**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 28 December 2004 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of S.Aliyeva*

**31 May 2006 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, F.Babayev, S.Hasanova, B.Garibov, R.Qvaladze, E.Mammadov, I.Nadjafov, and A.Sultanov (reporter judge),

with participation of the secretary I.Ismayilov,

applicant S. Aliyeva and her representative K. Aliyev

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on complaint of Salatin Aliyeva concerning verification of conformity of decision of the Judicial Board on Civil Cases (hereinafter referred to as the JBCC) of the Supreme Court of the Republic of Azerbaijan of 28 December 2004 with Constitution and laws of the Republic of Azerbaijan

Constitutional case was considered without participation of respondent party.

Having heard the report of Judge A.Sultanov, speech of the applicant and her representative, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

From the facts of the case established by courts it is evident that two rooms (hereinafter referred to as the disputable property) from three making 3/24 part of a house No. 41 (hereinafter referred to as the apartment) on the M.Senani street, Baku city, became a subject of dispute. This apartment since 1956 was in the name of V. Bagdasarova, and on April 14, 1972 it was bought by I. Bagiryan, and on May 24, 1989 it was sold to G. Aliyeva, and the latter on May 24, 1995 sold it to T. Aliyev. According to the contract on purchase and sale dated December 15, 2000, the claimant bought this apartment from T. Aliyev and on January 26, 2001, the Baku city Department of technical inventory and registration of a property right issued to him the registration certificate.

On December 22, 2003 B. Iskenderov, having appealed to court with the statement of claim, specified that in 1969 he bought two rooms from three which are in S. Aliyeva's property from I. Bagiryan and, having registered, lived in this apartment with the family, however did not registered the purchase and sale contract, that his son E.Iskenderov remains registered there, asked about recognition of the contract of purchase and sale with I. Bagiryan of concerning the disputable property, cancellation of the registration certificate given to S. Aliyeva and issue, according to a share, the new registration certificate.

On February 5, 2004, B. Iskenderov's claim satisfied by the decision of Narimanov district court.

The court of the first instance proved the decision that B. Iskenderov bought disputable property from I. Bagiryan in 1969, though he was not the owner, continuously and honestly carried out for more than 30 years all duties following from the property right and though several times at a purchase sale other room of the apartment was provided in contracts as one room because the contract of purchase and sale between I. Bagiryan and the claimant was not registered, the apartment in full, including the disputable property used by the last, was registered for several persons, and at last, for S. Aliyeva.

By its decision the Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Court of Appeal) of April 21, 2004 uphold the judgment of the first instance and is not satisfied the appeal complaint of S. Aliyeva.

By the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Supreme Court) as of July 14, 2004 the appeal of S. Aliyeva was satisfied, the judgment of appeal instance was cancelled and case was sent for appeal reconsideration.

By the decision of JBCC of the Court of Appeal as of September 30, 2004 the judgment of the first instance, while by the decision of JBCC of the Supreme Court as of December 28, 2004 the judgment of appeal instance were upheld.

In the letter of the Chairman of the Supreme Court as of May 4, 2005 to S. Aliyeva the lack of reasons for consideration of additional appeal at the Supreme Court’s Plenum was indicated.

It is specified in the claimant’s complaint to the Constitutional Court that during consideration of the case by courts the Articles 149.1 and 178.6 of the Civil Code of the Republic Azerbaijan were applied, which do not have relation to the subject of application (hereinafter referred to as the acting Civil Code), while the Articles 76, 130, 416, 417, 418.1 and 418.3 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) were applied incorrectly, and the admission of limitation term was not taken into account. Its rights affirmed in the Articles 29, 60, 71 and 127 of the Constitution of the Azerbaijan Republic were as a result violated (hereinafter referred to as the Constitution). The claimant asks to recognize as null and void the decision of JBCC of the Supreme Court as of December 28, 2004 in connection with its discrepancy with the Constitution and laws, and restoration of the violated rights.

T. Aliyev who sold the disputed apartment to S. Aliyeva appealed to the Constitutional Court with the notarized statement and specified: that the apartment consists of three rooms, that since 1995 until the end of 2000 he lived there together with family, and later he sold this three-rooms apartment to S. Aliyeva.

