**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan as of April 15, 2011 with Constitution and laws of the Republic of Azerbaijan in connection with the complaint of A. A. Nasibova*

**May 3, 2012                                                                                     Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikrat Babayev, Sudaba Hasanova (Reporter Judge), Rovshan Ismayilov, Jeyhun Garajayev, Isa Najafov and Kamran Shafiyev,

attended by the Court Clerk Ismail Ismaylov,

Representatives of the applicant: Zaur Niftaliyev and Azar Taghiyev,

Representative of the Responder Body: Gunel Aliyeva, employee of Secretariat of the Supreme Court of the Republic of Azerbaijan,

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan has examined in open court session via procedure of special constitutional proceedings the constitutional case on verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of April 15, 2011 with the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of A. A. Nasibova.

Having heard the report of Judge S. Hasanova, the arguments of representatives of applicant and the respondent, the Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

As evident from the materials of the civil case and complaint the claim of Gunduz Shahverdiyev against Asgar Nasibova and others on considering of the transaction as valid and to consider sale contract as concluded was rejected by the Decision of Sumgait City Court of October 9, 2009.

By the Decision of Civil Board of the Court of Appeal of Sumgait city (hereinafter referred to as CB of Court of Appeal of Sumgait city) of 05.03.2010 the appeal of G.Shahverdiyev was not satisfied and decision remained in force.

According to the decision of Civil Board of Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the CB of Supreme Court) of June 30, 2010, decision of CB of Court of Appeal of Sumgait city was annulled and the case was sent to the same Court for reexamination.

The CB of Court of Appeal of Sumgait city by its decision of November 19, 2010 cancelled the decision of Sumgait City Court of October 9, 2009 and satisfied the claim.

By ruling of the Supreme Court of the Republic of Azerbaijan dated August 4, 2011, it was refused in presentation of the additional appeal from A. Nasibova for consideration at the Plenum of the Supreme Court.

Legal successor of A. Nasibova applicant Asmat Nasibova (Sardarova) stated in her complaint, addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) that courts have not considered the circumstances related to fact that she leased the apartment (owner of which is her father) for three years and due to her illiteracy the power of attorney was received from her name and now all family members are registered in this apartment, and the term of limitation period is missed. The applicant has also shown that the decision adopted by the court of appeal as a result of biased trial contradicts to requirement of the Article 230 of the Civil Code of the Republic of Azerbaijan that was in effect until September 1, 2000, that decision - upheld by the CB of the Supreme Court - was baseless, as a result, her right and liabilities, as well as rights and liabilities of her family members, contemplated in the Articles 13, 29, 43, 60 Article 71.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution), as well as in the Article 6 of the Convention on “Protection of Human Rights and Fundamental Freedoms” (hereinafter referred to as Convention), are violated.

As evident from facts of the civil case, determined by the courts G. Shahverdiyev based his claim by that the A. Nasibov agreed with him on the sale and purchase of the apartment, consisting of two rooms, and provided for him power of attorney at State Notary Office of Sumgait City No. 3. Wife of A. Nasibov M. Nasibova did not reject the sale of the apartment in written form. G. Shahverdiyev paid to A. Nasibov 4000 USD for the apartment, A. Nasibov gave him documents of the apartment and left it with his family, however, asked him to stay in passport registry in order not to lose apartment turn at his work. G.Shahverdiyev lived at that apartment up to 2001, and then he leased this apartment to close relative T.Eminov and left for Moscow city. In 2008 he learned that T.Eminov transfered the apartment to his name on the basis of court decision. However, that court decision was annulled at the courts of higher instances. Then, G.Shahverdiyev appealed to court with this claim.

Court of first instance declined the claim and court of appeal instance that uphold this decision, based their decisions according to the Article 77.1 of the Civil Procedure Code of the Republic of Azerbaijan and stated that plaintiff could not provide sufficient evidences, A.Nasibov provided power of attorney only for three years, validity is expired, G.Shahverdiyev did not make any measure regarding with that apartment for that period, as well as, did not make any transaction on behalf of A.Nasibov.

The Civil Board of the Supreme Court, examining the case on the cassation of G.Shahverdiyev, considered that Article 43 of Civil Code of the Republic of Azerbaijan had to be applied by court of appeal instance, annulled the decision, of October 9, 2009, of Civil Board of the Court of Appeal of Sumgait city and returned the case for new appeal examination.

The Civil Board of Court of Appeal of Sumgait city cancelled the decision of the Sumgait city court of October 9, 2009, having made the decision on satisfaction of the claim of G. Shahverdiyev, recognition of the sale and purchase agreement signed between him and A. Nasibov as concluded and recognition of the property right of G. Shakhverdiyev to the disputed apartment.

The CB of the Supreme Court by its decision of April 15, 2011 uphold that decision.

