**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On review of the compliance of decisions of October 25, 2002 and May 14, 2004 of the Board of Civil Cases of the Supreme Court to Constitution and legislation of the Republic of Azerbaijan, under the complaint of Kamal Alekper Mahmudov*

**12 January, 2005 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, I. Najafov, S. Salmanova (Reporter Judge) and A. Sultanov,

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

representative of Applicant K. Mahmudov – A. Alekperov

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 K. Mahmudov concerning verification of conformity of the decisions of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of October 25, 2002 and May 14, 2004 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter of the Chairman of Supreme Court of the Republic of Azerbaijan dated December 28, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge S. Salmanova and information from applicant’ representative A. Alekperov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In accordance with decision of Binagadi District Court from July 10, 2000 the claim of S. Shirinova against K. Mahmudov on recognition of invalidity of resolution, order and registration certificate for the apartment at 22/39A Nakhichevani str, city of Baku and his and his family members’ eviction from the apartment, was satisfied.

In accordance with decision of the Board of Civil Cases of the Appeal Court of the Republic of Azerbaijan (hereinafter BCCAC) on November 22, 2000 decision was adopted changing the decision of Binagadi District Court, stating the requirement for invalidation of the resolution, order and registration certificate issued to K. Mahmudov, his eviction along with family members from the disputed house to different apartment, competitive by its size and state.

Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as BCCSC) on March 14, 2001 has adopted the decision, in accordance with which the decision of the Appeal Court was changed and words “Eviction of K. Mahmudov from the disputed house to other apartment, competitive by its size and state” were excluded.

Plenary Session of Supreme Court in its decision from November 1, 2001 has cancelled the decision of the BCC of Supreme Court from March 14, 2001 in part of eviction of K. Mahmudov and his family members from the apartment without provision of alternative housing, and reinstated in force the decision of the BCC of Appeal Court from November 22, 2000, with keeping in force the remaining parts of the decision.

Afterwards, the BCC of Appeal Court has satisfied the petition of K. Mahmudov on cancellation of the decision of Binagadi District Court from July 10, 2000, and adopted the decision on November 26, 2001 on his and his family members’ eviction to the disputed apartment, and movement from apartment of S. Shirinova.

The subject decision of the BCC of Appeal Court was cancelled by the decision of BBC of Supreme Court from January 30, 2002.

In accordance with decision from May 23, 2002 of the BCC of Appeal Court, the execution of the decision of Binagadi District Court from July 10, 2000 was changed and it was decided that K. Mahmudov and his family members shall be moved to the disputed apartment, and S. Shrinova shall be moved from this apartment.

In accordance with BCC of Supreme Court from October 25, 2002, the cassation complaint of S. Shirinova was partially satisfied, the decision of the BCC of Appeal Court from May 23, 2002 was changed, and application of K. Mahmudov for suspension of execution of the decision was rejected.

BCC of Supreme Court upon the review of application of S. Shirinova for change in execution of the above mentioned decision, in its decision from May 14, 2004 has decided on change of the subject decision of the BCC of Appeal Court, eviction of K. Mahmudov along with family members from the disputed apartment, and movement of Salmanova to this apartment.

Additional cassation complaint of K. Mahmudov against the above decision was rejected and in accordance with the letter of the Chairman of Supreme Court from June 23, 2004, there were deemed that no sufficient reasons exist for taking the case to the Plenary Session of the Supreme Court.

Applicant states that he had no knowledge of the court proceedings held by BCC of Supreme Court of the Republic of Azerbaijan on October 25, 2002 and the decision made, indicates the incompliance of the decision of the Board from May 14, 2004 with Part I, Article 43 of the Constitution of the Republic of Azerbaijan and number of provision of the Civil Procedures Code (hereinafter, CPC) of the Republic of Azerbaijan (Articles 19.1.3, 405.1, 407 and 417), and requests the cancellation of this decision.

Plenary Session of Constitution Court in connection with K. Mahmudov’s Complaint informs the following.

As it seen from essence of the case reviewed by first and appeal instance courts, disputed apartment was given to Sevinj and Aziza Shirinov’s in 1993, however was overtaken by F. Nagiyev, resident of Beylagan district, and for this reason S. Shirinova could not reside in her apartment for the period of 6 years.

In accordance with decision of Binagadi district court from April 23, 1999, the order of apartment issued to S. Shirinova, was considered invalid. Upon entering into force of the decision, on August 10, 1999 the order on apartment was issued to K. Mahmudov. At the time of issuance of order to K. Mahmudov the disputed apartment was not resided and approximately one month upon his movement to the apartment in accordance with decision of the Executive Board of Baku City Court from September 3, 1999, the decision of Binagadi District Court from April 23, 1999 for invalidation of the order issued to the name of S. Shirinova was considered invalid, and case was returned to same court for additional review.

Since S. Shirinova was not aware of the fact that apartment was given to K. Mahmudov, she has raised claim against F. Nagiyev and in accordance with decision of Binagadi District Court from April 6, 2000, the claim of the Executive Power of Binagadi District on invalidation of the order issued to S. Shirinova was rejected, and request of S. Shirinova for eviction of F. Nagiyev from the apartment was satisfied. However, at the time of execution of the decision it was established the order on apartment was issued to Group 2 Karabakh War Disabled person, K. Mahmudov and he lives in this apartment.

Afterwards S. Shirinova has raised the claim against Mahmudov on recognition of invalidity of resolution, order and registration certificate for the apartment and his and his family members’ eviction from the apartment.

