**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of 21 January 2004 with the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Hajiyeva I. G.*

**1 August 2006 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, B.Garibov, R.Qvaladze, E.Mammadov (reporter judge), I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

representative of applicant V.Aliyeva and M.Nasibov

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijanexamined in open judicial session via special constitutional proceedings the case on complaint of Idris Hajiyev concerning verification of conformity of decision of the Judicial Board on Civil Cases (hereinafter referred to as the JBCC) of the Supreme Court of the Republic of Azerbaijan of 21 January 2004 to Constitution and laws of the Republic of Azerbaijan

Having heard the report of Judge E.Mammadov, speech of the representatives M.Aliyev and T.Sardarli, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

As evident from the documents of a civil case, by the order of the Head of Executive Power of Geranboy area (hereinafter referred to as the EP of Geranboy) No. 167 as of 11.12.2001, the land plot of 20 hectares from the first site of the Yukhary-Agdzhakend gypsum field was leased for 50 years to “Emil” Limited Liability Company (hereinafter referred to as the LLC “Emil”), and the relevant lease contract in this regard was certified.

On August 28, 2002 the Ministry of Ecology and Natural Resources of the Republic of Azerbaijan granted to LLC “Emil” the license allowing implementation on the land plot rented by it the industrial production of non-metallic construction materials. On September 12, 2002 the State Committee of the Republic of Azerbaijan on Acres and Cartography granted to LLC “Emil” the certificate on right of temporary use of land. On September 4, 2002 on the basis of the contract concluded by LLC “Emil” with the “Azersenayepartlayish” enterprise were spent earth and explosive works, and production of plaster materials began.

On October 21, 2002 the head EP of Geranboy published the order No. 236 about cancellation of the order of the former head who worked at this position before, No. 167 as of 11.12.2001 and the lease contract concluded with LLC “Emil”.

The director of LLC “Emil” I. Hajiyev and others, considering that cancellation of the lease contract violates their rights, on December 16, 2002 submitted claim to Geranboy district court for cancellation of order of the head of EP of Geranboy No. 236 as of October 21, 2002. EP of Geranboy, in turn, appealed, to court with the statement of claim with a request to adopt the decision on cancellation of the certificate on the right of temporary use of the land plot of 20 hectares of a gypsum field in Yukhary-Agdzhakend. By decision of court as of January 13, 2003 the procedure according to both statements of claim was united in one process. After this I. Hajiyev and others made additional claim with a request for compensation of the material damage of 35.052.712 AZN caused to them as a result of the issue of the order of the head by EP of Geranboy No. 236 as of November 21, 2002.

On February 3, 2003 the rejection by I. Hajiyev's and others to Geranboy District Court was satisfied, and the civil case was submitted to Hodzhavend District Court. Claim demands of I. Hajiyev and others were rejected by decision of this court as of April 28, 2003, and the claim of EP of Geranboy was satisfied.

By decision of Judicial Board on Civil Cases of Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as the JBCC of Court of Appeal) as of August 26, 2003 the appeal complaint of I. Hajiyev was not satisfied and the decision of Hodzhavend District Court was left unchanged. By the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Supreme Court) as of January 21, 2004 the appeal of I. Hajiyev was not satisfied and the decision of JBCC of Court of Appeal was left unchanged.

According to provisions of civil procedural legislation I. Hajiyev submitted the application to the Supreme Court in the order of revision of the judicial acts which entered into force on newly discovered facts and cancellation of the adopted judicial acts. By the letter of the Chairman of the Supreme Court as of December 29, 2005 I. Hajiyev was informed that the civil case was studied, and due to lack of the reasons for reconsideration on newly discovered facts of the challenged judicial acts provided by the Article 432 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), the appeal was not submitted for consideration of Plenum of the Supreme Court.