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

According to Article 13.1 of the Constitution, the property in the Republic of Azerbaijan is inviolable and is protected by state. According to sections I and II of Article 29 of the Constitution, everyone has the right to own property. Law protects ownership rights, including the rights for private owners.

According to Article 1 of the Protocol No 1 of the Convention, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall 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.

The civil legislation following from regulations of the Constitution and international treaties and developing them establishes the legal mechanisms directed to recognition and protection of the property right in the sphere of the civil relations.

It should be noted that, according to Article 217.2 of the Civil Procedure Code decision on each civil case shall be made according to the norms of substantive law acting when the dispute arise and procedural legal norms acting while examining of civil case.

Considering that the relations of the parties on this case arose in 1997, the resolution of dispute is also regulated by norms of the former Civil Code. According to Article 230 of the former Civil Code if at least one of the parties is the citizen, then the sale and purchase agreement of the apartment house should be certified by notary and is registered in local executive committee of Council of People's Deputies. The sale and purchase agreement of the apartment house considered as concluded from the moment of its registration.

At the same time, according to the Article 12 of the Law of the Republic of Azerbaijan “On Privatization of the Housing Stock in the Republic of Azerbaijan” citizens taken houses to their ownership shall own, use and dispose (leave by will, sell, donate, rent and conclude other transaction not contradicting the legislation concerning them) these apartments (houses) under their discretion by consent of family members achieved their maturity age.

However, court of appeal instance, re-examining the case, did not take into consideration the provisions of the above stated norm, though underage daughter of A.Nasibov, born in 1977, Zeynab Nasibova registered in the disputed apartment, Court did not take into consideration absence of her consent on the sale of the apartment.

Moreover, Civil Board of the Court of Appeal of Sumgait city did not examine avoidance of registry of transaction by responder and did not legally evaluate and solve the dispute based on the Article 43 of the Civil Code.

According to the section I of the stated article certification of the transactions at State Notary Office is obligatory in cases, contemplated in legislation. Not observing the rule of the certification of the transaction at the State Notary Office lead to the invalidity of the transaction. According to the essence of the Article 39 of former Civil Code, the contract of sale and purchase of the apartment is transaction and compulsory character of the certification of this transaction at State Notary Office is contemplated in Article 230 of the stated Code.

According to Article 43.2 of the former Civil Code, determining the order of recognition of the transaction concluded without notarization, if one of the party completely or partially executed the transaction which shall be certified at Notary Office and the other party avoids to approve the transaction at Notary Office, in case where there is no act contradictory to the legislation, Court is entitled to consider such transaction as valid according to claim of a party that fulfilled the transaction.

The former civil legislation also provided some other guarantees for the purpose of protection of the parties against wrong judicial acts in case of non-compliance with a written form of the transaction. One of such guarantees is reflected in Article 42 of the former Civil Code. According to this regulation, non-compliance with the simple written form of the transaction required by the law, deprives of the party of the right to refer during the dispute to the testimony for confirmation of the transaction.

Plenum of Constitutional Court in its decision of March 22, 2006, on the claim of I.K.Rajabov, having noted the created legal position in connection with consequences of “non-compliance with a notarial form of the transaction” once again emphasizes that in a sense of the specified provision, for recognition of the transaction by court as valid upon the demand of the party which fulfilled the transaction fully or partially several conditions, including, a condition of its creation in writing shall be complied. The purchase and sale agreement of the apartment house is also one of the transactions that are subject to creation in writing.

Plenum of Constitutional Court, approving mentioned legal position in several decisions (decision of May 31, 2006, on claim of S.Aliyeva, decision of April 13, 2007, on claim of J.Abdullayeva), stated that court can recognize the deal as valid upon request of the party, which made it, in case of presence of the following options:

- non-observance of notarial legalization of agreement because of other party’s fault;

- deviation from notarial legalization of agreement namely by other party;

- deal itself shall not be in conflict with law and shall correspond to the written procedure of its conclusion.

The last option has special importance for deal, which validity brought by legislation to dependence of its direct written conclusion.

Apparently, the legislator under any circumstances causes validity of the purchase and sale contract of real estate its conclusion in writing and assurance of a notarial order. Non-compliance with these conditions prejudice the validity of the purchase and sale agreement of real estate.

Nevertheless, Civil Board of the Court of Appeal of Sumgait city did not apply the norms of the former Civil Code on the present case, improperly explained the Article 43, and considered as valid the contract of sale and purchase, concluded between G.Shahverdiyev and A.Nasibov.

Plenum of Constitutional Court states that the property right results only from observance of the rules established by the law. Property acquisition without observance of requirements of the law creates the actual possession, which is not based on private law. Non-compliance as appropriate with requirements of the legislation in connection with property acquisition can lead subsequently to deprivation of the person of actual possession by this property.

At the same time, the courts which considered case did not consider that the institute of limitation period is of great importance from the point of view of the legal decision of a civil case therefore adopted the decision which is not conforming to the requirement of the law.

