**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 Judicial Board on Civil Cases*

*of the Supreme Court of the Republic of Azerbaijan of 25February 2011 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of N.Babayev*

**28 December 2011 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, Jeyhun Garajayev, Rafael Qvaladze (reporter judge), Isa Nadjafov and Kamran Shafiyev,

with participation of the secretary I.Ismayilov,

representativeof applicant Shahverdi Agaveys,

representative of respondent body – Gunel Aliyeva, employee 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 25 February 2011 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of N.Babayev.

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

**DETERMINED AS FOLLOWS:**

 By the decision of Binagadi district court of the Baku city dated 20 September 2009 the claim requirement of Nizam Babayev against Makhsun Babayev, Sadig Akhmedov, Vusal Ragimov and HCC “Tereggi-Tikinti” concerning cancellation of rulings of general meetings of HCC “Tereggi-Tikinti” dated July 13 and September 9, 2008 concerning registration of the apartment No. 207 (129 sq.m.) being in the building of quarter 364, on crossing of streets of S. Salayeva and A. Gurbanov of the city of Baku, for the name of M. Babayev and S. Akhmedov was 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) dated 22 February 2010 N. Babayev's claim was satisfied, the judgment of the first instance was cancelled.

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 15 July 2010 the decision of CB of the Court of Appeal of Baku city was cancelled and the was case sent for reconsideration to the same court.

The CB of the Court of Appeal of Baku city by its decision as of 22 October 2010 upheld the decision of Binagadi district court dated 20 October 2009, and the mentioned decision of the CB of the Court of Appeal of Baku city upheld by the decision of CB of the Supreme Court dated 25 February 2011.

In the complaint submitted to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) N. Babayev, considering the judgment of cassation instance as illegal and unreasonable, asks for verification of its compliance with the Constitution (hereinafter referred to as the Constitution) and to laws of the Republic of Azerbaijan.

The constitutional complaint was proved by that the challenged apartment belonging to the applicant, fraudulently, at first was registered to M. Babayev, then registered to S. Akhmedov, on this fact, the persons deceived his are brought to trial and punished, and he filed the statement of claim to court, however when considering the case by courts the requirements of Articles 111, 112.3, 146.2, 337.5, 339.2, 339.5, 394, 651 of the Civil Code of the Republic of Azerbaijan, and also the requirement of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms were not observed.

The applicant considers that courts broke his right for property and guarantees on legal protection of the rights and freedoms reflected in Articles 29 and 60 of the Constitution.

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

Apparently from the provisions determined by courts by a civil case it agrees to the contract between N. Babayev and HCC “Tereggi-Tikinti” signed on June 9, 2007, the cost of the challenged apartment was fully replaced with the land plot. Later N. Babayev, made the decision on selling of this apartment and for this purpose asked Ramil Garashov who is engaged to a purchase sale to assist him.

In August, 2008 R. Garashov declared to N. Babayev desire of the person named Vusal Ragimov to get the apartment. However, V. Ragimov specified that he will pay part of money for the apartment by the car, and other part by cash, within 45 days. One of the conditions put forward by V. Ragimov was that the apartment has to be registered to M. Babayev. Having agreed with this condition N. Babayev, asked HCC “Tereggi-Tikinti” concerning re-legalization of the apartment for M. Babayev. In view of the fact that upon the expiration of the agreement neither car nor money was not transferred to him, N. Babayev asked HCC “Tereggi-Tikinti” to suspend re-legalization of the apartment for M. Babayev. However, the management of HCC “Tereggi-Tikinti” informed him that the apartment is already registered for M. Babayev and the last registered the apartment for S. Akhmedov.

After N. Babayev knew that the apartment was appropriated by specified persons fraudulently, he addressed with complaints to appropriate authorities, and to court with the statement of claim.

Court of the first instance, having come to a conclusion that the rulings of July 13 and of September 9, 2008, the memberships in HCC “Tereggi-Tikinti” of N. Babayev and transfer of the challenged apartment to M. Babayev adopted by cooperative concerning the termination, in turn, concerning the termination of membership in M. Babayev's cooperative and transfer of the challenged apartment to S. Akhmedov correspond to the civil legislation, rejected the claim requirement of N. Babayev.

