**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of some provisions of Article 449 of the Civil Code*

*of the Republic of Azerbaijan*

# 9 July, 2009 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, B.Garibov, E.Mamedov, F.Babayev, S. Hasanova, , R. Gvaladze, I.Najafov and A.Sultanov (Reporter Judge);

attended by the Court Clerk I. Ismayilov,

the legal representative of the subject interested in special constitutional proceedings: S.Gafary, Judge of the Nasimi District Court;

the specialists: B.Asadov, Judge of the Supreme Court of the Republic of Azerbaijan, I.Akhmedov, associate professor of Chair of Civil Law of Baku State University and A.Bahishov, employee of the Central Bank of the Republic of Azerbaijan;

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session the constitutional case on interpretation of some provisions of Articles 449 of the Civil Code of the Republic of Azerbaijan;

having heard the report of Judge A.Sultanov, the reports of the lawful representatives of the subjects interested in special constitutional proceedings and opinions of specialist, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Nasimi District Court of a Baku city, having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) on a civil case which is in its pending proceeding in connection with application of norms of civil law, asks to give interpretation of Article 449.1 from the point of view of application of Article 449.4 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as Civil Code).

From a civil case specified in inquiry, it follows that the claimant - Open Society “Azernagliyatbank” has brought against respondent S.Mamedova the suit concerning the requirement on a mortgage and eviction from apartment.

During proceedings it has been established that, according to the credit contract concluded between Open Society “Azernagliyatbank” and respondent S.Mamedova N22 of 7 March 2007, the credit for the sum of 45.000 US dollars with a condition of returning within 360 days is given out to respondent. According to the mortgage contract N22 of 7 March 2007, as guarantee of the credit the apartment N3, located in the building N35, Tagizade str. of the Nasimiy disctrict of the Baku city, belonging to S.Mamedova, has been mortgaged to bank. Respondent S.Mamedova and members of her family undertook the obligation to voluntarily vacate the specified apartment in case of the requirement on a mortgage, certified in a notary. S.Mamedova has not executed the basic obligation properly and 2 consecutive times has broken the schedule of repayment of the credit.

Court having satisfied the claim with the correspondent decision of 2 April 2008, has decided to sell the specified apartment put under a mortgage, from auction, and at the expense of the received means to keep in favour of Open Society “Azernagliyatbank” the basic debt in 43.750 US dollars, a debt on percent in 6.299 US dollars, the penalty at a rate of 5.466 US dollars, all a debt under the credit in 55.515 US dollars, and the paid state duty at a rate of 19.80 AZN, and the sum which has remained after payment of a debt to bank to give out S.Mamedova, in case of insufficiency of the monetary resources received from sale of a subject of a mortgage, for satisfaction of the requirement, to direct debt payment on other property belonging to the respondent, and to evict the respondent together with members of a family from the given apartment.

After introduction of the given decision into validity by the decision of the judicial executor of 28 May 2008 on case there started the execution procedure. According to “the report on results of an appraisal of property” of 5 September 2008, presented within the limits of the given procedure by the corresponding organization the noted apartment is appraised at 71.500 AZN.

“Certificate” of voluntary eviction by debtor S.Mamedova and members of her family from apartment, and securing of acceptance of apartment is made between latter and the representative of bank on 10 October 2008. The law enforcement officer by the letter of 19 November 2008 having addressed to the director of Open Company “Specialized Auction Center on Property” and asked to organise the sale of the given apartment and to transfer the sum received from sale, into the account of Department of law enforcement officers.

But, despite the possibilities fixed in Articles 38, 43 and 45 of the Law of the Republic of Azerbaijan “On a mortgage”, the given decision which has entered into force, for the unknown reasons has not been executed in the terms specified in the law.

Therefore on 10 September 2008 the Open Society "Azernagliyatbank" has made to S.Mamedova the claim “on reception of again collected percent and the penalty in view of default of liabilities in due time”. The requirement has proved that, despite the expiration more than 5 months from the moment of passing of the mentioned judgment, the obligation has not been executed, and for this reason the respondent should be involved for payment of percent and the penalty for the five months.

The Nasimi district court by the ruling of 9 January 2009 has suspended procedure on case and considered necessary to direct to the Constitutional Court the inquiry. The inquiry is proved by that along with necessity of an explanation of occurrence of the deriving of profit reflected in Article 449.1 of the Civil Code, application of Article 449.4 of the Civil Code at charge of the percent formed in a consequence of it causes uncertainty. In the inquiry there is expressed a request to interpret the derive profit provided in Article 449.1 of the Civil Code, from the point of view of application of Article 449.4 of the given Code.

