**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of the Article 372.5 of the Civil Procedural Code of the Republic of Azerbaijan in connection with the Articles 155, 156 and 372.4 of the given Code*

# 27 August 2012 Baku city

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

attended by the Court Clerk Ismail Ismaylov,

the legal representative of the subject interested in special constitutional proceedings: Elman Ragimov, Judge of the Court of Appeal of Sheki city, Fuad Mammadov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

specialists: Bagir Asadov, Judge of Civil board of the Supreme Court of the Republic of Azerbaijan, Gazanfar Bayramli, deputy head of Department of the Prosecutor’s General Office on Public Prosecution,

based on Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open court session via procedure of special constitutional proceedings the constitutional case on interpretation of Article 372.5 of the Civil Procedural Code of the Republic of Azerbaijan in comparison with Articles 155, 156 and 372.4 of given Code based on inquiry of Court of Appeal of Sheki city;

having heard the report of Judge Rafael Gvaladze, the reports of legal representatives of the subjects interested in special constitutional proceedings, conclusions of expert and specialists, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

 The Court of Appeal of Sheki city having applied with request to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks to give interpretation of the Article 372.5 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) in connection with the Articles 155, 156 and 372.4 of the given Code from the point of view of the Article 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), the Article 8 of the Universal Declaration of Human Rights, the Article 6 of the Convention “On Protection of Human Rights and Fundamental Freedoms” (hereinafter referred to as the Convention).

 As evident from the case materials A. Aliyev applied to District Court of Ismailli with the statement of claim on eviction of Y. Gasymov together with his family members from the apartment that is in his property, dismantling of the door established on an entrance to this apartment, and his moving into the apartment. The claim was partially allowed by the decision of this court as of April 29, 2011, and the decision to vacate the apartment with eviction of respondents from the disputed apartment and moving in of the owner A. Aliyev in this apartment was adopted.

When considering the case in an appeal order the respondent Sh. Gasymova, having appealed to court with the counter demand of claim and asked to adopt the decision on recognition of the contract with A. Aliyev on purchase and sale of the disputed apartment.

In connection with adoption of the counter demand on a civil case to procedure to consideration of the appeal complaint, there was a need of the inquiry to the Constitutional Court for interpretation of Article 372.5 of the CPC in comparison with Articles 155, 156 and 372.4 of this Code.

For the correct solution of the issue raised in the address, significance is represented by disclosure of a subject, basis, legal basis of the claim, the concepts “new demand” and “counter demand” in court of appeal instance.

The right for legal protection fixed in the Article 60 of the Constitution is one of guarantees of constitutional rights and freedoms.

According to provisions of the Constitution, in the civil and procedural legislation the right of appeal of each interested person to court is reserved for protection of the violated rights and legitimate interests. Thus, according to the Article 4.1 of the CPC, any individual and legal entity, in accordance with procedure specified by law, shall be entitled to exercise the right to appeal to court for protection of their rights and freedoms, as well as for protection of interests guaranteed by law.

The right of appeal to the court first of all is carried out by bringing of the claim. The circle of disputes for which legal entities appeal to court is quite wide. Claims differ from each other by interested persons, parties of process, substantive laws (in connection with which protection is asked by claimant), circumstances that became the basis for the request for judicial protection.

In the acting procedural legislation it is possible to meet two elements individualizing the claim: subject of the claim and its basis (for example, the Articles 53 and 153 of the CPC). These elements allow to concretize not only the claim, but also trial, to establish its volume, character, the direction and features of activity of court.

The subject of the claim in process is meant as the subjective right concerning which the claimant asks to adopt the decision. It is possible to refer the interests protected by the law to a subject of the claim, including, legal relations in general.

Considering means of protection of the vested civil rights, the claimant can:

● first, to ask court to force the respondent to make any action, or to refrain from commission of such action.

The subject of such claim makes the right of the claimant to demand from the party of the respondent of certain actions in connection with non-execution of the corresponding obligation voluntary. For example, the subject of a claim for deduction from respondent of money makes the substantive subjective law of the claimant for receiving certain sum of money (the right of demand);

● secondly, the claimant can demand from court of recognition by court of existence or absence of legal relationship, the subjective rights or obligations. In this case the subject of the claim is made by any subject, property right to results of mental activity relating to exclusive rights, invalidity of the deal, etc.;

● thirdly, the court can change or stop legal relations the basis of the demand of the claimant (the Article 53 of the CPC). Thus, the subject of the claim makes unilateral will of the claimant about change or the termination of the relations existing between the parties.

It is necessary to differentiate a subject of the claim and object of the claim. The object of the claim is a material benefit that the claimant tries to receive: sum of money, uninhabited area and other concrete property. The object of the claim is included into a subject of the claim and does not represent independent value. At putting of a question of increase or reduction of the claim demand, not the subject of the claim in general but only a volume of material object changes.

