**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by A.A.Ibrahimov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of July 11, 2003 to Constitution and legislation of the Republic of Azerbaijan*

**12 April, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Chairman F.Abdullayev, Judges F.Babayev, B.Garibov, R.Gvaladze, E. Mammadov (Reporter Judge), I. Najafov, S. Salmanova and A. Sultanov,

joined in the proceedings by the Court Clerk I. Ismayilov;

complainant’s representatives M.Sultanov and M. Mustafayev, as well as with the attendance of A. Malikov - representative of V. Rahimov whose rights and interests were challenged in the complaint.

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan has examined in open court session via the procedure of constitutional proceeding the constitutional case on complaint lodged by A.A.Ibrahimov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of July 11, 2003 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 8m – 415/03 of the Chairman of Supreme Court of the Azerbaijan Republic dated March 30, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge E. Mammadov, and speeches of the complainant’s representatives M. Sultanov and M. Mustafayev and also A.Malikov - representative of V. Rahimov whose rights and interests were challenged in the complaint and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

A.Ibrahimov have negotiated a sales contract with S. Tagiyeva and bought an apartment of three rooms from her. After purchase, A.Ibrahimov received a registration card from Registration Department of the Rights to Technical Inventory and Property of Executive Power of Baku which confirms that the apartment is in his private property. Later on A.Ibrahimov filed a claim in Yasamal district court demanding S.Tagiyeva and her family members to leave the apartment and to be removed from the apartment registration. After this, respondents filed a counter-claim requesting to declare sales contract and registration card of the apartment invalid. As the respondents mentioned, husband of S.Tagiyeva V. Rahimov asked his friend A. Maharramov to help him to receive a credit and therefore gave him necessary documents. V.Rahimov and S.Tagiyeva came to notary office and signed some empty blanks in order to formalize credit giving process, with the request of A. Maharramov. After several months, in order to examine the request of Sabail branch of International Bank to disburse payments for credits given to V. Rahimov, A.Maharramov was invited to the bank. A.Maharramov confirmed that he took the credits and promise to return money and documents to the owner in near future. After some time, the credit contract was terminated and documents concerning the plant to V.Rahimov were returned to him. But documents regarding the apartment haven’t been returned, but it was promised to return them to the owner very soon. But, the documents haven’t been returned to the owner and moreover a false sales contract about selling the apartment to A. Ibrahimov was formalized without the agreement of the real owner.

Yasamal district court made a decision in September 11, 2002 and satisfied the counter claim leaving the claim of A. Ibrahimov unsatisfied. As we see from the court decision, state notary office № 12 of Baku city had confirmed the sales contract in February 20, 2001 about sale of “Puta Flour Mill” company and apartment № 17 situated in building 21, Haqverdiyev Street in Baku which belonged V.Rahimov to plaintiff A. Ibrahimov. In March 21, 2001, Sabail branch of International Bank negotiated Credit agreements with “Puta Flour Mill” company and “Moto-Dor”firm, at the amount of $ 100 000 for each agreement. In the credit agreement with “Moto-dor” firm it is determined that disputed apartment is mortgaged. But the owner of “Moto-dor” firm A.Salimov, who is also a friend of V.Rahimov says that he hasn’t received any credits and that the disputed apartment wasn’t mortgaged. The above mention notary office, with the request of A. Ibrahimov confirmed the document in January 30, 2002 about returning “Puta Flour Mill” company which was brought for 795 million manats to V. Rahimov without any reimbursement. Taking into consideration these and other facts of the case, Yasamal district court came to the conclusion that sales contract regarding the disputed apartment was made through deception.

Appellate Court considered an appellate complaint of the plaintiff’s representative M.Sultanov and made a decision in December 5, 2002, repealing the decision of the Yasamal district court made in September 11, 2002 and satisfied the appellate complaint and claim. It is noted in the decision that it is groundless to correlate the sales contract with the credit agreements and district court infringed norms of law by deciding that respondents were deceived.

