**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by M. A. Muradov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan to Constitution and legislation of the Republic of Azerbaijan*

**28 April, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Chairman F.Abdullayev, Judges F.Babayev (Reporter Judge), B.Garibov, R.Gvaladze, E. Mammadov, I. Najafov, S. Salmanova and A. Sultanov,

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

with the attendance of complainant M.A Muradov and his representatives R.Ahmadov and A.Karimov and witness T.Isayev

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 M.A Muradov concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 8m-9/0 of the Chairman of Supreme Court of the Republic of Azerbaijan dated April 2, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge B. Garibov, listening to complainant and his representatives A.Karimov and R.Ahmadov and witness T.Isayev and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In his complaint M.A.Muradov shows that by the order № 232 of the head of executive power of Balakan Region in November 3, 1998, a land of 0.20 hectares in Balakan city was given to “Supersun” private company (his brother is the founder of the company and plaintiff himself also participated in foundation of the company) for the construction of gas station. After disbursing all the state and construction estimate costs, construction of gas station started.

But the resident of Balakan city Yusif Mahamaliyev laid obstacles for the construction and the order № 232 made in November 3, 1998 was annulled groundlessly due to reason that Silk Way passes from that area. While seizing that land, a plaintiff wasn’t given a new land as replacement which was contradictory to existing legislature and expenses for the construction work wasn’t reimbursed. After the brother of Y.Mahamaliyev was appointed as the head of the executive power of Balakan region, that piece of land was given to Y.Mahamaliyev.

Plaintiff also alleges that while receiving an ambulatory medical treatment in Baku, he was dismissed illegally from his position as the head of surgery department of central hospital of Balakan region with the pressures of the head of executive power of Balakan region by the order of Head Doctor in October 12, 2000 and was transferred to another position. Claim of plaintiff about restoration to his position and payment of salary for the obligatory truancy haven’t been satisfied by the courts.

Muradov also states that he founded a small enterprise called “AVN-MED”. Although Ministry of Health gave AVN-MED license for pharmaceutics activities and a permission to conduct private medical activities, there were obstacles preventing the activity of AVN – MED.

Plaintiff have complained to different government bodies and mass media from the illegal actions of the head of executive power of Balakan region and his brother Y.Mahamaliyev, as well as submitted a complaint to official government newspaper “Azerbaijan”.

The newspaper “Independent Azerbaijan” has published Article in June 15, 2001 called “There is no strength left in Balakan” (author Vali) and newspaper “Azerbaijan” has published an Article called “On the track of a complaint” in August 5, 2001 (author T.Isayev).

Complainant states that after the publication of these Articles, Y.Mahamliyev filed a claim to Balakan regional court about protection of his honor and dignity. But Balakan regional court didn’t accept the claim into consideration and sent it to Yasamal district court as it was in the jurisdiction of the latter. Yasamal district court recognized the complainant as respondent instead of newspapers “Azad Azerbaijan” and “Azerbaijan” and journalist who wrote the Articles. Court decided that respondent should apologize and write a refutation, as well as compensate moral damage at the amount of 30 (thirty) million manats.

Collegium of Civil Disputes (CCD) of Appellate Court of the Republic of Azerbaijan decreased the amount of compensation for the moral damage to 2 (two) million manats. The Collegium of Civil Disputes of Supreme Court of the Republic of Azerbaijan left the appellate decision unchanged. To the additional cassation complaint of the respondent, the Chairman of Supreme Court replied with letter about not satisfying the complaint.

Complainant argues that according to Article 57 of Constitution he wrote complaints to government bodies requesting to prevent illegal actions towards him and restoration of his constitutional rights and freedoms. But courts evaluated these complaints as spread of information that stains the honor and dignity of person and recognized him as respondent although he was not.

M.Muradov also states that it was impossible to enforce the court resolution since no obligation was put on newspapers for his refutation of facts written by the authors and he wasn’t given any right to demand from newspapers to publish refutation. However regional prosecutor office started a criminal case referring to Article 306.1 of Criminal Code of the Republic of Azerbaijan according to special resolution of Balakan regional court in December 6, 2004 and has sent the criminal case for the investigation to investigation department of Ministry of Justice.

In his complaint M. Muradov asks to examine the conformity of court decision with the Constitution and civil legislature of the Republic of Azerbaijan.

The Presidium of Constitutional Court made a resolution in February 11, 2004 accepting the complaint of M.A.Muradov regarding the court decisions on claim of Y.Mahamaliyev about refutation of information staining the honor and dignity into consideration.

