**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 420 of the Civil Procedure Code*

*of the Republic of Azerbaijan*

# 28 February, 2012 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev (Reporter-Judge), Rafael Gvaladze (Reporter-Judge), Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Zaur Guliyev,

the legal representatives of the subjects interested in special constitutional proceedings: Kahgani Mammadov, Judge of the Baku Court of Appeal and Mammad Mammadov, senior advisor of department of military and administrative legislation of Administration of the Milli Majlis of the Republic of Azerbaijan

experts: Bagir Asadov, Judge of the Supreme Court of Republic of Azerbaijan,

 in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of Baku Court of Appeal concerning interpretation of Article 420 of the Civil Procedure Code of Republic of Azerbaijan,

having heard the reports of Judge Jeyhun Garajayev and Judge Rafael Gvaladze, the reports of the legal representatives of the subjects interested in special constitutional proceedings and experts, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Baku Court of Appeal in its request addressed to the Constitutional Court of Republic of Azerbaijan (further – the Constitutional Court) and has specified that in spite of the fact that claim about a recognition of a mandatory fraction in hereditary property and transfer it to its claimants in accordance with the pending case of L.Rasulzade and U.Rasulzade, was not examined by courts of the first and appeal instance, court of cassation instance (further – a cassation court) having cancelled the decision of court of appeal instance (further – the appeal court), has given the indication concerning the settlement of the issues connected with the rights of claimants on a mandatory fraction in hereditary property.

The court having addressed asked to clarify the issue of whether the Court of appeal should examine and resolve the issue of mandatory shares plaintiffs in ancestral property in connection with the consideration of the dispute, although there is no such requirement in a claim and the Court of first instance did not examine this issue, given that this follows from the provisions of Article 420 of the Civil Procedure Code of Republic of Azerbaijan (hereinafter CPC) and instructions of the Court of Cassation.

 In this regard, with a view to establish a unified court practice, Baku Court of Appeal asks for interpretation of Article 420 of CPC with respect to whether the instruction of the Court of Cassation have certain limits taking into account the constitutional status and powers of the Court of Cassation.

In connection with request the Plenum of Constitutional Court considers necessary to note in first place the following:

According to part VI and part VII of Article 71 of the Constitution of Republic of Azerbaijan (hereinafter referred to as the Constitution) Rights and freedoms of man and citizen shall have direct effect on the territory of the Republic of Azerbaijan. Disputes concerning the violation of rights and freedoms of man and citizen shall be resolved by courts of law. Part I of Article 125 of the Constitution establishes that judicial power in the Republic of Azerbaijan

shall be exercised by the courts of law, through the administration of justice.

The guarantee of judicial protection, being one of the fundamental rights and freedoms of individuals and citizens, at the same time, is perceived as a guarantee of all other rights and freedoms. Ensuring of this law, in its turn, stipulates the administration of justice which is able to effectively protect and restore the violated rights and freedoms to the extent provided by law. Universal system for ensuring of human rights and freedoms by law also covers the possibility of appeal to the courts for the protection of persons against unlawful and unreasonable judgments. In order to improve these opportunities and achieving the greater efficiency in judicial-legal sphere a number of reforms were held.

To clarify the issue it is necessary to consider certain legislation of Republic of Azerbaijan and the functional responsibilities of new judicial bodies established as a result of judicial reforms in Republic of Azerbaijan in particular, the Court of Cassation.

 So, the definition of the Court of appeal, as well as strict separation rules on appeals and cassation proceedings is one of the main innovations of the procedural law. These proceedings are determined to protect the rights and legitimate interests of parties of irregularities in the lower courts.

The appeal issue has been the subject of examination of the Plenum of the Constitutional Court and on May 20, 2011 in connection with a limits of appeal the Court delivered the decision ('on the interpretation of the provisions of Article 372 of the Code of Civil Procedure of the Republic of Azerbaijan regarding the limits of the appeal in terms of the requirements of Articles 372.1 and 372.7 of the Code).

This decision stated that the appeal court, as a full-fledged court examines the case on merits on the basis of the additional evidence submitted. The Court of appeal, irrespective of arguments listed in complaint, shall verify the observance of material and procedural norms by the Court law and take one of the decisions referred to in Article 384 of CPC.

