**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of compliance of the decision of Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan to Constitution and legislation of the Republic of Azerbaijan under the complaint of S.N. Mammadova*

**27 October, 2004 Baku city**

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

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

with participation of applicant’s representative R. Orujov,

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 Sona Niftulla Mammadova concerning verification of conformity of the decisions of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of October 03, 2003 and November 05, 2003 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 8m-84 of the Chairman of Supreme Court of the Republic of Azerbaijan dated August 11, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge E. Mammadov, floor of applicant’s representative R. Orujov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

As it observed from Constitution case materials on the basis of Credit Contract No. 165 from May 29 1998, E.T. Abdullayev has obtained the 3 months loan under 40% annual interest at the amount of 30000 dollars USA from Rossiyskiy Kredit Commercial Bank (currently- United Credit Bank). At the same date, for the purposes of providing mortgage under the loan he has made the notary approved sale contract with F.R. Muradov, employee of Rossiyskiy Kredit Commercial Bank (hereinafter referred to as Bank) of his own apartment situated at 25/2, Aliyarbayov str., City of Baku.

Meanwhile, on the basis of various applications of citizens two criminal cases for fraud against E.T.Abdullayeva were initiated, on January 29, 1999 these cases merged into one by Sabayil District Police Department, primary investigation was completed and case submitted to the Sabayil District Court. Court, with consideration of acquired mental illness by E.T. Abdullayeva during primary investigation has made the decision on her forced controlled medical treatment, with followed regular control medical treatment, and stopping of case proceeding on the basis of court expert’s opinion due to stationary treatment (Upon commencement of constitution case the absence of E.T. Abdullyeva in hospital was established and Sabayil district court has re-initiated the case and announced her search).

During primary investigation for satisfaction of claims on incurred losses E.T. Abdullayev’s apartment was put under arrest. Upon the cancellation of arrest by investigation authority, on April 10, 1999 the apartment was transferred to Bank employee, F.R. Muradov on the basis of sale and purchasing contract made earlier, and relevant registration certificate has been issued by the Department of Technical Inventory and Property Rights (DIPR) of Executive Authority of Baku City.

However, on April 20, 1999 the subject apartment was sold to S.N. Mammadova on the basis of notary approved sale and purchasing contract. After this her rights to sold apartment were registered by DIPR in accordance with civil legislation, and 35 625 thousand dollars directed at payment of credit and interest to the Bank by E.T. Abdullayeva and 34 375 dollars USA were handed to the Sabayil District Police Department.

Approximately two years later K.A. Miriyeva, daughter of E.T. Abdullayeva, who did live with her mother, stated that she has never agreed to sale of apartment and submitted the claim to the court for cancellation of the sale and purchasing contract and registration certificate as they were issues on the basis of forged documents.

In accordance with decision of Sabayil District Court from October 25, 2001 the claim was not satisfied. On February 18, 2002 the decision of the Board on Civil Cases of the Appeal Court of the Republic of Azerbaijan (hereinafter referred to as- BCC of the Appeal Court), has cancelled the decision of Sabayil District Court and satisfied the claim of K.A. Miriyeva. It was also explained to parties in the decision that each of them that they can claim all the amounts paid from each under the invalid sale and purchasing contract in the court of law under general terms. In accordance with decision dated July 17, 2002 of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as BCC of the Supreme Court), the decision of the BCC of the Appeal Court was retained unchanged.

Later S. N. Mammadova has submitted the claim against E.T. Abdullayeva and F.A. Muradov for compensation of payments made and losses incurred in connection with invalid apartment sale and purchasing contract. During court proceedings F.R. Muradov stated that contract was a matter of formality implemented under instructions of Bank management. Upon determination of this the court has announced the Bank as respondent under the deal.

In accordance with decision from March 17, 2003 of the Yasamal District Court claim made by S.N. Mammadova was satisfied partially and the Bank, which actually acted as seller under the contract was instructed to pay 92 500 dollars USA for apartment sale and 48 500 dollars USA for its maintenance, and amount of 18000 dollars USA was withheld from E.T. Abdullayeva for loss of legal source of income.

