ON BEHALF OF THE REPUBLIC OF AZERBAIJAN

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of the resolution of the Panel of Judges on common pleas
at the Supreme Court of Republic of Azerbaijan as of April 28, 2004
in correspondence to Constitution and legislation of the Republic of Azerbaijan upon appeal of Sh. Agakishiyev*

### 21 February, 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;

aplicant Sh. Agakishiyev and his representative A. Habilov,

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 Sh. Agakishiyev concerning verification of conformity of the decision of the Panel of Judges of common pleas at the Supreme Court of the Republic of Azerbaijan of April 28, 2004 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 8m-419/04 2n-2 of the Chairman of Supreme Court of the Republic of Azerbaijan dated January 12, 2005, the case proceeded in absence of the respondent representatives.

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

**DETERMINED AS FOLLOWS:**

From the factual details of the case, defined by the general jurisdiction courts, it is seen that according to decree of the Local Agrarian Reforms Commission (hereinafter –LARC) on the village of Ibrahim Hajili in Tovuz District dated September 20. 2001, the belonging to “Tovuz” sovkhoz the livestock barns together with adjacent land areas of 0.30 hectares were sold to Sh. Agakishiyev for the price defined by the working group of Tovuz District Agrarian Reforms Commission (hereinafter – DARC), that is, 14,000,000 (fourteen million) manats. On October 15, 2001 the Tovuz DARC issued a decree to cancel the decree of LARC because of low sale price and to sell the barns by the auction again. This decree was sent to “Tovuz” LARC in the village of Ibrahim Hajili in Tovuz District only on December 29, 2001. On January 04, 2002 the chairman of LARC responded to the letter that as there were more than 3 months passed since the sale date of the property it was impossible to put up the barns back to action. According to the DARC’s decree of the same very date the LARC’s staff has been changed and its chairman and chief accountant removed from their positions. After that, on January 12, 2002 the new staff of LARC issued decree on selling the livestock barns and adjacent 2.5 hectares (which is more 2.2 hectares more than were sold to Sh. Agakishiyev), belonging to “Tovuz” sovkhoz, to “Tovuz-Baltiya Ltd” Company for 30,000,000 (thirty million) manats. And on February 15, 2002 they issued the registration certificate on giving this property to the assets of the company.

Sh. Agakishiyev lodged a complaint to the Tovuz District Court on illegal actions of “Tovuz” LARC. In this complaint it was also requested to stop illegal actions of the workers of “Tovuz-Baltiya Ltd” Company as well as to cancel the decree of “Tovuz” LARC on illegal sale of his property to another party. Upon the resolution of the Court as of December 26, 2002, the complaint was not satisfied.

Upon the resolution of the Panel of Judges on common pleas at the Court of Appeal of the Republic of Azerbaijan (hereinafter – PJOCP at the Supreme Court) as of May 14, 2003, the appeal of Sh. Agakishiyev was satisfied, the resolution of the Tovuz District Court as of December 26, 2002, was cancelled, the decree of Tovuz DARC as of October 15. 2001 was cancelled in full and the decree of “Tovuz” LARC as of January 12, 2002 was cancelled in the parts referring to Sh. Agakishiyev, as well as the registration certificate issued to “Tovuz-Baltiya Ltd” Company was declared invalid.

After this, without following the resolution of the PJOCP at the Supreme Court as of December 05, 2003 and the complaint, the resolution of Tovuz District Court as of December 26, 2002 remained unchanged.

The resolution of PJOCP at the Supreme Court as of April 28, 2004, and the cassation appeal of Sh. Agakishiyev remained unsatisfied. And in return letter of the Chairman of Supreme Court as of 06 July 2004 he was informed that as there were no grounds for additional review of his cassation appeal there was no necessity in sending it to the Plenum of the Supreme Court.

In his appeal to the Constitutional Court Sh. Agakishiyev notifies of violation of his rights provided by the Constitution of the Republic of Azerbaijan in regard of wrong implementation and interpretation of several articles in the Laws of the Republic of Azerbaijan “On basic principles of agrarian reforms’ and “On reforms in sovkhozes and kolkhozes”, and requests to inspect correspondence of that decree to the Constitution of the Republic of Azerbaijan and the laws, consider it as invalid and to restore his violated rights.

In regard of this appeal the Plenum of the Constitutional Court considers essential to note the following below.

On the basis of the new conditions defined by the Constitution of the Republic of Azerbaijan there were solid reforms fulfilled in the agricultural and industrial complex, as well as in other spheres of economy of the Republic of Azerbaijan. Clarification of the matters discussed in the appeal of Sh. Agakishiyev in consideration of the recent conduction of agrarian reforms, and especially in regard of division and sale of the assets which were in the use (on the balance) of kolkhozes and sovkhozes, raises the issue of necessity in analysis of the adopted laws and other normative and legal acts with the purpose to define the boundaries of responsibilities of the local and district agrarian reform commissions.

