**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by Aydin Hasanbala oglu Zalov concerning verification of conformity of the decision of the Presidium of the Supreme Court of the Republic of Azerbaijan of February 1, 2002 to Constitution and legislation*

*of the Republic of Azerbaijan*

**21 May, 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. Mamedov, I. Najafov (Reporter Judge), S. Salmanova and A. Sultanov,

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

complainant Aydin Hasanbala oglu Zalov and his representative Leyla Polad qizi Mammadova and Faxriyya Anvar qizi Zalova

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 Zalov Aydin Hasanbala oglu concerning verification of conformity of the decision of the Presidium of the Supreme Court of the Republic of Azerbaijan of February 1, 2004 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 8m-14/02 of the Chairman of Supreme Court of the Azerbaijan Republic dated May 10, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge I. Najafov, speeches of the complainant’s representative Leyla Mammadova and also Faxriyya Zalova and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

The decision of the Yasamal district court made on February 13, 2000 has left unchanged the decision of the Common plea Collegium of the Appellate Court of the Republic of Azerbaijan on January 11, 2001, thus leaving the claim by F. Zalova about moving to the building 121 situated in Yasamal Street 5 unsatisfied.

Plaintiff filed a cassation claim to the Supreme Court of the Republic of Azerbaijan on April 18, 2001 and Civil Law Collegium of Supreme Court of the Republic of Azerbaijan left unchanged the decision of the Appellate Court.

According to the additional cassation claim by F. Zalova on February 1, 2002, the Presidium of Supreme Court of the Republic of Azerbaijan considered the case and made a decision about changing the above mentioned decisions, moving F. Zalova with her two children to the disputed apartment. Decision of the Presidium says that decisions of the lower courts are based on the unexamined facts of the case and evidences of the case haven’t been correctly assessed. Presidium’s decision also states that the facts of the case confirm that the claim is legitimate and there is no need for the re-examination of the case.

In his complaint A. Zalov states that the Presidium of the Supreme Court of the Republic of Azerbaijan while making a decision exceeded its authority by considering the case in essence. Thus, his rights and rights of other family members living in the disputed apartment, such as, property right, right to housing, the right to protection of rights and liberties in the court which are determined by the Constitution and laws of the Republic of Azerbaijan have been violated. Therefore A. Zalov asked to reverse the decision of the Presidium of the Supreme Court of the Republic of Azerbaijan made on February 1, 2002 concerning the dispute.

As it was obvious from court materials, A. Zalov and F. Zalova have got married in 1989 and had two children from this marriage. They have lived in Baku in Yasamal Street 5, house 121till 1993. Afterwards as the relationship between them as husband and wife was disrupted and it was impossible for them to live together, the after of the complainant Hasanbala Zalov bought to his daughter-in-law an apartment in Yeni Yasamal, 2nd living area, building 2 apartmetn43 in 1993. Apartment consisted of two rooms. Faxriyya has moved to that apartment with her own consent and there wasn’t any apartment claims against them. Afterwards A. Zalov entered into common- law marriage with someone else. In November 13, 2000, A. Zalov and F. Zalova have got divorced. After the death of H. Zalov F. Zalova wanted to move to the apartment of her father – in law, but her mother –in-law Sona Zalova didn’t agree with this. Therefore F. Zalova filed a claim in the court about moving to that apartment. She substantiated her position by saying that her father-in-law promised to buy her a new apartment, because the living conditions in the apartment where she lived with her two children were bad. But later on, her father-in-law suggested her to sell that apartment and move to his apartment, because he didn’t have enough finances to buy a new apartment for her. F. Zalova agreed with this proposal and have sold the apartment, but gave the money from the sale, i.e. $ 12 000 to A. Zalov for the medical treatment of her father-in-law. But A. Zalov decisively rejects the fact that he took money from her.

After the above mentioned decision of the Presidium of the Supreme Court of the Republic of Azerbaijan, F. Zalova filed a claim in Yasamal district court about determination of the rules of using the living area. Yasamal district court made a decision in July 4, 2003, determining the rules of using the living area in the house 121 in Yasamal Street 5 and giving two adjacent rooms to her disposal. Size of the rooms was 18 and 24 square meters. Considering the appellate complaint of A. Zalov, Civil Law Collegium of the Appellate Court made a decision in December 25, 2003 leaving the decision of the Yasamal district Court unchanged.

