**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by A. A. Mammadyarov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of March 3, 2004 to Constitution and legislation*

 *of the Republic of Azerbaijan*

**15 February, 2005 Baku city**

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

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

applicant, A. Mammadyarov,

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 H. Hamdamov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of March 3, 2004 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 2n-14 of the Deputy Chairman of Supreme Court of the Azerbaijan Republic dated January 13, 2005, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge F. Babayev, applicant A. Mammadyarov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In accordance with decision of Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan dated March 3, 2004, the decision of the Board on Civil Cases of the Appeal Court of the Republic of Azerbaijan from October 30, 2003 on satisfying the claim of A. A. Mammadyarov against H. H. Hamdanov for movement from the apartment was cancelled.

In the complaint submitted by A. Mammadyarov to the Constitution Court, the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan was considered as illegal and ungrounded, and cancellation of the decision was requested. The complaint was explained by the fact that the decision of Agsu District Court from February 9, 1996 was not implemented appropriately, and relevant protocols have been developed by the Court Officers (hereinafter CO) of the Shamakhi Court and Agsu District Court.

As it seen from the case materials, in accordance with Decision of Gabala district court from April 6, 1995, the application of H. Hamdamov for extension of acceptance of property, consideration of the sale and purchasing deal by A. Mammadyarov and establishment of the fact of ownership for construction was overruled, and the fact of ownership by A. Mammadyarov of the one-storey, two-room 43 sq. meters apartment in the Chikhuryurd village of Shamakha Region was established.

In accordance with decision of the Agsu District Court from February 9, 1996, the ownership rights of applicant plaintiff A. Mammadov were recognized, and removal of H. Hamdamov along with his family members from the apartment was satisfied.

In accordance with this decision A. Mammadyarov was issued with act of execution, and at the same time the act of execution was directed to the Shamakha District Court for execution on March 18, 1996. However, since Hamdamov interrupted the execution of the decision, court officers have prepared appropriate acts on the issue.

On May 2003 A. Mammadyarov once more requested the court officers to facilitate the removal of H. Hamdamov from the apartment, however, Hamdamov did not allow the execution of decision and applied to Gobustan District Court with compliant on action of the CO group.

In accordance with decision of Gobustan District Court from August 19, 2003, the compliant of H. Hamdamov against the CO group of Shamakha District Court and its officials was not satisfied as ungrounded.

In accordance with decision of the Board of Civil Cases of the Appeal Court of the Republic of Azerbaijan from October 30, 2003 the decision of the Gobustan District Court from August 19, 2003 remained unchanged, and the appeal claim of H. Hamdamov was not satisfied.

The Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan, which reviewed the case under the complaint of H. Hamdamov on the basis of Article 73 of the Civil Code of the Republic of Azerbaijan and Article 358 of the Civil Procedures Code of the Republic of Azerbaijan, have cancelled the decision of the Board of Civil Cases of the Appeal Court of the Republic of Azerbaijan from October 30, 2003 and has shut the execution on the case.

Plenary Session of the Constitution Court of the Republic of Azerbaijan considers the importance of noting the following in accordance with the complaint of A. Mammadyarov.

The property in Azerbaijan Republic shall be inviolable and protected by state. Every citizen has the right of ownership. Everybody may own movable or immovable property. Nobody can be deprived of his property without court decision (Articles 13 and 29 of the Constitution of the Republic of Azerbaijan).

The right of ownership, comprising one of the most important human rights consists of the right to own, use or manage any property in accordance with procedures of legislation. Demonstration of respect to property rights and their protection, as well as demonstration of respect towards such property shall be obligatory for all state executive authorities, local executive authorities, political parties, public entities, trade-unions, legal entities and natural persons. The Constitution Court of the Republic of Azerbaijan provides guarantee for court protection of rights and freedoms of anybody (Article 60). The protection of rights within the country is provided by court in accordance with procedures of established legislation, authorities of each court instance, its roles and responsibilities.