Collegium of Civil Disputes (CCD) of Supreme Court considered the cassation claim of the respondents and made a decision in February 7, 2003 repealing the decision of the Appellate Court and sending the case back to that court for reconsideration. In the decision of the cassation instance court it is noted that Appellate Court considered the case only one-sided, haven’t examined and assessed legally the evidences of the case. By doing so, Appellate Court infringed the Article 88 of CPC. Although there is a possibility to recognize a contract made through deception invalid, Appellate Court did not show any initiative to examine this fact.

Appellate Court reconsidered the case in April 30, 2003 and again made a decision repealing the decision of Yasamal district court made in September 11, 2002 and satisfying an appellate claim. As it was stated in the court decision, no evidences proving that sales contract was made through deception was found.

But, CCD of Supreme Court after considering the cassation complaint of respondents, made a decision in July 11, 2003 annulling the decision of Appellate Court made in April 30, 2003 and satisfying a counter claim. The decision of CCD of Supreme Court recognized the sales contract between S. Tagiyeva and A. Ibrahimova, as well as registration card confirming the ownership of A. Ibrahimov over the disputed apartment invalid. Thus CCD of Supreme Court satisfied the cassation complaint. It is stated in the decision that certain facts prove that there was no sales contract and contract made through deception is invalid; also there is no need to send the case back to Appellate Court for reconsideration.

To the additional cassation complaint of A.Ibrahimov the Chairman of the Supreme Court replied by the letter № 8m-415 in October 24, 2003 saying that there are no necessary grounds to consider the case in the Presidium of Supreme Court.

A.Ibrahimov filed a complaint to the Constitutional Court from the decision of CCD of Supreme Court made in July 11, 2003. Complainant argues there are no legal grounds to recognize the sales contract regarding the disputed apartment invalid. He thinks that CCD of Supreme Court instead of applying provisions of chapter 14 (invalidity of contracts), Articles 228.1 and 228.2 of Civil Code and the decision of the Constitutional Court made in July 27, 2001 about interpretation of Article 28 of Civil Code of the Republic of Azerbaijan and I part of Article 123 of Housing Code applied Article 339.2 of Civil Code. Moreover, by applying Article 339.2 of Civil Code separately from the Article 339.3 of Civil Code the court interpreted the first Article incorrectly. Complainant requests to annul the decision of CCD of Supreme Court made in July 11, 2003 which relied on the Articles 339.2, 339.3 of Civil Code and Article 417.02 of Civil Procedure Code.

The Presidium of Constitutional Court finds it important to note several issues regarding the complaint of A.Ibrahimov, ownership rights and validity of the sales contract, as well as the legitimacy of the disputed court decision.

In the constitutional state and democratic society private property is inviolable.

According to the Constitution of the Republic of Azerbaijan the property is inviolable and is guarded by the state. Everyone has a right to property. Nobody can be deprived of the property without court decision (provisions of Articles 13 and 29 of Constitution).

Ownership right is regarded as one of the fundamental and inseparable rights in the international legal documents (Article 17 of the Declaration of Human Rights, Article 1 of the Protocol № 1 of European Convention on human rights and fundamental freedoms etc.).

Ownership rights means acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at their discretion (Article 152.1 of Civil Code). Bu the state guarantees the protection of ownership rights over personal and real estate only within the norms of law. The ownership rights to immovable property shall pass to the purchaser from the moment of registration of transfer act in the state register department of immovable property (Article 178 of Civil Code).

There can be one or more subjects to the ownership right. Common ownership has 2 types: joint ownership (for instance: the property of husband and wife) and shared ownership (each participant, for instance: family members each has a share of property). For the realisation of common ownership rights it is important to consider will and legal interests of other participants. Disposition of common property is possible only after mutual consent of all owners.

Ownership right accrued as a result of legal fact or facts. One of the modes to for the accruement of ownership right is to receive it by the contract. Agreements are considered one of the legal facts and sales contract is one the types of agreements.

Right for ownership of immovable property accrued from the dare of registration of such property on territorial basis in the state registry department of immovable property (Article 146 of Civil Code). From this moment an ownership right of the previous owner is terminated.

An agreement shall mean unilateral, bilateral or multilateral expression of will directed at emergence, modification and termination of civil legal relationship. Agreements may be unilateral or in contractual form (bilateral or multilateral).Negotiation of contract shall require agreed expression of will of two parties (bilateral agreement) or agreed expression of will of three or more parties (multilateral agreement). In the course of interpretation of expression of will, its true content shall be established not only in accordance with its literal meaning, but also on the basis of reasonable judgment (Articles 324.1, 324.2, 324.4 and 324.5 of Civil Code).