Plenum of the Constitutional Court in connection with the complaint considers necessary to note the following.

Legal protection of rights and liberties of every citizen is ensured. To observe and to protect the human and civil rights and freedoms established by the Constitution is the duty of legislative, executive and judicial bodies. In consideration of legal cases judges must be impartial, fair, they should provide juridical equality of parties, act based on facts and according to the law (Article 60.1, Article 71.1 and Article 127.2 of the Constitution).

Tasks of court proceeding in respect of civil cases and economic disputes are consist of endorsement of rights and privileges of any physical person and legal entity rising out of the Constitution of the Republic of Azerbaijan, laws and other normative legal acts of the Azerbaijan Republic. Civil proceeding is conduce to strengthening legality and public order, education of persons in spirit of strict respect to laws (Articles 2.1 and 2.2 of the CPC).

Circumstances of a case, which in accordance with law or other legal normative acts should be proved by certain means of proof, shall not be proved by any other means. Court should evaluate evidence in a fair, impartial, all-complete and full manner and thereafter evaluate norms of law to apply to such evidence. No evidence have a preliminarily established force for court. Decision of court should be legal and motivated. The decision has to be adopted according to the material and procedural legal norms existing during consideration of resolution of case (Articles 81, 88, 217.1 and 218.1 of the CPC).

Proceeding from the specified provisions of the civil procedural legislation, the court, having specified the facts of the case and proofs forming the conclusion, arguments on which was based for a rejection of any proofs, and laws by which was guided established in the decision has to prove it from the legal point of view.

The court of the first instance which considered the case instead of according to the norms of the Constitution and civil procedural legislation, objectively, comprehensively investigate the available proofs, to prove the arguments investigated in the decision, limited itself only by citation of some proofs and referring to the Article 43 of the Civil Code of the Republic of Azerbaijan existing till September 1, 2000 (hereinafter referred to as the previous Civil Code), and to the Articles 178.6, 335.2 and 567 of the acting Civil Code, came to conclusion concerning validity of the claim of B. Iskenderov.

Plenum of the Constitutional Court considers necessary to clear up some issues connected with the norms applied in the judgment.

According to Article 7.1 of the acting Civil Code reading about action of civil legislation in time, acts of civil legislation have no retroactive force and are applied to the relations which arose after their introduction to action except the cases provided by part VII of the Article 149 of the Constitution of the Republic of Azerbaijan. On the other hand, according to Article 7.2 of this Code, acts of the civil legislation can have retroactive force when it is directly provided by the law.

Plenum of the Constitutional Court according to a legal position in the decision “On interpretation of Article 179 of the Civil Code of the Republic of Azerbaijan” as of January 28, 2002 once again notes that from the point of view of fair ensuring and protection of rights and interests of participants of civil turnover, including the preservation of integrity and continuity of previously arisen and continuing legal relationships the force of norms of substantive law shall be applied with respect to relationships, which arose after adoption of this norm.

From the analysis of part VII of the Article 149 of the Constitution, of the Law of the Azerbaijan Republic “On adoption and coming into force of the Civil Code of the Republic of Azerbaijan and the issues of legal regulation connected with it” and the acting Civil Code it is evident that action of provisions of Articles 178.6, 335.2 and 567 of this Code does not belong to terms till September 1, 2000.

The court of the first instance made a mistake, having applied the above articles of the acting Civil Code that are not the subject of application.

At the same time, though the court of the first instance also established absence of any written proof concerning purchase of disputable property by B. Iskenderov, in the adopted decision, referring to the Article 43 of the previous Civil Code came to such conclusion that B. Iskenderov executed the transaction, however because of certain reasons this transaction was not notarized.

According to requirements of the specified article if one of parties in whole or in part executed the transaction demanding notarized certificate, and other party evades notarization of transaction, court has right on request of the party which executed the transaction to recognize the transaction as executed under a condition if this transaction in not illegal.

