**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of ruling dated May 6, 2016 of Judicial Composition of the Supreme Court of the Republic of Azerbaijan on reconsideration of judicial acts in force based on newly discovered facts with Constitution and laws of the Republic of Azerbaijan on complaint of H.Mammadova and N.Aliyeva*

**17 February 2017 Baku city**

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

attended by the Court Clerk Faraid Aliyev,

applicants – Hadidja Mammadova, Nargizhanim Aliyeva and their representative Mehman Neymatzadee;

representative of respondent body – Gunel Tanriverdiyeva, assistant of judge 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 H.Mammadova and N.Aliyeva on verification of conformity of ruling of May 6, 2016 of Judicial Composition of the Supreme Court of the Republic of Azerbaijan on reconsideration of judicial acts in force based on newly discovered facts with Constitution and laws of the Republic of Azerbaijan.

having heard the report of Judge Jeyhun Garajayev, the reports of the applicants and representative or respondent body, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

H.Mammadova and N.Aliyeva having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) ask for verification of conformity of ruling dated May 6, 2016 of the Judicial Composition of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the Judicial Composition) on reconsideration of judicial acts in force based on newly discovered facts with the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and laws of the Republic of Azerbaijan.

From the complaint and the documents attached to it, it is evident that the Yasamal District Court of Baku city by the resolution of April 7, 2006, has satisfied the claim of the claimant of J. Aleskerova against defendant N. Aliyeva concerning recognition as concluded of contract on purchase and sale of individual house (living space of 190 sq.m. and with the auxiliary area of 195 sq.m) located in the village of Mammadli of Absheron District and recognition of property right.

By the resolution of Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan of December 8, 2006, the appeal complaint on decision of the court of first instance submitted by the interested person V. Mamedov was rejected.

By the decision of the Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan of July 25, 2007, the appeal of other interested person of R. Mamedov was not satisfied and the decision of the court of appeal was upheld.

After that the Absheron District Court by the decision of August 15, 2011 has partially satisfied the claim of claimants A. Ibragimov and I. Rustamova against defendants N. Aliyeva and D. Veliyeva concerning eviction of the last from the private house located in the village of Mammadli of Absheron District and about deduction from defendants of 200 manats monthly before they vacate the house till October 1, 2009, having decided to start count the deduction of 200 manats monthly from December 1, 2010.

The Civil Board of the Court of Appeal of Sumgait city by the decision of May 22, 2012 and the Civil Board of the Supreme Court of the Republic of Azerbaijan by the decision of November 13, 2012, have not satisfied appeal and cassation appeal of N. Aliyeva.

H. Mamedova and N. Aliyev having filed a claim to the Supreme Court of the Republic of Azerbaijan asked to reconsider judicial acts in force based upon newly discovered facts.

The claim is proved by the fact that after obtaining of conclusions of the expertise that was carried out with respect to criminal case, in actions of J. Aleskerova and N. Aliyeva were revealed the circumstances specified in the Article 320.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code) and in actions of D. Veliyeva the circumstances specified in the Articles 320.1 and 320.2 of the Criminal Code. But by the Prosecutor's Office of Sabail District of Baku city dated May 27, 2015 on the basis of Article 75 of the Criminal Code the criminal cases concerning them based upon Articles 320.1 and 320.2 were stopped because since the moment of commission of the specified criminal actions had already passed two years.

By ruling of the Judicial Composition dated May 6, 2016, it was refused to present the claim of H.Mamedova and N. Aliyeva at consideration of the Plenum of the Supreme Court for reconsideration of judicial acts in force based on newly discovered facts.

The Judicial Composition has proved its position by the fact that as there are no available information concerning results of criminal case concerning J. Aleskerova, the documents submitted by applicants cannot be recognized as the decisive material earlier unknown at consideration of the case according to Article 432.2.1 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Procedure Code).

Applicants have proved the complaint lodged to the Constitutional Court by the fact that, at consideration of their claim by Judicial Composition the requirements of Article 432.2.1 of the Civil Procedure Code have not been observed. Applicants consider that, the specified ruling of Judicial Composition violates the rights and freedoms of legal protection specified in the Article 60.1 of the Constitution.