At the same time, the legislator, in Article 403 of CPC has defined the right of persons who do not agree with a judgment or ruling (hereinafter referred to as the decision) of the Court of appeal, to the appeal (submission or protest). Filing of the complaint in accordance with the established procedure and timing gives rise to the initiation of cassation proceedings in order to validate the data.

In this regard, the Plenum of Constitutional Court considers necessary to note, that for a correct solution of the outstanding issues it is important to clarify the grounds for commencement of proceedings, its essence, objectives, characteristics, the limits of the hearing in this Court.

The use of the word 'Cassation' – 'cassatio', which is translated from Latin as 'cancellation' as a legal term in the procedural sense of the word comes from the 17th century, and in the tradition of European courts as the first special authority conducting proceedings of this kind, in 1790 the was established the Tribunal of Cassation of France.

In contemporary period within civil proceedings in foreign countries there are different features and limits of cassation proceedings. The xxamples include the Republic of France, where the proceedings of cassation imply the verification of conformity of judicial decisions solely as to the legal rules. Most European countries, including Belgium, Greece, Germany and Italy also have the same model. As a result of judicial reforms in our country, the choice was given to this model.

In accordance with relevant Articles of chapter 43 of the CPC governing the rules of appeal, the Cassation Court’s decisions are limited to certain frames. And the application of those Articles in practice gives the rise to some questions as to the limits of cassation examination:

-whether Court of Cassation’s examination is limited to the verification of legality touched upon in claim;

-whether the Court of cassation can check only the legality or validity of contested acts;

-is it possible for Court of Cassation when examining the available evidences to examine also the newly emerged evidences or facts.

In connection with these issues in theory and practice, two positions emerged. One of the positions is that the Cassation proceeding should be confined to the evidence of cassation. Accordingly, the judicial verification of the legality of an act must be limited to the rules which violation or incorrect application alleging is challenged in a complaint, there must be verified the legitimacy of the establishment of only contested by the applicant issue, and the conclusion of the Court should not be based on the new evidence.

According to the other position, the checking of legality of the challenged judicial act there should be carried out full examination, regardless of the reason the cassation and, in so doing, the Court of Cassation should eliminate all violations of substantive and procedural law.

In this regard, it should be noted that according to the civil procedure law that was in effect until September 1, 2000 , the proceedings was held on cassation as a special kind of process to oversee the errors in the decisions adopted by the courts.

 In its proceedings the Court of Cassation verifies the legality and validity of decisions on the basis of existing and additional materials, i.e. compliance with procedural proceedings and resolution of the merits of the case. The limits of the powers of the Court of Cassation is not limited only to the arguments provided in the complaint, it was held in full.

Cassation proceedings provided for in the existing CPC is essentially a new stage, unknown to the previous legislation. The current review is the same with the previous stage in name only, and a thoroughly different from it on purpose, object, essence of emerging legal relations. The Court of Cassation is the court seized on the basis of cassation complaint or a protest filed by the decision of the Court of appeal.

 First of all, it should be noted that the grounds for the institution of cassation proceedings is not any cassation complaint or a protest, and only complaint or protest, which meets the following requirements set out in procedural law.

So, a cassation appeal against the decision of the Court of appeal is filed in written form through the appeal court (Article 406.1). Failure to comply with this rule may result in sending a complaint by Cassation Court to the court of appeal to perform requirements set in the procedural legislation (art. 406.2 CPC).

Cassation shall meet the requirements specified in Article 407 of CPC, including the requirement of complaint, and specifying the nature of the irregularity of application of material and procedural norms of law. Failure to comply with the requirements of Article 407 of CPC provides the basis for the return of the appeal (Article 408.2 CPC). In cassation there shall be permitted where appropriate, references to the facts of all factual circumstances relevant to the findings of the Court or on the lack of findings in the decision, the facts of the case (Article 407.2 of CPC). The meaning of the last requirement is that the applicant, on the basis of already established by the Court of the circumstances of the case, should substantiate his position only in terms of material and procedural norms of law.

On the other hand, according to Article 412.2 CPC, persons participating in case shall have a right to send to court objections and explanations in respect of cassation complaint. In connection with objections one should also bear in mind that as objections express the relationship of an adverse party to the legal arguments put forward in the appeal, the Court of Cassation does not consider this objection if they are not relevant to the arguments of the cassation complaint or submitted to a judicial act not challenged in the appeal.

