**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of the complaint by H.Halilov concerning the conformity of the decision of the Civil Board of the Supreme Court of 18 June 2008 to Constitution and laws of the Republic of Azerbaijan*

**16 January 2009 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Judges F.Abdullayev (Chairman), F.Babayev, B.Qaribov, R.Qvaladze (Reporter Judge), E.Mammadov, I.Najafov, S.Salmanova and A.Sultanov;

attended by Court Clerk I.Ismayilov,

the complainant H.Halilov and his representative S. Mammadov,

has examined in open session via special constitutional proceedings in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan, the constitutional case by complaint of Halil Halilov on conformity of the decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of 18 June 2008 to the Constitution and laws of the Republic of Azerbaijan.

The constitutional case was examined in the absence of the respondent party – representative of the Supreme Court of the Republic of Azerbaijan since the latter failed to appear in the court.

Having heard report of Judge R. Gvaladze and statements of complainant and respondent’s representative, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The complainants Halil Halilov and Mammad Mammadov, co-founders of Manufacturing Commercial Firm “Tabriz” (hereinafter referred to as “Tabriz” MCF) brought a suit to the court against the State Notary Office N1, State Notary Office N12, founder of “Shahinlar” Co LTD (hereinafter referred to as “Shahinlar” LTD”) Teymur Guliyev, third party the Baku District Department of the State List of Record of Legal Persons of the Ministry of Justice of the Republic of Azerbaijan concerning the liquidation of “Shahinlar” LTD, cancelation of the contract of sale, driving out, restoration of “Tabriz” MCF and returning to the territory.

The suit was grounded on the fact that H.Halilov and M.Mammadov founded, legally registered and the “Tabriz” MCF proceeded to business. On the basis of act of the Head of Baku city Executive power the firm receive the 0,49 hectare for the projecting and construction of compact administrative hotel and trade complex. The construction began according to the project and budget but by some objective and subjective reasons the construction was not completed and remained unfinished.

There is no activity a long time on the land belonged to “Tabriz” MCF but territory was constantly observed and guarded.

On 2007 it became known that the land belonging to H.Halilov and M.Mammdov has been drawn property to Shahin Guliyev by some person on the basis of false documents and then by successor of last R.Agayarov has been illegally sold to Teymur Guliyev.

On 16 January 2007 Nizami District Court of Baku city refused to receive the case for examination.

On 07 June 2007 the Civil Board of the Court of Appeal of the Republic of Azerbaijan abolished the decision of Nizami District Court and decided to consider null and void the sale contract concluded between M.Mammadov and Sh.Guliyev, to consider null and void the sale of part of capital and usage of ground area contract concluded between Rafiga Agayarova and Teymur Guliyev, to restore the status of “Tabriz” MCF, to recognize H.Halilov and M.Mammadov as founders of firm, to restore the legal registration of firm, to restore the rights on ground area and right to construction, to consider null and void the certificate of inheritance right given to R.Agayarov, to rejected the part of claim concerning liquidation of “Shahinlar” Co Ltd.

On 11 October 2007 the Civil Board of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as CB of Supreme Court) abolished the mentioned judgment of the Court of Appeal and sent it to Court of Appeal of Baku city for re-examination.

On 08 February 2008 the Civil Board of the Court of Appeal of Baku city uphold the decision of Nizami District Court, the decision of Civil Board of the Supreme Court, the decision of the court of the appeal instance.

H.Halilov applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) and asked for the examination of the abovementioned decision of the Civil Board of the Supreme Court for the conformity with the Constitution (hereinafter referred to as Constitution) and laws of the Republic of Azerbaijan.

In his complaint H.Halilov indicated that his property was illegally appropriated by the other persons and in spite of that this fact was recognizes by court in indisputable manner his claim was rejected because of expiration of claim time.

Nevertheless, in the court session H.Halilov proved that he applied to the court as soon as get informed concerning the illegal appropriation of firm documents by the Shahin Guliyev.