It is important to follow the form determined in the Civil Code for agreement to be valid. It is mandatory for agreements to be confirmed by the notary in cases shown in law. Sales contract on real estate (as well as, a living apartment) is valid as long as the contract is written and confirmed by the notary. Confirmation by the notary means noting down by notorious or by the official person who has a right to perform such notary act authenticated remarks on the document that fits requirements of the Article 331 of Civil Code. Rules for the confirmation of the agreement by notorious is determined by the Law about Notary (Articles 329.1, 334.1, 334.2, 334.3.1 and 647.1 of Civil Code).

Rules about notary actions are determined by this law, other laws of the Republic of Azerbaijan and relevant instructions of relevant executive bodies according to the Article 27 of the Law about Notary of the Republic of Azerbaijan. Notary actions in the consuls of the Republic of Azerbaijan are regulated by the Law about Notary of the Republic of Azerbaijan, Consul Charter of the Republic of Azerbaijan and joint instructions of the relevant executive bodies.

In order to negotiate notary confirmed and (or) registered agreements concerning the ownership rights of the property or disposition over the joint property of husband and wife, there should be a consent of the other party confirmed by notary according to the Article 46 of Law about Notary.

According to the instructions about the Rules for Notary Actions in Azerbaijan Republic confirmed by the decision № 167 of the Cabinet of Ministers in September 11, 2000, notaries while verifying the agreements about real estate, besides their other duties, should also do the followings:

Determine the identity of persons requesting for notary acts.

Explain the content of the agreement to parties and check the correlation of content of the contract and true intentions of the parties to the legislature.

Demand an application about people who are registered in that apartment and have consent of all the adult family members who are permanently registered in that apartment (paragraphs 17, 38, 46 and 49).

Agreement concluded with violation of provisions in Civil Code, not complying with the requirements of this Code or violating rules and prohibitions specified by this Code or concluded as a result of abuse of power, deception, violence, agreement with bad intentions between the representatives each party, as well as resulting with bad conditions for the person may found invalid (Articles 337.1, 338 and 339 of Civil Code).

Thus, for the consideration of agreement (as well as sales contract) valid, certain requirements such as the participation of necessary persons (official persons), existence of the agreed expression of will between the parties, accordance agreement’s form and content to legislature should be followed.

By not demanding an application about the people living in the apartment and not determining the existence of their consent regarding the sale of apartment confirms that notary office while formalizing sales contract haven’t performed one of its duties determined in Instructions about Rules for notary activities in Azerbaijan Republic. This fact can be significant to declare a sales contract invalid in case if the disputed property is in the common ownership or rights of other people living in the disputed property (besides husband and wife) were violated.

The ownership rights of people living in the apartment mostly consists of the right to use the living area (Article 123 of Housing Code) or a right to use an integral part of the residential building (Article 228.2 of Civil Code). According to the Articles 228.1 and 228.2 of Civil Code a right to use an integral part of the residential building accrues at the moment when this right is registered in the state register department of immovable property and established by notarized written agreement concluded between owner and family members, as well as other people.

According to the decision of the Constitutional Court in July 27, 2001, legal disputes arising from the use of the living area or residential buildings after September 1, 2000 are regulated by the Articles 228.1 and 228.2 of Civil Code. Disputes aroused before that date are regulated by the Article 123 of Housing Code. As other decisions of the Constitutional Court, this decision has an obligatory power within the territory of the Republic of Azerbaijan (IX part of the Article 130 of Constitution of the Republic of Azerbaijan).

The purpose of the Constitutional Court Decision made in July 27, 2001 is not allowing the illegal restriction ownership rights of the person by people who also use that property.

If the notorious did not require application about the people who are registered in the disputed apartment and consent of the all the adult members of the family living in that apartment concerning the use of the apartment after September 1, 2000, it doesn’t mean that the sales contract was made through deception or should be declared invalid according to the Articles 339.2 and 339.3 of Civil Code. At the same time, it is also groundless to try to prove that there was no deception and sales contract was absolutely legitimate.