According to Article 78 of the former Civil Code the term of limitation period begins from the date of emergence of the claim right; the claim right arises from that day when the person learned or owed learn about violation of the right.

This regulation is connected only with whether it is known to the person of the facts of violation of his expected right, and cannot be coordinated with ignorance by the person of the rights and laws on protection of the rights.

The former civil legislation established unambiguous rules in connection with terms of limitation period. Non-compliance with one of the parties of these rules did not exclude the right of other party to take a legal action for protection of the rights. The term of limitation period extended to all requirements, except the cases provided by the law.

Court of appeal instance, re-examining the case, violated the provision of the Article 73 of former Civil Code and did not consider that person has three year period for protection of his rights (period of claim). According to the Article 77, titled “compulsory character of limitation of action” of the stated Code the limitation of action shall be applied by the Court, not depending on whether the parties are aware of it or not. According to Article 82 of the stated Code, expiration of the limitation of action up to the put of the claim is the basis for rejection of the claim.

Plenum of Constitutional Court touching essence of the limitation of action in several decisions stated that the correct application of provisions of the legislation concerning claim terms represents importance from the point of view of resolution of a civil case according to the law (decisions of the Plenum of Constitutional Court on the claim of Hashimov and others dated June 30, 2005, on the claim of R.Salamov dated October 30, 2007, on the claim of V.Ozerov as of April 15, 2011, etc.).

According to the legal position, formed regarding limitation of action in the Decision of December 27, 2001 on interpretation of the Article 373 of the Civil Code of the Republic of Azerbaijan, the significance of the limitation of action is in the following: first of all it disciplines the participants of legal relationships, obliges them to protect theirs rights in due time, promotes the contractual and financial discipline; secondly, the limitation of action promotes elimination of vagueness and instability in civil legal relationships; thirdly, the limitation of action provides judicial bodies with possibility to resolve disputes on the ground of objective truth, eliminating the possibility for parties concerned to turn to the long-standing evidences whose validation is either impossible or too difficult.

European Court on Human Rights, acting from a similar legal position, in its decision on Miragall Escolano and others vs. Spain as of January 25, 2000 concluded that the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants should expect those rules to be applied (§ 33).

According to the above stated the Plenum of the Constitutional Court considers that court of appeal instance, reexamined the case, did not apply Articles 230 and 82, 73, 77, 78, 82 of the Civil Code and did not properly interpret Article 43 of the same Code.

According to the civil procedure legislation, court of cassation instance verifies proper application of substantive and procedural legal norms by the court of appeal instance. While examining the case, court of cassation instance may completely or partially overrule the decision of the court of appeal instance and may send back the case for re-examination at the court of appeal instance. Violation or improper application of substantive and procedural legal norms is the basis for termination of decision and decision of appeal instance (Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code).

However, Civil Board of Supreme Court did not consider violation of the above stated norms by Civil Board of Court of Appeal of Sumgait city, uphold the decision of the appeal court of November 19, 2010, and did not observe the Articles 43, 73, 77, 78, 82, 230 of the former Civil Code and Articles 416, 417 and 418 of the Civil Procedure Code.

At the same time, despite of existence of the indication in the complaint of the defendant to the legal position of the Plenum of the Constitutional Court created in the case of I. Rajabov in connection with disputes of similar character the court of cassation instance has not given any assessment to this argument of the complaint.

Apparently, the court of cassation instance which reconsidered the case did not pay due attention to violation of the above-noted regulations by court of appellate instance therefore the property right of A. Nasibov provided in the Article 29 and the right to legal protection of rights and liberties enshrined in Article 60 of the Constitution were violated.

According to the Article 60.1 of the Constitution, the legal protection of rights and liberties of every citizen is ensured. According to the essence of this norm, the legal protection of the person may not be limited with any frame and it concerns all judicial instances.

According to Article 8 of the Universal Declaration on Human Rights, Article 14 of the International Covenant on Civil and Political Rights, in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Thus, according to the requirements of the international legal acts and legal positions created by the Plenum of the Constitutional Court, legal protection in fact has to answer a concept of justice and provide effective restoration of the rights.

According to the above-mentioned, Plenum of the Constitutional Court comes to conclusion that the decision of CB of the Supreme Court of April 15, 2011, on validity of the transaction and conclusion of the contract of sale and purchase of G.Shahverdiyev against A.Nasibova and others, has to be considered as void in view of its discrepancy with Articles 29 and 60 of the Constitution, Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code, and case has to be reconsidered according to the present decision, in order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize as null and void the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan as of April 15, 2011 on validity of the transaction and conclusion of the contract of sale and purchase of G.Shahverdiyev against A.Nasibova and others, due to its discrepancy with the Articles 29 and 60 of the Constitution, the Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code. To re-consider the case according to this decision, in order and terms established by civil procedure legislation of the Republic of Azerbaijan.

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

  3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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