**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of the complaint by F.M.Aliyeva concerning conformity of the decision*

*of the Civil Collegium of the Supreme Court of 29 April 2005*

*to the Constitution and laws of the Republic of Azerbaijan*

**7 April, 2006 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan in attendance of:

Judges F.Abdullayev (President Judge), F.Babayev (Reporting Judge), B.Qaribov, R.Qvaladze, E.Mammadov, I.Najafov, S.Salmanova and A.Sultanov and Court Secretary I.Ismayilov,

in presence of the complainant and her representatives R.Quliyev and R.Chukanov

based on a complaint lodged by Fatmakhanim Aliyeva,

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of the decision of the Civil Collegium of the Supreme Court of the Republic of Azerbaijan of 29 April 2005 to the Constitution and laws of the Republic of Azerbaijan. The respondent party did not attend court deliberations.

Having heard a report of Judge Babayev and statements from Fatmaxanim Aliyeva and her representative R.Chukanov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Fatmaxanim Aliyeva brought a suit to the Baku City Khatai District Court against Ispandiyar Hasanov, with whom she made a deal (the purchase agreement) on 25 September 2001 to buy the latter’s property, namely an apartment located at 21 Nikishin Street #1, Baku, for AZM 42,500,000. Aliyeva claimed that despite the purchase being legal and her further obtaining a legal title (registration certificate) to the said real estate, Hasanov refused to vacate the premises under various pretexts.

On 25 July 2003 the Khatai District Court sustained the claim by Aliyeva and ordered to evict Hasanov from the premises.

On 25 December 2003 the Civil Collegium of the Court of Appeals of the Republic of Azerbaijan upheld the above judgment of the Khatai District Court, and on 10 March 2004 the Civil Collegium of the Supreme Court of the Republic of Azerbaijan upheld the said judgment of the appellate court.

On 10 September 2004 Hasanov filed an additional cassation claim to bring the case before the Plenum of the Supreme Court. The claim was granted. On 30 September 2004 the Plenum of the Supreme Court ruled to:

reverse the above decision of the Civil Collegium of the Supreme Court;

reverse the above judgement of the Civil Collegium of the Court of Appeals; and

forward the case for a retrial to the Court of Appeals.

On 30 December 2004 the Civil Collegium of the Court of Appeals ruled to:

reverse the judgement of the Khatai District Court of 25 July 2003;

dismiss the claim of Aliyeva to evict Hasanov from the premises; and

sustain a counter-claim by Hasanov.

On 29 April 2005 the Civil Collegium of the Supreme Court ruled to uphold the last judgement of the Civil Collegium of the Court of Appeals.

An additional cassation claim by the complainant about bringing the case before the Plenum of the Supreme Court was dismissed for the lack of merits by the letter of the Chairperson of the Supreme Court of 7 August 2005.

In her complaint lodged with the Constitutional Court, Fatmakhanim Aliyeva alleges that the judgement of the Civil Collegium of the Court of Appeals of 30 September 2004 and the decision of the Civil Collegium of the Supreme Court of 29 April 2005 are unlawful and unsubstantiated, arguing that the said court acts disregarded Articles 144.1, 146, 152.1, 152.5, 324.5, 334, 647, 739-742 of the Civil Code of the Republic of Azerbaijan and Articles 386, 418.1, 418.2, 424 and 426.1 of the Code of Civil Procedure of the Republic of Azerbaijan and therefore violated rights protected by Articles 13, 25 and 29 and requirements stated in Article 127 Section II of the Constitution of the Republic of Azerbaijan.

The Plenum of the Constitutional Court has noted the following in relation to the complaint of Fatmakhanim Aliyeva.

The Constitution of the Republic of Azerbaijan deems property guarantees one of the primary goals of the state and affords effective protection to property rights. Property, including private property, is inviolable and protected by the Republic of Azerbaijan. Everyone has a right to possess property. Property rights consist of the right to own, the right to use and the right to dispose of property individually or collectively (Articles 13 and 29 of the Constitution of the Republic of Azerbaijan).

Article 127 of Section II of the Constitution requires judges to try cases fairly, impartially, based on facts and the law and to ensure legal equality of parties at the trial.

Espousing and further developing the mentioned legal norms, the Civil Code of the Republic of Azerbaijan (henceforth “CC”) and the Code of Civil Procedure of the Republic of Azerbaijan (henceforth “CCP”) define legal mechanisms of recognition and protection of property and main principles and conditions of administration of justice.

According to CC Article 6, inviolability of property is a fundamental principle of civil law. CC Article 153.3 establishes that matters of ownership, use, disposal and termination of property, whether private (in possession of a physical or legal person), municipal or public, shall only be decided by the law.

Civil acts and deals, including purchase agreements, are a primary means of acquiring property rights over any property, including real estate. The right to own and use real estate becomes effective from the moment of certification of a real estate deal by notary public, and the right to dispose – from the moment of registration of the property in the State Real Estate Registry (CC Article 146).

General provisions of the Civil Code establish that a seller must transfer an object sold under a purchase agreement to a buyer. If not otherwise stated in the purchase agreement or implied from the nature of the obligation, the buyer must pay for the object sold and purchased immediately prior or upon the transfer. Also, the purchase agreement related to real estate is effective only if executed in writing and certified by notary public. Full property rights are transferred to the buyer upon registration of the transfer in the State Real Estate Registry (CC Articles 178.1, 568.1, 598.1, and Article 647.1 and .2 effective at the time).

