**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 178.8 of the Civil Code of the Republic of Azerbaijan*

# 25 October, 2010 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, F.Babayev, S. Hasanova, J.Garajayev, R. Gvaladze, I.Najafov and K.Shafiyev (Reporter Judge);

attended by the Court Clerk V.Zeynalov,

the legal representative of the subject interested in special constitutional proceedings: B.Asadov, Judge of the Supreme Court of the Republic of Azerbaijan, V.Amiraslanov, Adviser of the Department of Economical Legislation of Administration of Milli Majlis of the Republic of Azerbaijan;

the expert: professor A. Talibov, Lecturer of the Civil Law Board of the Law Faculty of Baku State University;

the specialist: O.Hasanov, Head of Legal Department of the State Service for Registration of Real Estate under the State Committee on Property Issues of the Republic of Azerbaijan;

based on Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open court session via procedure of special constitutional proceedings the constitutional case on inquiry of Supreme Court of the Republic of Azerbaijan of 05 July 2010 on interpretation of Article 178.8 of the Civil Code of the Republic of Azerbaijan;

having heard the report of Judge K.Shafiyev, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialist, conclusions of expert, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Supreme Court of the Republic of Azerbaijan in its inquiry asks to give interpretation of Article 178.8 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as Civil Code).

In inquiry it is indicated that along with Articles 139 and 146 of the Civil Code determining the moment of origin of the right to real estate, in Article 178.8 of this Code the special order of origin of the ownership right of the member of apartment, summer cottage, garage or other cooperative on the apartment, summer cottage, garage or other premises provided by cooperative is established. In this article the moment of origin of the ownership right to the apartment, summer cottage, garage or other premises provided by apartment, summer cottage, garage or other cooperative, is coordinated not by time of registration of the specified objects in the state register, but by the fact of full payment of a share by members of cooperative. Supreme Court considers that application of Article 178.8 of the Civil Code, creating of serious difficulties in work of judicial, notarial and other appropriate authorities, interferes to formation of uniform practice.

The Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) in connection with inquiry notes the following.

In the constitutional state and democratic society the ownership right is inviolable and inseparable.

According to Article 29 of the Constitution of the Republic of Azerbaijan, everyone has the ownership right. The ownership right, including the right to private property is protected by law. No one may be deprived of his property without a court decision.

The ownership right as one of fundamental human rights consists of the rights of possession of property, usage of property and dispose of concerning its by an dispose and means established by the law.

In Article 152 of the Civil Code the ownership right is expressed as possess, usage and dispose by the owner belonging to him property voluntarily and legal concepts of these rights are given. According to this article the right to possess means the legally protected possibility of enjoying actual possession of property (chattel), 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 and the right to dispose means the legally protected possibility of determining the legal fate of the property (chattel).

As a result of the rights of possess and use the person possesses property and can exploit it. Implementation of the right to dispose as a result comes to an end with change of accessory, a condition or purpose of property.

The approaches in a question of origin of the ownership right are various. So, in the legislation of the states relating to the general (Anglo-Saxon) legal system and continental (Roman-German) legal system, there are different rules.

In the states of the general legal system, as a rule, the ownership right and other rights to real estate, restrictions of these rights, their origin, transfer and the termination do not undergo the state registration.

In the states of continental legal system including in the Republic of Azerbaijan, the ownership right and other rights to real estate, restrictions of these rights, their origin, transfer and the termination are established by the fact of the state registration.

According to Article 139.1 of the Civil Code, the Ownership rights and other rights to the real estate, restriction of such rights, their origin, transfer and termination is a subject to state registration.

Along with it, it should be noted that in the civil legislation of the Republic of Azerbaijan the moments of origin, transfer and the termination of the ownership right to the real estate, acquired on a basis of bargain are established differently.

So, according to Article 146.1 of the Civil Code, the right for ownership and disposal of immovable property is accrued from the moment of notary verification of the deal on such property. And according to Article 146.2 of the Civil Code 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.

According to the provisions of the civil legislation regulating purchase of ownership right to real estate, the ownership right to real estate arises from the from the moment of registration of act of transfer in the state register of immovable property, and the ownership rights to newly created immovable property arises from the moment of registration of such property in the state register of immovable property (Articles 178.1 and 178.2 of the Civil Code).

However, according to Article 178.8 of the Civil Code, the member of housing, summer cottage, garage or other cooperative, other persons holding their share accumulation, who have paid fully their share for apartment, summer cottage, garage or other facility, built by cooperative, get the right of ownership on such property. As evident from the content of norm, unlike other articles of the civil legislation in this article origin at the member of cooperative of the ownership right to property coordinates not with the registration moment in the state register of real estate, but with full payment of a share.

The Constitutional Court for clarifying of contents of specified article considers important to analyse a number of questions, connected with the right to dispose of property and the state register of real estate.

In the decision of Plenum of the Constitutional Court of 15 January 2010 according to V.G.Terekhin's complaint in connection with the right of possess, use and dispose, making a ownership right essence, the following legal position is created: “As appears from provisions of the civil and land legislation, along with a consent of the parties the necessary condition of registration in the state register of real estate, in particular, origin of the right of the dispose of it by the person has a great importance from the point of view of getting of ownership right on the given thing in full”.

The European Court of Human Rights in its decision of 13 July 1979 on case Marckx v. Belgium specified that the dispose of the property the highest and forming base aspect of the ownership right.

