

JUDICIAL CHAMBER RULING

Almaty, August 17, 2018

N 2 a – 5822/18

Almaty City Court Civil Chamber comprised of the presiding judge N.Muhamedzhanuly, judges A.E.Ramazanov and B.S.Makhpirov, and in the presence of E.A.Mamedov, the defendant,

Having heard, in an open hearing in the premises of the Almaty City Court, the civil suit by XXX and XXX against Eldar Agif-Ogly Mamedov regarding violation of the right to dispose of one's own image and moral damage claim, as submitted via the defendant's appeal against the judgement of the District court N 2 of the Auezov District of Almaty of May 18, 2018,

HAS ESTABLISHED THE FOLLOWING:

XXX and XXX (hereinafter referred to as the plaintiffs) filed a civil suit regarding violation of the right to dispose of one's own image and moral damage claim against Eldar Agif-Ogly Mamedov (hereinafter referred to as the defendant).

On May 18, the District court N 2 of the Auezov District of Almaty partially granted the suit, having ruled as follows:

Eldar Mamedov (under alias Eldar Gamilzade) has unlawfully distributed via Facebook a video containing the images of the plaintiffs.

Eldar Agif-Ogly Mamedov shall pay XXX 10,000 tenge in moral damages.

Eldar Agif-Ogly Mamedov shall pay XXX 5,000 tenge in moral damages.

The remaining claims shall be rejected.

In his appeal, the defendant has requested to vacate the judgement and to issue a new one rejecting the suit in full, alleging that the court had failed to invoke applicable law and therefore its judgement shall be deemed unlawful.

The plaintiffs, though having been duly notified about the date and place of the hearing, have failed to appear at the appeals hearing.

Under Article 418 of the Civil Procedure Code, should the persons mentioned in part one of the said article, despite having been duly notified, fail to appear in court, the court may choose to proceed.

Based on the above, the appeals court found no valid reason for the plaintiffs' absence and decided to hear the case in their absence.

Having heard the appealing defendant and having reviewed the case and the appeal, the Chamber has ruled that the first instance court judgement shall be amended, based on the following.

Under sub-points 1, 3, and 4, part 1, article 427 of the Kazakhstan Civil Procedure Code, an appeals court shall vacate or amend a lower court's judgement if the relevant circumstances have not been properly identified and examined; if the first instance judgement doesn't match the circumstances of the case; if substantive or procedural law has been violated or misapplied.

The first instance court has committed such violations while delivering its judgement.

As it is clear from the case materials and as established by the court, at 20:12 on January 30, 2018, E.A.Mamedov, under alias Eldar Gamilzade, posted a Facebook video with the following caption: "Perhaps, someone's children, sisters or friends, make a REPOST, let them talk [to them], may be not too late to explain, to correct, or at least to shame (emojis) #ястыз #казахстан #алмата #есентаймол #кинопарк #воспитание #увд #законодатели #нравственность #все #люди #хорошие #поступки #невсе #девушки #нежлоб #душа #болит P.S. for making namaz in public there is a fine and *oi-bai* [reprimand], but for the pink [lesbian], for the blue [gay] it's total freedom (emoji ? emoji). *Screenshot attached.*

On January 31, 2018, the defendant deleted the post and the video, neither side has disputed that.

The fact that the video depicting the plaintiffs was indeed distributed, and the fact that the defendant failed to notify XXX and XXX that he was shooting video for social media posting has been established in the case materials and has been confirmed by the parties in their testimonies.

The first instance court has erroneously granted the plaintiffs' claim to declare unlawful the distribution by the defendant, via a Facebook post, of the video depicting the plaintiffs, and has erroneously acknowledged that the plaintiffs have incurred moral damage thereby.

Based on the following, the appeal's arguments warrant attention.

The first instance court has established, based on the video and the parties' testimonies, that, while the defendant was shooting the video, one of the plaintiffs, namely XXX, made a hand gesture towards the defendant.

