**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 of 09 February2006 and decision of the Plenum of the Supreme Court of the Republic of Azerbaijan as of 22 December 2006 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of N.Abilov*

**13 June 2008 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant N.Abilov and his representative N.Abdullayev

representative of respondent body – R.Akperov, employee of Staff of the Supreme Court of the Republic of Azerbaijan

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 verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijanof 09 February 2006 and decision of the Plenum of the Supreme Court of the Republic of Azerbaijan of 22 December 2006 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of N.Abilov.

Having heard the report of Judge R.Qvaladze, speech of the representatives of applicant and respondent body, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

The claimant M. Isazade appealed to court with the claim to respondents N. Abilov and A. Abilov for collection of debt in amount of 20.000 US dollars and direction of the requirement with respect to mortgaged property of the “Auto engine-Service” company (which founder is N. Abilov). V. Isazade substantiated his requirements by stating that N. Abilov and A. Abilov borrowed 20.000 US dollars from his late spouse O. Isazade and as a debt repayment guarantee mortgaged the above-mentioned N. Abilov's property.

By the decision of Gusar area court as of November 28, 2003, according to Articles 266 and 188 of the Civil Code of the Republic of Azerbaijan acted till September 1, 2000 (hereinafter referred to as the former Civil Code), the claim was satisfied and it was decided to collect from respondents N. Abilov and A. Abilov in a joint order 20.000 US dollars at the rate of manat in favor of I. Isazade on payment date and to direct a debt on the put real estate of the “Auto engine-Service” company located in the Gusar city.

From materials of a civil case it is evident that the court at establishment of facts of the case referred to the contract of pawn by N. Abilov of unfinished office room and an administration premise of the “Auto engine-Service” company which founder he is, as a guarantee of return of the debt of 20.000 US dollars taken in general for one year, on condition of stage-by-stage repayment, on behalf of “Admiral” firm, certified on September 28, 1998 by the State notary office of the Gusar area with the register No. 4E2-518, and recognition by the respondent N. Abilov of the claim.

The Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Court of Appeal) which considered case in an appeal order by its decision as of October 19, 2005 upheld the judgment of the first instance.

This decision was upheld 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 February 9, 2006, and the latter one by the decision of Plenum of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the Plenum of the Supreme Court) as of December 22, 2006.

The applicant lodged the complaint to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court). On belief of the applicant, the courts which considered case, without having applied a number of articles, including Articles 81, 88 and 217 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) which are subject to application took the false document for the authentic proof, did not consider the arguments which are put forward by him and by that, having falsely established facts of the case, incorrectly applied norms of a substantive law and therefore his rights fixed by Articles 13, 29 and 60 of the Constitution of the Republic of Azerbaijan are violated (hereinafter referred to as the Constitution). N. Abilov in the constitutional complaint asks on recognition as invalid of the decision of JBCC of the Supreme Court as of February 9, 2006 and the decision of Plenum of the Supreme Court as of December 22, 2006, adopted on a civil case, in view of discrepancy with the Constitution and to laws.

To the complaint was attached the reference that the State Notary of the State Notary Office of the Gusar area did not register any operation by N. Abilov or from his name in register books of this Notary Office in 1998.

Plenum of the Constitutional Court in connection with the complaint considers necessary to specify the following.

According to Article 29.1 of the Constitution, everyone has the property right. According to Article 13.1 of the Constitution the property in the Republic of Azerbaijan is inviolable and is protected by state. Along with other rights and freedoms, one of remedies of property is fixed in Article 60 of the Constitution. According to part I of this article, legal protection of rights and liberties of every citizen is ensured. According to Article 125.1 of the Basic Law, judicial power of the Republic of Azerbaijan can only be exercised by courts through a fair trial.

As the basic principles of implementation of justice in the Constitution are enshrined the consideration of cases impartially, fairly, observing legal equality of the parties, on the basis of the facts and according to the law (Article 127.2), implementation of legal proceedings on the basis of the principle of contest (Article 127.7).

