**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# **OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of the complaint by A.Jafarov, head of Khayal Farm, concerning conformity of the decision of the Collegium of Economic Disputes of the Supreme Court of 8 January 2004 to the Constitution and laws of the Republic of Azerbaijan*

**1 February, 2005 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan in attendance of:

Judges F.Abdullayev (President Judge), F.Babayev, R.Qvaladze, E.Mammadov (Reporting Judge), I.Najafov, S.Salmanova and A.Sultanov and Court Secretary I.Ismayilov,

in presence of the complainant A.Jafarov and his representative R.Ahmadov

based on a complaint lodged by A.Jafarov, head of Khayal Farm,

has examined in the open session under special constitutional procedure in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of the decision of the Collegium of Economic Disputes of the Supreme Court of the Republic of Azerbaijan of 8 January 2004 to the Constitution and laws of the Republic of Azerbaijan.

Further to the letter of the Acting Chairperson of the Supreme Court of the Republic of Azerbaijan of 6 December 2004 (ref. # 2n-414 8i-11/04), the constitutional case was examined in absence of a representative of the Supreme Court as the respondent in the case.

Having heard a report of Judge Mammadov and statements from the complainant A.Jafarov and his representative R.Ahmadov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Khayal Rural Farming Enterprise (hereinafter “Khayal Farm”) sued Sabirabad-Pambig Open Joint Stock Company (hereinafter “Sabirabad-Pambig JSC”) to the Third Local Economic Court for arrears from raw cotton supply contracts executed in 1995 and 1996 for the total amount of AZM 129,340,000 (one hundred twenty nine million three hundred forty thousand Azerbaijani manat) and demanded recovering the claim from respondent’s assets. On 27 June 2001 the Third Local Economic Court ruled to sustain the claim.

As the judgement was not appealed within the procedurally mandated time, the judgement went into legal effect. But as Sabirabad-Pambig JSC were not complying with the decision, the Group of Court Supervisors and Bailiffs made a presentation to the Third Local Economic Court, and on 27 February 2003 the Court ruled to seize some vehicles and agricultural equipment belonging to Sabirabad-Pambig JSC.

On 5 February 2003 (i.e. a year and seven months after the judgement of the court), the Department of Management and Privatisation of State Property of the Ministry of Economic Development of the Republic of Azerbaijan (hereinafter “the State Property Department”) appealed to the court, claiming that despite state control over 29.02% of the shares in Sabirabad-Pambig JSC, the State Property Department was not involved in the court hearings, and hence rights concerning preservation and management of state property were breached. Therefore, the State Property Department demanded revoking the judgement of 27 June 2001 and appointing a new trial with participation of the Department. This claim by the State Property Department was dismissed by a procedural decision of the same court of 6 February 2003.

The State Property Department further appealed this decision to the Economic Court of the Republic of Azerbaijan. Khayal Farm did not accept the appeal stating that the judgement had been sent to all parties in the case in the legally mandated time and the responsibility to inform its shareholders about the court decision fell on Sabirabad-Pambig JSC.

On 25 March 2003 the Economic Court of the Republic of Azerbaijan dismissed the appeal by the State Property Department and ruled to uphold the procedural decision of the Third Local Economic Court without modification.

The position of the Economic Court of the Republic of Azerbaijan on this case was that in accordance with Article 357 of the Code of Civil Procedure of the Republic of Azerbaijan (hereinafter “CCP”) that, except in cases provided in the Code, judgements and procedural decisions adopted by first-instance courts in the Republic of Azerbaijan can be, before entering into legal effect, appealed against by the parties to the case and third parties and, in cases of the special court procedure, by claimants and interested parties. The judgement of the Third Local Economic Court of 27 June 2001 was posted to Sabirabad-Pambig JSC as a respondent in the civil case. Sabirabad-Pambig JSC did not appeal against the judgement within one month of receiving the notice of the judgement. The State Property Department, however, appealed against the court decision one year and seven months after the ruling. As the appeal was brought after the legally mandated time as established in CCP Article 361.1.3, the right to effect procedural actions concerning the case should be considered deferred.

Subsequently, the State Property Department requested from the Collegium of Economic Disputes of the Supreme Court of the Republic of Azerbaijan to revoke the procedural decision of the appellate court and forward the case for a repeat appellate examination.

On 22 May 2003 the Collegium of Economic Disputes of the Supreme Court ruled to:

* sustain the cassation claim by the State Property Department;
* reverse the procedural decision of the Economic Court of the Republic of Azerbaijan of 25 March 2003; and
* forward the case for a retrial to the appellate court.

