**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 3 June 2005 to the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of I.K.Rajabov*

**22 March, 2006 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), Judges F.Babayev, S.Hasanova, B.Garibov, R.Qvaladze (Reporter Judge), I.Najafov and S. Salmanova,

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

with participation of A.Garibov - representative of the complainant I.Rajabov;

according to Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open court session on constitutional proceedings the complaint of I.Rajabov concerning verification of conformity of decision of the Judicial Board on Civil Cases (JBCC) of the Supreme Court of the Republic of Azerbaijan of 3 June 2005 to the Constitution and laws of the Republic of Azerbaijan.

The constitutional case was examined in the absence of the respondent party.

Having heard the report of Judge R.Gvaladze, statement of A.Garibov – representative of the complainant I.Rajabov and studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Imran Rajabov brought a suit concerning eviction of the respondent Z.Farhadov and others from his apartment. From his part, Z.Farhadov brought a counter-claim on recognition of the agreement on purchase and sale of the disputed apartment as valid and right of property to this apartment.

By its decision of 5 April 2004 the Nasimi district court of Baku city satisfied I.Rajabov’s suit and declined Z.Farhadov’s counter-claim.

By its decision of 24 June 2004 the JBCC of the Court of Appeal left decision of Nasimi district court without any changes.

The JBCC of the Supreme Court by its decision of 6 October 2004 reversed the above-mentioned decision of the Court of Appeal and sent it to the Court of Appeal for re-examination.

By decision of the JBCC of the Court of Appeal of 28 December 2004 decision of Nasimi district court of 5 April 2004 was reversed, Rajabov’s suit was declined and Z.Farhadov’s counter-claim was satisfied. On 3 June 2005 the JBCC of the Supreme Court left this decision without any changes. The additional cassation complaint of the applicant was not satisfied and by the letter of the Chairman of the Supreme Court of 28 June 2005 No 8m-443/05, I.Rajabov was informed about absence of founds for bringing the case before the Plenum of the Supreme Court.

In its complaint to the Constitutional Court, I.Rajabov points out that being the owner of the disputed apartment he did not give to anyone powers to sell it as well as that by its decision the court of cassation instance violated his rights provided for by Articles 13, 29, 60, 71.2, 127.2 and 127.4 of the Constitution of Azerbaijan, having illegally left without any changes decision of the Court of Appeal which contradicts to Articles 14, 152.1, 152.4, 324.1, 329.2, 332.1, 3591 and 362.2 of the Civil Code (CC).

In connection with I.Rajabov’s complaint Plenum of the Constitutional Court notes the following:

As it is seen from the circumstances of the case which were established by courts, I.Rajabov having brought a suit against R.Jafarova, Z.Farhadov and Z.Aleskerova asked to evict them from the mentioned apartment, emphasizing that the disputed apartment had been his private property and that R.Jafarova and members of her family lived in it as tenants by approbation of the previous owner and refused to leave the apartment regardless of his repeated appeals.

In his counter-claim Z.Farhadov asked to recognize the agreement on purchase and sale of the disputed apartment between him and I.Rajabov as valid, emphasizing purchase of the disputed apartment from I.Rajabov’s parents in 2001 for the amount of 6000 USD, emphasizing I.Rajabov’s refusal to legalize the agreement on purchase and sale regardless of his repeated appeals as well as holding major repairs of the purchased apartment and living therein with members of his family since 2001.

Having satisfied primary and declined counter claim court of first instance and Court of Appeal, which kept this decision in force, motivated adoption of their acts by the fact that respondent Z.Farhadov and others illegally lived in the disputed apartment and I.Rajabov has the right to demand his property from the other’s illegal use on the basis of Article 157.2 of the Civil Code (CC). Another motivation was the fact that respondents could not submit to court any strong proves for recognition of the agreement on purchase and sale of the disputed apartment as valid.

The JBCC of the Supreme Court examining the case through the procedure of cassation on the basis of Z.Farhadov’s complaint came to conclusion that as to the counter claim of Z.Farhadov the rights and duties of the parties were not defined in accordance to the rules prescribed by Article 336.2 of the CC and demands and objection of the parties were not properly grounded within adopted decisions. In this connection decision of the Court of Appeal of 24 July 2004 was canceled by the decision of the court of cassation of 6 December 2004 and the case was referred to the same court for appellate re-examination.