According to the expert conclusion #074,209/074 dated 05.05.2018 by the Almaty city branch of the Kazakh Society of the Deaf, “the gesture demonstrated in the video is deemed offending not only among the deaf, but also among the general population, insulting honour and dignity of the addressee” (case file, p. 85).

According to the expert conclusion by E.K.Myrzybaev, director of the Family Welfare Center and a psychologist, the girls in the video demonstrate sexual behavior that can be characterized as petting and an open demonstration of erotic sexuality between same-sex partners, destroys family values in the children’s minds (case file, p. 84).

Under article 20 of the Kazakhstan Constitution, “everyone shall have the right to freely receive and impart information via any lawful means. The information that constitutes state secret in the Republic of Kazakhstan shall be defined by law.”

The Chamber is of the opinion that E.Mamedov had the right to shoot video in public places without requesting permission from any bystanders who may have appeared in the video.

Besides, Esentai Mall is an entertainment center, the disputed video depicts what is happening in the cinema lobby, a waiting zone, the cinema is an organization of culture, therefore, the place as depicted in the video shall be deemed public.

The Chamber believes that the defendant had the right to shoot the video since he was not interfering in the plaintiffs’ privacy, the latter openly demonstrating their relationship to the public, having engaged in petting in full view of the bystanders, including children.

Moreover, the girls never objected to being filmed, and made no effort against it.

Our society is not yet ready for open same-sex sexual relations. The law On Marriage and Family only permits lawful union between a man and a woman, while same-sex unions are not allowed under the current legislation of Kazakhstan.

Under point 4, article 8 of the Kazakhstan Civil Code, citizens, while exercising their rights, shall act in good faith, reasonably and fairly, and shall observe legal provisions and moral principles of the society.

The Chamber is of the opinion, that the plaintiffs’ public behavior and actions, as depicted by the defendant in his video, openly (defiantly) violate moral foundations of the society.

Therefore, having behaved immorally in a public place, the plaintiffs shall not have the right to claim their rights under article 145 of the Civil Code of Kazakhstan. This article provides for the protection of personal non-property rights, and no such rights have been in fact violated in this case.

Therefore, the plaintiffs' claims, as based upon the violation of public morals, shall not be recognized as bona fide ones, and as such shall not be covered under the Civil Code article 145 protections that pertain to personal non-property rights protected by law.

E.Mamedov has acted as a public morals protector, the majority of the society would find the plaintiffs' behavior immoral and obscene, and that it all takes place in front of children is altogether heinous and affects their mental health.

Under the said circumstances, the first instance court conclusions are not based on substantive law and factual circumstances of the case. Therefore, the judgement shall be amended to vacate the granted claims and issue a new judgement rejecting the lawsuit in full.

Based on the above and under articles 423-426 of the Kazakhstan Civil Procedure Code,

THE CHAMBER HAS RULED AS FOLLOWS:

The judgement on the case by the District court N 2 of the Auezov District of Almaty of May 18, 2018, shall be amended.

The part of the judgement granting the plaintiffs' claim to declare unlawful the distribution by Eldar Mamedov (under alias Eldar Gamilzade), via a Facebook post, of the video depicting the plaintiffs, as well as ordering Eldar Agif-Ogly Mamedov to pay plaintiff XXX 10,000 tenge and to plaintiff XXX 5,000 tenge in moral damages, shall be vacated.

In the vacated part, issue a new judgement rejecting in full the claims by XXX and XXX against Eldar Agif-Ogly Mamedov regarding violation of the right to dispose of one's own image and moral damage claim.

The defendant's appeal shall be granted partially.

The appeals court ruling shall enter into force from the day of issuance.

The ruling may be appealed, challenged by way of cassation to the Supreme Court of Kazakhstan within six months from the day of entering into force.

Presiding Judge: N.Muhamedzhanuly
Judges A.E.Ramazanov, B.S.Makhpirov