**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by firm “Syama 10” concerning verification of conformity of the decision of the Judicial Chamber on Economic Disputes of the Supreme Court of the Republic of Azerbaijan of October 9, 2003 to the laws and*

*Constitution of the Republic of Azerbaijan*

**19 November, 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.Qvaladze (Reporter Judge), E. Mamedov, I. Najafov, S. Salmanova and A. Sultanov,

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

with participation of complainant D.M Aliyev, director general of the firm “Syama 10” and his representative M.Y. Novruzov

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 firm “Syama 10” concerning verification of conformity of the decision of the Judicial Chamber on Economic Disputes of the Supreme Court of the Republic of Azerbaijan of 9 October 2003 to the laws and Constitution of the Republic of Azerbaijan.

The constitutional case has been examined without participation of respondent party.

Having heard the report of judge R. Gvaladze, applicant’s representative D.M. Aliyev and M.Y. Novruzov, having studied the materials of the case, the Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

By the resolution of 19 May 2003 adopted by local economic court N 1 the pretension of firm “Syama 10” against “Etilen-Polietilen” factory concerning the payment of a debt at the rate of 320.130.000 AZM was satisfied. In this resolution the payment by “Etilen-Polietilen” factory to “Syama 10” firm of 20.500.000 AZM; 298.275.000 AZM as a fine and 1.355.000 AZM as necessary payment to tax authority was declared.

By the resolution of the Economic Court of the Republic of Azerbaijan of 12 August 2003 the resolution of the court of first instance was left without modification.

By the decision of Judicial Chamber on Economic Disputes of the Supreme Court of the Republic of Azerbaijan of 9 October 2003 the abovementioned resolution of the economic court was modified. The part of the resolution concerning the payment of a fine at the rate of 298.375.000 AZM was deleted. The remaining part of the resolution was left without modification.

According to the letter of Chairman of the Supreme Court of the Republic of Azerbaijan of 20 April 2004, since the Article 424 of the Civil Procedure Code of the Republic of Azerbaijan does not contain any grounds for the examination by the Plenum of Supreme Court of the Republic of Azerbaijan of complaint of firm “Syama 10” via additional cassation.

Complainant firm “Syama 10” considering the decision of the court of cassation instance as illegal and groundless asked for the verification of conformity of the decision to laws and Constitution. The complaint was based on the fact that the court of cassation instance applied Article 74 of the Civil Code of the Republic of Azerbaijan of 1964 that should not have been applied and without any ground deleted the provision concerning the fine.

Moreover, the complaint indicates that having violated the requirements of civil procedure legislation and exceeded its competences the court of cassation instance, in principle adopted a new decision.

In connection with the complaint the Plenum of the Constitutional Court notes the following.

As it gets evident from the cases established by the court of first instance, according to the contract N17/18-1-06-00 of 28 April 2000, between firm “Syama 10” and “Etilen-Polietilen” factory, the firm “Syama 10” undertook the obligation to sell to “Etilen-Polietilen” factory the electric equipment and in its turn the factory undertook the obligation to pay a cost of equipment. According to the provisions of contract in case of delaying of payment for acquired electric equipment the factory should pay a fine at the rate of 3 percent per every delayed day. In some months of 2001 the firm deliver to the factory the electric equipments at the rate of 92.000.000 AZM, in its turn the factory paid only 71.500.000 AZM and did not pay 20.500.000 AZM.

Therefore, the firm “Syama 10” applied to court asking for deduction from the “Etilen-Polietilen” factory of the rate of 20.500.000 AZM as basic debt, 298.275.000 AZM as fine for delayed payment and 1.355.000 AZM as fine determined by the tax authorities for the delayed payment.

All judicial instances considered as indisputable the facts that “Etilen-Polietilen” factory should pay to firm “Syama 10” the sum at the rate of 20.500.000 AZM of basic dept and 1.355.000 AZM as a fine determined by the tax authorities for the delayed payment and considered the dept as a consequence of respondent’s fault.

Judicial Chamber on Economic Disputes of the Supreme Court of the Republic of Azerbaijan having considered as lawful and valid the decisions of the courts of first and appeal instances concerning the basic dept and fine left the courts’ rulings in the mentioned part without modification.

The court of cassation instance did not agree with the resolutions of courts of first and appeal instance in the part concerning the pretension of firm “Syama 10” to “Etilen-Polietilen” factory on 298.375.000 AZM of fine and having taken into account the fact that the contract had been concluded on April 2000 and the pretension was arose on April 2003, considered that term of pretension as to have expired. Based on this fact the Judicial Chamber on Economic Disputes of the Supreme Court deleted the part concerning the fine.

