**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of resolution of the Panel of Judges on economical disputes
at the Supreme Court of the Republic of Azerbaijan of November 20, 2003
in correspondence to Constitution and legislation of the Republic of Azerbaijan upon appeal of Z. S. Guliyev and G. G. Jabrayilov*

**28 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 (Reporter Judge), I. Najafov, S. Salmanova and A. Sultanov,

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

applicant representative T. Babayev, officer of the legal department of the Agriculture Ministry of the Republic of Azerbaijan R. Axundov, officer of the State Property Management and Privatization department at the Ministry of Economical Development N. Ibrahimli, director of the State Horse Races Stadium N. Safarov

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 Zeynalabdin Sadigoglu Guliyev and Gulnara Gubadgyzy Jabrayilova versus the Agriculture Ministry, Economical Development Ministry and the State Property Management and Privatization Department of the same ministry on considering invalid the orders on issuing certificates for privatized one-storey uninhabitable area of 98.1 sq. m., constructions of half-built hotel for 35 beds, exhibition hall, livestock barn No 3 and 4,800 sq. m. occupied by the barn – all situated on the area of the Baku State Horse race Stadium.

Based on the letter No. 2n-420 of the Chairman of Supreme Court of the Republic of Azerbaijan dated December 15, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge E. Mammadov, applicant’s representative T. Babayev and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Z. Guliyev and G. Jabrayilova show in their appeal that in Resolution No 1 of the Local Economical Court as of March 31, 2003, the lawsuit versus the Agriculture Ministry, Economical Development Ministry and the State Property Management and Privatization Department (hereinafter – Department) of the same ministry was approved and the parts of the orders relevant to issuing certificates for the situated on the area of the Baku State Horse Race Stadium privatized one-storey uninhabitable area of 98.1 sq. m., constructions of half-built hotel for 35 beds, exhibition hall, livestock barn No 3 and 4,800 sq. m., occupied by the barn, were nullified.

The Economical Court of the Republic of Azerbaijan approved the appeals of Z. Guliyev, G. Jabrayilova and V. Isayev by nullifying the issued certificates for the situated on the area of the Baku State Horse Race Stadium privatized one-storey uninhabitable area of 98.1 sq. m., constructions of half-built hotel for 35 beds, pavilion, livestock barn No 3 and 4,800 sq. m., occupied by the barn, and disapproved the lawsuit of the Agriculture Ministry by issuing the new resolution as of July 09, 2003.

Further in the appeal it is said that in the submitted cassation appeal the Agriculture Ministry in contrast to the previous appeal requested to cancel the orders of the State Property Committee (hereinafter – SPC), which gave grounds for issuing certificates to V. Isayev for barn No 3 and its situated area of 4,800 sq. m., to Z. Guliyev for the sold half-built hotel for 35 beds, to G. Jabrayilova for the sold half-built exhibition pavilion.

The Panel of Judges on Economical Dispute (hereinafter – PJOED) at the Supreme Court of the Republic of Azerbaijan in its order as of November 20, 2003 approved the cassation appeal of the Agriculture Ministry and disapproved the order of SPC No 31 as of 06 February 1997 which gave grounds to issue certificate on selling the half-built hotel for 35 beds on the territory of the Baku State Horse Race Stadium to Z. Guliyev in the part related to him, and disapproved the order of SPC No 173 as of April 28, 1997, which, in the parts related to her, gave grounds to issue certificate on selling the half-built exhibition pavilion on the territory Baku State Horse Race Stadium to G. Jabrayilova.

Regarding the complaint of Z. Guliyev and G. Jabrayilov, which was submitted as an additional cassation order on the resolution of the PJOED of the Supreme Court, it is said in the letter of the Chairman of the Supreme Court of the Republic of Azerbaijan as of May 24, 2004, that there are no grounds for examination of that resolution in the cassation order.

In the complaint it is also said that upon the SPC’s order No 31 as of December 06, 1997 the frozen and unfinished construction of the hotel for 35 beds on the territory of the Baku State Horse Race Stadium was bought by Z. Guliyev at the auction which took place on February 18, 1997, and by registering it in the Register No 3, Note No 1040 the SPC issued a certificate which approved the ownership rights in regard of this property.

According to the order of the same committee No 173 as of April 28, 1997, the unfinished exhibition hall on the territory of the Baku State Horse Race Stadium was bought by G. Jabrayilova at the auction which took place on April 29, 1997, and by registering it in the Register No 10, Note No 4530 the SPC issued a certificate which approved the ownership rights in regard of this property.

