**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 4 May 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of M.Bagirov*

**30 July 2008 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant M.Bagirov and his representative F.Guseynbeyli

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 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 dated 4 May 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Mehdi Bagirov.

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

**DETERMINED AS FOLLOWS:**

Z.Gasanova appealed to court with the statement of claim to the chairman of housing construction cooperative “Cooperator” (hereinafter referred to as the HCC “Cooperator”) to Mehdi Bagirov concerning residential space in the building built for workers of “Azerittifag”, the 5-room apartment as to the successor of Arif Movsumov who was the shareholder of cooperative.

Substantiating the requirement Z.Gasanova noted that her spouse A. Movsumov entered into membership of the above-named cooperative in 1986 for the purpose of acquisition of apartment for his family. On August 8, 1989 A. Movsumov deposited 30% of cost of the apartment that was due to them in the cooperative residential building which was under construction since 1989 (that is 8,700 rubles). Construction of the building was suspended in the beginning of 1991. In the middle of 2000 construction works were resumed and when in the same year the building was ready, her husband was not alive any more.

She (as the successor of the husband) addressed the chairman of cooperative concerning allotting of the apartment in the built building, and declared readiness to pay the sum which it owes to cooperative. However, the chairman of cooperative refused to her and informed that will return to her 1343 US dollars.

By the judgment of the Yasamal district of the city of Baku as of March 17, 2005, Z.Gasanova'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 as of May 25, 2005 upheld the judgment of the Yasamal district court.

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 March 9, 2006 cancel the above judgment of appeal instance and returned the case to this court on reconsideration.

The court of appeal instance, at reconsideration of the case, by the decision dated 30 November 2006 satisfied the claim, and adopted the decision on Z.Gasanova's allot in the building built by “HCC Cooperator”, 5 room apartment and transfer into her property, collecting from Z.Gasanova unpaid part of cost of the apartment and transfer to the account of cooperative.

The JBCC of the Supreme Court of the Republic of Azerbaijan by its decision as of May 4, 2007 upheld the judgment of appeal instance.

By the ruling of JBCC of the Court of Appeal of the Republic of Azerbaijan dated April 27, 2007 it was explained that from the respondent the cost of the 5-roomed apartment in the building built by HCC “Cooperator”, the due Z.Gasanova at the real market price in the form of money has to be collected and paid.

In response to the complaint made by M. Bagirov as the additional cassation the acting Chairman of the Supreme Court, by the letter dated 20 August 2007 informed on lack of bases for presentation of case for consideration to the Plenum of the Supreme Court.

The applicant, having appealed to the Constitutional Court of the Republic of Azerbaijan hereinafter referred to as the Constitutional Court) with the complaint, asked to verify compliance of the decision of JBCC of the Supreme Court with the Constitution (hereinafter referred to as the Constitution) and laws of the Republic of Azerbaijan.

M. Bagirov specified in the complaint that Z.Gasanova had to direct the claim requirement not to him, that is the former chairman of the board of cooperative, but to the legal person provided by Articles 49 and 61 of the Civil Code of the of Azerbaijan (hereinafter referred to as the acting CC), or the liquidating commission. Court, having violated the specified norms of the acting CC and requirements of Article 54 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), did not replace the improper party - the respondent with the appropriate party.

M. Bagirov also noted that in spite of the fact that the husband of the claimant knew that for 8.700 rubles paid to them in 1989 construction was not carried out, alleged violation of his right, since 1991, did not make the demand concerning the given right in 1999 and subsequently up to death and by that passed the term of limitation of action provided by the Article 73 of the former CC.

The applicant also noted that according to Article 112.4 of acting CC Z.Gasanova could demand acceptance of her to membership of cooperative instead of the her died spouse or demand cost of the share paid by her husband, but she did not use this right.

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

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

As the basic principles of implementation of justice are enshrined in the Constitution hearing of cases impartially, fairly, observing legal equality of the parties, on the basis of the facts and according to the law (Article 127.2), implementation of legal proceedings on the basis of the principle of contest (Article 127.7).

