**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On Article 440.4 of the Civil Code and Article 74.1 of the Law*

*of the Republic of Azerbaijan “On Execution of Court Decisions”*

**27 December 2002 Baku city**

The Constitutional Court of the Republic of Azerbaijan composed of Kh.Hajiyev (Chairman), Judges: F.Babayev, B.Garibov, R.Gvaladze, S.Salmanova, A.Sultanov (Reporter Judge), I.Najafov, E.Mamedov,

joined in the proceeding by: the Court Clerk I.Ismayilov;

the legal representatives of the subjects interested in special constitutional proceedings: B.Asadov, Judge of the Supreme Court of the Republic of Azerbaijan and I.Rafibeyli, officer of Administration of Milli Majlis of the Republic of Azerbaijan;

expert: M. Aliyev, lecturer of the Civil Procedure, Labour and Environmental Law Board of the faculty of law of Baku State University of the Republic of Azerbaijan;

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined via special constitutional proceedings in open court session the constitutional case connected with the petition of the Supreme Court of the Republic of Azerbaijan of October 31, N 8-2002 regarding Article 440.4 of the Civil Code of the Republic of Azerbaijan and and Article 74.1 of the Law of the Republic of Azerbaijan “On Execution of the Court Judgments”.

Having heard the report of Judge A. Sultanov, the statement of the legal representative of the subject interested in special constitutional proceedings: B. Asadov and I.Rafibeyli and taking to view the opinion of expert, M.Aliyev, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In its petition the Supreme Court of the Republic of Azerbaijan asks for interpretation of Article 440.4 of the Civil Code and Article 74.1 of the Law of the Republic of Azerbaijan “On Execution of the Court Decisions”. It is stated in the petition that according to the mentioned provisions in case where there are no sufficient money to be taken from a debtor this brings first of all to the restriction of defence potentials of the claimant seeking the reimbursement of legal costs and expenses as well as to non-execution of his/her lawful claims and creation of contradictions between private and individual interests at the stage of execution.

The official texts of Article 440.4 of the Civil Code and Article 74.1 of the Law of the Republic of Azerbaijan “On Execution of the Court Decisions” certified by Administration of Milli Majlis of the Republic of Azerbaijan have been enclosed to materials of case.

In connection with petition the Constitutional Court of the Republic of Azerbaijan notes as follows:

Any claim is based on the belief that the debtor undertakes a commitment to carry out the relevant actions in the future with the view to reimburse the interests of a claimant. Such belief proceeds first of all from the fact that his/her rights are ensured by means of coercive measures implemented by the state.

In its special part the Civil Code determines the coercive measures and other legal means by the state in case of violation of commitments as well as the procedure of their implementation.

For instance, Article 440.4 of the Civil Code provides that when there has come the time to pay the debts but at the same time there are no enough means to cover all of them firstly there should be paid the court expenses, then the basic execution (debt) and finally the percents.

In Article 74.1 of the Law “On Execution of the Court Decisions” it is indicated that from the money sums which have been obtained by court executor from a debtor including the money sums obtained from the debtor’s sold property firstly there should be reimbursed the execution expenses, the expenses connected with implementation of executive measures as well as the penalties imposed to a debtor on the basis on execution documents within legal proceedings. The remaining money sums shall be used to reimburse the demands of a claimant (claimants).

Thus the mentioned provisions prescribe that the demands of a claimant should be reimbursed at the end.

In the democratic state where the principles of the state governed by the rule of law and civil society are ensured, the fair balance between the interests of a state and individual is the essential precondition. The democratic state that declared the guarantees of human rights and freedoms as the supreme objective shall give priority to the protection of individual’s legitimate interests.

It is not accidental that Article 12 of the Constitution of the Republic of Azerbaijan proclaims that the supreme objective of the state shall be to ensure human and civil rights and freedoms.

Article 13.1 of the Constitution notes that the property in Azerbaijan Republic shall be inviolable and protected by the state.

Article 29 of the Constitution stipulates that every person shall have the right to property. No one shall be dispossessed without the decision of court.

Article 60 of the Constitution ensures protection of the rights and freedoms of every person in a court.

In paras 1 and 2 of Article 71 of the Basic Law it is noted that executive, legislative and judicial powers shall observe and protect human rights and freedoms enshrined in the Constitution. No one may restrict the implementation of human rights and freedoms.

