**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by “Landlord Agro Industrial Union” concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of August 17, 2001 to Constitution and legislation of the Republic of Azerbaijan*

**3 August, 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 (Reporter Judge), I. Najafov, S. Salmanova and A. Sultanov,

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

with the attendance of complainant’s representative A.Qaziyeva

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 “Landlord Agro Industrial Union” concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of August 17, 2001 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 3i-103 of the Chairman of Supreme Court of the Republic of Azerbaijan dated July 16, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge E. Mammadov, listening to representative of complainant A.Qaziyev and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Agrarian Industrial Union (hereinafter will be referred as Agroindustry Union) filed a claim petition to local economical court № 1 demanding to retain rent at the amount of 21 339 078 manats from “Qeyret” Agro Company, to terminate the lease contract № 399/6975 negotiated between Ministry of State Property of the Republic of Azerbaijan in October 25, 1999 and technical passport № 04085 given to “Qeyret” Agro Company in February 26, 1998 based on inventory number 2836. Claim hasn’t been satisfied by the local economical court № 1 in January 12, 2001.

Agroindustry Union didn’t agree with the decision of the court and appealed to Economical Court of the Republic of Azerbaijan asking to recognize the decision of court of first instance unlawful and groundless and annul it, as well as satisfy claim thereof.

Complainant reasoned its claim by noting that although the area of 156.5 square meters situated in block 1968, A.Rajabli Street was leased, “Qeyret” Agro Company occupied the area of 2215.1 square meters and got a technical passport regarding it. As a balance holder Ministry of State Property hasn’t informed Agroindustry Union about which part of 2215, 1 square meters area is leased at the size of 156, 5 square meters while negotiating a lease contract. As a result this led to illegal occupation of repair construction area.

Complainant also alleged that Ministry of State Property negotiated a lease contract with “Qeyret” Agro Company, although knew about the fact that “Qeyret” Agro Company owed rent to plaintiff at the amount of 16 492 500 manats, as well as money for the goods and materials at the amount of 3 680 916 manats for years 1995-1997. Complainant finds the refusal of local economical court № 1 to accept the claim due to expiration of claim time-limit groundless and court didn’t take into consideration that this dispute was subject to court hearing in 1997.

Economical Court of the Republic of Azerbaijan made a decision in April 24, 2001 annulling the decision of first instance court made in January 12, 2001 and satisfying the claim of plaintiff. Thus lease contract between Ministry of State Property and “Qeyret” Agro Company and technical passport given to “Qeyret” Agro Company was terminated, but the part of claim regarding seizing money from “Qeyret” Agro Company at the amount of 21 339 078 manats was rejected.

It was noted in the decision of Economical Court of the Republic of Azerbaijan that local economical court № 1 rejected the claim of plaintiff by referring to that fact that “Qeyret” Agro Company was given a subsidiary area of 1920 square meters with the consent of Agroindustry Union and to forms № 2 which confirms the practice of construction work in that area. But in the court of first instance these facts of the case haven’t been revealed comprehensively and required substantive norms of law haven’t been applied.

Court resolution states that Agroindustry Union was created by “Baku Main Construction” Department in February 1, 1991. According to Charter of this union, it uses main production fund leased from “Baku Main Construction” Department in order to provide services shown in the charter according to lease contract between them. Union regulates its activities with the Law on Lease of the Republic of Azerbaijan adopted in November 28, 1992 and with its Charter. According to above mentioned law it is allowed to double lease the property only with the consent of owner. But the plaintiff hasn’t got the consent of “Baku Main Construction” Department while leasing the disputed area to “Qeyret” Agro Company with the right to sell. This fact was confirmed by the case materials.

The decision of court of appellate level also states that according to President Decree № 629 made in September 6, 1997 about Measures of using the leased state property effectively, the legal inheritance of all the leaseholders of state immovable property till the time this decree was signed is considered Committee of State Property. Accroding to 1st paragraph of 2nd provision, Committee of State property is entitled to analyze the contracts regarding the lease of state property and to take measures in order to eliminate conditions contradictory to legislature. But Committee of State Property didn’t legally evaluate the lease contract made in June 1, 1995, about leasing the area with right to sell while negotiating a lease contract № 399 with “Qeyret” Agro Company in May 11, 1998, about leasing of the non-residential area of 156.5 square meters from January 1, 1998 till June 1, 1998. As the Committee of State property had a right to lease the disputed area according to that contract, it made a lease contract with “Qeyret” Agro Company and violated the requirements of provision 2.1 of above mentioned President Decree. Therefore, since the lease contract negotiated in June 1, 1995 was illegal, the lease contracts made in May 11, 1998 and in October 25, 1999, basing on the first contract were terminated by the Economical Court of the Republic of Azerbaijan.

