**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 dated 30 January 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of B.Abbasov*

**19 April 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 (reporter judge), R.Qvaladze, S.Hasanova, I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

applicant B.Abbasov and his representative A.Nazarli

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 30 January 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of B.Abbasov.

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 order of the director of Sumgait plant “Sintezkauchuk” of the State Company “Azerkhimiya” (hereinafter referred to as the Sintezkauchuk plant) dated June 19, 2006 the employment contract signed with the deputy chief of check point bureau (hereinafter referred to as the CPB) Abbasov Bakhtiyar was terminated, according to the point “ç” of the Article 70 of the Labor Code of the Republic of Azerbaijan (hereinafter referred to as the LC). In the order as the basis were specified indifference and negligence to functions, inability to ensure safety of the state property.

B. Abbasov, considering the order as illegal and unreasonable, appealed on July 26, 2006 to Sumgait city court with the statement of claim, requesting to make decision on restoration of him at former work place and payment of an average salary for time of the forced unemployment.

During judicial consideration it was established that the order of the management of Sintezkauchuk plant as of May 8, 2006 to the chief of a CPB, deputy chief, including the claimant, declared strict reprimands with a final warning for no taking of necessary measures for preservation of the state property in the context of increased stealing at the plant. B. Abbasov did not challenge the disciplinary punishment in court according to the Article 190.3 of the LC. During action of disciplinary punishment in the territory of the plant again there were stealing and attempt of stealing. On May 29, 2006 from the pipeline passing through the territory between the workshop “D-1a” of Yeni Butadiyen and plant 9, pieces of pipes were cut off and stolen, and on June 10, 2006 on 20:00 the attempt of stealing of engine by the supervisor of a CPB of the 1st category in the served territory was made, but stealing was prevented by police officers, besides, in the workshops of plant making production, violations at determining the remains of raw materials and finished goods took place. For this reason labor contracts with several workers of a CPB, including with the claimant B. Abbasov were terminated.

The court of the first instance came to a conclusion that the circumstances specified in the order of the plant manager on cancellation of the employment contract signed with B. Abbasov on June 19, 2006 were confirmed by court, and the claimant could not bring the convincing evidence rejecting these circumstances, and contest of legality of the order unreasonably. In this regard B.Abbasov's claim to Sintezkauchuk plant was rejected by the decision of Sumgait city court as of October 16, 2006. At the same time in view of identification at the plant of cases of stealing of the state property, court by its specially adopted definition directed the relevant documents to prosecutor's office of the city of Sumgait.

The Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Court of Appeal), carrying out new judicial review according to the appeal complaint of the claimant, came to a conclusion that the employer dissolved the employment contract with B.Abbasov, having formulated dismissing as non-execution of the labor functions or obligations under the employment contract, including labor duties, with violation of the provisions provided in Article 70 of the LC.

The JBCC of the Court of Appeal, considering that the first case of stealing was on approximately 5 km away from the protected perimeter of plant and the department “D-1a” of Yeni Butadiyen workshop. In case of attempt of stealing from the territory of plant of the engine in the register of acceptance and completion the record was not made. According to the employment contract signed between the parties, labor function of the deputy chief of a CPB consists only in ensuring of compliance with rules of the admission in check-point of plant; according to the contract signed on November 15, 2000 protection of personal and of real estate on and out of the territory of plant is exercised by Head Department of Protection of the Ministry of Internal Affairs of the Republic of Azerbaijan. Despite the statement of the employer that both cases were a crime against property, there were no reports about it to appropriate authorities, by the decision dated February 8, 2007 the appeal complaint by B. Abbasov was satisfied and the decision of Sumgait city court as of October 16, 2006 was cancelled and the claim was satisfied.

The Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Supreme Court) by the decision as of September 11, 2007 dismissed the appeal of Sintezkauchuk plant, and upheld the decision of JBCC of the Court of Appeal as of February 8, 2007.

By the decision of Plenum of the Supreme Court as of March 31, 2008 the complaint of the respondent made as the additional cassation satisfied, the decision of JBCC of the Supreme Court as of September 11, 2007 and the decision of the Court of Appeal as of February 8, 2007, adopted on case, were cancelled, and case sent to the Court of Appeal of Sumgait city for reconsideration.

