**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 6 November 2007 to Constitution and laws of the Republic of Azerbaijan*

*in connection with the complaint of Eyvaz Khakimov*

**3 November 2008 Baku city**

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

with participation of the secretary V.Zaynalov,

applicant E.Khakimov and his representative E.Gadimi

representative of respondent party: A.Ismaylov, employee of the Staff of Supreme Court of the Republic of Azerbaijan

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijanexamined in open judicial session via special constitutional proceedings the case on complaint of Eyvaz Khakimov concerning verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of 6 November 2007 to Constitution and laws of the Republic of Azerbaijan.

Having heard the report of Judge B.Garibov, speech of the applicant and representative of respondent, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

As evident from documents of the civil case, the house located at the address: the Baku city, Abilov Street 75 (hereinafter referred to as the disputed house), was for the first time registered (without date) on the names of Gambar Meshadi Medjidoglu, Minakhanum Meshadi Medjidgizi and Sakinakhanum Meshadi Medjidgizi. After death of Minakhanum Khakimova on the basis of the certificate on inheritance dated May 5, 1994 Khakimova (in some constitutive documents – Akimov Eyvaz Sadykhogli) inherited 1/6 after the death of Gambar Meshadi Medjidoglu on the basis of the certificate on inheritance dated July 12, 1994, Gambarov Yarmamed Ali Oglu – 2/6 parts, after death of Sakinakhanum Imamverdiyeva on the basis of the certificate on inheritance as of June 28, 1994, Imamverdiyev Gamid Aga Gusejnaga ogli – 2/6 parts of this house inherited 1/6 part. Besides, after death of Minakhanum Khakimova on the basis of the certificate on inheritance as of June 8, 2004 Gambarov Balaoglan Atamoglanogli inherited 1/6 part of this house, and after his death on the basis of the certificate as of July 14, 2005 this part passed to Dzhabbarova Ziby Balaoglan gizi.

By its decision the people's court of Nasimi district as of March 30, 1994 satisfied the claim of E.Khakimov, which established fact of acceptance of the disputed hereditary house by E.K.Khakimov on March 18, 1983. By the decision of the same court as of July 8, 1994 it was recognized that Gambarov Ali Medzhidogli and Gambar Meshadi Medzhidogli is the same person. By the another decision of the people’s court of Nasimi district as of August 8, 1994 satisfied E.Khakimov's claim, and established the fact that Minakhanum Meshadi Medzhidgizi is the mother of E.Khakimov, Sakinakhanum Meshadi Medzhidgizi – his native aunt, and Gambarov Ali Medzhidogli – his native uncle. On this court session E.Khakimov declared that establishment of this fact is necessary for registration of the contract of donation with successors of his relatives which already died. Y. Gambarov and G. Imamverdiyev confirmed the relationship facts. All three judicial acts attached to materials of a civil case entered into force.

On the basis of the bill of sale as of May 27, 1994 1/6 part (share) of the disputed house was in a private property of the applicant E.Khakimov.

2/6 parts of this house, according to the bill of sale No. 30/9249 as of August 5, 1994 was in a private property of Y.Gambarov, and other 2/6 parts on the basis of the bill of sale No. 30/9248 of the same date – in a private property of G.Imamverdiyev.

According to the contracts certified on October 19, 1994 of the state notary office (hereinafter referred to as the SNO) No. 13 and registered in the register book No. 3-M/7-2158 and 3-M/7-2157, Y.Gambarov and G.Imamverdiyev presented to E.Khakimov 2/6 shares in the disputed house belonging to each of them separately on the basis of the right of a private property.

On the basis of the bill of sale as of November 16, 1994, including the presented shares, 5/6 parts of the disputed house was in E.Khakimov's property.

In the duplicate of the bill of sale issued on December 22, 2004 to Y.Gambarov and dated August 5, 1994 it is specified that the disputed house (in which 2/6 shares are in a private property of Y.Gambarov, 3/6 shares in a private property of E.Khakimov, and 1/6 share in a private property of B. Gambarova) had passed legal registration.

At the same time, in connection with the letter of legal advice office No. 4 of the Baku city dated May 14, 2004, and in the response letter as of May 15, 2004 which are in materials of the territorial administration of service of the state registry of real estate of Baku city (hereinafter referred to as the service of the registry) it is noted that on the basis of the contract signed on October 19, 1994 G.Imamverdiyev presented to E.Khakimov the 1/3 part in the disputed house (the law of succession with respect to which was recognized), and on 1/3 part of this house the law of succession of Y.Gambarov was recognized.

