**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by S.A. Rasulova concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 7, 2004 to Constitution and legislation of the Republic of Azerbaijan*

**9 March, 2005 Baku city**

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

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

Applicant, S. Rasulova and her representative M. Aliyev

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 S. Rasulova concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 7, 2004 to Constitution and legislation of the Republic of Azerbaijan.

Although the time and venue of Constitution court hearing was advised in advance, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge I. Najafov, and information from applicant and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Factual base established by court demonstrates that Ismayil Akper Aleskerov acting on the basis of the notary approved sale and purchasing contract has sold his owned apartment to Saida Abbas Rasulova for 28 200 000 manats. On august 22, 2002 S. Rasulova has obtained the registration certificate verifying her ownership issued by the Technical Inventory and Civil Rights Registration Department of Baku City. Afterwards, I. Aleskerov has raised the claim on termination of the sale and purchasing contract and registration certificate in the court, stating that he did not sell the apartment to S. Rasulova, but together with his friend has decided to borrow from S. Rasulova the amount of 6000 dollars USA for business needs by putting the mortgage. Sale and purchasing agreement between them was just a formality, but the reality was that apartment was used as mortgage for borrowed amount.

The decision of Khojali District Court from September 15, 2003 has satisfied the claim of I. Aleskerov and rejected the counter claim of S. Rasulova. The court has decided that at the time of execution of the sale and purchasing contract the will to sale was not obvious and was directed to serve as the mortgage for borrowed money. In accordance with decision the amount of 5600 USD had to be paid by I. Aleskerov in manats at the exchange rate to S. Rasulova and the sale and purchasing contract should be terminated along with the registration certificate issued to the name of S. Rasulova.

Board on Civil Cases of the Appeal Court of the Republic of Azerbaijan in its decision of December 8, 2003 has partially canceled the decision of Khojali District Court, has rejected the claim of I. Aleskerov against S. Rasulova and others on termination of the contract and registration certificate, and has partially satisfied the counter claim. The court has made the decision on removal of I. Aleskerov and his family members from the apartment 3/18 Tebriz str., Baku city, and leaving the remaining parts of the decision unchanged.

Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan in its decision of April 7, 2004, has changed the decision of the appeal instance court, and has decided on payment of the amount of 5600 USD by I. Aleskerov in manats at the exchange rate to S. Rasulova and termination of the sale and purchasing contract along with registration certificate issued to the name of S. Rasulova. The counter claim of S. Rasulova against I. Aleskerov and his family members with demand for their removal from apartment, compensation of material and morale loss was not satisfied.

As a response to additional cassation complaint of S, Rasulova, and the acting chairman of the Supreme Court in his letter of August 10, 2004 has indicated that since the basis of the complaint not comply with Article 424 of the Civil Procedures Code, its processing by the Plenary Session of the Supreme Court is not possible.

Applicant in the complaint submitted to the Constitution Court has considered the above decision of the cassation instance as illegal and ungrounded, and requested its review for compliance with Constitution and legislation of the Republic of Azerbaijan.

In relation with complaint the Constitution Court notes the following:

Constitution of the Republic of Azerbaijan stipulates the provision of human rights and freedoms as a primary goal of the state, and has stipulated provisions for their protection by court authorities (Articles 12 and 71). Efficient protection by the state of rights and freedoms also stipulates effective legal mechanisms for fair trial, as well as provisions for correction of court mistakes.

Additional application to the court serves to the purpose of provision of rights and freedoms stipulated under the Constitution and correction of court mistakes in the first place. For this, the legislation stipulates the review by higher instance court of the compliance of court decisions with legal norms and procedures.

Procedures for review of cases in accordance with Civil Procedures Code are defined clearly. Description of Articles of this Code clearly provides the existence of two procedures that are established for review of concrete cases in the court of law. They include the review of facts on the case, as well as correct application of material and procedural norms. First and appeal instance courts are entitled to proceed on essence of the case, while cassation instance court shall review legal aspects of the case only. Since the subject of review of the cassation instance court is the valid court decision, this instance does not review the case on essence, conditions of the case are not investigated, new evidences are not accepted and no legal assessment is provided for existing evidences. Cassation shall review only the legality of decisions made by the appeal instance court, thus checking the compliance with applicable material and procedural legal norms.

Besides, Plenary Session of the Constitution Court has outlined in its decisions made under the claims of Azetelekom Production Union, A.H. Zalov, Saip Azer Machine Company, Sama-10 company and others that in accordance with established legislative procedures the cassation instance court shall be entitled to review of correct application of material and procedural provisions in the decision of the appeal instance court. In accordance with these provisions cassation instance is not entitled to review the case on essence. In the event of establishment of violation or incorrect application of material and procedural legal norms cassation instance may cancel the decision of the appeal instance court (Article 418.1 of Civil Procedures Code). In this event the cassation instance court may direct the case for revision by the appeal instance court (Article 417.0.3 of Civil Procedures Code).

Plenary session of Constitution Court notes, that review of issues on either the sale and purchase contract was executed on the basis of good will of the parties, or had other intentions and whether the intentions of parties where clearly indicated in the sale and purchasing contract shall mean the review of the case on essence, and investigation of particular conditions of the case, which shall be allowed only to court instances entitled to review the case on essence. In accordance with existing legislation authorities of cassation instance court are limited only to review of issues on either correct or incorrect application of the material and procedural norms by the appeal instance court (Article 416 of the Civil Procedures Code).

In accordance with above, Plenary Session of the Constitution Court has drawn the decision that decision of cassation instance was made in contradiction with provisions of Articles 416, 417.0.3 and 418.1 of the Civil Procedures Code, as well as Article 60 of Constitution of the Republic of Azerbaijan, violating the right of applicant for protection of rights and freedoms in fair trial.

Thus, in accordance with provisions of Constitution and international treaties of the Azerbaijan Republic (Article 10 of General statement on human rights, Article 14 of International Pact on Civil and Political Rights, Article 6 of the European Convention on Protection of Human Rights and Main Freedoms), the court protection on essence shall provide the understanding of fairness and reinstatement of violated rights.

Considering the above, Plenary Session of the Constitution Court decides that the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan dated April 7, 2004 on the claim of I. Aleskerov against S. Rasulova for termination of the sale and purchasing contract along with registration certificate issued to the name of S. Rasulova and counter claim of S. Rasulova against I. Aleskerov and his family members with demand for their removal from apartment, compensation of material and morale loss shall be considered invalid due to contradictions with Article 60 of the Constitution, Articles 416, 417.0.3 and 418.1 of Civil Procedures Code of Azerbaijan. The case shall be revised in accordance with terms and procedures stipulated under the civil procedures code.

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:**

1.The decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 7, 2004 made under the claim of I. Aleskerov against S. Rasulova for termination of the sale and purchasing contract along with registration certificate issued to the name of S. Rasulova and counter claim of S. Rasulova against I. Aleskerov and his family members with demand for their removal from apartment, compensation of material and morale loss to recognize 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 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.