**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of some provisions of Articles 220.6 and 221 of the Civil Code of the Republic of Azerbaijan*

**April 4, 2014 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Sudaba Hasanova, Rovshan Ismayilov, Jeyhun Garajayev, Rafael Gvaladze, Mahir Muradov, Isa Najafov and Kamran Shafiyev (Reporting Judge);

attended by the Court Clerk Faraid Aliyev,

the legal representatives: Elchin Khasmammadov, Judge of Court of Appeal of Ganja city, Rovshan Muradov, Chief of Legislative Branch on Financial and Budget Issues of Economic Legislation Department of the Office of the Milli Majlis of the Republic of Azerbaijan,

 Experts: Sarvar Suleymanli, Deputy Dean of the Faculty of Law of Baku State University, Associate Professor of Civil Law Department, Doctor of Philosophy in Law; Asad Mirzaliyev, Judge of the Supreme Court of the Republic of Azerbaijan, Ismayil Khalilov, Judge of Court of Appeal of Baku city.

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 Court of Appeal of Ganja city on interpretation of some provisions of Articles 220.6 and 221 of the Civil Code of the Republic of Azerbaijan.

Having heard the report of Judge Kamran Shafiyev, 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:**

Court of Appeal of Ganja city having addressed to the Constitutional Court of Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), asked to give interpretation of some provisions of Articles 220.6 and 221 of the Civil Code of the Republic of Azerbaijan in terms of Articles 13 and 29 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) and Article 1 of Protocol No.1 of the Convention "On Protection of Human Rights and Fundamental Freedoms" (hereinafter referred to as Convention).

It has been stated that by the decision of Agstafa Region Court of August 10, 2012 each of 5 inheritors of the late F.Mehdiyev, on 0,12 hectare back-yard land and individual dwelling house in the mentioned land inherited from F.Mehdiyev and located at Dag Kesemen village of Agstafa Region, has share of inheritance on 1/5 part and ownership rights of inheritors K.Mehdiyev, R.Mehdiyeva, K.Valiyeva, S.Khalilova and R.Mehdiyeva - heir-at-law of the late E.Mehdiyev on the mentioned plot of land and house.

Thereafter, K.Mehdiyev, R.Mehdiyeva, K.Valiyeva and S.Khalilova filed a claim in court against R.Mehdiyeva and asked to adopt a decision on sale of the disputed house, located on 0,12 hectare back-yard land being under common ownership, at public auction and distribution of the funds obtained from sale among owners in proportion to their shares.

Agstafa Region Court by its decision of July 5, 2013 has not satisfied the claim.

K.Mehdiyev, one of the claimants, having made the appeal complaint to a judgment of the court of first instance, asked to adopt the decision on cancellation of given judicial act and satisfaction of the claim completely.

In the complaint, it was noted that in Articles 220.3-220.5 of the Civil Code the order of the division of the property, which is in share property, and a share apportionment from it is established.

In these norms receiving a consent of the owner at the termination of a share of the owner, wishing to be allocated from the general property, by an apportionment of a share in kind, payment of monetary or other compensation is established as an indispensable condition. However, there are no provision in Article 220.6 of the Civil Code on receiving by court of a consent of all or several owners, or the owner demanding an apportionment of the share at adoption of the decision on sale of the general property from open auction that led to uncertainty at application of law.

According to the above-mentioned, Court of Appeal of Ganja city asked to give interpretation of provision of Article 220.6 of the Civil Code “in the event of obvious non-purposefulness of division of common property or separation of share from it according to Articles 220.3-220.5 of this Code, court may take decision on sale of property at public auction and division of sale proceeds among owners of common ownership in proportion to their shares” and provision of Article 221 of the mentioned Code “in the event participants cannot come to agreement on type of termination of right, property shall be physically divided, and where such division in not possible without significant depreciation of the property’s value it shall be sold at public auction or auction with participation of just owners” in terms of Articles 13 and 29 of the Constitution and Article 1 of Protocol 1 of the Convention.

In connection with the request, Plenum of the Constitutional Court considers necessary to note the following.

The property in the Republic of Azerbaijan is inviolable and protected by state. Everyone has the right to own property. Law protects the right to property, including the right to private property. Everyone may have movable and immovable property. The right to property includes the right to possess, use, and dispose of property individually or jointly with others (Articles 13 and 29 of the Constitution).

The Civil Code following from the specified standards of the Constitution and developing these norms also establishes the legal mechanisms directed on recognition and protection of the property rights in the field of the civil relations.

One, and also two or more persons can be the subject of Civil law. Types of the general property are the joint property (property of the spouses who are in marriage) and share ownership (property where each participant, each family member has a certain share). Implementation of the right of joint property requires coordination of will of its participants and taking into consideration their legitimate interests. Implementation of the order over joint property is possible only at a mutual consent of joint owners.

