**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 12 January 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of K.Bunyatov*

**27 December 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,

applicant K.Bunyatov and his representative A.Abdulgayev

representative of respondent – A.Mirzaliyev, Judge of the Supreme Court of the Republic of Azerbaijan

expert: R.Suleymanov, Deputy head of Department of land management and land reformation of State Land and Cartography Committee 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 of 12 January 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Keram Bunyatov.

Having heard the report of Judge A.Sultanov, speech of the representatives of applicant and respondent, expert and interested persons, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

K. Bunyatov submitted a claim to Hachmaz district court with a request of cancellation of the decision of municipality of Hudat city as of November 10, 2005 concerning sale of the land plot that is in its property of 400 sq.m.

The applicant proved the claim by that the disputable land plot allocated to him in use by the decision No. 9 of Executive Committee of the Hudat city as of September 27, 1991 was transferred to him by the decision of the Commission of Agrarian Reforming as of June 24, 1998, and on the basis of this decision the regional land department issued to him the certificate of the property right as of October 20, 2003. But due to the lack of material opportunity to construct the house, he transferred the land plot for temporary use to D. Velibekova, the inhabitant of the building which is in the neighborhood, and at the requirement to release a site she declared that bought the land at municipality.

By a judgment of the court of first instance as of March 30, 2006 K.Bunyatov's claim was rejected. 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) by its decision of August 8, 2006 uphold this decision and decided to assign the obligation on Hudat municipality for allocation of 400 sq.m. of the land plot to K. Bunyatov in other place of the city from spare fund of municipality.

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 January 12, 2007 did not satisfy the appeal of the claimant and upheld the judgment of appeal instance.

Chairman of the Supreme Court by the letter as of March 30, 2007 reported concerning lack of the bases for presentation of the complaint of the additional cassation for consideration by Plenum of the Supreme Court.

By courts it was established that there was a decision of Executive Committee of Council of People's Deputies of the city of Hudat (in judicial acts it is mistakenly specified as “Hachmaz area”) as of September 27, 1991 concerning allocation to K. Bunyatov of 400 sq. m. of the land plot. The decision of the Commission of agrarian reforming of the Hachmaz area as of June 24, 1998 to K. Bunyatov together with 4 family members transferred the land plot (0,04 hectares) and on the basis of this decision to him, the certificate confirming the property right as of October 20, 2003 was issued. But the land plot allocated for K. Bunyatov on the basis of the decision of Executive Committee as of September 27, 1991 for construction of the private house was in the 4th, and land plot the sold to D. Velibekova in the 8th block of the city of Hudat and last site being carried to municipal intracity spare fund is in property of municipality.

At the same time, on belief of courts, despite allocation to K. Bunyatov of the land plot and registration of the property rights to that site the decision (in judicial acts is mistakenly written as “decree”) local executive power, because of not establishment on a place in the accuracy of the sizes of a site violated the property right of the claimant which protection is guaranteed by the state. Therefore, JBCC of the Court of Appeal charged to Hudat's municipality allocation to him the land plot in the specified size in other place of the city.

The applicant proved the lodged to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) the complaint that he appealed to court for restoration of the violated rights, but after a preparatory meeting challenged the judge of court of the first instance. Despite of it, without carrying out of any court session on case the copy of the adopted decision on a rejection of the claim was sent to him.

Along with stated above the applicant in the appeal complaint lodged concerning this decision, also, referring to the letter of the Chairman of the State Land and Cartography Committee of March 27, 2006 as confirmation of accessory of the disputable land plot to him, declared concerning the illegal sale of D. Velibekova by the decision of municipality of Hudat of November 10, 2005of the personal land plot which is in his property.

K. Bunyatov in the constitutional complaint also noted that at a court session of JBCC of the Court of Appeal on July 14, 2006 he and his lawyer provided to court the above letter of the Chairman of the State Land and Cartography Committee and filed the petition for calling the Committee’s representative, and the Chief of local land department as witnesses. Having satisfied the petition, the next court session was appointed on August 8, 2006. Having come to court in the specified date, by the secretary it was declared that the court session would not take place. Despite of it, at a later date the claimant received the copy of the decision adopted on August 8, 2006. Though he also specified all these violations in the appeal, the board of the Supreme Court considered the case without his participation and by the decision as of January 12, 2007 upheld the judgment of the court of appeal instance.

