**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by Baku Telephone Communications Production Union concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 22, 2004 to Constitution and legislation 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.Gvaladze (Reporter Judge), E. Mammadov, I. Najafov, S. Salmanova and A. Sultanov,

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

applicant representatives- Acting director of the Baku Telephone Communications Production Union and Legal Advisor- A. M. Huseynly

expert- independent auditor N.M. Talibov

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 Elkhan Tayyar Abbasov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 24, 2004 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, applicant’s representative A. M. Huseynli and expert N. M. Talibov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In accordance with decision from March 17, 2003 of the 1st Local Economic Court of the Republic of Azerbaijan, loans were issued to Poctbank Joint- Stock Investment Bank (JSIB) under mortgage agreements by and between National Bank of the Republic of Azerbaijan and Baku Telephone Communications Production Union (BTCPU) and claims was raised on the main debt and accrued interests unpaid and Poctbank JSIB was demanded to pay from its accounts to the National Bank, amount of 7 500 000 000 and 2 000 000 000 manats, totaling 9 500 000 000 manats as a principle amount under two loans and the amount of 758 219 178 and 139 726 027 manats as accrued interest. The claim of Baku Telephone Communucation Production Union was rejected.

In accordance with decision of the Economic Court of the Republic of Azerbaijan from June 23, 2003 the decision of the first instance court remained unchanged.

In accordance with decision of the Board on Settlement of Economic Disputes of the Supreme Court of the Republic of Azerbaijan (BSEDSC) from December 11, 2003, the above decision of the Economic Court of the Republic of Azerbaijan was terminated and the case was sent back for revision by same court.

In accordance with decision of the Economic Court of the Republic of Azerbaijan from February 20, 2004, the decision of the 1st Local Economic Court of the Republic of Azerbaijan from March 17, 2003 was terminated, and new decision was adopted, the claim of National Bank was satisfied at the account of BTCPU, and the respondent was obliged to pay to the National Bank the amount of 9 500 000 000 manats of main debts and 897 945 205 manats of accrued interests, and counter- claim of Pochtbank JSIB was rejected.

In accordance with decision of BSED of the Supreme Court of the Republic of Azerbaijan from April 22, 2004 the above decision of the appeal instance court was remained unchanged.

The BTCPU assuming that the decision of cassation instance court was illegal and groundless, has sent the complaint to the Constitution Court requesting the review of compliance of subject decision with Constitution and legislation of the Republic of Azerbaijan.

Complaint was explained by the fact that the cassation instance court did not correctly interpreted the provisions of Articles 453, 470 and 472.1 of the Civil Procedures Code, without taking into account of the subsidiary liability of BTCPU before National Bank, has raised the court order not against the Pochtbank JSIB as a main debtor, but against the BTCPU, which bears secondary liability.

In respect of complaint the Plenary Session of the Constitution Court notes the following.

As it is observed from conditions of the case established by courts, National Bank and Pochtbank JSIB have entered into two contracts No. 501-180-01 and 522-14-01 on provision of interbank loans for the amount of 7 500000000 (180 days loan) on June 27, 2001 and for the amount of 2000000000 manats (14 days loan) on October 17, 2001.

At the time of conclusion of credit contracts National Bank (creditor), Pochtbank JSIB (debtor) and BTCPU (Guarantor) have entered into the contracts on provision of guarantees.

In accordance with these contracts if the debtor is incapable to repay the credit amounts to the bank (creditor) in timely manner, the guarantor shall be obliged to repay complete amount of the debts (principle amount, interests, penalties and other stipulated payment under credits) under the written request of the bank within the timeframe specified.

In accordance with contracts the guarantor shall bear subsidiary liability before bank for debtors liabilities.

Appeal instance court upon review of the case in essence, has established that Pochtbank JSIB is incapable to repay the credit, and in accordance with contracts on provision of guarantee, if debtor is incapable to implement its liabilities under credit contracts, BTCPU accepts the liability for its complete repayment, and with reference to Articles 470.1 and 453.2 of the CC, re-directed the demand for repayment to the BTCPU.

Plenary Session of Constitution Court deems that for legally sound settlement of dispute between the parties, correct application of provisions of credit and guarantee contracts, as well as provisions of legislation applicable to implementation of liabilities and guarantees shall be of primary importance.

