restoration of term of acceptance of inheritance, recognition of the contract on purchase and sale invalid and cancellation of the registration certificate. T. Agabalayev, in turn, having submitted the counterclaim, asked court to recognize his brother O. Agabalayev as the unworthy successor.

Primary claim was proved by that in spite of the fact that O. Agabalayev's mother died on January 15, 2006, the contract on purchase and sale of the challenged apartment is signed on January 26, 2006 by proxy, this S. Javadova to T. Agabalayev.

By the judgment of the court of Sumgait city of March 18, 2008, the primary claim of O. Agabalayev and the counterclaim of the respondent T. Agabalayev were rejected because of groundlessness.

By the decision of Civil Board of the Court of Appeal of Sumgait city (hereinafter referred to as the CB of the Court of Appeal of Sumgait city) of September 23, 2008, the appeal complaint of the claimant O. Agabalayev is partially satisfied, a judgment of the court of Sumgait city on case of March 18, 2008, regarding restoration of term of acceptance of inheritance and recognition of a right of succession is cancelled, O. Agabalayev's claim in this part is satisfied and the decision on deduction from T. Agabalayev of a half of the real cost of the apartment No. 17 which is to the address Sumgait, quarter 36, building No. 22/1is made in favor of the claimant O. Agabalayev.

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) of April 8, 2009, the appeal of O. Agabalayev was partially satisfied, the decision of CB of the Court of Appeal of Sumgait city of September 23, 2008 - regarding “recognition of the contract on purchase and sale invalid with cancellation of the registration certificate, deduction of a half of the real cost of the challenged apartment from the respondent T. Agabalayev in favor of the claimant O. Agabalayev” is cancelled, and case is sent for reconsideration to the Court of Appeal of Sumgait city.

At reconsideration of the case on August 31, 2009, the CB of the Court of Appeal of Sumgait city made the decision on partial satisfaction of the appeal complaint of the claimant O. Agabalayev, partial cancellation of the decision of court of Sumgait city on case of March 18, 2008 and restoration of term of acceptance of inheritance by O. Agabalayev, recognition of a right of succession, deduction of a half of the real cost of the apartment from the respondent T. Agabalayev in favor of O. Agabalayev.

By the decision of CB of Supreme Court of 08.01.2010 the appeal of O. Agabalayev was partially satisfied, the decision CB of the Court of Appeal of Sumgait city as of August 31, 2009, regarding recognition of the contract on purchase and sale invalid with cancellation of the registration certificate, deduction of a half of the real cost of the challenged apartment from T. Agabalayev in favor of O. Agabalayev is cancelled, and matter in this part was sent for new appeal consideration.

The CB of the Court of Appeal of Sumgait city, having considered case on May 24, 2010, adopt the decision on satisfaction of the appeal complaint of O. Agabalayev, on partial cancellation of the decision of court of Sumgait city of March 18, 2008, satisfaction of the claim of O. Agabalayev, recognition invalid of the contract on purchase and sale concluded between T. Agabalayev and T. Mansurov on January 26, 2006, both its cancellation, and cancellation of the registration certificate issued to T. Mansurov on the apartment No. 17 to the address: Sumgait, quarter 36, house 22/1.

The CB of Supreme Court by its decision as of October 4, 2010left without satisfaction the appeal of T. Mansurov and uphold the decision CB of the Court of Appeal of Sumgait city of May 24, 2010.

According to ruling of the Supreme Court of the Republic of Azerbaijan of November 30, 2011 the additional appeal of T. Mansurov was not submitted for consideration of Plenum of the Supreme Court.

In the complaint lodged to the Constitutional Court, T. Mansurov asked to verify the decision of CB of Supreme Court of October 4, 2010 for compliance with the Constitution (hereinafter referred to as the Constitution) and to laws of the Republic of Azerbaijan.

According to the applicant, the courts of appeal and cassation instance which considered case, having applied Articles 365.1.7 and 366.2 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code), violated his right for legal protection of the rights and freedoms enshrined in the Constitution.

In connection with the complaint the Plenum of the Constitutional Court considers necessary to note the following.

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

According to Article 29 of the Constitution, everyone has the right to own property. No type of property should be granted superiority. Ownership rights, including the rights for private owners, 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 or her own or together with others, to use the property and to make arrangements for it. No one can be deprived of his or her property without a decision of the court.

According to Article 1 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Protection of property in full estimated is one of the supreme values peculiar to the constitutional state. The constitution, affirming the property right, also guarantees its protection with effective remedies. For this reason, the property right is specified among basic rights and freedoms of the person and citizen.

Along with other rights and freedoms, one of remedies of property is fixed in Article 60 of the Constitution. According to part I of this article legal protection of rights and liberties of every citizen is ensured.