According to the Article 213 of the Civil Code, property may be in common ownership of one or several persons with establishment of shares of each of owners (shared ownership) or without establishment of such shares (joint ownership).

There are the following general features of implementation by owners of powers of possession, use and dispose: 1) possession and use of the property (thing) which is in share property is carried out on the basis of the agreement of all his owners and if the agreement is not reached, carried out as it should be by the established court; 2) the owner of share property has rights of possession and use of part of the general property of the corresponding share and if it is impossible, owner can demand from other owners who own and use the thing belonging to it of payment of the corresponding compensation. The disposal of property which is in share property is carried out on the basis of the agreement of all owners of a thing; 3) if the agreement is not reached and owners of share property did not come to the agreement concerning ways and conditions of the division of the general property or an apportionment from it of a share, they can demand an apportionment of the share in kind through legal proceedings.

Apparently, in difference from owners possessing the right of a private property, owners of share property are not free in implementation of the powers.

Acting civil legislation grants to the owner of the general property the right to carry out the property or apportionment division in nature of part belonging to it from the general property. This right is one of the forms of implementation of the right of the disposal of the right of a share in common ownership.

The share apportionment from the general share property can be carried out in two forms:

1) share apportionment from the general share property in the form of nature;

2) payment of monetary compensation (cost).

Each owner of shared ownership bears responsibility, in proportion to his share, for payment of taxes, fees and other payments in respect of common ownership, as well as for expenses relating to safekeeping and maintenance of the property (Article 217 of the Civil Code). The participant of share property possesses the right of transfer to him on possession and using of a share to a proportional ideal share of the general property. Fruits, production and income from use of the general thing, are distributed in proportion to shares (Article 216 of the Civil Code). Disproportionality of property separated to owner of shared ownership eliminated by payment of relevant monetary amount or other compensation (Article 220.4 of the Civil Code). Thus, the reasonable way of the division of property or a share apportionment from it at impossibility of the division of property or an apportionment from it of a share in kind is payment of monetary compensation.

Articles 220.1 and 220.2 of the Civil Code reflect in themselves the general principles providing importance of the agreement between all owners concerning ways and conditions of the division of a thing of being in share property or an apportionment from it of a share of one of owners.

In the mentioned article also states that owner of shared ownership may demand separation of his share in kind in court order in the event owners of shared ownership cannot come to an agreement on procedures and conditions of division of common property or separation of a share from it. In the event a separation of share in kind is not permitted or where it is not possible without causing disproportionate damage to property in common ownership, separating owner shall have the right to receive from other owners of shared ownership compensation for value of his share. (Article 220.3 of the Civil Code).

In the Article 220.4 of the Civil Code, the possibility to exercise this right connected with the consent of owner of shared ownership on compensation by other owners instead of separation of share in kind.

Thereby, payment of monetary compensation instead of a share relying to the owner can be carried out only at impossibility of an apportionment of a share in kind and with his consent.

It should be noted that this rule could be applied only in case of promotion of the requirement concerning an apportionment of a share in kind and in accordance with Article 220.3 of the Civil Code.

Irrespective of volume of share, any owner of share property has the right to make the demand concerning of payment of monetary compensation. If the claimant did not make such demand, the court cannot to establish the payment of compensation of its own motion. The owner of common ownership can demand only payment of monetary compensation to him. Such owner has not the right to demand payment of monetary compensation to other owners.

In case there the volume of shares and will of owner are not taken into consideration, it would led to determination of ownership rights on any property on a mandatory basis by parties of civil law relations.

According to Article 220.4 of the Civil Code, in the event an owner’s share is insignificant, is practically inseparable and where there does not exist significant interest in use of common property, court may impose an obligation on the rest of owners of shared ownership to pay compensation to the owner even in the absence of consent of such owner.

Deprivation of the right of share on common shared ownership is possible only in exclusive cases (Article 220.4 of the Civil Code). The issue of existence of essential interest in use of the general property of the owner of common ownership in each case is resolved by courts by research and estimation in total of proofs, presented by the parties.

Application of the third sentence of this Article is possible only in case of simultaneous existence of all conditions listed by the legislator: when the share of the owner is insignificant; it cannot be allocated in nature; when he has no essential interest in use of the common property.

Thus, Article 220.4 of the Civil Code does not envisage deprivation of ownership right of owner, who does not claim separation of his/her share from common property, by means of payment of compensation by other owners against the will of owner. Opposed approach would contradict to the principle of the inviolability of ownership rights.

Pursuant to Article 220.6 of the Civil Code, in respect of division of common property, court may take decision on sale of such property at public auction and division of sale proceeds among owners of shared ownership in proportion to their shares. Adoption by court of such decision is not connected with the consent of all shared owners. According to the meaning of the Article, such decision may be made also on the basis of claim of one of shared owners. Decision of court on sale of property at public auction without the consent of owners should be analyzed in terms of restriction of ownership right (intervention in the right of ownership).