The agrarian part of the Law of the Republic of Azerbaijan “On basic principles of agrarian reforms” proclaimed formation of new proprietor relations and creation of diverse economies as the main directions of the agrarian reforms (Article 2). The Law of the Republic of Azerbaijan “On reforms in sovkhozes and kolkhozes” in its turn also declared establishment of diverse economy forms, relevant to the market economy, and development of entrepreneurship in the agrarian sector as the purposes of the implemented reforms in this sphere. And the goals of the reforms were defined as to divide sovkhoz and kolkhoz economies between the farmers, to transform joint private property based assets into agricultural enterprises, to create state agricultural enterprises on the basis of sovkhozes, to develop private supplementary enterprises, to reach cooperation between created economies and arrange service areas (Article 2).

The Law of the Republic of Azerbaijan “On reforms in sovkhozes and kolkhozes” also defined to create the State Agriculture Reforms Commission of the Republic of Azerbaijan, the Agriculture Reforms Commission of the Nakhchyvan Autonomous Republic as well as district and local agrarian reform commissions with the purpose of implementation of reforms within the boundaries of their authorities.

The Decree of the President of the Republic of Azerbaijan No 313 as of April 14, 1995 on Regulations on the State Agrarian Reforms Commission of the Republic of Azerbaijan, and in its turn the decrees of the State Agrarian Reforms Commission of the Republic of Azerbaijan No 10/AA-02 as of March 25, 1995, on Regulations on district and local agrarian reforms commissions have been approved. In these regulations it was once again notified that the main objectives of the commissions were to implement reforms within the boundaries of their authorities and in accordance with legislation.

The Plenum of the Constitutional Court notifies that as regards the inspection of the disputable court act for the relevance to the Constitution and the laws it is important first of all to pay attention to what basic principles they apply to in the question of attraction of the assets on the balance of kolkhozes and sovkhozes to the reforms and to those clauses in the legislation where the main directions of the reforms have been defined.

In this regard, it must be taken into consideration that the Law of the Republic of Azerbaijan “On reforms in sovkhozes and kolkhozes” regulates the purposes and tasks of the reform, its target object and subject, the organs managing the reform, their authorities, main rules of privatization of the assets of sovkhozes and other state enterprises, division of kolkhozes’ property, creation of diverse forms of enterprises in agriculture, implementation of the reform and other matters.

The law intended to provide the persons, having right for the share from the land or assets used (or on the balance) of sovkhozes and kolkhozes, to choose and establish any economical or legal form on a volunteer basis.

The state agricultural industrial enterprises, whose assets are to be privatized, and the ones, which hold their assets in the state property have been defined, and the rules of defining private property shares for giving those assets to private enterprises are shown in the legislation precisely. The Regulations on “Sharing of assets of the agricultural industrial enterprises and providing one of such shares to the property of municipalities” which has been approved by the Decree of the President of the Republic of Azerbaijan No 534 as of January 10, 1997, provide detailed description on how to evaluate assets of the agricultural industrial enterprises, to define the volume of a property share, to divide the assets between members of an enterprise and provide one of such a share into the municipal property.

It’s noteworthy that during the reformation of sovkhozes the property shares must be defined in order to transfer their assets to private property. By decision of the persons authorized to receive the shares the property share can be given to a private property in natural way to a single person or a joint enterprise. In case it is not possible to give the property share in natural way its cost shall be paid (the Law of the Republic of Azerbaijan “On reform of sovkhozes and kolkhozes”, Article 9, parts 3, 4 and 5).

As it is seen, the probability of sale of the property sitting in the balance of the state agricultural industrial enterprises within the framework of the reforms is considered only as an exceptional case. Basing on the Paragraph 16 of the Regulations on “Sharing of assets of the agricultural industrial enterprises and providing one of such shares to the property of municipalities”, in case when the property sharing in correspondence with share rights is impossible, then in accordance with the current legislation such property goes for sale or the shares are being combined and a joint venture established where each member’s share is known.

At the same time, it must be taken into consideration that any case related with sale of the property sitting on the balance of sovkhozes and kolkhozes, including the one when Tovuz DARC issued the decree dated October 15, 2001, putting the property for sale on the auction have not been defined in the legislation. This is why when within the framework of the reforms realization during assessment of concordance with the law of the decisions made in regard of sale of the property sitting on the balance of sovkhozes and kolkhozes the agrarian reform commissions must pay permanent attention to the correspondent clauses of law.

The Plenum of the Constitutional Court also notes that within the framework of the matter under discussion it is also a matter of big importance to identify the objects of the reform and the subjects, which have rights to get shares from such objects. According to the Article 3 of the Law of the Republic of Azerbaijan “On reforms in sovkhozes and kolkhozes” the objects of the reform are mainly the lands and property in possession (on the balance) of sovkhozes and kolkhozes.

