**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 22 December 2005 to Constitution and laws of the Republic of Azerbaijan*

*in connection with the complaint of A.Gakhramanov and I.Gakhramanov*

**8 June 2007 Baku city**

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

with participation of the secretary I.Ismayilov,

applicants A. Gakhramanov and I.Gakhramanovand their representative of G.Suleymanov

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

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijanexamined in open judicial session via special constitutional proceedings the case on complaint of A. Gakhramanov and I.Gakhramanov concerning verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of 22 December 2005 to Constitution and laws of the Republic of Azerbaijan

Having heard the report of Judge R.Gvaladze, speech of the representatives of applicant G.Suleymanov and defendant A.Kalbaliyev, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Firudin Askerov appealed to court with the requirement against Asad and Ilgar Gakhramanov, Mansur Bayramov and Department of Management and Privatization of the State Property of the Ministry of Economic Development of the Republic of Azerbaijan (hereinafter referred to as the Department of MED) concerning recognition of the contract of purchase and sale of the “Household and Sports Goods” shop number 45 of the address: the city of Baku, the Binagadi district, 8th micro-district, G. Guseynov Street, building 23, as concluded and issue of the certificate by Department of MED on his name confirming his property right to this object.

By the decision of Binagadi district court of the city of Baku of March 11, 2005 the claim was satisfied, the contract of purchase and sale of property between F.Askerov and I. Gakhramanov of concerning disputable object is recognized as concluded, to the Department of MED it is entrusted to issue to F.Askerov the certificate confirming his property right to this site, adopted the decision on collecting from the claimant and payment of 35.000 US dollars to I. Gakhramanov.

Asad and Ilgar Gakhramanov (hereinafter referred to as the applicants), and Department of MED made the appeal complaint to this decision. By the decision of 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) of July 19, 2005 the appeal complaint was not satisfied and the judgment of the first instance uphold.

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 December 22, 2005 did not satisfy the appeal of applicants and upheld the judgment of appeal instance.

In the letter of the Chairman of the Supreme Court as of July 21, 2006 in response to the additional appeal, it was reported that there are no bases for the direction of the complaint for consideration of Plenum of the Supreme Court.

Applicants appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) with the complaint and a request to verify compliance of the decision of JBCC of the Supreme Court to the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and to laws. The complaint was ground by that in the decision of JBCC of the Supreme Court a number of the norms of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC)which were not subject to application was applied, these norms are misinterpreted, a number of norms of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) and CC was nor applied, thereby were violated the rights and freedoms of applicants ensured by legal protection and the property right of I. Gakhramanov.

As evident from the circumstances of a civil case established by courts, on April 1, 2004 between the claimant F.Askerov and A. Gakhramanov the bilateral contract-obligation concerning purchase and sale of disputable property was signed. This contract was made with participation of the founder of the Istanbul-H enterprise that is engaged in intermediary services, the 3rdperson in the case of M. Bayramov and Sh. Ibragimov certified by signatures of the parties, intermediaries and stamp of the enterprise. According to the contract, the cost of property was estimated at the level of 94.000 US dollars, Asad Gakhramanov received previously 35.000 US dollars. Then he received 24.000 US dollars and confirmed it in the separate note brought in the contract. The challenged property privatized in 2005 on the name of Ilgar Gakhramanov and the authorized government body issued to him the certificate No. 003185 as of February 3, 2005.

At considering the case the court of the first instance established that though A. Gakhramanov signed the bilateral contract obligation as the seller, nevertheless, the first sum of 1.000 US dollars was received personally by I. Gakhramanov, and other money was paid to Asad Gakhramanov. Being guided by Article 335.2 of the CC, the court recognized the contract of purchase and sale of disputable object concluded. This conclusion recognized by the courts of the supreme authority considering subsequently case, as correct, the judgment of the first instance uphold by the decision of Court of Appeal, and the last judicial act – by the decision of the Supreme Court.

For the correct solution of dispute, Plenum of the Constitutional Court considered necessary to analyze some provisions of the civil legislation.

Effective protection by all branches of the power of the property right affirmed by Article 29 of the Constitution makes one of the cornerstone principles of civil society. This right, protection and inviolability of which guaranteed by the state, includes such basic elements as possession of everyone alone or together with others personal or real estate, use and the order of property. Protection of the property right against all illegal encroachments is one of the important tasks facing the democratic state.

The state regulates implementation of this right in various ways, including by means of the special legislation setting the mode of the property right, a basis of emergence of the property right, use and termination of this right, limits of its restriction in interests of society.

The civil legislation of the Republic of Azerbaijan is guided by the Constitution and consists of CC, other laws and normative legal acts adopted on their basis and establishing norms of civil law. The purpose of CC consists in ensuring of freedom of a civil turn on the basis of equality of its participants and without causing damage to the rights of the third parties (Article 1 of the CC).

According to Article 146.5 of the CC the right of the disposal of real estate arises from the moment of registration of this property in the state registry. The concluded contracts of real estate which are not registered in the state registry of real estate are considered invalid. According to the Article 178.1 of the CC the property right to real estate passes to the person who got it, from the moment of registration of its transfer in the state registry of real estate.

The most widespread form of bases of buying of property are the bargains concluded and certified according to the legislation between representatives on that the parties defining destiny of this property. At the same time, the legislation, considering features of real estate and its place in a civil turn, established special and more tough rules for transactions on it.