Plenum of the Constitutional Court, in connection with the inquiry from the point of view of the civil legislation, and also the international practice considers necessary to note the following.

According to Article 385.1 of the Civil Code, due to an obligation, one person (debtor) is obliged to perform certain actions to the benefit of the other person (creditor), namely: payment of funds, performance of works, transfer of property, delivery of services, etc., or refrain from certain actions, and the creditor have the right to demand from the debtor the performance of his obligations.

Article 386.1 of the given Code establishes that except for the some cases a contract between the parties is required for the appearance of obligations.

One of such contracts is the loan agreement specified in Article 739.2 of the Civil Code. According to loan agreement one party (creditor) undertakes to transfer to possession of another party (borrower) money or other substitutive items, and borrower undertakes to return the same amount of money or similar quantity of items of the same sort and quality.

As one of the basic ways of securing of execution of the given obligations the contract on the pledge, provided in Article 280 of the Civil Code acts. In the availability of the bases specified in Article 295 of the Civil Code, the creditor can transfer the requirement of pledge. And as one of special kinds of pledge the civil legislation provides a mortgage.

Along with it the civil legislation establishes responsibility for default of obligations. So, Article 449.1 of the Civil Code provides that in the event if someone’s monetary funds are utilized and are illegally not returned, or in the event of any evasion from return thereof, or other delay of repayment thereof, or groundless acquisition or accumulation of funds, interest is due payable on the amounts of such funds. The amount of interest is determined by the bank interest rate as of the date of the monetary obligation performance or the relevant part thereof. In case of the debt collection under a court procedure, the creditor’s claim can be satisfied by the court on the basis of the bank interest rate as of the date of the court’s award.

On sense of the given norm, the debtor uses another's monetary resources only at fulfillment of following four actions:

- illegal not returning;

- evasion from returning;

- a delay of repayment in other form;

- groundless acquisition or accumulation of funds at the expense of other person.

It is necessary to note that in spite of the fact that concept of “deriving of profit” is not given in the civil legislation, considering that literal meaning of “deriving of profit” means using for the need, Article 152.3 of the Civil Code devoted to “right of use”, being in indissoluble relationship with this term, brings some clearness in this concept. According to given article, the right of use means the legally protected possibility of enjoying useful features of the property (chattel), as well as to receive income there from. Income from use may be in the form of income, growth, fruit, reproduction, etc.

From this point of view, a word “deriving of profit” and “(illegal) use” in special norm of Article 449 of the Civil Code providing “responsibility for default of obligations”, having identical sense, means acquisition of the certain income, a gain, a fruit etc. as a result of the given four actions (inaction).

At the same time, Article 445.7 of the Civil Code also fixes possibility of deduction of percent from the debtor with certain conditions at a delay of a monetary payment. But it is necessary to consider that the named norm, unlike Article 449.1 of the Civil Code, without connecting a delay of payment of money with deriving of profit, reflects the right to demand of the given percent in case it is impossible to demand larger sum, referring to losses or other bases.

Also, according to Article 21of the Civil Code in case of damages of the creditor as a result of illegal use of means, he/she has the right to demand payment of damages.

And as to an order of charge of percent (hereinafter referred to as “the financial sanction”), specified in Article 449.1 of the Civil Code, that is whether percent after passing of the judicial decision should be withheld or not, Plenum of the Constitutional Court notes that as the named provision of the civil legislation as a matter of fact, providing the financial sanction, expresses intervention in the bank or debtor property, the analysis of a question demands to take into account Article 1 of Protocol N1 of the Convention “On on protection of human rights and fundamental freedoms” and case-law of the European Court of Human Rights.

The European Court in the decision of 19 June 2001 on case of Zwierzyński v. Poland has expressed such legal position that any interference with the property must also satisfy the requirement of proportionality. An interference must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (§71).

In this connection it is necessary to consider that banks assume liability to return the means received from clients, at appropriate conditions. Default of the given obligation by bank or execution with a delay can reduce trust of the population to bank system. And it, in turn, can negatively affect economic safety and a country financial position. On the other hand, proprietary interests of the debtor should be protected and its attraction to excessive financial responsibility is prevented.

From the point of view of application of the above-stated principle to the present case during the resolving of similar questions it is necessary to achieve fair balance between the general interest expressed in appropriate execution of obligations on deposits of bank clients, and protection of the property rights of the debtor.

