**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 as of 11 May 2005 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of J.Abdullayeva and others*

**13 April 2007 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,

applicants J.Abdullayeva, A.Abdullayev and their representative T.Azayev

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijanexamined in open judicial session via special constitutional proceedings the case on verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 11 May 2005 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Jeyran Abduulayeva, Bahtiyar Abduulayev and Aydin Abduulayev.

The respondent party –Supreme Court of the Republic of Azerbaijan asks for consideration of the case without participation of its representative.

Having heard the report of Judge A.Sultanov, speech of the representative of applicants T.Azayev, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

J. Abdullaeva and others applied to court with the claim against A. Asadov and others concerning eviction from the apartment. The claim concerns the disputed apartment located at: Sumgait city, block 45, building 14, apartment 117. In 1992 it was leased by its that time owner Zyumraddin Abdullaev to Asadovs family for temporary residence, and during last ten years they lived in this apartment. This apartment was registered for Z. Abdullaev in 1993 as a private property, and after death of the latter on February 7, 1996 was accepted as inheritance share by Jeyran Abdullaeva and children under the inheritance certificate issued by the State Notary Office No. 1 of the Sumgait city according to the Law dated February 3, 1999 and the registration certificate confirming property right from Department of the State Technical Inventory and Registration of the Property rights of the city of Sumgait was acquired. Currently they need this apartment. After many ineffectual addresses to respondents for the purpose of release of the apartment, they were compelled to put forward the claim.

Respondents (Asadovs) having submitted the counterclaim concerning recognition of the contract of purchase and sale as actually concluded, proved the requirements that in 1995, having paid cost, they bought the disputed apartment from its owner Z. Abdullaev.

By the decision of Sumgait city court as of November 26, 2004 the claim requirements of Abdullaev were rejected, and the counterclaim of Asadov concerning recognition of the contract of purchase and sale as actually concluded was satisfied.

The court came to conclusion that the disputed apartment from 1992 to 1995 was leased by Z. Abdullaev with advance payment for 3 years in rent to Asadov, and in 1995 he came to the decision on sale of the apartment and agreed about it with A. Asadov, having established the price for the apartment in 13.000.000 rubles, the same year, having paid to the owner from this money 3.000.000 rubles, and in 1996 - another 10.000.000 rubles without any check or other written document, the transaction about purchase and sale was actually made, however after 7-10 days because of sudden death of Z.Abdullayev the transaction was not registered in the appropriate order.

By its decision the Judicial Board on Civil Cases of Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Court of Appeal) as of February 22, 2005 upheld a judgment of the court of first instance, and the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Supreme Court) by its decision as of May 11, 2005 upheld the judgment of court of appeal instance.

In the letter of Chairman of the Supreme Court dated May 22, 2006 to applicants lack of the bases for consideration of the additional appeal complaint on Plenum of the Supreme Court was specified.

J. Abdullaeva and others appealed to the Constitutional Court with the complaint. The complaint was proved by that courts, having misinterpreted the Article 43 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the former Civil Code) applicable till September 1, 2000 without existence of any written proof, referring only to testimony, recognized the contract of purchase and sale as concluded, thus did not take into account the legal position reflected in the decision of Plenum of the Constitutional Court as of May 31, 2006 according to S. Aliyeva's complaint concerning purchase and sale of immovable property, and also the requirement of the Articles 42 and 230 of the former Civil Code. Besides, it is specified in the complaint that courts came to a wrong conclusion concerning the admission of term of limitation of action, and at the admission of limitation of action, respondents did not apply the Articles 73 and 77 of the former Civil Code. In the complaint it is also specified that the norms of the Civil Procedure Code of the Republic of Azerbaijan which are not subject to application were applied (hereinafter referred to as the existing CPC), and their rights, the property right and the right of legal protection enshrined in the Articles 29, 60, the Constitution of the Republic of Azerbaijan were violated.

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

According to the Article 43.1 of the former Civil Code, the notarized certificate of transactions is obligatory only in cases specified by law. Non-compliance with notarized form demanded by law is a reason of invalidity of the transaction.

The contract of purchase and sale of immovable property also refers to transactions that have to be surely certified by a notary. Thus, according to the Article 230 of the above-mentioned Code if at least one of parties is a citizen, the contract of purchase and sale of a house has to be notarized. As evident, the last norm refers to cases when at least one of parties is a citizen. For the purpose of reliability a purchase and sale contract shall be notarized and can be concluded only in written form.

Along with it, the Article 43.2 of the former Civil Code reflects rules out of notary recognition of bargain as concluded. Thus, according to this norm if one of parties in whole or in part executed the transaction demanding notarization, and other party evades notarization of transaction, a court is entitled on request of the party which executed the transaction, to recognize such transaction as concluded under a condition if this transaction does not comprise anything illegal.

Due to the application of this norm in the decision of Plenum of the Constitutional Court as of May 31, 2006 “On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of 28 December 2004 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of S. Aliyeva” it is specified that according to constitutional legal sense of this norm, for possibility of recognition by court of the transaction (the contract of purchase and sale of a house) as valid by request of the party in whole or in part the executed transaction shall meet certain conditions including condition to be concluded in written form.

