**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 5 June 2007 to the Constitution and laws of the Republic of Azerbaijan*

*in connection with the complaint of L. Binnatova*

**8 May 2008 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(reporter judge),I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

applicant L.Binnatova and her representative I.Javadov

representative of respondent body – R.Akperov, employee of Staff of the Supreme Court of the Republic of Azerbaijan

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan examined 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 5 June 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of L.Binnatova.

Having heard the report of Judge E.Mammadov, speech of the representatives of applicant I.Javadov and respondent body R.Akperov, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

As evident from materials of a civil case, 20.04.1996 between the applicant L. Binnatova and M. Abadov official marriage was concluded, on September 03, 1997 they gave birth the child, on July 30, 1998 (when the parties were in marriage) M. Abadov got the apartment (hereinafter referred to as the disputed apartment) in Baku city, O. Kerimov St., house 71. By the decision of Narimanov district court of 10.02.1999 L. Binnatova's claim was partially satisfied and court decided to register the disputed apartment and to move it her there together with the child. The requirement of recognition of the property rights on ¾ part of this apartment which is in joint property in view of finding of the parties in marriage was left without satisfaction. L. Binnatova and M. Abadov's marriage was terminated by the decision of Narimanov district court as of 15.11.2001.

On March 22, 2006 L. Binnatova, having appealed with the complaint to court again, specified that the decision of Narimanov district court of February 10, 1999 though partially executed in the form of her registration together with the juvenile child in the disputed apartment, the part concerning moving in is left without execution. Therefore, because the judgment of February 10, 1999 concerns the parts relating to the parties of this dispute, the reasons of dissatisfaction of the claim in this part are eliminated (that is divorce between them and the impossibility of moving in the disputed apartment because of the respondent), asked to adopt the decision on the division of the disputed apartment acquired during joint marriage, allocation of a share from the apartment by nature and delivery on her name of the registration certificate on this share.

Narimanov district court by the decision of June 8, 2006 satisfied the L. Binnatova's requirement, the rights of everyone for ½ part of the disputed apartment are recognized and is decided to issue registration certificates according to shares of the parties, and the counterclaim of M. Abadov against L. Binnatova with the requirement about loss of the right of use of living space is rejected.

According to 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) of November 9, 2006, the appeal complaint of M. Abadov is partially satisfied, the decision of Narimanov district court of June 8, 2006 partially cancelled and the requirement of the applicant L. Binnatova rejected. Other part of the decision leaved unchanged.

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 the decision of June 5, 2007 is not satisfy the appeal of L. Binnatova and uphold the decision of JBCC of the Court of Appeal of November 9, 2006.

As the answer to L. Binnatova's complaint submitted as the additional cassation, by the letter of the Chairman of the Supreme Court it was specified that the complaint in view of the fact that it does not contain the bases provided in Article 424.1 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), is not presented for consideration at Plenum of the Supreme Court of the Republic of Azerbaijan.

After that L. Binnatova, having made the complaint to the Constitutional Court of the Republic of Azerbaijan, specified that the courts of appeal and cassation instances which considered her claim violated the rights defined in Article 233.3 of the CPC, Article 375.2 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC), because of the wrong application of Articles 8.2 and 36.9 of the Family Code of the Republic of Azerbaijan (hereinafter referred to as the Family Code), Articles 217.2 and 416 of the CPC, and also rights defined in Articles 26, 29 and 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).Thus, the applicant asked to recognize the decision of JBCC of the Supreme Court of June 5, 2007 as void.

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

As evident from materials of a civil case on case of L. Binnatova against M. Abadov, in connection with the claim requirement concerning the division in kind of a share of the disputed apartment acquired during joint marriage, and issue of the registration certificate on the divided share, court of the first instance, being guided by Articles 82.2 and 82.3 of the CPC, having taken into account the decision of Narimanov district court of February 10, 1999, came to a conclusion that there is no need anew to prove the fact of acquisition of the disputed apartment during joint marriage and stay it in their joint property. The court, based on the provision of Articles 32.1, 36.1, 36.3 and 37.1 of the Family Code, divided joint property of spouses into equal parts between the parties.

Court of appeal instance, having cancelled a judgment of the first instance on this case and having adopted new one, having applied provisions of Articles 36.9 of the Family Code and 375.2 of CC, rejected claim requirements. The court considered that the marriage concluded between the parties was terminated by the decision of Narimanov district court of November 15, 2001, and the applicant L. Binnatova then only in March, 2006, that is 5 years later after divorce, appealed to court with the present statement though, according to Article 36.9 of the Family Code, at divorce, to requirements of spouses concerning the division of joint property of spouses, the three-year term of limitation of action is applied.