Besides compliant noted that court of appeal instance infringed the Article 420 of the Code of Civil Procedure of the Republic of Azerbaijan (henceforth “CCP”), was not execute the obligatory instructions of the court of cassation instance, examine the case without participation of all interested persons, was not inform them concerning the time and place of court session.

The Plenum of the Constitutional Court emphasized the below-mentioned in relation to the complaint of H.Halilov.

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

The main principles of the implementation of justice enshrined in the Constitution are impartial and fair consideration of legal cases, juridical equality of parties, action based on facts and according to the law (Article 127.2), law proceedings are carried out based on the principle of contest (Article 127.7).

Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms provide for that in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

According to this requirements justice shall be exercised based on facts, principle of contentiousness and equality of parties. Judge should base his decision solely upon reasons discussed in compliance with the principle of contentiousness, explanations and documentation submitted by parties. Court shall evaluate evidence in a fair, impartial, all-complete and full manner and shall thereafter evaluate norms of law to apply to such evidence. Court resolution shall be legal and motivated. Resolution shall be based upon actual circumstances established with respect to case and relationships between the parties (Articles 9.1, 9.3, 88, 217.1, 217.3 of CCP).

One of the most important elements of fair trial is the possibility to appeal or protest by the procedure established by law to the superior court instance for the decisions of inferior courts.

The decisions adopted by the general courts of the Republic of Azerbaijan but not come into force could be appealed on the procedures and cases determined by the CCP. According to the Article 365 of CCP provisions of this Chapter (Chapter 41) of this Code shall apply to appellate proceeding. According to the same requirements of procedural legislation the case hearing in the courts of appeal instance provided by Chapter 41 of CCP should be examine in compliance with the principle of contentiousness and equality of parties.

However, during examination of present case the courts are acted contradict to laws and adopted norms which contradict to the procedural legislation.

Thus, as evident from the materials of the case the court of appeal instance by its decision uphold the decision of general court concerning rejection of complaint based on the Articles 73 and 77 of the Civil Code of the Republic of Azerbaijan that was in force till 01 September, 2000 and came to conclusion that H.Halilov’s claim period is elapsed.

The Constitutional Court noted in some of its decisions concerning the claim period, that in civil legislation this institution was created for the discipline of civil case participant, for the realization of rights and agitation of discharging of duties.

Legislator assigned the claim period for the cases of protection of persons which law of substance was infringed and the compulsory measures against offenders are applied.

Article 73 of the antecedent Civil Code determined the three years general time period (claim period) for the protection of persons whose rights was infringed. Article 78 of the same Code stated that claim period counting is beginning from the day the right of suit arises; right of suit arise from the day the person inquire about his infringed right or from the day that he should to inquire. Last factor connected with the investigation of factual situation.1

As Constitutional Court noted on 03 November, 2008 in the case of E.Hakimova, connected with maintenance of this article the beginning of the course of claim period connected on the one hand with the objective moment of infringement of subjective right and on the other hand with the subjective moment of person informed or should be informed concerning infringement of his rights. Existence of this two different factors and that these factors never coincide are very important factor for beginning of claim period.

As Constitutional Court Plenum noted on 08 May, 2008 in the case of L.Binnatova in any civil dispute from the point of view of legal resolution besides determination of beginning of course of claim period the other facts also should be taken into consideration.

According to the legal position of the Constitutional Court expressed in the same decision the claim period as well as period of protection of infringed right associated with the base of beginning of period counting an infringement of subjective law. Therefore the court does not have right to reject the complaint on the base of lapse of claim period until find out has complainant the right to correspondent subjective law or not, was the subject law infringed or not, whether respondent committed it or not. The court act rejected the complaint on the base of lapse of claim period but not investigated the infringement of subjective civil law is inwardly inconsistent and groundless because the conclusion of court concerning claim period elapse has not any base.

