**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 1, 5 and 12 of the Law of the Republic of Azerbaijan “On Privatization of Housing Stock in the Republic of Azerbaijan”*

**21 December 2012 Baku city**

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

attended by the Court Clerk Ismayil Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: Ph.JDr Bagir Asadov, Judge of the Supreme Court of the Republic of Azerbaijan and Vasif Amiraslanov, senior advisor of department of economic legislation of Administration of the Milli Majlis of the Republic of Azerbaijan;

expert: Sarvar Suleymanli, Deputy Dean of the Faculty of Law of Baku State University, Associate Professor of Civil Law Department, Doctor of Philosophy in Law;

specialists: Ilham Asadov, Judge of the Court of Appeal of Baku city, Oktay Hasanov, Director of Legal Department of the State Committee of the Republic of Azerbaijan “On Property Issues”;

in accordance with the Article 130.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Supreme Court of the Republic of Azerbaijan on interpretation of Articles 1, 5 and 12 of the Law of the Republic of Azerbaijan “On Privatization of Housing Stock in the Republic of Azerbaijan».

having heard the report of Judge Rovshan Ismaylov, the reports of the legal representatives of the subjects interested in special constitutional proceedings, specialists and experts, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the Supreme Court) in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) asked the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) for interpretation of Articles 1, 5 and 12 of the Law of the Republic of Azerbaijan “On Privatization of the Housing stock in the Republic of Azerbaijan” (hereinafter referred to as the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan”) in respect to Article 32.1 of the Family Code of the Republic of Azerbaijan (hereinafter referred to as the Family Code) and Article 225.1 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code).

In the request stated that according to Article 1 of the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan” the citizens of the Republic of Azerbaijan as well as stateless persons who concluded the contract for lease of apartment premise with the owner of state or public housing stock have the right to gratisly transfer the apartments (houses) in which they live to their ownership under conditions and order specified by Law. According to Article 5.1 of the mentioned Law the apartments (houses) may be given to the common (share, joint) ownership of one or some of family members stated in the apartment rent contract and actually lived with the renter by the consent of a full aged family members or all family members at the time of application for privatization.

According to Article 12.1 of the mentioned Law citizens who take houses to ownership shall own, use and dispose (leave by will, sell, donate, rent and conclude other transaction not contradicting the legislation) these apartments (houses) under their discretion by consent of his/her family members achieved maturity age. Execution of ownership on the apartment (house) should not harm righst and legal interests of other persons.

According to Article 32.1 of the Family Code the property acquired by spouses during marriage, recognized as their joint property. According to Article 225.1 of the Civil Code, the property earned by spouses during their marriage are their common ownership, unless provided otherwise in prenuptial agreement or agreement between them.

The Supreme Court states that lack of specific norm in the legislation concerning their (individual, common) property rights on the house to be privatized for the name of one of spouses creates difficulties in the court practice and has negative impact on formation of the unique court practice and protection of property rights of citizens. In that respect the interpretation of the matter of belonginess of apartments (houses) to be privatized according to the grounds and procedures of privatization of apartments as a joint property of spouses or the person to whose name they will be privatized has a great importance in the procedure of constitutional proceedings.

Plenum of the Constitutional Court considers that there are the nessity of clarication of the legal status of the joint property of spouses in the family law for the correct solution of the issue.

According to Article 32 of the Family Code in order to consider the property as the joint ownership of spouse, it is important of availability of two conditions at the same time:

- acquisition of the property during marriage of spouse;

- acquisition of the property at the expense of common income of spouse.

In order to recognize the property as a joint property of spouse the second condition requires its compensated (onerous) purchase, that is purchase based on the compensatory transactions of spouse during the marriage.

On the other hand, pursuant to the contex of Article 34 of the Family Code the property, owned by each of the spouses before marriage as well as property received by one spouse during the marriage as a gift, by inheritance or other gratuitous deals (property of each spouse) is the separate property of each spouse.

Pursuant to the contex of Articles 1 and 3 of the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan”, apartments (houses) should be transferred to the individual ownership free of charge.

From the point of view of requirements of Article 34 of the Family Code, the apartment (house) at transfering to individual property of one of spouses, as non-paid privatization, the apartment (house) cannot be considered as joint (common) property of spouses.