Upon a retrial of the case, the Economic Court of the Republic of Azerbaijan ruled on 6 August 2003 to:

* reverse the procedural decision of the Third Local Economic Court of 6 February 2003;
* accept to court procedure the appeal of the State Property Department against the judgement of the same court dated 27 June 2001; and
* involve the State Property Department in the civil case as a third party without a separate claim about the subject of the case.

Referring to Article 10.82 of the Statute of the Ministry of Economic Development approved by the Decree No. 495 of the President of the Republic of Azerbaijan of 11 June 2001, which stipulates that the Ministry is directly responsible for ensuring proper maintenance and management of the state share in the chartered capital of commercial companies, the Economic Court of the Republic of Azerbaijan noted that non-involvement of the Ministry in the case hearing led to the Third Local Economic Court giving a judgement on 27 June 2001 that violated rights pertaining to proper maintenance and management of the state share in the chartered capital of Sabirabad-Pambig JSC. The Court also noted that because the payment for raw cotton supplied in 1995-1996 was not made after compilation of the settlement act of 30 December 1997, the claimant had known about violation of its right and time allowed for bringing a claim in the court should be counted since then. Therefore, the court breached substantive law in allowing the claim of the claimant to stand after expiration of the legally mandated claim period.

Based on the above, the Economic Court of the Republic of Azerbaijan ruled on 26 August 2003 to:

* sustain the appeal by the State Property Department;
* reverse the judgement of the Third Local Economic Court of 27 June 2001;
* reverse enforcement of its own decision; and
* consequently, release from seizure and return to Sabirabad-Pambig JSC the agricultural equipment seized from the respondent by the procedural decision of the Third Local Economic Court of 27 February 2003.

Khayal Farm brought a cassation claim to the Collegium of Economic Disputes of the Supreme Court against the above judgement of the Economic Court of the Republic of Azerbaijan. On 8 January 2004 the Collegium dismissed the claim and upheld the judgement of the Economic Court of the Republic of Azerbaijan of 26 August 2003 without modification.

An additional cassation claim by the complainant about bringing the case before the Plenum of the Supreme Court was dismissed for the lack of merits by the letter of the Chairperson of the Supreme Court of 21 May 2004.

Thereupon A.Jafarov, the head of Khayal Farm, filed a complaint with the Constitutional Court of the Republic of Azerbaijan requesting the latter to reverse the decision of the Collegium of Economic Disputes of the Supreme Court for infringement of Article 60 of the Constitution of the Republic of Azerbaijan (hereinafter “the Constitution”) and CCP Articles 416 and 418.

The Plenum of the Constitutional Court has noted the following in relation to the complaint at hand.

Article 60 of the Constitution provides for judicial protection of rights and liberties. The right to judicial protection enshrined in this Article relates to the legislation in force. The Constitutional Court has repeatedly stated in its decisions that non-compliance with substantive and procedural law when reviewing the substance of any case shall be deemed as a situation leading to violation of constitutional provisions.

The right to judicial defence is also reflected in international legal instruments acceded to by the Republic of Azerbaijan. Article 14 Paragraph 1 of the International Pact on Civil and Political Rights, everyone has a right to a fair and public hearing by an authoritative, independent and impartial tribunal in determination of any criminal charge against him/her or in a civil case adjudicating his/her rights and obligations. The same provision is contained in Article 6 Paragraph 1 of the European Convention on Protection of Human Rights and Basic Freedoms, which states that every individual, in the determination of his civil rights and obligations or of any criminal charge against him, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law .

As A.Jafarov, the head of Khayal Farm, in his constitutional complaint disputes the decision of the Collegium of Economic Disputes of the Supreme Court as violating his right to judicial defence (the right to a fair trial), the review of the case shall touch upon the issues of the legally mandated claim period, participation in the civil case of a third party without a separate claim about the subject of the case and procedures for filing an appeal.

In 1995 – 1996 Khayal Farm and Sabirabad-Pambig JSC entered into a contractual relationship binding one party (Khayal Farm) to deliver raw cotton to the other party (Sabirabad-Pambig JSC), which it did, whereupon Sabirabad-Pambig JSC was bound to pay Khayal Farm a pre-determined amount to of money, which it did not. The parties agreed to recognise the resultant arrears and settle them later.