Apparently, unlike court of the first instance at the solution of a civil case the court of appeal instance applied provisions of the legislation on terms of limitation of action. Plenum of the Constitutional Court considers that for the correct settlement of dispute in court some rules of protection of the right, and also the issues of use of terms of limitation of action having special value, have to be considered the following.

Rule of law is one of the fundamental principles of the constitutional state. Observance of this principle bears in itself special value during implementation of the right for fair judicial proceedings accepted as the right on implementation in the appropriate order of justice in the democratic state. Implementation in the appropriate order of the rule of law and justice in modern legal proceedings, are two mutual and supplementing each other of a condition.

The right for legal protection that is not the obligatory right under certain conditions can undergo concrete restrictions. However, such restrictions defined only at the level of the legislation cannot cancel the rights and freedoms enshrined in the Constitution of the Republic of Azerbaijan. These restrictions with courts have to be applied not willfully, and is correctly adapted for the right nature in the proportional form corresponding to the right and in the same time within this right.

Implementation of the subjective right, regulation of its framework at the level of the legislation serves for the principles of legal certainty and legal coverage. It also creates possibility to use objective criteria of justice at using the mechanisms of legal protection for ensuring the right. Especially important that interested persons are right assuming that in court the requirement of the law are correctly applied.

It should be noted that, according to the Article 8.2 of the Family Code, at application of the norms establishing limitation of action, the court is guided by the rules provided by the Civil Code of the Republic of Azerbaijan.

From a point sight of lawful resolution of any civil case, besides definition of the beginning of the expiration of limitation of action also all other circumstances relating to dispute have to be considered. For observance of norms of use of term of limitation of action, first of all, it has to be considered that the claim right consists of the right of representation and the right of securing of claim.

Original right is the right to demand consideration and the solution in the appropriate order of the dispute that arose during court session. Implementation of this right does not depend, from any term of limitation of action. Therefore, irrespective of the expiration of limitation of action, submission of the claim in court is possible (Article 375.1 of the CC). The secondary right provides possibility of implementation of claim requirements in an obligatory form by means of court. The expiration of limitation of action prevents this opportunity, and refusal of the claim by court undertakes as a basis (Article 375.2 of the CC).

Rejecting the claim for the reason of the expiration of limitation action, the court at first has to investigate, has or not the applicant the corresponding subjective rights, and whether there are violations of this right by the respondent.

The term of limitation of action as the term of protection of the violated right is inseparably connected with violation of the subjective right which is the reason of the beginning of the expiration of this term. Therefore the court has no right to reject the claim for the expiration of limitation of action, in advance without having investigated such issues, whether as the applicant has the corresponding subjective rights, whether there are violations of the subjective right, whether this violation is made by the respondent. The judicial act which rejected the claim for the reason of the expiration of limitation of action which however is not resolving an issue of violation of subjective civil law in itself is contradictory and unreasonable as results to which the court in connection with the expiration of limitation of action came to the necessary bases does not refer.

Requirements of the law providing terms of limitation of action and norm of their definition have generally imperative character. At the same time, the law provides the important rule concerning use of the term of limitation of action by court only according to the statement of the party in dispute made before pronouncement of the decision by court (Article 375.2 of group of companies). It means that if the respondent does not wish to use the expiration of limitation of action and does not give in the matter of the complaint, the court has to consider the merits of the case and make the decision on material legal dispute between the applicant and the respondent, despite the expiration of any time.

The statement for use of limitation of action in court of the first instance from the applicant or the respondent has to be brought in writing and assumes the concrete and reasonable request for a rejection of the claim addressed into court in connection with the expiration of limitation of action.

Thus, according to Article 375.2 of the CC, limitation of action is applied by court only according to the statement of the party in dispute made before pronouncement of the decision by court. The expiration of limitation of action which application it is declared by the party in dispute, is the basis to pronouncement by court of the decision on refusal in the claim.

Apparently from this norm: 1) limitation of action is applied by court only according to the statement of the party in dispute; 2) this statement is submitted before pronouncement of the decision by court; 3) existence of such statement is the basis for pronouncement by court of the decision on refusal of the claim connected with the expiration of limitation of action.

However, the legislator, defining an order of use of limitation of action in Article 375.2 of the CC, having connected it with submission of the corresponding statement, did not specify before exactly what kind of pronouncement of the judgment submission of this statement is possible.

For an explanation of an issue it is necessary to take into account that the statement connected with application by limitation of action in essence is addressed in court, however is the material legal requirements directed on resolution of case. Material legal requirements (for example, primary or counter claim requirements), according to provisions of the existing civil procedural legislation, can be given only in court of the first instance. It is not a coincidence that in practice of the legislation of other countries (for example, the Russian Federation) possibility of filing of application, connected with use of limitation of action, not before pronouncement of any judgment but before decision-making of the first instance by court is reflected.