The right to property and right to legal defence have the significant place in a number of international instruments. According to Article 17 of the Universal Declaration of Human Rights everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his/her property.

In accordance with Article 1 of the Protocol N 1 of the European Convention on Human Rights and Fundamental Freedoms every natural or legal person is entitled to the peaceful enjoyment of his/her possessions. 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.

The above-mentioned provisions do not restrict the right of a state to implement, within the common interests, the legislation that is necessary for the supervision over the use of property or ensuring the payment of taxes or other duties or penalties.

On the basis of Article 8 of the Universal Declaration of Human Rights everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms enshrines that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The case-law of the European Court of Human Rights on this issue also gives rise to interest. In its decision of 19 March 1997 adopted on case Hornsby vs. Greece this Court emphasized that the “right to a court” would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of any decision adopted by the court is an integral part of the “court proceedings” conception, anticipated by the same article [6].

Provisions of the Constitution of the Republic of Azerbaijan, European Convention on Human Rights and Fundamental Freedoms and other norms of international law, the judgments of the European Court on specific cases prescribe ensuring the right to property and right to legal defence for natural and legal persons.

These provisions attribute the protection of human rights and freedoms to the task of state’s constitutional system and consider as necessary their protection by the state including by means of courts.

The provision of Article 440.4 of the Civil Code that determines the distribution procedure and Article 74.1 of the Law “On Execution of the Court Decisions” that which includes such a provision as “the execution expenses, the expenses connected with implementation of executive measures as well as the penalties imposed to a debtor on the basis on execution documents within legal proceedings. The remaining money sums…” does not enable the claimant to implement properly his/her legitimate interests and the right to property, restricts the right to possess, use and dispose of this property, distorts the main point of the state’s task i.e. to guarantee the protection of constitutional right to property.

In a number of its decisions the Constitutional Court noted that in international law the legal defence is considered as an efficient restoration of the rights based on fair trial held by independent court. By its nature the fair trial must provide the restoration of violated rights and must suit to the concept of justice.

The order (sequence) that is determined in Article 440.4 of the Civil Code does not suit to the concept of justice and violates the fair equilibrium principle between public and private interests.

Thus, the above-mentioned provision that provides for the satisfaction of the claimant’s demands only after the payment of court expenses cannot be considered as the coercive restoration of violated rights and this situation must be estimated as the violation of Article 60 of the Constitution.

Hence, Article 440.4 of the Civil Code and provision of Article 74.1 “ the execution expenses, the expenses connected with implementation of executive measures as well as the penalties imposed to a debtor on the basis on execution documents within legal proceedings. The remaining money sums…” of the Law “On Execution of Court Decisions” restricts the right to property and to legal defence enshrined in Constitution.

It is necessary to note that according to Article 220.5 of the Civil Procedural Code the resolutive part of court ruling shall contain the conclusions of court in respect of full or partial satisfaction or rejection of claims, reference to distribution of court expenses. Under this provision the court decision must contain firstly claims of petitioner and only then provide for court expenses. As it is obvious, as compared with Article 440.4 of the Civil Code the procedural legislation provides firstly the reimbursement of the claimant’s demands.

Taking into account the above stated the Constitutional Court of the Republic of Azerbaijan considers that the distribution of money sums determined by Article 440.4 of the Civil Code and Article 74.1 of the Law “On Execution of Court Decisions” does not correspond to Articles 12, 13, 29, 60 and 71 of the Constitution of the Republic of Azerbaijan.

Being guided by Article 130.4 and 130.6 of the Constitution of the Republic of Azerbaijan, Articles 66, 75, 76, 78, 80, 83 and 85 of the Law “On Constitutional Court” of the Republic of Azerbaijan, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Provision of Article 440.4 of the Civil Code of the Republic of Azerbaijan and provision “… the execution expenses, the expenses connected with implementation of executive measures as well as the penalties imposed to a debtor on the basis on execution documents within legal proceedings. The remaining money sums…” of Article 74.1 of the Law “On Execution of Court Decisions” shall be recognized as null and void because of their non-conformity to Articles 12, 13, 29, 60 and 71 of the Constitution of the Republic of Azerbaijan.

2. The decision comes into force from the date of its publication.

3. The decision is subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final and cannot be cancelled, changed or interpreted by any body or official.