These requirements as factors contributing to implementation of the appeal in the case of a complaint, are derived from the essence to appeal. And its essence is defined by issues addressed by the Court in this instance. The immediate challenge of cassation proceedings is to examine the legality of the decision or the decision of court of appeal challenged by complaint (Article 416 of CPC).

The legality of judicial acts have traditionally perceived as a line of judicial act rules of substantive and procedural law. The Court of Cassation, taking the facts as established, is not evaluating evidence and facts, the correctness of the decision adopted by court of appeal on the merits, it is only interested to determine the compliance of a court of law with the fundamental principles of judicial activities, since the Court of Cassation judge not the case but the decision. The judicial act is legitimate if the dispute was considered and a decision was taken in accordance with the rules established by the procedural law and the contested relations had been regulated by rules set by the relevant rules of substantive law.

It should be noted the legal position established in various rulings of the plenum of the Constitutional Court that the Court of Cassation examines the correct application by Court of appeal instance of material and procedural norms of law. That duties of the Court of Cassation is the clearly explained in the Articles 407.1.4, 408.1.5 and 416 of CPC. In accordance with Article 407.2 of the same Code, reference in cassation complaint to proof of case circumstances, to non-discovery of significant factual circumstances important for court-reached conclusion, or to non-conformity of case conclusions reflected in resolution or ruling to a cases factual circumstances shall not be permitted..

This fact limits the Cassation proceeding only to the legal side of the case, without addressing the issue of determining the facts including the merits of the case, offences in the decision appealed or to reply to the issues raised in the complaint, regarding their absence (decision of the Plenum of Constitutional Court on the complaint of A.Ibrahimov of April 12, 2004).

This approach also derives from the ruling of the European Court of Human Rights (ECHR) of September 22, 2005 on complaint of Fimar Hajiyeva against Azerbaijan. In this ruling, the European Court, while recognizing the complaint inadmissible, stated that the applicant without substantiating the appeal filed with the Supreme Court challenged only court of appeal procedural irregularities. The European Court , in assessing the extension of the argument as to the claimant, concluded that is not the duty of the Court of Cassation to examine the case beyond the claims of applicant.

To identify whether it refers to the law that is in the discretion of the Court of Cassation, first and foremost, it is necessary to consider Article 4.1 of CPC, that entitled the right to apply to court for judicial protection arising from part I of Article 60 of the Constitution, which stipulates the guarantee of judicial protection. Under this rule, the protection of rights and freedoms in a court of law shall be guaranteed.

As one can see, the rule of the CPC, within the meaning of Article 60 of the Constitution, once again reaffirmed that the use of judicial protection depends on the will of the person, and he should take this decision on his own. This generally accepted principle of law disposition provides that whether to apply to court or not to determine the level of required protection should depend on the person. On this basis, the choice of procedural methods for achieving a goal must also be on person’s independent discretion. Accordingly, to appeal in respect thereof to the top, including the Court of Cassation, or agree with it, to challenge the ruling fully or partly also depends on the will of the person concerned.

It should also be noted that in CPC the Court of Cassation does not have the power to verify the legitimacy of judicial acts within non-challenged part of appeal. In this sense, the checking of an undisputed part by the Court of Cassation, on its own initiative, is contrary to the principle of disposition deriving from Article 60 of the Constitution and Article 4 of the CPC. The Court of Cassation's efforts should be aimed at elimination of violations of the rights and legitimate interests of the applicant specified in the complaint. And if the argument put forward in the cassation complaint, is inevitably associated with any other (non-contested) legal issue and depends on the expression of the opinion of the Court of Cassation regarding it, the in accordance with the principle of adversarial proceedings provided for in part VII of Article 127 of the Constitution, as an exception, it may express it opinion under condition this issue is subject also to examination of parties.

At the same time, when examining the legal argument put forward in the appeal, the Court of Cassation does not depend on the legal assessment specified by applicant and under the legal principle of 'iura novit curia’ that is the ‘Court knows the laws', which is given in the above-mentioned interpretation of the Plenum of the Constitutional Court of May 20, 2011 on Article 372.6 of CPC based on repeated legal evaluation within the limits of the appeal can cancel or change the judgment of the appeal court due to contradiction with substantive or procedural law.