Having addressed again with the complaint the Plenum of Supreme Court, I. Hajiyev asked to cancel in the order of additional cassation the decision of JBCC of the Supreme Court dated January 21, 2004. In connection with the complaint the civil case was studied again and the applicant by the letter of the Chairman of the Supreme Court as of May 24, 2006 was informed that due to the lack in the Articles 424.2.1-424.2.4 of the COPC of the reasons for cancellation of cassation decisions in the order of additional cassation, there are no reasons for consideration of the complaint by the Plenum of the Supreme Court.

After that I. Hajiyev, having twice appealed with the complaint to the Constitutional Court, declared that by consideration of his claim by the courts of general jurisdiction were incorrectly applied and interpreted the Articles 6, 421, 423 of the Civil Code (hereinafter referred to as the CC), the Articles 73, 75 of the Land Code of the Republic of Azerbaijan (hereinafter referred to as the LC) and the Article 12 of the Law of the Republic of Azerbaijan “On Interior”. In the complaint it is also emphasized that while the judgment of the court of first instance did not enter into force, part of the disputed land by the order of the head of EP of Geranboy as of May 17, 2003 was leased to LLC “Gulistan” and other part by the order as of June 13, 2003 to LLC “Kristall LTD”. The applicant, considering that fixed by the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) his right for freedom of enterprise is broken, asked to recognize the decision of JBCC of the Supreme Court as of January 21, 2004 as void because of discrepancy with the Constitution and laws and to restore his violated right.

The Constitutional Court considers that for the solution of the complaint of I. Hajiyev there is a need for consideration of provisions of the Constitution and some legal issues concerning the relations connected with lease of land, rules of their termination and consideration of statements of claim.

According to the Article 59 of the Constitution affirming the right for freedom of enterprise everyone may, using his/her possibilities, abilities and property, according to existing legislation, individually or together with other citizens, carry out business activity or other kinds of economic activity not prohibited by the law.

This constitutional norm develops the principle of freedom of the economic activity of any individual that is not forbidden by law. If decisions or actions (inaction) of authorities or officials limit the right for freedom of enterprise, they can be challenged in a judicial proceeding.

According to the Constitution, the state guarantees protection of rights and liberties of all people (Article 26.2), legal protection of rights and liberties of every citizen (Article 60.1).

As evident from materials of the constitutional case, I. Hajiyev and others took certain actions for use of right for legal protection. However, in the constitutional complaint of I. Hajiyev it is specified that by courts of general jurisdiction was incorrectly applied norms of a substantive law and claim requirements was rejected without studying of legal bases.

Taking into consideration the arguments of constitutional complaint it should be noted that lease agreement is not the only type of bilateral contracts; there are also property lease contracts. Given contract, as well as other types of transactions, can promote emergence, change and termination of civil relations. According to lease agreement, one party (lessor) transfers to other party (tenant) not only a right of use of leased object, but also a right of use of profits and gained incomes. The land plots, buildings, movable subjects, rights and enterprises can be a subject of lease.

The rent relations are, as a rule, governed by provisions of the Civil Code of the Republic of Azerbaijan. At the same time, considering features of the relations of land lease, the legislator adopted the separate Law “On Lease of Land”. However, in the Article 2 of this Law it is especially noted that legislation of the Republic of Azerbaijan on lease of land consists of this Law, civil and other acts of the Republic of Azerbaijan.

According to the Article 73.3 of the LC, establishment of cases serving as grounds for the withdrawal of lands provided for temporary use and lease, as envisaged under point 7 of paragraph 1 of this Article, is carried out by court (in the event of withdrawal of these lands with the consent of the parties this rule is not apply).