The applicant considers that along with that procedural violations are allowed, courts in the adopted acts incorrectly applied Articles 55, 56 and 67 of the Land Code of the Republic of Azerbaijan (hereinafter referred to as the LC) to the established facts of the case, were as a result broken, provided in the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) its property right and right for legal protection. K. Bunyatov in the constitutional complaint asks for recognition as null and void of the decision of JBCC of the Supreme Court as of January 12, 2007.

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

According to Article 13.1 of the Constitution the property in the Republic of Azerbaijan is inviolable and is protected by state. According to Article 29.1 of the Constitution, everyone has the right to own property. Along with other rights and freedoms one of remedies of property is fixed in Article 60 of the Constitution. According to part I of this article, legal protection of rights and liberties of every citizen is ensured. According to Article 125.1 of the Basic Law the judicial power of the Republic of Azerbaijan can only be exercised by courts through a fair trial. As the basic principles of implementation of justice are enshrined in 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 (Article 127.2), law proceedings are carried out based on the principle of contest (Article 127.8).

According to Article 6.1 of the Convention “On Protection of Human Rights and Fundamental Freedoms” the Republic Azerbaijan is a party too, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

According to provisions of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), justice is carried out based on facts, principle of contentiousness and equality of parties. The 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 should evaluate evidence in a fair, impartial, all-complete and full manner and thereafter evaluate norms of law to apply to such evidence. The judgment has to be legal and motivated. The decision has to be based upon actual circumstances established with respect to case and relationships between the parties (Articles 9.1, 9.3, 88, 217.1 and 217.3 of the CPC).

However, the court of the first instance by consideration of a civil case in the claim of the applicant did not follow the principles of implementation of justice enshrined in the Constitution and the civil procedural legislation on the basis of facts, principle of contentiousness and equality of parties. The court rejected the claim, referring to the decision of Executive Committee of September 27, 1991, without having discussed arguments of applicant concerning belonging of a disputable site on the property right of K. Bunyatov, according to the certificate as of October 20, 2003 which was issued according to the decision of the Commission of Agrarian Reforming as of June 24, 1998.

Plenum of the Constitutional Court also notes that according to Article 7.1 of the Law of the Republic of Azerbaijan “On Land Reform” for the except of the lands within the corresponding territorial unit remaining in state ownership and the lands given to a private property, other lands are transferred to the municipal possession. According to transitional provisions, established by Article 25 of the Law, before formation in the Republic of Azerbaijan of municipal bodies management of the lands allocated by this Law for municipalities is carried out from the appropriate government bodies of executive power.

According to Article 156 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC), the property belonging under property right to municipalities is municipal property. According Article 178.1 of the same Code the ownership rights to immovable property pass to the purchaser from the moment of registration of act of transfer in the state register of immovable property. As evident from the joint analysis of these civil norms, the property right to real estate and also to the land, including the property right of municipalities to the property belonging to them is considered arisen in case of registration in legal order.

According to the Article 152.1 that the property right means acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at their discretion. In this sense in connection with sale of the disputable land plot by municipality, i.e. with implementation of the right of the order it has to be noted that implementation of the right of dispose, without having the property right, contradicts to the specified norm of the civil law.

However, the court of the first instance when considering the case did not investigate, whether had Hudat's municipality according to requirements of the civil legislation the property right to a disputable site and the arguments of K. Bunyatov concerning being of this site in his property.

Besides, according to points 15 and 16 of the Regulation “On rules of drawing up and coordination of documents concerning allotment of land of municipalities” approved by the Law of the Republic of Azerbaijan of March 15, 2002 during consideration of addresses of legal entities and individuals the municipality with the purpose to specify the possibility of allocation of the land plot considers specified in the address, and also the land management and economic plan of the territory, the main plan of housing point, projects of planning and construction of the territory with participation of legal entities and individuals conduct the inspection on a place of the land plot, estimated for allocation. At compliance of target mission of the land plot, estimated for allocation, to land management-economic plan, main plan of housing point, to projects of planning and construction of this territory and if this place is not transferred to the possession, use or rent to other legal or natural persons and also if it is not in the protected center of electric, communications, transport, gas, water, sewer and other lines of communication, the municipality finds possible allocation of the land plot to the addressed legal entities and individuals.

