**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by F.A.Huseynov and A.A.Qasimov*

*concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 2, 2004 to Constitution and legislation of the Republic of Azerbaijan*

**19 November, 2004 Baku city**

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

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

with the attendance of representatives of complainants M.Quliyeva and R.Zulfuqarov,

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 Farhad Ashraf oglu Huseynov and Aslan Amiraslan oglu Qasimov. concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 2, 2004 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 8m-308/04 of the Chairman of Supreme Court of the Republic of Azerbaijan dated October 20, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge B. Garibov, listening to representative of complainant A Quliyev and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Complainants F.A.Huseynov and A.A.Qasimov state that Yasamal district court made a decision in July 1, 2003, concerning the claim of N.Pashayeva against F.Huseynov and A.Qasimov about determination of rules of using the apartment № 1, situated in building 6, Inshaatchilar Avenue, termination of the contract, recognition of ownership right and repayment of repair costs and also counter claim of A.Qasimov against N.Pashayeva about removal from the apartment

The court decision had satisfied partly the claim of N.Pashayeva by giving living rooms № 1 (50 square meter) and № 2 (15.8 square meter) of apartment 1 (general size of the apartment is 226 square metres) situated in building 6, Inshaatchilar Avenue into her disposition (spare parts of the apartment was kept for common use) and by recognizing the sales contract made in February 12, 2003 between A.Qasimov and firm “SUN-CITY” (hereinafter will be referred as firm) concerning the sale of the disputed apartment invalid. The claim of N.Pashayeva about recognition of her ownership right over the disputed apartment was left unconsidered. The claim of N.Pashayeva against F.Huseynov and A.Qasimov about repayment of repair costs for the disputed apartment, as well as counter claim of A. Qasimov about removal of N.Pashayeva from the disputed apartment № 1, with four rooms, situated in the 2nd floor of building 6, Inshaatchilar Avenue was rejected due to reason claims were groundless.

CDD of Appellate Court of the Republic of Azerbaijan didn’t satisfy the appeal claim of complainants and made a decision in November 27, 2003, leaving the decision of Yasamal district court unchanged.

CDD of Supreme Court of the Republic of Azerbaijan made a decision in April 2, 2004, leaving the decision of Appellate Court unchanged and cassation claim of complainants unsatisfied.

Chairman of the Supreme Court stated in his letter in June 7, 2004, that there were no grounds for the complaint to be considered in additional cassation proceeding by the Presidium of Supreme Court.

It is also noted in the complaint that according to the contract of debt without percentages negotiated in December 3, 1999, A.Qasimov lent 115 000 (one hundred fifteen thousand) US dollars to F.Huseynov with the term to return it till December 2, 2001. But F.Huseynov couldn’t perform his obligation for valid reasons.

Parties negotiated a new contract of debt in June 10, 2002 and prolonged the time for performance of debt obligation for seven months starting from the moment of new contract was made.

In order to ensure the performance of debt obligation, F.Huseynov and A.Qasimov negotiated a mortgage contract in June 10, 2002 and by this contract F.Huseynov was obliged to formalize the money i.e. 66 000 (sixty six thousand) US dollars paid for the apartment 1, situated in building 6, Inshaatchilar Avenue, according to sales contract between him and firm under the name of A.Qasimov. F.Huseynov also was obliged to formalize ownership rights over the apartment under the name of A.Qasimov after the building was accepted into operation by State Construction Committee and was registered in state registry department of real estate.

During this time the construction of building was finished, F.Huseynov transferred 60 000 (sixty thousand) US dollars for the apartment to the account of firm and spent 40 000 US dollars for reparation of apartment. The factual price of the apartment was 100 000 US dollars and this amount was enough to reinstate the debt of F.Huseynov to A.Qasimov. Therefore, F. Huseynov and A.Qasimov negotiated a contract about concession of the right to demand the debt to be repaid in January 30, 2003. According to this contract creditor rights, i.e. a right to formalize ownership rights over the apartment determined by the contract between F.Huseynov and firm in May 1, 2002 are compromised to A.Qasimov. A new contract was negotiated between firm and A.Qasimov in February 12, 2003 about this matter. But the courts recognized the sales contract invalid stating that civil legislature of the Republic of Azerbaijan doesn’t mention the sales contract of obligations.

Complainants allege that concession of debt is according to law and is regulated by the Article 193 of Civil Code. Complainants also state that debt of F. Huseynov in the amount of 6 000 (six thousand) US Dollars to firm passed on to A.Qasimov and he paid 1000 (one thousand) US dollars from that debt to the firm. In order to make this contract valid, it is important to have consent of the creditor and in this case firm as a creditor agreed on that.