The Plenum of the Constitutional Court in connection with the complaint considers necessary is emphasized the following.

According to Article 60.1 of the Constitution, everyone is guaranteed the protection of his/her rights and liberties in the administrative manner and in court.

According to the legal position formed by the Constitutional Court, the right for legal protection, being in the same line with the basic human and citizen rights and freedoms, acts as the guarantor of ensuring of other rights and freedoms specified in the Constitution. The specified right is not limited only by the appeal to the court, but also envisage the justice and effective restoration of the violated rights and freedoms.

Legal protection is perceived as effective restoration of the rights on the basis of fair judicial proceedings by independent court. In fact, justice has to answer a concept of justice and provide restoration of the violated rights (decisions of the Plenum of the Constitutional Court on complaint of S. Abbasova of October 14, 2016 and on complaint of F.Shirinov of November 16, 2016, etc.).

Reconsideration of judicial acts in force based on newly discovered facts is considered as a special type of proceeding on civil proceeding of reconsideration of judicial acts in force based on newly discovered facts and this proceeding differs from an appeal and cassation order. At a stage of reconsideration of the case based on newly discovered facts, the court does not investigate injustices, validity of judgments, not correct use of norms of substantive law by courts or violations of norms of the procedural legislation or other issues. At this phase of proceeding the circumstances that can substantially effect on result of case at decision-making or having special importance for case are studied. Unknown or which cannot be known on newly discovered facts are those that are important for case at adoption of the fair decision as a result of judicial proceedings in essence.

Rules of proceeding of reconsideration of judicial acts in force based on newly discovered facts are regulated by norms of the Chapter 45 of the Civil Procedure Code. In Article 432.2 of the same Code are determined the four independent bases for reconsideration of judicial acts based on newly discovered facts:

- discovery, after issuance of court act of important facts which were not known in the course of previous consideration;

- intentional rendering of false testimony by witness, of false opinion by expert, of false translation by interpreter, forgery of documents or material evidence established by entered into legal force court verdict and resulting in making of illegal or groundless decision;

- criminal activities in the course of case review of parties, other persons participating in case or their representatives as well as criminal actions of judges established by entered into legal force court verdict;

- cancellation of resolution, verdict, ruling or decision of court or decision of other body serving as a basis for pronouncement of the court act.

According to Article 433 of the Civil Procedure Code, the judicial acts in force can be reconsidered based upon newly discovered facts by the Plenum of the Supreme Court of the Republic of Azerbaijan.

In presence of any of four bases specified in the Article 432.2 of the Civil Procedure Code and when the application submitted for reconsideration of the judicial acts in force meets requirements of the Articles 434 and 435, then it together with case shall be presented for consideration of the Plenum of the Supreme Court.

For reconsideration of judicial acts in force based on newly discovered facts, as the basis shall be allowed the reference only to four independent bases specified in the Article 432.2 of the Civil Procedure Code.

Plenum of the Constitutional Court reminding the previous legal position notes that, conditions that are shown by the civil procedural legislation to reconsideration of the case on newly discovered facts serve for protection of the principles of legal certainty and aims for prevention of the unreasonable decision of the judicial acts in force.

Along with it, at pronouncement of the judicial act, unknown earlier at consideration of case decisive materials, have to be accepted as the facts of important degree influencing on conclusions of courts concerning the rights and obligations of the parties. Importance of the decisive materials unknown at previous consideration of the case therefore are important for resolution of case since if such circumstances (materials), would be revealed at consideration of case, then it would lead to pronouncement of the judicial act having other contents.

In spite of the fact that applicants have not proved the claim by Article 432.2.1 of the Civil Procedure Code, the Judicial Composition has not studied compliance of the claim to this justification, without having given a legal treatment to the arguments specified in the claim, based only on that there are no information concerning results of the criminal case conducted concerning J. Aleskerova, has not carried out full and comprehensive study for recognition of decisive material unknown at previous consideration of the case.

