**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by “Rafzan” small company concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of February 28, 2002 to Constitution and legislation of the Republic of Azerbaijan*

**19 October, 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 (Reporter Judge), E. Mammadov, I. Najafov, S. Salmanova and A. Sultanov,

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

with the attendance of complainant R.N.Hasanov (the director of “Rafzan” SC) and his representative R.B.Ahmadov

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 R.N.Hasanov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of in February 28, 2002 to Constitution and legislation of the Republic of Azerbaijan.

The case proceeded in absence of the respondent representatives.

Having heard the report of Judge R. Gvaladze, listening to representative of complainant R.Hasanov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

According to the decision of local economical court № 1 made in August 22, 2001, the claim of “Trustbank” Commercial Bank (CB) against “Zirva” building society (BS) and “Rafzan” small company (SC) regarding the payment of debts for credit was partly satisfied by deciding that the followings shall be transferred to the account of “Trustbank” CB:

the main credit debt at the amount of 1.050.000.000 manats based on mortgaged property;

debt from the percentages for credits at the amount of 8.516.261 manats;

cost for the legal services regarding the case at the amount of 10 000 000 manats

state dues at the amount of 1000 000 manats

Part of the claim concerning the accumulation of extra percentages for the credit wasn’t satisfied.

The Economical Court of the Republic of Azerbaijan made a decision in November 27, 2001, leaving the decision of first instance court unchanged.

CED of Supreme Court of the Republic of Azerbaijan made a decision in February 28, 2002, leaving the decision of court of appellate instance unchanged.

In its complaint to Constitutional Court of the Republic of Azerbaijan, “Rafzan” SC stated that they were given 0.23 hectare of land to build administrative and residential building, but the construction work wasn’t conducted for a long period of time due to financial difficulties. In order to construct the building “Zirva” BS was organized and assigned for the construction of building according to labour contract. However, after the construction of three floors of the building there was lack of financial resources and “Zirva” BS was given credits for 165 days at the amount of 550 million manats according to the credit contract negotiated with “Trustbank” CM. But again, this sum wasn’t enough to accomplish the construction of the building and with the insistence of director of “Zirva” BS, there was negotiated another credit contract in April 3, 2001, with “Trustbank” CB for 165 days period at the amount of 500 million manats.

Both credit contracts were negotiated under the same terms and rules. Provision 4.4 of both contracts determined the right of the bank to demand repayment of credits before the agreed time in case is debtor doesn’t spend credit for the purpose it was given, if the debtor doesn’t pay percentages for credits in time and in other conditions.

Before the performance of second credit contract i.e. in April 5, 2001, “Rafzan” SC which is one of the founders of “Zirva” BS and depositor sent a letter to bank requesting to stop giving credits to “Zirva” BS till the audit monitoring was conducted in order to discover the use of credits for different purpose and waste of credits. Although a right to direct the payment towards the mortgaged property due to expiration of time to return the main debt and percentages, “Trustbank” CB haven’t challenged this in the court. In the contrary, “Trustbank” CB constituted an act verifying that the credit is used for the purpose they were given and started transferring new credits to “Zirva” BS. But three moths after constitution of the act “Trustbank” filed a claim petition in court referring to fact that terms of the above mentioned contracts haven’t been performed.

Court resolved the dispute in the above mentioned way.

Complainant alleges that court decisions regarding this case are unlawful and groundless since by infringing the Article 21 of Law of AR on Co-operation Societies, Articles 213.3, 213.6, 213.7, 215.4, 215.5, 337.4, 338, 299.1, 431.1, 431.3, 444 of Civil Code of the Republic of Azerbaijan (CC), it restricts his rights to ownership and court protection as the founder of “Rafzan” SM. Therefore, the complainant asks to examine the conformity of the court decision regarding this case with the Constitution and civil legislature of the Republic of Azerbaijan.

Constitutional Court of the Republic of Azerbaijan found it possible to accept the complaint of “Rafzan” SC for consideration according to I part of Article 131 of Constitution, parts I and II of Article 77 of Law on Courts and Judges of the Republic of Azerbaijan, Article 34.4.1 of Law on Constitutional Court of the Republic of Azerbaijan.

1. The Presidium of Constitutional Court notes that as it is obvious from the circumstances verified by the courts, “Rafzan” SC was regarded as the third party not having independent claims on the side of respondent according to resolution of local economical court № 1 made in July 24, 2001 concerning the claim of “Trustbank” CB against “Zirva” BS in June 17, 2001. “Rafzan” SC filed a counter claim against both respondent and plaintiff in August 12, 2001. But the local economical court № 1 refused to consider the counter claim due to reason that as a third person in the case, “Rafzan” SC cannot file a counter claim and postponed the hearing till August 21, 2001.