Complainants also note that according to Article 1.4 of Family Code of the Republic of Azerbaijan, legal regulation of family issues is conducted by the government and only marriage, registered in the relevant executive body is recognized by law. According to different Article of the same Code religious marriage doesn’t have any legal consequences. Plaintiff N.Pashayeva wasn’t in official marriage with I.Huseynov – a son of respondent F.Huseynov. The relationship between them is not official and doesn’t have any legal consequences.

It is also noted in the complain that court decisions were made not following the requirements of Article 228 of Civil Code and the space of the apartment wasn’t divided correctly between the parties, as well as the counter claim of A.Qasimov was considered without requirements of Articles 79 and 572 of Civil Code.

Therefore, complainants ask the Presidium of Constitutional Court to examine the conformity of decision of CCD of Supreme Court of the Republic of Azerbaijan made in April 2, 2004 with Articles 29, 33, 34 of Constitution of the Republic of Azerbaijan, with the Articles 193, 198, 228 of Civil Code, with Articles 1.4 and 1.5 of Family Code and with Article 79 of Housing Code.

The Presidium of Constitutional Court of the Republic of Azerbaijan notes that protection of property right is one of the very important values of democratic state. By confirming this right, the Constitution of the Republic of Azerbaijan determines guarantees for the protection of it. Therefore, property right is considered one of the main human rights and freedoms.

The property in the Azerbaijan Republic shall be inviolable and protected by the State. Every Person shall have the right to Property. The property right, including the private property right, shall be protected by Law.  Every individual may possess movable and immovable property. The property right shall consist of the owner's right to possess, use and dispose the property, individually or jointly (Articles 13 and 29 of Constitution).

Civil Code determines legal mechanisms of regulating property rights and its protection relying on the norms of Constitution.

One of the main principles enlisted in the Article 6 of Civil Code is the principle of inviolability of property. According to Article 153.3 of the same code features of acquisition or termination of ownership rights to property, possession, use and disposal depending upon the fact whether the property is under the ownership of legal entity or natural person, under the ownership of the Azerbaijan Republic or communities may be established only by the law.

Civil agreements, as well as sales contract are one of the ways to receive an ownership right over the property (also real estate). Sales contract of real estate is a consensual agreement and obligations by the contract such as to give the real estate to purchaser and payment of the price of real estate by the purchaser can be performed till the moment of state registration of ownership right. In this view, the purchaser is entitled owner of the real estate till the moment of state registration of the property right.

It should be mentioned that such contracts is a legal fact confirming the ownership right of purchaser. Besides the consent of the parties regarding the property right over the real estate, this right also needs to be state registered. From the analysis of the provisions of Civil Code regarding the sales contracts, it is obvious that seller is responsible to transmit to buyer the object determined by the sales contract. The buyer is obliged to pay for the goods before or after the transfer of the product into his possession if there is no other stipulation according to sales contract or to nature of the obligation. If the purchaser does not pay for the transferred goods in required time in accordance with the sales contract, the Vendor has the right to demand the payment for the goods together with percentages in compliance with the Article 449 of present Code (Articles 568.1, 598.1, 598.3 of CC).

As we see from analysis of Article 646 of Civil Code, vendor of the real estate obliged to give the object into ownership of purchaser. According to Civil Code the agreement on purchase and sale of real estate is considered valid if it is made in written form and approved by notary. The right to real estate shall pass to the purchaser at the moment of registration of the property in the State Property Register Department (Articles 647.1 and 647.2 of CC).

As we see from case materials F.Huseynov and firm negotiated a sales contract in May 1, 2002 regarding the apartment №1 with the size of 225 square meters, consisting of four rooms, situated in Building 6 which was constructed by the firm in Inshatchilar Avenue. It is obvious from the content of the contract that F.Huseynov had the rights and obligations of the vendor.

The disputed apartment was given to F.Huseynov before it was accepted into operation by the relevant commission and registered by the state registry department of real estate. F.Huseynov conducted capital repairing of the apartment. The firm haven’t objected this and haven’t demanded to pay 6 000 (six thousand) US dollars (remainder from the price of the apartment).

Ownership rights for the apartment haven’t been registered in the state registry department of real estate before the argument due to reasons that didn’t depend from F.Huseynov. According to Civil Code, this situation means that the apartment was given to actual disposition of F.Huseynov.

According to Article 159 of Civil Code possession shall be achieved via actual possession of the property. Taking into consideration Article 152.2 of Civil Code, sales contract between the firm and F.Huseynov is legal ground for the realization of actual possession. The right of the person possessing the property is equally protected by law as the right of the owner. Rights of owner shall also belong to a person who while not being the owner possesses the property upon grounds specified by this Code or under a contract according to Article 157.8 of Civil Code.

