**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by Seyid Kazim Mahammadali Seyid Khamushi concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of December 25, 2003 to Constitution and legislation of the Republic of Azerbaijan*

**29 July, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Chairman F.Abdullayev, Judges F.Babayev, B.Garibov, R.Gvaladze, E. Mammadov, I. Najafov, S. Salmanova (Reporter Judge) and A. Sultanov,

joined in the proceedings by the Court Clerk I. Ismayilov;

with participation of Applicant’s- Seyid Kazim Mahammadali Seyid Khamushi’s representative- E. Sariveliyev,

interpreters Firudin Kusedgi and Seyid Imani Chorabchi,

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan has examined in open court session via the procedure of constitutional proceeding the constitutional case on complaint lodged by S. Khamuishi concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter of the Chairman of Supreme Court of the Republic of Azerbaijan dated July 19, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge S.Salmanova, applicant S. Khamushi, and applicant’s representative E. Sariveliyev and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In accordance with decision of Economic Court of the Republic of Azerbaijan for Settlement of Disputes Arising From International Contracts from July 31, 2003, the claim of Seyid Kazim Mahammadali Seyid Khamushi against AMAY Production and Commercial Firm for payment of main debts at the amount 3721776 (three millions seven hundred twenty one thousand seven hundred seventy six dollars) dollars USA, and accrued interests at the amount of 17350753 (seventeen million three hundred fifty thousand seven hundred fifty three) dollars USA, total of 21071529 (twenty one million seventy two thousand five hundred twenty nine) dollars USA, was rejected.

In accordance with decision of the Economic Court of the Republic of Azerbaijan from September 26, 2003 the appeal complaint was partially satisfied, and the payment was demanded of main debts at the amount of 3721776 (three millions seven hundred twenty one thousand seven hundred seventy six dollars) dollars USA, accrued interests at the amount of 9508203 (nine million five hundred eight thousand two hundred three) dollars USA was stated, along with payment of state duties of 99000 manats for claim application and 120000 manats for appeal complaint proceedings, and the rest of claim was rejected.

On the basis of cassation appeal of parties, the Board on Settlement of Economic Disputes of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as BSED of the Supreme Court) with its decision from December 25, 2003 has changed the decision of the Economic Court of the Republic of Azerbaijan, partially satisfied the cassation complaint of AMAY Production and Commercial Firm, and has rejected the claim of S. Khamushi for repayment of debts.

On the basis of additional cassation complaint of the Applicant, the letter of the Chairman of Supreme Court from March 18, 2001 has stated, that there are no legal basis for case review by the Plenary Session of Supreme Court.

In applicant’s opinion, first instance court has made the ungrounded statements that goods received by AMAY PCF were not sent only by S. Khamushi but various firms, the database of the Department for State Registration of Legal Entities of the Republic of Azerbaijan did not contain any information on Tural Co. company located at 101 Moscow Avenue, indication by the State Customs Committee of the Republic of Azerbaijan in the letter No. 16/04-22/2003 dated June 19, 2003 that there is no information and any receipts on goods sent by S. Khamushi to AMAY PCF, expiry of claim submission period by the plaintiff, as well as the fact that legal relations between the parties occurred before September 1, 2000, the Articles 73, 77 and 82 of the Civil Code (hereinafter referred to as CC) valid from 1964 to September 2000 were applied to reject the claim.

Complaint contains the information that the plaintiff, via M/Sinag KFT Al-Marashit Trading Shahad Sakheb International Company of United Arab Emirates within the period of 1998-1999 has supplied to the address of Tural Co. company (owned by AMAY PCF) of the Republic of Azerbaijan at 101 Moscow Avenue meat products, in September-October of 1999 via Trading SEYID Behzad Gaziziade Mogadam Company has supplied to AMAY Company macaroni production equipment, cables and electric boards, meat and fat products, on which AMAY PCF has submitted the letter to transportation company on October 20, 1998 stating that all products will be purchased by Tural Co. company and accepting all liabilities for this.

It was also indicated in the complaint that in accordance with agreements made by the parties, S. Khamushi supplied to AMAY PCF 23 items of various products for the total amount of 3721777 dollars USA, however, the value of products and accrued interests were not paid by respondent to date. Case materials contain information on invoices and receipts on sending of products to AMAY PCF. As a result of non-payment by AMAY PCF of the value of goods, payment protocol (contract) was made by and between S. Khamuishi and President of AMAY PCF at the Embassy of Islamic Republic of Iran in Azerbaijan Republic. In accordance with this Contract, the president of AMAY PCF did not deny the existence of debts, expressed its consent with payment of debt, thus 3 721 776 dollars USA, as well as five percent of profits made, with this decision verified by signatures of parties. This agreement was made on the letterhead of the Embassy of Islamic Republic of Iran in Azerbaijan Republic in Farsi and Azeri languages, signed in two original copies by all participants and verified by the seal of respondent. In the attachment to this Agreement, titles and values of all 23 items of products received by AMAY PCF were indicated. Independent on how this document is called (“notification of organization of proceedings”, “protocol of intent”, “protocol of recalculation of accounts” etc.), by its content and nature it represents the contract of recognition of debts made by parties.