Economical Court of the Republic of Azerbaijan also stated that in technical passport given to “Qeyret” Agro Company, it is shown that the repair-construction area of 1368 square meters situated in block 1968, Street A.Rajabli is in use. On the other hand, Committee of State Property gave Agroindustry Union different technical passport over the same area in July 30, 1998.

“Qeyret” Agro Company didn’t agree with the decision of Economical Court of the Republic of Azerbaijan made in April 24, 2001 and filed a cassation claim to Supreme Court of the Republic of Azerbaijan.

Collegium of Economical Disputes of Supreme Court of the Republic of Azerbaijan (hereinafter will be referred as CED of Supreme Court) made a decision in August 17, 2001, changing the decision of Economical Court of the Republic of Azerbaijan made in April 24, 2001. According to decision of CED of Supreme Court the claim regarding the repeal of leas contract between Committee of State Property and “Qeyret” Agro Company was rejected and the part of claim concerning the annulment of technical passport № 04085 given in February 26, 1998 to “Qeyret” Agro Company based on inventory number 2836 was terminated. Other parts of the decision were left unchanged.

Agroindustry Union filed additional cassation claim from the decision of CED of Supreme Court made in August 17, 2001. Plaintiff argued that this decision is unlawful and was made by infringing the provisions of civil procedural legislature. But Chairman of the Supreme Court stated in his letter in March 28, 2002, that there were no grounds for the complaint to be considered in additional cassation proceeding by the Presidium of Supreme Court.

Afterwards the director of Agroindustry Union filed a complaint to Constitutional Court asking to examine the conformity of decision of CED of Supreme Court made in August 17, 2001 with the Constitution and laws of the Republic of Azerbaijan.

The Presidium of Constitutional Court finds it important to mention the followings regarding this constitutional case.

Ensurance of human rights and freedoms is a supreme aim of state. State guarantees the protection of rights and freedoms of every person (Articles 12 and 26 of Constitution).

Court protection of rights and freedoms is one of the constitutional guarantees. The Article 60 of Constitution determines that every Person can complain in the court of actions (or inaction) of state bodies, political parties, trade unions, other public unions and officials.

The effective remedy of the rights during the fair court examination by the independent courts is also revealed in international legal documents, as well as in Article 14 of International Pact on Civil and Political Rights, in Articles 7, 8, 10 of Universal Declaration of Human Rights, in Article 6 of European Convention on Human Rights and Fundamental Freedoms.

For instance: according to Article 8 of Universal Declaration of Human Rights, everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

These provisions determine the existence of court guarantees while implementing a right to court hearing.

Executive, Legislative and Judicial powers shall observe and protect human rights and freedoms fixed in the Constitution.  No one shall restrict the implementation of human rights and freedoms (part I and II of Article 71 of Constitution).

The principle determined in Article 127 of Constitution about realization of public justice based on equality of parties and litigation is concerns all levels of civil proceeding.

Procedural rights of the parties during cassation proceedings are more limited than during proceedings in first instance court. But these rights were determined based on constitutional principles such as equality of citizens before the court (Article 25), judicial guarantee of human rights and freedoms (Article 60), conduction of court proceedings through equality of parties and litigation (Article 127). It means that parties have equal procedural rights and opportunities during all the levels of court proceedings, as well as during the cassation proceeding.

A right to file an appeal from the court decisions and consideration of the appeal by the upper instance courts within requirements of Civil Procedure Code (hereinafter will be referred as CPC) is one of the inseparable elements of the Article 60 of Constitution.

Legislature determines the procedural rules for examination lawfulness and reasonableness of lower court decisions by the upper instance courts.

According to Article 67 of CPC determining the mandatory participation of advocate in trial, in courts of cassation instance, while filing additional cassation complaints, re-hearing of case further to newly established circumstances, persons participating in case shall act in court only if accompanied by an advocate.

As it is obvious from case materials, plaintiff submitted an application to CED of Supreme Court before the cassation proceedings took place and requested to postpone the hearing. Because the plaintiff’s advocate was in other civil trial and plaintiff was refusing to participate in the hearing without advocate. But the CED of Supreme Court held court hearing and included Agroindustry Union who protested the consideration of the case among the participants of hearing.