In accordance with this Law and the Regulations on “Sharing of assets of the agricultural industrial enterprises and providing one of such shares to the property of municipalities” the circle of the subjects which have rights to get share of property of sovkhozes and kolkhozes was defined as follows:

1. permanent workers of sovkhozes and other agricultural enterprises
2. members of kolkhozes
3. persons who worked in agricultural enterprises and then retired
4. persons who worked in agricultural enterprises in the past and presently are on a fixed period military service or elected to the elective state bodies.

From the court acts on civil case it is seen that the court dispute has been resolved without clarifying the issue of the subjects which have rights to get share of sovkhoz property. That is, the courts did not show their opinion to the issue of selection of either side as the subject which has right to get share of property in relation to the reforms in agriculture. And this issue is the main factor in resolution of this dispute.

Along with this, it must be noted that the appeal of Sh. Agakishiyev to the court about restraining illegal actions of employees of “Tovuz-Baltiya Ltd” Company and cancellation of the decree of “Tovuz” LARC is mainly based on the proper interpretation and realization of the Article 25 of the Law of the Republic of Azerbaijan “On reforms in sovkhozes and kolkhozes”.

In this Article the ways are identified to resolve the disputes, which occur in relation to agrarian reforms. According to the meaning of the Article, in case physical and legal persons do not agree with decision of LARC must report to DARC, if they do no agree with DARC, they must report to the Azerbaijan State Agrarian Reforms Commission, and in the end they may appeal to the courts.

The analysis of the current legislation of the Republic of Azerbaijan shows that DARC is not authorized to cancel LARC’s decision all by its own initiative. For this, it is necessary required that LARC would acknowledge DARC with the complaints of the physical and legal persons, submitted in identified period, which disagree with LARC’s decision. That’s why for proper examination of such cases in the courts it is very important to check the relevant facts on availability of such appeals, were they submitted in identified period of time or not, were these complaints examined in the period of time and in the order defined by the legislation.

In accordance with the first part of the Article 25 of the Law of the Republic of Azerbaijan “On reforms in sovkhozes and kolkhozes”, in case physical or legal persons do not agree with decision of LARC they may apply with complaint to DARC in 10-days period of time. Although in the decree of Tovuz DARC as of October 15, 2001 on cancellation of the decree of “Tovuz” LARC as of September 20, 2001 it is said that one group of the citizens of the Village of Ibrahim Hajili applied with a request, and not appeal, as it is provided by the law, none requests have been attached to the case papers, nor there were any references on such a request in the adopted court acts. In such circumstances it is rather arguable to claim that such a request have been submitted in the period of time defined by the legislation, or such a request have been examined in the period of time defined by the legislation.

At the same time, it is seen from materials of the civil case that the decision of the “Tovuz” LARC on giving the disputed property in possession of Sh. Agakishiyev from the Village of Ibrahim Hajili of Tovuz District was taken on September 20, 2001. Although Tovuz DARC’s decree, canceling the mentioned-above decree, is dated by October 15, 2001, somehow this information was sent to LARC only on December 29, 2001. This fact was the reason why the chairman of LARC noted on January 04, 2002, that more three months had already passed since the day of sale of the property.

Despite of this, on the first and appellation instance courts during examination of factual circumstances the availability of the request or appeal, which had caused inspection of the LARC’s decree, who this request was submitted from and at what time, was this request examined in the period of time defined by the law, was there a relation between the content of the request and the decision taken by DARC and other issues were not clarified.

Moreover, it’s worth to take into consideration that the rules of examination of requests submitted by any person have been identified in the Law of the Republic of Azerbaijan “On reforms in sovkhozes and kolkhozes,” as well as the Law of the Republic of Azerbaijan “On the order of examination of requests of the citizen.” Although the issue of following the requirement coming out from the clauses of these laws makes only one of the reasons of this case, neither the first court, nor the appellation instance court did not perform necessary examinations in this regard.

From the point of proper interpretation of the Article 25 of the Law of the Republic of Azerbaijan “On reforms of sovkhozes and kolkhozes” it is very important for resolution of the dispute to identify the boundaries of authorities in what regards cancellation of LARC’s orders by DARC. This is why it is required to identify in the legislation in which cases and on what basis DARC is authorized to cancel the orders of LARC.

The Plenum of the Constitutional Court notes that as it is explicitly defined in the legislation, the main tasks of the commissions is to assure that implementation of the reforms goes in accordance with the legislation, and that they are responsible for acting within the boundaries of their authorities. DARC is authorized to cancel orders of LARC in those cases, when the relevant orders issued by LARC do not correspond the requirements of the legislation in implementation of the reforms.

