**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 7 July 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Natavan Musayeva*

**21 June 2010 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant N.Musayeva and her representative R.Samedov

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

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 7 July 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of N.Nusayeva.

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

**DETERMINED AS FOLLOWS:**

As it follows from the circumstances of a civil case (established by courts) between the late husband of the applicant Vahid Musayev and Memar-3 housing construction cooperative (hereinafter referred to as the HCC “Memar-3”) the contract on construction of the three-room apartment of 112,5 sq.m was signed on April 13, 1998. The price for the apartment was specified and paid in amount of 116.480.000 AZM. On February 1, 2004 the new contract on construction of the three-room apartment of 132,5 sq.m between Vahid Musayev and HCC “Memar-3” was signed. According to this contract, the price for the apartment was established in amount of 41.100 US dollars. Cancellation of the previous contract was provided in this contract signed by the parties.

Dissatisfied with price increase for apartments seven participants of cooperative including Vahid Musayev, providing information on an order of charge of a debt and balance cost of apartments, however demanded in view of the fact that their inquiry remained without answer, they filed the claim against the chairman of cooperative for inaction of the official. The cooperative addressed with the counterclaim concerning payment of a penalty for defaults of a debt and non-execution of the obligation, concerning expulsion from cooperative and eviction from the apartment.

The Nasimi district court made on April 26, 2007 the decision on these claims, however because on April 17, 2007 Vahid Musayev died, the proceeding in the part concerning him was suspended.

The applicant Natavan Musayeva, being the heiress-at-law and Vahid Musayev's wife, in 2008 submitted a new claim to Yasamal district court of the city of Baku against the chairman of HCC “Memar-3” of the Aida Ragimova with the requirement of recognition of the contract partially invalid, assignment of an obligation on the official for the termination of illegal actions, establishments of cost of the apartment and compensation of the caused material and moral damage, having proved it that the apartment was under construction on the means joint with the husband, the cooperative was ready in 2003 and is repaired by them, for each additional square meter of the area from them demanded 1000 US dollars, having locked doors of the block and the elevator where there was an apartment, she did not allow to the apartment therefore she could not finish completely repair, and for this reason the material and moral damage was caused to her. The applicant during judicial review, having presented addition to the statement of claim, also asked to adopt the decision on recognition of her acceptance in membership of HCC “Memar-3”.

The chairman of HCC “Memar-3”A.Ragimova submitted the counterclaim against N.Musayeva concerning removal at sale intended for her 3 room apartments with a total area of 132,5sq.m, return of the paid 28300 US dollars and transfer of other sum to cooperative. At the same time V. Musayev's son from first marriage of Rasim Bagirli who made the independent demand as the third party joined to case with the statement of claim on establishment and office of part of the disputed apartment relating to inheritance.

By the decision of Yasamal district court of the city of Baku of September 23, 2008 the primary claim was not satisfied. Having satisfied the counterclaim and the claim of the third party who made the independent demand 28300 US dollars paid to him and 28971 manats spent for apartment renovation were solved concerning Vahid Musayev's recognition dismissed from membership of cooperative, deduction from HCC “Memar-3” and payment to his successors (4/6 parts of Natavan Musayeva, 1/6 part to Iza Musaevu, and 1/6 part to Rasim Bagirli).

N. Musayeva and the third party Rasim Bagirli separately made the appeal complaint to this decision. During appeal consideration in connection with the reached agreement between the chairman of HCC “Memar-3” A. Ragimova and R. Bagirli the last refused the appeal complaint, and refusal of the third party of R. Bagirli of the appeal complaint made about the decision was accepted by definition of court of February 5, 2009, and appeal procedure is suspended. By the decision of Judicial Board on Civil Cases of the Court of Appeal of Baku city (hereinafter referred to as the JBCC of Court of Appeal of Baku city) of the same date the N. Musayeva's complaint was not satisfied and upheld the judgment of the first instance.

The appeal of N. Musayeva made on decision of JBCC of Court of Appeal of Baku city, 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 July 7, 2009 was not satisfied, and upheld the decision of JBCC of Court of Appeal of Baku city of February 5, 2009.

In the letter of the Chairman of the Supreme Court of September 28, 2009 it was reported that due to the lack of the bases the additional appeal of the applicant was not presented for consideration of Plenum of the Supreme Court.

The applicant, having lodge the complaint to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), specified that by consideration of a civil case as a result of adoption by courts of the judicial acts which are not conform with material and procedural norms of law her property right and the right of legal protection enshrined in the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution)were violated, and asked to verify compliance of adopted judicial acts with the Constitution and laws.

Plenum of the Constitutional Court in connection with inquiry considers necessary to note the following.

According to Article 60 of the Constitution, legal protection of rights and liberties of every citizen is ensured, everyone may appeal to law court regarding decisions and activity (or inactivity) of state bodies, political parties, trade unions, other public organizations and officials.

According to Article 71 of the Constitution to observe and to protect the human and civil rights and freedoms established by the Constitution is the duty of legislative, executive and judicial bodies.

Plenum of the Constitutional Court in a number of its decisions especially noted an essence and value of the right of legal protection.