A civil case related to this dispute was initiated after Khayal Farm brought a suit to the court. It should be noted that in civil law the claim period (the period for defending civil rights) is understood as the period for enforcing or defending one’s rights. Substantive law applicable to the case was the Civil Code of the Republic of Azerbaijan enacted in 1964 (hereinafter “the former Civil Code”). According to Article 73 of this Code, the total period for defending rights (the claim period) under the Code was three years for claims of physical persons and one year for claims of state bodies, collective farms, cooperatives and other public and social organizations against each other.

In this context it is very important to define the moment of commencement of the claim period. Article 78 the former Civil Code established that the claim period commenced from the day of emergence of the right to civil claim. As accepted in civil law, the claim period commences from the day an aggrieved person knows or should have known about breach of his/her right.

The judgement of the Economic Court of the Republic of Azerbaijan of 26 August 2003 counts the claim period from the first settlement act between the parties, i.e. from 30 December 1997. However, as seen from factual circumstances of the case established by the first-instance court, the debt of Sabirabad-Pambig JSC to Khayal Farm for raw cotton deliveries made in performance of the 1995-1996 contracts of the parties was also recognised in the settlement act executed between the parties on 23 December 1999. It is therefore clear that legal relationship should be considered renewed from this moment. But the appellate court disregarded this situation and counted the claim period from the settlement act executed in 1997.

With regard to the claim period it should also be considered that the meaning of Article 82 of the former Civil Code allows making a decision on reinstatement of the claim period dependent exclusively on the will of the court only in excusable cases. In practice, such excusable cases may be varied and united only in their relation to a claimant.

The judgement of the first-instance court allowed reinstatement of the expired claim period for several reasons: claimant’s lack of legal knowledge, his numerous addresses to various government bodies and his inability to meet court charges. The appellate court, without analysing the given grounds and substantiating its decision in this part, ruled that reinstatement of the expired claim period by the first-instance court amounted to violation of substantive law.

The constitutional claim by A.Jafarov also disputed participation of the State Property Department in the civil case as a third party without a separate claim about the subject of the case and incorrect application of CCP provisions on procedural terms.

The review of this claim shall start from a look at a legal status of the respondent, Sabirabad-Pambig JSC. According to Article 43.1 of a new Civil Code that became effective on 1 September 2000 (hereinafter “the current Civil Code”), a legal person is a special entity registered in the manner prescribed by the law that has its own property at its disposal, that is responsible for its liabilities with this property, that is entitled to acquire and execute property and personal non-property rights, to implement certain tasks, stand as a complainant or a respondent in the court of law.

Article 98.1 of the current Civil Code prescribes that a company whose chartered capital is divided into shares is a joint-stock company. The legal and organisational status of Sabirabad-Pambig JSC is precisely that of an open joint-stock company and an independent legal entity (person). The same Article also establishes that investors in a joint-stock company (shareholders) are not responsible for company’s liabilities, and only risk they bear due to loss in activities of the company is limited to the value of their shares.

According to Clause 7.3 of the Statute of Regulations for Reorganising State Enterprises into Joint-Stock Companies, approved by the Law of the Republic of Azerbaijan No. 208-I of 29 November 1996, state ministries and committees, public corporations, companies and associations, as well as sectoral government agencies and local executive bodies cease control over joint-stock companies reorganised from former state enterprises from the moment they are registered as such (except when the state maintains a controlling interest in a company). Article 107.5 of the current Civil Code provides that competencies, decision-making and representation of a joint-stock company by its management are defined elsewhere in the Code and by a corporate charter.

Sabirabad-Pambig JSC acted as a respondent in the courts in full compliance with its charter. Reference of one of its shareholders, namely the State Property Department, to Article 10.82 of the Statute of the Ministry of Economic Development to allow participation of the Department in this civil case and its acceptance as a third party without a separate claim about the subject of the case contradicts provisions of civil law.

The same approach was displayed in Paragraph 49 of the decision of the UN International Court of Justice in the Barcelona Traction case of 1970 (Belgium vs. Spain). The International Court of Justice resolved to differentiate between rights of a legal person and lawful interests of its shareholders and noted that when the former are breached, it should pursue them in the capacity of the legal person.

The constitutional complaint by A.Jafarov also points out that acceptance to court procedure and substantive examination of the appeal one year and seven months after the judgement had been passed by the Third Local Economic Court lacked correspondence to a number of civil procedure provisions. Legal analysis requires review of several pertinent CCP articles.

Article 357.1 of the CCP stipulates that, except in cases provided in the Code, judgements and procedural decisions rendered by first-instance courts in the Republic of Azerbaijan can be, before entering into legal effect, appealed against by the parties to the case and third parties and, in cases of the special court procedure, by claimants and interested parties.