Nevertheless, PJOED at the Supreme Court decided that in accordance with the Clause 18 of Addendum 1 of the State Program on privatization of the state property, which took place in Azerbaijan Republic in 1995-1998 the Baku State Horse Race Stadium belonged to the enterprises forbidden for privatization. However, construction of the exhibition pavilion and hotel, which makes the subject of the dispute, started and froze in 1992 and as long as the normative terms of this construction have already expired these buildings belong to the obligatorily privatized objects in accordance with the mentioned Clause 10, Addendum 1.

According to the Articles 1, 2 and 3 of the Regulations “On privatization of the objects with frozen construction, expired normative terms and completed constructions” which has been approved by the Decree of the President of the Republic of Azerbaijan No 451 as of March 25, 1998, the privatization of the objects with unfinished construction is carried out by the State Property Committee (presently – the Ministry of Economical Development of the Republic of Azerbaijan), in such a case the Ministry performs as a seller of unfinished constructions and such objects are being privatized upon its orders.

Furthermore, the plaintiffs inform that as the economic relations regarding property privatization started in 1997-1998, the Articles 73, 77 and 78 of the Civil Code (hereinafter – CC) of the Republic of Azerbaijan, which were in effect till September 01, 2000, as well as the Article 134 of the same Code (property to ‘clean hands”) and the Chapter VI of the CC that is presently in force have not been applied to resolve this case.

 The plaintiffs claim violation of their ownership rights provided by the Articles 13 and 29 of the Constitution of the Republic of Azerbaijan and as the Articles 73, 77, 78 and 143 of the CC have expired on September 01, 2000, request to cancel the resolution of PJOED of the Supreme Court dated November 20, 2003.

The Plenum of the Constitutional Court of the Republic of Azerbaijan considers necessary to notify the following below:

From the factual circumstances identified by the general courts it is seen that the SPC performing as the seller of the objects of state enterprises and other state property objects in accordance with the “State Program on privatization of the state property in 1995-1998” (Article 1, Addendum 13 of this Program), which has been approved by the Law adopted on September 29, 1995, put to the auction the half-built hotel for 35 beds with normative terms expired (SPC’s order No 31 as of February 06, 1997) and the half-built exhibition pavilion (SPC’s order No 173 as of April 28, 1997) both situated on the territory of the Baku State Horse race Stadium with the purpose of privatization. On the auction the hotel for 35 beds was bought by Z. Guliyev for 10,182,000 (ten million one hundred and eighty two thousand) manats (auction protocol of February 18, 1997, sale and purchase agreement of February 20, 1997, unlimited certificate on the sale of the state property to a legal or physical person, issued by SPC), the half-built exhibition pavilion was bought in the same order by G. Jabrayilova for 76,122,000 (seventy six million one hundred and twenty two thousand) manats (auction protocol of April 29, 1997, sale and purchase agreement of April 30, 1997, unlimited certificate on the sale of the state property to a legal or physical person, issued by SPC on May 07, 1997, No 4530).

The privatization of the mentioned property, as well as the other property situated on the same territory, was held with the knowledge of the Baku State Horse Race Stadium, and at that time neither the Stadium, nor any other interested organization had any protests regarding this privatization.

Nevertheless, the Agriculture Ministry’s lawsuit versus the Ministry of Economical Development and Department regarding cancellation of the orders, in the parts related to them, which gave grounds to issue certificates on privatization of the one-storey uninhabitable area of 98.1 sq. m. (owner – B. Nadirov), constructions of half-built hotel for 35 beds (owner – Z. Guliyev), exhibition hall, livestock barn No 3 and 4,800 sq. m. (owner – V. Isayev), was approved by the Local Economic Court No 1 on March 31, 2003 (The Agriculture Ministry raised the suit for cancellation of the orders, in the parts related to them, which gave grounds for issuing certificates to Z. Guliyev and G. Jabrayilov 6 years after privatization).

It’s noteworthy that the Baku State Horse Race Stadium performed on the side of the plaintiff, and Z. Guliyev, G. Jabrayilov, V. Isayev and B. Nadirov performed on the side of the defender to discuss the subject of the dispute as third parties without any independent claims.

The Economical Court of the Republic of Azerbaijan basing on appeal of Z. Guliyev, G. Jabrayilov, V. Isayev on July 09, 2003 issued a new resolution (the appeal of B. Nadirov was partially satisfied) by removing the part related to them from the claim of the Ministry of Agriculture.