According to Article 6.1 of the “Convention on Protection of Human Rights and Fundamental Freedoms” in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

According to these provisions justice is carried out on the basis of competitiveness, equality of the parties and on the basis of the facts. Judge shall always secure compliance with the principle of contentiousness. Judge shall base his decision solely upon reasons discussed in compliance with the principle of contentiousness, explanations and documentation submitted by parties. The court estimates proofs according to the precepts of law which are subject to application to those proofs after objective, impartial, comprehensive and their full investigation. The judgment has to be lawful and reasonable. The decision has to be based upon actual circumstances established with respect to case and relationships between the parties (Articles 9.1, 9.3, 217.1 and 217.3 of the CPC).

One of important elements of the right of fair trial is existence of the right of submission of the complaint or a protest on acts of the lowest judicial instances in the highest judicial authorities in the order provided by the procedural legislation.

The appeal complaint in the order and cases provided by the CPC can be lodged on the decisions and rulings adopted by courts of the first instance of the Republic of Azerbaijan, which did not enter into force.

By Article 365 of the CPC it is established that provisions of the present chapter (41st) and the present Code are applied to appeal procedure. According to these provisions of the procedural legislation, cases in court of appeal instance are considered along with the features specified in Chapter 41 of the CPC, establishing procedure in this court, also according to the principles of civil process, including, the principle of possession of the parties of the equal rights and opportunities.

According to Article 372.7 of the CPC, court of appellate instance, irrespective of arguments listed in complaint, verify observance by court of material and procedural norms of law. In Articles 385.1.1 and 385.1.3 of this Code violation or incorrect application of material or procedural norms of law and non-proof of circumstances important for case established by court of first instance are considered as basis for cancellation of judgment in an appeal order.

The applicant in the appeal complaint noted some issues, including that he was not invited to any court session held on matter in court of the first instance and did not give any confessionary explanations.

According to requirements of the civil procedural legislation the persons participating in case, are informed by the writ on time and a place of court session or commission of separate procedural actions (Article 140.3 of the CPC). The writs is delivered by post or through persons commissioned by the judge. Time of presentation of writ to the recipient shown on the part of the writ to be returned to the court (Article 142.1 of the CPC).

These requirements of the civil and procedural law violated by court of the first instance. Thus, in case papers there is no stub of writ addressed to N. Abilov.

The European Court of Human Rights of October 20, 2005 on case Groshev vs. Russia recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. It considers that the right to a fair and public hearing would be devoid of substance if a party to the case were not apprised of the hearing in such a way so as to have an opportunity to attend it, should he or she decide to exercise the right to appear guaranteed in the domestic law.

As for confession by N. Abilov of the claim which is of great importance for the correct resolution of case to which a reference in all judicial acts adopted by all judicial instances is made it should be noted that, according to Article 191.1 of the CPC, confession of the claim by the respondent is noted in the protocol of court session and the protocol is signed by the respondent. Confession of the claim by the respondent has to be expressed in clearly written motions addressed to court. But court of the first instance, without observing these requirements of the legislation, disregarding absence in case papers of the statement for recognition of the claim, referred in the protocol of court session to the indications which are not confirmed with N. Abilov’s signature.

The European Court of Human Rights, expressing the legal position in the decision of February 10, 2005 on case of Sukhorubchenko vs. Russia, showed that while the Contracting States enjoy a wide margin of appreciation in determining logistical arrangements for the administration of justice, the keeping of accurate court records is one of the foundations of the fair hearing guarantees enshrined in Article 6 § 1 of the Convention (§ 45).

N. Abilov in the appeal complaint also noted that court of the first instance, having violated requirements of the law, without having verified reliability of the contract on pledge brought by the claimant into court satisfied the claim, based on this document. The applicant showed that the contract on pledge brought by V. Isazade into court, being false, is not issued by the State notary office of the Gusar area as it is specified in the decision. In this regard, the applicant asked for examination of State notary as the witness on case.

As it apparent from case papers, V. Isazade brought the photocopy of document called “receipt” written by N. Abilov, and court having accepted this document as a type of the proof, satisfied the claim.

Plenum of the Constitutional Court in this regard notes that the court of the first instance at implementation of civil legal proceedings did not adhere to provisions established by the CPC.

According to Article 89.1 of the CPC, a notarized document, act, contract, note, business correspondence and other document and/or material containing information on circumstances important for case shall be accepted as written evidence. In this sense it should be noted that, according to Article 89.3 of the CPC, evidence should be submitted in an original form or as a duly certified copy. But by consideration of a civil case this requirement of the law was not observed, the copy of the above written document attached to a civil case is not duly certified. It excludes the reference to this document as the proof.

