**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by N.Mammadova concerning verification of conformity of judicial acts to laws and Constitution of the Republic of Azerbaijan*

**31 January, 2006 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.Ismaylov;

complainant: N.Mammadova and her representative R. Samadov,

respondent: the representative of the Supreme Court of the Republic of Azerbaijan, A.Kalbaliyev,

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 Naila Yasar qizi Mammadova concerning verification of conformity of judicial acts to laws and Constitution of the Republic of Azerbaijan.

Having heard the report of Judge E.Mammadov, applicant’s representative and respondent’s representative R.Samadov and A.Kalbaliyev in the procedure of constitutional proceeding and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

N.Mammadova and her family have been living for 7 years in a room of the flat 52 in the house 141 (hostel N1) located at ''AB'' living space, Yeni Gunashli settlement of Baku on the basis of the head’s permission because of working at the factory for 26 years, standing in line for an apartment for 23 years. By filing the claim she asked the court to cancel mutual protocol N2 of N.Mammadova with ''Baki Tikish Evi'' D E S C (hereinafter ''Baki Tikish Evi'' DESC) and its Trend Union Committee, authorization N 44 given to G.Rahmanova of October 10, 2002, and to register her and her family’s members in living room.

The claim was satisfied by the decision of Nasimi District Court of July 07, 2003.

The appeal claims of ''Baku Tikish Evi'' DESC and G. Rahmanova were satisfied by the decision of the Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan ( hereinafter JBCC of the Court of Appeal) of September 08, 2003. In accordance with this decision the decision of Nasimi District Court of July 07, 2003 was cancelled, the claim was rejected and the counter claim was satisfied. By satisfying the counter claim court decided to evict N.Mammadova and members of her family from disputed room.

The decision of JBCC of the court of Appeal of September 08, 2003 was cancelled by the decision of the Judicial Board on Civil Cases of Supreme Court of the Republic of Azerbaijan (hereinafter referred as JBCC of Supreme Court) of January 07, 2004 and the case was directed to the court of appellate instance for re-consideration on the basis of cassation claim of complainant.

The decision of Nasimi District Court of July 07, 2003 was cancelled again, the claim was rejected, the counter claim was satisfied by the decision of JBCC of the Court of Appeal of April 05, 2004.

The decision of JBCC of the Court of Appeal of April 05, 2004 was left unchanged in accordance with the decision of JBCC of Supreme Court of September 02, 2004 without satisfying of the cassation complaint of complainant. Additional cassation complaint of N.Mammadova was answered by the letter of chairman of the Supreme Court of November 24, 2004, 8m-708/2004 that there were not grounds for consideration of the complaint by the plenum of Supreme Court (the letter was delivered to complainant by post in December 30, 2004).

 Afterwards N. Mammadova submitted the complaint on the decision of JBCC of the Court of Appeal adopted in April 05, 2004 and decision of JBCC of Supreme Court adopted in September 02, 2004 to the Constitutional Court of the Republic of Azerbaijan.

As it was noted in the complaint her rights provided by the Constitution of the Republic of Azerbaijan were violated. Article 48 of the Housing Code of the Republic of Azerbaijan, articles 58 and 420 of CPC, also provisions of decree of Cabinet of Ministers of the Republic of Azerbaijan of September 14, 1999 ''On transmission of social-cultural and communal-welfare objects of privatized state institutions (unions) and cancelled ministries, state companies and concerns to balance of proper organizations on destination of local administration bodies'' were not applied in courts acts and by this reason the applicant requests Constitutional Court to cancel abovementioned acts of the Court of Appeal and the Supreme Court because of their non-compliance to the Constitution of Azerbaijan Republic and laws, with the aim of restoration of her rights.

The Presidium of Constitutional Court finds it important to mention the following.

According to Article 60.1 of the Constitution of the Republic of Azerbaijan legal protection of rights and liberties of every citizen is ensured.

This constitutional norm provides to everybody effective right to appeal to court for solving arguments.

In accordance with part VII of Article 71 of the Constitution of the Republic of Azerbaijan any arguments related to violation of rights and liberties of a human being and citizen are settled in law courts.

According to the legislation of the Republic of Azerbaijan in consideration of legal cases courts must be impartial, fair, they should provide juridical equality of parties, act based on facts and juridical arguments must be settled in the frame of determined procedural order and according to the law.