Plenum of the Constitutional Court in the resolution according to I. K. Rajabov's complaint as of March 22, 2006, once again confirming the legal position connected with consequences of non-compliance with requirement about notarization of transaction claims that, according to sense of the specified article, for possibility of recognition of the transaction valid by request of the party in whole or in part executed the transaction some conditions, including a condition of its conclusion in written have to be met. This moment for the transactions provided by the legislation to dependence on the conclusion in writing has special value. The contract on purchase and sale of a house – one of such transactions.

Despite of it, court of the first instance, having misinterpreted the Article 43 of the previous Civil Code, recognized as the concluded the contract of purchase and sale between B. Iskenderov and I. Bagiryan.

In general, it should be noted that only transfer of an item illegally does not change the subject of civil law. The property right arises only from implementation of rules established by law. Acquisition of property having the owner without observance of requirements of law creates actual property that is not based on private law.

It gives the grounds to state that if buyer in connection with acquisition of property did not execute actions demanded from him for the purpose of observance in the necessary form of legislation, this circumstance indicates the actual deprivation of property right because of his indifferent relation.

Plenum of the Constitutional Court notes also that for the purpose of resolution of a civil case according to law, the correct application of provisions in the previous Civil Code concerning the limitation of action is important.

Plenum of the Constitutional Court, repeating the legal position reflected in the decision “On interpretation of Article 373 of the Civil Code of the Republic of Azerbaijan” as of December 27, 2001 notes that significance of limitation of action lies in the following: first of all it disciplines the participants of legal relationships, obliges them to protect their rights in due time, promotes the contractual and financial discipline; secondly, the limitation of action promotes elimination of vagueness and instability in civil legal relationships; thirdly, the limitation of action provides judicial bodies with possibility to resolve disputes on the ground of objective truth, eliminating the possibility for parties concerned to turn to the long-standing evidences whose validation is either impossible or too difficult.

The European Court of Human Rights, acting from a similar legal position in the decision on case of Miragall Escolano & Others vs. Spain on January 25, 2000 came to such conclusion that the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants should expect those rules to be applied (§33).

According to Article 78 of the former Civil Code, the course of term of limitation of action begins from the date of emergence of a right of action; the right of action arises from the date of when the person learned or had to learn about violation of the right. This norm is connected only with knowledge of the person of the facts concerning violation of his estimated right. This norm cannot be connected with ignorance of the laws concerning the rights of the person and protection of these rights. The law establishes the unambiguous rules connected with a purchase and sale. Non-compliance of these of these rules by one party gives grounds to other party to appeal to court for satisfaction of the requirements for the purpose of protection of the rights. If other is not provided in law, limitation of action concerns all requirements.

At consideration of issue from this point of view it becomes clear that the court of the first instance at calculation of limitation of action period also made a mistake and did not take into account that, according to the Article 73 of the previous Civil Code, the general (claim) term on the claim of a person whose rights are violated, for protection of rights makes three years. According to the Article 77 of this Code “obligation of use of limitation of action”, limitation of action is applied by court irrespective of notification of parties. According to the Article 82 of this Code the admission of term of limitation of action before submission of claim is a reason for rejection of claim.

Thus, Plenum of the Constitutional Court, taking into account the foregoing, concludes that the court of first instance considered case with violation of requirements of the Articles 60.1, 71.1, and 127.2 of the Constitution, the Articles 81, 88, 217.1 and 218.1 of the CPC, incorrectly interpreted the Article 43 of the previous Civil Code, applied the Articles 178.6, 335.2 and 567 of the acting Civil Code which are not subject for application and did not apply the relevant Articles 73, 77 and 82 of the previous Civil Code.

In particular, it should be noted that, having considered case for the first time, court of cassation instance, having cancelled a judgment of appeal instance, having sent case for new appeal consideration, on July 14, 2004 specified in its decision that besides that E.Iskenderov's registration in the apartment which is in a private property of the respondent S. Aliyeva was not confirmed, by the courts which considered case were not found out existence of any forms of written proofs of acquisition by the claimant of the challenged property with payment of its cost and the reason of not challenging of this issue until now. According to a conclusion of court of cassation instance, the court of first instance incorrectly applied the Article 43 of the previous Civil Code, while requirements of the Articles 73 and 82 were not considered, and the Article 42 was not applied; and these shortcomings were repeated by court of appeal instance.