According to the legal position created by Plenum of the Constitutional Court, the right for legal protection, being in number of basic rights and freedoms of the person and citizen, also acts as a guarantee of other rights and freedoms enshrined in the Constitution. The specified right isnot limited only by an appeal to the court, it also provides the justice capable effectively restore the violated rights and freedoms.

According to the Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The Civil Code proceeding from the specified norms of the Constitution and developing it also defines the legal mechanisms directed on recognition and protection of the property right.

According to Article 6 of the Civil Code, natural persons and legal entities acquire and exercise their civil rights by their own will and for their own interest. They are free to establish rights and obligations by contract and to determine the terms and conditions of the contract, provided that such terms and conditions are not contrary to law. Civil rights may be restricted by law only where necessary for the protection of state and public security, civil order, the health and morals of society, rights and freedoms, and the dignity and good name of other persons.

The means acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at their discretion (Article 152.1 of the Civil Code).

In Article 135 of the Civil Code, objects of the property right are specified. According to this article, a thing can be movable and immovable. The land plots, subsoil plots, buildings, including, money and securities are things.

Civil transactions, including contracts on purchase and sale, are one of the bases of buying of property.

Right for ownership and disposal of immovable property is accrued from the moment of notary verification of the deal on such property. Right for disposal of immovable property accrued from the date of registration of such property on territorial basis in the state registry of immovable property (Articles 146.1 and 146.2 of the Civil Code).

According to Article 567 of the Civil Code, under the contract of purchase and sale the seller undertakes to transfer a thing to the possession to the buyer, and the buyer undertakes to accept this thing and to pay for it a certain sum of money (price).

One of means of protection of the property rights is recognition of the transaction concluded concerning challenged property as invalid and application of its results. According to Article 337.1 of the Civil Code, the transaction concluded with violation of the conditions established by the present Code is invalid. Invalid transactions can be the challenged transactions or insignificant transactions.

In the event of invalidity of agreement, and where other consequences of its invalidity have not been stipulated in this Code, each party should be obligated to return to the other party all items received pursuant to agreement, and in the event of impossibility of return of the same received items (including where received items have been expressed in the use of property, performed work or rendered service), be obligated to compensate for its value in money (Article 337.5 of the Civil Code). Apparently, provisions of this article provide return of the parties to initial situation, including, return of the sum paid by the buyer at invalidity of the transaction.

By the decision of CB of the Supreme Court of January 8, 2010, the decision of CB of the Court of Appeal of Sumgait city as of August 31, 2009 is cancelled, the case is sent for new appeal consideration with the indication of recognition of the contract on purchase and sale as invalid and cancellation of the registration certificate. Considering this instruction, CB of the Court of Appeal of Sumgait city adopted on May 24, 2010 the decision on recognition of the contract on purchase and sale signed concerning the challenged apartment between T. Agabalayev and T. Mansurov, as invalid, and cancellation of the registration certificate on the apartment issued addressed to T. Mansurov.

However, the court of appeal instance which repeatedly considered case after recognition of the contract on purchase and sale as invalid, did not resolve the issues following in this regard and did not return legal status of the buyer and seller to initial situation, despite requirements of provisions of Article 337.5 of the Civil Code.

Thus, CB of the Court of Appeal of Sumgait city, recognizing the contract on purchase and sale concerning thechallenged apartment as invalid, didnot resolve the issues following from this, didnot return legal status of the buyer and seller to initial situation and didnot resolve an issue of return of the money paid by T. Mansurov for this apartment. Thereby, the court didnot apply Article 337.5 of the Civil Code which is subject for application.

In this regard, Plenum of the Constitutional Court emphasizes that according to the nullified contract on purchase and sale, not return of the paid money led to violation of the property right of T. Mansurov fixed in Article 29 of the Constitution.

Plenum of the Constitutional Court also considers that recognition of the contract on purchase and sale as invalid with return of legal status of the parties to initial situation should not be limited only by reimbursement according to the transaction. Thus, possibility of the requirement of reimbursement for improvement of challenged property at application of Article 337.5 of the Civil Code follows from Article 21 of the Civil Code. The similar legal position found the reflection in the decision of Plenum Constitutional Court of October 27, 2004 on case “On verification of conformity of acts of Judicial Board on Civil Cases of the Supreme Court of the Republic Azerbaijan to the Constitution and laws of the Republic of Azerbaijan according to S. N. Mamedova's complaint”.

Plenum of the Constitutional Court in connection with other question considers necessary to note that the term of acceptance of inheritance is one of important aspects of institute of inheritance. Thus, the term of acceptance of inheritance disciplines participants of legal relations, promotes implementation of the rights and execution of duties of successors, and serves for elimination of uncertainty, instability in the civil relations.

According to Article 1246 of the Civil Code, the successor may accept the legacy within three months from the date of obtaining of knowledge or supposed obtaining of knowledge on legacy. The acceptance of legacy six months upon its availability is not allowed. But court may extend the fixed period for inheritance acceptance if it declares that reasons of delay are valid (Article 1248 of the Civil Code).