In view of requirements of the above civil procedural rules, Plenum of the Constitutional Court came to conclusion that Gusar district court at settlement of dispute, without having applied Articles 9.1, 9.3, 88, 89.3, 191.1, 140.3, 142.1, 217,1 and 217.3 of the CPC which were subject to application, violated the right for legal protection of the applicant affirmed in Article 60 of the Constitution.

For the purpose of ensuring elimination of miscarriages of justice in Article 372.1 of the CPC it is established that the court of appellate instance, as a court of full authorities, considers case and evidences present in case or additionally submitted evidences on merits. On sense of the specified norm the court of appeal instance gives a legal assessment to requirements and objections of the parties, establishes their rights and duties, and considers case with carrying out research. For this purpose, the court of appeal instance uses the proofs brought into court of the first instance, and the new evidence produced to it in the order established in Article 371 of the CPC.

Court of appeal instance, though a judgment of the first instance did not meet the requirements of the above procedural legislation, did not investigate comprehensively, completely and objectively the arguments which are put forward in the appeal complaint, including arguments about illegal attraction to matter in quality of the respondent as at V. Isazade's statement about receiving a debt by A. Abilov the son is not obliged to bear responsibility for actions of the father. Thus, the court of appeal instance estimated display in the protocol of court session only of biographical particulars of the applicant as the proof of its participation in court session and making confession by it, even without trying to verify the falseness of the contract approved by the applicant, and did not involve the notary of the State notary office of the Gusar area in judicial proceedings.

Along with it the court of appeal instance as one more proof of confession by the applicant of the claim, referred to the statement which is drawn up by group of Judicial supervisors and law-enforcement officers of the Gusar area on September 24, 2003 by ruling of Gusar district court of September 24, 2003 on the basis of V. Isazade's statement of September 24, 2003 for a measure for execution of the claim.

But thus the court of appeal instance did not mention the moments demanding clarity introduction such as filing of application about providing the claim on September 24, 2003, adopting of judicial ruling about it and drawing up by law-enforcement officers the act of its execution on the same day, and also singularity of reflection of recognition of the claim in the act of execution of definition of a measure of satisfaction of the claim.

 The legal position of Plenum of the Constitutional Court on this matter consists that the doctrine of a constitutional right recognizes the principle of legal certainty as one of the basic elements of rule of law that found the reflection in a preamble of the Constitution of the Republic of Azerbaijan. The principle of legal certainty, along with other requirements, provides clarity and definiteness concerning existing legal situation in the most general sense. From this point of view, all necessary issues on the case resolved in the decisions adopted by courts it has to be cleared up, the contradictory moments have to be eliminated. In the judicial acts that are taken out on behalf of the Republic of Azerbaijan there should not be provisions calling into question the fair solution of case, making a contradiction and influencing the right of constitutional and legal protection of participants on dispute.

At the same time court of appeal instance, referring to non-presentation by N. Abilov of the corresponding statement for the term of limitation of action concerning its application to the put-forward arguments rejected this argument of the appeal complaint, according to Article 375.2 of the acting Civil Code.

Plenum of the Constitutional Court notes that, according to Article 7.1 of the acting Civil Code provisions of civil law, except those provided in Article 149, Chapter VII of the Constitution of the Republic of Azerbaijan, do not have retroactive effect and only apply to relationships created after the enactment of such law. On the other hand, according to the Article 7.2 of this Code civil law may have retroactive effect also in cases specifically provided by the law.

Plenum of the Constitutional Court according to the legal position reflected in the decision “On interpretation of Article 179.1 of the Civil Code of the Republic of Azerbaijan” of January 28, 2002 once again notes that action of norms of material civil law is applied to the relations arisen after their entry into force from the point of view of need of fair providing and rational protection of the rights and interests of participants of a civil turn, including protection of integrity and a continuity of earlier formed and proceeding legal relations.

From the analysis of Article 149.7 of the Constitution, the Law of the Republic of Azerbaijan “On approval, coming into effect of the Civil Code of the Republic of Azerbaijan and issues of legal regulation connected with it” and the acting Civil Code it is evident that validity of provisions of Article 375.2 of this Code does not extend for the terms before September 1, 2000.

