**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 02 June 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of V.Terekhin*

**15 January 2010 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant V.Terekhin and his representative M.Mustafayev

representative of respondent body – R.Akperov, employee of Staff of the Supreme Court of the Republic of Azerbaijan

specialists: G.Aliyev, chief adviser of the Department of administrative control of the Center for work with municipalities of the Ministry of Justice of the Republic of Azerbaijan and N.Rasulov, senior adviser;

examined 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 02June 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Vladimir Terekhin.

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

**DETERMINED AS FOLLOWS:**

By the decision of Binagadi district court of Baku city as of April 25, 2007 the claims of the claimant V.Terekhin against the respondent – municipality of the settlement of M.A.Rasulzadeh concerning cancellation of the decision on transfer of the land plot of 500 sq.m belonging to it on the basis of the decision of this municipality No. 265 dated August 5, 2004 in N.Ismailova's property for No. 98 of April 29, 2005, recognition of the subsequent actions on the land plot invalid, and other requirements, and also E.Mamedova to V.Terekhin concerning recognition of the decision of municipality on transfer of 400 sq.m of the challenged land plot to E.Mamedov's property with the consent of N.Ismailova with leaving of 100 sq.m at the last for No. 225 of September 20, 2005 as valid and eviction from the land plot, were rejected.

By the decision of Judicial Board on Civil Cases of the Court of Appeal of Baku city (hereinafter referred to as the JBCC of the Court of Appeal of Baku city) as of October 3, 2007 the appeal complaint of V.Terekhin was not satisfied. The appeal complaint of E.Mamedov was satisfied partially, the judgment of the first instance concerning a rejection of the claim of E.Mamedov cancelled, and the resolution of municipality of the settlement of M.Rasulzadeh on sale of the land plot in 400 sq.m to E.Mamedov of September 20, 2005 is recognized as valid in view of the fact that unauthorized occupation of this site by other persons was not proved, the claim regarding eviction from the land plot was not satisfied and upheld the other part of the decision.

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) of February 5, 2008 the decision of JBCC of the Court of Appeal of Baku city was cancelled, and case is returned for new appeal consideration.

By the decision of JBCC of the Court of Appeal of Baku city as of June 5, 2008 the appeal complaint of V.Terekhin was satisfied, the judgment of the first instance on case was partially cancelled, the resolution of municipality of the settlement of M.A.Rasulzade on transfer of 500 sq.m of the land plot to N.Ismailova's property No. 98 dated April 29, 2005 and the resolution on transfer of 400 sq.m of this land plot to E.Mamedov's property No. 225 dated September 20, 2005 were recognized invalid, and the appeal complaint of E.Mamedov rejected.

By the decision of JBCC of the Supreme Court dated September 24, 2008 the appeal of E.Mamedov was partially satisfied, the decision of Court of Appeal on the case was cancelled, and case was returned to the same court for new consideration in appeal order.

By the decision of JBCC of the Court of Appeal of Baku city of February 20, 2009 a judgment of the first instance, and by the decision JBCC of the Supreme Court of June 2, 2009the decision of appeal instance were upheld.

By courts it is established that municipality of the settlement of M.A.Rasulzade, selling the land plot of 500 sq.m to V.Terekhin, was based that this land plot is located before the apartment No. 11 of the building No. 9, street of G.Agamaliyev of the settlement of M. A. Rasulzade which was in property of V.Terekhin. But, by the decision of Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan of December 6, 2005V.Terekhin was evicted from this house, and the registration certificate confirming the property right to noted apartment is nullified, restored the property right to this apartment of N. Ismailova.

Based on loss by V.Terekhin of the property right to the apartment, municipality, of M.A.Rasulzade by the resolution No. 98 of April 29, 2005 cancelled the former resolution No. 265 of August 5, 2004, transferred the challenged land plot to N. Ismailova's possession, further by the resolution No. 225 of September 20, 2005 taking into account N.Ismailova's consent transferred to E.Mamedov's possession 400 sq.m of this site.

The courts of the first and appeal instance which considered case, and the court of cassation instance which issued the final decision, as a result with reference to point 4 of Article 48 of the Law of the Republic of Azerbaijan “On status of municipalities” and Articles 67 and 68 of the Land Code of the Republic of Azerbaijan (hereinafter referred to as the Land Code) recognized V.Terekhin's deprivation of the challenged land plot transferred to his possession by the resolution of municipality of the settlement of M.A.Rasulzade No. 98 of April 29, 2005 as lawful, and also having recognized valid the resolution of municipality for No. 225 of September 20, 2005, came to conclusion that as V.Terekhin's rights for the challenged land plot are not registered, their protection is not guaranteed.