 If cases of incorrect application of law and rude infringement of procedural requires take place during administration of justice it may become a reason for adopting groundless and unlawful decisions. By other side such actions also may lead to the violation of right to a trial defense and right to a fair trial.

Court decision is adopted in court hearings after examination of legal arguments on the basis of determined factual aspects and judicial norms. If violation of complainant’s right is confirmed court should defend this right by its decision. If violation of complainant’s right is not confirmed the court should reject his claim and must defend respondent’s rights which may be infringed by groundless action or thoughts of complainant. In any case first of all the court decision must be the act defending individual rights and lawful positions of sides.

As observed from materials of the civil case N.Mammadova`s claim was satisfied by the decision of the court of first instance. JBCC of the Court of Appeal cancelled this decision, rejected the claim and satisfied the counter claim. The last decision was also cancelled by the decision of JBCC of Supreme Court of January 07, 2004 and the case was sent to a court of appellate instance for re-examination.

 As it was noted in the decision of cassation instance court the hostel (where disputed room was situated) was transferred to the balance of the service of local-self government organ but not to ''Baki Tikish Evi'' DESC prior to the decision of the Court of Appeal adopted concerning the case at hand as determined by law. By this reason N.Mammadova`s eviction from this room on the basis of counter claim of ''Baku Tikish Evi'' DESC can not be executed by the reason of absence of property right of ''Baku Tikish Ev'' DESC upon disputed room.

According to Article 418.3 of CPC of the Republic of Azerbaijan JBCC of Supreme Court cancelled the decision of the court of appellate instance because it considered the fact that Housing Office N 135 (hereinafter HO N135) of Special Purpose Housing Union was not taken to legal proceeding by the court of appellate instance and its position was not determined as a procedural law violation.

According to conclusion of court of cassation instance, HO N 135 should be taken to legal proceeding as a remedial assignment and its claim against N.Mammadova about her eviction from living floor should be examined in accordance with articles 58.1 and 58.2 of CPC during re-consideration; the problem of disputed room should be solved depending on result on the basis of legislation.

 But JBCC of the Court of Appeal cancelled first instance court decision during new examination of the case and satisfied ''Baki Tikish Evi'' DESC and G. Rahmanov’s counter claim without realization of directions of court of cassation instance. JBCC of Supreme Court left the decision of JBCC of the Court of Appeal unchanged without broaching realization of prior directions.

 The Presidium of Constitutional Court notes in particularly that requires of any claim including requires of counter claims may be satisfied in the case of filing them only by owner of right (by its authorized representative) and in case of infringement of this right by responsible side. That’s why requirement about eviction of complainant N.Mammadova and her family from room may be filed by persons having right to ownership (property right) on disputed room.

According to Article 153.1 of Civil Code of the Republic of Azerbaijan (hereinafter referred as – CC) legal entities, natural persons, municipalities and the state of the Republic of Azerbaijan may have rights of ownership to movable and immovable property. In accordance with 153.3 special features of acquisition or termination of ownership rights to property, possession, use and disposal depending upon the fact whether the property is under the ownership of legal entity or natural person, under the ownership of the Republic of Azerbaijan or communities may be established only by the law.

''Baki Tikish Evi'' OJSC founded during privatization (creation of stock company) of state enterprises may obtain appropriate rights including ownership right (property right) as any other juridical person in order foreseen by legislation.

The legislation of the Republic of Azerbaijan does not exclude possibility of transmission of social-cultural and communal-welfare objects (hostels, welfare centers, nursery schools, sports buildings, tailor’s shop, boiler-houses and ex.) of privatized state institutions (unions), cancelled state companies and concerns to local administration bodies and to balance of proper organizations on destination. But this is possible on the basis of decision of authorized state body only.

There are not references to documents confirming right of ''Baki Tikish Evi'' DESC to ownership, possession, use and disposal of house located at 141/AB, Yeni Gunashli settlement of Baku in decisions adopted by common courts.