By court of the first instance it was not taken into consideration whether the requirements of the above Regulation at adoption by municipality of Hudat of the decision on allocation of the land plot to D. Velibekova were observed or not.

Thus, Plenum of the Constitutional Court comes to conclusion that Hachmaz district court, when resolving of dispute without having applied Articles 9.1, 9.3, 88, 217.1, and 217.3 of the CPC which were subject to application, broke the rights of property and legal protection enshrined in the Articles 29 and 60 of the Constitution.

According to Article 372.7 of the CPC, court of appeal instance shall, irrespective of arguments listed in complaint, verify observance by court of material and procedural norms of law. In the Articles 385.1.1 and 385.1.3 of the Code violation or incorrect application of material or procedural norms of law and non-proof of circumstances important for case established by court of first instance are provided as the basis for cancellation of the judgment in an appeal order. However, JBCC of the Court of Appeal which considered case, having violated the specified requirements of the civil procedural legislation by the decision as of August 8, 2006 uphold a judgment of the court of first instance.

On the other hand, with the purpose of ensuring of elimination of miscarriages of justice in the Article 372.1 of the CPC it is established that the court of appeal instance shall, as a court of full authorities, hear case and evidence present in case or additionally submitted evidence on merits. This norm has special value of that the court of the first instance considered the given case without full investigation.

It should be noted that the applicant in the appeal complaint specified some questions, including carrying out of court session without participation of the claimant, not consideration of the declared rejection to the judge and along with other arguments existence of the letter of the Chairman of the State Land and Cartography Committee of the Republic of Azerbaijan from February 27, 2006 concerning being of the disputable land plot in property K. Bunyatov and illegal sale of it by municipality.

Plenum of the Constitutional Court for fair and lawful consideration of a civil case, without being aware of these arguments which were put forward from the claimant in the appeal complaint notes that during consideration of the case in an appeal order it was not given any assessment to these moments which were put forward by the applicant in the appeal complaint.

According to legal position expressed in the decision as of April 19, 1993 of the European Court of Human Rights on case of Kraska vs. Switzerland the effect of the Article 6.1 is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (§30).

Besides, court of appeal instance, having specified that the disputable property has no relation to the claimant, recognized existence of the property right of the applicant to the equal land plot, but came to a conclusion not to define specifically a place of the property belonging to him.

In the above Article 152.1 of the CC the property right is expressed as acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at their discretion. On the other hand, according to Article 372.4 of the CPC, сourt of appeal instance should not accept and should not review new demands that were not subject of case hearing in court of first instance. Besides, because of definition in point 13.1 of the Regulation “On rules of drawing up and coordination of documents concerning allotment of land of municipalities” of rules of purchase of the land plots belonging to municipalities, gratuitous transfer of lands outside of these rules is inadmissible.

However, despite of these requirements of the legislation, court of appeal instance, though having confirmed possession of the claimant of the property right and its violation instead of executing the duties assigned to it, having illegally interfered with this right, went beyond of claim requirements, on the own initiative decided concerning transfer to the claimant of the land plot from municipality at other place of the city, rejected requirements of the applicant, having uphold the decision of district court.

Due to the issue of protection of the property right the European Court of Human Rights in the decision of May 30, 2000 on the case of Belvedere Alberghieras R.L. vs. Italy specified that the first and most important requirement of the Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (§56).

Along with it the court of appeal instance for legal justification referred to provisions of the general character of the Articles 55 (bases of emergence of the rights for the land plot), 56 (general bases of transfer of the land plots to property, disposal and rent) and 67 (obligation of the state registration of the rights for the land plot) of the LC.

The European Court of Human Rights in the decision as of March 13, 2007 on the case of Castravet vs. Moldova, came to conclusion that domestic courts, at the resolution of certain issues having limited to repetition of provisions of the legislation, did not explain their application at this case, and thus, these decisions are not reasonable and satisfactory (§34).

Court of appeal instance also referring to norms of the land legislation on this case, did not prove the position concerning their application to the established facts of the case.

According to the Article 417.1.3 of the CPC, court of cassation instance, having considered the case have a right to cancel decision or ruling of court of appeal instance completely or in part and to send the case for reconsideration to appeal instance. According to Article 418.1 the bases for cancellation of the decision and ruling of court of appeal instance are violation or wrong application of norms of a substantive and procedural law.