As we see from the complaint of A. Zalov, Supreme Court hasn’t considered the cassation claim from the decision of the Appellate Court yet.

The Presidium of the Constitutional Court of the Republic of Azerbaijan states that lack of the opportunity to reconsider the wrong court decision in Article 60 of the Constitution of the Republic of Azerbaijan which declares that everyone has a right to protection of rights and liberties in court bounds the right of the person to court protection.

Article 65 of the Constitution of the Republic of Azerbaijan confirms the right to repetitive hearing in the court, thus serving for the protection of the rights and liberties and for the correction of the court mistakes as soon as possible. Thereby, unlawful court decisions can be corrected only by the relevant courts according to law. This rule confirms the principle of law which states that no one can doubt the fairness and lawfulness of the court decision.

While choosing different forms for the reconsideration of court decisions in civil, criminal and administrative cases, legislature mainly tries to ensure that violated rights and liberties are restored in time and adequately. The wrong court decision cannot be considered lawful. For the sake of the fulfillment of the state’s obligation to protect rights and liberties effectively, such court decision must not be considered legitimate. Hence, the legislature has determined a legal mechanism to eliminate such wrong court decision within the court system.

In order to achieve the aims of the legal reforms in Azerbaijan Republic, legislature has determined the procedural rules for examination the lawfulness and sufficiency of the court decision by the upper courts. Civil Procedural Code (CPC) determining the implementation of new court rules and proceedings corroborates that complaining from the court decisions is one of the stages (other stages are: filing a claim, preparing the case for the hearing, court hearings and making the decision and etc.) of the civil law trial proceedings (CPC, Articles 357-401, 402-431, 432-438).

Civil Procedural Code determines the rules for additional cassation from court decisions and this is one of the ways to realize the right of citizens to repetitive court hearings serving for the lawfulness, objectivity and sufficiency of the civil procedure. The decisions of the Presidium of the Supreme Court of the Republic of Azerbaijan are reconsidered during additional cassation proceedings (CPC Article 422). Grounds for starting additional cassation proceedings are determined in Article 424.2 of the CPC.

Generally, there are two different procedures for deciding cases according to the CPC: 1) Considering a case based on the factual side of the claim; 2) Examining the implementation of the substantive and procedural norms of law correctly. From the analysis of the norms of CPC, it is clear that district and courts of appellate instance consider the case based on the facts of the case. However, in the cassation and additional cassation levels only the legitimacy of the decisions is challenged. But, to start additional cassation proceeding, there should be particular grounds for this. Those particular grounds are determined in Article 424.2 of the CPC.

The Presidium of the Constitutional Court of the Republic of Azerbaijan finds it significant to make some analysis concerning the competence of the Presidium of the Supreme Court within the scope of additional cassation proceedings in order to asses the compliance of the disputed court decision with the Constitution and laws of the Republic of Azerbaijan.

First of all it should be mentioned that additional cassation is the last possible stage to make complaints from the court decisions within the court system, except the court hearings about court decision that have come into force, but needs to be re-examined again because of the newly discovered facts of the case. Therefore, the courts must be more cautious in implementing substantive and procedural legal norms in order to ensure objectivity, sufficiency and fairness of the public justice.

The Presidium of the Supreme Court has a right to make changes to the decision of the court of cassation instance according to the Article 429.0.2 of the CPC.

The Presidium of the Constitutional Court notes that making changes to the decision of the court of cassation instance during additional cassation hearings must not be about the occurrences concerning the merits of the case. By interference to the merits of the case while making changes in the decision of the court of cassation instance, the Presidium of the Supreme Court of the Republic of Azerbaijan exceeds its duty to decide only legal aspects of the case. The Presidium of the Supreme Court is authorized to make changes to the decision of the court of cassation instance only if the facts of the case have been thoroughly examined in the prior court levels and there is no need for re-examination of the case and proofs or for congregating new evidences. According to the legal opinion of the Constitutional Court, additional cassation proceedings mean to re-consider the case in the court of cassation instance again. Court of cassation instance doesn’t consider the case depending on facts; therefore the Presidium of the Supreme Court doesn’t have a right to make changes to the decision of the Supreme Court based on the facts of the case.

