**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 06 August 2008 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of N.Manafov*

**13 July 2009 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant N.Manafov and his representative Z.Askerov

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

specialists: Y.Gumbatov, the lawyer of the State Committee of land management and cartography of the Republic of Azerbaijan and A. Hidirov, chief specialist of Sector on the organization of the land market, T. Bayramov, leading adviser of the Department of administrative control of the Center for work with municipalities of the Ministry of Justice 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 06August 2008 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of N.Manafov.

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

**DETERMINED AS FOLLOWS:**

From the circumstances of a civil case established by courts it follows that on August 19, 2006 the applicant Novruz Manafov filed a petition in Gashgachay municipality of the Gakh area for purchase of the land plot on the territory called “Bash Malakh”. In this regard the Gakh regional department of the State Committee of land management and cartography of the Republic of Azerbaijan (hereinafter referred to as the SCLC) stated concerning accessory of this land plot to Gashgachay municipality, and that it is a subject of purchase and sale, as well as that the sale of this land plot is shall be arranged according to law. According to the Minutes No. 8 of meeting of council of Gashgachay municipality as of August 21, 2006, in view of N. Manafov's statement, it was decided to sell to him the land plot located in the territory “Bash Malakh” (60 hectares) for the purpose of touristic business. On the basis of the Act of purchase and sale of lands dated September 20, 2006 the Gashgachay municipality sold the land plot in 60 hectares to N. Manafov for 32.000 manat. On November 24, 2006 the cadastral plan registered in the State Land Cadastral Book under No. 55 for this land plot (60 hectares) located on the territory of the Gashgachay village was developed for N. Manafov.

On December 5, 2008 Gakh regional department of SCLC, having appealed to court with the statement of claim against Gashgachay municipality and N. Manafov, asked to recognize the Decision No. 8 of Meeting of Council of the same municipality on sale of the land plot in 60 hectares on the territory called “Bash Malakh” - which is in property of municipality of the Gashgachay village - to N. Manafov and the cadastral plan dated November 24, 2006 on transfer of the specified land plot into N. Manafov's property, as invalid in connection with their illegality. The statement of claim was proved by that as the challenged territory is the district used by the population as a pasture for the cattle, and according to legislation, similar sites are public lands relating to property of municipality, these lands cannot be transferred to a private property.

According to the decision of Gakh district court as of January 11, 2008, the claim was not satisfied. The court established that the challenged land plot, being the land plot that is in property of municipality of the village Gashgachay is not the district used by the population as a pasture for the cattle. This land plot is located 18 km away from the village, this territory is covered by thickets, is unsuitable, and was never used for any purposes.

The claimant made the appeal complaint, and by the decision of Judicial Board on Civil Cases (hereinafter referred to as the JBCC) of the Court of Appeal of Sheki city of April 8, 2008 the decision of Gakh district court was cancelled, the claim is satisfied, the decision to restore a former condition of the parties, and to return the land plot to 60 hectares to Gashgachay municipality, to return to N. Manafov transferred by him on account of Gashgachay municipality in the Gakh regional branch of “Capital Bank” 32000 manat of money is made. The court of appeal instance on the basis of the scheme of land management of the lands transferred to the possession of Gashgachay municipality of the Gakh area, and the scheme of the land plot sold to N. Manafov came to such conclusion that the sold land plot in 60 hectares is the land plot which is in common use.

By the decision of Judicial Board on Civil Cases (hereinafter referred to as the JBCC) the Supreme Court of the Republic of Azerbaijan of August 6, 2008 the appeal of N. Manafov was not satisfied, the decision of the Court of Appeal of Sheki city was upheld.

In the letter of the Chairman of the Supreme Court of the Republic of Azerbaijan of December 23, 2008 in response to the made complaint for consideration of this civil case as the additional cassation it was specified that there are no bases for consideration of the case on Plenum of the Supreme Court.

In the complaint lodged to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) the applicant notes that acts of courts of the highest authority on case where he is a respondent, violate his rights, and asks to verify compliance of decision of JBCC of the Supreme Court of August 6, 2008 to the Constitution (hereinafter referred to as the Constitution) and to laws of the Republic of Azerbaijan.

Plenum of the Constitutional Court in connection with the complaint considers necessary to analyze a number of the norms of the Constitution, civil, civil procedure and land legislation relating with the solution of issue.

According to Article 13 of the Constitution, the property in the Republic of Azerbaijan is inviolable and protected by state. The property may be state, private and municipal. According to Article 29 of the Constitution, everyone has the right to own property. No type of property should be granted superiority. Ownership rights, including the rights for private owners, is protected by law.

 According to Article 6 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC), natural persons and legal entities acquire and exercise their civil rights by their own will and for their own interest. They are free to establish rights and obligations by contract and to determine the terms and conditions of the contract, provided that such terms and conditions are not contrary to law. Civil rights may be restricted by law only where necessary for the protection of state and public security, civil order, the health and morals of society, rights and freedoms, and the dignity and good name of other persons (Articles 6.2 and 6.3 of the CC).