The CB of the Court of Appeal of Sumgait city in the decision as of September 23, 2008, having come to a conclusion concerning respectfulness of the reason of the admission of the term established for acceptance of inheritance by the claimant O. Agabalayev restored this term.

In this regard, it should be noted that court of appeal instance, having satisfied the appeal complaint of the claimant O. Agabalayev in this part, did not pay attention to validity of the arguments presented concerning recognition of the reason of the admission of term for acceptance of inheritance as valid, and a issue of assignment of a duty of proof of these circumstances according to the civil procedural legislation on him.

According to Articles 77 and 88 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Procedural Code ), each party has to prove circumstances used as grounds for its claims and objections, and the court should evaluate evidence in a fair, impartial, all-complete and full manner and should thereafter evaluate norms of law to apply to such evidence.

According to Articles 9.1, 9.3, 14.2, 217.4, 218.1 and 220.4 of the Civil Procedural Code, for the lawful and reasonable resolution of any dispute the court after objective, impartial, comprehensive and full consideration of the available proofs during judicial proceedings has to estimate proofs according to norms of law, applied to these proofs. The judgment has to be lawful and reasonable. At pronouncement of the decision the court estimates proofs, defines, what circumstances important for case are established and what are not established, what legal relationship of the parties, what law has to be applied on the this case and whether the claim is subject to satisfaction. In motivational part of the decision the facts of the case established by court, proofs on which conclusions of court are based concerning these circumstances and arguments on which the court rejects these or those proofs have to be specified and does not apply laws and other legal acts to which referred the persons participating in case, and also laws and normative legal acts by which the court at pronouncement of the decision was guided.

In the decision of Plenum of the Constitutional Court of May 20, 2011 it is noted that 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 Republic of Azerbaijan 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 and 127 of the Constitution).

The European Court of Human Rights (hereinafter referred to as the European Court) recognizes non-compliance by courts with the demand of validity made to judicial acts as violation of the right for fair trial, and in a number of the decisions expressed the legal positions.

In decisions of the European Court it is noted that non-compliance with the requirement of justification of the decisions by national courts leads to an absence of proof during fair trials of hearing of positions of the parties with observance of the principle of equality; as it is not clear, arguments of the applicant are rejected by court of appeal instance or simply are not considered. It testifies to groundlessness of conclusions of court concerning a deviation of these arguments (the decision on the case of Kuznetsov and others as of January 21, 2007; the decision on the case of Hiro Balani as of December 9, 1994).

According to the above, Plenum of the Constitutional Court considers that the court of appeal instance did not prove respectfulness of the reason of the admission of the term established for acceptance of inheritance whereas had to make it and therefore, provisions of Articles 9.1, 9.3, 14.1, 88, 217.1 and 218.1 of the Civil Procedural Code were not observed.

According to the civil procedural legislation, the court of cassation instance verify the correctness of application of norms of a substantive and procedural law by court of appeal instance. Court of cassation instance, having considered case, can cancel the decision or ruling of court of appeal instance completely or in part and to send the case for reconsideration in court of appeal instance. The bases for cancellation of the decision or ruling of court of appeal instance are the violation or the wrong application of norms of a substantive law and norms of a procedural law (Articles 416, 417.1.3 and 418.1 of the Civil and Procedural Code).

However, the CB of the Supreme Court did not investigate violation CB of the Court of Appeal of Sumgait city of the above-noted norms of a substantive and procedural law adequately, by its decision as of October 4, 2010 uphold a judgment of appeal instance of May 24, 2010, and not followed of requirements of Article 337.5 of the Civil Code and Articles 416, 417 and 418 of the Civil Procedural Code therefore the property right of T. Mansurov provided in Article 29 and the right for the effective restoration in the rights on the basis of 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 were broken.

Apparently, the court of cassation instance which considered case did not pay due attention to violation of norms of substantive and procedural law by court of appeal instance that led to violation of the above-noted T. Mansurov's rights.

According to the above, Plenum of the Constitutional Court comes to a conclusion that the decision of CB of the Supreme Court of October 4, 2010 has to be considered become invalid in view of discrepancy with the Article 29, Article 60.1, parts II, VII of Article 127, Article 129.3 of the Constitution, and with the Articles 416, 417.1.3, 418.1 of the Civil Procedural Code, and case is subject of reconsideration 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 of the Republic of Azerbaijan on a civil case on O. Agabalayev's claim against T. Agabalayev and T. Mansurov with the requirement of recognition of a right of succession, acceptance (restoration of term) of inheritance, recognition of the contract on purchase and sale invalid with cancellation of the registration certificate, and also according to the counterclaim of T. Agabalayev to O. Agabalayev concerning the requirement of recognition of the last by the unworthy successor as of October 4, 2010 as null and void in connection with its discrepancy with the Article 29, Article 60.1, parts II, VII of Article 127, Article 129.3 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.