**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by S. M. Mammadov and S.M. Mammadova*

*concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of February 5, 2004 to Constitution and legislation of the Republic of Azerbaijan*

**4 February, 2005 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, Salman Mammadov and his representative A. Nabilov

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 S. M. Mammadov and S.M. Mammadova concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of February 5, 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. Habilov having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In accordance with decision of Shamkir district court from August 28, 2002, the claim of Salman and Samaya Mammadov’s against Jamila Safikhanova and others on the cancellation of the right of inheritance and share in inherited property was not satisfied, counter claim of J. Safikhanova was satisfied, and decision was made for splitting and fenced separation of the land area, where the facilities claimed by the parties are located.

Decision of the Board on Civil Cases of the Appeal Court of the Republic of Azerbaijan from September 17, 2003 has cancelled the decision of the district court, satisfied the claim of Salman and Samaya Mammadovs’, and rejecting the counter claim.

Decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan from February 5, 2004 the decision of the appeal instance court was changed, claims of Salman and Samaya Mammadovs’ was satisfied, counter claim of J. Safikhanova was satisfied, and the separation of the land areas was decided as per the decision of the district court.

The additional cassation complaint of Salman and Samaya Mamedov’s was not satisfied by the letter of the chairman of Supreme Court from June 24, 2004.

Salman and Samaya Mammadovs’ have deemed this decision illegal and requested the review of its compliance with Constitution and legislation of the Republic of Azerbaijan. Complaint was also grounded by the fact that Board on Civil Cases of the Supreme Court has exceeded its authority, and have made the new decision on the case essence.

In relation with complaints the Plenary Session of the Constitution Court decides on following.

Plenary Session of the Constitution Court in a number of its decisions has indicated that in accordance with provisions of legislation the cassation instance court shall review the legality, applicability of the decision of the appeal court in essence and procedural terms (Article 416 of the Civil Procedures Code). In accordance with these provisions of legislation the cassation instance does not review the case in essence. If material and procedural legal norms are found violated, the cassation instance court shall be entitled to cancel the decision or verdict of the appeal instance (Article 418.1 of the Civil Procedures Code). In this event the cassation instance court shall be entitled to direct the case for additional review by the appeal court (Article 417.0.3 of Civil Procedures Code).

On the claim of Salman and Samaya Mammadovs’ the Board on Civil Cases of the Supreme Court has established the wrong application of legislation, and instead of directing the case to the appeal instance court, it made the new decision on essence of the case calling it change to the decision. By this the cassation instance has violated the provisions of the Civil Procedures Code. This has resulted in the violation of rights of Salman and Samaya Mammadovs’ for fair court justice on protection of rights and freedoms, as per Article 60 of the Constitution of the Republic of Azerbaijan.

In accordance with above, the Plenary Session of the Constitution Court has drawn the decision, that 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 the decision of the Board on Civil Cases of the Supreme Court, protested by Salman and Samaya Mammadovs’ shall be deemed invalid and the relevant aspect of the case shall be reviewed additionally in accordance with procedures of legislation.

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:**

1. To recognize the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of February 5, 2004 made under the claim of S.M. Mammadov and S.M. Mammadova against Jamila Safikhanova and others on the cancellation of the right of inheritance and share in inherited property 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.