In accordance with decision of BCC of the Appeal Court from August 29, 2003 the decision of Yasamal District Court was partially changed and the amount payable by the Bank to S.N. Mammadova included only payment of maintenance costs at the amount of 48 567 dollars USA and the amount payable by E.T. Abdullayeva for loss of legal source of payment was established under 17225 dollars USA.

Bank and E.T. Abdullayeva have submitted the appeal against the decisions.

In accordance with decision of BCC of the Appeal Court from October 3, 2003 the Bank petition has been satisfied and until the completion of petition implementation the execution of the decision of BCC of the Appeal Court from August 29, 2003 was suspended. On November 05, 2003 the BCC of the Supreme Court has made the decision on changing of the previous verdict.

By this decision the BCC of the Supreme Court has required: 1) payment by the Bank to S.N. Mammadov, of the reduced amount for apartment purchasing to 70000 dollars USA, and reduced amount for maintenance work costs to 35443.6; 2) payment by E.T. Abdullayeva of the paid principle amount and interests of 35 625 dollars USA to the Bank, as well as the amount of 35443.5 dollars USA payable by the Bank to S.N. Mammadova for compensation of maintenance costs; 3) termination of the decision of BCC of the Appeal Court for payment by E.T. Abdullayeva to S.N. Mammadova of the amount of 17225 dollars USA for loss of legal source of income; 4) as well as simultaneous implementation of its own decision.

As a response to additional appeal complaint of S.N. Mammadova, the letter 8m-84 of the Chairman of Supreme Court from April 30, 2004 indicates that since the decision of appeal instance court complied with material and procedural legal norms and due to the fact that there are no basis for its cancellation stipulated under Article 424 of the Civil Procedures Code of the Republic of Azerbaijan, the decision was retained unchanged and was not further proceeded by Plenary Session.

Afterwards, S.N. Mammadova has submitted the constitution complaint, and has stated the violation of her rights of ownership, eligibility for compensation, court protection of rights and freedoms etc. stipulated under the Constitution. Therefore, she has requested the Constitution Court for cancellation of the decisions of BCC of Supreme Court from October 03, 203 and November 05, 2003 due to their incompliance with provisions of Constitution and legislation of the Republic of Azerbaijan.

Plenary Session of the Constitution Court of the Republic of Azerbaijan deems necessary to note the following in connection with complaint.

In accordance with Constitution of the Republic of Azerbaijan the property is untouchable and shall be protected by law. Nobody can be deprived of his property without relevant court order (Article 13 and 29).

Property rights are inviolable and unique in legal state and democratic society. It takes important, integral and significant part in international legislative acts (Article 17 of the General Provision on Human Rights, as well as Article 1, Protocol 1 of the European Convention on Human Rights and Main Freedoms etc.).

Property rights in Azerbaijan Republic are obtained by various means including execution of deals (contracts). State shall provide the recognition and protection of property rights in accordance with established procedures and in cases stipulated under relevant legislation.

When legally stipulated property rights on disputed items are applicable to more than one owner constitution provisions on protection of property rights shall also be applicable protection of rights on immovable property. Such property rights also include the rights of the rights of fair obtaining.

It shall be taken into consideration that in accordance with Articles 157.5-157.7 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as CC) when the owner claims back his property from dishonest ownership of other person, he can also demand the compensation for all known or supposed actual or potential incomes obtained during the entire period of dishonest ownership; and the dishonest owner can be demanded to pay the compensation on all incomes and profits made from the property from the time of obtaining of knowledge of such dishonest ownership or obtaining of call made under claim of legal owner for return of property. The honest owner as well as dishonest owner is entitled to claim the compensation by the property owner of all necessary costs on property incurred from the time of obtaining of incomes from the property by its owner. Honest owner can retain the improvement element made without damaging of property. If improvement element can not be separated without damage, the honest owner shall be entitled to demand the payment of compensation providing that such compensation will not exceed the actual costs incurred.