The applicant, considering the above-noted conclusion of courts as illegal and unreasonable, lodge the complaint to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court). He proved the complaint that as recognition of the registration certificate on the apartment which was available in his private property the invalid has no relation to the contract on purchase and sale of the land plot signed with municipality, deprivation of its property by the last is illegal. At the same time, the applicant specified that at him the right of possession for a disputable site evolved from the called contract and protection of it is guaranteed by the legislation.

The applicant considers that his property right and the right for legal protection enshrined in Articles 13, 29 and 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and in Article 1 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, are broken as a result of the wrong application and interpretation of legislative norms by court of cassation instance, and asks to verify compliance of the resolution JBCC of the Supreme Court of June 2, 2009 with the Constitution and laws.

In connection with the complaint, Plenum of the Constitutional Court considers necessary to consider the Constitution, the civil and land legislation, international treaties and case-law of the European Court of Human Rights.

Parts I and II of Article 13 of the Constitution establish that the property in the Republic of Azerbaijan is inviolable and is protected by state. The property may be state, private and municipal.

Everyone has the right to own property. No type of property shall be granted superiority. Ownership rights, including the rights for private owners, is protected by law. No one can be deprived of his or her property without a decision of the court. Absolute confiscation of property is not allowed. Alienation of the property for state needs is allowed only after the cost of property is fairly reimbursed (parts I, II and IV of Article 29 of the Constitution).

The property right, being the universally accepted right, is fixed in Article 17 of the Universal Declaration on Human Rights, in Article 1 of the Minutes No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

According to Article 49 of the Land Code, The right of private individuals and legal entities to private land ownership is the right to own, use and dispose of lands while observing limitations and other conditions established by law and an agreement. The right of private individuals and legal entities to private land ownership occurs on the basis of privatization, purchase and sale, inheritance, presentation, exchange of state and municipal lands, and other transactions pertaining to land, as well as the transfer into the charter (share) fund of legal entities. According to the Article 59 of the Code, Land plots from the reserve fund of municipalities allocated to private ownership of citizens with payment of the cost for the construction of individual housing and summer cottage.

Provision, on the basis of any rights, of state and municipal land plots to legal entities and private individuals is carried out with permission of relevant executive authority’s body or municipality and on the basis of the agreement signed between the parties (point 1 of article 66 of the Land Code).

The edition of Article 67 of the Code acting during emergence of challenged legal relationship provided that the rights for the land plots, including the rights of legal entities and individuals, and also the rights of the government bodies and municipalities, for protection of the bases granting these rights have to be registered in the state land registry and the state land register, and also in the order established by the legislation in the state register of real estate.

Records concerning the rights of owners, users and tenants on the land and their duties in the state land registry and the state land register, and in the order established by the legislation in the state register of real estate are the main document claiming and defining the rights.

The state registration of the rights arising with acquisition of the land plots that are in the state and municipal ownership and the rights found as a result of the bargains concluded on the land plots and other real estate is obligatory.

The state does not guarantee protection and inviolability of not registered rights for the land plots (points 1-4 of Article 67 of the Land Code; point 1 of this article by the Law of the Republic of Azerbaijan of April 21, 2006 given in the new edition; and point 2 excluded).

The rights to land plots appear after the establishment of borders of land plots, completion of their layout and dimensions, conclusion of an agreement on the provision of land plots and state registration in an established order (Article 68 of the Land Code).

According to Article 2.3 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code), Family, labor relationships, relationships concerning the use of natural resources and environmental protection, and copyright and related rights are regulated by civil law and other legal acts, except as otherwise provided stipulated by family, labor, land, environmental, copyright and other special legislation.

According to Article 14.1 of the Civil Code, civil rights and obligations are created occurred on the basis specified by civil law as well as the actions of natural persons and legal entities not specified by law that, by virtue of the principles of civil law, give rise to civil rights and obligations. Article 14.2.2 of the Code indicates the acts of local governments as a basis for the creation occurrence of civil rights and obligations.

Article 152.1 of the Civil Code established the property right as the acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at their discretion.

The right for ownership and disposal of immovable property is accrued from the moment of notary verification of the deal on such property (with exception of rights, which are formed on the basis of court order or other resolution in legal force and not subject to appeal). The right for disposal of immovable property accrued from the date of registration of such property on territorial basis in the state registry of immovable property. The content of the registered right can be supported by the documents or otherwise. The ownership rights to immovable property shall pass to the purchaser from the moment of registration of act of transfer in the state register of immovable property (Articles 146.1, 146.2 and 178.1 of the Civil Code).