Court declared “Rafzan” SC as second respondent in the case in August 8, 2001. Representative of “Rafzan” SC filed a motion to court requesting the copy of the resolution and postponement of the hearing so that “Rafzan” SC could prepare and submit a counter claim regarding its assertion as a second respondent. But the court rejected the motion stating that it has a purpose to prolong the hearings groundlessly and to create obstacles for the hearings. Hence, the court continued proceedings and made a decision.

According to I part of Article 60 of Constitution of AR, rights and freedoms of every Person shall be guaranteed in a court. A right to court protection is one of the inseparable rights of human and realization of this right is ensured by the international legal principles and norms, as well as by the Constitution of AR.

According to Article 2 of CPC, tasks of court proceeding in respect of civil cases and economic disputes shall consist of endorsement of rights and privileges of any physical person and legal entity rising out of the Constitution of the Azerbaijan Republic, laws and other normative legal acts of the Azerbaijan Republic. This includes not only the right to apply to court, but also the right to use other procedural methods. One of such procedural methods is a right of the respondent to file a counter-claim against the plaintiff according to Article 155 of CPC.

According to Article 25 of Constitution, plaintiff and respondent are equal before the law and court and dispute between them should be solved by the court based on the principles of litigation and equality of rights. Articles 7, 8 and 10 of Declaration of Human Rights and Article 6 of European Convention on Protection of Human Rights and Fundamental Freedoms guarantees every person’s right to equal treatment by law and by court, as well as the right to solve the dispute regarding civil rights and obligations by the independent and impartial courts. These general principles and norms are inseparable part of Legislature of the Republic of Azerbaijan according to II part of Article 148 of Constitution.

According to content of Azeri legislature and international law plaintiff and respondent have a right to court protection equally. It means that respondent also have a right to protect himself/herself in civil trial. Therefore, according to Article 9.1 justice shall be exercised based on facts, principle of contentiousness and equality of parties and court shall create necessary conditions for all-faceted, complete and fair hearing of case for the purposes of finding truth and shall explain to persons participating in case their procedural rights and obligations, warn them of consequences of actions or inaction and provide assistance in exercise of their procedural rights (Article 14.1 of CPC). A right to counter claim is procedural protection of respondent from the claim of the plaintiff in civil trial.

The Presidium of Constitutional Court thinks that by refusing to consider the counter claim of “Rafzan” SC local Economical Court № 1 violated the right of respondent to court protection.

2. The rights and responsibilities enlisted in Constitution determine the content and application of other laws. Every person has a right to property according to I part of Article 29 of Constitution. Property right is inviolable and guarded by the law and state according to I part of Article 13 and II part of Article 29 of Constitution.

Constitution guarantees the right of every person to use his/her possibilities, abilities and property, to be independently or jointly engaged with others in business activity or in any other kind of economic activity authorized by Law (Article 59 of Constitution).

The requirements of Civil Code such as the equality of the subjects of civil law equality of rights of the participants of civil relationships, inviolability of property, freedom of contract, the prohibition inadmissibility of unauthorized interference into a person’s private life, the establishment of conditions for the unrestricted exercise of civil rights, the securing of the restoration of breached rights rely on the constitutional norms.

As it is obvious from court materials, credit agreement № 20 in December 4, 2000 and credit agreement № 20 in April 3, 2001 were negotiated between “Trustbank” CB, “Zirva” BS and “Rafzan”SC. In order to secure those agreements, three floors of 9 floor building which was being constructed by “Zirva”BS which hasn’t been fully constructed yet was given under mortgage according to first mortgage contract. According to second mortgage contract the left parts of the unfinished building was given as mortgage.

Article 21 of Law about Co-operative Societies of the Republic of Azerbaijan says that property of the co-operative society in the private ownership (commonly shared and commonly joint) of its members.

Article 213.1 of CC determines the notion of common ownership and it notes that property in ownership of two or several persons shall belong to them on the basis common ownership right.

According to Article 213.3 of the same Code, common ownership of property is considered as shared ownership, except for cases when the legislation determines the establishment of joint ownership over the property.

According to Article 215.4 of CC, any owner shall have the right to possess, use and dispose the property to extent that conforms to the rights of the other owners. Consent of all owners shall be required for the purposes of alienation or encumbrance of property, as well as for the purposes of change of its designation.

According to Article 215.5 of CC, disposition of property in shared ownership shall be carried out through agreement of all owners of property.

As we see, the mortgaged building was in the shared ownership of members of “Zirva” BS and any agreements concerning the disposition of property, as well as the mortgage agreement could be negotiated only with the consent of all members of co-operative society.