In point 1 of Article 6 of the Convention for the protection of human rights and fundamental freedoms it is fixed that 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 these provisions, justice is carried out on the basis of contest, equality of the parties and on the basis of the facts. The judge in all cases is obliged to provide observance of the principle of contest of process, to base the decision on reasons discussed in compliance with the principle of contentiousness, explanations and documentation submitted by parties. Court 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 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).

One of important elements of the right of fair trial is existence of the right of submission of the complaint or a protest on acts of subordinate judicial instances in the highest judicial authorities in the order provided by the procedural legislation.

The appeal complaint in the order and cases provided in the CPC can be made on decisions and rulings adopted by courts of the first instance of the Republic of Azerbaijan, which did not enter into force.

Article 365 of the CPC established that provisions of the present chapter (41st Chapter) and the present Code are applied to appeal proceeding. According to these provisions of the procedural legislation, cases in court of appeal instance are considered along with the features specified in chapter 41 of the CPC, establishing proceeding in this court, also according to the principles of civil process, including, the principle of possession of the parties of the equal rights and opportunities.

The court considering case for lawful resolution of civil dispute including, court of appeal instance as full court is obliged to verify, first of all, possession of the person who brought the claim, the corresponding subjective right.

In subjective sense, the right expresses the outer freedom established by normative legal acts. Opportunity consciously to define the purposes, choosing anyway of behavior of the personality, and to work in their direction is inside of such freedom. This party does not fall under legal regulation. The outer side of this freedom accepted as possibility of expression of the purpose in the public relations is of great importance.

The second (outer) party is expressed, as demonstration of legal will. Thus, the subjective right can be estimated as set of three elements: legal will to the actions; the right to demand from other persons (debtors); right for protection. The second and third elements of the subjective right are connected with existence of the first element. The first element sometimes arises only at observance of the rule established by the law. Without observance of similar rules concerning emergence and implementation of other elements of the subjective right, that is the right of the demand from others and the right for protection is out of the question. The right of succession is one of such rights.

Thus, according to the Article 1243.2 of the acting Civil Code, heir (heiress) is considered to accept inheritance upon handing in an application on his (her) acceptance of inheritance to Notary Office that is in charge of particular place where inheritance commencement took place, or upon his (her) practical commencement of owning and administration of property and thus demonstrating undoubtedly that he (she) accepted inheritance.

But the court of appeal instance which considered case, making on November 30, 2006 the decision on satisfaction of the claim of Z.Gasanova consisting with A. Movsumov who died on September 2, 2000 in marriage as his successors, did not establish acceptance of inheritance by her according to Article 1243.2 of the CC, that is possession by her of the first element of the subjective right. M. Bagirov claims that marriage between Z.Gasanova and A. Movsumovis terminated.

Besides, court of appeal instance, having satisfied Z.Gasanova's claim for the requirement of the apartment located in the building built by HCC “Cooperator” from M. Bagirov as chairman of the board of cooperative, did not fulfill the requirement of the law.

Thus, according to the Articles 24 and 26 of the former Civil Code, Article 49.1 of the acting Civil Code, a legal entity acquires civil rights and undertakes civil obligations through its bodies, which act in accordance with law and the charter. The procedure for the election or appointment of a legal entity’s bodies is specified by the charter. According to points 51 and 55 of the Charter of “HCC Cooperator”, that is legal entity, the supreme body of cooperative is general meeting. During the period between meetings control is exercised by board of cooperative. Apparently, according to requirements of the legislation and according to the charter, responsibility for activity of cooperative is not born at all by M. Bagirov therefore specifically in this case the claim requirement belongs to obligations of legal entity and is not connected with the natural person M. Bagirov, as the chairman of the board.