Along with it, in the case of presence of one of spouse in the privatization of apartment (house) and voluntary renunciation of a right to participate in privatization (that is giving consent for privatization) by the other one, the said apartment should be transferred to the personal ownership of husband (wife) participated in the apartment privatization, so therefore it can not be divided.

Thus, according to Article 5 Law “On Privatization of the Housing Stock in the Republic of Azerbaijan”, the residential premises (house) can be transferred to possession of one of them or in a common (shared, joint) ownership of some or all of the member of family by the consent as specified in the contract of employment of premises at the time of applying for privatization and actually living together with the employer of adult family members.

As evident, during privatization of apartments, the legislator has provided to the tenant, including the full age family members specified in the agreement on hiring of premises and who are actually living together with the tenant, an opportunity to choose to whose property to transfer the apartment. Thus, that apartment may be given to the (share) ownership of one of them or some of them or all of them under the voluntary consent. Consent of the full age family members who are actually lives in the apartment on transfer of the apartment to property of one (several) of family members shoud be perceived as disclaimer on participation in privatization of the apartment.

In this case, because of giving by the husband (wife) voluntary consent to privatization and transfer of the apartment (house) to property of one of them, this apartment (house) cannot be considered as joint (common) property of spouses.

Along with specified, it is necessary to consider that earlier purchased rights to the privatized apartment of family members who is not the owner of the apartment (house) of the tenant which actually lives together with him/her at the time of privatization shall be protected since it proceed from constitutionally significant values. However, anyway, it shall be in a pro rata form, taking into account the property rights of the owner of the privatized apartment. Such approach meets such constitutional principles as purposes of the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan”.

In connection with it, the Plenum of the Constitutional Court states that the right to private property enshrined in the interconnected Articles 13, 15, 29 and 59 of the Constitution, the right of free entrepreneurship, contractual freedom, and the principles of non-admission of a monopolism and unfair competition in the economic relations, constitute the constitutional fundamentals of market economy. Institute of privatization, being one of conditions of market economy, upon transition to property is one of the most important means serving to origin and development of the market relations.

To achieve these constitutional objectives the legislator has established the legal basis of transformation of property relations. Such legal basis in the sphere of housing relations has been prescribed in the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan”.

As stated above, according to Article 1 of the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan” the citizens of the Republic of Azerbaijanas as well as stateless persons who concluded the contract for lease of apartment premise with the owner of state or public housing stock have the right gratisly transfer the apartments (houses) in which they live to their ownership under conditions and order specified by Law.

According to the legal position of the Constitutional Court expressed in the decision of the Constitutional Court of October 30, 2000 “On conformity of Article 5.2 of the Law of the Republic of Azerbaijan “On Privatization of the Housing Stock in the Republic of Azerbaijan” with the Constitution of the Republic of Azerbaijan” the right of privatization of apartments is a right prescribed by law, origin of which is directly connected with the right for accommodation in the privatized premises. Along with fixing in the law of a possibility of non-paid privatization of premises, the state should create to citizens the conditions for implementation of this right and provide protection of the principles provided by the Constitution by transfer of a certain property to their private property. At the same time, special significance should be attached both to the constitutional guarantees of the property right, and protection of the rights and legitimate interests of all participants of the corresponding relations on the basis of the principle of proportionality used in the Law, between legal means and values having constitutionally significant.

Accordingly, the legislature in Article 3 of the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan” along with other principles, also established the principles of providing the rights of citizens to require transfer into the ownership of apartments in which they live according to the rules and conditions provided by the Law, publicity of privatization, the state and public control over privatization.

The main goal of the Law proceeding from the specified first principle shall be perceived as more effective ensuring of housing needs of citizens, by means of provision of opportunities to own, use and dispose independently of living space and to participate in the real estate market, and also uses and preserving a housing stock. Other essential purpose of the Law is following from the second above-stated principle, directed to protection of the rights of all participants of the relations arising during privatization and as a result of it including members of the family of the owner of premises. Another essential purpose of the Law following from the second above-stated principle is directed to protection of the rights of all participants of the relations arising during privatization and as a result of it, including members of the family of the owner.