Thus, as obvious from decree of Cabinet of Ministers of the Republic of Azerbaijan N 149 of September 14, 1999, ''On transmission of social-cultural and communal-welfare directed objects of privatizing state institutions (unions) and cancelled ministries, state companies and concerns to balance of proper organizations on destination of local administration bodies'', The Head of the executive power of Baku city order N 266 of March 23, 1999, letter of Department of Administration of State Property of Ministry of Economical Development of the Republic of Azerbaijan of June 20, 2003, order N 81 of Department of Residential Facilities of Secretariat of The Head of the executive power of Baku city of July 09, 2003, adding to materials of civil case, the house ( hostel N1) was transferred to the balance and service of DESC N135.

It is impossible to come to conclusion about legality of authorization given to G. Rahmanova on the basis of mutual decision of the head of ''Baki Tikish Evi'' DESC and Trade Union Committee and legality of staying of N. Mammadova in this room without determination of rights to ownership, possession, use and disposal of ''Baki Tikish Evi'' OJSC upon the house (hostel N1) by common courts. Also it’s impossible to advance definitive opinion about violation or non-violation of any lawful rights of the sides.

 With this regard it should be taken into consideration that according to requires of Article 77 and 88 of CPC each party shall prove circumstances used as grounds for its claims and objections and court shall evaluate evidence in a fair, impartial, all-complete and full manner and shall thereafter evaluate norms of law to apply to such evidence.

Furthermore, it should be noted that in accordance with Article 218.3 of the CPC judge shall issue a decision in accordance with claims made by persons participating in case.

During rejection of the claim, basing on the absence of legal grounds, the court of appellate instance did not give judicial appreciation to some evidences laid down for its substantiation (an apartment was given by the head on the basis of her employment in sewing factory for a long time; she used the apartment for seven years without someone’s objections; the apartment was not empty on the moment of giving of authorization to G.Rahmanova; in accordance with Article 48.2 of the Housing Code authorization may be given only to individual floor space).

 According to requires of Article 420 of CPC directives indicated in decision of court of cassation instance shall be obligatory for court re-hearing the case.

Infringing requirements of Article 420 of the CPC, JBCC of the Court of Appeal did not fulfill directives indicated in decision of JBCC of Supreme Court of January 07, 2004 properly. The court of appellate instance did not bring HO N 135 to trial in the capacity ordered by decision of cassation court and did not determine existence of its independent demands.

 According to civil procedural legislation, court of cassation instance shall verify exact application of material and procedural norms of law by court of appellate instance (Article 416 of CPC); and it cancels and sends the case to court of appellate instance for new examination in case of violation or incorrect application of material and procedural norms of law (articles 418.1, 418.3 and 417.0.3 of CPC).

 By the decision of September 2, 2004, JBCC of Supreme Court left the decision of the Court of Appeal of April 05, 2004 adopted with forenamed procedural violations, not substantiating with real circumstances and interrelations of the sides, moreover, adopted without taking into consideration directives of court of cassation instance unchanged, what is contradictory to articles 418.1, 418.3 and 417.0.3 of CPC.

 All this circumstances violate the right of N.Mammadova to court defense provided by article 60.1 of the Constitution of the Republic of Azerbaijan.

Thus, the Presidium of the Supreme Court decides that the decision of JBCC of the Supreme Court of September 02, 2004 concerning cancellation of mutual protocol N2 of N.Mammadova with ''Baki Tikish Evi'' DESC and its Trend Union Committee, authorization N 44 given to G.Rahmanova of October 10, 2002, and claim about passport registration of G.Rahmanova and her family’s member to living room should be considered as null and void because it contradicts Article 60.1 of Constitution of the Republic of Azerbaijan, Articles 416, 417.0.3, 418.1, 41.3 of CPC of the Republic of Azerbaijan and the cases should be re-considered according to the civil procedural legislature 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:**

1. The decision of JBCC of the Supreme Court of September 02, 2004 concerning cancellation of mutual protocol N2 of N.Mammadova with ''Baki Tikish Evi'' DESC and its Trend Union Committee, authorization N 44 given to G.Rahmanova of October 10, 2002, and claim about passport registration of G.Rahmanova and her family’s member to living room should be considered as null and void because it contradicts to Article 60.1 of Constitution of the Republic of Azerbaijan, Articles 416, 417.0.3, 418.1, 41.3 of CPC of the Republic of Azerbaijan. The cases should be re-considered according to this decision on the ground of the civil procedural legislature 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 of officially interpreted by any body of official.