In the bill of sale dated August 11, 2005 issued by service of the registry to Z.Dzhabbarova as B.Gambarov's successor, it is indicated that 1/6 part of the disputed house belongs to Z.Dzhabbarova, 3/6 parts to E.Khakimov, and 2/6 parts to Y.Gambarov.

Because of emergence of litigation between owners and their successors Y.Gambarov and Z.Jabbarova brought in court against E.Khakimov suits for the real division of the house which is in share property, its division according to shares, definition of rules of use of plot of land attached to a house and subsidiary site and moving in to the house; E.Khakimov against Y.Gambarov and service of the registry on cancellation of unreasonable registration and restoration of the property rights; Imamverdi Gamidagaogli Imamverdiyev (son of Mr. Imamverdiyeva) against E.Khakimov, SNO No. 13 and services of registry concerning recognition of the deed of gift and the bill of sale as invalid, recognition hereditary and property rights. At the same time Y.Gambarov brought the counterclaim against E.Khakimov, SNO No. 13 and service of the registry concerning recognition of the deed of gift as invalid and partial cancellation of the bill of sale.

Nasimi district court that considered these cases in uniform procedure by the decision of March 5, 2007 rejected the submitted claims and the counterclaim. The court proved the conclusion that on the basis of the contracts signed on October 19, 1994 in SNO No. 13 and registered in the registry, G.Imamverdiyev and Y.Gambarov presented to E.Khakimov the parts of the disputed house belonging to them. In the bill of sale number 30/15518 of November 16, 1994 it is also specified that 5/6 parts of the disputed house are in a private property of E.Khakimov.

The court of the first instance established that in an explanation of the representative of service of the registry and the letter of this body No. 11/12711 dated November 1, 2006 it is noted that the duplicate of the bill of sale was issued to Y.Gambarov mistakenly, and in this connection the latter was informed about invalidity of this document, and belonging of 5/6 parts of property to E.Khakimov. The court also established that deeds of gift were signed according to the Articles 245 (provisions concerning the deed) and 230 (provisions concerning a form of the contract of purchase and sale of a house) of the Civil Code acting till September 1, 2000 (hereinafter referred to as the former Civil Code); since that moment more than 11 years had passed; it also was not confirmed that Y.Gambarov and I.Imamverdiyev missed the term of the claim for a good reason; specifying E.Khakimov's request for use of term of the claim and being guided by the decision of the Constitutional Court of the Republic of Azerbaijan as of December 27, 2001 (concerning interpretation of the Article 373 of the Civil Code of the Republic of Azerbaijan) the court applied to the 3-year term of limitation period with respect to claim requirements.

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) as of July 16, 2007 satisfied partially the appeal complaints made by other claimants except for E.Khakimov. By given decision the deeds of gift were recognized as invalid; the bill of sale issued on November 16, 1994 to E.Khakimov was cancelled; the service of the registry was commissioned to issue to E.Khakimov the bill of sale for 1/6 part, to Z.Jabbarova – 1/6 part, to Y.Gambarov - 2/6 parts, and to I.Imamverdiyev - 2/6 parts of the disputed house; decision was made to entitle Y.Gambarov and I.Imamverdiyev for moving into the disputed house.

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 November 6, 2007 upheld the judgment of appeal instance.

By the letter of the Chairman of the Supreme Court as of February 7, 2008 the additional appeal of the applicant in view of lack of the bases was left without consideration at Plenum.

Having applied to the Constitutional Court against the decision of JBCC of the Supreme Court as of November 6, 2007, the applicant E.Khakimov appealed to cancel this decision because of its contradiction to the Constitution (hereinafter referred to as the Constitution) and to laws of the Republic of Azerbaijan.

In connection with the complaint, Plenum of the Constitutional Court notes the following.

During consideration of a civil case in judicial instances, the issue of the expiration of terms of the claim at presentation of statements of claim was one of the main subjects of discussion.

In the previous decisions the Constitutional Court created the legal positions concerning establishment and value of institute of term of the claim (decision “On interpretation of the Article 373 of the Civil Code of the Republic of Azerbaijan” as of December 27, 2001, in connection with complaint of G. Gashimov and others as of June 30, 2005, concerning complaint of S. Aliyeva as of May 31, 2006, in connection with complaint of R. Javadov and others as of June 29, 2007, according to complaint of L.I.Binnatova as of May 8, 2008, etc.). Besides, in connection with application of the norms of the former Civil Code regulating claim terms, Plenum of the Constitutional Court considers necessary to note the following:

Obligatory protection of the violated rights is not limited and possible in the limits that are specifically set by legislation with respect to terms of limitation period.

