



IN THE NAME OF THE KING
The Constitutional Court

Ruling No. 12/2541*

Dated 20th October B.E. 2541 (1998)

Re : The Civil Court referred the opinion of the parties in a case objecting that the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to the Constitutional Court for a ruling.

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The Civil Court referred the opinion of the parties in a case objecting that the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to the Constitutional Court for a ruling. In this case, Tawan-ork Finance Securities Public Limited Company, the first plaintiff, with Mr. Kosol Krairerk, the second plaintiff, filed claims against Mr. Rengchai Marakanon, the first defendant, Mr. Jarung Nookwan, the second defendant, Mr. Siri Karncharoendee, the third defendant, Mr. Thirachai Phuwatnaranubal, the fourth defendant, Mr. Thanong Pittaya, the fifth defendant, the Bank of Thailand, the sixth defendant, and the Ministry of Finance, the seventh defendant, as defendants at the Civil Court. The plaintiffs claimed that the defendants were jointly liable in negligence in Case No. 30107/2540. The Civil Court issued an order dismissing the claims against the second to fifth defendants, giving reasons for such an order that under section 5 paragraph one of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996), the two plaintiffs could make direct claims against the State agency, but could not make claims against the State officials. Hence, the plaintiffs did not have the power to file cases against the second to the fifth defendants. In this connection, the plaintiffs submitted an objection that the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was a law inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and requested that the Civil Court refer the opinion to the Constitutional Court for a ruling.

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According to the facts in the application, the parties' submissions and report of the proceedings in the Civil Court, it appeared that the first and second plaintiffs claimed that the seven defendants had jointly acted in the unlawful discharge of duties with intent or severe negligence causing both plaintiffs to suffer damages to property. In other words, during the end of the year B.E. 2539 (1996) till the beginning of the year B.E. 2540 (1997), the first defendant, in his capacity as supervisor and administrator of financial institutions, had acquired knowledge of activities and statuses of financial institutions through the performance of duties. Such information was classified and the defendant disclosed information to the public that many financial institutions were suffering from liquidity problems and that the sixth defendant had entered into the scene to remedy the problem. As a result, the public who were creditors of the financial institutions lacked confidence in the institutions and withdrew large sums from the institutions, including the first plaintiff's, causing the first plaintiff's financial business to suffer from severe liquidity problems. Thereafter, the first defendant to the fourth defendant issued measures suggesting the fifth defendant to order the closure of the first plaintiff's finance and securities business in order to remedy the financial status of the first plaintiff. As a result, the fifth defendant issued an order to terminate the business of the first plaintiff's as suggested, as well as other financial institutions forming a total of 15 institutions. Such an order caused damage to the entire financial institution system and to the public throughout the country. In addition, the first defendant ordered that the first plaintiff increased its registered share capital by at least Baht 500 million to be completed with the time prescribed. In making the order, the first defendant did not exercise the degree of caution required to keep the information classified causing distress amongst the other investors and shareholders, including the public, who withdrew large sums of money from the first plaintiff and thereafter causing the first plaintiff to suffer from even severer liquidity problems. The first to fourth defendants intended to reduce the number of existing financial institutions to a manageable number. In addition, the first defendant ordered the merger of the first plaintiff and other financial institutions, a total of 58 institutions, without sufficient laws and regulations. Such acts done by the first to the seventh defendant caused both plaintiffs to suffer damages in the sum of Baht 5,446,485,571.49. The plaintiffs therefore claimed that the defendants were jointly liable for such sums to the plaintiff.

The Civil Court issued an order accepting both plaintiffs' claims, but only for those made against the first, sixth and seventh defendants. The Civil Court issued an order that both plaintiffs did not have the power to file the claims against the second to fifth defendants and therefore such claims were dismissed.

Both plaintiffs objected that the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was inconsistent with section 6, section 26, section 27 and section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). A request was therefore made that the Civil Court refer an opinion to the Constitutional Court for ruling.