According to the Article 338 of Civil Code agreement not complying with the requirements of this Code or violating rules and prohibitions specified by this Code shall be invalid. According to the Articles 339.2 and 339.3 of Civil Code, if a person has been defrauded with the purpose of making a contract, he may demand recognition of that agreement as invalid. This claim shall be put forward where impossibility of conclusion of agreement without fraud has become evident. If one of the parties knew and was silent about circumstances that making conclusion of agreement by the other party is impossible, then defrauded party may demand recognition of agreement as invalid. Obligation to inform about silenced circumstances may arise only when the other party expects it in good faith. Purpose of a party to benefit or to inflict damage on the other party while providing false information shall not affect recognition of agreement concluded as a result of fraud as invalid. In case of deception by the third party, recognition of agreement as invalid may be demanded if the person benefiting from this agreement knew or should have known of fraud. If both parties have acted fraudulently, neither of them shall have the right to demand recognition of agreement as invalid or compensation for the damage by claiming that they were defrauded by the other party.

Fraud (deception) is creation of wrong expression about the agreement by providing false information in order to compel the other party to conclude a contract. Lack of the will of one of the parties or wrong formation of such will while concluding an agreement is essential to declare it as result of fraud and invalid.

The price of the apartment, payment rules and time is determined by the will of the parties to sales contract. Existence of additional documents proving that the price of the apartment was paid to the other party is not required by the law and can be conducted only by the consent of the parties. But facts determined by the courts concerning the documentation of sales contract may cause judgments that contract was concluded by deception.

In this view, the Presidium of the Constitutional Court states that correspondence of the final court decision to Articles 228.1, 228.2, 339.2 and 339.3 of Civil Code can be examined if all the facts concerning the disputed apartment are examined thoroughly and objectively, if the validity or invalidity of the agreement is determined, if there is a reasonably judgment and at last if all these is revealed in the court decision by the general jurisdiction courts.

Nevertheless, the Presidium of the Constitutional Court finds it important to mention certain issues concerning the right to court protection of rights and freedoms.

In order not use a right to make a decision based in their conscious for partial and subjective intentions, judges must strictly follow the rules of civil procedural legislature.

Within new judicial reforms in Azerbaijan Republic, implementation of new court proceedings was determined. One of such changes was formation of new provisions about appellate proceedings and separation of cassation proceedings from the appellate proceedings.

Appellate proceeding starts with the appellate complaint or appellate protest. This proceeding is created for the purpose of protecting rights and legal interests of the parties from the violations by the first instance courts.

According to the Articles 372.1 and 372.7 court of appellate instance shall, as a court of full authorities, hear case and evidence present in case or additionally submitted evidence on merits. Court of appellate instance shall, irrespective to arguments listed in complaint, verify observance by the court material and procedural norms of law.

According to the Article 384 of Civil Procedure Code court of appellate instance may: keep the resolution unchanged and appellate complaint without satisfaction; partially or completely repeal resolution and issue new resolution in court of first instance on the basis of established circumstances or additionally submitted evidence; change resolution; partially of completely repeal resolution, terminate proceeding in respect of case or keep petition without consideration.

Cassation proceedings in Supreme Court may start with the cassation complaint or cassation protest from the decision of the court of appellate instance. According to the Article 403.2 of Civil Procedure Code Chairman of the Supreme Court of the Republic of Azerbaijan may give recommendation in respect of entered into legal force resolution and ruling of court of appellate instance on the basis of application of persons not involved in case whose interests are touched upon by court act.

Submission of the cassation complaint or cassation protest does not stop the challenged appellate claim from entering into force. Court of cassation instance can stop the execution of such decision only under conditions shown in the Article 413 of Civil Procedure Code.

Court of cassation instance examines correct application of substantive and procedural legal norms by the court of appellate instance. This is the only task of the court of cassation instance as we see from the Articles 407.1.4, 408.1.5 and 416 of Civil Procedure Code. According to the Article 407.2 of the same code, reference in cassation complaint to non-proof of case facts, to non-discovery of significant factual circumstances important for the court conclusion, or to non-conformity of conclusions stated in the decision to factual circumstances of case shall not be permitted.

