**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of the Articles 43.4-43.8 and 48 of the Law of the Republic of Azerbaijan “On Mortgage”*

**28 October, 2014 Baku city**

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

attended by the Court Clerk F. Aliyev,

the legal representatives of the subjects interested in special constitutional proceedings: Vusal Jabrailov, Judge of the Court of Appeal of Shirvan district,

the 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: Bagir Asadov, Judge of the Supreme Court of the Republic of Azerbaijan, Sanan Hajiyev, Judge of the Court of Appeal of Baku city, Farid Hajiabdulqalimzadeh, senior adviser of the Legal Department of Mortgage Fond of Azerbaijan at Central Bank of the Republic of Azerbaijan, Farid Bayramov, leading legal adviser of the Department of Legal Coverage of Bank Control of Legal Department of the Central Bank of the Republic of Azerbaijan;

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session via special constitutional proceeding the constitutional case on request of Court of Appeal of Shirvan city on interpretation of the Articles 43.4-43.8 and 48 of the Law of the Republic of Azerbaijan “On Mortgage”;

having heard the report of Judge R. Gvaladze, the reports of legal representatives of the interested subjects, conclusions of experts and opinion of visiting specialist, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In its request the Court of Appeal of Shirvan city asks Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) to give interpretation of Articles 43.4-43.8 and 48 of the Law of the Republic of Azerbaijan “On Mortgage” (hereinafter referred to as the Law “On Mortgage”) concerning the cancellation of auction and holding of repeated tendering because of not purchasing by a demander of a subject of a mortgage.

As evident from the request, Z. Samedov appealed to District Court of Masalli region with the statement of claim concerning the termination of a mortgage connected with purchasing of a private residence.

The claim was proved on May 13, 2010 and the District Court of Masalli region decided to turn N. Guseynov's debt on the credit of 33.320 US dollars and 32 cents for the private residence belonging to him which is a subject of a mortgage and to sell the residence by auction.

The first auction was conducted by the limited (liability) company “Kulek” (hereinafter referred to as LLC “Kulek”) on February 28, 2011 and there-auction on March 15, 2011. Further, on April 5, 2011 one more auction was conducted and on April 12, 2011 the proposal on purchase within 30 calendar days and 25 percent cheaper than initial auction cost of a subject of a mortgage was made to demander, otherwise the termination of a mortgage was declared.

Demander having addressed organizers of auction by the letter of April 20, 2011 asked to suspend temporarily the holding of auction, and by the letter of September 1, 2011 to restore actions according to the offer. Further on September 8, 2011 LLC “Kulek” conducted auction and the non-banking credit organization KredAqro (hereinafter KONB “KredAqro”) became the winner of auction. On the same day following the results of auction between the customer the Office of Execution of Masalli region and the winner of auction the contract on a property purchase sale was signed.

By its decision of January 15, 2013 the Masalli district court satisfied claim of Z.Samedov.

On April 16, 2013 the Court of Appeal of Shirvan city did not satisfy the appeal complaint of KONB “KredAqro” and upheld the decision of Masalli district court.

By the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan as of September 26, 2013 the decision of Court of Appeal of Shirvan city was cancelled and the case sent for new consideration.

In the request it is noted that the organizer of auction conducted three auctions. Though the carrying out of re-auction provided by the legislation, however possibility of its termination by the second auction or carrying out after that the new auction is not established. Since it becomes the uncertainty reason in jurisprudence, there is a need for interpretation of Article 43.8 of the Law “On Mortgage” regulating the matter.

In the request it is also indicated that according to Article 43.8 of the Law “On Mortgage” if mortgage holder does not get the mortgage object in 30 calendar days after the declaration of re-auction as frustrated, the mortgage is cancelled. As evident from the specified term, inaction of mortgage holder is specified as the main condition of cancellation of a mortgage. However, this Law did not regulate whether emergence of desire of the mortgage holder about purchase of a subject of a mortgage after the determined time becomes adjusted by the reason of cancellation of a mortgage.

In Article 48 of the Law “On Mortgage”the circumstances of cancellation of a mortgage are specified. However the provision“if mortgage holder does not get the mortgage object in 30 calendar days after the declaration of re-auction as frustrated”isnot provided in this article, as the circumstance which is the reason of cancellation of a mortgage.

Thus, according to appellant,for the reason that in jurisprudence application of Articles 43.4-43.8 and 48 of the Law “On Mortgage” becomes the reason of certain difficulties, there was a need of their interpretation.

In connection with the request Plenum of the Constitutional Court considers necessary first of all to reveal from the point of view of the legislation the basis of origin of a mortgage, the rights and an obligations of the parties, the rule of compensation at the expense of a mortgage of a debt and other civil legal obligations.