In spite of the fact that the court of appeal instance concerning the term of limitation of action came to a conclusion about the conclusion of the challenged contract on pledge in 1998, having applied above-stated and not appropriate for application article of the Civil Code which came into force since September 1, 2000 did not consider the requirement of the legislation.

Also the court of appeal instance did not take into consideration that, according to Article 78 of the former Civil Code, calculation of term of limitation of action begins from the date of formation of the claim right; the claim right is formed from the date when the person learns or has to learn about violation of the rights. In this regard, it should be noted that as the claimant knows about time of violation of its rights, calculation of an established period of execution and term of limitation of action according to obligations begins on the expiration of execution of the obligation and is estimated on the general order.

At approaching to this issue from this point of view it becomes clear that the term of limitation of action according to claim requirements of V. Isazade of September 5, 2003 about collection of debt under the contract of September 28, 1998 which date of execution it is established in one year, is counted by court incorrectly and is not considered that, according to Article 72 of the former Civil Code, total period (term of limitation of action) for protection of the rights of the person which rights are violated, in his claim, is determined in three years. According to Article 77 of this Code, the term of limitation of action, irrespective of the information of the parties, is applied by court. According to Article 82 of this Code, the expiration of limitation of action before initiation of the claim is the basis for rejection of the claim.

N. Abilov, having specified the offenses introduced by the courts that considered case lodged cassation and additional cassation complaints.

According to Article 417.1.3 of the CPC, court of cassation instance, having considered the case having the right to cancel the decision or ruling of court of appeal instance completely or in part and to submit the case for reconsideration in appeal instance. According to Article 418.1 of the CPC, the bases for cancellation of the decision and ruling of court of appeal instance are violation or the wrong application of norms of a substantive and procedural law. According to Article 424.2.3 of the CPC, where there do not exist grounds of motives referred to in decision of court of cassation instance are the basis to cancellation of cassation decisions. According to Article 429.0.3 of this Code, Plenum of the Supreme Court has the right to cancel the decision of court of cassation instance completely or in parts and the related decision or ruling of court of appeal instance completely or in part and direct case for reconsideration to court of appeal instance.

However, as opposed to noted norms of the civil procedural legislation the JBCC of the Supreme Court, without having considered the consideration of the case by JBCC of the Court of Appeal without observance of requirements of norms of a substantive and procedural law, uphold a judgment of appeal instance, and the Plenum of the Supreme Court by the decision of December 22, 2006 upheld the decision of JBCC of the Supreme Court as of February 9, 2006 concerning upheld of the judgment of appeal instance which is taken out with violation of norms of a substantive and procedural law and as a result the right of legal protection of the applicant provided in Article 60 of the Constitution violated.

Plenum of the Constitutional Court, having once again mentioned the legal position stated in the decision of December 27, 2007 according to K. Bunyatov's complaint notes that consideration of the case as the cassation, and also as the additional cassation should not have only formal character, and has to serve for verification of the arguments which are put forward from the applicant according to requirements of the legislation.

Considering the above, Plenum of the Constitutional Court comes to conclusion that the decision of JBCC of the Supreme Court of the Republic of Azerbaijan of February 9, 2006 because of discrepancy to Articles 417.3 and 418.1 of the CPC and the decision of Plenum of the Supreme Court of the Republic of Azerbaijan of December 22, 2006 because of discrepancy to Articles 424.2.3 and 429.0.3 of the CPC, and Article 60.1 of the Constitution have to be recognized as void, and case is reconsidered according to the present decision, an order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by 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 Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To Recognize as null and void the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of February 9, 2006 on a civil case of the claimant M. Isazade to respondents N. Abilov and A. Abilov concerning collection of debt and direction of the requirement to a mortgaged property due to its discrepancy with the Articles 417.3 and 418.1 of the CPC, with the decision of Plenum of the Supreme Court of the Republic of Azerbaijan dated December 22, 2006, with the Articles 424.2.3 and 429.0.3 of the CPC, and discrepancy of both decisions with the Article 60.1 of the Constitution. To reconsider case according to the present decision, in order and the 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.