The Civil Court therefore referred the application together with the opinion, objection, copy of the claims, order and judgment of the Court to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court considered the application from both applicants and held that it was case under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The application was therefore accepted for consideration and copies of the application were sent to the relevant persons in order that they could give opinions. The Constitutional Court also conducted a trial to hear facts and instructed the relevant persons to submit statements and additional documents.

The issue to be considered by the Constitutional Court in the objections made by both applicants was whether or not section 5 paragraph one of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was contrary to or inconsistent with section 26, section 27 section 29 and prohibited under section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held that the Constitution recognized the rights and liberties of the Thai people in Chapter III, from section 26 to section 65. Section 26 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that “in exercising powers of all State authorities, regard shall be had to... rights and liberties in accordance with this Constitution.” Section 27 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that “rights and liberties recognized by this Constitution expressly, by implication or by decisions of the Constitutional Court shall be protected...” Section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that “the restriction of such rights and liberties as recognized by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties.” However, section 62 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that “the right of a person to sue a Government agency, State agency, State enterprise, local government organization or other State authority which is a juristic person to be liable for an act or omission done by its Government official, official or employee shall be protected, as provided by law.” Therefore, it was seen that the rights of a person guaranteed by the Constitution under section 62 was a provision in Chapter III on “Rights and Liberties of the Thai People,” was a right to sue only a Government agency, State agency, State enterprise, local government agencies or other organs of the State which were juristic persons. The Constitution of the Kingdom of Thailand, B.E. 2540 (1997) did not recognize the right of a person to sue an official of such agency, being a natural person. Therefore, section 5 of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996), which stated that “a State agency shall be liable to a victim in the result of a negligent act committed in the performance of duties. In this case, the victim is able to sue only such a State agency directly but not the

official,” was a recognition by law of the rights of a person consistent with section 62 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The law provided that the victim could directly sue the State agency, a juristic person, to be liable for the negligent act of its officials in the performance of duties and the part which prohibited the suing of the officials was neither contrary to nor inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) because the right of a person to sue an official, even though existed, was not recognized in the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Therefore, the right to sue a State official according to the applicant’s objection was not a right recognized under section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Nevertheless, the right of a person to sue an official still existed in section 6 of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996), which stated that “if a negligent act of a State official was not committed in the performance of duties, such State official shall be personally liable. In such case, the victim shall be able to sue the State official directly...” and section 7 paragraph two of the same Act which stated that “if the Court dismissed the case because the State agency... was not the liable party, the prescription period for claims against the liable party not included in the case shall be extended for a period of six months as from the date of the final judgment.” Hence, the Constitutional Court held that section 5 paragraph one of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was neither contrary to nor inconsistent with section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

As section 5 paragraph one of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was neither contrary to nor inconsistent with section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), it was no longer necessary to consider section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) on whether or not the law was applicable generally and on whether or not the provision of the Constitution authorizing its enactment should be mentioned because section 29 paragraph two only applied with section 29 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Moreover, this was consistent with the transitory provision in section 335 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which stated that “in the initial period, the following provisions shall not apply to the following cases (1) the provisions of section 29 paragraph two and paragraph three shall not apply to the law already in force on the date of the promulgation of the Constitution....” Therefore, the Act on Negligence Liabilities of Officials, B.E. 2539 (1996), which was a law in force on the date of promulgation of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was not subject to the application of section 29 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

As for the objection that section 5 paragraph one of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was also contrary to or inconsistent with section 26 and section 27 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 26 provided for the rights and liberties according to the provisions of the Constitution and section 27 provided for the rights and liberties recognised by the Constitution. However, the

right of a person to sue an official was not provided by the Constitution as ruled earlier. As a result, section 5 of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was also not subject to the application of section 26 and section 27 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

By virtue of the reasons stated above, the Constitutional Court held that section 5 paragraph one of the Act on Negligence Liabilities of Officials, B.E. 2539 (1996) was neither contrary to nor inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