Alongside with proprietorial legal relations, obligatorily legal relations as one of types of property legal relations also serve for free exchange of material benefits between participants of a civil circulation. According to Article 385.1 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC)due to an obligation, one person (debtor) obliged to perform certain actions to the benefit of the other person (creditor), namely: payment of funds, execution of works, transfer of property, delivery of services, etc., or refrain from certain actions, and the creditor entitled to demand from the debtor the fulfillment of his obligations.

As it is specified in the Decision of Plenum of the Constitutional Court of December 30, 2008 “Onconformity of the resolution of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of October 23, 2007 to the Constitution and Laws of the Republic of Azerbaijan in connection with F.Javadov and V. Aslanov's complaint” with the purpose to discipline the parties of the relations of the obligation, for encouragement of its full and timely execution the CC also establishes the methods of providing fulfillment of obligations which are creating a straight e or indirect load concerning the debtor in comparison with the creditor and acting as an additional tool of a guarantee. According to Article 460 of CC, one of such methods is a pledge (mortgage). According to Article 269.1 of CC pledge and hypothecation right mean property right of pledgee in respect of pledgor’s property, and, at the same time, mean method of guarantee to pledgee of debtor’s monetary or other obligations.

From this point of view for the reason that a mortgage as the additional obligation in cases of not of execution or a delay of execution of the obligations provided to them, creates real threat of deprivation of property, compels the debtor to fulfill the main obligation in due time.

The Law “On Mortgage” regulates the bases of emergence of a mortgage connected with the providing of fulfillment of obligations following from civil legal instruments, its state registration, rules of repayment at the expense of a mortgage of a provided debt and other civil right obligation, the right and an obligation of the parties.

According to civil legislation in the event debtor delays repayment of claim whose guarantee method is hypothecation, mortgagor may demand sale of immovable property (Article 317.1 of CC).

According to Article 33 of the Law “On Mortgage” if mortgagor fails the commitment of obligations or fulfils it insufficiently, mortgagee can apply for deduction of mortgage object to execute the main commitment.

Rules of tendering, the declaration of the auction frustrated, rules and results of the re-auction held in this case are regulated by Articles 42 and 43 of the Law “On Mortgage”.

According to Article 43.1 of the given Law the organizer of auction publishes the frustrated of auction in the information bureau where the declaration of auction was declared in if any of the following situations happens: less than two buyers come to the auction; no participant appears; the winner of auction refuses to sign the report about auction results; the winner of auction do not pay the sale price completely for a while intended on this law (on the condition that time is not extended with mortgagee’s agreement).

 According to Articles 43.3-43.5 of the Law “On Mortgage” after the declaration day of auction frustrated mortgagee can buy mortgage object in sale price from mortgagor on the basis of contract in 10 calendar days. If the contract intended on Article 43.3 of this law about the purchase of mortgage object by mortgagee fails, re-auction should be held not later than 45calendar days from the day which first auction is held on. New auction is held under the rule provided in Article 42 of this law. The organizer of auction offers mortgage object for new auction with 15% less than initial sale price due to reasons provided on Article 43.1.2 of this law.

 According to Articles 43.7 and 43.8 of the Law “On Mortgage” if the auction frustrated is declared due to reasons excluding the situation provided by Article 43.1.1 of the given Law, mortgagee can buy mortgage object with not 25% less than initial sale price. If mortgagee does not get the mortgage object in 30 calendar days after the declaration of re-auction as frustrated, mortgage is ceased.

In connection with holding of the re-auction from the point of view of the above provisions of the Law “On Mortgage” the Plenum of the Constitutional Court notes the following.

From the sense of Article 43 of the Law “On Mortgage” it can to draw the conclusion that as it provided in Article 42 of the present Law the carrying out only two auctions is provided. So, if the first auction did not take place for the reason provided in Article 43.1.2 of this Law that is because of absence of the bidder then the sale of a subject of a mortgage at the re-auction on initial sale price of 15% lower than at the previous auction is provided. Unlike it for other reasons provided in Articles 43.1.1, 43.1.3 and 43.1.4 of the present Law (that is less than two buyers come to the auction; the winner of auction refuses to sign the report about auction results; the winner of auction do not pay the sale price completely for a while intended on this law, on the condition that time is not extended with mortgagee’s agreement) the auction is declared frustrated, initial sale price remains invariable.

Unlike the first auction, the circumstance provided in Article 43.1.1 of the Law “On Mortgage” that is less than two buyers come to the auction during the re-auction are not provided, as circumstance of the frustrated auction. So, according to Article 43.6 of the Law there-auction is realized if at least one participant takes part and in this case that participant is considered as a winner of auction.

In case of the declaration of the repeated public auction as frustrated for the reasons provided in Articles 43.1.2, 43.1.3 and 43.1.4 of the Law “On Mortgage” to the mortgage holder has the opportunity during 30 calendar day to purchase a subject of a mortgage at the price no more than 25 percent lower than its initial sale price at the first public auction (Articles 43.7 and 43.8 of the Law “On Mortgage”).