The cassation appeal of the Ministry of Agriculture was approved by the PJOED of the Supreme Court on November 20, 2003, and the orders of SPC No 31 of February 06, 1997 and No 173 of April 28, 1997, in the parts related to them, which gave grounds to issuing the relevant certificates, were announced as invalid.

Privatization as a special condition for termination of the ownership right ensures transfer of the state property (with the exception of the property defined by the law) to the ownership of physical and legal persons.

The realization of privatization aims to create of the self-regulating market economy environment, based on the principles of private property and free competition, to attract all kind of unclaimed goods to industrial processes (incomplete and non-used objects, real estate, etc.), investments, including foreign investments, improvement of the life level and social prosperity.

From this point of view, the government’s task of a big importance is to prepare necessary conditions in order to ensure participation and activity of legal and physical persons in the privatization process as well as holding this process in uninterruptible and balanced way.

It must be noted that one of the features of democratic state is the mechanism of legal protection which prevents any violations and negative impacts on realization of the rights and liberties.

The social and economical provisions, reflecting the relevant environment for free use of rights and liberties, protection and defense of the social relations emerging during privatization make their influence, too. In transition period to the market economy, and especially in the relations, created during privatization, the necessity of the government protection of the rights and liberties in full scope even grows.

The legal certainty is one of the most important general legal principles. This principle, aiming toward non-execution of the legal acts which by their content might bring the legal condition of persons to complicated situation, was reflected in the Part VII of the Article 149 of the Constitution. According to that norm, the normative legal acts which improve the condition of a physical or legal person, remove or ease the legal responsibility are being applied with reverse action. The other normative legal acts do not have the reverse action.

Basing on this clause in the Constitution the lawmaker defined in the CC that with the exception of what is defined in Part VII of the Article 149 of the Constitution, the clauses of the civil code do not have reverse action and as soon as they enter into force they are being applied to the created relations. In the conditions directly identified by the law the civil code may have the reverse action. In case damage was made to the civil legal subjects or their condition worsened the civil code can not have reverse action (Article 7 of the CC). This rule is also applied to the relations in regard of appeal terms, regulated by the CC.

In the order as of December 27, 2001 of the Constitutional Court of the Republic of Azerbaijan “On interpretation of the Article 373 of the Civil Code of the Republic of Azerbaijan” it was shown that before adopting new normative legal acts of the same content, which would regulate the civil legal relations, the lawmaker, in order to prevent any harm to continuation and stability of legal relations, refers them to the legal relations which may appear after the adoption of such a legal act. It was shown in the order that the requirements coming out of the legal relations created after September 1, 2000, must use the appeal terms defined in the Article 373 of the Civil Code, whereas the requirements coming out of the legal relations created before September 1, 2000, must use the appeal terms defined in the Article 73 of the Civil Code.

According to the Article 73 of the CC, which was in effect till September 01, 2000, the common term (appeal term) for a person, whose rights have been violated, to defense rights is defined for three years, for mutual claims of state enterprises, kolkhozes and cooperatives and other social organizations – one year.

In the Article 77 of the same Code it was taken into consideration that not depending on informing parties the appeal terms are a[applied by the court, arbitrage or panel of judges.

In the first paragraph of the Article 78 of the code the rule was adopted where the flow of appeal term begins since the date of creation of appeal right and the date of violation of appeal right or the person’s right when he/she learned or should have learned about it.

From the factual cases defined by the courts it is seen that the authorized state organs presented for privatization the hotel for 35 beds and exhibition pavilion which were purchased respectively by Z. Guliyev and G. Jabrayilova in 1997 and the legal relations have started since that date. However, for the resolution of the dispute where the legal relation have started in 1997, the first court and cassation instance courts did not apply the clauses of the Articles 73, 77, 78 of the CC which were in effect before September 01, 2000. From the point of Part VII of the Article 149 of the Constitution of the Republic of Azerbaijan such an approach cannot be considered as applicable.

According to Part I of the Article 25 of the Constitution everyone is equal under the law.

The main essence of this norm (principle) of the Constitution is to help in ensuring of equal approach to legal subjects and preventing of creation of regime of inequality, unjustified dominance and privileges. Violation of boundaries of the mentioned principles in any form may create grounds for the factual inequality of legal subjects in the legal relations they participate in, more beneficial position of one comparing to another and may bring to disbelief in the principles of the Constitution, reduction of trust to the state organs and increase of social tense.

It is seen from the case papers the Ministry of Agriculture appealed for cancellation of the orders, in the parts related to them, which had given grounds for issuing certificates for the respective property to B. Nadirov, V. Isayev, G. Jabrayilov, Z. Guliyev. Such an appeal was approved by the first instance court.

