**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 2 February 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of A.M.Javidan*

**14 November 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,

assign of applicant T.Sultanova - Javidan and her representative I.Gasimov

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 of 02 February 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Azer Javidan.

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

**DETERMINED AS FOLLOWS:**

As evident from civil case materials, Sevinj Sevdimaliyeva, having appealed on June 8, 2005 to Yasamal district court with the statement of claim against Azer Javidan, specified that on December 3, 2004 she married with Anar Javidan, moved to the apartment located at the following address: Baku city, G. Javid Avenue, 518th block, building 15, apartment 25 (hereinafter referred to as the “disputed apartment”) in which his parents lived, and within 40 days, having with them joint economy, lived in that apartment. Later, in spite of the fact that she lived in the disputed apartment in due time, the respondent limits her right of use of living space in this apartment. Being guided by requirements of the Article 53 of the Housing Code of the Republic of Azerbaijan (hereinafter referred to as the Housing Code), S. A. Sevdimaliyeva in the statement of claim asks court to recognize her right of use of living space in the disputed apartment and to moving in to the apartment.

On the basis of the Article 123 of the Housing Code claim requirements of S. Sevdimaliyeva were satisfied by the decision of Yasamal district court as of September 28, 2005.

Having made the appeal complaint, the respondent A. Javidan expressed disagreement with this decision and asked to cancel it. In the complaint made to Judicial Board on Civil Cases of Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Court of Appeal), he specified that after marriage wedding ceremony dated December 3, 2004 his former daughter-in-law S. Sevdimaliyeva together with his son A. Javidan lived in “K-Vig” hotel in the settlement of Mardakyan. Being seriously ill patient the respondent was together with the spouse on treatment in the Republic of Turkey for the reason that the apartment did not remain without supervision, his son together with the claimant during 10 days lived in this apartment. Then S. Sevdimaliyeva returned to the house of the father, and his son (divorced with her) in the beginning addressed Binagadi regional registry office, and then in view of the fact that S. Sevdimaliyeva did not agree to divorce, - to Binagadi district court. With the purpose to drag out process in this court of S. A. Sevdimaliyeva gave a protest against the judge, and then against composition of the court, and by ruling of JBCC of the Court of Appeal case was directed for consideration to Yasamal district court. Only on September 5, 2005 a marriage was dissolved by the decision of this court. However, court, without having notified the respondent in the order provided by Civil Procedure Code on S. A. Sevdimaliyeva's claim concerning recognition of her right of use of living space in the disputed apartment and moving in the apartment, without participation of the respondent on September 28, 2005 adopted the decision contradicting requirements of the Articles 228.1 and 228.2 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC).

Having considered the complaint of A. Javidan the JBCC of the Court of Appeal recognized on December 8, 2005 that the proof on moving in the disputed apartment of S. A. Sevdimaliyeva and accommodation in this apartment within 40 days does not grant the right for use of the apartment. Therefore on the basis of Articles 228.1 and 228.2 of the CC, and also legal positions of the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the “Constitutional Court”) the judgment of the first instance as of September 28, 2005 in view of illegality and groundlessness was cancelled, and the statement of claim was left without satisfaction.

Having disagreed with the decision of JBCC of the Court of Appeal of December 8, 2005, S. A. Sevdimalyeva made the appeal. Referring, generally to the Article 53 of the Housing Code and Article 228 of the CC, she, considering the challenged decision as illegal and unreasonable, asked to cancel it and to uphold the decision of Yasamal district court as of September 28, 2005.

By the decision of 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 May 24, 2006 the appeal of S. A. Sevdimaliyeva was satisfied partially, the judgment of JBCC of the Court of Appeal as of December 8, 2005 was cancelled, and case is directed to the same court for reconsideration.

The JBCC of the Court of Appeal by its decision as of November 8, 2006, did not satisfy the appeal complaint of the respondent A. Javidan and upheld the decision of Yasamal district court dated September 28, 2005.

The JBCC of the Supreme Court by its decision as of February 2, 2007 did not satisfy the appeal of A. Javidan, and upheld the decision of JBCC of the Court of Appeal as of November 8, 2006.