According to Article 338 of CC, agreement not complying with the requirements of this Code or violating rules and prohibitions specified by this Code shall, where this Code does not specify that such agreement is void or where other consequences of violation have not been stipulated, be invalid.

Article 337.2 of CC says that disputed agreement shall be called as invalid agreement due to its consideration by court as invalid. If there is a dispute in respect of agreement, agreement shall be invalid from the moment of its conclusion.

According to Article 337.4 of the same code, invalid agreement shall not result in legal consequences except for consequences relating to its invalidity. Such agreement shall be invalid from the moment of its conclusion.

The Presidium of Constitutional Court notes that consideration of disputes with the compliance of substantive and procedural legal norms excludes the doubts about legitimacy and fairness of court decisions.

As it was mentioned above, by refusing to consider the counter claim of “Rafzan” SC and thus contradicting to norms of procedural legislature, local economical court № 1 deprived “Rafzan” SC from the right to challenge the legitimacy of the contracts and made a decision without following the requirements of above mentioned Articles of CC.

The Presidium of Constitutional Court believes that by this action the property right determined in Article 29 of Constitution of members of “Zirva” BS and a right of “Rafzan” SC to freedom of enterprise determined in Article 59 of Constitution was violated.

3. According to principles of civil legislature such as freedom of will of parties, freedom of contract (Articles 6.1.2 and 6.1.3 of CC) parties should obtain agreement upon the rights and obligations of each-other.

Amendment and termination of the contract, as well as refusal from the performance of the contract partly or fully is possible upon the consent of parties or upon the demand of one of the parties (Articles 421, 422, 423 of CC).

If there was no consent about amendment or termination of contract complying with the above mentioned norms of law, the interested party may challenge it in the court within the requirements of Articles 422.2.1, 422.2.2, 422.2.3, 422.2.of CC.

According to Article 444.1 of CC if the conditions, serving as the basis for the agreement, clearly changed after the latter entered into force, and the parties, accounting for the mentioned changes, could have not entered into the agreement or could have entered into an agreement of a different contents, then the agreement may need to be brought in compliance with the changed conditions. Otherwise, considering certain circumstances, it would be impossible to demand strict performance of the agreement not changed by the party. Article 444.2 of CC says that if expectations which the agreement was based on and turn erroneous, it shall be equal to the changed circumstances.

From the facts determined by the courts it is obvious that “Rafzan” SC has sent letter to “Trustbank” CB and National Bank of the Republic of Azerbaijan after the accruement of second credit contract. In its letter, “Rafzan” SC stated that credits given to “Zirva” BS for the construction of residential building was not used for the required purpose and this leaded to increasement of estimated price of the construction of building. Moreover, additional expenses, as well as increasing percentages for the credit contracts needed to be paid to the bank contravenes to the interests of “Rafzan” SC and deprives it from the expected profits.

After the second contract was accrued, “Rafzan” SC has sent official letter in April 5, 2001 to “Trustbank” with warning that circumstance which may cause obstacles for repayment of credit is known to “Rafzan” SC and suggested to stop granting of credits until there is an opinion of relevant audit. It was also noted in the letter that if “Trustbank” doesn’t take into consideration the warning, “Rafzan” SC doesn’t carry any responsibility and turns down the contract. But “Trustbank” didn’t take into consideration the changes in circumstances and started giving credits to “Zirva” BS in April 9, 2001 according to second credit contract.

According to Article 443.3 of CC, the parties shall try to bring the agreement into compliance with the changed circumstances in the first place. If the agreement can not be brought in compliance with the changed circumstances, or the other party disagrees thereto, then the party, which interests have been influenced, shall be entitled to turn down the agreement.

Thus the above mention norm of law (Article 444.3) entitles “Rafzan” SC to turn down the contract (partly or fully). This refusal is possible without challenging it in the court according to Articles 422 and 423 of CC. Respondent “Rafzan” Sc followed this requirement of law.

The Presidium of Constitutional Court thinks that courts of first, appellate and cassation instance haven’t paid attention to above mentioned Articles of CC and the law that needed to be applied wasn’t applied regarding this case.

4. In the course of the obligations performance, the parties shall, with the purpose of creating preconditions for the contract to be carried out, act together and refrain from any actions, which may impede achievement of the contract’s goals or endanger the obligations performance (Article 425.2 of CC).

Legislature determines the possibility and results of performance of the obligations by one of the debtors (Article 503 of CC), as well as the possibility and terms of performance of obligations by third persons (431.1.1 of CC).

Besides according to Article 431.3 of CC, the party undertaking the obligation under a bilateral agreement, except for the cases of its early performance of the agreement, shall be entitled to refuse the obligation performance prior to the actions of the other party in responds.

