

Summary of Constitutional Court Ruling

No. 4-5/2562 (2019)

Dated 10th April B.E. 2562 (2019)*

Re: Whether or not section 44 paragraph one of the Consumer Procedures Act B.E. 2551 (2008) was contrary to or inconsistent with section 37 paragraph one and paragraph two and section 26 of the Constitution.

1. Summary of background and facts

Pattaya Provincial Court referred the objections of two defendants (Come Global Company Limited, 6th defendant, and Keane Tech Company Limited, 7th defendant) in Civil Case Number Phor Bor. 515/2561 and Civil Case Number Phor Bor. 956/2561 to the Constitutional Court for a ruling under section 212 of the Constitution. The facts in the letter referring the objections of both defendants and supporting documents, a total of two applications, could be summarised as follows.

In Case File Number 15/2561, the plaintiff filed an action against the 1st defendant and others, a total of 7 defendants, claiming that on 19th February B.E. 2555 (2012) the 1st defendant, a juristic person, executed an agreement to buy and sell with the plaintiff with regard to the ownership of condominium unit 1106, Waterfront Suite and Residence Project, in which the 1st defendant agreed to transfer ownership of the condominium unit to the plaintiff within 31st December B.E. 2558 (2015). The plaintiff had satisfied part-payment as per the contract but the 1st defendant was unable to transfer ownership as stipulated in the contract. The actions of the 1st defendant, a business operator, constituted an act with intent to harm the plaintiff, a consumer. The 1st defendant, a juristic person incorporated or operating dishonestly or exhibiting a behaviour to defraud consumers, the 2nd to 5th defendants, as directors of the company, and the 6th and 7th defendants, as shareholders, should therefore be jointly or severally liable with the 1st defendant to refund the plaintiff with interests, reimburse costs and attorney fees incurred by the plaintiff, as well as punitive damages.

In Case File Number 20/2561, the 1st plaintiff and 2nd plaintiff filed an action against the 1st defendant and others, a total of 7 defendants, claiming that on 17th November B.E. 2555 (2012), the 1st defendant, a juristic person, executed an agreement to buy and sell with both plaintiffs with regard to the ownership of condominium unit number 901, Waterfront Suite and Residence Project, in which the 1st defendant agreed to transfer the ownership of the condominium unit to both plaintiffs within 31st December B.E. 2558 (2015). Both plaintiffs had satisfied part-payment as per the

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contract but the 1st defendant was unable to transfer ownership as stipulated in the contract. The actions of the 1st defendant, a business operator, constituted an act with intent to harm the plaintiff, a consumer. The 1st defendant, a juristic person incorporated or operating dishonestly or exhibiting a behaviour to defraud consumers, the 2nd to 5th defendants, as directors of the company, and the 6th and 7th defendants, as shareholders, should therefore be jointly or severally liable with the 1st defendant to refund both plaintiffs with interests, reimburse costs and attorney fees incurred by the plaintiff, as well as punitive damages.

Thereafter, the 6th and 7th defendants filed objections in both cases for a referral to the Constitutional Court for a ruling under section 212 of the Constitution on whether or not section 44 of the Consumer Procedures Act B.E. 2551 (2008) was contrary to or inconsistent with section 37 and section 26 of the Constitution. It was asserted that section 37 of the Constitution protected rights in property and section 26 provided that the state should protect the rights of individuals and the powers of the state were limited by law. The enactment of a law should not be inconsistent with the rule of law, not disproportionately increase a burden or restrict the rights or liberties of a person. Section 44 of the Consumer Procedures Act B.E. 2551 (2008) provided that a person could be jointly liable with a company by virtue of shareholder status. Such liability exceeded the individual's investment. The provision further stated that a shareholder had the duty to prove non-involvement in the company's actions, directly prejudicing the right to hold property. The Civil and Commercial Code provided that a shareholder in a limited company should be liable only to the outstanding amount for the value of shares held, and granted the shareholder with only the right to inspect minutes of the Board of Directors and minutes of the shareholders meeting. A shareholder did not have the right to directly administer as was the case of a company director. Hence, section 44, which provided for both defendants to be liable in an amount exceeding their investments, constituted an exercise of state power to enact a law which disproportionately imposed a burden on the people. The state aimed to protect consumers without regard for the grievance and harm which could be inflicted on the shareholder. Furthermore, the shift of burden of proof on the defendants, being merely shareholders in the company, in particular the 7th defendant who held only one share, resulted in the plaintiff's action imposing a burden on the defendants to find legal representation and defend the proceedings, which was also inconsistent with the principle of proportionality under section 26 of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court could accept both objections for a ruling under section 212 of the Constitution.