In the letter of the Chairman of the Supreme Court as of May 2, 2007 directed as the answer to the complaint made by A. Javidan as the additional cassation indicated that in view of lack of the bases provided by Article 424.1 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), the complaint was not submitted for consideration of Plenum of the Supreme Court.

After that A. Javidan, having made the complaint to the Constitutional Court, specified that as a result of application by courts of appeal and cassation instances of the Article 228.5 of the CC which should not have been applied, her property right fixed by the Constitution of the Republic of Azerbaijan, the right for housing and the right for inviolability of housing was violated. The applicant asked to recognize that the decision of JBCC of the Supreme Court as of February 2, 2007 contradicts the Constitution (hereinafter referred to as the Constitution) and laws of the Republic of Azerbaijan and asked to recognize the given decision as void.

After receipt of the complaint in the Constitutional Court the applicant A. Javidan died. His daughter – Tadzhira Sultanova-Dzhavidan, having filed a petition to the Constitutional Court, asked to register the disputed apartment on her name and, considering death of her father, recognize her as the legal successor of the applicant.

On the basis of ruling of Chamber of the Constitutional Court as of May 14, 2008 A. M. Dzhavidan's complaint was accepted in procedure of the Constitutional Court, and in connection with death of the applicant T. Sultanova-Javidan as the legal successor was accepted as replacing the applicant in the constitutional legal proceedings. Because of consideration of the complaint coincided with the consideration period Plenum of the Constitutional Court of the appeal of Court of Appeal of Sumgait city concerning application of Article 228 of the CC and inquiry of the Ombudsman of the Republic of Azerbaijan and that elimination of the misunderstanding which arose in application of article in jurisprudence represents importance and for resolution of this dispute, consideration of the complaint of A. Javidan was suspended. Among the cases appointed after adoption of the decision of the Constitutional Court concerning the Article 228.5 of the CC, it was decided to resume consideration of the complaint of A. Javidan in essence.

In connection with the complaint of A. Javidan Plenum of the Constitutional Court considers necessary to note the following.

The solution of a civil case on the statement of claim of S. A. Sevdimaliyeva against A. Javidan concerning recognition of her right of use of living space in the disputed apartment and settling to the apartment is connected in fact with value of the property right and establishment of existence of a right of use of living space.

The property right takes an important place in system of basic human rights and freedoms, in particular, among the rights affirmed by Article 17 of the Universal Declaration of Human Rights and Article 1 of the Additional protocol (No. 1) to the Convention on Protection of Human Rights and Fundamental Freedoms (European Convention).

In the Republic of Azerbaijan, the property and the relation to the property right according to international legal norms reflected in Articles 13 and 29 of the Constitution. These articles fixed inviolability of property, its identical protection by the state irrespective of a kind, protection of the right to own property by the law, that fact that this right includes the rights of the owner to own property, to use the property and to make arrangements for it and other provisions.

In provisions of the Constitution it is also emphasized that no one can be deprived of his or her property without a decision of the court. Nobody can limit implementation of constitutional rights and freedoms, including the right to own property. Alienation of the property for state needs is allowed only after the cost of property is fairly reimbursed.

The right of use of living space acts as an element of the right for the housing established by Article 43 of the Constitution and at the same time is reflected in the Housing Code and in the CC.

According to Article 123.1 of the Housing Code, the members of the family of the owner of a house moving in by him to the house belonging to him, having the right to use living spaces in the house on an equal basis if at their moving in the other was not stipulated.

According to Articles 228.1 and 228.2 of the CC, family members of owner of integral part of residential building and other persons have the right of use of building, provided that such right has been registered in the state register of immovable property. Emergence, enforcement conditions and termination of right of use of integral part of residential building established by notarized written agreement concluded with owner.

According to Article 228.5 of the CC, family members of the owner of integral part of residential building (husband, wife, parents, children), residing together with him, have the right of use of living space equally with him. Family members of the owner of integral part of residential building are entitled to move their minor children in this building. Moving of other family members (husband, wife) in permitted only with the owner's consent.

Due to the studying of an essence of the property right and right of use of living space the Constitutional Court adopted a number of decisions.