Whereas, Article 432.2.1 of the Civil Procedure Code, provides the revelation of the decisive materials which was unknown at adoption of judicial act at previous consideration of the case as the independent basis for consideration of such type of claims.

According to the legal position formed by the Plenum of the Constitutional Court, settlement of cases by observing the substantial and procedural legal norms in all judicial instances comprises legal ground for lawfulness and fairness of made court acts and excludes the possibility of doubts (decision of the Plenum of the Constitutional Court on A.Yahyazada’s complaint of July 16, 2013).

The Plenum of the Constitutional Court also notes that, within legal protection of the rights and freedoms, the lodging of complaint to court on decisions and actions (inaction) of any public authorities is possible. The impossibility of revision of wrong judicial acts, does not correspond with universal order of effective reconsideration of rights by means of justice, violating and limiting the specified right. Institutional and procedural conditions of reconsideration of wrong judicial acts, anyway have to meet the requirements of procedural efficiency, usage of judicial remedies, transparent implementation of justice on what it is necessary to refer at prolongation of judicial proceedings. Thereby the justice of the judgment and recognition of legal certainty will be provided. Otherwise, a balance of the common (public) and private legal interests is impossible.

Such approach concerning the right for fair trial finds the reflection also in a case-law of the European Court of Human Rights (hereinafter referred to as the European Court). According to the European Court, the one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question (decisions dated October 28, 1999 on case of Brumărescu v. Romania and dated November 18, 2004 on case of Pravednaya v. Russia).

According to legal position of the European Court in fact, the Convention in principle tolerates the reopening of final judgments if new circumstances are discovered. For example, Article 4 of Protocol No. 7 expressly permits a state to correct miscarriages of criminal justice. A verdict ignoring key evidence may well constitute such a miscarriage. However, the power of review should be exercised to correct judicial errors and miscarriages of justice, and not treated just as an “appeal in disguise”. The European Court accepts that in certain circumstances legal certainty can be disturbed in order to correct a “fundamental defect” or a “miscarriage of justice”. At that the procedure for quashing of a final judgment presupposes that there is evidence not previously available through the exercise of due diligence that would lead to a different outcome of the proceedings. The person applying for rescission should show that there was no opportunity to present the item of evidence at the final hearing and that the evidence is decisive (decisions of November 18, 2004 on case of Pravednaya v. Russia, of July 12, 2007 on case of Vedernikova v. Russia and of July 23, 2009 on case of Sutyazhnik v. Russia).

The Plenum of the Constitutional Court considers that, by the Judicial Composition has not given an assessment to obtaining of stated above documents after entering into force of the challenged judgments, to recognition or non-recognition as a decisive circumstance of newly discovered facts and has not paid attention to the facts of the case stated above.

Thereby at consideration of the case by Judicial Composition, the requirements of the civil procedural legislation stated above have not been observed and as a result H.Mamedova and N. Aliyeva's right for legal protection, provided by Article 60.1 of the Constitution have been broken.

Considering the above, the Plenum of the Constitutional Court comes to such conclusion that, because of discrepancy of Article 437 of the Civil Procedure Code with Article 60.1 of the Constitution, it is necessary to recognize as null and void the ruling of Judicial Composition of May 6, 2016 concerning the claim of the claimant of J. Aleskerova to the defendant N. Aliyeva on recognition of the contract of purchase and sale as concluded and recognition of the property right. The claim concerning reconsideration of judicial acts in force based on newly discovered facts, shall be reconsidered in the orders and terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by the parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 52, 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. To recognize as null and void the ruling of Judicial Composition dated May 6, 2016 concerning the claim of the claimant of J. Aleskerova against defendant N. Aliyeva on recognition of the contract concerning purchase and sale as concluded and recognition of the property right because of discrepancy of Article 437 of the Civil Procedure Code with the Article 60.1 of the Constitution. The claim concerning reconsideration of judicial acts in force based on newly discovered facts, shall be reconsidered 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 institution or official.