**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 17January 2011 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of I.Agayev*

**22 January 2013 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), Sudaba Hasanova, Rafael Gvaladze (reporter judge), Jeyhun Garajayev, Mahir Muradov, Isa Nadjafov and Kamran Shafiyev,

with participation of the secretary Nigar Askerova,

representative of the applicant Ikram Agayev - Rafig Guliyev, applicant Natavan Kerimova and her representative Muhtar Mustafayev,

representative of respondent body – Geysar Jafarov, employee of Staff of the Supreme Court of the Republic of Azerbaijan

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on complaint of I.Agayev concerning verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of 17January 2011 to Constitution and laws of the Republic of Azerbaijan.

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

**DETERMINED AS FOLLOWS:**

 Esmira Godjayeva appealed to court with requirements against “Milli Mashin Company” Limited Liability Company (hereinafter referred to as the LLC “Milli Mashin Company”) and others concerning distribution of constituent shares, transfer of share to property of the founder, division of net profit of society, repayment of debt and so forth.

In turn, the founder of LLC “Milli Mashin Company” Ikram Agayev submitted to court the counterclaim against E.Godjayeva concerning recognition of the Purchase & Sale Contract with respect to share as partially invalid, its cancellation and termination of the founding right.

E.Godjayeva's claim was partially satisfied by the decision of Yasamal district court of Baku as of July 20, 2009, the property of LLC “Milli Mashin Company” was divided between founders as follows: 70% - to the founder I. Agayev, 5% - to the founder Z.Agayeva and 25% - to the founder E.Godjayeva. 25% of property due to E.Godjayeva were determined according to the balance, and allocated from the society of uninhabited building (2910.1 sq.m.). In addition to the above mentioned another property which was on the balance (727.5 sq.m. of the uninhabited area) was also allocated for, and transferred to, E.Godjayeva.

Other part of the claim and the counterclaim of the founder of LLC “Milli Mashin Company” I. Agayev was rejected.

By the decision of Civil Board of the Court of Appeal of Baku city (hereinafter referred to as the CB of the Court of Appeal of Baku city) dated May 25, 2010 appeal complaints of E.Godjayeva, I. Agayev, Z.Agayeva and LLC “Milli Mashin Company” were not satisfied, and the decision of Yasamal district court was upheld.

By the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the CB of the Supreme Court) as of January 17, 2011 the decision of Court of Appeal of Baku city was partially cancelled (in part concerning withdrawal from I. Agayev of 450.000 US dollars), the case was returned to court of appeal instance for new consideration in this part, while for the rest the decision was upheld.

I. Agayev appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) with the complaint concerning the part of the decision of CB of Supreme Court dated January 17, 2011 with respect to distribution of founding shares and transfer into the ownership of E.Godjayeva of the share belonging to her.

According to the Article 37.0.1 of the Law of the Republic of Azerbaijan “On Constitutional Court” by ruling of Chamber of the Constitutional Court I. Agayev's complaint was rejected, and the case was not accepted for procedure by the Constitutional Court.

During this period the decision of CB of the Court of Appeal of Baku city as of June 21, 2011, decisions of Yasamal district court in part concerning withdrawal from I. Agayev 450.000 US dollars were upheld.

The CB of the Supreme Court by its decision dated November 16, 2011 upheld the judgment of appeal instance.

In the repeated complaint addressed to the Constitutional Court, I. Agayev asked to verify compliance of the challenged by him part of the decision of CB of the Supreme Court as of January 17, 2011 to the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and to laws.

The complaint was grounded by the fact that the courts did not apply the Articles 95 and 96 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC), did not observe requirements of the Article 6.1 of the Convention for the Protection of the Human Rights and Fundamental Freedoms.

Therefore, the applicant considers that courts violated his property right and guarantee of legal protection of his rights and freedoms reflected in the Articles 29 and 60 of the Constitution.

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

According to the Article 59 of the Constitution reflecting the right for freedom of enterprise everyone may, using his/her possibilities, abilities and property, according to existing legislation, individually or together with other citizens, carry out business activity or other kinds of economic activity not prohibited by law. This constitutional norm develops the principle of independence of the economic activity of any individual that is not forbidden by the law.

According to the civil legislation of the Republic of Azerbaijan each legal entity can be created in a form of commercial or non-profit organization (public association, fund and so forth). The constitutional bases of creation of the legal entity and implementation of its related activity form provisions of Articles 58 (the right for association) and 59 (the right for freedom of enterprise) of the Constitution.

A legal entity may be an organization which pursues as its main purpose profit generation (commercial legal entities) or an organization, which does not have the purpose of generating profit and does not distribute the received profits among participants (non-commercial legal entities) (Article 43.5 of the CC).

Among commercial legal entities the special place is taken by limited liability companies.

Limited liability company is a company established by one or more persons (natural persons and (or) legal entity), the charter capital of which is divided into shares, the sizes of which are specified by the charter (the Article 87 of the CC).

 The listed in the Article 6 of the CC principles of free will of subjects of civil law, property independence of participants of a civil turn, freedoms of the contract directed on providing a civil turn, support of business activity, creation of conditions for development of free market economy are considered as the fundamental doctrine and serve (within, provided by the law) for the balanced regulation of interests of participants of the civil relations.

