**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of the Article 1194 of the Civil Code of the Republic of Azerbaijan*

**22 April 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 (Reporter-Judge), Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Teymur Ojagverdov,

representatives of interested subjects: Judge of the Court of Appeal of Sumgait city; Vasif Amiraslanov, Senior Advisor of the Department for Economical Legislation of Milli Majlis of the Republic of Azerbaijan;

expert: Server Suleymanli, Deputy Dean of Law Faculty, Docent of Civil Law Board of the Baku State University, Doctor of Law;

specialist: Asad Mirzaliyev, Judge of the Supreme Court of the Republic of Azerbaijan;

in accordance with the part VI of the Article 130 of the Constitution of the Republic of Azerbaijan, examined in open court session via special constitutional proceedings, the case on inquiry of Court of Appeal of Sumgait city on interpretation of Article 1194 of the Civil Code of the Republic of Azerbaijan.

Having heard the report of judge M.Muradov, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialist, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Court of Appeal of Sumgait city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked for interpretation of Article 1194 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code).

In the inquiry was specified that on October 7, 2011 at the Notary Office No. 1 of Sumgait city, Zinaida Yakovlevna Paraskevich devised the flat No. 20 belonged to her and located in the building No. 20 B/35 at the 2nd micro district of Sumgait city, to Esmira Shamil gizi Abbasova. Z.Paraskevich died on February 27, 2012 and on the same day, E.Abbasova registered at the mentioned flat.

When E.Abbasova, following the death of Z.Paraskevich, applied to the Notary Office with the request to issue the inheritance certificate for this flat, she was said that the time period for receiving the inheritance expired and the inheritance certificate for ½ part of the inheritable property was issued to the grandson of the testator Vladimir Paraskevich.

E.Abbasova applied to the court with the lawsuit against V.Paraskevich and Notary Office No. 1 of Sumgait city and demanded recognition of the inheritance certificate as invalid and recognition of inheritance property as actual received, V.Paraskevich filed the counter-suit against Notary Office No. 1 of Sumgait city and E.Abbasova claiming the loss of inheritance right and eviction from the flat.

By its decision of May 29, 2013 the Sumgait city court ruled in favor of E.Abbasova’s lawsuit and rejected the counter-suit.

V.Paraskevich submitted the appeal complaint to the Court of Appeal of Sumgait city to annul the decision of the court of first instance and to adopt new decision confirming his right to get obligatory inheritance share.

The court of first instance at supporting the initial lawsuit referred to Article 1193 of the Civil Code. This article specifies the heirs who have the right for obligatory share of inheritance property. However, at the same time, according to Article 1194 of the Civil Code the right to demand obligatory share appears at the moment of opening of inheritance. Such requirement right is assigned under inheritance.

By the opinion of the applicant, the provision “Such requirement right is assigned under inheritance” causes controversy and creates some difficulties in the practice of law enforcement.

In connection with the inquiry, the Plenum of the Constitutional Court considers necessary to disclose the essence, content and basics of the inheritance right:

The Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) declared the ensuring of human rights and civil liberties, adequate standard of living for the citizens of the Republic of Azerbaijan as the supreme objective of the state (Article 12.1).

Therefore, the state obliged to protect these rights and liberties, to implement them in accordance with universally recognized principles and norms of the international law.

According to Article 29.5 of the Constitution, the state guarantees the right of inheritance. This constitutional norm along with the right to make a testament also ensure the right to inherit. Thus, ensuring of the right to inherit envisages willing to, i.e. the ability to make a testament from one side, and from another side to get inheritance being an heir and to own it. The owner’s (testator’s) ability to dispose the property belonged to him originates from the property right reflected in the part III of Article 29 of the Constitution and thus provides the basis of liberty to make a testament.