In applicant’s opinion, the conclusion drawn by the cassation instance court that the claiming period for submission of claim was expired does not comply with procedures of legislation. Thus, due to taking of actions by respondent on October 17, 2001 recognizing the debts, laps of the claiming period should have stopped. At that date the contract made by the parties of recognition of the debt has developed new liabilities, and calculation of claiming period hereinafter shall be implemented in accordance with the Civil Code entered into force on September 1, 2000. In accordance with Article 373 of the Code, total claiming period is 10 years, and claiming periods for obligation under contracts is 3 years.

In Applicant’s opinion the BSED of the Supreme Court did interpreted the law wrongly, and by significant violation of provisions of Articles 386 and 418 of the Civil Procedures Code (hereinafter referred to as CPC) did not apply the applicable legislation, as a result, making decision non-complying with legislation. In connection with this S. Khamushi has requested the termination of the decision of cassation instance for its violation of provisions of Articles 25, 59, 69 and 78 of the Constitution and non-compliance with provisions of Article 386, 418 of the CPC, adoption of decision on revision of the case in accordance with legislation of the Republic of Azerbaijan.

In connection with complain of S. Khamushi Plenary Session of the Constitution Court hereby decides.

On the number of cases held on the basis of citizen complaints the Plenary Session of Constitution Court in its decisions has stated that in accordance with Articles 407.1.4, 408.1.5. and 416 of the CPC cassation instance court shall only verify the correct application by the appeal instance court of material and procedural legal norms.

In accordance with the decision of the Plenary Session of the Constitution Court from June 11, 2003 ''On review of compliance with the Constitution and legislation of the Republic of Azerbaijan of the Decision of the Board on Civil Cases of Supreme Court of the Republic of Azerbaijan from April 12, 2004 regarding the claim of A.A. Ibragimov”: “in accordance with provisions of Article 407.2 cassation instance court shall review the correct material and procedural application of legislation by the appeal instance court. In accordance with Code in the cassation complaint is not allowed to include the lack of evidences on the case, resolution of all actual conditions and reference to non-compliance of actual conditions on the case with the results indicated in the decision or verdict”.

On the case proceeded by the cassation court instance under the complaint of S. Khamushi, articles 407.1.4, 408.1.5 and 416 of the CPC were violated and the conclusion was drawn that appeal instance court did not provide correct assessment of actual conditions of the case. Thus, the cassation instance court did not accept facts established by the appeal instance court, and made its own assessment of those.

As a result, the appeal instance court has reviewed multiple references, including numerous transportation receipts, and has decided that contractual relations between the parties were established in 1998-1999. But the cassation instance court in opposite has decided that there were no contractual relations established between the parties. The Appeal instance court with reference to documents submitted on the case, has decided that in October 2001 the respondent has actually accepted the claims, cassation instance court with reference to same documents, decided that the respondent did not accept the claim.

By this, cassation instance court has exceeded its authority and reviewed case in essence by assessment of actual conditions.

Besides, cassation instance court has established that since contractual relations between the parties occurred within 1998-1999, and since the plaintiff has applied to court only in 2003, with reference to the CC in force until September 1, 2000 has stated the expiry of claiming period.

In connection with this the Plenary Session of Constitution Court hereby notes, that in accordance with Article 78 of the CC in force at the time of contract conclusion, thus 1998-1999, the laps of claiming period starts on the date of occurrence of the right to claim; the claiming right occurs on the date when the person knows or should have known that his rights have been violated.

It was established by the appeal instance court that for obtaining of debt from the respondent, the plaintiff has held with him numerous consultations in participation of the Embassy of the Islamic Republic of Iran in Baku, President of AMAYP, on February 27, 2000 has recognized the existence of main debt (without interest accrued) and has taken the obligation to repay this within five months period. On January 17, 2000 the Respondent once more has confirmed the obligation to pay the main debt and interests. On the basis of these facts the appeal instance court has drawn the conclusion, that due to the recognition by respondent of his debts and obligation taken for their payment, plaintiff was not aware that his rights are violated.