Under the agreement between Aliyeva and Hasanov, the latter sold to the former his two-room apartment with a living space of 31.5 m2 located at 21 Nikishin Street #1, Baku. The agreement nominates the said individuals as parties to the agreement and confers upon them rights and obligations of, respectively, the buyer and the seller of the property.

Guided by CC Articles 152.1 and 157.2 and Article 647.1 and .2 which were in force at the time of the transaction, the first-instance, appellate and cassation courts during their respective first examinations of this civil dispute passed decisions to sustain the relevant claim by Aliyeva.

The Plenum of the Constitutional Court notes that during the retrial the appellate and cassation courts, when making respective decisions to dismiss the claim by Aliyeva and grant the counter-claim by Hasanov, did not refer to provisions of the Civil Code concerning acquisition and termination of property rights and sale and purchase of real estate, but only to CC Article 340 on invalidation of false and concocted deals and Clause 45 of the Guidelines of the Ministry of Justice of the Republic of Azerbaijan on Actions of Public Notaries. But these can not be taken as grounds for legal resolution of the dispute. At the same time, while referring to CC Article 340.2, the respective courts did not investigate evidence or provide legal assessment of a charge that the disputed deal was really executed to cover up another deal.

CCP Article 420 requires that examination of suppositions of the cassation court cited in substantiation of its decision is obligatory upon lower-instance courts retrying the case. Contrary to this provision, the appellate court did not even attempt to follow suppositions enumerated in the decision of the Plenum of the Supreme Court during the retrial of the case and instead applied provisions of Article 340.2 without due substantiation. Therefore, in contravention of CCP Article 88, the court failed to examine evidence fairly, impartially and comprehensively and assess legal norms to be applied to evidence thus tested, which constitutes a violation of Article 127 Section II of the Constitution of the Republic of Azerbaijan.

Resultantly, on 30 December 2004 the appellate court reversed the judgement of the Khatai District Court of 25 July 2003 and sustained the counter-claim by Hasanov to annul the purchase agreement for the disputed apartment executed on 25 September 2001 at the Baku City State Notary Public No. 5 and the registration certificate (title deed) for the same issued to Aliyeva on 12 April 2002.

A decision of the Civil Collegium of the Supreme Court, which examined the case under the cassation procedure, was an identical and abridged version of the decision of the Plenum of the Supreme Court of 29 April 2005 and the judgement of the Civil Collegium of the Court of Appeals of 30 December 2004. It did not base its decision on relevant provisions of substantial and procedural law, nor did it engage and interview the respondent and other interested parties or show initiative in investigating and legally assessing other evidence indicated in the decision of the Plenum of the Supreme Court.

CCP Article 416 requires the cassation court to verify that an appellate court has correctly applied relevant provisions of substantive and procedural law. Also, according to CCP Article 417.0.3, the cassation court can reverse judgements and procedural decisions of an appellate court in their entirety or in part and forward the case for a retrial to appellate court. Breach or wrong application of substantive and procedural law provisions by an appellate court constitutes the grounds for revocation of its judgements and procedural decisions by the cassation court (CCP Article 418.1).

However, in this case the cassation court breached the above provisions of the Code of Civil Procedure by upholding the judgement of the Civil Collegium of the Court of Appeals regardless of the fact that the said judgement was passed without regard to suppositions indicated in the decision of the Plenum of the Supreme Court in contravention of CCP Article 420. This, in turn, led to violation of the constitutional right of Fatmakhanim Aliyeva to legal protection of rights and freedoms (Article 60 of the Constitution of the Republic of Azerbaijan). In line with the Constitution and international legal norms (Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Pact of Civil and political Rights, Article 6 of the European Convention on Protection of Human Rights and Basic Freedoms), judiciary protection of rights and freedoms should correspond to principles of justice and legality and guarantee effective reinstatement of rights.

In consideration of the above, the Plenum of the Constitutional Court has come to the conclusion that because the decision of the Civil Collegium of the Supreme Court of 29 April March 2005 in the civil action of Fatmakhanim Aliyeva against Ispandiyar Hasanov contravenes Articles 60 and 127 Section II of the Constitution of the Republic of Azerbaijan and CCP Articles 416, 417.0.3 and 418.1, the said decision shall be deemed forfeited. Therefore, the case shall be tried again in the manner and at times prescribed by the civil procedure of the Republic of Azerbaijan.

Guided by Article 130 Sections V and IX of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. As the decision of the Civil Collegium of the Supreme Court of 29 April 2005 contravenes Articles 60 and 127 Section II of the Constitution of the Republic of Azerbaijan and CCP Articles 416, 417.0.3 and 418.1, the said decision in the civil case concerning a suit by Fatmakhanim Aliyeva against Ispandiyar Hasanov to evict the latter from the premises occupied by him, shall be deemed forfeited. In accordance with this Decision, the case shall be tried again in the manner and at times prescribed by the civil procedure of the Republic of Azerbaijan.
2. The Decision shall become effective immediately after it is announced.
3. The Decision shall be published in the newspapers Azerbaycan, Respublika, Xalq Qazeti and Bakinskiy Rabochiy and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
4. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.