Free will of subjects of civil law provided in the specified article plays the main role in creation of society and withdrawal its participant from society.

According to the Article 95 of the CC, the participant of a limited liability company is entitled to leave the company at any time, regardless of consent or objections of other participants.

Essence of this article is that withdrawal of participant from society is unconditional meaning termination of existing corporate legal relationships between him/her and society. However, withdrawal from society leads to corresponding changes. First of all, such withdrawal becomes the reason of changes in structure of participants of society.

In this regard, at receipt of the statement for an withdrawal from society, the executive body of society has to call extraordinary meeting and bring in the agenda the statement of the participant and issues of payment of the part of property corresponding to his share in authorized capital or payments to him of cost of property in nature under the agreement with society, according to Article 96 of the CC, modification of constituent documents.

According to an essence of Articles 95 and 96 of the CC, payment to the participant of part of property according to his share in authorized capital, maintaining with him of other calculations is possible only in case of an withdrawal of the participant from society.

As it is stated above until between the parties there is a dispute on the specified issues, their decision belongs only to powers of limited liability company.

At the same time, in case of not consideration by society in reasonable terms of the statement of the participant for withdrawal from it, the participant has the right to demand in a judicial proceeding modification of constituent documents in connection with his withdrawal from society.

In turn, courts, have to within the powers according to the law, thoroughly, without allowing any superiority, discrimination or bias, observing the principles of equality and competitiveness of the parties, comprehensively considering cases, to provide the right of everyone for fair trial.

The judgment has to be lawful and reasonable. The decision has to be proved according to the circumstances established on case valid and the mutual relations of the parties.

I. Agayev and his representative specified in court that E.Godjayeva did not file in executive bodies of society a petition for cessation of founders, did not submit to court any documents concerning it and, being still the founder having no right to demand from court of the division of property of society in the form of nature.

Court of the first instance, without having given an assessment to the arguments specified by I. Agayev at violation of requirements of Article 217 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) proved the decision by the proofs which are not investigated on court session, but hypotheses.

Thus, court, having violated requirements of Article 220 of the CPC, not based on any proofs, specified in motivational part of the decision on E.Godjayeva's intention to leave structure of founders, and in final - about her cessation of founders.

I. Agayev, having challenged the judgment of the court of first instance, specified in the appeal complaint that court, having violated requirements of Articles 95 and 96 of the CC, assigned to himself the solution of a question of the society relating only to powers of executive bodies, suspended E.Godjayeva's founder when the question of her secession of founders of society was not considered. These arguments were put forward by I. Agayev's representative also on consideration of the case of appeal instance by court.

The court of appeal instance, did not even try to discuss these arguments specified in the appeal complaint of I. Agayev and contrary to requirements of Article 392.1.5 of the CPC did not prove in the decision the conclusions.

According to Article 392.2 of the CPC at a rejection of the appeal complaint or change of the judgment, the court of appeal instance is obliged to specify arguments on which the complaint was rejected or the decision was changed. The court of appeal instance did not specify even one argument which became the basis for a rejection of the appeal complaint of I. Agayev regarding violation of a substantive law.

The European Court of Human Rights (hereinafter referred to as the European Court) perceives non-compliance by courts with the requirement to prove judicial acts as violation of the right for fair trial and in a number of the decisions showed the legal positions connected with it.

In decisions of the European Court it is noted that non-compliance with the requirement of justification of the decisions by national courts leads to an absence of proof during fair trials of hearing of positions of the parties with observance of the principle of equality; as it is not clear, arguments of the applicant are rejected by court of appeal instance or simply are not considered. It testifies to groundlessness of conclusions of court concerning a deviation of these arguments (the decision on the case of Kuznetsov and others of January 21, 2007; the decision on the case of Hiro Balani as of December 9, 1994).

I. Agayev made the appeal, having specified the violations of the law allowed by the judicial instances considering case.

According to Article 417.1.3 of the CPC, court of cassation instance, having considered case has the right to cancel the decision or ruling of court of appeal instance completely or in part and to send case for new consideration in court of appeal instance. According to Article 418.1 of the CPC violation or the wrong application of norms of a substantive and procedural law is the basis for cancellation of the decision or definition of court of appeal instance.

However, CB of the Supreme Court, without having taken into account that CB of the Court of Appeal of Baku city considered case without observance of requirements of norms of a substantive and procedural law, without having proved conclusions in the decision by any substantive law rules, uphold a decision of appeal instance and therefore violated the right of the applicant for legal protection provided by the Article 60 of the Constitution.

Considering the above, Plenum of the Constitutional Court comes to conclusion that the decision of CB of the Supreme Court of January 17, 2011, in part concerning distributions of constituent shares and delivery of the share belonging to E.Godjayeva in her property, has to be considered become invalid in view of its discrepancy with the Article 60.1 of the Constitution, with the Articles 416, 417.1.3 and 418 of the CPC and case has to be reconsidered 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 January 17, 2011 on a civil case concerning Esmira Godjayeva claim against the founder of “Milli Mashin Company” Limited Liability Company IkramAgayev and others in part concerning the distribution of constituent shares and delivery of the share belonging to E.Godjayeva into her property, due to its discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan and with the Articles 416, 417.1.3 and 418 of the Civil Procedural Code of the Republic of Azerbaijan. To reconsider case according to the present 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.