It shall be noted that if there is no suspicion of legitimacy of the deal on obtaining of the property from other persons, the buyer shall be considered an honest buyer. Besides, the person shall be considered honest owner if he has no knowledge of potential claims on property of third persons.

Also it shall be stressed that the honest buyer shall be considered the property owner not upon the review of legitimacy of the state registry records but on the basis of existence of such records. Occurrence of any new interrupting circumstances in future deal making shall not constitute the violation of the property rights of the honest buyer.

It shall be noted in this respect that in the event of recognition of deal invalid in accordance with Article 337.5 of CC, unless other outcomes of its invalidity are stipulated under the subject Code, both parties shall return to each other all items purchased, and in the event of impossibility of such return (including the instances of use of purchased property in implementation of works or provision of services) the financial compensation shall be paid.

In this, provisions of Articles 21.1 and 21.2 of CC shall be taken into consideration. In accordance with these provisions the person, whose rights were violated shall be entitled to claim the complete compensation of losses incurred, unless legislation or contract stipulates the payment of lower compensation amount. Loss means costs incurred by the person to reinstate his violated rights, as well as lost incomes as a result of loss or property and/or damage of property (actual damage).

With indication of above the Plenary Session of the Constitution Court especially notes that in resolution of disputes arising from invalidity of deals the property rights shall be protected, as well as property rights of honest buyers shall be protected. Such legal position provides conditions for civil stabilization, rights and legal interests of its participants, as well as civil legislative principles stipulated under Article 4 of CC.

Such approach to disputed court decisions in the constitution complaint of S.M. Mammadova, as well as compliance with procedures stipulated under Civil Procedures Code of the Republic of Azerbaijan (hereinafter referred to as CPC), especially with limits set towards cassation proceedings and actual processing implemented by Supreme Court are of primary importance.

Cassation instance court shall review the correct application of material and procedural legal norms by the appeal instance court (Article 416, CPC). The function of cassation instance court is limited only to this.

In the cassation complaint it is not allowed to refer to lack of evidences on case, non-clarification of all relevant facts necessary for making of court decisions, or inconsistency of the court decision on the case with actual facts. This court instance shall also have the authority to make changes to the decisions of the appeal instance court (Articles 407.2 and 417.0.2 of CPC).

The legal opinion of the Constitution Court formed in various decisions is that legal nature of cassation proceedings shall include the changes to the decision of the appeal instance court that are not related with in essence revision of case aspects. Cassation instance court shall not have the authority to make changes in essence of the decisions made by first and appeal instance courts.

But in the disputed decision on which S.N. Mammadova has made the constitution complaint, BCC of the Supreme Court has exceeded its authorities stipulated under legislation and adopted new decision on the case essence.

Thus, BCC has reviewed the case, reduced the amounts paid for the sale and purchasing of the apartment and its refurbishment, terminated the Appeal Instance Court in part of the payment by E.T. Abdullayeva to S.N. Mammadova of compensation for lost profits and by this has made the decision on case in essence.

Also by consideration of issues and matters, which were not reviewed by the first and appeal instance courts and were brought to attention only for the cassation instance, the BCC of Supreme Court has made the decision on the subject of civil claim and issues proceeded various instance courts (on payment by E.T. Abdullayeva of the principle amount and interests paid by the Bank and compensation payable to S.N. Mammadova for refurbishment costs incurred).

In connection with this it shall be noted that in accordance with Article 153.2.4 of the CPC, if different court proceeds on the case between same parties, over same subject and on the similar basis, the acceptance of claim shall be rejected on the basis of inadmissibility of the claim.

On the other side it shall also be taken into consideration, provisions for raising of claim are reflected in accordance with Articles 149-156 of the CPC, regulating first instance court proceedings. Certainly this provision of legislation is not casual. Along with other things the court compliance with this provision and protection of rights and legal interests of case participants by civil courts, play important role.

It is also important to note the provisions of Article 372 of CPC that outline the limits of case reviews by Appeal instance courts. It outlines that parties shall be entitled to change the content of claims made initially to the first instance courts. The appeal instance court shall neither accept nor review new claims that were not originally submitted to the first instance court. Parties shall be entitled to submit new claims to the appeal instance court only in cases, when these are directed to satisfaction of cross appeal, involvement of third parties, revealing of facts and/or provision of information (Articles 372.3-372.5 of CPC).