The right for legal protection, being among basic rights and freedoms of the individual and citizen, at the same time acts as a guarantee of other rights and freedoms. This right, without being limited only to the right of an appeal to the court, provides also justice with effective restoration of the violated rights and freedoms within the limits adjusted in the legislation (decision of Plenum of the Constitutional Court of December 30, 2008).

According to the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) acting as one of important mechanisms of an effective guarantee of Article 60 of the Constitution, justice is carried out based on facts, principle of contentiousness and equality of parties. Judge should always secure compliance with the principle of contentiousness. Judge should base his decision solely upon reasons discussed in compliance with the principle of contentiousness, explanations and documentation submitted by parties. Court should create necessary conditions for all-faceted, complete and fair hearing of case for the purposes of finding truth. Court evaluate evidence in a fair, impartial, all-complete and full manner and thereafter evaluate norms of law to apply to such evidence. No evidence have a preliminarily established force for court. Court decision should be legal and motivated. Decision should be issued in accordance with material and procedural norms of law in effect as of the time of hearing and settlement of case. Judge should adopt a decision in accordance with claims made by persons participating in case. However, in exceptional cases stipulated by the law, judge has the right to exceed claims (Articles 9.1, 9.3, 14.1, 88, 217.1, 217.2 and 218.3 of the CPC).

Implementation of the right for protection provided in the Constitution in court is established by the existing legislation. Non-compliance with material and procedural rules at consideration on the merits of any lawsuit can be regarded as the circumstance which led to violation of provisions of the Constitution.

Concerning the provisions of the civil legislation which are not subject of application on civil dispute at the initiative of the applicant Plenum of the Constitutional Court, first of all, notes that in the period of HCC “Memar-3” institution a legal basis of activity of cooperatives, including an order of establishment of cooperatives, reception of new members and the membership termination, it was regulated by the Civil Code of the Republic of Azerbaijan acting till September, 2000 (hereinafter referred to as the former CC), the Law of the Republic of Azerbaijan “On cooperative”, acting at that time, and the Charter of Cooperative.

According to Article 24.3 of the former Civil Code, the cooperative organizations and their associations are legal entities. Article 25 of the Code establishes that the legal entity acts under the charter (provision).

According to Article 8 of the Law of the Republic of Azerbaijan “On cooperative” of the February 7, 1996 acting till June 17, 2003, the cooperative acting on the basis of the charter. Along with other issues in the Charter of cooperative are specified an introduction order in membership of cooperative, an exit and exception of cooperative. According to Article 13 of this Law, membership in cooperative stops in case of death of the member of cooperative. In case of death of one (several) of members of cooperative his successor (successors) can be accepted in members of cooperative. Article 14 of the Law establishes that the member of cooperative can be expelled from cooperative in case of non-execution of the duties provided by the present Law and the charter, drawings to cooperative of damage owing to violation of the charter and laws of the Republic of Azerbaijan and on other bases provided by the charter and which are not contradicting the present Law. The issue of exclusion by cooperative of its member is considered by the general meeting as it should be defined in the charter. The decision of general meeting on an exclusion by cooperative of its member can be appealed in court.

According to the Article 1 of the Charter of HCC “Memar-3” attached to materials of a civil case and which is undoubtedly accepted by courts, the cooperative works according to the Law of the Republic of Azerbaijan “On cooperative” and this Charter. According to Article 6.2 of the Charter, the member of cooperative can be dismissed by the solution of general meeting of members of cooperative. According to Article 9.1 of the Charter the order of convocation and carrying out of general meeting of members of cooperative, exclusive competences, duties, functions and rules of the organization of their work are established by the Law of the Republic Azerbaijan “On cooperative” and the decisions made by general meeting of members of cooperative. According to the point “a” of part II of the same article acceptance and an dismissal of membership of cooperative are within the competence of general meeting of members of cooperative.

Also, according to Article 111.3.3 of the acting Civil Code of the Republic of Azerbaijan (hereinafter referred to as the acting Civil Code), acceptance and dismissal of members of cooperative are within the exclusive competence of general meeting of members of cooperative. According to Article 112.4 of this Code, in event of the death of a member of a cooperative, his heirs may be accepted into membership of the cooperative, unless otherwise provided by the cooperative’s charter. Otherwise, the cooperative pay to the heirs the value of the deceased member’s share.

However, the court of the first instance considering case, having broken norms of the civil legislation acting during establishment and action of HCC “Memar-3” assumed the competence of general meeting of cooperative established by the law and the charter, satisfied the counter claim in part which should not be accepted, recognized Vahid Musayev as dismissed from membership by HCC “Memar-3”. The court also made it impossible the right of successors of the dyed member of cooperative to be accepted in members of cooperative and discussion of this issue at general meeting of members of cooperative.

Having come to such conclusion, at the same time the court allowed violation of requirements of CPC. Thus, according to the Articles 153.2.1 and 261.0.1 of the specified Code the judge refuses to accept the statement on the basis of inadmissibility of the claim if the statement is not subject of consideration in a judicial proceeding, and the judge stops proceeding if case is not subject court consideration.