In some of its decisions, the Plenum of the Constitutional Court, regarding the legal regulation of the inheritance right, indicated that the institute of a right of inheritance regulates the civil-legal relations existing between group of norms of the family and labor laws. The inheritance institute in a certain degree reflects in itself specific features of both groups of norms (family and labor). Thus, this feature of institute of a right of inheritance proves, as in a binding character of considerable part of the rules relating to it, and in restriction with special conditions of freedom of the contract (decisions of October 20, 2011 “On verification of conformity of Article 1193 of the Civil Code of the Republic of Azerbaijan with parts I and II of Article 13 and parts I, II of Article 29 of the Constitution of the Republic of Azerbaijan” and of December 13, 2011 “On interpretation of Article 1203.1 of the Civil Code of the Republic of Azerbaijan”).

The civil legislation by disclosing the essence, content and basis of the inheritance right regulates inheritance relationship on the law or the testament and according to the bases of emergence of right of inheritance guarantees implementation of this right.

At the same time, the institute of inheritance guarantees to every individual that the property and other material wealth (together with their liabilities) earned him during his life will be devolved after his death to the indicated heirs according to his testament and in case of absence of testament, to heirs determined by law.

According to Article 1133.1 of the Civil Code, the property of the deceased (testator (testatrix) is devolved to other persons (heirs) according to law or testament or on both grounds. Intestate succession (devolution of decedent’s property to persons indicated in law) is effective in case of an intestacy or if testament is declared invalid entirely or partly (Article 1133.2 of the Civil Code).

Arising of the right of inheritance is conditional upon the testator’s death and is realized, taking into account his will, by the person obtaining rights and obligations as the legal heir in the form of legal inheritance envisaged by testament or law.

In cases of absence of testament or when it is declared as invalid, it is necessary to adopt decision by determining relationship degree, scope of inheritance and their priority.

In this type of inheritance the principle of priority between heirs is observed, the concrete scope of heirs with the equal share right is indicated and the presence of at least one of heirs of previous turn excludes the heir of following one.

The institute of inheritance is based on the principles of individualism and family maintenance.

The principle of individualism gives priority to the owner’s interests and envisages the full dependence of the inheritance on the testator’s will. This principle contains the possession by the individual during his life, as well as after his death, of the authority to determine the future of its ownership (property wealth). Thus, the main terms of the ownership law are ensured.

The family maintenance in the inheritance law envisages priority of family members’ interests, which is a core of the civil society, over interests of other persons. According to this principle, to the persons who are closely related to the testator (child, husband, wife, parents) are given obligatory inheritance share irrespective of the testator’s will.

Emergence, change or termination of the civil relations, including hereditary legal relations is based on the transactions reflecting wills of participants of these relations.

The principle of freedom of will of subjects of civil law directly linked with other principle of civil law, notably principle of freedom of contracts.

The testament being by its legal nature of one-sided arrangement, expresses the testator’s will. Thus, the testator can devise his property to one or several persons both his heirs and bystanders, define inheritance shares of heirs, deprive of inheritance of one, several or all of his legal heirs and is not obliged to give reasons for this. At the same time, the testator can deprive of the right to get obligatory inheritance share at the court while alive.

Making by the owner of his testament according to the requirement of legislation and deprivation of inheritance or of the right to get obligatory share by testament of one, several or all heirs while alive is one of the factors providing his right to make arrangements on his property.

The specific feature of the testament as an arrangement is that after the testament it has no legal consequences for supposed heirs. The legal inheritance relationship arises when the testator dies or declared as dead.

Thus, the testament is one-sided arrangement, which establishes rights and obligations after commencement of inheritance.

However, the legislation also provides the restrictions on freedom of testament, which is peculiar to heir right under a testament. Thus, according to Article 1193 of the Civil Code, testator (testatrix)’s children, parents and spouse have obligatory inheritance share irrespective of testament’s content. According to law, this share makes up to the half of the share (obligatory share).

The establishment of this restriction serves for protection of the legal interests of the testator’s family members. The obligatory inheritance share having socio-economic and moral importance is a crucial part of the right of inheritance. The right for obligatory share plays a role of social provision with respect to some categories of deceased person’s relatives (obligatory share heirs).