At the same time, legislature guarantees the protection of rights of third persons in case if their interests don’t comply with the interests of debtor.

The demand of “Trustbank” towards “Rafzan” SC regarding the payment for the building which construction hasn’t been finished yet, created a risk for “Rafzan” SC to loose the rights over the disputed building. Therefore “Rafzan” SC had a right to fulfill the demand of “Trustbank” according to above mentioned Articles, although the debtor was “Zirva” BS.

According to Article 299.1 of CC, debtor or third person who put in pledge may, by performing an obligation or part of obligation guaranteed by pledge in respect of which performance is late, terminate foreclosure of and sell of pledged property.

According to Article 518.0.3 of CC, creditor’s demands under the obligation shall pass to other person if debtor’s obligation performed by pawner who is not a debtor under such obligation.

This norm of law is considered imperative and determines the obligation of third party, especially pawner to demand from the creditor the acceptance of the proposed performance of obligation. Thus it creates legal relationship between the third person (pawner) and creditor.

It is obvious from the evidences of complaint that before the court decision was made “Rafzan” SC have proposed several times to perform the obligation, but with the protest of debtor the creditor has refused to accept the performance. But according to Article 513.2 of CC no consent of the debtor is required for the assignment of the creditor’s demand. The demands of initial creditor shall be passed to a new creditor in such a volume and on such terms, which existed by the time of the right’s assignment (Article 515 of CC).

The above mentioned provisions of civil legislature give the third persons enlisted rights and guarantees the realization of the right to property determined by Constitution.

According to Article 71 of Constitution no one can restrict the realization of human rights and freedoms including a right to property.

CC determines provisions regarding the performance of obligation by the debtor if the creditor delays acceptance of performance of obligation or the place of the creditor is unknown.

The Presidium if Constitutional Court thinks that the above mentioned Articles of CC should be applied also if according to Article 431.1 of CC the third party declares his/her willingness to perform the contract obligation instead of the debtor or if the creditor declines performance of obligation.

According to Article § 2 of chapter 27 of CC, court had a right to demand from “Rafzan” SC to accept the debt sum into deposit and by informing “Trustbank” CB about this to demand the acceptance of performance of obligation. But the court didn’t apply the above mentioned norms of CC and thus the rights and responsibilities of the parties weren’t effectively restored.

5. The decision of local economical court № 1 relied only on one Article of CC (Article 385.1 of CC) and didn’t refer to provisions of Civil Procedure Code, to other provisions of CC and other laws.

In order to ensure accuracy of court decisions Article 321 of CPC determines that court of appellate instance shall, as a court of full authorities, hear case and evidence present in case or additionally submitted evidence on merits. Article 372.7 of CPC says that Court of appellate instance shall, irrespective of arguments listed in complaint, verify observance by court of material and procedural norms of law. Article 385.1.1 of CPC determines that one of the grounds to repeal of court resolution on appeal is violation or incorrect application of material or procedural norms of law. According to Article 416 of CPC, court of cassation instance shall verify correct application by court of appellate instance of material and procedural norms of law.

Article 418 of CPC says that violation or incorrect application of material and procedural norms of law shall be a ground for repeal of resolution or ruling of court of appellate instance.

According to Article 386 of the same Code, substantive norms of law shall be considered violated or incorrectly applied only in the event of court of first instance making a mistake during application of law, not applying applicable law or other normative legal act, or incorrectly interpreting the law. According to Article 418.2 of CPC, material norms of law shall be deemed to be violated in circumstances specified in Article 386 of this Code.

Therefore although the court of first instance and the court of appellate instance did not follow the substantive and procedural norms of law, court of cassation instance didn’t take any measures to correct these mistakes.

In this view not observance of above mentioned legal norms regarding the dispute between “Trustbank” CB, “Zirva” BS and “Rafzan” SC led to violation of the right determined in the Article 60 of Constitution.

Taking into consideration above mentioned, the Presidium of Constitutional Court concludes that decision of CCD of Supreme Court of the Republic of Azerbaijan made in February 28, 2002 regarding the claim of “Trustbank” CB against “Zirva” BS about repayment of credit debt should be recognized null and void as it contradicts to part I of Article 60 of Constitution of the Republic of Azerbaijan and to Article 416 of CPC. The case should be reconsidered within the requirements of civil procedural 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:**

The decision of Board on Civil Cases of Supreme Court of the Republic of Azerbaijan made in February 28, 2002 regarding the claim of “Trustbank” CB against “Zirva” BS about repayment of credit debt shall be recognized as null and void as it contradicts to part I of Article 60 of Constitution of the Republic of Azerbaijan and to Article 416 of the Civil Procedures Code 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.