Just from the point of view of mutual providing of these two purposes the legislator established the order provided in Article 12 of the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan”. According to contents of the first sentence of part one of this article, the owner of the privatized housing, with the consent of full age family members, at discretion owns, uses this housing and gives orders in connection with it: can bequeath it, sell, present, lease and conclude concerning it other bargains, which are not contradict to the legislation.

Apparently, the conclusion of any contract that not contradict to legislation, concerning the privatized apartment which is in property of the person shall be without fail caused by a consent of family members. Thus, the legislator limited the property right of the owner for the providing that is earlier purchased and being, in fact, the limited corporeal right, the rights of family members to the privatized apartment.

In this regard, the Plenum of the Constitutional Court considers necessary to determine the limits of the possible restrictions to the right to property enshrined in Article 29 of the Constitution. According to Article 29 of the Constitution, everyone has the right to own property. Law protects ownership right including right for private owners. Everyone might possess movable and real property. Right of ownership envisages the right of owner to possess, use and dispose of the property himself/herself or jointly with others. Nobody can be deprived of his/her property without decision of law court. Total confiscation of the property is not permitted. Alienation of the property for state needs is permitted only after preliminary fair reimbursement of its cost.

The content of this right should be understood, in view of provisions of Article 13 of the Constitution. The property as important institute of civil society is one of the main factors making a basis of development of economy. Therefore, under Article 13 of the Constitution the property declared as inviolable and protected by the state. The property right, acting as the basis of freedom of each individual of society, is an important condition for development of personality and free business. Along with it, despite the importance of noted right, it is not obligatory and can be limited. It is necessary to take into consideration that besides that the property bears important function in implementation of special interests of the individual, it has also important social function in socially directed state on the basis of contents of Article 15 of the Constitution (decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan of 16 December 2011 “On interpretation of Articles 107-2.1 and 107-5.1 of the Civil Code”).

It also must be taken into account that along with classification of the right to property in the Constitution, its general and specific restrictions boundaries (limits) have been established (Part III of Article 13 of the Constitution, Part II of Article 29 and Part II of Article 71, Article 3.3 of the Constitutional Law of the Republic of Azerbaijan “On regulation of implementation of human rights and freedoms in Azerbaijan”).

Thus, the restriction of property rights must meet the requirements of the rule of law, to be applied in order to protect the rights and freedoms of other persons, shall be proportionate and not affect the substance of the constitutional law. Such restrictions, including the possibility of living standard of its character must be conditioned by protection of important constitutional values.

The European Court of Human Rights expressed the similar legal positions on the property right enshrined in Article 1 of the Protocol No. 1 of the Convention “On Protection of Human Rights and Fundamental Freedoms”. Thus, according to the Court's case-law, the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful.... The principle of lawfulness also presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application. Any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim.... The principle of a “fair balance” inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community.... Both an interference with the peaceful enjoyment of possessions and an abstention from action must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights... In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures depriving a person of his of her possessions (decision of the Grand Chamber of June 22, 2004 on case of Broniowski v. Poland, §147-148, 150; Decision of the Grand Chamber of 29 March 2006 on the case of Scordino v. Italy, § 93).

Respectively, limitation of ownership right provided in Article 12 of the Law “On Privatization of the Housing Stock in the Republic of Azerbaijan” is necessary to apply in a proportional type only for the purpose of protection of values having constitutional significans. As it is noted above, one of main objectives of this Law is aimed at providing of protection of the rights of all participants of the relations arising during privatization and as a result of it including members of the family of the owner of premises. Reflection of social protection of citizens and care of the worthy standard of living among the constitutional purposes of the state in the social sphere and establishment in the Constitution of the fact that nobody can be illegally deprived of the dwelling shows the importance and the constitutional significance of state policy in the sphere of the housing relations.

Thus, the made decisions on housing policy of the state that are the constitutional bases at observance of the conditions following from the Constitution can act as the basis for property right restriction. However, in each case such restriction, being reasonably proportional to a goal, should not impose on the owner an individual and excessive burden.

As seen in the first part of Article 12 of the Law of Azerbaijan “On Privatization of Housing Stock in the Republic of Azerbaijan”, the owner of the privatized apartment can not to enter into any transaction or bequeath it without the consent of the family members who are not the home owners. The purpose of this restriction is protection of the rights of the owner's family members living in the same apartment. Achievment of this goal is certainly in the interests of the whole society.