Plenum of the Constitutional Court attach importance to setting of limits of possible restrictions on the right of ownership stipulated in Article 29 of the Constitution.

The bases for restriction of the property rights fixed in the Constitution and in the international acts and despite of importance of this right it is not obligatory, and can be limited.

In this connection, it should be taken into consideration that in addition to stipulating of ownership right, the Constitution also set the limits of common and special restrictions of it (Article 13.3, Article 29.2, Article 71.2 of the Constitution and Article 3.3 of the Constitutional Law of the Republic of Azerbaijan “On governing of the implementation of human rights and freedoms in the Republic of Azerbaijan”).

Bases for restriction of ownership right have been set in Article 13 of the Constitution. According to this Article, property may not be used to infringe upon rights and freedoms of man and citizen, interests of society and state, and the dignity of the human person.

In the Constitutional Law of the Republic of Azerbaijan "On governing of the implementation of human rights and freedoms in the Republic of Azerbaijan", the limits of the general restrictions of the rights and freedoms, including the property rights are set. Restriction of the property right has to meet the requirements of legality, the established restrictions should not change an essence of this right, have to be applied for the purpose of protection of the rights and freedoms of other persons, are directed on the lawful purposes and to be proportional to these purposes.

In accordance with Article 1 of Protocol No.1 to the Convention, 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. From the content of the specified norms, it is evident that restriction of the property right has to meet the requirements of legality, be applied for the purpose of protection of the rights and freedoms of other persons, to be proportional and not to change an essence of the granted constitutional law.

Restriction of property right allowed at observance of the specified principles. The rights of some of owners in connection with possession, usage and disposal cannot be considered above the rights of others. Possibility of implementation of the property right for all parties has to be equal. In this regard, it is important to note that the judgment concerning the sale of property from the public auction adopted with the purpose of ensuring the rights of other owners.

Thus, Plenum of the Constitutional Court states that restriction of any right stipulated in the Constitution, including the right of ownership should be executed with a glance of the principle of proportionality.

In its Decision dated on October 29, 2010 “On interpretation of seventh paragraph of the first Part of Article 21 of Law of the Republic of Azerbaijan “On Social Insurance” the Plenum of the Constitutional Court stated that the Basic Law along with the rights and freedoms also establishes duties following from them and does not exclude possible lawful and reasonable interventions to implementation of the rights. However, lawful intervention to any right, including to the property right, has to be proportional, carried out at achievement of fair balance between common interests of society or the state and protection of constitutional laws of an individual.

According to case law of the European Court of Human Rights, 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. … An interference with the right to the peaceful enjoyment of possessions 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 measure applied by the State, including measures depriving a person of his possessions (judgment of Grand Chamber dated on June 22, 2004 in the case of Broniowski v. Poland, §147-148, 150; judgment of Grand Chamber dated on March 29, 2006 in the case of Scordino v. Italy, §93).

It is necessary to take into consideration that the procedure provided in Articles 220.3-220.4 of the Civil Code have to be observed before the property division by sale from the public auction. These rules provide regulation in a stage-by-stage form of the division of property being in share ownership and a share apportionment from it. First of all, possibility of the division of property in kind has to be established. In case of impossibility of the division of property in kind, the owner of share ownership has the right to demand payment of the cost of its share by other participants of share ownership.

In the absence of opportunity of other participants of payment of compensation or refusal of payment of compensation, the issue concerning sales of property from the auction based on the court judgment can be considered. At the same time at impossibility of an apportionment of a share in kind and refusal of the owner of receiving monetary compensation for a share, this owner cannot demand property sale from the public auction. The owner of share ownership also, has no right to demand property sale from the public auction directly.

From this point of view, adoption by court of the decision on sale of property from the public auction and distribution of the gained money between owners of the general property in proportion to their shares without consent of owners of share ownership cannot be regarded as illegal restriction of the property right.

On the basis of specified the Plenum of the Constitutional Court comes to the following conclusions:

According to sense of Articles 220.6 and 221 of the Civil Code adoption by court of the decision on sale of property from the public auction without consent of all share owners and the division of the money received from sale between owners of the general property in proportion to their shares cannot be regarded as illegal restriction of the property right.

Sale of the thing which is in the general property from the public auction and the division of the money received from sale between share owners in proportion to their shares on the basis of a court judgment are possible after consecutive application of the provisions provided in Articles 220.3-220.4 of the Civil Code.

Being guided by part IV of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 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. According to sense of Articles 220.6 and 221 of the Civil Code adoption by court of the decision on sale of property from the public auction without consent of all share owners and the division of the money received from sale between owners of the general property in proportion to their shares cannot be regarded as illegal restriction of the property right.

2. Sale of the thing which is in the general property from the public auction and the division of the money received from sale between share owners in proportion to their shares on the basis of a court judgment are possible after consecutive application of the provisions provided in Articles 220.3-220.4 of the Civil 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.