Also, the Appeal Instance Court decided that since respondent has made actions on October 17, 2001 recognizing his debts the lapse of claiming period should have stopped. Signed agreement made by the parties at the above date, establishment of new obligations between them, results in the necessity to apply the provisions of the CC entered into force on September 1, 2000.

Constitution Court, with consideration of conditions established by the appeal instance court hereby decides that the subject instance has made the correct decision applying provisions of CC entered into force on September 1, 2000.

Thus, in accordance with Article 380 of this Code, if the claim is made appropriately, and the debtor recognizes his debts the lapse of claiming period shall be stopped.

It shall be noted that since provisions of CC entered into force on September 1, 2000 are applied to these relations, such claiming period shall not be deemed expired.

In accordance with Article 81 of the CC, if one or both parties are natural persons, who take actions for recognition of the debts of debtor the lapse of claiming period shall be stopped. The claiming period is re-started after certain time; the time lapsed before the stoppage is not applied for the new restarted period.

Cassation instance court has allowed incorrect interpretation of Article 81 of the Code and has come to conclusion that since parties both have the status of entrepreneurs, the recognition of debts shall not serve basis for stoppage of the lapse of claiming period.

In accordance with Article 3 of Law of the Republic of Azerbaijan “On entrepreneur activities” any citizen of the Republic of Azerbaijan, any legal entity independent of its legal form, any foreign citizen or person without citizenship, as well as any foreign legal entity shall be entitled to be engaged in entrepreneur activities. As it seen the status of entrepreneurs held by the parties (even if this norm is applied) should not be of any significance for subject dispute.

Besides, although BSED of the Supreme Court has made the decision on changing of the decision of appeal instance court, it actually has not cancelled the court decision, but adopted new decision on case in essence. By this cassation instance court has exceeded its authorities stipulated under Article 417 of the CPC. In connection with application of this Article, the Plenary Session of Constitution Court has made the following statement in its decision on the complaint of A.A. Ibrahimov case: “For correct application of Article 417 of the Civil Procedures Code the cassation instance court:

1) in accordance with Articles 418 and 386 of this Code, in the event of violation or incorrect application of material and procedural norms, or in the event of termination of appeal court decision independent of evidences brought in the complaint, the appeal instance court decision shall be terminated completely or partially and sent to the appeal instance court for revision;

2) in accordance with provisions of Articles 407.1.4, 407.2, 408.1.5 and 416 of this Code, the verification of case conditions associated with cassation complaint, clarification of all important facts required for the decision identified by the court, or with reference to the fact that decision of court do not correspond with submitted facts and evidences, subject decision may be amended, but no change to the decision in essence shall be made via adoption of new decision.

Also the cassation instance court with reference to Article 265 of the CPC on December 25, 2003 has adopted special decision on reporting judge of the appeal instance court (also special verdict is stipulated under Article 265 of the CPC).

Cassation instance court has explained the special decision by the fact; judge of the appeal instance court did not provide correct assessment of actual conditions of the case and did not provide clarification on evidences important for case review in essence.

In this respect the Constitution Court believes that adoption of special decision on the judge of the Economic Court of the Republic of Azerbaijan on the basis of incorrect assessment of facts, once more demonstrates that the cassation instance court tends to exceed its authority stipulated under the legislation.

With consideration of above, the Plenary Session of the Constitution Court has come to the conclusion that decision of the BSED of Supreme Court from October 3, 2003 contradicts with provisions of Articles 416, 417 and 418 of CPC. Such contradiction in turn results in violation of the right of fair court protection of violated rights and freedoms, stipulated under Part I Article 60 of the Constitution of the Republic of Azerbaijan. Therefore, this decision shall be considered as lost its legal force and revised in accordance with provisions of the legislation. Due to termination of this decision, the special decision shall also be deemed terminated.

Using the guidance of parts V and IX 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 Constitution Court” the Plenary Session of the Constitution Court of the Republic of Azerbaijan

**DECIDED:**

Decision of the BSED of Supreme Court from December 25, 2003 on payment of main debts and accrued interests by AMAY Production and Commerical Firm under the complaint of Seyid Kazim Mahammadali Seyid Khamushi, shall be recognize as null and void because of its contradiction to Articles 416, 417 and 418 of the Civil Procedures Code, and Part I of Article 60 of the Constitution of the Republic of Azerbaijan, and the case shall be processed on the basis of this Decision and via the procedure specified in the Civil Procedure Code of the Republic of Azerbaijan.

2. The decision of the Constitutional Court of the Republic of Azerbaijan comes into force from the date of its publication.

3. The decision is subject to publication in the "Azerbaijan", “Respublika”, “Xalg gazeti”, “Bakinsky rabochiy” newspapers and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final and cannot be cancelled, changed or officially interpreted by any body or official.