With the purpose of protection of the parties against wrong judicial acts at non-compliance with the written form of the transaction demanded by law, the former civil legislation provided also some other guarantees. One of such guarantees found the reflection in the Article 42 of this Code. According to this norm, non-compliance with the written form of the transaction demanded by law deprives the party of the right, in case of dispute, to refer on testimonial evidence for confirmation of the transaction.

However, the court of the first instance that considered case satisfied the counterclaim, having recognized disputable purchase and sale as valid, without having taken into account non-compliance with a written form of the transaction, being based only on testimonial evidence in a contradiction to the specified requirements of the legislation.

Plenum of the Constitutional Court notes as well that according to the Article 7.1 of the existing Civil Code the provisions of civil law, except those provided in the Article 149.7 of the Constitution of the Republic of Azerbaijan, do not have retroactive effect and only apply to relationships created after the enactment of such law. On the other hand, according to the Article 7.2 of this Code, acts of the civil legislation have retroactive force when it is directly provided by the law.

Plenum of the Constitutional Court, once again confirming the legal position, notes that from the point of view of necessity to fair ensuring and protection of rights and interests of participants of civil turn, 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 (decision of the Constitutional Court as of January 28, 2002 on the request of the Supreme Court of the Republic of Azerbaijan “On interpretation of the Article 179 of the Civil Code of the Republic of Azerbaijan”).

From the analysis of the Article 149.7 of the Constitution, of the Law of the Republic of Azerbaijan “On the approval, coming into force of the Civil Code and issues of legal regulation connected with it” and the existing Civil Code it is evident that action of provisions of the Articles 567 and 335 of this Code does not extend on time period till September 1, 2000.

The court of the first instance considering the issue of conclusion of the challenged purchase and sale contract in 1995, mistakenly applied the above articles of Civil Code (not due to application) that came into force since September 1, 2000.

Plenum of the Constitutional Court stresses the importance of correct application of norms of former Civil Code connected with limitation of action.

The court of the first instance established the purchase of the disputed apartment by A. Asadov from Z. Abdullaev in 1995 as the actual conclusion between them of purchase and sale contract; because of death of the latter, this transaction was not officially certified.

According to the Article 78 of the former Civil Code, the current 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.

Plenum of the Constitutional Court once again notes that this norm is connected only with knowledge of person of facts concerning violation of his/her estimated right. This norm cannot be connected with ignorance with respect to laws concerning rights of person and protection of these rights. The law establishes the unambiguous rules connected with purchase and sale. Non-compliance of one of the parties with these rules gives grounds to other party to appeal to court for satisfaction of the requirements for the purpose of protection of rights. If it is not specified otherwise by law, limitation of action concerns all requirements (decision of Plenum of the Constitutional Court as of May 31, 2006 “On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of 28 December 2004 to Constitution and laws of the Republic of Azerbaijan in connection with complaint of S. Aliyeva”).

At consideration of issue from this point of view it is become clear that court of the first instance, having applied the term of limitation of action concerning the counterclaim of Asadov as of November 15, 2004 concerning recognition of the contract of purchase and sale as actually concluded, did not take into consideration that, according to the Article 73 of the former Civil Code the total period for protection of the right in the claim of the person whose right was violated (limitation of action), is determined in three years. According to Article 77 of this Code “on obligation of application of limitation of action”, limitation of action is applied by court irrespective of notification of parties. According to the Article 82 of the Code the expiration of limitation of action before bringing of claim is the basis for refusal in claim.

At the same time, Plenum of the Constitutional Court in connection with application of the provisions of the former civil legislation connected with the term of limitation of action considers necessary to note the following.

In Articles 73, 74 of the former Civil Code the general and reduced terms of limitation of action are determined. Along with it, in Article 85 of the Code also provided the circle of requirements that is not depending on the terms of limitation of action connected with protection of the subjective rights. According to point III of this article, limitation of action also does not extend on requirements of the state organizations concerning return of the state property from illicit possession of collective farms, cooperative and other public organizations or citizens.

From this situation, it is evident that limitation of action does not extend on requirements of the state organizations concerning return of the state property only at its illicit possession. Along with the state property, despite existence of other types of property the position of the first that was more guaranteed in comparison with others in socialist economic system was established, as one of advantages inherent to it.

From this point of view, application of the specified articles of the former Civil Code at settlement of disputes following from the civil relations which arose in the period of the new Civil Code (since September 1, 2000) without provisions of the Constitution of the Republic of Azerbaijan existing since November 27, 1995 cannot be recognized as the fair.

Thus, according to parts I and II of Article 13 of the Constitution, the property in the Republic of Azerbaijan is inviolable and is protected by state. The property may be state, private and municipal.

According to parts I and II of Article 29 of the Constitution, everyone has the right to own property. No type of property can granted the superiority. Property rights, including the rights for private owners, is protected by law.

The essence of these norms, on an equal basis with recognition of the property right of each subject of civil law, provides possession in a civil turn of an identical legal regime, and also denies existence of distinctions and in volume of opportunities, and the means (including in use of terms of limitation of action) connected with protection of the subjective rights. Other understanding of these provisions besides creation of distinction between types of property, reduction to pretentiousness of other Constitutional norms could do harm to their complexity in general.