According to Article 54.1 of the CPC where a claim is filed by person, who does not have right of claim, or is brought against a person, who is not liable under the claim, court have the right, upon consent of claimant and without cancelling case, allow substitution of initial claimant or respondent by proper claimant or respondent. The court of appeal instance that did not use this opportunity given by the legislation, having met the requirements directed on the respondent who is not ought, finally, adopted the decision violating M. Bagirov's rights.

As appears from materials of a civil case, general meeting of HCC “Cooperator”, and, according to the decision made with the assistance of 110 members of cooperative from 147 is held on January 30, 1999, the average price of 1 sq.m from the total area of the apartment is established in the ratio a rate of 300 US dollars in manats. According to this decision, the persons who were not paying means within two months are considered excluded from membership with return earlier paid by them in rubles of money in proportion to a rate of US dollars of that time.

Court of appeal instance, without having investigated appropriate notification from A. Movsumov on holding the called meeting and adoption of noted resolution there, came to conclusion that it could not execute the rules accepted by the real meeting as did not participate in it. Even if to assume that A. Movsumov did not participate in the above meeting, the resolution of cooperative adopted in this meeting directly does not influence on his property position, and also Z.Gasanova recognized by courts his successor, the last despite the expiration of long time, did not show due attention to the property interests and only on February 16, 2005 brought in court the corresponding claim.

According to 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. In this regard, it should be noted that the question of time when the claimant had to learn about violation of the right, has to be resolved taking into account circumstances of concrete case, and proceeding from the assumption of demonstration of reasonable attention by each participant of a civil turn to the property interests.

According to Article 73 of the former Civil Code, total period (term of limitation of action) for protection of the rights of the person which rights are violated, in his claim, is determined in three years. According to Article 77 of this Code, the term of limitation of action, irrespective of the message of the parties, is applied by court. According to Article 82 of this Code, the expiration of limitation of action before initiation of the claim is the basis for a rejection of the claim.

Plenum of the Constitutional Court also notes that according to Article 217.1 of the CPC a judgment is considered as lawful at exact observance of norms of a procedural law and in full accordance with the norms of a substantive law that are subject to application to the corresponding relations. It, along with a legal procedure, demands the indication of the material law that is subject to application to the corresponding legal relations in the descriptive motivational part of the decision.

Court of appeal instance in a contradiction with the present requirements of the procedural legislation, without being based in the decision on any norm of a substantive law, allowed a rough offense, having come to conclusion on satisfaction of the claim.

According to the above, Plenum of the Constitutional Court comes to conclusion that the court of appeal instance considered case on Z.Gasanova's claim to M. Bagirov with violation of requirements of Article 60.1, parts II and VII of Article 127 of the Constitution, Articles 9.1, 9.3, 88, 217.1, 217.3, 372.7 of the CPC, Articles 73, 77, 78 and 82 of the former Civil Code.

M. Bagirov, having specified the offenses allowed by the court that considered case made the appeal.

According to Article 417.1.3 of the CPC, court of cassation instance, having considered the case having the right to cancel the decision or ruling of court of appeal instance completely or in part and to submit the case for new consideration by appeal instance. According to Article 418.1 of the CPC, 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.

However, JBCC of the Supreme Court, not taking into account the consideration of the case by JBCC of the Court of Appeal without observance of requirements of norms of a substantive and procedural law and without having proved the conclusion to which came in the decision by any norm of a substantive law, uphold thedecision of appeal instance, and as a result violated the right of legal protection of the applicant provided by the Article 60 of the Constitution.

Considering the above, Plenum of the Constitutional Court comes to conclusion that the decision of JBCC of the Supreme Court of the Republic of Azerbaijan of May 4, 2007 in view of discrepancy with Article 60.1 of the Constitution and with the Articles 417.3 and 418.1 of the CPC has to be recognized as void. The case gas 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, 60, 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 JBCC of the Supreme Court dated May 4, 2007 on a civil case in Z.Gasanova's claim for allotting of the apartment to M. Bagirov as null and void in connection with its discrepancy with the Article 60.1 of the Constitution and with the Articles 417.3 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.