In the decision dated July 27, 2001 “On interpretation of Article 228 of the Civil Code of the Republic of Azerbaijan and Article 123.1 of the Housing Code of the Republic of Azerbaijan” the Constitutional Court, considering force of the law on time, specified that the disputes concerning the legal relations that arose after 1 September 2000 have to be solved in accordance with the rules of Articles 228.1 and 228.2 of the Civil Code and the disputes connected with legal relations established prior to this date are to be solved in accordance with the rules of Article 123 of the Housing Code.

In the decision of September 26, 2007 “On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 31 March 2006 to the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of R.Agalarov” the Constitutional Court noted that the right to property in the Republic of Azerbaijan is not only a broad power of the proprietor reflected by the law (to own the property that belongs to him, to use this property as she/he wishes in accordance with the functions of the property and in accordance with his/her needs, and to determine legal regime of the property by his/her will) but also is the power, in the frame of the current legislation, to eliminate the interference by third parties to his/her powers over the property guaranteed by the state without damage to rights and lawful interests of others and to act on his/her choice, and in accordance with his/her interests.

In the decision as of May 27, 2008 “On Article 228.5 of the Civil Code of the Republic of Azerbaijan” the Constitutional Court noted that for occurrence of the right of use of a part of living space (a being integral of the property right) observance of Articles 228.1 and 228.2 of the Civil Code is required. Article 228.5 of the Civil Code also provides that family members of the owner of integral part of residential building are entitled to move their minor children in this building. As for moving in of other members of a family (the husband, the wife), Article 228.5 of the Civil Code has caused the moving in of the given persons with the consent of the owner. Within the sense of these provisions of law, for moving in by members of a family of the owner of an integral part of a living space of the husband or the wife in the given area the consent of the owner is required. The provision “the consent of the owner”, reflected in Article 228.5 of the Civil Code should be applied according to requirements of Article 228.2 of the given Code and the consent of the owner should be expressed in the notarized written agreement.

Before studying issues of application of substantive law rules it is necessary to consider that, as it apparent from the circumstances established by courts of law, the relations between claimant S. Sevdimaliyeva and her former father-in-law A. Javidan (who was the owner of the disputed apartment) started in 2004, and between the parties was not signed the notarized agreement on conditions of emergence and implementation of a right of use of the disputed apartment and its termination.

On a civil case concerning the statement of claim of S. Sevdimaliyeva against A. Javidan, Yasamal district court, referring to the Article 123 of the Housing Code, adopted decision on satisfaction of claim requirements, and the JBCC of the Court of Appeal, based on Articles 228.1 and 228.2 of Civil Code and the decision of the Constitutional Court of July 27, 2001 “On interpretation of Article 228 of the Civil Code of the Republic of Azerbaijan and Article 123.1 of the Housing Code of the Republic of Azerbaijan” adopted the decision on refusal in satisfaction of claim requirements.

After that because requirements of Article 228.5 of the CC were not considered, the decision of JBCC of the Court of Appeal as of December 8, 2005 was cancelled by the decision of JBCC of the Supreme Court as of May 24, 2006, and case directed to this court for reconsideration.

On November 8, 2006 the JBCC of the Court of Appeal, having made the decision corresponding to the decision of court of cassation instance did not satisfy the appeal complaint of the respondent A. Javidan and uphold the decision of Yasamal district court of September 28, 2005.

Making this decision, the JBCC of the Court of Appeal made mistakes in application of norms of a substantive and procedural law.

Thus, the motivating part of this decision is based on the Article 228.5 of the CC, and in final part is decided to uphold the decision of Yasamal district court of September 28, 2005 made on the basis of Article 123 of the Housing Code.

In this regard it should be noted that motives for which the court came to the decision, laws by which the court, and results of court on consideration of the appeal complaint was guided are reflected in motivation and final parts of a judgment of appeal instance respectively. Drawing up motivational and final parts without compliance each other should be regarded as violation by the JBCC of the Court of Appeal of requirements of Articles 392.1.5 and 392.1.6 of the CPC.

Besides, as evident from judicial acts, before the first consideration of the case in court of cassation instance the relevant decisions in courts of the first and appeal instances were adopted within requirements of the edition of Article 217.2 of the CPC acting during this period and on the basis acting at the time of consideration and the resolution of case of norms of a substantive and procedural law.