 Article 17 of the CC establishes that all state authorities, bodies of local self-administration, political parties, public associations, trade unions, and natural persons and legal entities are obligated to respect civil rights and provide assistance in the course of their protection.

According to the Code the ownership rights and other rights over immovable property, restriction of such rights, their accrual, transfer and termination is subject to state registration. The following is subject to registration in cases provided in this Code and by law: ownership rights, right of use, mortgages, easements, as well as other rights to immovable property (Article 139 of the CC).

According to Article 140 of the CC, until the inaccuracy of the registry content is proven, its contents to be presumed as accurate and complete. Note in the registry to the favor of persons obtaining any rights registered under the name of the beneficiary of the deal, is considered valid, with exception of cases of obtaining by registry of objections on such note or determination of inaccuracy of the obtaining person.

The right for ownership and disposal of immovable property is accrued from the moment of notary verification of the deal on such property. 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 (Article 146 of the CC).

Article 156.1 of the CC provides that the property belonging to municipalities on the right of property is municipal property.

One of the main acts governing the land relations in the Republic of Azerbaijan and directed on execution by owners, users and tenants of the earth of the duties connected with the land and protection of their rights for the land and also on creation of conditions for rational use of lands and their protection is the Land Code of the Republic of Azerbaijan (hereinafter referred to as the LC).

According to Article 41 of the LC, the state land cadastre is a combination of necessary and reliable information on state registration of land use, quantitative and qualitative record, inventory and economic assessment of lands. The information of the state land cadastre shall be applied during an assessment of the economic activity pertaining to the planning of the use and protection of lands, provision and withdrawal of lands, establishment of regulatory cost of lands, payment for them, implementation of activities pertaining to land structure, establishment of alienation zones, use of land, and during the implementation of other relevant activities pertaining to the use and protection of lands. The keeping of the state land cadastre should be supplied with geodetic, topographic and mapping activities, activities pertaining to land structure, study of land, agro-chemical, melioration, geo-botanical and other research and exploration activities.

According to Article 47 of the LC, the lands owned by a municipality is divided into: lands in common use; lands used by private individuals and legal entities; lands of the reserve fund. The lands in common use mainly include the lands under streets and squares of cities, settlements and rural communities, roads of the local importance and domestic roads, parks, forest parks, bodies of water, stadiums, sporting grounds, as well as the lands on accommodating green belts, water economy facilities, hydro-technical facilities, other installations and facilities of the local importance and of common use, and the lands of pastures used for grazing the cattle owned by the population.

According to Article 86.2 of the LC, the commonly used state lands envisaged by the present Code, as well as the lands of municipalities which are usable for agricultural needs and are being used and leased by legal entities and private individuals shall not be objects of purchase and sale.

Protection of right of property, including the land rights, except for the restrictions determined by the law, ensuring thus fair balance between public interests and interests of the state is one of the major tasks facing the constitutional state.

Along with other rights and freedoms, the most important constitutional mechanism of means of protection of the right of property is fixed in Article 60 of the Constitution. According to part I of this article, legal protection of rights and liberties of every citizen is ensured. 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.

In the Constitution as the basic principles of implementation of justice are enshrined the principles of impartiality, justice, observance of equality of the parties, consideration of the case on the basis of the facts and according to the law (Article 127.2), implementation of legal proceedings on the basis of the principle of competitiveness.

According to these provisions, justice is carried out on the basis of competitiveness, equality of the parties and the facts. The judge in all cases is obliged to provide the principle of competitiveness of process, he is obliged to motivate the decision only with those proofs, explanations of the parties and documents which were discussed by them on the basis of the principle of competitiveness of the parties. The court after objective, impartial, comprehensive and complete examination of proofs estimates them according to the legal norms applied in this case. The judgment has to be lawful and reasonable. The decision has to be based on the valid facts of the case and on relationship of the parties (Articles 9.1, 9.3, 88, 217.1, 217.3 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC)).

The court of appeal instance proved cancellation of a judgment of the first instance by that the land plot sold by municipality to the applicant is a part of the land plot of the municipality which is in the common use and as the main proof referred to the scheme of land management and to the scheme of the land plot sold to the applicant.

Plenum of the Constitutional Court notes that the constitutional principle of inviolability of property right in solution of issues connected with property rights of persons which got this right and registered it in accordance with established procedure, assigns to courts a duty to proceed not from the point of view of formal discussions, but completely and comprehensively study similar issues, using all possible means provided to them by the legislation. According to requirements of the above civil legislation, the owner of real estate registered in the official registry can be considered unfair only if in advance, the protest concerning this registration is entered in the registry, or the person getting the right of property knows that this registration is illegal.

During the solution of procedure legislative disputes courts are given opportunity: to ask for the help persons - having technical or other skills and knowledge, required for assisting court in course of hearing of case; where it is impossible to submit or to deliver written and material evidence to court, court have the right to examine and to conduct research of such evidence at place of their location or storage for the purpose of clarification of matters emerging in course of hearing and requiring special knowledge, upon application of a person participating in the case or further to its own initiative, appoint an expert examination. No evidence have a preliminarily established force for court (Articles 64.1, 79.1, 97.1 and 88 of the CPC).