In connection with Article 335.2 of the CC existing during this period to which a reference in judicial acts is made, Plenum of the Constitutional Court notes that recognition of the contract as concluded on the basis of the specified article can be carried out only at the strict taking into consideration of the rules and requirements established by the legislation for the conclusion of such contracts and assurance of them by authorized government bodies. Otherwise, it can lead to registration of the specified transactions in circumvention of requirements of the law and to increase in risk of violation of the rights and legitimate interests of participants of a civil turn.

The edition of CC acting at emergence of legal relations between the parties provided that: the validity of the transaction requires observance of the form established by this Code (Article 329.1); non-compliance with a notary form of the transaction lead to its invalidity and such transaction is considered senseless (Article 335.1); the bargain concluded with violation of the conditions established by this Code is invalid (Article 337.1); the contract under which one party accepts the obligation concerning acquisition or transfer of property to other party on real estate, has to be notarized (Article 394); the contract of purchase and sale of real estate is considered valid at the conclusion in written form and notarized, the property right to real estate passes to the buyer from the moment of registration in the state registry of real estate (Articles 647.1 and 647.2).

As evident, for the conclusion of transactions of purchase and sale of real estate legislation provided such unambiguous instructions as registration of property, right to this property in the state registry and notarization of such contracts. These instructions serve protection of the rights and legitimate interests of subjects of the civil law that is one of main objectives of the civil legislation.

As evident from the circumstances of a civil case established by courts, at signing between the claimant of the case F.Askerov and one of applicants - A. Gakhramanov of the contract-obligation adopted subsequently by courts as the contract of purchase and sale, A. Gakhramanov who signed it as the seller and applicant – I. Gakhramanov were not authorized for this purpose, because the disputable property was in state ownership.

According to requirements of the legislation, the disputable object that was at the time of the conclusion of the contract the state property could not serve as subject of the contract of purchase and sale between individuals. Transfer by the state of the property that is in its property to property of individual and legal entities is not forbidden by the law. However, it has to be carried out by privatization of the state property, organizational, economic and which legal bases are established by the legislation. The property right of I. Gakhramanov to disputable property, including the right to dispose of this property, arose only in 2005 on the basis of the certificate number 003185 issued to him by authority of February 03, 2005. The property right to property that arose subsequently in itself does not give the grounds for legality of the bargains concluded earlier contrary to requirements of the legislation.

It should be noted what exactly on the above basis other respondent in case –Department of MED in the appeal complaint appealed to cancel the decision of court of the first instance.

The court of the first instance instead of solving dispute from the point of view of requirements acting during emergence of the legal relations of wording of the Articles 146, 178.1, 329.1, 335.1, 337.1, 394, 647.1 and 647.2 of CC, did not apply the norms that were subject to application that led to adoption of the wrong judicial act.

Along with the above Plenum of the Constitutional Court considers necessary also especially to note the procedural violation make during consideration of a civil case.

Thus, the main argument of the appeal complaint made by applicants about a judgment of the first instance was connected with that case was considered without ensuring their presence.

As evident from materials of a civil case, the decision of Binagadi district court was adopted on March 11, 2005. Though in the decision reflected that the respondent A. Gakhramanov was present on court session and disagreed with the made claim, at the same time it is marked out that “in spite of the fact that to Gakhramanov I.N. directed the notice of appointment concerning a place and date of court session was in accordance with the established procedure, they were not appeared on court session and didnot inform court on the reasons of absence”.

As evident from stub of notice of appointment which is on pages 23 and 24 of the case, last time respondents were invited to court session on May 30, 2005. Besides, in the report of proceeding of court session as time of carrying out it is specified “on May 30, 2003". In the letters of May 30, 2005 that are on pages 32 and 33 of case and signed by the presiding judge concerning the direction of the decision to the parties it is also reflected that “the decision from on May 30, 2005” was sent to respondents. At the receipt on the obtaining of the decision filed (p. 33) and signed by one of respondents A. Gakhramanov of March 11, 2005 it is dated “08.04.05”. Absence of respondents on court session was confirmed and in the objection given F.Askerov on appeal complaints. In objection it was noted that “… therefore the court absolutely fairly, on the basis of requirements of the legislation considered case in the absence of respondents”.

Despite of all these contradictory moments, court of appeal instance in the decision of July 19, 2005 came to conclusion that arguments of the appeal complaint consist of formal opinions.

The concrete list of the circumstances which are the basis for cancellation of a judgment of the first instance forcibly irrespective of arguments of the complaint is provided in Article 387.2 of the CPC. One of such circumstances is consideration of case by court at absence of any of the persons participating in case who are not informed in accordance with the established procedure on a place and date of court session.

However, the court of appeal instance upheld the judgment of the first instance made without observance of requirements of Articles 372.6 and 372.7 of the CPC with material and procedural offenses, and JBCC of the Supreme Court, in turn, - a judgment of appeal instance, contrary to requirements of Articles 416, 418.1-418.3 of the CPC, having violate thereby the rights of applicants for fair trial affirmed by the Article 60.1 of the Constitution.

On the basis of the above Plenum of the Constitutional Court comes to conclusion that because of discrepancy of the decision of JBCC of the Supreme Court of December 22, 2005 to Article 60.1 of the Constitution, to Articles 416, 418.1-418.3 of the CPC to consider it as null and void, to reconsider case in an order and the terms established by the CPC.

Being guided by parts V, IX and X 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 22, 2005 on a civil case with participation of Firudin Askerov vs. Asad and Ilgar Gakhramanov concerning recognition of the contract of purchase and sale as concluded and the requirement of issue of the certificate confirming the property right as null and void in connection with its discrepancy with the Article 60.1 of the Constitution, with the Articles 416 and 418.1-418.3 of the Civil Procedure Code of the Republic of Azerbaijan. 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.