In the preparatory court session held in Court of Appeal of Sumgait city, the respondent challenged all structure of Judicial Board. After satisfaction of this challenge to jury of Court of Appeal of Sumgait city by the Chairman, on the basis of the letter of the Chairman of the Supreme Court of June 27, 2008 case was sent to the Court of Appeal of Baku city for reconsideration.

By the decision of JBCC of the Court of Appeal of Baku city as of September 3 2008 the appeal complaint of B.Abbasov was dismissed and the decision of Sumgait city court of October 16, 2006 was upheld.

The JBCC of the Supreme Court by the decision dated January 30, 2009 dismissed the appeal of B.Abbasov, and upheld the decision of the JBCC Court of Appeal of Baku city as of September 3, 2008. By the letter of the Chairman of the Supreme Court as of May 22, 2009 to the claimant it was declared that the complaint made to them as the additional cassation was not submitted for Plenum of the Supreme Court because there were no bases specified in the Article 424 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC).

B.Abbasov, having appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), asked to recognize the decision of JBCC of the Supreme Court of January 30, 2009 adopted on a civil case in its claim for restoration on previous work place and payment of salary for the period of forced unemployment as void because of discrepancy with the Articles 12, 25, 60, 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), with the Articles 14.1, 88, 217.1, 217.3, 220.4, 407.1.4, 407.2, 408.1.5, 416, 418.1 of the CPC and Articles 43, 45, 54, 57, 70 and 80 of the LC.

In connection with complaint of B.Abbasov the Plenum of Constitutional Court considers necessary to note that the majority of the arguments containing in the complaint are connected with examination of the actual circumstances. Carrying out this examination is not included into authority of Constitutional Court. Thus, according to Article 34.3 of the Law of the Republic of Azerbaijan “On Constitutional Court”, in cases provided for by Article 34.2 of the present law the examination of facts of the case examined by the Supreme Court of the Republic of Azerbaijan is inadmissible.

At the same time, in B. Abbasov's complaint there are some arguments connected by application of rules of law which examination directly included into power of the Constitutional Court.

Thus, one of arguments of the complaint of the applicant B. Abbasov is connected with that JBCC of the Court of Appeal of Baku city, without having investigated the proof objectively, completely and comprehensively according to the decision of Plenum of the Supreme Court of March 31, 2008, without having paid attention and without having given an assessment to the evidence and documents of case presented by the claimant, having incorrectly applied the norms of a substantive and procedural law which are subject to application on case adopted an illegal and unreasonable judicial acts.

Besides, B.Abbasov considers that JBCC of the Court of Appeal of Baku city at new consideration of the case made the decision with violation of requirements of Article 19.1.3 of the CPC. The applicant specifies that by consideration of a civil case the same person acted as the judge twice. For the first time with its participation requirements of the claimant met by the decision made by JBCC of the Court of Appeal of the Republic of Azerbaijan, and for the second time are rejected by the JBCC of the Court of Appeal of Baku city. In spite of the fact that after his statement for impossibility of participation of this judge as a part of court for the second time, it was expelled from structure of court in a preparatory meeting and replaced by other judge, during judicial review the first judge again took part in the composition of JBCC of the Court of Appeal of Baku city.

Plenum of the Constitutional Court considers necessary to note the following in connection with arguments of the complaint of B.Abbasov concerning wrong application of legal norms.

According to the Constitution the legal protection of rights and liberties of every citizen is ensured. 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 (Article 60.1, Article 71.1).

In connection with the above arguments of the complaint of B.Abbasov, Plenum of the Constitutional Court first of all considers important again to draw attention to the legal positions created in its previous decisions.

 Article 60 of the Constitution provides for judicial protection of rights and liberties. The right to judicial protection enshrined in this Article relates to the legislation in force. The Constitutional Court has repeatedly stated in its decisions that non-compliance with substantive and procedural law when reviewing the substance of any case deemed as a situation leading to violation of constitutional provisions (decision of the Constitutional Court of February 1, 2005 according to the complaint by A.Jafarov, head of Khayal Farm).