The owner at own discretion can make the decision on sale, rent, pledge, donation of the property. The owner at the disposing of property enters to legal relations with the particular person (for example, with the buyer of property, the pawnbroker, etc.). At the same time, implementation of the right of dispose can infringe the interests of other subjects of the civil relations.

The right of dispose is approved by possession of this right disposing party, according to the state register of real estate. Data concerning restriction of the ownership right on real estate is registered in the state register.

The state register of real estate is the uniform registration collection which is conducting in the territory of the Republic of Azerbaijan. According to Article 2.1 of the Law of the Republic of Azerbaijan “On state register of real estate” (hereinafter referred to as Law “On state register of real estate”) according to the Civil Code the state registration of the ownership right and other proprietary interest to real estate is the legal act of recognition and the approval by the state of origin of the rights to real estate, transfer of restriction (encumbrance) to another and the termination of these rights.

It is not casual that in the normative legal acts regulating activity of notarial bodies carrying out powers on the certification of the agreements connected with real estate, on notaries assigns a number of the duties connected with checking of possession of the right of dispose by persons, alienating such property. So, notaries at the certificating of agreements in a notarial procedure concerning alienation or a pledging of real estate, check their belonging to the alienated person or the depositor. The notary demands an extract from the corresponding register about the state registration of the ownership rights to alienated or pledged property. At the certification of agreements concerning alienation or a mortgaging of a house, the apartment, summer cottage, the country house, garage, the land plot, other real estate the existence of a ban on alienation of property or seizure of property is checked. For this purpose the notary demands the reference of lack of a ban and arrest on alienation (points 46, 47 and 48 of the Instruction “On rules of conducting of notarial actions”, approved by the resolution N. 167 of the Cabinet of Ministers of the Republic of Azerbaijan of 11 September 2000).

The mechanism of a guarantee of the ownership right, fixed in the legislation of the Republic of Azerbaijan, is carried out on the basis of registration of real estate in the state register. Registration in the uniform state register of the data concerning real estate is important from the point of view of protection of interests both the state and owners. Recognition of the ownership right of the person on the corresponding real estate acquired on the lawful bases as a result of the state registration of real estate prevents violation and contest of this right. The state registration of real estate is estimated as a guarantee of authenticity and validity of the documents certifying the ownership right to property. And one of the main objectives of activity of government bodies in this direction is protection of the rights and legitimate interests of everyone. From this point of view as a result of implementation in noted area of the powers assigned to government bodies, has special value also inadmissibility of unreasonable restriction of realization in full of rights of any individual or juridical entity, including the ownership right.

Due to the ownership right of members of cooperative it should be noted that before full payment of a share the legal relations which have arisen between cooperative and its member, have obligatory character. The essence of this obligation consists that the member of cooperative incur an obligation on full payment of the share giving the grounds of buying of property on an inhabited or non-residential premise, and the cooperative incur an obligation on transfer in due time this premise to the member of cooperative. Thus, full payment by the member of cooperative of a share to cooperative creates the right of the request, as owner of this property, from the body which is carrying out the state registration, the state registration of the ownership rights, the rights of new possession, usage and the dispose.

The right of the request of acknowledgement of ownership rights of the owner found the reflection also in Article 157.1 of the Civil Code.

Along with it, according to Article 17.2 of the Law “On state register of real estate” the ownership right to apartments or the uninhabited areas which become a component of the unfinished building, and also its encumbrance by a mortgage can be registered in the beginning in the state register. And in Article 17.5 of this Law it is specified that rules provided in Articles 17.2-17.4 of this Law belong as well to a component part of the completed building. In this sense the rule provided in Article 17.2 of the Law “On state register of real estate”, has to be accepted as an additional guarantee of implementation in the future of the request for recognition of ownership right of the owner who got the ownership right on the lawful bases.

From the point of view of settlement of question making a subject of special constitutional proceeding, some provisions of the Housing Code which has come into force since 1 October 2009 of the Republic of Azerbaijan regulating, along with other important questions, the usage of living space which enter into private housing fund, creation and activity of housing co-operatives and the right and a duty of their members are noteworthy.

According to Article 112 of the Housing Code, the member of housing cooperative gets the ownership right to premises in case of full payment of a share. According to Article 113 of this Code, reception of the person in membership of housing cooperative is the basis for moving in premises of buildings of housing cooperative, and full payment of the provided share is the basis for registration of the ownership rights in the state register of real estate. Membership in housing cooperative also creates the basis for possession of premises, usage of it and disposes in the limits established by the legislation.

According to the above stated, Plenum of the Constitutional Court comes to conclusion that Article 178.8 of the Civil Code has to be applied according to provisions of Articles 146.1, 146.2, 178.1 and 178.2 of this Code and Article 113 of the Housing Code. The member of cooperative and other persons having the right to share accumulation, completely brought a share for the apartment, summer cottage, garage, other premises provided by cooperative get the right of possession and usage to the specified property, and after registration of real estate in the state register get the right of dispose.

Being guided by part IV of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Article 178.8 of the Civil Code shall be applied according to provisions of Articles 146.1, 146.2, 178.1 and 178.2 of this Code and Article 113 of the Housing Code. The member of cooperative and other persons having the right to share accumulation, completely brought a share for the apartment, summer cottage, garage, other premises provided by cooperative can get the right of possession and usage of the specified property and after registration of real estate in the state register can get the right of dispose.

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 can not be cancelled, changed or officially interpreted by any body or official.