From all circumstances of the cases which are unambiguously established by all courts it is evident that during acquisition by the claimant of the land of municipality the decision of competent authority – Gakh regional department of SCLC was received in advance and the cadastral plan of the land plot addressed to N. Manafov was issued.

However, the JBCC of the Court of Appeal of Sheki city at consideration of issue concerning right of property of complainant did not use all available means provided by the legislation for establishment of truth and, being based only on documents, made by the complainant, did not prove a deviation of conclusions to which the court of the first instance came. Whereas, according to part VII of Article 125 of the Constitution, legal proceedings are obliged to provide establishment of justice and truth, and according to part III of Article 129, – the decision should be grounded on law and evidence.

Plenum of the Constitutional Court comes to such conclusion that the judicial proceedings which are carried out in court of appeal instance were not carried out according to criteria of ensuring fair balance between the right of property of the applicant and the principle of its inviolability and interests of society and state.

The European Court of Human Rights in many decisions specified its legal position concerning given criterion. For example, in the decision “Broniowski v. Poland” Court noted that both an interference with the peaceful enjoyment of possessions and an abstention from action 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.

The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures depriving a person of his of her possessions. In each case involving the alleged violation of that Article the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden.

In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are “practical and effective”. It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the relevant compensation terms – if the situation is akin to the taking of property – but also the conduct of the parties, including the means employed by the State and their implementation. In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see Vasilescu v. Romania and Sovtransavto v. Ukraine).

Along with it, court of appeal instance in final part of the decision, without having recognized as invalid the challenged acts, simply concluded concerning satisfaction of the claim and restored primary condition of the parties. Actually, the Gakh regional department of SCLC asked in the application to nullify the decision of the local self-government institutions and the cadastral plan issued based on this decision.

According to Article 221.1 of the CPC, the following information shall be contained in the resolutive section of resolution issued with respect to satisfaction of claims on acknowledgement of an act of state authorities, local self-governing bodies, other authorities and bodies or an official unlawful: information on title, order number, date of issue, other data on act and authority issuing said act; reference to recognition of act as void in full or in part, as well as reference to nullity of the act from date of its issue.

On the basis of the above Plenum of the Constitutional Court comes to conclusion that the judgment of appeal instance was adopted with violation of Article 60.1, Article 125.7, parts II and VII of Article 127, Article 129.2 of the Constitution, and also requirements of Articles 9.1, 9.3, 88, 217.1, 217.3 and 221.1 of the CPC.

According to Article 417.1.3 of the CPC, when considering the case the court of cassation, can cancel the decision or ruling of court of appeal instance completely or in part and to send case for reconsideration in court of appeal instance. According to Article 418.1 of the CPC, violation or the wrong application of norms of a substantive and procedure law is the basis for cancellation by court of cassation instance of decision or ruling of court of appeal instance.

However, the JBCC of the Supreme Court, without having taken into account that the court of appeal instance considered case with violation of the constitutional principles and a number of legislative norms, by the decision of August 6, 2008 uphold a judgment of appeal instance of April 8, 2008,thereby did not execute the requirement of Articles 417.1.3 and 418.1 of the CPC and therefore the property right and the right of protection in court of the applicant N. Manafov provided by Articles 29 and 60 of the Constitution were broken.

As evident from a civil case, the main argument of the appeal brought by the applicant into the Supreme Court was connected with definition of the real content of concept of the common use of the land plots that found the reflection in the legislation.

The European Court of Human Rights on case of Kraska v. Switzerland noted that it falls to the Court to decide whether the contested proceedings considered as a whole were fair within the meaning of the Convention. The effect of Article 6 para. 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 the other decision on case of Gheorghiu v. Romania Court, having come to conclusion that the right of the claimant for fair trial of case was violated, proved the position also that the argument which is put forward by the applicant in the complaint to the Supreme Court and demanding a concrete and accurate assessment on the decisive importance was not taken into account by the Supreme Court (§50).

The created legal position of Plenum of the Constitutional Court is that the consideration of the case in a cassation order should not have only formal character and has to serve for verification of the proofs which are put forward by the applicant (decision of the Constitutional court of December 27, 2007 according to K. Bunyatov's complaint).

Considering the above, Plenum of the Constitutional Court comes to a conclusion that in view of discrepancy of the decision of JBCC of the Supreme Court of August 6, 2008 to Article 60.1, parts II and VII of Article 127, part III of Article 129 of the Constitution and Articles 417.1.3 and 418.1 of the CPC has to be considered as invalid and according to descriptive and motivation parts of this decision, case has to be reconsidered in an order and the terms provided 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, 60, 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 August 6, 2008 on a civil case of department of the Gakh area of the State Committee of land management and cartography against Gashgachay municipality of the Gakh area and Novruz Manafov concerning recognition as invalid of decisions on sale of the land plot, and also the cadastral plan as null and void in connection with its discrepancy with the Article 60.1, parts II and VII of the Article 127, part III of the Article 129 of the Constitution and the Articles 417.1.3 and 418.1 of the Civil Procedure Code. To reconsider case according to descriptive and motivation parts of 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.