Plenum of the Constitutional Court considers the decision of the court of cassation instance as incompatible with the civil legislation.

The principal issue is the determination of the start point of countdown of the pretension term. The incorrect determination of the term of pretension would artificially make the term longer or shorter. As a rule, a subject of law knows or should know that his/her right is violated from the very outset. An individual could not apply to state authorities for the protection of the violated right without being informed about violation of right. Therefore, the legislation connects the right to lodge a claim with a fact that individual knows or should have known that his/her rights had been violated. Thus, according to the Article 78 of the Civil Code that was into force till 1 September 2000 the countdown of the term of legal pretension shall start from the day of emerging of the right to lodge a claim and right to pretension starts from the day when the person was informed about the violation of his/her right or from the day when the person should have known about violation.

As it was established by the court instances the firm “Syama 10” implemented all provisions of contract while “Etilen-Polietilen” factory paid only the part of the cost of acquired equipment.

As it gets evident from the resolutions of the courts of first and appeal instances “Etilen-Polietilen” factory acknowledged a debt at the rate of 20.500.000 AZM to firm “Syama 10” and on 25 February 2002 and 19 March 2003 the confirmation acts were signed and attested by stamp.

Thus, as it gets evident from the established facts of the case, “Etilen-Polietilen” factory acknowledged a debt to firm “Syama 10” till April 2003 that is till the firm “Syama 10” lodged a pretension to court.

According to the provisions of the Article 78 of the Civil Code that was in force till 1 September 2000 the term of legal claim to pay for acquired equipment or services rendered shall start from the day when producer knows or should have known that that purchaser (customer) refuses cover of equipment cost or cost of service. This statutory requirement concern both basic and extra depts.

The Judicial Chamber on Economic Disputes of the Supreme Court having examined from the legal point of view the resolution of the court of appeal as to its legality adopted in essence the wrong decision by non-applying the provision that should have been applied i.e. Article 78 of the Civil Code that was in force from 1 September 2000.

Moreover, the Plenum of Constitutional Court in its decision on complaint of Industrial association “Aztelecom”, A.H. Zalov, “Saip Azar Machine Company” company noted:

According to the rules determined by legislator the court of cassation instance shall verify the correct application of material and procedural legal norms by court of appeal instance (Article 416 of Civil Procedure Code). According to such provision of the law the court of cassation instance shall examine the case on merits. If court of cassation instance establishes the incorrect application or violation of material and procedural legal norms by the court of appeal instance then the court of cassation instance could consider the decision and resolution of court of appeal instance as null and void (Article 418 of Civil Procedure Code). In that case the court of cassation instance can send a case to the court of appeal instance for the re-examination (Article 417.0.3 of Civil Procedure Code).

In connection with the claim of firm “Syama 10”, The Judicial Chamber on Economic Disputes of the Supreme Court having established the incorrect application of material and procedural legal norms by the court of appeal instance in principle adopted the new decision instead of abolishing the resolution and sending it to re-examination in the court of appeal instance.

In this connection the Plenum of Constitutional Court has come to conclusion that the decision of the court of cassation instance that is disputed by the firm “Syama 10” contradicts to the Article 78 of the Civil Code that was in force till 1 September 2000 and Articles 416, 417.0.3 and 418.1 of the Civil Procedure Code. And it in its turn causes the violation of the right to legal protection of rights and liberties of every citizen enshrined by the Article 60 of the Constitution of the Republic of Azerbaijan.

On the basis of the aforesaid the Plenum of Constitutional Court comes to conclusion that in the case concerning the pretension of firm “Syama 10” on payment of the dept by the “Etilen-Polietilen” factory, the decision of the Judicial Chamber on Economic Disputes of the Supreme Court of the Republic of Azerbaijan of 9 October, 2003 contradicts to Article 60 of the Constitution, Article 78 of the Civil Code, Articles 416, 417.0.3 and 418.1 of the Civil Procedure Code and should be considered as null and void. In accordance with this decision, the case should be re-examined via the procedure specified in civil procedural legislation.

Being guided by Articles 130.5 and 130.9 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 Constitutional Court”, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

To recognize the decision of Judicial Chamber on Economic Disputes of the Supreme Court of the Republic of Azerbaijan of 9 October, 2003 as null and void because of its contradiction to Article 60 of the Constitution, Article 78 of the Civil Code of the Republic of Azerbaijan that was in force till 1 September 2000, Articles 416, 417.0.3 and 418.1 of the Civil Procedure Code of the Republic of Azerbaijan. In accordance with this decision, the case should be re-examined via the procedure specified in civil procedural legislation.

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.