In this sense, according to Article 449.1 of the Civil Code, deduction of percent for deriving of profit, being the sanction applied to execution of the liability, is a civil-law measure of responsibility. And responsibility can arise within the limits of relations of the parties owing to default of one of the parties of the obligations and infringement of the established agreement that is an assumption of guilty action (inaction). On sense of the interpreted article, the given financial sanction on the liability is charged only on an amount of debt, and in this case the sum of the percent added for the given sum, not considered.

At the same time, even at the settlement of question via judicial procedure, contractual relations between the parties, that is the creditor and the debtor, continue and the delivery of the judicial decision concerning deduction of a debt, percent and the financial sanction do not lead to the termination of the given relations.

In case of occurrence of a dispute, at the solution of case via judicial procedure, for more rational protection of the rights and interests of the parties it is necessary to consider that according to requirements of Article 222.2 of the Civil Procedural Code of the Republic of Azerbaijan if before adjudication the amount of debt has been paid, the court in the decision is obliged to specify precisely the sums of percent and the financial sanction. Also, in case of non-payment of the given sums before adjudication, the indication in the judgment of necessity of calculation of the financial sanction before full execution of the obligation with indication of a debt and percent have special value for ensuring of legal certainty.

The given circumstance has found its reflection in the Article 449.4 of Code. So, according to the given norm, the percent for using of another's means are deducted until the date of the final repayment of the said amount to the creditor, unless the agreement envisages any shorter term for the calculation of interest.

Along with it, considering that by Article 339 of the Civil Code the termination of contractual relations between the parties related with contract validity period, and at not setting of such term, ending of execution of the obligation, in case of the reference of a debt, percent and the financial sanction on a mortgaged property between the parties also there are new relations of the creditor-debtor, and from this point of view the termination of contractual relations as a result of the settlement of question gets to dependence on execution of judgment.

Considering that appropriate execution of the obligation, first of all, depends on observance of requirements of the legislation and its conditions, the person who has not evaded from discharge of duties laid on him in connection with execution of judgment according to the Law of the Republic of Azerbaijan “On execution of judicial decisions”, intentionally and voluntarily executed them, having transferred a mortgaged property, is considered as executed the obligation on the credit contract from the moment of the reference of a debt and percent on a mortgaged property, and cannot be brought to responsibility on Article 449.1 of the Civil Code as thereby contractual relations between the parties shall terminate.

Acting from this position, the legislator in Article 448.2 of the Civil Code connecting responsibility of the debtor on the obligations with fault (action or inaction), in Article 448.4 has been established that the debtor is not be liable for the violation of the obligation, if he proves that the violation was caused by the circumstances beyond his control and that he was not able to take account thereof at the time of entering the agreement or wait until he can exclude or eliminate the said circumstance and the consequences thereof.

And the transfer by the debtor of a mortgaged property for the purpose of voluntary execution of the legislation on execution of judgments and obligation execution unequivocally proves that any infringement after the reference of a debt and percent on a mortgaged property by the judgment which entered into force follows from circumstances beyond his control.

In view of the aforesaid, Plenum of the Constitutional Court comes to such conclusion that:

Provision “deriving of profit”, that is reflected in Article 449.1 of the Civil Code, means formation of the income, a gain or other material benefit specified in Article 152.3 of the Civil Code, as a result of illegally not returning of another's monetary resources for himself, evasion from their returning, a delay in other form of their payment or unreasonable acquisition or accumulation of monetary resources at the expense of other person;

Provisions “illegal use of monetary resources” and “use of another's means”, which are reflected in Articles 449.3 and 449.4 of the Civil Code, are caused by presence of the circumstances specified in Article 449.1 of the given Code.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan, Articles 60, 62, 63, 65-67, and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Provision “deriving of profit”, that is reflected in Article 449.1 of the Civil Code, means formation of the income, a gain or other material benefit specified in Article 152.3 of the Civil Code, as a result of illegally not returning of another's monetary resources for himself, evasion from their returning, a delay in other form of their payment or unreasonable acquisition or accumulation of monetary resources at the expense of other person;

Provisions “illegal use of monetary resources” and “use of another's means”, which are reflected in Articles 449.3 and 449.4 of the Civil Code, are caused by presence of the circumstances specified in Article 449.1 of the given Code.

2. The decision comes into force from the date of its publication.

3. The decision is a subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of Azerbaijan Republic”.

4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.