The basis of the claim is made by the legal facts on which the claim’s demands are based. Deals, in particular, of the contract, the expiration fact, violation of the rights, causing damage and others can be carried to them. The claim basis usually consists not of one but of set of the facts called the actual structure of the claim.

Along with the indication of the actual basis of the claim, the claimant also has the right to refer to the law and other normative legal acts, rule of law that as he assumes, is broken by the respondent. It makes a legal ground of the claim.

At justification by the claimant of the demands by norm of law that is not subject of application, before court can raise the question what actions should be taken. In such case, first of all, it is necessary to consider that legal justification of the claim cannot be identified with its actual basis. Change of a legal ground of the claim is meant as change of circumstances on which demands of the claimant to the respondent are based.

According to Article 53 of the CPC, the claimant has the right to change the basis or a subject of the claim. On sense of this article, it is impossible to change at the same time both a subject and the claim basis. It is possible to change only one of these elements of the claim. Change of a subject and basis of the claim is at the same time inadmissible because such change of the claim indicates existence of absolutely new claim.

It is also necessary to consider that at the link in motivation part of the judicial act does not change a subject or the basis of the claim for other rules of law, court, and makes the decision on a being of dispute, being guided by the existing normative legal acts. Such actions of court have to be considered as corresponding to legal interests.

In the decision of Plenum of the Constitutional Court of May 20, 2011 on interpretation of provisions of Article 372 of the CPC concerning limits of appeal consideration it is noted that it is necessary to understand the correct application of norms of a substantive and procedural law on the considered case as legal interests.

According to Article 2.2 of the CPC, one of the main tasks of civil legal proceedings consists in providing a triumph of justice. The task of court consists in ensuring the correct application of provisions of the Constitution, laws and other normative legal acts of the Republic of Azerbaijan on the considered case (Article 2.1 of the CPC).

Execution of this task by court cannot depend on a legal position of the person participating in case. As the court directly bears responsibility for application of the right, the legal position of the parties is not obligatory for the judge.

According to Article 372.3 of the CPC, when considering the case in an appeal order, the parties have the right to change only a legal basis of the claim.

As it was noted, change of a subject and the bases of the claim it is regarded as submission of the new claim. Since such claim is not a subject of consideration of court of the first instance, the court of appeal instance has no right to resolve a case on the new claim and by that, to replace court of the first instance, based on existence of the appeal complaint.

For this reason, in Article 372.4 of the CPC it is provided that new claim demands which were not a subject of consideration of matter in the first instance, are not accepted by court of appeal instance and are not considered.

The legislator provided only one exception of this rule. According to the Article 372.5 of the CPC, the parties may submit new demands to court of appellate instance only in the event if such demands are directed at resolution of matter based on satisfaction of counter demand, rejection of counter party’s demand, bringing of third parties into the case, finding of fact or presentation of information in respect of fact.

As appears from essence of the specified article, the legislator referred to the concept “new demand” provided in article, generally elements, in particular, of the counterclaim.

The principle of a counter in the western countries accompanies all process: counter claim, counter statement, counter appeal, etc. The principle of a counter, complicating a process, nevertheless allows to carry out the basic procedural principles. It is correct to establish reality and interests of parties, including all means of protection used by them.

Implementation of justice on the principles of equality, competitiveness and a dispositivity excludes granting to any of parties of process of privileges or advantages. Along with it the principle of procedural economy is directed on elimination of a tightening of trials, reduction of a number of procedural institutes in the acceptable state, more exact regulation by their legislation. In this sense institute of the counterclaim spending the minimum means plays an important intermediary role in achievement of good results in legal procedure.

Civil process by means of institute of the counterclaim, provided the party of the respondent with set of the rights for protection of the position in dispute on the basis of the principles of a dispositivity and competitiveness.

According to the Article 155.1 of the CPC, prior to issue of resolution on case, respondent have the right to file against a claimant a counter-claim to be heard along with the initial claim. According to the Article 155.2 of the Code, filing counter claim is possible where grounds for such action has been established in course of court hearing.

From the specified norms, it is possible to come to such conclusion that the counterclaim is independent material legal demand and a security measure of the respondent from the initial claim. Joint consideration initial and the counterclaim allows resolving quicker the dispute that is available between the parties, prevents pronouncement of inconsistent decisions on the demands connected among themselves.

Only the respondent in the initial claim has rights to put forward the counterclaim. The counterclaim can be put forward only to the person who submitted an initial claim – the claimant. The counterclaim cannot be put forward to the third party having certain interests in process, to the prosecutor or government body. In a case when in case there are some respondents, promotion of the counterclaim by one or several respondents (the joint counterclaim) is possible.