According to the Article 75.1 of the LC in the case envisaged under passage 6 of provision 1 of the Article 73 of the Code, termination of right to use land is carried out by management of the enterprise, department and organization; in the case envisaged under passage 11 termination of right to use land is carried out by an relevant body of executive authority; termination of right to use land free of charge is be carried out by court on a motion from an relevant body of executive authority or municipality, while in cases envisaged under other passages, termination the right to own, use and lease land is carried out by court, whereas of the permanent right to use by an relevant body of executive authority or municipality. According to the Article 75.3 of the LC, in the cases provided by paragraphs 5, 7 and 10 of provision 1 of Article 73 of the present Code, the decision to terminate the right to use and lease land plots shall be made if no measures are taken following a warning to eliminate drawbacks (breaches) in an established time-frame. In the Article 75.6 of the LC it is specified that in case when this Code did not provide an order of termination of the rights for the land, it is established by the Civil Code.

According to the Article 421.1 of the CC, change and cancellation of a contract are possible with the consent of the parties if it is not specified by this Code or a contract.

At emergence between the parties of relations connected with lease of land, according to the Article 421.2 of the Civil Code, contract can be changed or cancelled, under the request of one of the parties, only in the event of material violation of the contract by the other party, or in other cases, stipulated by this Code or the contract. Violation of the contract by one of the parties deemed sufficient, if the other party in result of the damage caused is significantly deprived of what it had counted on in the course of entering into the contract.

According to the Article 423.2 of the CC, the request to have the contract changed or dissolved can be made by a party in court, after the receipt of a refusal from the other party to the offer to have the contract changed or dissolved, or failure to receive the response within the term set forth in the offer, and in the absence thereof — within a thirty day term.

The responsibility for violation of the legislation on lease of land and the solution of disputes were also found the reflection in provisions of the Law “On Lease of Land”. According to the Article 13.1 of the Law, change of conditions of lease agreement, its cancellation or termination are allowed in order established by the Civil Code of the Republic of Azerbaijan and other normative legal acts and also with consent of the parties. In cases of violation by one of the parties of terms of the contract, on request of other party the lease agreement can be dissolved by a judgment. In the Article 31 of the Law, it is also specified that the point at issue connected with transfer of lands to rent, their use, change, extension, early cancellation and the termination of contracts are solved in a judicial proceeding according to the legislation of the Republic of Azerbaijan.

As evident, the specified provisions of the listed normative legal acts, in case of absence of consent of parties to termination of rent, including relations arising in connection with lease of land, demand an appeal to court. It is no coincidence, that the point 2.14 of the contract signed between the parties on December 11, 2001 on transfer of the land plot to rent also provides the decision on cancellation of the contract in a judicial proceeding.

Early cancellation of the contract unilaterally without arrangement and an appeal to the court also does not correspond to the principles of equality and a free will of subjects of civil law provided by the Articles 6.1.1 and 6.1.2 of the CC.

According to the Articles 88 and 218.1 of the CPC, for lawful and reasonable solution of any civil dispute during judicial examination the court after objective, impartial, comprehensive and complete examination of proofs has to estimate these proofs according to the legal norms that are subject of application. At adjudication the judge has to estimate proofs, define, what facts, essential for case, established and not established, in what legal relations the parties are, what provisions of the law should be applied, and also to define whether the claim is subject to satisfaction or not.

Having studied documents of a civil case, the Constitutional Court considers that the court of the first instance did not pay due attention to observance of provisions of the Articles 28 and 218 of the CPC.

Thus, in the judgment the question of, whether the head EP of Geranboy was authorized to cancel in a unilateral extrajudicial order the lease of land which is a subject of the claim of I. Hajiyev and others, remained open. Four reasons for cancellation of the former order specified at his order (use of the land plot inappropriately, lack of activity, absence of the expected result, the trouble caused to the population by explosions on a plaster field) are insufficiently investigated at judicial examination.