However, establishment by the legislator in a final and obligatory form of need of receiving of such consent for all cases can lead to disproportionate restriction of the rights of the owner. It should be noted that the first sentence of the first part of Article 12 of the Law “On Privatization of Housing Stock in the Republic of Azerbaijan” might also be understood as authorization of persons who are not the owners on the property to dispose the apartment owned only by the owner. It should be particularly emphasized that the unique nature of property rights and the aspect of distinguish it from the other property rights are a power to dispose.

In any case, the condition of exercise of this power by the owner at will of persons who actually is not the owner shows belonginess of the power to dispose to the persons who are not the owner. However, the prohibition of it has been stated both in Part III of Article 29 of the Constitution and in Article 152.1 of the Civil Code. According to this norm, the property right is the recognized and protected by the state right of the subject to own, use and dispose at discretion of the property (thing) belonging to him.

In contrast to it, giving the power to dispose of a property to the persons who are not the owner, in fact, means the existence of property rights at the same time on the same second scaled ownership. It is only is possible only in the case of availability of joint property rights of few persons on the property.

Also it should be noted that from literal interpretation of provisions in the first sentence of Article 12 of the Law of Republic of Azerbaijan “On Privatization of Housing Stock in the Republic of Azerbaijan” it becomes clear that in case of transition of the privatized apartment to possession of one person the housing powers of this person become more limited, than powers of share owners.

On the other hand, such interpretation provides to the family members who are actually living in the privatized apartment and not being owners more large powers, than the right of shareowners. Therefore, the family members who have refused privatization of the apartment on the name in difference from shareowners can have access to decisive influence on owners or the general owners in issues of disposal and use of the apartment, and also in a issue of his will.

Thus, according to provisions of the first offer of part one of Article 12 of the Law, recognition of the transactions on the privatized apartment concluded by the owner as invalid because an absence of a consent of the family members who reached an age of majority and by that recognition by the member of the family of power to dispose which belongs only to the owner contradict to the property right affirmed in Article 29 of the Constitution.

However, it should be considered that the Law “On Privatization of Housing Stock in the Republic of Azerbaijan” was adopted on 26 February 1993. After that, following constitutional reforms implemented in Azerbaijan on November 12, 1995 was adopted the Constitution. Constitution made necessary to radical change the legislation in the field of civil law, and as a result, the new Civil Code and a number of new legislative enactments have been adopted in this sphere.

The Plenum of Constitutional Court notes that the relations arising between the owner of the privatized apartment and family members, who live in this apartment, being important, from the point of view of comprehensive ensuring social balance in society, shall be regulated in a legislative order.

In this connection, the Plenum of Constitutional Court considers that the mutual rights and obligations which arose between the owner and family members who live with owner during privatization of the housing stock regulated by the Law “On Privatization of Housing Stock in the Republic of Azerbaijan” and the family members who live together with owner during the conclusion of contract on the privatized apartment shall be enhanced according to the Constitution and civil legal acts.

It should be noted that according to the criteria of necessity within the frame of the principle of proportionality, when restricting implementation of the constitutional right the state authority must choose the least restrictive means from the two relevant legal means in order to achieve the goals (decision of the Plenum of the Constitutional Court on interpretation of the first part of the seventh paragraph of Article 21 of the Law of the Republic of Azerbaijan of October 29, 2010 “On Social Insurance”).

At the same time, the Plenum of the Constitutional Court considers necessary to note that availability of a consent on transfer of the apartment (house) to property of any of the full age family members who are actually lives in the privatized apartment cannot be considered as their disclaimer of accommodation in this apartment.

In addition, giving by members of the family of a consent to privatization of the apartment becomes not for disclaimer of accommodation at the apartment, and on the contrary, for possession of a possibility of more rational use of this apartment, according to one of the Law purposes. According to Article 5.1 of the Law “On Privatization of a Housing Stock in the Republic of Azerbaijan” to the family members who are actually lives in the privatized apartment are given an opportunity to choose in what form to perform the right to accommodation in this apartment (as the owner or the member of the family of the owner). However, this choice in itself cannot lead to complete elimination of one of the purposes of the Law and deprivation of the family members who agreed to privatization, the rights to accommodation at the apartment.