After consideration, the Constitutional Court found as follows. This was a case where Pattaya Provincial Court referred the objections of the 6th and 7th defendants to the Constitutional Court for a ruling under section 212 of the Constitution that section 44 of the Consumer Procedures Act B.E. 2551 (2008) was inconsistent with section 37 and section 26 of the Constitution. According to the facts stated in the letter referring both objections, Pattaya Provincial Court was going to apply only section 44 paragraph one of the Consumer Procedures Act B.E. 2551 (2008) to the cases. Upon both defendants objecting with reasons that such provisions of law were contrary to or inconsistent with the Constitution and that there had not yet been a ruling of the Constitutional Court in relation to such provisions, the case was in accordance with the rules under section 212 paragraph one of the Constitution in conjunction with section 41 paragraph three and section 50 of the Organic Act on Constitutional Court Procedures B.E. 2561 (2018). The Constitutional Court therefore ordered the acceptance of these applications for consideration. As both objections raised the same question, the cases were consolidated into one ruling.

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 44 paragraph one of the Consumer Procedures Act B.E. 2551 (2008) was contrary to or inconsistent with section 37 paragraph one and paragraph two and section 26 of the Constitution.

After consideration, the Constitutional Court found as follows. Section 37 paragraph one and paragraph two of the Constitution was a provision in Chapter 3 Rights and Liberties of the Thai People. The provision on protection of a person's right in property could be restricted under paragraph two, which provided that "the limits of the right and restriction of such right shall be as provided by law". It was apparent that a person's right in property was protected under the Constitution. A person's right in rightfully acquired property, including inheritance, ownership or possession rights, as well as other obtainable right were protected. However, such property right could be restricted by provisions of law, such as those governing asset freezing, seizure, confiscation and distribution of property to other person could be done where authorized by law. Nevertheless, the enactment of law to restrict the people's rights and liberties under the Constitution would also be subject to the principles stipulated by the Constitution.

Section 26 of the Constitution was a provision on the principle of recognition and protection of a person's rights and liberties. It was stated therein that when enacting a law to restrict the rights and liberties of a person, the legislature or organ exercising state powers had to take into account a fundamental essential principle, that is, proportionality. This essential principle was used to control, review or limit the exercise of state powers to prevent the exercise of unfettered discretion to enact laws enforceable on the people. The enactment of a law to restrict the right or liberty of the people under such principle should show expediency, necessity and proportionality or a balance between public or common benefits and the loss of enjoyment of right or liberty of the people due to such law.

The Consumer Procedures Act B.E. 2551 (2008) was enacted with the intent of securing fairness for consumers who were in a disadvantageous position to business operators in terms of knowledge, bargaining power and capacity to contest legal actions in court. Prior to the enactment of this law, the Civil Procedure Code, which was designed for general civil cases between two parties of equal terms, applied to civil cases between a consumer and business operator. This situation was inappropriate and caused great unfairness to the consumer. As a consequence, the National Assembly provided for specific consumer procedures applicable to disputes between consumers and business operators to facilitate the exercise of claim rights of consumers. Consumers who suffered harm as a result of an unlawful act of a business operator could therefore receive remedies expeditiously, economically and fairly, which would improve the efficiency of consumer rights protection. At the same time, the enactment of special rules for consumer procedures had been balanced with the preparedness of business operators. In other words, the rights of the country's business operators were not excessively affected to the extent of disrupting or impeding competitiveness in the global market. This could be perceived from the case of founding a company under the law which could be easily done, but the system of controlling a juristic person remained incapable of ensuring that businesses were operated honestly. As a consequence, companies became puppets or shells for evading contractual compliance. This Act therefore applied the "piercing the corporate veil principle" in trial in order to set aside the division of company juristic person status from the natural persons. In this regard, section 44 paragraph one provided that "in a case where a business operator subject to a legal action is a juristic person, if facts are found that such juristic person has been founded or has operated dishonestly, or there are circumstances of fraud on consumers, or there has been transfer of the juristic person's assets for the benefit of any particular person, and there are insufficient assets in the juristic person to satisfy the debt claimed in the lawsuit, upon motion of a party or where the court deems appropriate, the court has