Provisions of civil procedures legislation for cassation execution, including the Article 416 of CPC defining the limits of case review by cassation instance, there are no provisions on submission of claim. In accordance with Article 407.2 of the same Code, the existence of restriction for clarification of actual facts by cassation instance shall be considered as natural.

With consideration of above, the review in essence of the case by BCC of the Supreme Court as well as review of new claims, which were not subject to review by previous court instances, shall be considered as exceeding the authority by cassation instance court.

It shall also be noted that the decision of the BCC of Supreme Court, in evaluation of the amount paid by S.N. Mammadova for apartment purchasing, referred to the sale and purchasing contract, considered to be invalid by previous court. It shall also be noted in this respect, at the time of formation of disputed legal relations, in accordance with Article 55 of the CC valid until September 01, 2000, the deal considered invalid shall be deemed invalid at the time of conclusion. In this event, the application of subject contract shall not be appropriate.

Above conditions do not provide correspondence between the approach of the BCC of Supreme Court and Article 88 of CPC. Thus, in accordance with provisions of subject Article, the court shall review all evidences in objective, impartial, all-sided and complete manner and upon completion of review shall implement the assessment of applicability of evidences to existing legal regulations. No evidence has its preliminary legal force for the court.

In connection with suspension of execution of the decision of BCC of Appeal Court from August 29, 2003 until the completion of cassation proceedings, as a result of decision of BCC of Supreme Court from October 3, 2003, Plenary Session of Constitution Court deems the importance of following.

Suspension of execution of the decision of the appeal instance court until the completion of the cassation instance proceedings shall be performed in accordance with procedures and in cases stipulated under Article 413 of the CPC. In accordance with this Article the cassation instance court shall be entitled to suspend the execution of court decisions under petitions of parties to the case in following instances: 1) if the case participant comes from family with many children; 2) if case participant got into difficult financial situation as a result of loss of work ability, loss of bread-winner, illness, injury; 3) if case participants have lost their place of living and incapable to live somewhere else.

As it observed, the instances when court decision execution can be suspended are clearly indicated in the legislation and can be applied to natural persons only. Therefore, the decision of the BCC of Supreme Court dated October 3, 2003 on the basis of petition submitted by the Bank with reference to Article 413 of CPC, without indication of reasons for suspension of appeal court decision execution, shall not be considered as complying with legislation.

All of the above have resulted in violation by the cassation instance court of rights of S.N Mammadova for fair court justice, which forms the important element of judicial court protection of rights and freedoms, as per Article 60 of the Constitution of the Republic of Azerbaijan.

Plenary Session of the Constitution Court has drawn the decision, that decisions of the BCC of Supreme Court from October 3, 2003 and November 5, 2003 on return of payments made and payment of compensation for incurred losses as a result of termination of apartment sale and purchasing contract, to S.N. Mammadova, due to violation of provisions of Articles 413, 88. 407.2 and 417.2 of the Civil Procedures Code, and Article 60 of the Constitution of the Republic of Azerbaijan, shall be deemed invalid and the relevant aspect of the case shall be reviewed additionally in accordance with procedures of civil procedures legislation of the Republic of Azerbaijan.

Using the guidance of parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the law of the Republic of Azerbaijan “On Constitution Court” the Plenary Session of the Constitution Court of the Republic of Azerbaijan

**DECIDED:**

Decisions of the BCC of Supreme Court from October 3, 2003 and November 5, 2003 on return of payments made and payment of compensation for incurred losses as a result of termination of apartment sale and purchasing contract, to S.N. Mammadova, due to violation of provisions of Articles 413, 88. 407.2 and 417.2 of the Civil Procedures Code, and Article 60 of the Constitution of the Republic of Azerbaijan, shall be recognize as null and void and the case shall be processed on the basis of this Decision and via the procedure specified in the Civil Procedure 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.