In accordance with paragraph 1.4 of both credit contracts Pochtbank JSIB has undertaken the payment of principle amount. In accordance with provisions of paragraph 1.3 the payment of accrued quarterly interests shall be made no later than on 20th of the last month of each quarter to the National Bank by the Pochtbank JSIB.

In accordance with provisions of Article 448.1 setting liabilities for debtors not capable to fulfill its obligations, unless otherwise is stipulated under this Code or Contract, debtor shall bear liability for non-execution of all obligations to be fulfilled. In accordance with Article 448.2 of the same Code, debtor shall be held responsible for non-execution (as a result of actions or lack of actions).

Thus, in accordance with provisions of contract and legislation the primary responsibility for payment of both credits shall be laid on Pochtbank JSIB.

As for contracts on provision of guarantees made by and between the parties, the Plenary Session of the Constitution Court notes, in accordance with Article 472.1 of the CC referred to in decisions of the appeal and cassation instance courts, if the debtor does not fulfill the obligation secured by guarantee appropriately, unless the subsidiary liability of guarantor is stipulated under this Code or contract on provision of guarantee, guarantor and debtor shall bear common liability before the creditor.

However, as it was indicated above, in accordance with provisions of contracts on provision of mortgage, BTCPU bears subsidiary liability before bank. Legal definition of subsidiary liability and procedures for satisfaction of creditor requirements under such liability are stipulated under Article 453 of the CC.

In accordance with Article 453.1 of the Civil Code, creditor in accordance with this Code and liability, before raising of claim against the person, who bears additional (subsidiary) liability, shall first raise the claim against the debtor himself.

It shall be noted, that both credit contracts contain the provisions stipulated under Article 453.1 of the Civil Code.

Thus, in accordance with paragraph 2.4 of contracts, if the debtor (Pochtbank) does not repay the credit in the due time, on the day following the due date the creditor bank shall be entitled to deduct the amount due from the correspondent account of the debtor without his consent.

In paragraph 2.5 of Contracts it is stipulated that bank for the purposes of guarantee of credit liabilities, shall be entitled to use all mortgages used as guarantee of credit repayment by debtor.

In paragraph 1.3 of both credit contracts the procedures for payment of interests accrued on credits are indicated and it was noted that if interest is not paid at the due date, National Bank shall be entitled to deduct the amount owned from the correspondent account of debtor (Pochtbank JSIB).

In accordance with Article 453.2 of the CC, if primary debtor refuses the payment under creditor’s demand or creditor does not obtain any response within reasonable time on his enquiry, the claim can be made to the party holding the subsidiary liability.

Review of Articles 453.1 and 453.2 indicates that, before the application of Article 453.2 of CC, provisions of Article 453.1 shall be implemented, all demands for payment shall be directed at debtor, and only in the event of his rejection to pay or lack of any response within reasonable time, the claim can be made to the party holding subsidiary liability.

Such application procedure on subsidiary liability was also verified by N. Talibov, independent auditor, who was attracted to the constitution case as expert.

In accordance with expert’s opinion National Bank is entitled as per provisions of Article 453.1 of CC and credit contracts:

- to deduct the interest on credit (897 945 205 manats) within the timeframe specified in the credit contract from the correspondent account without consent of Pochtbank JSIB;

- upon the completion of credit term demand from Pochtbank JSIB the payment of principle credit amount (9 500 000 000);

- if such demand is not satisfied raise the claim against Pochtbank JSIB;

- if Pochtbank JSIB does not have financial capability for payment, the claim shall be applied to its assets.

The expert has concluded, that if National Bank will use all his rights, but is not successful to obtain the payment on credit, its interests and other credit payment, it can raise the claim against the guarantor- BTCPU, provided the compliance with provisions of Article 453.2 of the CC.

However, National Bank in contradiction with provisions of legislation and credit contracts, instead of raising the claim against Pochtabnk JSIB when the fulfillment of debtor’s liabilities was endangered and at the due date of credit payment, has raised this claim against BTCPU.

With consideration of these the Plenary Session of Constitution Court has concluded that Economic Court, which has reviewed the case in essence did not apply the provisions of applicable Article 453.1 of CC, and without clarification of whether the National Bank has complied with provisions this Article and credit contract, has directly referred to Article 453.2, has come to opinion that bank is entitled to raise the claim against BTCPU.

Review of Article 453.2 of CC has established that creditor claim can be applied against bearer of subsidiary liability only in two cases:

- when the debtor rejected to satisfy the payment demand of the creditor;

-if the creditor did not obtain within the reasonable timeframe any response on his payment demand.