Thus, family members, in compliance to the purposes of Law, agreed to privatization of the apartment to have potential of more rational use of this apartment, having put trust in the owner of the apartment and relying on the fact that he does not use the property right contrary to the rights of family members to accommodation in this apartment. For this reason the owner cannot deprive of other family members who agreed to privatization of opportunities to live in this apartment, using the property right to the apartment contrary to the vest confidence. Otherwise, it can contradict to the admitted principle of “prohibition of abuse of the right”.

The principle of the inadmissibility of abuse of rights as one of the important principles consolidated in Article 16 of the Civil Code and proceeding from Article 71.2 and Article 13.3 of the Constitution as in other areas of Law primarily involves two main aspects: damage and use of the right in violation of the purposes determined by the legislature.

In this sense, Article 560.3.4 of the Civil Code has the special importance. According to this provision, an abuse of the law is implementation of rights contradicting to the prior statement, which the other party was or is rely on.

It should be considered that such approach had been directed to ensuring of protection of relationship of all participants as well as family members of the owner of a residential area arisen at the time of privatization and as a result of the privatization process and proceeds from transparency of Law “On Privatization of Housing Stock in the Republic of Azerbaijan” and principles of state control and public control over the privatization.

Accordingly, the Plenum of the Constitutional Court considers that use of the property right by the person who privatize the apartment contrary to the family members given their consent in violation of confidence is an abuse of rights.

A similar position was expressed by the Court of Justice of the European Union. According to the judgment of the Court of March 9, 1999 on the case of Centros Ltd. against Erhvervs Og Selskabsstyrelsen, taking into consideration the legislative practice of Member States which is the Romano-German legal system it has been shown that a person abuses the right conferred on him if he exercises it unreasonably to derive, to the detriment of others, "an improper advantage, manifestly contrary to the objective" pursued by the legislator in conferring that particular right on the individual. On this aspect of the abuse of rights, there appears to be a certain affinity between the general principle regarding such abuse and the principle of proportionality as a criterion for limiting the exercise of power.

Based on the above mentioned, the Constitutional Court comes to the conclusions:

- purchase of (general) property by the spouses as defined in Article 225.1 of the Civil Code and Article 32.1 of the Family Code unlike the legal basis of its purchase pursuant to Articles 1 and 5 Law “On Privatization of a Housing Stock in the Republic of Azerbaijan” the privatized apartments can not be considered as joint (common) property in view of their free purchase and voluntary consent of one of the spouses for the privatization (transfer of ownership) of the apartment in the name of husband or wife.

- consent by a family member who actually lives in the privatized apartment on transfer of ownership of the apartment to one of them can not be regarded as a denial of their right to live in the same apartment.

- it shall be recommended to Milli Majlis of the Republic of Azerbaijan to adjust in accordance with given Decision the mutual rights and obligations which arose between the owner and members of his/her family during privatization of a housing stock including the legal provisions of the legal statuses of the owner and the family members who lives with him/her during the conclusion of transactions on the privatized apartment.

Being guided by Article 130.4 of the Constitution of the Republic of Azerbaijan, Articles 60, 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. Purchase of (general) property by the spouses as defined in the Article 225.1 of the Civil Code and the Article 32.1 of the Family Code unlike the legal basis of its purchase pursuant to the Articles 1 and 5 Law “On Privatization of a Housing Stock in the Republic of Azerbaijan” the privatized apartments can not be considered as a joint (common) property in view of their free purchase and voluntary consent of one of the spouses for the privatization (transfer of ownership) of the apartment in the name of husband or wife.

2. To recommend to the Milli Majlis of the Republic of Azerbaijan to improve mutual rights and obligations between the owner and his family members, including legal status of the owner and family members who lives with him at the time of conclusion of transactions on the privatized apartment in accordance with the decision of the legal authorities when privatising the Housing Stock.

3. Consent by a family member who actually lives in the privatized apartment on transfer of ownership of the apartment to one of them can not be regarded as a denial of their right to live in the same apartment.

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

5. 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”.

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