In accordance with Article 73 of the Civil Code of the Republic of Azerbaijan valid until September 1, 2000 (Civil Code lost its force afterwards), the total period (claim period) for protection of the interests of person, whose rights were violated is three years.

In accordance with Article 358 of the Civil Procedures Code of the Republic of Azerbaijan valid until September 1, 2000 (Civil Procedures Code that lost its force afterwards), the court decision to which at least one of the parties is a citizen shall be executed within three years period, any other cases shall be executed within one year period, unless otherwise is stipulated under the legislation.

As it seen from the context of these Articles, Article 73 of the Civil Code that lost its force defines general claim periods, and Article 358 of the Civil Procedures Code that lost its force establishes the timing for submission for execution of the acts for execution.

On the civil case the ownership of the apartment by A. Mammadyarov was established in accordance with property legislation and it was accepted undisputedly. As can be drawn from the decisions of the first instance and appeal instance courts on the claim of H. Hamdamov, A. Mammadyarov has demanded the execution of the decision of Agsu District Court immediately, the decision was sent to Shamakhi court for execution on time on February 9, 1996 and relevant actions have been taken by the CO department of Shamakhi District Court. This, CO department of Shamakhi District Court, immediately after the decision, thus on April 24-25 and May 6, 1996, as well as upon the second demand from A. Mammadyarov, on May 21 and June 9, 2003, have required H. Hamdamov to leave the apartment, however he interrupted the execution of decision and did not leave the apartment.

Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan with reference to Article 73 of the invalid Civil Code and Article 358 of the invalid Civil Procedures Code of the Republic of Azerbaijan, has applied inappropriate provisions of these legal acts. Thus, general claim periods are not applicable to execution of court decisions, and on the other side Article 358 of the invalid Civil Procedures Code, do not apply for the periods of non-execution of court decision by the court authorities.

Besides, the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan has exceeded its legally established authority during the case review. In accordance with Article 417 of the Civil Procedures Code of the Republic of Azerbaijan the authorities of the cassation instance court are established. In accordance with this Article cassation instance court shall be entitled to cancel entirely or partially the decisions or verdicts of the appeal instance court, or close the execution of the case in accordance with Articles 261.0.1-261.0.3, 261.0.6 and 261.0.7 of the Code. However, there was no basis established in accordance with provisions of the above Articles to close the execution under the case in relation with claim of H. H. Hamdamov. Also it shall be taken into consideration, that Article 417.0.4 of the Civil Procedures Code establishes the provisions for cancellation of execution on the case. However, the Board on Civil Cases of the Supreme Court during the case review has exceeded its authority and have cancelled the execution by its disputable decision. However, the existing and former civil procedures legislation provides these authorities only to first instance courts (Article 380 of former Civil Procedures Code and Article 262 of current Civil Procedures Code).

Plenary Session of the Constitution Court of the Republic of Azerbaijan draws the decision, the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan did not applied correctly the provisions of Article 73 of the Civil Code and provisions of Article 358 of the Civil Procedures Code that have lost their force, and, the cassation instance court has exceeded its authorities above Article 417 of the Civil Procedures Code, and by this has violated the property rights of the applicant stipulated in Article 29 and rights and freedoms stipulated under Article 60 of the Constitution of the Republic of Azerbaijan.

Therefore, the Plenary Session of the Constitution Court of the Republic of Azerbaijan decides, that the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan from March 3, 2004 on the case initiated under the claim of A. Mammadyarov shall be deemed as lost its force on the basis of contradictions with Articles 29 and 60 of the Constitution of the Republic of Azerbaijan, and Article 417 of the Civil Procedures Code of the Republic of Azerbaijan and the case shall be processed on the basis of this Decision and civil procedures code 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:**

To recognize the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of March 3, 2004 made under the claim of Hamdulla Hamdali Hamdamov as null and void because of its contradiction to Articles 29 and 60 of the Constitution of the Republic of Azerbaijan, and Article 417 of the Civil Procedures 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.