First instance court and appeal instance court, which has remained the initial decision unchanged have established that at the time of raising of claim by National Bank against the BTCPU, in letter No. 11, dated January 8, 2003 of Pochtbank JSIB to BTCPU it was stated that there is no rejection to make the payment of principle amount and interests to the National Bank and guaranteed that the complete sum will be repaid.

Courts have not established any facts of claim raised against the Pochtbank JSIB by National Bank, before raising the claim against BTCPU, and therefore no reference to any such fact was made in court protocols.

Thus, although the National Bank was not entitled by law at this stage to raise any claims against BTCPU, which bears the subsidiary liability, the appeal court, which reviewed the case in essence, in contradiction with provisions of Article 453.2 of CC, has satisfied the claim raised against BTCPU.

Plenary Session of Constitution Court came to opinion that the appeal court had no grounds to believe that Pochtbank JSIB is not capable to repay the principle amount and interests stipulated under credit contracts.

Thus in accordance with Article 26 of the Law of the Republic of Azerbaijan “On Banks and Banking Activity” credit entity shall hold reserve funds at the levels established by the National Bank, open its assets and establish its reserve funds for compensation of potential losses, as well as comply with standards established for the minimum charter capital, maximum amount of risks and requirements for liquidity.

If credit entity does not follow these requirements continuously, Directors’ Board of the National Bank may adopt the decision on its conservation when there are hopes for its financial recovery (Article 41 of the Law).

In accordance with Article 46 of the subject Law, if until the end of conservation period National Bank does not consider the credit entity solvent, its license shall be annulled and credit entity is announced bankrupt in accordance with procedures of legislation.

It shall be noted that same provisions are included in the Law of the Republic of Azerbaijan “On Banks”.

Instead of establishment of solvency of Pochtbank JSIB in accordance with provisions of above legislation, appeal instance court without any evidences and legal justification assumed that Pochtbank JSIB is incapable to fulfill its liabilities before National Bank.

Above legislative violations by appeal instance court shall be considered as violation of rights on indifferent, fair, equality of law approach stipulated under the Constitution (Article 127). This in turn resulted in adoption of decision, which does not comply with requirements of legislation.

In accordance with civil procedures legislation, the cassation instance court shall review the correct application by the appeal instance court of applicable material and procedures legal norms (Article 416 of CPC).

Violation or incorrect application of material and procedural norms shall provide basis for cancellation of the decision of the appeal instance court (Article 418.1.1. of the CPC). In accordance with civil procedures legislation, cassation instance court shall be entitle to cancel partially or completely the decision of the appeal court adopted with violation or incorrect application of material and procedural legal norms, and shall be entitled to submit the case for review by the appeal instance court (Article 417.0.3 of CPC).

However, cassation instance court, not only did not review the correct application by the appeal court of material and procedural legislative requirements in settlement of dispute between National Bank, BTCPU and Poctbank JSIB, but repeated the mistakes by the earlier instance court by adopting the decision, which contradicts with provisions of Articles 416, 417.0.3, 418.1 of CPC. This results in the violation of rights fair fair court justice, which forms the important element of judicial court protection of rights and freedoms, as per Article 60 of the Constitution.

On the basis of above the Plenary Session of the Constitution Court has drawn the decision, that decision of BSED of the Supreme Court of the Republic of Azerbaijan from April 22, 2004 on leaving unchanged the decision of Economic Court of the Republic of Azerbaijan from February 20, 2004 on satisfaction of the claim raised by the National Bank of the Republic of Azerbaijan against the Baku Telephone Communications Production Union and Poctbank Joint-Stock Investment Bank, due to violation of provisions of Articles 416, 417.0.3 and 418.1 of the Civil Procedures Code, and Article 60 of the Constitution of the Republic of Azerbaijan, shall be deemed invalid and the relevant aspect of the case shall be reviewed additionally in accordance with procedures of civil procedures legislation of the Republic of Azerbaijan.

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:**

To recognize the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of April 22, 2004 on leaving unchanged the decision of Economic Court of the Republic of Azerbaijan from February 20, 2004 made under the claim of National Bank of the Republic of Azerbaijan against the Baku Telephone Communications Production Union and Poctbank Joint-Stock Investment Bank as null and void because of its contradiction to Article 60 of the Constitution of the Republic of Azerbaijan, and Articles 416, 417.0.3 and 418.1 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.