At consideration of appeal complaints of N. Babayev and HCC “Tereggi-Tikinti” in court of appeal instance it was defined that general meeting of members of cooperative for an occasion of transfer of the challenged apartment to M. Babayev, and hereinafter referred to as the S. Akhmedova was not carried out.

This circumstance was confirmed in the appeal complaint of HCC “Tereggi-Tikinti” and in the reference provided to court, and also in speech of his representative in court of appeal instance.

In view of these circumstances, the court of appeal instance cancelled a judgment of the court of first instance and satisfied N. Babayev's claim.

Concerning the civil legislation applied on civil disputes, Plenum of the Constitutional Court notes that in Article 112 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC) it is provided that the termination of membership of cooperative is carried out in voluntary and compulsory forms.

In Article 112.1 of the CC the right of the member of cooperative for a voluntary withdraw from cooperative is specified, and in the presence of the provisions specified in Article 112.2 of the Code the right of cooperative for a compulsory withdrawal of the member of cooperative of membership and legal consequences of realization of these rights are defined.

Other basis for the voluntary termination of membership in cooperative is defined in Article 112.3 of the CC.

Thus, according to the specified article of the CC, a member of a cooperative may transfer its share or a portion thereof to any other member of the cooperative provided that the cooperative’s charter does not specify otherwise. The transfer of a share (or a portion thereof) to an individual who is not a member of the cooperative is permitted only with the consent of the cooperative. In such case, the members of the cooperative have a preemptive right to acquire this share (or portion thereof). Where members of the cooperative do not exercise their preemptive right within the term specified by the cooperative’s charter, the share may be alienated to a third party.

Here it should be especially noted that in the civil legislation imperative situation that the solution of all important issues concerning functioning of cooperative is carried out by general meeting of all his members is defined.

In Article 111.3.3 of the CC, among exclusive competences of general meeting of members of the cooperative that is the supreme body of management of cooperative also powers of acceptance and dismissal of members of the cooperative are specified.

Thus, on the basis of the provisions of the civil legislation noted above, irrespective of the bases of the termination of membership in cooperative, the decision on the termination belongs to powers of general meeting of members of cooperative, but not governing body of cooperative (council of management, etc.).

According to specified and in view of the fact that decisions of HCC “Tereggi-Tikinti” of July 13 and on September 9, 2008 were accepted not according to the requirements determined by the civil legislation on the termination of membership in cooperative, the decision of CB of the Court of Appeal of Baku city of February 22, 2010 appeal complaints of N. Babayev and HCC “Tereggi-Tikinti” were satisfied.

The legislation of the Republic of Azerbaijan defined powers, the rights and obligations of various judicial instances.

According to Article 416 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) defining a basic purpose of court of cassation instance and limits of hearing of cases in this instance, the court verify the correctness of application of norms of a substantive and procedural law from court of appeal instance.

According to Article 417.1.3 of the CPC, the court of cassation instance can cancel completely or in part the decisions or rulings of court of appeal instance and to return case to court of appeal instance for reconsideration. According to Article 418.1 of the CPC, violation of norms of a substantive and procedural law or their wrong application is the basis for cancellation of the decision or ruling of court of appeal instance.

As evident from the content of noted norms, the court of cassation instance does not establish fact of the case and proofs, correctness of application of norms of a substantive and procedural law on the circumstances and proofs established by court of appeal instance but only verifies.

On the basis of the appeal of M. Babayev the CB of the Supreme Court by the decision dated July 15, 2010 cancelled the decision CB of the Court of Appeal of Baku city dated February 22, 2010 and specified a number of violations of material and legal procedure by court of appeal instance.

Plenum of the Constitutional Court considers that the court of cassation instance did not observe requirements of Articles 416, 417.1.3, 418.1 of the CPC.

Thus, the court of cassation instance specified as procedural violation of the Articles 89.1 and 89.3 of the CPC the statement presented by N. Babayev, M. Babayev and HCC “Tereggi-Tikinti” (and admitted as proof by court of appeal instance) to cooperative and the decisions of cooperative made on the basis of these statements.