In one hand the plaintiff argues that court of cassation instance violated provisions of Article 67 of CPC. On the other hand refusal of plaintiff to participate in court hearing before it took place and protest of plaintiff about participation in the hearing after it took place; lack of explanation (that is contradictory to Article 419.2.7 of CPC) by Agroindustry Union in the decision of CED of Supreme Court made in August 17, 2001, regarding cassation complaint; sending the copy of this decision to the plaintiff after more than 2 months instead of sending it within one month as it determined in Article 419.3 of CPC; not preparing a protocol of court hearing determined in Article 270 of CPC creates doubts about participation of plaintiff in cassation hearing.

Besides, in its decision CED of Supreme Court did not reveal which substantive and procedural norms of law haven’t been applied correctly and by considering which facts of the case disclosed by the courts of lower instance made a decision.

According to Article 416 of CPC, court of cassation instance examines the correct application of substantive and procedural norms of law by the court of appellate instance. Court of cassation instance doesn’t have an authority to examine the factual sides of the case.

Article 417 of CPC which determines the filed of competence of court of cassation instance doesn’t conclude a right to make a decision which can be considered equal to new decision on merits of case. But CED of Constitutional Court made a decision by referring to Article 417.0.2 of CPC as if changing the decision of appellate court regarding the one of the claims actually made completely new decision on merits of case.

The position of Constitutional Court regarding the scope of cassation court proceedings is comprehensively revealed in decision of the Presidium of Constitutional Court made in April 12, 2004, regarding the examination of legitimacy of decision of Collegium of Civil Disputes of Supreme Court of the Republic of Azerbaijan made in April 12, 2004 based on complain of A.A. Ibrahimov. Afterwards the position of Constitutional Court regarding this issue was revealed in its other decisions too.

CED of Supreme Court have repealed the decision of court of appellate instance and terminated a proceeding concerning a part of the claim. It should be noted that a phrase used in the decision of CED of Supreme Court “proceedings regarding a part of the claim about ….shall be terminated” is not enlisted in CPC. Termination of proceedings over the claim is possible only under requirements of paragraph 20, as well as Article 417.0.4 of CPC.

Grounds for the termination of proceedings over the claim are enlisted in Article 261 of CPC. Article 417.0.4 which determines the possibility of termination of proceedings over the claim by the court of cassation instance requires this to be according to Articles 261.0.1 – 261.0.3, 261.0.6, 261.0.7 of CPC. In this view, instead of terminating the proceeding over the case, CED of Supreme Court terminated proceeding regarding part of the claim and thus exceeded its power.

Taking into consideration all the above mentioned, the Presidium of Constitutional Court comes to conclusion that decision of CED of Supreme Court of the Republic of Azerbaijan made in August 17, 2001 regarding the case about retaining the rent at the amount of 21 339 078 manats from “Qeyret” Agro Company, repeal of the lease contract № 399/6975 negotiated between Ministry of State Property of the Republic of Azerbaijan in October 25, 1999 and technical passport № 04085 given to “Qeyret” Agro Company in February 26, 1998 based on inventory number 2836 should be recognized null and void, as it contradicts to Articles 26, 60, 127 of Constitution of the Republic of Azerbaijan, to Articles 67, 261, 416, 417 of Civil Procedure Code and this decision shouldn’t be enforced. The case should be reconsidered according to civil legislature.

Being guided by the parts V, IX, X of the Article 130 of the Constitution of the Republic of Azerbaijan, as well as Articles 52, 62, 63, 65-67 and 69 of the law Azerbaijan Republic about Constitutional Court, the Presidium of the Constitutional Court

**DECIDED:**

1. The decision of Board on Civil Cases of Supreme Court of the Republic of Azerbaijan made in August 17, 2001 regarding the case about retaining the rent at the amount of 21 339 078 manats from “Qeyret” Agro Company, repeal of the lease contract № 399/6975 negotiated between Ministry of State Property of the Republic of Azerbaijan in October 25, 1999 and technical passport № 04085 given to “Qeyret” Agro Company in February 26, 1998 based on inventory number 2836 shall be recognized as null and void, as it contradicts to Articles 26, 60, 127 of Constitution of the Republic of Azerbaijan, to Articles 67, 261, 416, 417 of Civil Procedure Code and shall not be enforced. 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.