In the decision of the Civil Board of the Court of Appeal of Baku city on 08 June, 2008 is evident that the first time the “Tabriz” MCF was founded on 09 February, 1992 by 3 citizens of Islam Republic of Iran and Mammad Mammadov. When the citizens of Islam Republic of Iran did not fulfill the requirements of the protocol of establishment and lost founders rights, the firm was founded again by Mammad Mammadov and Halil Halilov on 25 February, 1992. On 16 December, 1992 the firm passed the registration by the act N4994 of the Head of Executive Power of Nizami District. In the Firm Charter was indicated that M.Mammadov and H.Halilov are the founders of firm and assessed contribution of each of them is 30.000 rubles. On 25 May, 1992 by the act N751 of the Head of Executive Power of Baku city to the firm was allocated the ground area in the Nizami district, Gara Garayev prospect, quarter N2561 for the construction of administrative hotel and trade complex. The firm constructed and used the public use facilities and for the construction of other buildings the three holes has been digged and the wall has been raised. The supervision for firm activity was executed by M.Mammadov. In its decision the court noted that H.Halilov did not give an authorization for selling the firm property to third persons. M.Mammadov made changes in the Charter of firm, changed the list of founders and sums of assessed contribution and sold the firm to Shahin Guliyev without H.Halilov’s authorization.

As evident, court of appeal instance confirmed the validity of H.Halilov’s claim and come to conclusion that the principal document of contract of sale the Charter of firm was illegally changed, H.Halilov was disabled from founders and his property was sold without his knowledge.

Court together with the determination of these facts rejected the complaint on the base that the long time passed after appropriation of firm and claim period is elapsed. Court in its decision did not take into consideration that H.Halilov apply as soon as get informed concerning the infringement of his right, not discussed was hi informed or not before applying to court and thus did not apply the Article 78 of the previous Civil Code.

The Plenum of the Constitutional Court noted following concerning the getting by T.Guliyev property without compensation and being bona fide purchaser.

Articles 13.1, 29.1,2,3 of the Constitution recognize and protect property.

According to the Civil Code of the Republic of Azerbaijan (hereinafter referred to as acting CC) based on norms of Constitution, the civil rights are protected in accordance with the procedure specified by legislation in a manner, which does not violate the law, public order and morals. Person who belief that his owner right have been infringed could apply to the court for the recognition of illegal appropriation as void and claim property from another’s illegal possession.

According to the Article 157.2 of the acting CC owner entitled to claim their property from another’s illegal possession. According to the Article 157.3 of the same Code, property is acquired from a person who does not have the right to dispose of such property and the purchaser did not and could not have known of such fact (bona fide purchaser), the owner shall be entitled to claim such property from the purchaser only where such property was lost by the former owner or by person who received property from the former owner for possession, or was stolen from either of the above mentioned persons, or of which possession was lost unintentionally in some other way.

Thus, according to law if owner want to get the property back, he should prove that other owner have not the right to property.

Bona fide purchaser should prove that he did not and could not have known of fact that property is acquired from a person who does not have the right to dispose of such property.

In its turn court should examine the case in a manner specified by legislation.

As evident from the materials of the case the court of first instance rejected the claim because H.Halilov could not prove that he is a founder of “Tabriz” firm and court considers Teymur Guliyev as bona fide purchaser.

H.Halilov in his appeal on that decision indicated that “Tabriz” firm was sold by forgery and without his consent, the contract of sale concluded between M.Mammadov and Sh.Guliyev have been illegally registered and there are no document confirming authority of M.Mammdov and charter of firm in the Notary case, the “Tabriz” firm was not registered on Sh.Guliyev in the state list of record of legal persons, there are no decision concerning the changing of founders, Sh.Guliyev not mentioned in the firm charter as founder, there are not mentioned the price given by Sh.Guliyev in the contract of part sale, the property was not over to him, there is no deed of conveyance have been signed and no successor could arise.

In the appeal was also indicated that Sh.Guliyev’s wife R.Agayarova get the “Tabriz” firm as inheritance but did not on the base of right of succession, this property was not included in the list of inheritance and R.Agayarova did not on the base of certificate of right of succession request the documents confirming that this property belongs to Sh.Guliyev. Property of “Tabriz” firm was not registered in state record of immovable property to R.Agayarova and she has no right to dispose of that property.