However, as evident from a judgment of appeal instance as of February 22, 2010 cancelled by court of cassation instance, the court satisfied N. Babayev's claim not on the basis of the specified statement or issue of correctness of application of decisions, but because of not held of general meeting of members of cooperative for an occasion of transfer of the challenged apartment to M. Babayev, and further and to S. Akhmedov.

Based on the Article 418.3 of the CPC the violation or incorrect application of procedural norms of law is a ground for repeal of decision or ruling only where the said violation has resulted or can result in issuance of incorrect decision.

Plenum of the Constitutional Court considers necessary to note that from the point of view of the facts lawful and reasonable, correct in essence, the judgment of appeal instance cannot be cancelled only for formal reasons.

The similar legal position found the reflection and in the decision of Plenum of the Constitutional Court of the May 20, 2011 connected with the Article 372 of the CPC.

At the same time, in the decision of CB of the Supreme Court of July 15, 2010, was revealed the circumstance that is not put forward by the parties in court of appeal instance and respectively not being a trial subject, and not challenged in the appeal of M. Babayev. Thus, the court of cassation instance considers, what not consideration of appeal instance of issue by court, concerning, whether there passed the state registration the property share of N. Babayev transferred to cooperative as a result led to violation of norms of the material and procedural is right.

Plenum of the Constitutional Court notes that according to contents of Articles 416, 417 and 418 of the CPC in view of the fact that a subject of cassation consideration draw up the judicial statements which entered into force in this instance do not consider the merits of the case, facts of the case are not considered, new proofs are not accepted and the legal assessment is not given to the available proofs. In a cassation order only legality of the acts adopted by court of appeal instance, that is, correctness of observance of application of norms of a substantive and procedural law verified.

Court of cassation instance, having made the decision contradicting to requirements of the specified legal procedure instructed court of appeal instance to define the facts that are not challenged by the parties.

At second trial of appeal instance by court any new proofs, was not investigated, is not given the legal assessment to arguments of appeal complaints on not held general meeting of members of cooperative in connection with transfer of the apartment to M. Babayev, and after that to S. Akhmedov challenged by N. Babayev and HCC “Tereggi-Tikinti”.

According to Articles 9.1, 9.3, 14.2, 88, 217.1, 218.1, 218.3 and 240.4 of the CPC, for lawful and reasonable resolution of any dispute during judicial proceedings the court estimates proofs according to the norms of law that are the subject of application concerning these proofs after their objective, impartial, comprehensive and complete examination. The judgment has to be lawful and reasonable. The judge adopt the decision on the requirements presented by the persons participating in case. At pronouncement of the decision the judge has to estimate proofs, define, what circumstances important for case are established and what arenot established, in what legal relationship there are parties, what law has to be applied on the this case and whether the claim is subject to satisfaction.

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 of June 13, 2008).

In a contradiction to the specified position, court of appeal instance in the decision, having violated requirements of Article 392.2 of the CPC, didnot prove, on the basis of what arguments it did not satisfy the appeal complaints of N. Babayev and HCC “Tereggi-Tikinti”.

The CB of the Supreme Court without having taken into account that at consideration of the case by court of appeal instance the requirements of norms of a material and procedural law regulating the termination of membership in cooperative were not observed, also without having proved conclusions in the decision, upheld a judgment of appeal instance, and as a result violated the right of the applicant for the legal protection provided in Article 60 of the Constitution.

On the basis of the above Plenum of the Constitutional Court comes to conclusion that the decision of CB of the Supreme Court of February 25, 2011 in view of its discrepancy with Article 60.1 of the Constitution, Articles 416, 417.1.3, 418.1 of the CPC should be recognized as void 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 the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan dated 25 February 2011 on a civil case in connection with Nizam Babayev's claim against Makhsun Babayev and others concerning cancellation of rulings of general meeting of cooperative and return of the apartment to him as null and void in connection with its discrepancy with the Article 60.1 of the Constitution and 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 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.