According to requirements of the Article 420 of the CPC, the instructions stated in the decision of the court that considered case in cassation instance are obligatory for the court that is reconsidering this case.

With the purpose of ensuring of elimination of injustices in the Article 372.1 of the CPC it is established that the court of appeal instance considers the merits of the case as full court on the basis of the evidence which is available in case and presented additionally. In Article 372.7 of this Code, it is specified that, irrespective of arguments of the appeal complaint, the court verify the observance of norms of a substantive and procedural law by court. In Article 385.1.1 of the Code violation or the wrong application of norms of a substantive law or norms of a procedural law is provided as one of the bases to cancellation of a judgment in an appeal order.

Despite of it, JBCC of the Court of Appeal, having violated the specified requirements of the legislation, without having followed sufficiently the instructions established in the decision of JBCC of the Supreme Court as of July 14, 2004 and without having made for this purpose additional investigation, on the basis of the established facts of the case, though specified not presentation of the written proof concerning a purchase by the applicant of disputable property, having counted reasonable purchase from its party of this property with compensation, being limited to the general assumptions, uphold the judgment of the first instance which is not conforming to requirements of the legislation.

Along with it the court of appeal instance in contradiction with the mentioned decision of JBCC of the Supreme Court and requirements of the Article 42 of the former Civil Code repeatedly referred to indications of the persons interrogated as witnesses in court of the first instance and also, having specified that, according to Article 377.1 of the acting Civil Code, the current term of limitation of action begins from the date when person learned or had to learn about violation of the right, according to the Article 373.1 of this Code, total period of limitation of action is determined in ten years, made a mistake in application of this article and came to a wrong conclusion concerning not the admission of term of limitation of action.

By the Article 416 of the CPC the court of cassation instance is allocated with power to verify the correctness of application of norms of a substantive and procedural law by court of appeal instance. According to Article 418 of the CPC, the bases for cancellation of the decision and definition of court of appeal instance are violation or the wrong application of norms of a substantive or procedural law.

According to the Article 386 of the specified Code, norms of a substantive law considered violated or incorrectly applied only in the event of court of first instance making a mistake during application of law, not applying applicable law or other normative legal act, or incorrectly interpreting the law. According to Article 418.2 of the CPC, the providing basis to cancellation of the decision or definition of court of appeal instance, in the cases specified in Article 386 of this Code, norms of a substantive law considered violated or incorrectly applied. However, JBCC of the Supreme Court which repeatedly considered case without having taken into account non-execution by the JBCC of the Court of Appeal of the instruction of the court of cassation instance which is obligatory that case is considered without observance of norms of a substantive and procedural law in a contradiction with the previous decision, by the decision of December 28, 2004 uphold a judgment of appeal instance of September 30, 2004, and did not observe requirements of Articles 416, 417.0.3 and 418.1 of the CPC, S. Aliyeva's right for legal protection affirmed by Article 60.1 of the Constitution was violated.

Considering the above specified, Plenum of the Constitutional Court comes to conclusion that the decision of JBCC of the Supreme Court as of December 28, 2004 has to be recognized as null and void in connection with discrepancy with the Article 60.1 of the Constitution, with Articles 416, 417.0.3 and 418.1 of CPC and case has to be reconsidered according to this decision, in order and terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by 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 Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To Recognize the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of December 28, 2004 on the civil case based upon B. Iskenderov's claim against S. Aliyeva and others concerning recognition as concluded of the contract of purchase & sale, cancellation of the registration certificate and issue, according to a share, of new registration certificate, as null and void in connection with its discrepancy with the Article 60.1 of the Constitution, with the Articles 416, 417.0.3 and 418.1 of the Civil Procedure Code. To reconsider case according to the present decision, in order and terms established by the civil procedure legislation of the Republic of Azerbaijan.

 2. The decision shall come into force from the date of its publication.

 3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

 4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.