A right to use the integral part of residential building is regulated by Civil Code. According to Article 228.1 of Civil Code, family members of the owner of integral part of residential building and other persons shall have the right to use a building, if such right has been registered in the state registry department of immovable property. Emergence of the right to use the integral part of residential building, enforcement conditions and termination of such right shall be established by notarized written agreement concluded with owner according to Article 228.2 of Civil Code. In this view, a rule concerning the right of the owner’s family members and other people to use the integral part of the residential building determines that emergence of such right directly depends on the will of owner. On the other hand, this rule ensures the protection of this right from the interference of other peoples including the owner himself/herself.

Constitutional Court of AR made a decision in July 27, 2001, about “Interpretation of Article 228 of Civil Code and first part of Article 123 of Housing Code” determining that legal disputes occurred after September 1, 2000, shall be regulated by Articles 228.1 and 228.2 of Civil Code. Disputes occurred before September 1, 2000, shall be regulated by the Article 123 of Housing Code.

The Presidium of Constitutional Court also notes that principles enlisted in Article 6 of Civil Code such as the free will of the subjects of civil law, the independence of the participants of civil relationships with respect to their property, freedom of contract are considered a part of fundamental doctrine that ensures the circulation of goods and services, supports the development of business and free market economy and serves to the balanced regulation of interest of participants of civil relationships. In this view, illegal interference to realization of the property rights and fulfillment of obligation is unacceptable.

As it is obvious from case materials, F.Huseynov borrowed 115 000 (one hundred fifteen thousand) US dollars from A.Qasimov according to the contract of debt negotiated between them in December 3, 1999. According to the contract between them in June 10, 2002, F.Huseynov was obliged to return the debt within seven months from the date of signing. But F.Huseynov wasn’t able to perform his obligation in time and parties negotiated another contract in January 30, 2003, about assignment of debt in which F.Huseynov gave his actual possession rights over the apartment to A.Qasimov (F.Huseynov haven’t paid the remainder from the price of the apartment in the amount of 6 000 (six thousand) to the firm at the time of negotiation of contract).

According to the contract № 27 February 12, 2003, between A.Qasimov and the firm based on the application by F.Huseynov at the same date, the rights and duties of F.Huseynov over the apartment was transferred to A.Qasimov.

While deciding this part of the claim of N.Pashayeva, courts haven’t taken into consideration Articles 193, 198, 199 of Civil Code. Each party had rights and obligations according to the contract between F.Huseynov and the firm. Non-material property values means claims and rights, transferable to another person or designed to grant their owner material advantage or right to claim something from the possession of other persons according to Article 137 of Civil Code. According to Article 193.1 of Civil Code the owner of rights or claims which may be assigned or pledged may assign them into ownership of another person. Such rights and claims are assigned to the new owner with the same status as they had with the predecessor in title (rights and claims which cannot be assigned to other persons are enlisted in Article 514 of Civil Code). According to Article 198.1 of Civil Code, on the basis of the agreement contracted with the claim owner, the third party is also entitled to assume the debt liability. In such case the third party will become the preliminary debtor. Where a debtor and a third party reaches agreement on assignment of a debt, the validity of such agreement depends on consent of the claim owner according to Article 199 of Civil Code.

In one hand courts recognized the right of claimer to use the disputed apartment which wasn’t registered in state registry department of real estate, in the other hand rejected the rights of A.Qasimov over the apartment due to reason that the apartment wasn’t state registered. Thus, the Presidium of Constitutional Court thinks that property rights of F.Huseynov and A.Qasimov were rejected according to court decisions. This situation should be accepted as violation of ownership rights determined in Articles 13, 29 of Constitution of the Republic of Azerbaijan, violation of Articles 152, 157, 198, 199, 228 of Civil Code and Article 416 of Civil procedure Code of the Republic of Azerbaijan.

The Presidium of Constitutional Court notes that the dispute between N.Pashayeva and I.Huseynov regarding the unofficial marriage relationships between them should be resolved by the relevant legislature.

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:**

To recognize the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 2, 2004 regarding the claim of N.M.Pashayeva against F.A Huseynov and A.A. Qasimov about determination of rules of using the apartment, termination of the contract, recognition of ownership right and repayment of repair costs and also counter claim of A.Qasimov against N.Pashayeva about removal from the apartment shall be declared null and void, as it contradicts to Articles 13 and 29 of Constitution of the Republic of Azerbaijan and to Articles152, 157, 198, 199, 228 of Civil Code of the Republic of Azerbaijan 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.