According to Article 360 of the CCP, a court judgement can be appealed within a month of being presented to (received by) a party. CCP Article 233.1 mandates that a court judgement becomes effective if not appealed within one month.

As can be seen from civil case materials, as the judgement of the Third Local Economic Court of 27 June 2001 was posted to participants in court procedure (parties in the case) and not appealed, it went into legal effect as procedurally required. However, the State Property Department appealed against the pertinent judgement one year and seven months after its adoption. This fact was initially considered by the first-instance and appellate courts as grounds for dismissal of respective appeals of the State Property Department due to expiration of the appeal period.

Nevertheless, the decision of the Collegium of Economic Disputes of the Supreme Court of 22 May 2003 stated that because the State Property Department appealed against the judgement immediately upon its receipt by the Department, a reference in the procedural decision of the Economic Court of 25 March 2003 to the State Property Department as appealing against the judgement after expiration of the legally mandated appeal period is unsubstantiated.

It should also be taken into consideration in connection with this case that CCP Article 57.1 establishes that a third party can participate in court hearing on the side of a complainant or respondent without making a separate claim about the subject of the case before the first-instance court has judged the case and if the said judgement as rendered in relation to one of the parties at the trial would affect rights and obligations of such third party. A third party can be involved in the court procedure upon request of the parties to the case or initiative of the court.

Hence, participation of third parties in the civil case procedure without their making a separate claim about the subject of the case is possible if the following conditions are met:

1. a judgement of the court might affect rights and obligations of such third party;
2. a third party participates on the side of a complainant or respondent;
3. participation of a third party had commenced before the first-instance court rendered a judgement; and
4. a third party is involved in the case upon request of a trial party or initiative of the court.

As can be seen from the case materials, procedural requirements for involvement of the State Property Department in the capacity of a third party without a separate claim about the subject of the case were not met.

The appellate court breached several provisions of substantive and procedural law in trying the dispute between Khayal Farm and Sabirabad-Pambig JSC in civil procedure. However, when reviewing merits of the cassation claim, the Collegium of Economic Disputes of the Supreme Court disregarded these circumstances and moved on 8 January 2004 to uphold the judgement of the Economic Court of the Republic of Azerbaijan of 26 August 2003 without modification.

In relation to the above, the Plenum of the Constitutional Court specifically observes a breach of several procedural law requirements with regard to cassation procedure.

Thus, Article 416 of the CCP requires from the cassation court to verify that an appellate court has correctly applied relevant provisions of substantive and procedural law. Article 418.1 of the CCP states that breach or wrong application of substantive and procedural law provisions by an appellate court constitutes the grounds for revocation of its judgements and procedural decisions by the cassation court. And, according to Article 417.0.3 of the CCP, the cassation court can reverse judgements and procedural decisions of an appellate court in their entirety or in part and forward the case for a retrial to appellate court.

From this perspective, non-compliance of both the appellate and cassation courts with the aforesaid provisions of substantive and procedural law in trying the dispute between Khayal Farm and Sabirabad-Pambig JSC resulted in violation of the right to judicial defence established by Article 60 Section I of the Constitution.

In consideration of the above, the Plenum of the Constitutional Court has come to the conclusion that because the decision of the Collegium of Economic Disputes of the Supreme Court of 8 January 2004 concerning the civil case of Khayal Farm vs. Sabirabad-Pambig JSC contravenes Article 60 Section I of the Constitution of the Republic of Azerbaijan and CCP Articles 416, 417.0.3 and 418.1, the said decision shall be deemed forfeited. Therefore, the case shall be tried again in the manner and at times prescribed by the civil procedure of the Republic of Azerbaijan.

Guided by Article 130 Sections V, IX and X of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. As the decision of the Collegium of Economic Disputes of the Supreme Court of 8 January 2004 concerning the civil case of Khayal Rural Farming Enterprise vs. Sabirabad-Pambig Open Joint-Stock Company contravenes Article 60 Section I of the Constitution of the Republic of Azerbaijan and CCP Articles 416, 417.0.3 and 418.1, the said decision shall be deemed forfeited. In accordance with this Decision, the case shall be tried again in the manner and at times prescribed by the civil procedure of the Republic of Azerbaijan.
2. The Decision shall become effective from the day it is announced.
3. The Decision shall be published in the newspapers *Azerbaycan, Respublika, Xalq Qazeti* and *Bakinskiy Rabochiy* and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
4. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.