As it was mentioned, Court of Appeal re-examining the case canceled by its decision of 28 December 2004 decision of Nasimi district court having rejected primary claim and satisfied counter claim.

Court of Appeal taking into account evidences of Z.Farhadov, witnesses I.Hajiyev, L.Sarvanova, G.Alekperov and act of 1 May 2004 enclosed to the materials of the case came to conclusion that plaintiff having received in 2001 the amount of 6000 USD for the disputed apartment in fact handed it to the respondent, then declined to legalize the act notarially. In this case the judicial board taking into account Article 336.2 of the CC recognized agreement on purchase and sale of the apartment as valid.

The JBCC of the Supreme Court having agreed with the arguments of the Court of Appeal by its decision of 3 June 2005 left decision of the Court of Appeal without any changes.

Plenum of the Constitutional Court considers that decision of the cassation court of 6 October 2004 and court acts adopted afterwards this decision contradict to the Constitution of Azerbaijan as well as to material and procedural norms of the legislation.

First of all it should be noted that the court of cassation having infringed requirements of Article 416 of the Civil Procedure Code (CPC) exceeded the limits of its powers having considered factual circumstances of the case, evaluated these circumstances and referred to them as well as to Article 336.2 of the CC canceled decision of the Court of Appeal and referred to it for re-examination.

Re-examining the case Court of Appeal adopted decision grounding only on proves of the court of cassation.

All adopted court acts determined that the apartment had belonged to I. Rajabov as private property since 2001.

According to Article 13.1 of the Constitution of Azerbaijan “Property in Azerbaijan Republic is inviolable and protected by state”. Article 29.1 of the Constitution states that “Everyone has the right to own property.” On the basis of para 4 of the same Article “No one shall be deprived of his/her property without decision of a court”.

Article 152.1 of the CC provides that “Ownership rights means acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at their discretion“

The legislator revealing essence of the right to possess, use and dispose in Article 152.4 of the CC noted that “Right to dispose means the legally protected possibility of determining the legal fate of the property (chattel)”.

Thus, according to requirements of the civil legislation, legal fate of property (chattel) can be defined only by its owner (except for cases provided for by legislation).

In appealed decision according to evidences of respondent Z.Farhadov, court of cassation indicated that in 2001 he paid the amount of 6000 USD to parents of I.Rajabov for the disputed apartment and the legalization of the agreement on purchase and sale of the apartment was postponed by mutual consent until I.Rajabov comes back from Russia.

Thus, according to evidences of Z.Farhadov accepted as a kind of prove, the apartment was not purchased from its owner I.Rajabov but from his parents.

The civil legislation does not exclude conclusion of act with participation of attorney. However, the legislator provided for certain rules for this.

According to Article 359.1 of the CC “Agreement may also be concluded through attorney. Agreement concluded by one person (attorney) on behalf of another person (represented) in accordance with authority based on power of attorney, law or act of authorized to it state or municipal body, shall directly create, change and terminate civil rights and obligations for represented”.

Definition of the document, which reflects rights of attorney, is indicated in Article 362.1 of the CC. On the basis of this norm the power of attorney is “a written authority given by one person to another for the purpose of representation before third persons”. Article 362.2 states that “Power of attorney in respect of agreements requiring notarization shall be notarized”.

According to Article 647.1 of the Civil Code, which was in effect during examination of the case, the agreement on purchase and sale of real estate is considered valid if it is approved by the notary. The notarization of power of attorney is necessary at conclusion of the agreement with attorney.

Repeatedly examining the case court of appeal instance did not apply abovementioned norms and as a result the important issue if parents were empowered by the owner I.Rajabov to sell the apartment remained undecided.

Repeatedly examining the case court of appeal instance the same way as cassation instance in its decisions refers to Article 335.2 of Civil Code (in civil decisions mistakenly indicated Article 336.2). In this connection Plenum of the Constitutional Court considers necessary to make clear some provisions of abovementioned article and civil legislation, which was in effect during examination of cases on deals.

According to requirements of Article 335.2 of Civil Code “in the event one of the parties has fully or partially performed agreement requiring notarization, and where the other party evades notarization of agreement, court shall have the right to consider agreement valid upon demand of the party performing agreement”.