As appears from provisions of the civil and land legislation, along with consent of the parties, the great importance from the point of view of buying of property this thing in full have a necessary condition of registration in the state register of real estate, in particular emergence of the right of the order it from the person. However, coordination of emergence of the property right to the land plot as real estate and protection of this right by the state with the state registration does not exclude possession of the persons that acquired similar property according to the legislation, the rights of possession and use which are a property right component.

Plenum of the Constitutional Court once again confirms the legal position expressed in the previous resolutions that as the contract of purchase and sale of immovable subjects is a concession contract, obligations for transfer of immovable subject to buyer and payment of its cost can be executed before state registration of property right. From this point of view, before state registration of this right buyer is considered an owner (title) reported to it the seller of the right for property with a legal ground. Such contracts act as the legal fact including emergence of the property right concerning the purchaser of real estate (decision of Plenum of the Constitutional Court “On complaint lodged by F.A.Huseynov and A.A.Qasimov concerning verification of conformity of the decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of April 2, 2004 to Constitution and legislation of the Republic of Azerbaijan” of November 19, 2004).

From the legal point of view the existence of possibility of ensuring the rights of possession and use, causes the necessity of protection of the rights of the owner of property on an equal basis with the rights of the owner. Thus, according to Article 157.8 of the Civil Code, rights of owner also belong to a person who while not being the owner possesses the property upon grounds specified by this Code or under a contract.

The opposite approach can lead to violation of the constitutional principles on protection of the property rights, a number of the principles and provisions of the civil legislation, and the obligations taken by the Republic of Azerbaijan according to international treaties.

The European Court of Human Rights on case of Öneryildiz v. Turkey of November 20, 2004 specified that the concept of “possessions” in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision. Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. The concept of “possessions” is not limited to “existing possessions” but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and “legitimate expectation” of obtaining effective enjoyment of a property right (§ 124).

By the judicial acts adopted on a civil case it is established that, according to the resolution of municipality of the settlement of M.A.Rasulzade No. 265 of August 5, 2004, between V.Terekhin and this municipality the act of purchase and sale of lands was signed on September 29, 2007. Municipal body after adoption of the resolution on transfer of the challenged land plot to property of the applicant and registrations of purchase and sale of this site, by the letter of December 21, 2004 having addressed to Head department of architecture and town planning of the Baku city, asked according to the legislation to take measures for submission of the certificate on the land plot transferred to V.Terekhin's possession.

Nevertheless, the resolution of municipality of the settlement of M.A.Rasulzade on transfer of the challenged land plot to V.Terekhin's property of August 5, 2004 was cancelled by the resolution of this municipality of April 29, 2005, the challenged land plot was transferred to the possession by N.Ismailova, andthe last resolution is recognized by the courts which considered case as the lawful. It led to deprivation of the applicant of property.

According to the legal position expressed by the European Court of Human Rights in the decision on case of Pia Gloria Serrilli and others v. Italy of November 17, 2005 the Article 1 of the Protocol No. 1, first of all and in particular, demands that intervention of government body in the right of free use of property had legal basis. The rule of law which is one of the fundamental principles of democratic society is a component of all articles of the Convention (§ 71). In case of Gerasimov v. Russia of September 16, 2004 the European Court mentioned in final definition that, according to the formed case law of bodies of the Convention, local governments, undoubtedly, are government bodies in the sense that they cope the general (public) law, carry out the state functions assigned to them by the Constitution and laws. The European Court noted that, according to international law, concept “government body” is not limited only to bodies of the central executive power. In cases of transfer (decentralization) of some duties of the government to local bodies, this concept extends on any national authority that is carrying out the state functions.

Plenum of the Constitutional Court in connection with a case in point notes that one of remedies of property, fixed in the Constitution, international treaties and the legislation of the country, provided in Article 60 of the Constitution. According to part I of this article, legal protection of rights and liberties of every citizen is ensured. In point 1 of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms it is also established 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 Article 125.1 of the Constitution, judicial power of the Republic of Azerbaijan can only be exercised by courts through a fair trial. Consideration of cases is impartial, fair, observing legal equality of the parties, on the basis of the facts and according to the law is fixed in Article 127.2 of the Constitution, as one of the basic principles of administration of justice. According to Article 129.3 of the Constitution, the judgment should be grounded in law and evidence.

But, recognizing the resolution of municipality on V.Terekhin's deprivation of the land plot which owner he was, on the basis of loss of the property right to the apartment, courts were misinterpreted and applied norms of a substantive law.