Constitution of the Republic of Azerbaijan is the basis of legislative system of the Republic of Azerbaijan, possesses the highest and direct legal power (Article 147 of the Constitution).

According to Article 149.3 of the Constitution, laws must not contradict the Constitution. According to point 8 of “Transitional clauses” of the Constitution, provisions of laws and other normative-legal acts acting on the territory of the Republic of Azerbaijan before acceptance of the present Constitution remain valid if they do not contradict to the present Constitution.

According to Article 25.1 of the Constitution, all people are equal with respect to law and court. From the point of view of this constitutional norm guaranteeing in the identical relation and situation equal rights and duties for everyone, point 3 of the Article 85 of the former Civil Code has to extend as well to requirements concerning return from illicit possession of property, being in a private property.

The court of the first instance, applied limitation of action to Abdullaevs requirements in a contradiction to the above norms of the Constitution.

Plenum of the Constitutional Court notes also that according to Article 127.2 of the Constitution 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. According to this norm, in Article 9.1 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) it is specified that justice carried out based on competitiveness, equality of the parties and the facts. The judge in all cases is obliged to provide the principle of competitiveness of process. He is obliged to motivate the decision only with those proofs, explanations of the parties and documents that were discussed by them based on the principle of competitiveness of the parties (Article 9.3 of the CPC).

As evident from materials of a civil case, the main claimants also in a written protest where made the counterclaim, informed court that this claim was submitted with the expiration established in the Article 73 of the former Civil Code. However, Sumgait city court, in a contradiction to requirements of the specified norms of the Constitution and civil procedural legislation, neglecting important arguments of the main claimants, did not give them a legal assessment, came to a conclusion concerning the admission of limitation of action owners of property though the defendant did not bring up a question of the admission by the main claimants of term of limitation of action, and he not only put by that the parties on dispute in unequal situation, but even made senseless the right of participation of the main claimants in judicial proceedings.

From this point of view of the case law of the European Court of Human Rights it is also noteworthy. Thus, in the decision of March 3, 2000 on case of Krčmář and others v. the Czech Republic” this Court noted that the principle of equality of arms, which is one of the elements of the broader concept of a fair hearing, requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis*its opponent (§39).

However, the concept of a fair hearing also implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision (§40).

In view of the above, Plenum of the Constitutional Court comes to conclusion that the court of the first instance when considering the case did not provide the right of legal protection, did not give an assessment according to the applied norms of law to the proofs which are available in case and as a result adopt the decision that not correspond to the material and legal procedure existing at the time of consideration and resolution of case (Article 60.1 of the Constitution, Articles 88 and 217.2 of the CPC).

On the basis of the above Plenum of the Constitutional Court considers that the court of the first instance that considered case, having violated Articles 9.1, 9.3, 88 and 217.2 of the CPC, applied not applicable Articles 567 and 335 of the existing Civil Code, did not apply applicable Articles 42 and 230 of the former Civil Code, not correctly applied Articles 73, 77, 78 and 82 of the same Code, guarantees and as a result the rights affirmed in Articles 13, 29 and 60 of the Constitution were violated.

According to Article 372.1 of the CPC, court of appeal instance as the full court considers the merits of the case based on available in it and in addition presented proofs. In Article 372.7 of the same 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 it is provided that one of the bases for cancellation of a judgment in an appeal order are the violation or the wrong application of norms of a substantive law or norms of a procedural law. However, JBCC of the Court of Appeal that considered case, having violated the specified requirements of the civil procedural legislation by the decision of February 22, 2005 upheld a judgment of the court of first instance.

According to Article 416 of the CPC, court of cassation instance verify the correctness of application of norms of a substantive law and correctness of application and observance of norms of a procedural law by court of appeal instance. According to Article 418 of the CPC, the bases for cancellation of the decision and ruling of court of appeal instance by the court of cassation instance are violation or the wrong application of norms of a substantive law or norms of a procedural law. According to Article 417.0.3 of the same Code, the court of cassation instance has the right to cancel the decision or ruling of court of appeal instance, completely or in part and to send the case for reconsideration to court of appeal instance.

Despite of it, JBCC of the Supreme Court, not taking into consideration that the court of appeal instance considered case without observance of norms of a substantive and procedural law, by the decision of May 11, 2005, having uphold the decision on case of court of appeal instance, violated requirements of Articles 416, 417.0.3 and 418.1 of the CPC.

Considering specified, Plenum of the Constitutional Court comes to conclusion that the decision of JBCC of the Supreme Court of May 11, 2005 has to be recognized as null and void in connection with discrepancy with Articles 13, 29 and 60 of the Constitution, Articles 416, 417.0.3 and 418.1 of the CPC, and case has to be reconsidered according to the present decision, an order and the 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 as null and void the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of May 11, 2005 on civil case with respect to complaint of J.Abdullayeva due to its discrepancy with the Articles 13, 29 and 60 of the Constitution, the Articles 416, 417.0.3 and 418.1 of the CPC. To reconsider case according to the present decision, in order and terms established by 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.