As it is obvious from case materials, Y.Mahamaliyev filed a claim in August 24, 2001 to Balakan regional court demanding from M.A.Muradov to deny the information staining his honor and dignity and pay compensation for the moral damage at the amount of 50 (fifty) million manats and transfer it to the account of Disabled Fund of Balakan region since the complaints of M.A.Muradov were the basis for the Articles published in newspaper “Independent Azerbaijan” in June 15, 2001 (edition № 48 (188) ) called “There is no strength left in Balakan” and in newspaper “Azerbaijan” in August 5, 2001 (edition № 176 (2889) ) called “On the track of a complaint”.

Balakan regional court made a resolution in September 5, 2001, not accepting the claim into consideration and sending it to Yasamal districts court in Baku as the issue was in the jurisdiction of the latter by referring to provision 9 of decision № 7 of Presidium of Constitutional Court about Practice of implementation of legislature by the courts regarding the protection of honor and dignity made in May 14, 1999 and to the fact that newspapers “Independent Azerbaijan” and “Azerbaijan” and the authors of the Articles might be respondents of the case.

In the decision of Yasamal district court made in December 10, 2001, M.Muradov was referred as respondent and newspapers “Independent Azerbaijan” and “Azerbaijan” participated in the case as interested party.

Yasamal District Court applied the Articles 316-337 of Civil Procedure Code (CPC) instead of applying the provisions of chapter 16 of CPC and partly satisfied the claim of Y.Mahamaliyev while making a decision. Court decided that M.Muradov should deny the information written by him in complaints to newspapers “Independent Azerbaijan” and “Azerbaijan”, to President of the Republic of Azerbaijan, to President Apparatus, to officials of New Azerbaijan Party, to Ministry of Taxes and other organizations because it wasn’t true and by defining the content of refutation should submit it to newspapers “Independent Azerbaijan” and “Azerbaijan”, as well as should pay compensation for the moral damage of Y.Mahamaliyev at the amount of 30 million manats and transfer it to the account of Fund for Disabled People of Balakan region.

CCD of Appellate Court made a decision in May 27, 2002 regarding appellate complaint of M.Muradov and decreased the amount of the compensation for moral damage to 2 (two) million manats. Other parts of the decision of first instance court were left unchanged.

CCD of Supreme Court made a decision in September 6, 2002 leaving the decision of CCD of Appellate Court unchanged and not satisfying the cassation claim of M.Muradov.

Chairman of the Supreme Court stated in his letter № 8m-9/03 in April 23, 2003, that additional cassation complaint wasn’t satisfied.

It is also obvious from the case materials that M.Muradov didn’t execute the decision of CCD of Appellate Court made in May 27, 2002 which came to force and was penalized at the amount of 30 counts of conventional financial unit by the Article 313.1.1 of Code of Administrative Offences according to decision of Balakan regional court made in September 24, 2003. Court Supervisors and Court Enforcers Group have sent a submission to regional court in December 30, 2003 about criminal liability of the respondent for not performing the court decision. Court satisfied the submission and made a special decision in January 6, 2004, sending materials to regional prosecutor’s office in Balakan to decide if a criminal case should be started by Article 306.1 of Criminal Code.

The Presidium of Constitutional Court finds it important to note the followings regarding this constitutional case.

One of the rights strengthening the democratic society and state and its development is a right to address. Guarantee of such right is very important for the protection of social, political, economical rights and freedoms and for their realization.

Citizens of the Republic of Azerbaijan have a right to address government bodies’ personally or send individually or collectively written petitions according to Article 57 of Constitution. According to paragraph 1st of provision 3, Article 5 of Law about Rules of Considering Petitions of Citizens, government bodies, organizations, unions and their official persons should consider the petitions, proposals, and applications of citizens thoroughly, prepare the needed documents and take measures to solve the problem.

According to 1st provision of Article 46 of Law about Mass Media which was in force when the argument was aroused, to search for the information, to collect, to produce and to spread information is the right of journalist. According to provisions 2, 4, 5 of the same Law, responsibilities of journalist include to check the truthfulness of information, to inform the editor about faults or any other legal requirement which may arise regarding the spread or preparation of information, not to spread the information or materials that are offensive or slander or information which truthfulness is not confirmed with signature or without signature or without pen-name (Articles 46 and 47 were removed from the Law on Mass Media of the Republic of Azerbaijan with the Law of Azerbaijan adopted in December 28, 2001). As it is obvious from case materials that editor of the legal reforms and social justice department Tacir Isayev have been sent to Balakan for three days starting from July 16, 2001, in order to investigate the facts shown in petition of M. Muradov, according to order № 6/E of editorial office of newspaper “Azerbaijan” made in July 11, 2001. Tacir Isayev have met with different people and collected information during three days. Afterwards the Article called “On the track of a complaint” was published in newspaper “Azerbaijan” in August 5, 2001.

As it is an obvious, legal relationship regarding the claim of Y.Mahamaliyev against M.Muradov about refutation of information staining the honor and dignity was accrued when the Articles 46 and 47 of Law of the Republic of Azerbaijan on Mass Media were in force.