Though as a basis for a rejection by the court of claim requirements of I. Hajiyev and others took a number of the circumstances which entailed essential breach of contract by LLC “Emil” (transfer of land to rent for term exceeding established by the law, that is for 50 years; non-payment of rent and taxes and so forth) nevertheless they were not specified at the challenged order and arose only after lawsuit that did not draw attention of court. As a result in the judgment a reference to the specified circumstances and the letter of the deputy head directed to LLC “Emil” by EP of Geranboy No. 376 as of September 18, 2002 it was accepted as in advance made prevention. While in this letter it is not specified any of the above-noted circumstances connected with essential violation of the lease agreement on the basis of the Article 719.4 of the CC, the Articles 15 and 17 of the Law “On Antimonopoly Activity” and the point 2.14 of the lease of the land signed between the parties it is offered to take away the land plot.

EP of Geranboy applied to court with claim against LLC “Emil” for cancellation of the certificate on the right of temporary use of land plot. In spite of the fact that the challenged certificate was granted by the State Committee of the Republic of Azerbaijan on Acres and Cartography, nevertheless, contrary to requirements of the Article 54 of the CPC, it was not involved in case. This fact should be noted especially because after unilateral cancellation of the lease of the land the head of EP of Geranboy sent to Committee the letter No. 476 as of November 22, 2002 with a request for cancellation of the certificate on the right of temporary use of land plot granted to LLC “Emil”. However, in the response letter of the Chairman of the State Committee on Acres and Cartography No. 17-9/547 as of December 2, 2002 it was recommended to appeal to court with this issue.

Referring to the Article 12 of the Law “On Interior” and the Articles 713, 719 and 721 of the CC cannot be considered reasonable.

The Article 12 of the specified Law specifies that a subsoil transferred to use for a certain term (in various cases – for 30 years) or forever. As evident from contents of the Article 713 of the CC, the lessor may lay a claim about lessee’s non-execution of his agreement liabilities. The Article 719.4 of the CC provides that where the lease agreement is concluded for more than 30 years any participant of the agreement after 30 years may submit a notice on termination of agreement no later than the third working day of any year of lease by entering into effect for the end of following year of lease. If the agreement is signed for the rest of life the lessor or the tenant, cancellation is not allowed. According to the Article 721.2 of the CC, based on the claim of one of the participants of the agreement, the court may make a decision about the procedure of liquidation of the land lease agreement validity of which is revoked in advance or partially. As evident, any of these articles does not give the grounds for unilateral cancellation of the lease agreement extra judicially.

The Constitutional Court considers that during consideration of a civil case the court of the first instance did not applied correctly the requirements of the Articles 54, 58 and 218 of the CPC, the Articles 73 and 75 of the LC, did not observe the Article 12 of the Law “On Interior”, the Articles 421.2, 713, 719 and 721 of the CC, and did not apply the Article 423.2 of the CC which was a subject for application.

The court of appeal considering case had to check observance of norms of a substantive and procedural law by court of the first instance on the basis of the evidence which was available in case and to eliminate the violations allowed by court of the first instance. However, the court having violated requirements of the Articles 372.1, 372.7, 384 and 385.1 of the CPC upheld a judgment of the court of first instance. Despite provisions of the Articles 416, 417.0.3 and 418.1 of the CPC, court of cassation instance, having upheld the judgment of appeal instance not corresponding with requirements of the law, also did not execute the duties assigned to it.

Plenum of the Constitutional Court comes to conclusion that in connection with discrepancy of the decision of JBCC of the Supreme Court as of January 21, 2004 to the Article 60.1 of the Constitution, to the Articles 416, 417.0.3 and 418.1 of the CPC it is necessary to recognize it as null and void, and to reconsider case according to the present decision in an order and terms established by the civil and procedural legislation of the Republic of Azerbaijan.

Being guided by parts V, IX and X of the Article 130 of the Constitution of the Republic of Azerbaijan, the Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To Recognize the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of January 21, 2004 as null and void in connection with its discrepancy with the Article 60.1 of the Constitution, with the Articles 416, 417.0.3 and 418.1 of the CPC. To reconsider case according to the present decision, in order and terms established by the civil procedure legislation of the Republic of Azerbaijan.

 2. The decision shall come into force from the date of its publication.

 3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

 4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.