the power to add a partner, shareholder or person with authority to control the juristic person's operations, or recipient of assets from such juristic person to become a co-defendant, and shall have the power to adjudge that such person be jointly liable for the debts of the juristic person owed to the consumer, except where such person can prove non-involvement in such action, or in the case of the recipient of assets from such juristic person, there must be proof that the assets were received honestly and for value." This provision was therefore merely a presumption that a partner, shareholder or person with authority to control the juristic person should be jointly liable for the debts of the juristic person owed to the consumer, except where such person could prove his/her non-involvement in the actions of the juristic person. Such provision of law stipulated a presumption for civil liability, not criminal liability, and constituted only a preliminary presumption, not an absolute presumption. There were also conditions for presumption which the plaintiff had to prove from the outset that the juristic person was founded or operated dishonestly, or there were circumstances of defrauding consumers or there was a transfer of assets to the extent of leaving insufficient assets for satisfaction of debts owed to consumers. Hence, there was a need and reason for the provision of this presumption.

It could be said that section 44 paragraph one of the Consumer Procedures Code B.E. 2551 (2008) merely provided a legal measure to empower the court to exercise a discretion to include a partner, shareholder or person with authority to control the operations of a juristic person, or recipient of assets from such juristic person, to join as a co-defendant. However, if such person was able to prove his/her non-involvement in the juristic person's actions, the person would be exonerated from liability. The court's exercise of power to include such person as a co-defendant or to adjudge joint liability for the juristic person's debts owed to a consumer under section 44 paragraph one was subject to conditions provided by law. The defendant had the right to defend the action in court, being the judicial organ. If such person was not able to provide proof required by law, a judgment for such person to be jointly liable for the juristic person's debts owed to the consumer would be in accordance with the principle of accountability for the juristic person's actions. This provision of law was also appropriate as an important tool which enabled consumer case procedures to achieve the objectives and spirit of consumer protection, i.e. those who were less capable of contesting a legal action than business operators. It was a case of necessity for the court to employ such tool in trial to prevent a person from relying juristic person status to unfairly deny joint liability for debts of the juristic person. In order for the court to exercise this discretion prudently to avoid undue effect on a person's rights, the President of the Supreme Court issued Rules of the President of the Supreme Court on Case Proceedings and Performance of Duties of

Case Officers in Consumer Cases B.E. 2551 (2008), in which article 28 provided that the court had the power to task a case officer to examine facts and present an opinion for consideration when making a judgment or order pursuant to such provision. In addition, section 44 paragraph one did not have the characteristics of violating the boundaries of the right or restricting the right in property of a person since joint liability in the debts of a juristic person and burden of proof did not constitute a restriction of power or obstruction or denial of power to possess shares of a person. The right of a person to hold shares remained intact. Also, after balancing the safeguards for rights and liberties of a person recognised and protected by the Constitution and the common interests of society in accordance with the objectives of this law for consumer protection, the provision of section 44 paragraph one was not a provision which affected the rights of a person in property beyond what was necessary or disproportionately increased a burden or restricted rights and liberties of person subject to the presumption. On the contrary, the contrary satisfied the test of proportionality, and was neither contrary to nor inconsistent with the rule of law. There was no prejudice on human dignity and the provision of law applied generally without being directed on a particular case or person. Such provision was therefore neither contrary to nor inconsistent with section 37 paragraph one and paragraph two and section 26 of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court therefore held that section 44 paragraph one of the Consumer Procedures Act B.E. 2551 (2008) was neither contrary to nor inconsistent with section 37 paragraph one and paragraph two and section 26 of the Constitution.