Existence of the substantive law rule meaning norm (the subject, a form, the presentation moment, the contents – the concrete factual basis reflecting the expiration of limitation of action and therefore the arisen material legal requirements) filing of application about use of limitation of action, the including settlement of the solution of an issue of use of limitation of action, and also the lawmaking and law-enforcement nature of a substantive law, as a rule, demand an advancing it the procedural rule protecting the right.

Therefore, referring to Article 372.2 of the CPC or from the point of view of requirements of Article 416 of the CPC respectively, the right of the party to submit the application in connection with use of limitation of action in courts of appeal and cassation instances is excluded.

Especially it should be noted that observance of requirements of Article 375.2 of the CC reflects execution of the principles of legality and optionality of the legislation generalizing essence of modern legal proceedings in consideration and resolution of civil cases by courts.

The principle of legality in activity of court means full compliance of implementation of all judicial acts and the carried-out procedural actions to requirements of the law. Courts are obliged to apply correctly substantive legal norms and to carry out procedural actions according to provisions of the law.

The principle of optionality provides opportunity to the persons participating in case, freely use the materials and procedural norms corresponding to interests, first of all, of the parties. According to it, presentation of the claim, definition of its basis and subject, and also refusal of the claim depend on will of the applicant. The conclusion of the peace agreement, consent or submission of the complaint to the act are defined by the taken-out judicial act on the basis of will of each of the parties. Recognition of the claim (acceptance or not acceptance), and application or non-use of limitation of action depend on position of the respondent. The parties can choose ways of protection of the rights, but court in a free form, being guided by the principles of civil legal proceedings, norms of a substantive and procedural law, carries out only justice function.

It is important to take into account and that the significance of appeal civil legal proceedings is that in court of appeal instance the dispute subject once again is considered in the volume demanded by the appeal complaint after discharge of the circumstances during procedure in court of the first instance that are not concerning the case in essence. The legal procedure regulating appeal civil legal proceedings also has to be applied according to significance of this kind of procedure.

The court of appeal instance as full court verify validity of the acts (resolutions) of court of the first instance which did not enter into force, and also, acting from arguments of the appeal complaint, having investigated again the case considered in court of the first instance, solves the case in essence (Articles 372.1 and 372.6 of the CPC).

However it is necessary to take into account that in procedure of civil judicial proceedings the volume of procedural rights of the parties, including a circle of powers which courts have, differ according to the nature of the first appeal and cassation instances.

Thus, the existing civil procedural legislation defining norms of new judicial proceedings assigns the main weight of conducting of case to courts of the first instance (providing requirements and proofs; research of all facts; check and assessment of proofs of the parties; decision-making on the basis of certain circumstances, provisions of the material and procedural law, important for case).

Even if in court of appeal instance, irrespective of arguments of the applicant, is allowed the verification of the observance by court of norms of a substantive and procedural law (Article 372.7 of the CPC), its appointment, as a rule, consists in acts (resolutions) of courts of the first instance, in reconsideration of the case on the basis of the presented facts by the parties, and also from correction of miscarriages of justice and shortcomings.

Especially it should be noted that the will of the legislator concerning powers of court of appeal instance is unambiguously reflected in Articles 78.1 and 372.2 of the CPC: the evidence is produced by the persons participating in case in court of the first instance; the additional facts and proofs are accepted by court if the applicant proved impossibility of their representation in court of the first instance for the reasons which are not depending on it.

Restriction by the legislator on granting the facts and proofs in court of appeal instance is necessary because otherwise the unfair party has an opportunity in any form to bring the suit or to defend the position connected with the claim in court not of the first instance, namely in court of appeal instance. Such situation can lead not only to violation of the new norms of legal proceedings accepted in the country but also to overload the courts of appeal instance, it is more intended to deprivation in court of the first instance - in the instance giving to the opposite side there is more to opportunity for protection of the position, right for fair judicial proceedings, to bring the procedure which is carried out in court of the first instance to insignificance.

It is not a coincidence that in the CPC in sequence it is defined that the parties can change legal justification of the claims which are initially submitted for consideration in court of the first instance (Article 372.3), in appeal instance are not accepted and are not considered the new requirements which were not a subject of consideration of the case in court of first instance (Article 372.4).

The legislator connects taking into consideration of the counterclaim of exceptions of the general norm on a rejection of new requirements in court of appeal instance, assignment of the requirement of an adverse party with a resolution in a judicial proceeding of the issues resulting from involvement of the third party, identification or the solution of the specific issues connected with the informing of the fact (Article 372.5). However, these exceptions cannot be perceived in essence as replacement to new claim requirements or the actions allowed only in court of the first instance.