As is seen from inquiry and reports at a meeting of Plenum of the Constitutional Court, sometimes the organizer of the auction considering the proposal of the mortgage holder as tendering holds the third auction. Besides, in practice there are the cases of holding of tendering, even after passed certain time, on the basis of the request of the executive official or a demander.

In this regard, Plenum of the Constitutional Court notes that holding of three and more auctions as repeated does not follow from requirements of the Law “On Mortgage” and becomes a cause of infringement of the rights of mortgagor. So, since the re-auction as frustrated it lead for mortgagor to emergence of the certain legal opportunities provided in Article 43.8 of the Law “On Mortgage”, regulating the termination of a mortgage.

As it was noted, in Article 43.8 of the Law “On Mortgage” it is provided, what if mortgage holder does not get the mortgage object in 30 calendar days after the declaration of re-auction as frustrated, the mortgage is cancelled.

Thus, Plenum of the Constitutional Court considers that by reason of that the Article 43 of the Law “On Mortgage” envisage the conducting only two auctions the carrying out of new auction on any basis is recognized as contradicting to law.

As regards the question which is brought up in the inquiry, concerning existence of possibility of purchasing by the mortgage holder of a subject of a mortgage also after the admission of 30 day terms provided in Article 43.8 of the Law “On Mortgage” the Plenum of the Constitutional Court notes that in the Law “On Mortgage” possibility of purchasing of a subject of a mortgage at the price that is no more than 25 % lower than its initial sale price within 30 days in case of the declaration of the re-auction as frustrated is provided to the mortgage holder only once.

Article 43.8 of the Law “On Mortgage” bears in itself the purpose of creation of definiteness and stability of legal relationship, and also to discipline the mortgage holder for this purpose that he in due time exercised the rights.

The mortgagor has a right of use, possibility of the termination of a mortgage which is important for him if the mortgage holder in due time did not use the possibility of purchasing of a subject of a mortgage.

Interpretation of the Law “On Mortgage” in other form, that is anew granting to mortgage holder of this opportunity also after the term provided by the law can let to violation of the rights protected by the law and interests of a mortgagor.

Also in the inquiry it is specified that in Article 48 of the Law “On Mortgage” among the basis for the termination of a mortgage, the provision “if mortgage holder does not purchased the mortgage object in 30 calendar days after the declaration of re-auction as frustrated, the mortgage is cancelled" of Article 43.8 of the Law is provided, as the circumstance which is the reason of the termination of a mortgage.

Besides, though in the Law “On Mortgage” it is specified concerning the termination of a mortgage, the procedural order of the termination is not indicated, that is what body (court or other body) as what procedure (as claim procedure or execution of judgments) has to cancel a mortgage.

In connection with the question the Plenum of the Constitutional Court notes that circumstances of the termination of a mortgage are specified in Article 48 of the Law “On Mortgage”.

These circumstances are following: when both mortgagee and mortgagor agrees about this; when a main responsibility is put an end; s a result of the application of deduction on mortgage object when it is sold; when a mortgage object is abolished; other cases with respect to this law (Articles 48.1.1-48.1.5 of the Law “On Mortgage”).

 As evident, though the circumstance of not of purchasing by the mortgage holder of a subject of a mortgage within 30 calendar days after the declaration of the re-auction as frustrated directly is also not specified in article 48 of the Law “On Mortgage”, acts as one of other circumstances of the termination of a mortgage provided by the present Law (Article 48.1.5 of the Law “On Mortgage”).

Due to procedure of termination of a mortgage on the basis specified in Article 43.8 of the Law “On Mortgage”, Plenum of the Constitutional Court notes that the mortgage can be cancelled on the basis of legal proceedings on the claim of mortgagor if the mortgage holder does not purchase a mortgage subject within 30 days after the declaration of the re-auction as frustrated.

Considering the above stated, the Plenum of the Constitutional Court comes to conclusion that:

because of the fact that the Article 43 of the Law “On Mortgage” provide holding only two auctions the carrying out of new auction on any basis is recognized contradicting to the present Law;

according to requirements of Article 43.8 of the Law “On Mortgage” mortgagor has only one opportunity to get a mortgage subject within 30 calendar days after the declaration of the re-auction as frustrated;

the mortgagor under civil legal proceedings can demand the termination of a mortgage if the mortgage holder within 30 calendar days after conducting the secondary auction did not purchase a mortgage subject.

Being guided by part VI of Article 130 of the Constitution of the Republic of Azerbaijan and 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. Because of the fact that the Article 43 of the Law “On Mortgage”provide holding only two auctions the carrying out of new auction on any basis is recognized contradicting to the present Law.

2. According to requirements of Article 43.8 of the Law “On Mortgage” mortgagor has only one opportunity to get a mortgage subject within 30 calendar days after the declaration of the re-auction as frustrated.

3. The mortgagor under civil legal proceedings can demand the termination of a mortgage if the mortgage holder within 30 calendar days after conducting the secondary auction does not purchased a mortgage subject.

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.