According to the mentioned article, court can recognize the deal as valid upon request of the party, which made it, in case of presence of the following options:

 - nonobservance of notarial legalization of agreement because of other party’s fault;

 - deviation from notarial legalization of agreement namely by other party;

 - the deal itself shall not be in conflict with law and shall correspond to the written procedure of its conclusion.

The last option has special importance for deal, which validity brought by legislation to dependence of its direct written conclusion.

Such deals cover agreement on purchase and sale of immovable property as well.

Thus, according to Article 647.1 of the Civil Code “the agreement on purchase and sale of real estate is considered valid if it is made in writing and approved by notary”.

As evident from the abovementioned norm the agreement on purchase and sale of immovable property is recognized as valid only in case of presence of two compulsory options:

conclusion in written form;

notarial legalization

Non-compliance of these conditions prejudices the validity of agreement on purchase and sale of immovable property.

Thus, in regard to agreement on purchase and sale of immovable property, the law explicitly determines that non-observance of written form of conclusion of such agreements results in its invalidity. As it was mentioned before, according to Article 335.2 of Civil Code the existence of written form of conclusion of agreement is one of the necessary requirements for the court to recognize agreement as valid.

Plenum of Constitutional Court considers that the court of appeal instance which re-examined the case and the court of cassation which left this decision without any changes having not applied the relevant norms and incorrectly interpreted the normative-legal acts, violated I.Rajabov’s rights provided for by the Constitution and laws of the Republic of Azerbaijan.

On the basis of the stated, the Plenum of Constitutional Court founds that decision of the JBCC of the Supreme Court of the Republic of Azerbaijan of 6 October, 2004 on I.Rajabov’s claim contradicts to requirements of Article 416 of the Civil Procedure Code and decision of the JBCC of the Court of Appeal of 28 December, 2004 contradicts to Articles 359.1 and 362.2 of the Civil Code as well as Articles 335.2, 360.2 and 647.1 of the Civil Code which were in effect during that time. As a result, rights of I.Rajabov provided for by Articles 13, 29 and 60 of the Constitution of the Republic of Azerbaijan were violated.

By its decision of 3 June, 2005 the court of cassation instance leaving the adopted decision without any changes, infringed requirements of Articles 416 and 418 of the Civil Procedure Code and did not consider infringements of requirements of procedure legislation and non application of appropriate material norms by the appeal instance.

According to Article 60.1 of the Constitution of the Republic of Azerbaijan “legal protection of rights and liberties of every citizen is ensured”. According to the mentioned provision of the Constitution, right to legal protection cannot be restricted by any scope and concerns to all court instances.

According to legal positions formed by the Constitutional Court right to judicial protection must respond to principle of justice and the restoration of rights must be provided for by all court instances.

From this point of view, the appealed by I.Rajabov decision of the court of cassation contradicts to the requirements of Article 60 of the Constitution.

Taking into account the above mentioned, Plenum of the Constitutional Court comes to conclusion that decision of the JBCC of the Supreme Court of 3 June 2005 on complaint of I.Rajabov against Z.Farhadov and others concerning eviction from apartment must lose its force as non conforming to Article 60 of the Constitution and Articles 416 and 418.1 of the Civil Procedure Code of Azerbaijan. The case must be re-examined on the basis of the present decision and via procedure and terms provided for by civil procedure legislation of the Republic of Azerbaijan.

Being guided by Articles 130.5 and 130.9 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the Law “On Constitutional Court”, Plenum of the Constitutional Court:

**DECIDED:**

1. To recognize as null and void decision of the JBCC of 3 June 2005 on complaint of I.Rajabov against Z.Farhadov and others concerning eviction from apartment, in connection with its non conformity to Article 60 of the Constitution and Articles 416 and 418.1 of the Civil Procedure Code of the Republic of Azerbaijan. The case must be re-examined on the basis of the present decision and via procedure and terms provided for by civil procedure legislation of Azerbaijan.
2. The decision comes into force from the date of its publication.
3. The decision must be published in “Azerbaijan”, “Respublika”, “Halg gazeti”, “Bakinskiy rabochiy” newspapers and Newsletter of the Constitutional Court of the Republic of Azerbaijan.
4. The decision is final and cannot be canceled, changed or interpreted by any body or official.