According to Article 2.4 of Civil Code of the Republic of Azerbaijan, relationships concerning the exercise and protection of inalienable human rights and freedoms and other intangible privileges are regulated by civil law and other legal acts, provided that the essence of such relationships does not require otherwise. Article 7.2 of the same code says that civil law may not have retroactive effect also in cases specifically provided by the law.

In the 9th provision of decision № 7 of Presidium of Constitutional Court made in May 14, 1999 about Practice of implementation of legislature by the courts regarding the protection of honor and dignity it is recommended to courts to recognize editorial staff of the mass media and authors of Articles as respondents. If the editorial is not a legal entity, then the founder of mass media should be recognized as respondent. Entrance of editorial office or authors of Articles into the case as third persons contradicts to law.

In order to solve the civil cases effectively and without waste of time within judicial system it is important to follow the rules concerning the court jurisdiction. According to Article 35.1 of CPC, except as otherwise specified by law, claim shall be submitted to court at place of official registration of respondent.

As it was already mentioned, the complaint of Y.Mahamaliyev was sent to Yasamal district court of Baku city according to resolution of Balakan regional court, as editorial offices of newspapers “Independent Azerbaijan” and “Azerbaijan” were situated in Yasamal district in Baku.

Yasamal district court recognized M.Muradov as respondent and newspapers “Independent Azerbaijan” and “Azerbaijan” as interested party in the case. It is clear from the decisions of CCD of Appellate Court and CCD of Supreme Court that not the newspapers and authors of Articles, but M.Muradov was the respondent.

But this situation opposes the Article 54 of CPC. According to Article 54.1 of CPC, if a claim is filed by person, who does not have right of claim, or is brought against a person, who is not liable under the claim, court shall have the right, upon consent of claimant and without canceling the case, allow substitution of initial claimant or respondent by proper claimant or respondent. According to Article 54.3 of the same Code, if claimant does not agree with the substitution of respondent by another person, court shall have right, upon consent of claimant, to invite such person to participate in court as a second respondent.

The Presidium of Constitutional Court notes that resolving cases via following substantive and procedural norms of law by the courts of all instances excludes the doubts about lawfulness and fairness of court decisions.

In this view, in order to ensure the elimination of court mistakes, Article 372.1 of CPC determines that court of appellate instance shall, as a court of full authorities, hear case and examine evidences present in case or additionally submitted evidence on merits. According to Article 372.7 of CPC, court of appellate instance shall, irrespective of arguments listed in complaint, verify observance of material and procedural norms of law by court. Article 385.1.1 of the same Code determines that violation or incorrect application of material or procedural norms of law is one of the grounds to repeal the decision of first instance court by the court of appellate instance. It should be noted that this rule also regards cassation proceedings. According to Article 416 of CPC, court of cassation instance shall verify correct application by court of appellate instance of material and procedural norms of law. Article 418.1 of the same Code says that Violation or incorrect application of material and procedural norms of law shall be a ground for repeal of resolution or ruling of court of appellate instance.

Not application of substantive and procedural legal norms during the court proceedings leads to the violation of constitutional norms. Article 60 of Constitution determines the judicial guarantee of rights and freedoms. A right to judicial protection is determined in the international legal documents that Azerbaijan is a party to. For instance: according to 1st provision of Article 6 of European 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.

In this view, by not following the substantive and procedural norms of law regarding the dispute between Y.Mahamaliyev and M.Muradov, the courts violated the Article 60 of Constitution.

Taking into consideration all the above mentioned, the Presidium of Constitutional Court concludes that decision of Collegium of Civil Disputes of Supreme Cuort of the Republic of Azerbaijan made in September 6, 2002 regarding the civil claim of Y.Mahamaliyev against M.Muradov about refutation of information staringin his honor and dignity and reimbursmenet of compensationfor the moral damage should declared null and and viod, as it contradicst to I part of Article 60 of Constitution and Article 416 and 418 of Civil Procedure Code of the Republic of Azerbaijan. Court decisions made ragrding this case should not be enforced and the case chould be reconsidered according to legislature.

Being guided by the parts V, IX, X of the Article 130 of the Constitution of the Republic of Azerbaijan, as well as Articles 52, 62, 63, 65-67 and 69 of the law Azerbaijan Republic about Constitutional Court, the Presidium of the Constitutional Court

**DECIDED:**

The decision of Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan made in September 6, 2002 regarding the civil claim of Y.Mahamaliyev against M.Muradov about refutation of information staining his honor and dignity and reimbursement of compensation for the moral damage should declared null and void, as it contradicts to I part of Article 60 of Constitution and Article 416 and 418 of Civil Procedure Code of the Republic of Azerbaijan. Previous court decisions made regarding this case should not be enforced 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.