As it is seen, the Civil Code provided for the right to dispose some part of person’s property based on testament, as well as the right of family members to get obligatory inheritance share.

According to Article 1194 of the Civil Code, the right to demand obligatory share arises at the moment of commencement of inheritance. Such kind of right to demand is assigned under inheritance. Other heirs act as joint debtors in relation to person who has the right to demand obligatory share.

The Plenum of the Constitutional Court notes that the demand related to the right for obligatory share aimed for protection of legal interests of heirs at to law defined by the Article 1159.1 of the Civil Code (first devisee) and assignment of right to demand obligatory share under inheritance, causes the creation of substantially different legal consequences.

According to Article 1151 of the Civil Code, inheritance contains aggregate of property rights (inheritance assets) and obligations (inheritance liabilities) pertaining to testator until the moment of his decease. Personal property rights are not included in inheritance (Article 1153 of the Civil Code). These are aliment obligations, right to use living area, obligations to pay the damage to testator’s health etc.

According to Article 1133 of the Civil Code, the rights (the property right and other corporeal rights to the personal and real estate entering to heritable property, a right to claim) and the liability having the material values making heritable property pass to heirs of the testator in an order of inheritance.

The ground of commencement of inheritance is made up of the aggregate (legal content) of several legal facts: scope of persons who have the right to receive inheritance, persons who have obligatory share under testament; totality of inheritance property at the moment of commencement of inheritance (inheritance assets and inheritance liabilities); beginning of inheritance process (inheritance receiving, refusal, etc.).

Thus, since the right for obligatory share of living heirs of testator mentioned in the Article 1193 of the Civil Code arises at the moment of commencement of inheritance, this share right as inheritance share is assigned by the way of inheritance at the day of property testator’s death or of entry into force of court decision declaring him as dead. As it is seen, inheritance rights of heir (heirs), including obligatory share heir (heirs), do not arise at the moment of division of inheritance property, but arise at the moment of commencement of inheritance.

It should be noted that the share that is due to heirs, including an obligatory share from heritable property is determined after commencement of inheritance; therefore, the right to claim of this share is also implemented after commencement of inheritance. In this case, from the moment of commencement of inheritance, the person (persons) having the right for an obligatory share in inheritance has a right to demand from the heir (heirs) according to the will of compensation of an obligatory share and all heirs who have received a hereditary share according to the will are obliged to compensate this obligatory share. Thus, according to Article 1194 of the Civil Code other heirs act before the person holding the right of request of mandatory share, as joint debtors.

Based on the above-mentioned one it may be concluded that the right of person entitled to get obligatory share from inheritance defined at the Article 1193 of the Civil Code, who was alive at the moment of commencement of inheritance, but deceased without implementing the right to demand obligatory share is assigned to his heirs according to law or testament. If the person entitled to obligatory share dies after the moment of commencement of inheritance, then his heir (heirs) obtains the right to demand only as heir of person entitled to obligatory share, but not in the status of obligatory heir of testator under testament. Thus, since person entitled to get obligatory share at the moment of testator’s death is alive, this right arises in his property assets as property right. Along with this, due to the fact that obligatory share is assigned under inheritance according to the Article 1194 of the Civil Code, other family members from heirs of the first devisee defined at the Article 1159.1 of the said Code, as well as persons without relationship to testator can have the right to demand obligatory share.

Taking into account the above mentioned, the Plenum of the Constitutional Court concludes that the provision of Article 1194 of the Civil Code “Such requirement right is assigned under inheritance” provides, transition of the right to demand of an obligatory share in an inheritance order in case if the person having these rights was alive at the moment of commencement of inheritance, but died without implementing the right to demand obligatory share.

Being guided by Article 130.6 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”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The provision of Article 1194 of the Civil Code of the Republic of Azerbaijan “Such requirement right is assigned under inheritance” provides, transition of the right to demand an obligatory share in inheritance order in case if the person having these rights was alive at the moment of commencement of inheritance, but died without implementing the right to demand obligatory share.

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 institution or official.