**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 3 April 2007 to Constitution and laws of the Republic of Azerbaijan*

*in connection with the complaint of R. Salamov*

**30 October 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(reporter judge), E.Mammadov, I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

applicant R.Salamanov

representative of respondent body – B.Asadov, 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 verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of 3 April 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of R.Salamov.

Having heard the report of Judge R.Qvaladze, speech of applicant R.Salamov and respondent B.Asadov, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Nizami district court of the Baku city by its decision as of August 31, 2006 rejected the claim of Nailya Yagubzade against Rasim Salamov and Kyubra Gadzhiyeva concerning establishment of the right of common ownership, division of property which is in shared property, allocation of a share from it, issues of the registration certificate, recognition as invalid of the Real Estate Purchase & Sale Contract.

By the decision of 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) dated November 14, 2006 the above-mentioned decision of district court was cancelled and the claim of N. Yagubzade was satisfied.

By its decision 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) as of April 3, 2007 upheld the judgment of court of appeal instance.

In response to R. Salamov's complaint made as the additional cassation, the letter of the Chairman of the Supreme Court informed him that there were no grounds for consideration of the complaint on the Supreme Court Plenum.

In the complaint addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), the applicant asks to verify conformity of the decision of court of cassation instance to the Constitution and laws of the Republic of Azerbaijan.

The applicant substantiated the constitutional complaint by the following.

On October 22, 2002 his marriage with N. Yagubzade was dissolved by department of the State Registry of Narimanov district of the Baku city (hereinafter referred to as the SR). The claim requirement connected with the division of property was submitted by N. Yagubzada 3 years and 32 days after divorce. According to the Article 8 of the Family Code of the Republic of Azerbaijan, regulating issues of application of term of limitation of action to family relations, the term of limitation of action does not extend on requirements following from family relations, except cases in relation to terms established by this Code for protection of violated rights. At application of norms establishing term of limitation of action, court is guided by rules specified in the Civil Code of the Republic of Azerbaijan. According to the Article 36.9 of the Family Code, three years term of limitation of action is applied to demands of divorced spouses on division of common property. According to the Article 367.1 of the Civil Code, term is a time connected to creation, change and termination of civil rights and obligations. The Article 369.1 of this Code provides that term calculated in years should expire on relevant month and day of its last year.

 Being guided by the above requirements of the legislation, the applicant considers that because of submission of the requirement of N. Yagubzade about the division of joint property of spouses after expiration of term of limitation of action, court of first instance quite fairly refused in satisfaction of the claim, having provided in the decision this basis along with other ones.

The court of appeal instance which cancelled the decision of this court and made the new decision and then the court of cassation instance which uphold the decision of this court without having attached any significance to the arguments containing in his appeal and cassation complaints concerning the expiration of term of limitation of action according to N. Yagubzade's statement, in the adopted judicial acts did not reacted to noted moment at all.

Because the main argument of the constitutional complaint connected with term of limitation of action, Plenum of the Constitutional Court considers necessary once again to clear up the matter.

Terms of limitation of action are one of the institutes of the civil legislation representing importance from the point of view of settlement of disputes. In many decisions, Plenum of the Constitutional Court noted that the correct application of provisions of the legislation of concerning the terms of limitation of action represents importance from the point of view of resolution of a civil case according to the law.

Plenum of the Constitutional Court in the decision as of December 27, 2001 “On interpretation of the Article 373 of the Civil Code of the Republic of Azerbaijan” noted that limitation of action disciplines the participants of legal relationships, obliges them to protect theirs rights in due time, promotes the contractual and financial discipline; promotes elimination of vagueness and instability in civil legal relationships; 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 in the decision as of January 25, 2000 on case of Miragall Escolano and others v. Spain 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.

As appears from case materials, objecting to the claim in the statement brought into court of the first instance, R. Salamov specified that a marriage with N. Yagubzade was dissolved by department of SR, and there were no disputes between them at divorce. N. Yagubzade appealed to court with the statement of claim with the requirement of division of property after the 3-year term provided by the Article 36.9 of the Family Code. Being guided by the Article 375.2 of the Civil Code, R. Salamov asked to apply limitation of action to the claim demand made against him by N. Yagubzade.

Court of the first instance, having refused to satisfy the claim of N. Yagubzade, came in the decision to conclusion that the challenged apartment was acquired on own means of R. Salamov before a marriage between R. Salamov and N. Yagubzade.

The court in this decision also came to a conclusion about need of use of limitation of action to the relations of the parties. The court established that though marriage between R. Salamov and N. Yagubzade was terminated on October 22, 2002, and N. Yagubzade in the filed a lawsuit statement of claim with the requirement of the section of property specified date on October 22, 2005, nevertheless, actually appealed to court with this statement of claim on November 23, 2005.

Court, considering R. Salamov's request for use of limitation of action and confirmation of this requirement the documents that are available in case, being guided by Article 36.9 of the Family Code refused to satisfy the claim.

As evident, court refused to satisfy the claim of N. Yagubzade on the ground that R. Salamov got the challenged apartment on own means before a marriage, and N. Yagubzade addressed to court after expiration of limitation of action.