The right for legal protection, being one of basic rights and freedoms of the person and the citizen, is also accepted as a guarantee of other rights and freedoms. This right, without being limited only to the right of an appeal to the court, also provides the justice capable it is productive to restore the violated rights and freedoms within, adjusted in the legislation (decision of the Constitutional Court of December 30, 2008 according to complaint of A.M.Gasanov).

Enforcement of the right to judicial protection (the right to fair trial) though various legal procedures at the courts of justice is a key prerequisite of the rule of law(decision of the Constitutional Court of December 13, 2005 according to the complaint of H.I.Gasymov).

Rule of law is one of the fundamental principles of the constitutional state. Observance of this principle bears in itself special value during implementation of the right for fair judicial proceedings accepted as the right on implementation in the appropriate order of justice in the democratic state. Implementation in the appropriate order of the rule of law and justice in modern legal proceedings, are two mutual and supplementing each other of a condition (decision of the Constitutional Court of May 8, 2008 in connection with the complaint of L.Binnatova).

Court specifying facts of case together with proofs forming the conclusion, arguments for rejection of proofs (if any), and relevant laws to be guided by during making certain decision has to prove it from the legal point of view. The court should not be content with enumeration of proofs. In the decision the contents of each proof have to be stated, including testimony. Proofs have to be agreed, while reasons of adoption of the studied proofs should be clearly specified (decision of the Constitutional Court as of May 31, 2006 according to complaint of S. Aliyeva).

By the decision of Plenum of the Supreme Court dated March 31, 2008 with respect to claim by B.Abbasov for restoration on work place and payment of salary for the period of forced unemployment, the following was specified by the court of appeal instance as the grounds for satisfaction of the respondent’s complaint (made as the additional cassation): not carrying out any investigation in connection with the letter of plant which is available in case in the Ministry of Internal Affairs and examination of arguments of the respondent, inspection of the specified places of stealing with indication of conclusion on location of a place of incidents outside the plant territory without establishment of their concrete place. Plenum of the Supreme Court, touched the part of the provisions chosen for justification of the decision of JBCC of the Court of Appeal dated February 8, 2007 cancelled the judgments adopted on case for elimination of some gaps and sent case for new appeal consideration.

Plenum of the Supreme Court considered that the judgment has to be proved according to the valid circumstances established on case and relationship of the parties, only by the proofs investigated in court session. At new appeal consideration of the case the proofs have to be investigated objectively, completely and comprehensively according to requirements of Articles 88, 106.1, 217.3, 217.4 of the CPC and the meeting assessment to the rules of law which are subject to application has to be given and then the lawful and reasonable decision with the correct application of norms of a substantive and procedural law has to be adopted.

Despite of it, court of appeal instance, superficially regarding to examination of circumstances to which the court of cassation instance for cancellation of the former decision of court of appeal referred, in the adopted decision mainly repeated the arguments which are available in a judgment of the first instance. According to a conclusion of court of appeal instance, as a result of negligent of the claimant B. Abbasov to the functions to interests of Sintezkauchuk plant, protected by the law, the damage is caused, the order of the employer on cancellation of the employment contract with the claimant is issued according to requirements of the legislation, and the court of the first instance came to the correct conclusion on case, having rejected claim requirements.

In the decision of JBCC of the Court of Appeal of Baku city which avoid a number of issues the circumstance known according to case papers in connection with the previous court proceedings is simply noted that in Ministry of Internal Affairs the criminal case in connection with stealing of 300 meters of the pipeline from 9 pieces of the pipeline lying through the territory between the department “D-1a” of Yeni Butadiyen workshop of Sintezkauchuk plant and plant itself is brought and sent for consideration to Court on Grave Crimes of the Republic of Azerbaijan.

The JBCC of the Court of Appeal of Baku city in contradiction to requirements of the Article 420 of the CPC, without having followed obligatory instructions of court of cassation instance, not only did not execute the inspection of places of commission of stealing, but even did not make any investigation in connection with the letter sent to the Ministry of Internal Affairs, did not give any legal assessment to the petition and to the evidence presented by the claimant.