It should be noted that this necessary institute providing inadmissibility of the claim requirement partially or completely if case is not subject of court consideration serves for a number of the important purposes. Thus, inadmissibility of the statement of claim which is not subject of court consideration or suspension of the cases which are already in procedure actually prevents unnecessary loading of court from cases in which there were no disputable legal relations yet and which are subject to consideration out of court. At the same time, this institute creates conditions for fruitful use of more wide opportunities that are available for the parties, for resolution of the controversial issues that arose between them.

Along with material and procedural violations of the law, the court of the first instance that considered case was beyond claim requirements. Thus, the court which came in primary claim to a conclusion for full satisfaction of requirements of the counterclaim of the respondent concerning removal of the apartment for sale, return of the paid money and transfer of other sum to cooperative decided to consider Vahid Musayev as dismissed from membership of cooperative, to hold the money paid and spent by him for apartment renovation from cooperative and to pay it to successors. The court of the first instance tried to prove this discrepancy in descriptive part of the decisionby the change of the counter claim requirement of the respondent in primary claim.

In this regard, first of all, it is necessary to consider that according to Article 155.3 of the CPC, filing of counter-claim should be made in accordance with general rules for bringing a claim. In spite of the fact that in Article 53 of the CPC it is reflected that the claimant have the right to make changes to grounds or subject matter of the claim, to increase or to decrease value of claim prior to adoption of decision, this right cannot be applied without taking into account Article 149.1 of the Code. According to this norm, the statement of claim has to be submitted to court in writing. Change of the grounds or subject matter of the claim, increase or decrease value of claim in essence admit equal to the statement of claim and therefore they can be recognized valid, taken by court into account only in cases of granting these written issues by the party.

However, in materials of a civil case there is no statement of defendant provided to court of the first instance in primary claim of A. Ragimova or her representative concerning change of the counter claim requirement. At the same time, this circumstance was not reflected in the minutes of court.

The legislation for the purpose of ensuring of elimination of miscarriages of justice, in Article 372.1 of the CPC established that the court of appeal instance as a court of full authorities, hear case and evidence present in case or additionally submitted evidence on merits.

According to civil procedural legislation, violation of norms of a substantive or procedural law or their wrong application is one of the bases to cancellation of the decision in an appeal order. Norms of a substantive law are considered violated or incorrectly applied only in the event of court of first instance making a mistake during application of law, not applying applicable law or other normative legal act, or incorrectly interpreting the law. Violation or incorrect application of norms of procedural law cause repeal of decision only in the event it leads to issuance of incorrect decision (Articles 385-387 of the CPC).

The JBCC of the Court of Appeal of Baku city by the decision as of February 5, 2009, having upheld the judgment of the first instance which dos not correspond to the requirements of the law, did not execute the duty assigned to it.

According to the Article 416 of the CPC the court of cassation instance verified correctness of application by court of appeal instance of norms of a substantive and procedural law. The court of cassation instance at consideration of case can cancel the decision or ruling of court of appeal instance completely or in part and send the case for reconsideration in court of appeal instance. Violation or the wrong application of norms of a substantive and procedural law is the basis for cancellation of the decision or ruling of court of appeal instance (Articles 417.1.3 and 418.1 of the CPC).

In a contradiction to the specified norms of the legislation, the JBCC of the Supreme Court by the decision dated July 7, 2009, having upheld the judgment of appeal instance, violated the right of the applicant for the guarantee of legal protection fixed in the Article 60 of the Constitution.

Along with specified especially it should be noted that one of the main arguments of the appeal of the applicant was connected with the decision courts of the issue that is not within their competence and Vahid Musayev's dismissal of membership of cooperative. Court of cassation instance, without having raised this issue at all, did not give any legal assessment to this argument that is important for case.

The European Court of Human Rights in the decision on case Kraska v. Switzerland, noted that it depends on Court to decide whether the contested proceedings considered as a whole were fair within the meaning of the Convention. The effect of the 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  (§30). In decision on the case of Gheorghe vs. Romania, the Court having come to a conclusion concerning violation of the right of the applicant for fair judicial proceedings, also based the position by that from the Supreme Court the argument which is put forward by the applicant in the complaint in the Supreme Court because of crucial importance demanding a concrete and clear assessment was not taken into account (§50).

Already created legal position of Plenum of the Constitutional Court is that the consideration of the case in a cassation order should not have formal character, and has to serve for verification of the arguments which are put forward by the applicant.

Considering the above, Plenum of the Constitutional Court comes to conclusion that the decision of JBCC of the Supreme Court of July 7, 2009 has to be recognized as void in view of discrepancy with the Articles 60 and 71 of the Constitution, Articles 416, 417.1.3 and 418.1 of the CPC, and case is reconsidered according to the present decision, 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, 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 January 30, 2009, adopted on a civil case on the claim of Natavan Musayeva against “Memar-3” housing construction cooperative as of July 7, 2009 as null and void in connection with its discrepancy with the Articles 60, 71 of the Constitution of the Republic of Azerbaijan and the Articles 416, 417.1.3 and 418.1 of the Civil Procedure Code of the Republic of Azerbaijan. To reconsider case according to the present decision, in order and terms established by 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.