Upon the appeal of V. Isayev (livestock barn No 3 and the land area of 4,800 sq. m where it is situated), G. Jabrayilova (owner of the exhibition pavilion), Z. Guliyev (owner of the hotel for 35 beds) the Economical Court of the Republic of Azerbaijan cancelled the resolution of the first instance court and issued a new resolution (appeal of B. Nadirov was partially satisfied).

By submitting cassation appeal, the Ministry of Agriculture without disputing the result of the appeal instance court as regards cancellation of the order which gave grounds for issuing certificate to V. Isayev, has requested to issue the resolution on cancellation of the resolution of the same instance in the parts related to Z. Guliyev and G. Jabrayilov as illegal.

In the Article 53 of the Civil Procedural Code (hereinafter – CPC) of the Republic of Azerbaijan it was taken in consideration that a plaintiff has the right make changes in the essence or subject of the appeal as well as to increase or decrease the amount of appeal until the resolution has been adopted. Disobedience to this rule of the Code by the plaintiff resulted with acceptation of subjective rights of one of the participants in privatization process arranged by the authorized state organ in 1997-1998, and disputing the rights of the others, although such a process as a matter of fact took place in the same region, on the same basis and in the same order. On the other hand, the Ministry of Agriculture in providing the functioning of the Baku State Horse Race Stadium shows lack of legal logic by disputing not the constructions and land areas of big importance due to their functional capacities and volume, but the secondary buildings.

Such a condition contradicts not only Part I of the Article 25 of the Constitution, but also violated requirements of the Article 53 of CPC.

All goods, services and financial assets are on free move on the whole territory of the Republic of Azerbaijan. The nature, essence and content of such a legal regime, which has been defined by the legislation, is aimed to prevent illegal and unjustified interference into the results of the legal relations between the civil legal subjects, as well as to ensure uninterruptible and unhindered turnover of the civil circulation.

It’s noteworthy that as the court resolutions adopted for resolving disputes have prejudicial character by their essence, the third parties, which do not present independent claims on the subject of dispute, differ with serious pressure on material and legal character of their interests. In this regard, non-application of the noted legal norms by the first and cassation instance courts, as well as selective (disputable) approach of the Ministry of Agriculture in its cassation appeal created grounds for violation of ownership rights of Z. Guliyev and G. Jabrayilova, provided by the Article 29 of the Constitution of the Republic of Azerbaijan.

According to the Part I of the Article 71 of the Constitution, it is the obligation of legislative, executive and court state organs to follow and protect the rights and liberties of the people and citizens as provided in the Constitution. And in the Part I of the Article 60 of the Constitution it is noted that provision of protection of anyone’s rights and liberties at the court is guaranteed.

From this point of view, while protecting constitutional rights and liberties, the courts must ensure that the court acts are stabile, that the court mistakes can be fixed, that the procedural regulations are being seriously followed at any level of the court system.

According to the Article 416 of CPC, the cassation instance court inspects the proper application of the material and procedural norms by the appeal instance court. The same Code’s Article 418.1 defined that violation of the material and procedural norms or their improper application gives grounds for cancellation of resolutions and decrees of such appeal instance court.

By decision of the PJOED of the Supreme Court as of November 20, 2003, the resolution of the Economical Court as of July 09, 2003, in the part related to Z. Guliyev and G. Jabrayilova, as a matter of fact, has been partially cancelled. However, in accordance with the Article 417.0.3 of the CPC the cassation instance court inspects a case may cancel the resolution and decrees of appeal instance court fully or in part and may send the case back to the appeal instance court for anew examination.

Hence, the Plenum of the Constitutional Court of the Republic of Azerbaijan guided by the mentioned above comes to such a conclusion that the resolution of PJOED of the Supreme Court as of November 20, 2003 in the part related to Z. Guliyev and G. Jabrayilova does not correspond with the Articles 25, 29, 60, 71 of the Constitution and the Articles 416, 417.0.3 and 418.1 of the CPC and considered to be invalid.

Being guided with the Parts V, IX and X of the Article 130 of the Constitution of the Republic of Azerbaijan, the Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

Regarding complaints of Z. Guliyev and G. Jabrayilov the resolution taken at the Panel of Judges on economical disputes of the Supreme Court of the Republic of Azerbaijan as of November 20, 2003, in the part related to Z. Guliyev and G. Jabrayilova must be considered as null and void because of its contradiction to the Articles 25, 29, 60, 71 of the Constitution of the Republic of Azerbaijan and the Articles 416, 417.0.3 and 418.1 of the Civil Procedural 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.