However, JBCC of the Supreme Court, not taking into consideration that JBCC of the Court of Appeal considered case, without having fulfilled the requirements of norms of a substantive and procedural law, uphold a judgment of appeal instance and, without having executed by that the requirement of Articles 417.1.3 and 418.1 of the CPC, violated the property right and right of legal protection of the applicant, provided by Articles 29 and 60of the Constitutions.

Plenum of the Constitutional Court considers necessary to especially note one more procedural violation that is not conforming to requirements of the legislation and causing a loss to an appropriate guarantee of the rights and freedoms of the applicant.

Thus, K. Bunyatov, having declared in the appeal along with other issues that from subordinate judicial instance procedural violations are assumed, and that though came to the meeting held on August 8, 2006 in an appeal order, having learned about adjournment of a meeting, left, and then received the decision adopted by same date and also specified that the opinion concerning specified letter of the Chairman of the State Land and Cartography Committee of the Republic of Azerbaijan brought into court of appeal instance and having crucial importance for the correct consideration of the case was not expressed.

From materials of a civil case it is evident that by the letter of the judge of the Supreme Court of December 12, 2006 the parties participating in case were given information on consideration of this appeal on court session on January 12, 2007. It agrees to the telegram filed, addressed to the judge of the Supreme Court of January 11, 2007 (on the same day it was registered in the Supreme Court), K. Bunyatov, having specified that in connection with health won't be able to come to court session and asked to postpone consideration of the case for other date.

However, the Supreme Court, having considered the complaint in due time, in the adopted decision did not concern the specified telegram at all, specified that, despite of providing to the parties information on date and a place of consideration of the case, they did not come to court and found possible to consider the case without participation of the parties.

Article 127.9 of the Constitution guarantees the right for legal protection at all stages of legal proceedings.

In this connection the position of the European Court of Human Rights expressed in the decision of November 6, 2003 on case of Roshka vs. Russia. The Court along with other issues of provisions of Article 6 of the Convention specified in this decision that participation of the criminal charge accused on criminal proceedings at a meeting, concerning, makes a basis of justice of process. Anyway, participation of the parties on a civil case has no identical value. A case law of the Convention, meaning representation of the parties by lawyers, defines that the right of personal participation in civil procedure is equivalent is not guaranteed, but by certain types of cases or depending on the available certain situation the right of fair judicial review can cover the right of personal participation also in civil procedure (§1).

The legal position of Plenum of the Constitutional Court on this case consists in that consideration of the case as the cassation should not have only formal character and has to serve for verification of the arguments which are put forward from the applicant according to requirements of the legislation. Considering the instruction in the appeal of violation of several norms of a procedural law having serious impact on resolution of case according to the law, and requirement of participation in court session of the applicant for verifying of these moments, consideration of the case without its participation despite the request made for the first time by the direction of the telegram, cannot be considered as the fair.

As a result in the decision of the Supreme Court adopted on case the legal assessment was not given to K. Bunyatov's arguments stated above. The European Court of Human Rights in the decision as of March 15, 2007 on the case of Gheorghe vs. Romania, having come to a conclusion concerning violation of the right of the applicant for fair judicial proceedings, also based the position by that from the Supreme Court the argument which is put forward by the applicant in the complaint in the Supreme Court because of crucial importance demanding a concrete and clear assessment was not taken into account (§50).

Considering stated above, Plenum of the Constitutional Court comes to such conclusion that the decision of JBCC of the Supreme Court of January 12, 2007 because of discrepancy to Articles 29, 60 and 127 of the Constitution, to Articles 417.1.3 and 418.1 of the CPC has to be recognized as null and void, and the case is 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 the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan dated November 12, 2007 on civil case on complaint of K.Bunyatov against Hudat's municipality concerning cancellation of the decision dated November 10, 2005 in connection with sale of 400 sq. m. of the land plot to D.Velibekova as null and void in connection with its discrepancy with the Articles 29, 60 and 127 of the Constitution of the Republic of Azerbaijan, with the Articles 417.1.3 and 418.1 of the Civil Procedural Code of the Republic of Azerbaijan. 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.