As it is shown above, the requirements of legislation mainly refer to the object of agrarian reforms and realization of conditions related to the subjects, having rights for property share, to identification of the amount of property share, to the stock-taking and evaluation of the property of sovkhoz and kolkhozes in the way defined by legislation, to privatization (for sovkhoz property) and splitting (for kolkhoz property) such a property among the given subjects, and so on.

From the civil case papers it is seen that Tovuz DARC by its decree as of October 15, 2001 canceled “Tovuz” LARC’s order as of September 20, 2001 basing on the fact that the property was sold for a low price. In this regard it must be stressed that DARC was basing on the low price of the sold property, yet there are no norms defined in the legislation to authorize cancellation of LARC’s order.

In general, it must be taken into consideration that evaluation of the property that was on the balance of sovkhozes and kolkhozes as a specific factor serving to identification of the value of the reform objects and total amount of the share fund to be divided among the members of the enterprise together with inventory-taking makes an important condition for proper implementation of the reform.

According to the Regulations “On Local agrarian reform commissions,” the authorities for inventory-taking and re-evaluation of the property of sovkhozes and kolkhozes are given to LARC. In the Regulations on “Sharing of assets of the agricultural industrial enterprises and providing one of such shares to the property of municipalities” the rules of inventory-taking and evaluation of the property has been defined.

It must be specially noted that implementation of these tasks impinges not on any physical or legal persons, but specifically on the organs, carrying out the agrarian reform. Hence, in case there are mistakes taken in inventory-taking or evaluation of sovkhoz property, these very organs carry responsibility.

Analysis of the current legislation shows that by referring only to the low price DARC does not have right to cancel the order of LARC. At the same time, referring to violation of the legislation it is possible for DARC to cancel LARC’s order. But in such case, in condition of following the requirements of legislation, the sovkhoz property must be re-evaluated again and it must be privatized anew in a transparent way among the subjects having rights for property share. Surely, in such case the right of the person who privatized this property in the first time to participate in the new privatization process shall not be violated.

The Plenum of the Constitutional Court considers that despite of big importance in the legal resolution of all the mentioned-above cases in regard of the new sale process of the livestock barns and the adjacent land areas, belonging to “Tovuz” sovkhoz, the first court and appellation instance court did not conduct comprehensive and complete examination of the case within the framework of requirements of the current legislation and did not properly interpret and perform the Article 25 of the Law of the Republic of Azerbaijan “On reform in sovkhozes and kolkhozes.” This resulted in mismatching with the Articles 88, 386 and 387 of the National Code of Practice.

That is, according to the Article 88, after reviewing evidences in objective, comprehensive and complete way, the court must make its decision in accordance with legal norms. For the court there is no evidence which would have power, initially identified.

According to the Article 386 of the National Code of Practice, the material legal norms considered to be violated or improperly applied, when the first instance court makes mistake in interpretation of rights, does not apply the applicable law or any other normative and legal act, or interprets law wrongfully.

In the Article 387.1 of the National Code of Practice it is defined that violation of procedural legal norms or their wrong application gives grounds for cancellation of resolution only in the case when there is a reason in taking wrong resolution.

As regards the appeal of Sh. Agakishiyev, the PJOCP at the Supreme Court upheld the resolution of the appellation instance court on the civil case. However, basing on the Articles 416, 418.1 and 417.0.3 of the National Code of Practice in case the cassation instance court while inspecting proper application of material and procedural legal norms by appellation instance court discovers violation of material and procedural legal forms or their improper application, it may cancel the resolution of the appellation instance court and send the case to the appellation instance court for anew examination. The improper interpretation of the normative legal act by the courts, which should have applied it to the case, as well as non-fulfillment of the mentioned norms of the National Code of Practice brought to violation of the right of the plaintiff provided by the Article 60 of the Constitution of the Republic of Azerbaijan as well as to violation of the right for legal defense.

Thus, the Plenum of the Constitutional Court considers that in regard of the civil case upon the appeal of Sh. Agakishiyev on illegal actions of “Tovuz” LARC, the resolution of the PJOCP at the Supreme Court as of April 28, 2004 becomes invalid as it does not correspond with the requirements of the Article 60 of the Constitution, Articles 416, 417.0.3 and 418.1 of the National Code of Practice, and the case must be re-examined in the order and time defined by the civil-procedural legislation of the Republic of Azerbaijan.

Being guided by the Parts V, IX and X 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 Constitutional Court” the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize the civil case upon the appeal of Sh. Agakishiyev on illegal actions of “Tovuz” Local Agrarian Reform Commission, the resolution of the Panel of Judges on common pleas at the Supreme Court as of April 28, 2004 as null and void because of its contradiction to Article 60 of the Constitution of the Republic of Azerbaijan, and Articles 416, 417.0.3 and 418.1 of the National Code of Practice 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.