As to violation of procedural norms of law, it should be noted that the appeal relates to the verification of compliance with the procedural requirements of the court of appeal. In Articles 418.4 and 418.3 of CPC there are specified the procedural grounds to overturn the ruling of the court of appeal. According to the Article 418.3 of CPC, violation or incorrect application of procedural norms of law shall be a ground for repeal of resolution or ruling only where the said violation has resulted or can result in issuance of incorrect resolution.

The issue whether or not a procedural violation is a grounds for cancellation of the decision of the court of appeal is decided by the court of cassation depending on the particular circumstances of the case. If there have been proved that the violations by court of appeal of procedural violations have no importance and have not affected or could not affect the final conclusion of the court, this cannot be a basis for cancellation of the decision.

In contrast, Article 418.4 of CPC provides for procedural violations which can be the grounds for cancellation of the decision of the court of appeal in any case. Irrespective of the arguments listed in complaint, these breaches are the absolute basis for cancellation of the decision of the court of appeal.

As regards the substantive law, according to Article 418.2 of CPC, Material norms of law shall be deemed to be violated in circumstances specified in Article 386 of this Code. According to Article 386 of the Code, the material norms of law shall be considered violated or incorrectly applied only in the event of court of first instance making a mistake during application of law, not applying applicable law or other normative legal act, or incorrectly interpreting the law. In connection with this circumstance of cassation proceedings, one should bear in mind that its main focus should be directed at the legal conclusion that does not correspond to the factual circumstances established by the court of appeal.

Thus, in accordance with Article 417 of CPC in the course of case review cassation court may: 417.0.1 keep resolution and ruling of court of appellate instance unchanged and complaint without satisfaction; 417.0.2 make changes to resolutions and rulings of court of appellate instance; 417.0.3 partially or completely repeal resolution or ruling of court of appellate instance and send case to court of appellate instance for new review; 417.0.4 partially or completely repeal resolution or ruling of court of appellate instance, and keep claim completely or partially without examination; 417.5 to terminate the case examination in accordance with requirements of Code.

The essence of the civil procedural legal relations between courts of cassation and courts of appeal re-evaluating the case also relates to Article 417.1.3 of CPC. In this sense, the sending of a case to a new appeal consideration taking into account the relevant provisions of the CPC, including the requirements of Article 372.2, is stipulated on the one hand by the need for its reconsideration on the merits and on the other hand by the possibility of a hearing on the merits via appeal procedure under Article 372.1 of CPC.

 For this reason within the new appeal review there should be ensured the legitimate resolution of a case taking into account the clarified indications of the court of cassation, in accordance with Article 420 of CPC regarding the application of material and procedural norms of law. Thus, according to the latest Article the directives indicated in decision of court hearing case in cassation instance shall be obligatory for court re-hearing the case..

The provisions of Article 420 of CPC in certain sense repeat the previous CPC provisions. The difference is that former provided for obligatory status of any instructions of the court of cassation, whereas in terms of the above provisions of the present CPC with respect to the essence and features of cassation proceedings, according to the content of Article 420 of the present Code the mandatory nature of instructions of the Court of Cassation is provided only in the matter of the application of the law.

One of the purposes of the legislation empowering the Court of Cassation to give binding instructions is to prevent repeating of mistakes made in passing of acts by the court of appeal when hearing the case on appeal. On the other hand, the court of cassation, checking the correct application of the law and explaining it, not only corrects the errors committed in case but also directs the jurisprudence to the exact and uniform application of the law.

This serves to unification of the jurisprudence deriving from the provisions of part I of Article 131 of the Constitution, as well as part I of Article 77 of the law of Republic of Azerbaijan 'On courts and judges'. The Plenum of the Constitutional Court in this regard reiterates (decision of the Plenum of Constitutional Court on the petition of January 15, 2010 of V.Terehin) that the different approaches within jurisprudence of the court of cassation in similar cases within factual and legal terms, without indicating the reasons for this, may lead to a breach of the guarantee of judicial protection enshrined in the above-mentioned Article 60 of the Constitution. So, this constitutional guarantee also includes the protection of legality in the courts. Legal act could be considered illegal if the court deviates from the established practice without reasonable justification or reasons, and without taking into account the already applied legal position, or when the wrongfully interprets or applies the legal position.