During reconsideration the court of appeal instance reflect the evidences of H.Halilov in its decision but attach no importance and only explain in essence of contract and recognize T.Guliyev as bona fide purchaser.

Nevertheless, Court of appeal instance shall, as a court of full authorities, hear case and evidence present in case or additionally submitted evidence on merits. (Article 372.1 of the CCP). According to the sense of indicated norm court of appeal instance should legally treat a demands and objections of parties, to define of their rights and duties, examine case on base of facts. Therefore court of appeal instance should examine not only the evidence afforded at the court of first instance but also a new evidences in order indicated in the Article 371 of CCP.

According to Article 392.2 of CCP in the event of non-satisfaction of appeal complaint, court of appeal should be obliged to indicate reasons upon which complaint has not been satisfied.

As the European Court of Human Rights noted in its judgment on the case of Karsa vs. Switzerland of 19 April, 1993 - The effect of Article 6 para. 1 (art. 6-1) is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (Para. 30).

The Plenum of the Constitutional Court considers that the court of appeal instance during revising the case should apply Article 78 of the previous Civil Code but did not apply it, did not adhere to principals of fair trial, equality of parties and facts, did not examine comprehensively and fully the available evidences, did not give the proper legal treatment to that evidences and did not grounded own conclusion. Thus the court of appeal instance infringed the Articles 60.1, 127.2,7 of the Constitution, Articles 73 and 78 of previous Civil Code, Articles 9.1, 9.3, 88, 372.1, 392.2 of the CCP.

According to the civil procedure legislation court of cassation instance should verify correct application by court of appeal instance of material and procedural norms of law. Violation or incorrect application of material and procedural norms of law shall be a ground for repeal of resolution or ruling of court of appeal instance. Violation or incorrect application of procedural norms of law shall be a ground for repeal of resolution or ruling only where the said violation has resulted or can result in issuance of incorrect resolution. (Articles 416, 418.1, 418.3 of the CCP).

Civil Board of the Supreme Court examine the case in order of cassation attached no importance to the facts that by the incorrect application of claim period, infringement of legal norms and incorrect legal treatment to evidences and as result made a decision that contradict to Articles 416,l 418.1 and 418.3 of the CCP. And it, in turn, has led to infringement of the complainant’s right established by the Article 60.1 of the Constitution and provided for one of the important elements of the judicial protection of rights and freedoms the efficient restoration of rights on the base of the fair trial by the independent court.

As the European Court of Human Rights noted in its judgment on the case of Gheorghe vs. Romania of 15 March, 2007 - considers that the right of applicant to fair trial has been infringed because the Supreme Court of Justice was required to give a specific and express reply but did not do that. (Para.50).

Based on the abovementioned the Plenum of the Constitutional Court concluded that because the decision of the Civil Board of the Supreme Court of 18 June 2008 contradicts to Articles 60.1 of the Constitution and Articles 416, 418.1 and 418.3 of the CCP, the said decision shall be considered as null and void. Therefore, the case must be re-examined in the manner and in time prescribed by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by Article 130 Sections V, IX and X of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. Since the decision of the Civil Board of the Supreme Court of 18 June 2008 contradicts to Article 60.1 of the Constitution of the Republic of Azerbaijan and Articles 416, 418.1 and 418.3 of the CCP, the said decision in the civil case concerning the suit by M.Mammadov and H.Halilov against State Notariat Office N12 and others to abolish the contract of sale, to evict from the land, shall be considered as void. In accordance with this Decision the case must be re-examined in the manner and in time prescribed by the civil procedure legislation of the Republic of Azerbaijan.
2. The Decision shall become effective immediately after its announcement.
3. The Decision shall be published in the newspapers *Azerbaycan, Respublika, Xalq Qazeti* and *Bakinskiy Rabochiy* and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
4. The Decision is final and can not be annulled, amended or officially interpreted by any person or official.