Also, justification by the superior courts which considered a civil case of existence at municipality of power to cancel the resolution on sale of the land plot to the applicant with reference to point 4 of Article 48 of the Law “On Status of Municipalities” cannot to be recognized satisfactory from the point of view of the lawful solution of a civil case. Thus, according to this norm, municipal resolutions can be cancelled by the bodies which adopted them or are recognized invalid by a judgment. In point 2 of article to which a reference is made, it is provided that the resolutions adopted by municipality cannot be directed on violation of the rights and powers of the legal entities and individuals located in the territory of municipality. Apparently, irrespective of legal consequences for other persons, interpretation of noted provisions as existence at municipality of power to cancel any resolution adopted by it, subsequently cannot be considered as the correct.

On the other hand, in relation to the given case it was not considered that XIV and XV chapters of the Land Code consolidate the special norms regulating the general rules, circumstances and the bases of seizure of land, and restriction and termination of the property rights, use and rent on the land plots. The abstract link to point 4of Article 48 of the Law without direct indications of these norms and other legislative provisions governing the similar relations led to distortion of real sense of this norm.

In this regard, Plenum of the Constitutional Court considers necessary to pay attention to another legal position of the European Court of Human Rights in the decision on case of “Castravet v. Moldova" as of March 13, 2007. In the this case the European Court came to such conclusion that at resolution of appropriate issues domestic courts, being content with repetition of provisions of the legislation, did not explain their application to the this case, and thus, these decisions are not reasonable and satisfactory (§ 34).

Plenum of the Constitutional Court also considers necessary to consider the following.

The JBCC of the Supreme Court, having cancelled by the decision of February 5, 2008 the decision of JBCC of the Court of Appeal of Baku city on a civil case of October 3, 2007 and having sent case for new appeal consideration, noted that judgments to which a reference is made, a subject of case are only the relations by the property right to the apartment, and the land plot is not challenged, and behind municipality power is not provided to withdraw the land which is available in property of the citizen and to transfer it to other person, and with reference to Article 146.1 of the Civil Code came to such conclusion that the applicant had a right of possession and use for the challenged land plot.

However, decision of JBCC of the Court of Appeal of Baku city of June 5, 2008 adopted according to this resolution cancelled by the decision of JBCC of the Supreme Court of September 24, 2008. As opposed to the above legal position, according to Articles 67 and 68 of the Land Code, the court of cassation instance in this resolution came to a conclusion that as the property right of V.Terekhin was not registered, he had no rights for the land plot. The legal relations identical in essence are also expressed in the decision of JBCC of the Supreme Court of June 2, 2009 concerning uphold of the decision of the Court of Appeal of Baku city as of February 20, 2009 adopted with observance of this position.

Thereby, the court of cassation instance expressed various positions concerning interpretation in the decisions adopted on the same case and application of the law to the actual circumstances established on case. However, such approach does not meet the requirements of formation of uniform jurisprudence following from Article 131.1 of the Constitution, and Article 79.3.1 of the Law of the Republic of Azerbaijan “On Courts and Judges”.

The European Court of Human Rights on the case of Beian v. Romania of December 6, 2007 mentioned that admittedly, divergences in case-law are an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. However, the role of a supreme court is precisely to resolve such conflicts. The practice which developed within the country’s highest judicial authority is in itself contrary to the principle of legal certainty, a principle which is implicit in all the Articles of the Convention and constitutes one of the basic elements of the rule of law (§§ 37-39).

Plenum of the Constitutional Court, taking into consideration the noted, comes to conclusion that the JBCC of the Court of Appeal of Baku city by the decision of February 20, 2009 uphold the judgment of the first instance which is not correspond to requirements of the legislation, and JBCC of the Supreme Court despite the different position expressed in the previous decision on case, having upheld a judgment of appeal instance, adopted the decision which is not correspond to provisions of Articles 416, 417 and 418 of the CPC and violating the property right and a guarantee of legal protection of the applicant provided in Articles 29 and 60 of the Constitution.

According to the aforementioned the Plenum of the Constitutional Court considers that the decision of the Supreme Court as of June 2, 2009 has to be recognized as void due to its discrepancy with the Articles 13, 29, 60, 127.7 and 129.3 of the Constitution, Articles 416, 417 and 418 of the CPC, and case has to be reconsidered according to 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, 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 June 2, 2009 on a civil case of V.Terekhin against municipality of the settlement of M.A.Rasulzade concerning cancellation of the resolution No. 98 dated April 29, 2005 and other requirements as null and void in connection with its discrepancy with the Articles 13, 29, 60, 127.7 and 129.3 of the Constitution of the Republic of Azerbaijan, Articles 416, 417 and 418 of the Civil Procedure Code of the Republic of Azerbaijan. To reconsider case according to order and 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.