The Article 156 of the CPC establishes conditions of acceptance of the counterclaim:

- if the counterclaim is directed on satisfaction of the initial requirement;

- if the satisfaction of the counter claim completely or in part excludes satisfaction of the initial claim;

- if between the counter and initial claim there is an interconnection and their joint consideration will lead to faster and correct consideration of disputes.

The counterclaim is accepted in case of its direction on satisfaction of the initial demand. It is necessary to consider, that the satisfaction of the requirement is possible in case if the demands are similar on character. For example, demands for mutual liabilities of the parties.

Other condition of acceptance of the counterclaim consists that satisfaction of such claim excludes satisfaction of the initial claim completely or in part. On this basis various claims can be put forward. The counterclaim goes for reflection of arguments of the claimant. The counterclaim, though directly does not disprove the initial claim for a being, nevertheless does impossible his satisfaction. In case of satisfaction of the initial claim, the counterclaim cannot be satisfied.

Existence of an interconnection between counter and initial claims and their joint consideration are possible at recognition by court expedient depending on concrete circumstances of disputes. Thus, it is necessary to consider that by consideration of the basic and the counterclaim separately, the decision made on earlier considered case has prejudicial value for the case considered subsequently (Article 82 of the CPC).

In the decision of Plenum of the Constitutional Court of May 8, 2008 according to L. I. Binnatova's complaint it is noted that initial or counter claim demands are to the material legal demands directed on resolution of case. Material legal demands under provisions of the acting civil and procedural legislation can be filled only in court of the first instance in writing. Filing of application according to the counterclaim is possible not before pronouncement of any judgment, but namely before adoption of decision by court of first instance.

However, in cases when the respondent on the reasons which are not depend on him could not file the counterclaim into court of the first instance, the court of appeal instance can consider the new demands imposed by the parties on the bases specified in Article 372.5 of the CPC.

As for a question, concerning in what order these demands have to be considered by court of appeal instance, Plenum of the Constitutional Court considers that Article 372.5 of the CPC should be considered in the context of Articles 372.1, 372.2, 372.3 and 372.4 of this Code. As it is specified in the decision of Plenum of the Constitutional Court of May 20, 2011 on interpretation of Article 372 of the CPC, limits of consideration of the case in court of appeal instance are set by the Articles 371 and 372 of the CPC.

These limits can be divided into three groups:

● restrictions at submission of new and additional proofs;

● limits of examination of legality and validity of judicial acts;

● a ban on submission of new demands that were not a subject of consideration of case by court of first instance.

For submission of new and additional proofs it is important existence of a number of circumstances:

 ● proof that a person participating in case when considering the case in court of first instance had no opportunity to submit the evidence. The burden of proof of impossibility of submission of new and additional proof is assigned to a person that submitted the petition concerning verification of these proofs;

● a subject of petition for verification of new and additional proofs can be any person participating in case, his representative and also the person whose rights are affected by the challenged act, that is the person who applied with the appeal complaint;

● new and additional proofs have to meet the demands of jurisdiction and an admissibility. If proofs do not belong to facts of the case or according to demands of law are inadmissible, they cannot be accepted;

● recognition of reasons by appellate court for which the evidence was not submitted in court of the first instance as valid.

Restrictions at submission and verification of new and additional proofs in appellate court testify concerning the absence of the full appeal in our country.

As opposed to the full appeal, at the incomplete appeal the court of appeal instance does not replace court of the first instance, its task consists in consideration of a subject of the dispute exempted in the first instance from the circumstances which are not relating to merits of case and in volume of the appeal complaint in the first instance.

Plenum of the Constitutional Court once again notes that in view of the fact that the new demand was not considered in court of the first instance, the court of appeal instance has no right to solve case on this requirement and by that to replace court of the first instance.

However, on the substance of the Article 372.5 of the CPC, for ensuring of the principle of dispositivity, competitiveness, equality of the parties, the court of appeal instance in exceptional cases can accept and consider the new demand.

Such exceptional case is established by the Article 372.2 of the CPC. In view of the fact that other exceptional circumstance for the parties is not provided in the Article 372 of the CPC concerning limits of consideration of the case in court of appeal instance, Plenum of the Constitutional Court considers that the new demand provided by the Article 372.5 of the CPC can be accepted by court of appeal instance in case if the applicant proves impossibility of submission of this demand in court of the first instance for the reasons which are not depending on him.

Other approach can lead to decrease in procedural value of court of the first instance.

According to the above, Plenum of the Constitutional Court comes to such conclusion that the new demand provided by the Article 372.5 of the CPC can be accepted by court of appeal instance in case if the applicant proves impossibility of submission of this demand in court of the first instance for the reasons which are not depending on him.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and the 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. The new demand provided by the Article 372.5 of the Civil Procedural Code of the Republic of Azerbaijan can be accepted by court of appeal instance in case if the applicant proves impossibility of submission of this demand in court of the first instance for the reasons not depending on him.

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 cannot be cancelled, changed or officially interpreted by any body or official.