Though, as it is obvious from the civil case of the response letter dated December 12, 2006 sent by Ministry of Internal Affairs to the claimant B.Abbasov (which is available in case materials) the prosecutor of the city of Sumgait brought criminal case upon stealing of metal pipes 300 meters long, worth 1.701.000 manat, belonging to Sintezkauchuk plant, in the first decade of November, the investigation of case is continued by department of investigation of serious crimes of Ministry of Internal Affairs, S.Magerramov and N.Makhmudov are brought to trial under Articles 177.2.1, 177.2.2 and 177.2.3 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the CC), and criminal case directed for consideration to Court on Grave Crimes of the Republic of Azerbaijan. Apparently, from the copy of a sentence of this court as of March 14, 2007, S. Magerramov and N. Makhmudov were found guilty and sentenced under Articles 177.2.1 and 177.2.2 of the CC for commission of stealing.

In materials of a civil case, there is a petition from 19 points brought into court by B.Abbasov at repeated appeal consideration. The request was expressed in this petition to claim some documents, data and references important for objective, full and comprehensive investigation of case at the respondent to attract witnesses, to conduct inspection of the territory on a place, and to resolve other issues. But JBCC of the Court of Appeal of Baku city neither in the protocol of court session, nor to this petition did not express any relation in the decision, the satisfaction of the requests specified in the petition (if are rejected, the reasons) did not find the reflection. On the contrary, in the minutes of court of September 3, 2008 absence of the petitions connected with consideration of the case is specified.

Though, according to Article 377 of the CPC the appeals and motions of persons participating in case relating to matters concerning review of case in court of appellate instance is resolved by court after acquaintance with opinion of other persons participating in case. Article 383 of the CPC provides that Minutes in appellate proceeding should be written in order contemplated in Chapter 22 of this Code. According to Article 271.2.9 of the CPC motions, statements and explanations of persons participating in case and representatives thereof are specified in the minutes of relevant court session.

Arguments of the complaint of B. Abbasov concerning participation of the same judge during consideration of the civil case twice are obvious from materials of the civil case. It was also established that in the decision of JBCC of the Court of Appeal of Baku city as of September 3, 2008 and in the minutes of court session as a part of court the name of the judge G.Guliyev was specified. In spite of the fact that of September 10, 2008 the amendment in connection with change of names of judges in judicial structure was made by ruling of JBCC of the Court of Appeal of Baku city, it cannot be considered relevant to requirements of CPC, and in that case it is impossible to exclude violation of requirements of Article 19.1.3 of the CPC.

In spite of the fact that JBCC of the Court of Appeal of Baku city which repeatedly considered a civil case incorrectly applied Articles 88, 106.1, 217.3, 217.4, 271.2.9, 377 and 420 of the CPC, the JBCC of the Supreme Court, which considered case on the appeal of B. Abbasov for the second time, without having paid attention to arguments of the applicant, to own and previous decisions of Plenum of the Supreme Court, upheld a judgment of appeal instance as of September 3, 2008. While, according to Articles 416, 417.1.3 and 418.1 of the CPC, the court of cassation instance had to verify the correct application of norms of a substantive and procedural law by court of appeal instance, at discovering violation or wrong application of these norms to cancel a judgment of appeal instance and to send the case to court of appeal instance for new consideration. Adoption of judicial acts without observance of requirements of procedural norms of law which are subject to application on case, in turn led to violation of requirements of the Article 60.1 and Article 71.1 of the Constitution of the Republic of Azerbaijan.

Thus, Plenum of the Constitutional Court considers that the decision of JBCC of the Supreme Court dated January 30, 2009 adopted on a civil case concerning restoration at work and payment of salary for the period of forced unemployment, on B. Abbasov's claim against Sintezkauchuk plant has to be recognized as void due to its discrepancy with requirements of the Article 60.1 and Article 71.1 of the Constitution, and the Articles 416, 417.1.3 and 418.1 of the CPC and case has to be reconsidered according to order and terms established by civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V, IX and X of the Article 130 of the Constitution of the Republic of Azerbaijan, the 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 as of January 30, 2009, adopted on a civil case concerning restoration at work and payment of a salary for the period of forced unemployment on B. Abbasov's claim to Sintezkauchuk plant as null and void in connection with its discrepancy with the Articles 60.1, 71.1 of the Constitution of the Republic of Azerbaijan and the Articles 416, 417 and 418.1 of the Civil Procedure Code of the Republic of Azerbaijan. To reconsider case according to 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.