On the basis of these circumstances of the case, court instances have proceeded as mentioned above. Plenary Session of Supreme Court in its decision from November 1, 2001 has come to the opinion that K. Mahmudov shall be moved along with his family members from the disputed apartment to another living place competitive by its state and size. Later on the basis of application of K. Mahmudov, in accordance with decision from May 23, 2002 of the BCC of Appeal Court, the execution of the decision of Binagadi District Court from July 10, 2000 was changed and it it was decided that K. Mahmudov and his family members shall be moved to the disputed apartment, and S. Shrinova shall be moved from this apartment.

The subject decision of the BCC of Appeal Court from May 23, 2003 was cancelled by the decision of BBC of Supreme Court from October 25, 2002 and application of Mahmudov for changing of decision was not satisfied.

In making this decision cassation instance court has stated: “the apartment in which K. Mahmudov resided before moving to the disputed apartment and after court decision on eviction is located at 151/232 Bunyadzade str., City of Baku and has the total living area of 48.23 sq. meters, with 5 people registered under subject address, and 9.64 sq. meters per person is allocated, there are normal conditions for living established and there is no need for his movement to the disputed apartment. Besides, in accordance with decision of the Appeal Court from May 23, 2002, the decision of Binagadi District Court from July 10, 2000 was cancelled and S. Shirinova was evicted from the apartment along with her family members. In accordance with this decision S. Shirinova was not moved to same apartment, only her passport registration on apartment was reinstated. Therefore, S. Shirinova should not be evicted from apartment under the name of change to the decision”.

Plenary Session of Constitution Court decides that adoption by BCC of Appeal Court has violated the provisions of Articles 416, 417.0.3 and 418.1 of CPC.

Thus, the cassation instance court shall review the procedural and material compliance with legal provisions of the decision of appeal instance court and if violation or incorrect application of these norms is established the cassation instance court shall be entitled to cancel the decision or verdict of the appeal instance and to direct the case for additional review by the appeal court (Articles 416, 418.1, 417.03 of the Civil Procedures Code).

However, in contradiction with these provisions the cassation instance court has exceeded its authority and by assessment of actual conditions of the case made the new decision on essence of the case.

Later, BCC of Supreme Court by its decision from May 14, 2004 has reviewed the case for second time, changed the decision of the BCC of Appeal Court from May 23, 2003, and adopted the decision on eviction of K. Makhmudov and his family members from the disputed apartment.

Also, in accordance with provisions of Article 235 of CPC, cassation instance court is not authorized to change the execution of the decision.

In addition to theses, in accordance with Article 403 of CPC cassation instance court shall proceed on cases on the basis of cassation complaints. Cassation complaint is submitted in accordance with Article 407 of CPC. In this instance the provisions of Article 406 of CPC shall be observed.

As observed from materials of the case on May 14, 2004 the cassation instance court proceeded on the basis of letter of S. Shirinova to the Chairman of Supreme Court. Since the letter was not made in compliance with provisions of Article 407 of the CPC and not submitted in accordance with provision of Article 406 of CPC, it could not be accepted as cassation complaint. Even if this application is considered cassation complaint, in accordance with 405.1 of CPC, it should be submitted within three months from the date of decision of the appeal instance court decision. But the complaint of S. Shirinova was made and proceeded by the cassation instance court 22 months after the date of decision of the Appeal Court.

In accordance with Article 19.1.3 of CPC the review of the case by judge, who at earlier dates reviewed the same case in first, appeal or cassation instances, is not allowed.

However, as it observed from court decisions, case was proceeded by same judge for the second time, contradicting this legislative requirement.

Plenary Session of the Constitution Court also deems important to note, although there was the decision of the Plenary Session of Supreme Court on provision of alternative living space for K. Mahmudov, the Board of same Court has made the decision on cancellation of this provision two times.

Thus, decision of BCC of Supreme Court from October 25, 2002 contradicts with provisions of Article 416, 417.0.3 and 418.1 of CPC, and decision of the its Board from May 14, 2004 contradicts with Articles 19.1.3, 235, 405, 406, 407, 416, 417.0.3 and 418.1 of CPC. This in turn violates the right of applicant for having living space stipulated under part I of Article 43 of Constitution as well as right of fair court justice in protection of violated rights and freedoms in accordance with Article 60 of Constitution.

With consideration of above, Plenary Session of the Constitution Court has concluded that due to the fact that decision of BCC of Supreme Court from October 25, 2002 contradicts with provisions of Article 416, 417.0.3 and 418.1 of CPC, and decision of the its Board from May 14, 2004 contradicts with Articles 19.1.3, 235, 405, 406, 407, 416, 417.0.3 and 418.1 of CPC as well as Articles 43 and 60 of Constitution of the Republic of Azerbaijan, these decision shall be deemed invalid and the relevant aspect of the case shall be reviewed additionally in accordance with procedures of legislation.

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 Azerbaijan Republic

**DECIDED:**

Due to the fact that decision of BCC of Supreme Court of October 25, 2002 contradicts with provisions of Article 416, 417.0.3 and 418.1 of CPC, and decision of the its Board of May 14, 2004 contradicts with Articles 19.1.3, 235, 405, 406, 407, 416, 417.0.3 and 418.1 of CPC as well as Articles 43 and 60 of Constitution of the Republic of Azerbaijan under the claim of S. Shirinova against K. Mahmudov on recognition of invalidity of resolution, order and registration certificate for the apartment, his and his family members’ eviction from the apartment, these decision shall be recognized as null and void and the the relevant aspect of 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.