Thus changes to the decision of the court of cassation instance by the Presidium of the Supreme Court during additional cassation proceeding cannot apply to the merits of the case. As in the cassation and additional cassation levels cases are considered not based on the merits of the case, this feature differs them from the courts of first and appellate instance. It means that in the cassation and additional cassation levels new evidences are not accepted, facts of the cases are not examined and there is no legal assessment of the evidences. Commonly the power to consider the case based in the facts and merits of the case are within the competence of the courts of first and appellate instance. Courts of cassation and additional cassation instances don’t have such right.

The Presidium of the Supreme Court can make changes to the decision of the court of cassation instance only relying on facts of the case determined by the prior courts. Accordingly, the Presidium of the Supreme Court doesn’t have a right to make changes to the decision of the court of cassation instance by referring to the merits and facts of the case which haven’t been determined by the prior courts. If new evidences significant for the case are revealed during additional cassation proceedings and there is a need for re-examination of the facts, for the assessment and congregation of new evidences, then the Presidium of the Supreme Court must terminate completely or partly the decision of the courts of cassation and appellate instance and send the case back to the court of appellate instance for re-consideration, since courts of cassation and additional cassation instances don’t have a right to re-examine the facts of the case (Articles 407.2, 416 CPC). The above mentioned right of the Presidium of the Supreme Court is confirmed in the Article 429.0.3 of CPC.

In the other hand, the Presidium of the Supreme Court can only make changes to the decisions of the court of cassation instance according to the Article 429 of CPC. This Article doesn’t hold provisions about the authority of the Presidium of the Supreme Court to make changes to the decision of the courts of appellate instance. The Presidium of the Supreme Court made a decision to change the decision of the court of appellate instance concerning the disputed issue, thus violating the provisions of the Article 429 of the CPC. As we understand from the analysis of the provisions of the CPC, the Presidium of the Supreme Court has a right only to annul completely or partly the decision of the court of appellate instance or to leave it in force (Articles 429.0.3, 429.0.5, CPC).

The Presidium of the Constitutional Court believes that the decision of the Presidium of the Supreme Court concerning the disputed issue violates the right of the complainant to court guarantee of the rights and liberties. Since the realization of the public justice by the courts without exceeding their authority is one of the essential elements of this right. It should be remembered that the right to independent, impartial and legitimate court hearings is one of the main guarantees for the public justice according to the international-legal acts (Article 10 of the Declaration of Human Rights, Article 14 of the International Pact for civil and political Rights, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and etc.). At the same time, the right to be tried in the legitimate court means that the court has authority to consider the relevant case. Thus, deciding different disputes must be within the authority of the court which is given by the law. And the court should settle the disputes according to the procedurals rules and time-limits determined by the law. The legislature of the Republic of Azerbaijan determines that the public justice must be realized according to rules confirmed by the law (Article 6 of CPC, Article 8 of the Law about Courts and Judges). In its decision the Presidium of the Supreme Court has exceeded its authority and consequently the constitutional right of Sona Zalova and others to the court guarantee of the rights and freedoms have been violated.

Thus, the Presidium of the Supreme Court have infringed the Articles 424.1, 429.0.2, and 429.0.3 of the CPC and violated the right of the complainant to court protection (Article 60 of the Constitution of the Republic of Azerbaijan) by re-considering the merits of the case and making a decision during additional cassation proceedings.

So the Presidium of the Constitutional Court of the Republic of Azerbaijan comes to the conclusion that the decision of the Presidium of the Supreme Court should be considered null and void and the cases should be re-considered according to the procedural legislature of the Republic of Azerbaijan.

Court acts made after the decision of the Presidium of the Supreme Court should not be executed and should be re-considered again.

Relying on the V, IX, X parts of the Article 130 of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65-67 and 69 of the Law about Constitutional Court, the Presidium of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Decision of the Presidium of the Supreme Court made in February 1, 2002 concerning the complaint of the Zalova Fakhriyya Anvar qizi against Zalova Sona Xaliq qizi and Zalov Aydin Hasanbala oglu about moving to the disputed apartment shall be considered null and void, as it infringes Article 60 of the Constitution of the Republic of Azerbaijan and Articles 424.2, 429.0.2, 429.0.3 of the CPC of the Republic of Azerbaijan.

 The court decisions concerning the claim of the F. Zalova against S. Zalova about determination of the rules of suing the living area of the apartment shall not be executed and this claim shall be re-considered according to the procedural legislature 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.