Thus, at the time of consideration and the solution of the dispute existing between S. Sevdimaliyeva and A. Javidan in courts of the first and appeal instances in Article 123 of the Housing Code, and also in Articles 228.1 and 228.2 of the CC regulating issues of settling to the apartment and emergence of a right of use of the apartment there were acting relevant norms.

For the correct application of these norms it is necessary to consider that, according to sense of Article 123 of the Housing Code if the owner, without having specified conditions, occupies family members to the house belonging to him, they have a right of use of this house (its inhabited part). However the person equated to family members can get this right in case is populated to the house even at oral consent of the owner and after that will conduct with it joint economy.

Articles 228.1 and 228.2 of Civil Code acting since September 1, 2000 regulate these questions in other form. These provisions, protecting to a greater extent the rights of the owner, provide for notarized agreement between owner and person wishing to get a right of use for emergence of a right of use of a component of a residential building, and also demand registration of this right in the state register of real estate.

By the decision of the Constitutional Court as of July 27, 2001 it was cleared up the contradictions which arose in jurisprudence after coming into effect of the new Civil Code in connection with application of the Article 123 of the Housing Code and Articles 228.1 and 228.2 of the CC. According to this decision the disputes connected with the legal relations which arose after September 1, 2000 between the owner and persons living in the apartment which is in his property concerning a right of use of living space are provided to be solved on the basis of provisions of Articles 228.1 and 228.2 of the CC.

Apparently from materials of a civil case, the JBCC of the Court of Appeal at pronouncement of the decision of December 8, 2005, in view of requirements of Articles 228.1 and 228.2 of the CC, and also that between S. Sevdimaliyeva and A. Javidan the contract on a right of use of the disputed apartment was not signed, and such contract on real estate is not adopted on the account in the state register, came to a conclusion that the right of the claimant for the disputed apartment did not arise.

After that on December 11, 2005the new Article 228.5 of the CC came into force. Referring to this article, on May 24, 2006 the JBCC of the Supreme Court and on November 8, 2006 the JBCC of the Court of Appeal adopted new judicial acts on a civil case concerning the statement of claim of S. Sevdimaliyeva against A. Javidan. Thus, the requirements of Articles 228.1 and 228.2 of the CC were not considered, and the provision of Article 228.5 of the CC concerning consent of the owner is applied owing to the wrong interpretation.

In this regard it should be noted once again that on the basis of the decision of the Constitutional Court of May 27, 2008, according to sense of Article 228.5 of the CC, settling by members of the family of the owner of a component of a house of the husband or the wife on this square requires consent of the owner. The provision of "consent of the owner" of Article 228.5 of the CC provides for written notarized agreement (according to the norm established by the Article 228.2 of this Code).

Plenum of the Constitutional Court considers inadmissible the adoption of judicial acts on a civil case concerning the statement of claim of S. Sevdimaliyeva against A. Javidan with reference to Article 228.5 of the CC contrary to sense of this article.

The JBCC of the Supreme Court, at reconsideration of case on the appeal of A. Javidan instead of correcting the mistakes made by court of appeal instance and to execute for this purpose the requirements of Articles 416, 417.1.3 and 418.1 of the CPC, by the decision of February 2, 2007 uphold the decision of JBCC of the Court of Appeal of November 8, 2006.

Thereby, by the adopted judicial acts were broken the property right guaranteed by Article 29 and the right for legal protection of the applicant affirmed by Article 60.1 of the Constitution.

Considering the above-mentioned, Plenum of the Constitutional Court comes to a conclusion that the decision of JBCC of the Supreme Court dated February 2, 2007 on a civil case of S. Sevdimaliyeva against A. Javidan concerning recognition of a right of use of living space in the disputed apartment and moving in the apartment has to be recognized as void because of discrepancy with the Article 29 and Article 60.1 of the Constitution, with the Articles 416, 417.1.3 and 418.1 of the CPC, and according to provisions of the present decision case needs to be reconsidered in 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, the 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 JBCC of the Supreme Court dated February 2, 2007 on a civil case of S. Sevdimaliyeva against A. Javidan concerning recognition of a right of use of living space in the disputed apartment and moving in the apartment as null and void in connection with its discrepancy with the Article 29 and Article 60.1 of the Constitution, with Articles 416, 417.1.3 and 418.1 of the CPC. 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.