It means that cassation proceedings are limited due to legal aspects of the case, i.e. court of cassation level can examine only how correctly legal norms are applied.

According to the Article 417 of Civil Procedural Code in the course of case review cassation court may: keep resolution and ruling of court of appellate instance unchanged and complaint without satisfaction; make changes to resolutions and rulings of court of appellate instance; partially or completely repeal resolution or ruling of court of appellate instance and send case to court of appellate instance for new review; partially or completely repeal resolution or ruling of court of appellate instance, and keep claim completely or partially without examination according to the requirements of this Code or terminate case proceeding.

According to the Article 418.1 and 418.2 of Civil Procedure Code violation or incorrect application of material and procedural norms of law shall be a ground for repeal of the decision court of appellate instance. Material norms of law shall be deemed to be violated in circumstances specified in Article 386 of Civil Procedural Code (according to this Article material norms of law shall be considered violated or incorrectly applied only if a court of first instance made a mistake during application of law, not applied the applicable law or other normative legal act, or incorrectly interpreted the law). As it says in the Article 418.3 of Civil procedure Code violation or incorrect application of procedural norms of law shall be a ground for repeal of resolution or ruling only if this violation has resulted or may result in adoption of incorrect resolution. Moreover, Article 418.4 of Civil Procedure Code determines circumstances for the repeal of decision of appellate court irrespective to complaint’s arguments.

Thus, in order to apply Article 417 of Civil Procedural Code, court of cassation should:

Partially or completely repeal resolution or ruling of court of appellate instance and send case to court of appellate instance for new review If there are conditions regarding violations of substantive and procedural legal norms or repeal of the decision of the court of appellate instance irrespective to evidences of the complaint determined in the Articles 418 and 386;

Not permit adoption of a new decision that changes the factual sides of the case by allowing parties to prove case circumstances, refer to non-discovery of significant factual circumstances important for court’s conclusion, or to non-conformity of court’s conclusions reflected in resolution with the facts of the case taking into consideration the Articles 407.1.4, 407.2, 407.1.5 and 416 of Civil Procedure Code.

But the CCD of Supreme Court has changed the decision of the court of appellate instance concerning the claim of A.Ibrahimov against S.Tagiyeva and counter claim of respondents and made a new decision regarding merits of the case.

The Presidium of the Constitutional Court believes that this decision is not corresponding with Articles 407.1.4, 407.2, 408.1.5, 416 and 417 of Civil Procedural Code. This decision also contradicts to the Article 60 of Constitution of the Republic of Azerbaijan which determines that court hearings shall be held by relevant courts and according to the legal procedures.

Taking into consideration all the above mentioned, the Presidium of the Constitutional Court comes to the conclusion that:

The decision of the CDD of Supreme Court should be recognized as null and void, as it contradicts to the Articles 407.1.4, 407.2, 408.1.5, 416 and 417 of Civil Procedural Code;

Court proceeding regarding this civil case should be renewed and a court decision should be made.

Any decision by the Presidium of Constitutional Court concerning the accordance of the decision of CCD of Supreme Court made in July 11, 2003 with Articles 228.1, 228.2, 339.2 and 339.3 would be equal to considering the case in merits and therefore is impossible.

Being guided by the parts V, IX, X of the Article 130 of the Constitution of the Republic of Azerbaijan, as well as Articles 52, 62, 63, 65-67 and 69 of the law Azerbaijan Republic about Constitutional Court, the Presidium of the Constitutional Court

**DECIDED:**

1.The decision of the Collegium of Civil Disputes of Supreme Court made in July 11, 2003 concerning the dispute between A.Ibrahimov who demanded to remove S.Tagiyeva and her family members from the apartment and apartment registration and respondents who counter-claimed to declare sales contract, as well as registration card of the apartment invalid shall be recognized as null and void, as it contradicts to the Articles 407.1.4, 407.2, 408.1.5, 416 and 417 of Civil Procedural Code of the Republic of Azerbaijan.

2. The decision of the Constitutional Court of the Republic of Azerbaijan comes into force from the date of its publication.

3. The decision is subject to publication in the "Azerbaijan", “Respublika”, “Xalg gazeti”, “Bakinsky rabochiy” newspapers and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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