N. Yagubzade, having made the appeal complaint to the specified judgment, asked to cancel the decision.

R. Salamov along with other bases specified in the application with objection submitted against a complaint that N. Yagubzade addressed after expiration of limitation of action, and asked to uphold a judgment of the first instance.

The JBCC of the Court of Appeal by the decision as of November 14, 2006, having satisfied the appeal complaint of N. Yagubzade, cancelled a judgment of the first instance and satisfied claims of N. Yagubzade. The court of appeal instance came to conclusion that the challenged apartment was acquired during joint marriage, sale of the apartment by R. Salamov without consent of N. Yagubzade who is the joint owner violated of her property right protected by the law. At the same time, the court of appeal instance shelve R. Salamov's arguments concerning the address of the claimant after expiration of limitation of action.

Plenum of the Constitutional Court considers that the court of appeal instance by consideration of this dispute broke to requirements of Article 60.1, parts II and VII of Article 127 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), Articles 9.1, 9.3 and 88 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC).

Thus, according to Article 60.1 of the Constitution, legal protection of rights and liberties of every citizen is ensured.

In a number of the adopted decisions Plenum of the Constitutional Court noted that in international law (Article 8 of the Universal Declaration of Human Rights, point 1 of Article 14 of the International Covenant on Civil and Political Rights, point 1 of Article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms) legal protection is perceived as effective restoration of the rights by independent court on the basis of fair trial.

As the basic principles of implementation of justice are fixed impartial, fair, juridical equality of parties, based on facts and according to the law (Article 127.2), implementation of legal proceedings on the basis of the on the principle of contest(Article 127.7).

According to these provisions, justice is exercised based on facts, principle of contest and equality of parties. Judge shall always secure compliance with the principle of contentiousness. Judge should base his decision solely upon reasons discussed in compliance with the principle of contentiousness, explanations and documentation submitted by parties. Court evaluates evidence in a fair, impartial, all-complete and full manner and thereafter evaluate norms of law to apply to such evidence (Articles 9.1, 9.3 and 88 of the CPC).

The principle of implementation of justice on the basis of equality and competition of the parties extends on all stages of civil process, including on appeal and cassation procedure.

By the Article 365 of the CPC it is established that in appeal procedure provisions of this section (section 41) and this Code shall be applied. According to these provisions of procedural legislation, case in court of appeal instance along with the features specified in section 41 of the CPC establishing procedure in this court are considered according to principles of civil process, including the principle of possession by parties of equal rights and opportunities.

Court of appeal instance, without having executed the principles of implementation of justice specified in the Constitution and the civil and procedural legislation on the basis of contest, equality of the parties and the facts, did not discuss the arguments presented by R. Salamov concerning the address to court of claimant after expiration of limitation of action.

According to the Article 372.6 of the CPC in case if the complaint is directed on cancellation of the decision or when proceeding from the arguments stated in the appeal complaint and objections on it the subject of dispute is indivisible, the court of appeal instance completely verify validity of a judgment of the first instance.

According to Article 372.7 of this Code, the court of appeal instance, irrespective of arguments of the complaint, verify observance of norms of a substantive and procedural law by court.

Without having followed instructions of provision of the law, the court of appeal instance did not take any actions directed on verification of legality and validity of a judgment of the court of first instance in the part concerning limitation of action.

According to the civil and procedural legislation, the court of cassation instance verify the accuracy of application by court of appeal instance of norms of a substantive and procedural law.

Violation or the wrong application of norms of a substantive and procedural law forms the basis for cancellation of the decision and ruling of court of appeal instance. Violation or the wrong application of norms of a procedural law can form the basis for cancellation of the decision or ruling when this violation brings or can lead to adoption of the wrong decision (Articles 416, 418.1 and 418.3 of the CPC).

Despite the arguments presented by R. Salamov in the appeal concerning non-use of appeal instance of limitation of action by court, the court of cassation instance did not pay due attention to the correct application of appeal instance of norms of a procedural law by court, having adopted as a result the decision which is not meet the requirements of Articles 416, 418.1 and 418.3 the CPC that, in turn, led to violation of the principle of effective restoration of the rights of the applicant on the basis of carrying out fair trial by independent court – one of important elements of the legal protection of his rights and freedoms fixed by Article 60.1 of the Constitution.

On the basis of the above Plenum of the Constitutional Court comes to conclusion that the decision of JBCC of the Supreme Court of April 3, 2007 because of discrepancy with Article 60.1 of the Constitution, with the Articles 416, 418.1 and 418.3 of the CPC has to be recognized as null and void, and case has to be reconsidered 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 the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of April 3, 2007 on the civil case concerning the claim requirement of N. Yagubzade against R. Salamov and K. Gadzhiyeva about establishment of the right of common ownership, the division of the property which is in share property, allocation of a share from it, issue of the registration certificate and recognition of the contract of purchase and sale of real estate as null and void in connection with its discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan, with the Articles 416, 418.1 and 418.3 of the Civil Procedural 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.