The court of appeal instance has no right to change norms of judicial proceedings, to deprive of the party from guarantees of legal protection or the right of fair trial, to subject to suspicion the purpose of implementation by courts of justice on the basis of the law.

Courts have to be respectful to the right of everyone for solution properly of cases according to norms of judicial proceedings provided in the legislation. These norms at various stages of civil trial are connected and depend on each other. Violation of these norms in one court can lead to violation of the rights of the parties in other courts.

Plenum of the Constitutional Court considers that the court of appeal instance is wrong when at consideration of the judicial act (decision) before pronouncement of the final decision in court of the first instance under the pretence of the additional facts and proofs or new requirements accepts use of limitation of action according to the possible appeal complaint of the party and solves case on this basis (excepting circumstance, deprivations of possibility of the party of an appeal to the court, in court of the first instance).

Along with it, the court of appeal instance has to pay necessary attention to ensuring the rights of the parties in court of the first instance. However, each of the parties at different stages of civil trial, has to use the rights concerning it in such a way as that the rights of the opposite side and norms of judicial proceedings determined by the law were not violated.

Therefore, if the respondent was not informed concerning the process which is carried out in court and therefore could not submit the statement with a request for a rejection of the claim which is put forward against him and connected with application of limitation of action before adoption of a judgment of the first instance, this statement can be attached to his appeal complaint, and thus the court of appeal instance has to consider the issue specified in the complaint and adopt the relevant decision.

Apparently from materials of a civil case in L.Binnatov's claim against the respondent M.Abadov in connection with the claim requirement concerning the division a share in kind from the disputed apartment acquired during joint marriage, and issue of the registration certificate on the divided share, the party of the respondent in connection with limitation of action did not appeal to court of the first instance. In that case, the court of appeal instance had no right to apply the provision of Articles 36.9 of the Family Code and 375.2 of the CC.

Plenum of the Constitutional Court considers that the court of appeal instance at consideration of dispute violated requirements of Article 60.1, parts II and VII of Article 127 of the Constitution, and Articles 8, 9.1 and 9.3 of the CPC.

Thus, according to Article 127.2 of the Constitution, at 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 part VII of the same article, law proceedings are carried out based on the principle of contest.

According to Article 8 of the CPC, justice on civil cases and economic disputes is carried out in accordance with principle of equality of everyone before law and court. The court exercise identical approach towards all persons participating in case irrespective of race, religion, gender, origin, property status, official capacity, believes, appurtenance to political parties, trade unions and other social associations, place of location, subordination, type of ownership, as well as any other grounds not specified by legislation.

According to Articles 9.1 of the CPC, justice should be exercised based on facts, principle of contest and equality of parties. According to point 3 of this article, the judge is obliged always secure compliance with the principle of contentiousness. Judge may base his decision solely upon reasons discussed in compliance with the principle of contest, explanations and documentation submitted by parties. Court may not been titled to make its decision based upon reasoning put forward by the court in virtue of its professional status.

 The legal position of the Constitutional Court consists that from the point of view of the provision of Article 127.2 of the Constitution, the court at consideration of any legal dispute in no circumstances should carry out their power instead of the parties. Otherwise, its acts in a contradiction with function of implementation of justice on the considered case and in the same time breaks the principles of civil legal proceedings.

According to the civil 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 are the bases for cancellation of the decision and ruling of court of appeal instance. Violation or the wrong application of norms of a procedural law are the basis for cancellation of the decision and ruling if this violation brought or could lead to adoption of the wrong decision (Articles 416, 418.1 and 418.3 of the CPC).

At consideration of the appeal of L.Binnatova the JBCC of the Supreme Court did not estimate properly arguments of the applicant concerning wrong application of limitation of action and as a result adopted the decision which does not correspond to requirements of Articles 416, 418.1 and 418.3 of the CPC. It, in turn, led to violation of the principle of rational restoration of the rights of the applicant on the basis of the fair trial by independent court which is one of important elements of a guarantee of legal protection of the rights and freedoms fixed in Article 60.1 of the Constitution.

According to the above, Plenum of the Constitutional Court considers that the decision of JBCC of the Supreme Court as of June 5, 2007 has to be recognized as null and void in view of discrepancy with Article 60.1 of the Constitution, Article 375.2 of Civil Code, Articles 416, 418.1 and 418.3 of the CPC. 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, 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 of June 5, 2007 on a civil case of the claimant L. Binnatov to the respondent M. Abadov with the claim requirement concerning division of share in kind from the disputed apartment acquired during joint marriage, and issue of the registration certificate on the divided share as null and void in connection with its discrepancy with Article 60.1 of the Constitution of the Republic of Azerbaijan, with Article 375.2 of the Civil Code of the Republic of Azerbaijan, with 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, an order and the 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.