In this regard, it is necessary to recall the legal position of the European Court of Human Rights providing that the differences in the jurisprudence are the inevitable result of any judicial system, consisting of having territorial jurisdiction of the courts of first instance and appeal, and the Supreme Court's role consists in resolving of contradictions between the decisions of the lower courts. The European Court referring to the importance of the unified practices of the Supreme Court on legal issues stated that, in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty and to reduce the public's confidence in the judicial system, which is one of the essential components of a State based on the rule of law. (Padararu vs. Romania, no. 63252/0000, December 1, 2005, § 98).

Therefore the implementation of the mentioned obligation requires the perfection of the activity of court of cassation in terms of compliance with all the requirements of the law. The court of cassation, by canceling the decision of the court of appeal, must clarify the law, directing the given court to correct resolution of the case, clearly and convincingly explain the essence of committed errors and how one should understand the rule of law. The obligation to give the directives set out in the decision of the court of cassation for the court of appeal that examines the case again, should be based on the rule of law and the full validity of these guidelines.

In this sense, the substantiation by the court of cassation of its decision appears as a particular procedural requirement (Article 419.2.9 of CPC). This requirement is also stipulated in paragraph 1 of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms and constitutes the case law of the European Court. According to the case-law of this Court, the provisions of Article 6 of the Convention impose an obligation on courts to ground their decisions. This principle is linked to the proper administration of justice and requires that decisions have sufficient validity of arguments on which they are based (Juez Albizu v. Spain, no. 25242/06, November 10, 2009, para. 21).

The mandatory nature of such solid indications of the court of cassation imposes on court of appeal the obligation to comply with these instructions when re-examining the case. Failure to comply with the mandatory instructions of the court of cassation by court of appeal can lead to an erroneous resolution of a dispute and a new review of the decisions of the court of appeal. In such a case, the grounds for examination of the decision of the court of appeal are these guidelines and non-eliminated violations of the law.

 In connection with the impact of these directives on the independence of judges, as laid down in part I, Article 127 of the Constitution, and also Article 7.1 of the CPC the plenum of Constitutional Court considers necessary to note that this principle, along with the proclamation of the independence of the judiciary from the other branches of power, also provides for the independence of judges within the judicial system in the instance sense.

##### It is not by chance that according to paragraph 2 of the Basic Principles on the Independence of the Judiciary adopted by the United Nations General Assembly on December 13, 1985, the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

 It is necessary to bear in mind that the instructions of the court of cassation can be given only within above-mentioned limits established by procedural legislation. Thus the giving of any indications outside the limits is not binding for the court of appeal hearing the case again.

 In this sense, in terms of the provisions of Articles 407.1.4, 407.2, 408.1.5, 416 and 420 of CPC, the court of cassation cannot give, in its sole discretion, any indications outside the frames of trial, including the circumstances on what basis the given evidence is subject to confirmation or denial, what evidence should be collected and analyzed during repeat examination of a case as well as to what conclusion the court should come that re-examines the case. The giving of such instructions contradicts to constitutional principles of independence of judges.

If the court of cassation gives such instructions, then the court of appeal must decide the case within the framework of its powers, in accordance with the relevant requirements of the law, and in accordance with part I of Article 127 of the Constitution, which provides for the independence of the judiciary, and their subordinate only to Constitution and laws of the Republic of Azerbaijan.

According to the above-mentioned, the Plenum of the Constitutional Court comes to the following conclusion:

- Instructions of the court of cassation established in Article 420 of CPC are mandatory for court of appeal, which re-examines the case, within the limits prescribed by law in Article 416, and the Articles 407.1.4, 407.2, 408.1.5 of CPC and being grounded in accordance with the requirements of Article 419.2.9 of this Code.

 Being guided by part IV of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED**

1. Instructions of the court of cassation established in Article 420 of CPC are mandatory for court of appeal, which re-examines the case, within the limits prescribed by law in Article 416, and the Articles 407.1.4, 407.2, 408.1.5 of CPC and being grounded in accordance with the requirements of Article 419.2.9 of this Code.

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

4. 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”.

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