By the Article 73 of the former Civil Code the total period (claim term) for protection of rights of a person, whose rights were violated, is established at a term of three years, and in claims of legal entities to each other – at term of one year. According to the Article 76 of this Code, irrespective of the claim expiration, the requirement concerning protection of the violated right was accepted by court for consideration.

It was specified in Article 78.1 of the former Civil Code regulating the start of running of limitation period and general order of its calculation that the running of limitation period begins from the date of emergence of a right of action: the right of action arises from the date when person learned or had to learn about violation of his/her right.

From contents of this article it becomes clear that the beginning of a running of limitation period is connected, on the one hand, with the objective moment of violation of the subjective right, and on another hand with the subjective moment when authorized person learned or had to learn about violation of the rights. Existence of these two different factors and their quite frequent discrepancy are the important point influencing establishment of the beginning of limitation period.

The Article 77 of the former Civil Code directly provided for competence of court in solution of issues concerning claim terms by, irrespective of will of parties, and the Article 82 established that expiration of this term before bringing of claim gives basis for refusal with respect to claim. The listed norms and influence of the correct definition of a reference point of term of claim on legal and legitimate interests of parties invoke need for establishment by court of this moment only on basis of serious proofs.

Purpose and function of indication concerning emergence of claim right from date when person had to learn about violation of his/her right, serve for increasing of sense of responsibility connected with protection of subjective rights and legitimate interests, directed on elimination of indifferent and negligent attitude, prevention of cases of abuses which can arise at its implementation.

The court of appeal instance noted that Y.Gambarov and I.Imamverdiyev were not informed on the transfer of the corresponding parts of the disputed house to E.Khakimov, from this point of view the term of the claim was not missed (Article 78 of the former Civil Code), and came to conclusion that Article 73 of the former Civil Code was applied by court of the first instance incorrectly. The court proved the position that in reference of service of the registry as of May 15, 2004 there are no records about deed of gift by Y.Gambarov to E.Khakimov, both in this document, and in given out to the Z.Jabbarov bill of sale it was noted that 2/6 parts of the disputed house belong to Y.Gambarov.

Considering the above, Plenum of the Constitutional Court underline that full and comprehensive study of all circumstances of a civil case at strict observance of requirements and indications of the procedural legislation represents crucial importance from the point of view of achievement of an objective truth.

The Article 60 of the Constitution guarantees legal protection of the rights and freedoms of everyone. The right for legal protection is among basic rights and freedoms of the person and citizen and perceived as a guarantee of other rights and freedoms. This right, without being limited only to the right to appeal to court, also provides the justice capable effectively to restore within the limits set by the legislation, the violated rights and freedoms. In the decision according to complaint of R. Aslanov as of July 26, 2004 the Constitutional Court, concerning an essence of the guarantee fixed by the Article 60 of the Constitution specified that the essence of this guarantee also consist in acting the court considering the case only within the powers established by the law.

According to requirements of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) concerning implementation of civil legal proceedings, the judge is obliged to motivate the decision only with those proofs, explanations of the parties and documents which were discussed by it on the basis of the principle of competitiveness of the parties. The court estimates proofs according to the precepts of law that are subject to application concerning these proofs after their objective, impartial, comprehensive and complete examination. The judgment has to be lawful and reasonable. The decision has to be passed according to the norms of substantive and procedural law acting at the time of emergence of disputable legal relations acting for date of consideration and resolution of case. The decision has to be based on the valid facts of the case and on relationship of the parties. The court (judge) bases the decision only on those proofs that were investigated in court session (Articles 9.3, 88 and 217 of the CPC).

However the Board of Court of Appeal on the given civil case, without having studied completely and comprehensively the evidence which is produced by the parties to court and without having cleared some contradictory moments, came to conclusion about a beginning of running of term of the claim ofrequirements of Y.Gambarov and I.Imamverdiyev in connection with protection of their violated rights not since 1994, but more than 11 years later – since 2006.

Thus, the court did not give any legal assessment to the circumstances presented by the parties which were reflected in the judgments adopted by people’s court of the Nasimi district in 1994 and entered into force and which could promote the fair solution of a civil case. There were established facts of inheritance by E.Khakimov since March 18, 1983 of the disputed hereditary house according to these, judicial acts attached to materials of a civil case, existence of its related communications with initial owners of this house and other circumstances.

In the decision on case “Kraska vs. Switzerland” the European Court of Human Rights noted that the effect as of Article 6 para. 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 (19.04.1993, paragraph 30).

Besides, court of appeal instance, estimating the references contradicting each other and letters of service of the registry, did not take the necessary actions directed on clearing of questions that could affect the moment of a reference point of limitation period for the parties. Though the court also established in the letter of service of the registry No. 11/12711 as of November 1, 2006 that the duplicate of the bill of sale was issued to Y.Gambarov mistakenly in this connection to the last it was reported about invalidity of this document, it did not clear up such important point when this government body to Y.Gambarov sent the warning of an inaccuracy, did not provide participation in court session of the representative of SNO No. 13 where deeds of gift were signed. The court was content with a request of this notary office to consider case in the absence of its representative and to adopt the decision without their participation. And all this became the reason of that the court of appeal instance came to the legal conclusion which generated dispute in connection reference point of limitation period for the parties and is not in conformity with the Articles 73 and 78 of the former Civil Code.

At the same time court of appeal instance, providing claim requirements of I.Imamverdiyev as successor of G.Imamverdiyev, did not study, whether there is at that a right to make such claim and to challenge powers more than 11 years later of the bargain which his father signed in competent government body and did not challenge during lifetime, and possibility of this circumstance from the point of view of the general requirements and the principles of the civil legislation.

The former Civil Code caused acquisition of inheritance by its acceptance by successor. Inheritance was considered accepted by successor when he/she actually entered into management or possession of hereditary property or when he/she submitted to notary at a place of opening of inheritance an application for acceptance of inheritance. The code provided implementation of these actions within six months from the date of opening of inheritance (Article 552). According to the Article 553 of the code the term for acceptance of inheritance established by Article 552 of the present Code can be prolonged by court if it recognizes the reasons of the admission of term as valid. The inheritance can be accepted after the expiration of the specified term and without appeal to court on condition of consent of all other successors who accepted inheritance.

As evident from the facts of the case established by courts, I. Imamverdiyev since 1986 did not live in the disputed house. Despite of it, court, without having studied issues of case’s documents on whether I. Imamverdiyev as the successor, actually or through a notary office inherited the inheritance belonging to his father, whether there was a consent of all other successors to inheritance of inheritance by I. Imamverdiyev, satisfied the claim submitted by him.

Thus, as it is clear from the foregoing, JBCC of the Court of Appeal, making the decision on the case as of June 16, 2007, did not fulfill properly the requirement and the indication of the material and procedural legislation and as a result adopted the judicial act which is not correspond to the Articles 73 and 78 of the former Civil Code and Articles 9.3, 77, 88 and 217 of the CPC.

Though, only the decision adopted according to the relevant norms of a substantive law, at exact observance of norms of a procedural law, can be considered as the judicial act corresponding to relevant requirements of the law.

According to the CPC, the court of cassation instance verifies correctness of application by court of appeal instance of norms of substantive and procedural law. Wrong application of norms of substantive and procedural law is the basis for cancellation of the decision or ruling of court of appeal instance. Cancellation of acts of Court of Appeal is in power of this court (Articles 416, 417 and 418 GPK).

However, JBCC of the Supreme Court, having kept in force the judgment of court of appeal instance adopted with violation of norms of substantive and procedural law broke the guarantee of legal protection of the rights and freedoms fixed in of the Article 60.1 of the Constitution.

Thus, Plenum of the Constitutional Court comes to a conclusion that the decision of JBCC of the Supreme Court as of November 6, 2007 on a civil case concerning Y.Gambarov and Z.Jabbarova's claims against E.Khakimov, the claim of the latter against Y.Gambarov and service of the registry, I.Imamverdiyev against E.Khakimov and SNO No. 13, the counterclaim of Y.Gambarov against E.Khakimov and others because of discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan and with the Articles 416, 417 and 418.1 of the CPC has to be recognized as null and void. The this civil case has to be reconsidered according to the present decision, 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 November 6, 2007 on civil case concerning Y.Gambarov and Z.Jabbarova's claims against E.Khakimov, the claim of the latter against Y.Gambarov and service of the registry, I.Imamverdiyev against E.Khakimov and SNO No. 13, the counterclaim of Y.Gambarov against E.Khakimov and others as null and void in connection with its discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan and with the Articles 416, 417 and 418.1 of the CPC. To reconsider case according to the present decision, an order and the terms established by the CPC.

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.