

Summary of the Constitutional Court Ruling No. 9-10/2544

Dated 8th March B.E. 2544 (2001) *

Re : Are the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962) (No. 4), B.E. 2541 (1998) and the Notification of the Ministry of Finance Re: Conferring Approval for the Project on Business Merger Between Sahathanakarn Bank Public Limited Company, Krung Thai Thanakij Securities Public Limited Company and 12 Finance Companies, Dated 22nd December B.E. 2541 (1998), contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) ?

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1. Background and summarized facts

The Bangkok South Civil Court and the Civil Court referred the objections of Kridsamahanakhorn Public Limited Company, the defendant and the applicant, in two applications to the Constitutional Court for a ruling under section 264 of the Constitution.

Kridsamahanakhorn Public Limited Company was a defendant in a case on a loan agreement with Krung Thai Thanakij Securities Public Limited Company in the amount of Baht 20,000,000 and was the first defendant in another case on the issue of a promissory note to IFCT Finance Securities Public Limited Company. Subsequently, on 22nd December B.E. 2541 (1998), the Ministry of Finance issued a Notification on the conferment of approval for the Project on Business Merger Between Sahathanakarn Bank Public Limited Company, Krung Thai Thanakij Securities Public Limited Company and 12 Finance Companies (including IFCT Finance Securities Public Limited Company) by virtue of the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), as amended by section 67 quarter of the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979) (No. 3), B.E. 2540 (1997), and the Commercial Banking Act, B.E. 2505 (1962), as amended by section 38 quarter of the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962) (No. 4), B.E. 2541 (1998). Pursuant to such Notification, the applicant's debts to Krung Thai Thanakij Securities Public Limited Company were assigned to Sahathanakarn Bank Public Limited Company. Sahathanakarn Bank Public Limited Company later registered a change of name to Thai Thanakarn Bank Public Limited Company, who was the plaintiff in both cases, on 21st December B.E. 2541 (1998). The applicant considered that the Emergency Decree Amending the Commercial Banking Act,

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B.E. 2505 (1962) (No. 4), B.E. 2541 (1998) and the Notification of the Ministry of Finance Re: Conferring Approval for the Project on Business Merger Between Sahathanakarn Bank Public Limited Company, Krung Thai Thanakij Securities Public Limited Company and 12 Finance Companies, Dated 22nd December B.E. 2541 (1998), were contrary to or inconsistent with section 29 of the Constitution.

2. Preliminary issue

Could the Constitutional Court accept the two applications for consideration under section 264 of the Constitution?

The Constitutional Court held that in the case of both applications, the applicant objected to the ability of the plaintiff to file lawsuits in both cases by claiming that the plaintiff could not rely on powers under a law which was contrary to or inconsistent with the Constitution, i.e. the cases involved a party's objections to the consistency of provisions of law which were applicable to the case with section 6 of the Constitution. The case was therefore in accordance with section 264 of the Constitution. The Constitutional Court had the power to accept both applications for consideration.

3. The issues considered by the Constitutional Court

The Constitutional Court considered that there were two issues which needed to be considered.

The first issue considered was whether or not the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962) (No. 4), B.E. 2541, which added section 3 bis to the Commercial Banking Act, B.E. 2505 (1962), was contrary to or inconsistent with section 29 of the Constitution.

The Constitutional Court held as follows. Section 335 (1) of the Constitution stated that "the provisions of section 29 paragraph two and section 29 paragraph three shall not apply to the law as in force on the date of the promulgation of this Constitution or already approved by the National Assembly before the date of the promulgation of this Constitution. If there is an enactment of a new law on that matter or there is any amendment to such law, it shall comply with section 29; provided that this requirement shall also apply to rules or regulations issued by virtue of the provisions of the law *mutatis mutandis*." In other words, section 335 (1) of the Constitution was a transitory provision which provided an exception for the application of section 29 paragraph two and section 29 paragraph three to laws which restricted the rights and liberties of persons as recognised by the Constitution already in force on the date of the promulgation of the Constitution (11th October B.E. 2540 (1997)) or that had already been approved by the National Assembly prior to the promulgation of the Constitution. Nevertheless, any amendments enacted for such laws must comply with section 29 paragraph two of the Constitution and must state the provisions of law authorising their enactment. In this case of the Commercial Banking Act, B.E. 2505 (1962), even though such law restricted the liberty in dwelling, rights in property of a person and liberty to engage in an enterprise or an occupation which were recognised by section 35 paragraph two,

section 48 and section 50 paragraph two in Chapter 3 on Rights and Liberties of the Thai People of the Constitution, such Act was already in force at the date of the promulgation of the Constitution. The Constitution allowed such an Act to continue to be in force without having to refer to section 29 of the Constitution.

Therefore, when the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962) (No. 4), B.E. 2541 (1998) was enacted after the promulgation of the Constitution, which was a law enacted to amend the Commercial Banking Act, B.E. 2505 (1962), the provision of law which authorised the enactment of such Emergency Decree had to be stated. The provision of section 3 which stated that “the following provision shall be added as section 3 bis of the Commercial Banking Act, B.E. 2505 (1962)...” amounted to the enactment of the Emergency Decree in accordance with section 29 in conjunction with section 335 (1) of the Constitution.

The second issue considered was whether or not the Notification of the Ministry of Finance Re: Conferring Approval for the Project on Business Merger Between Sahathanakarn Bank Public Limited Company, Krung Thai Thanakij Securities Public Limited Company and 12 Finance Companies, dated 22nd December B.E. 2541 (1998), was contrary to or inconsistent with section 29 of the Constitution.

The Constitutional Court held that such a Notification of the Ministry of Finance, which was a Notification issued by the Executive and not an exercise of legislative powers by an organ, was not a provision of law under section 264 of the Constitution and not within the powers of the Constitutional Court to rule upon. This interpretation was in accordance with Constitutional Court Ruling No. 4/2542, dated 1st April B.E. 2542 (1999). It was therefore not necessary to consider whether or not the Notification of the Ministry of Finance Re: Conferring Approval for the Project on Business Merger Between Sahathanakarn Bank Public Limited Company, Krung Thai Thanakij Securities Public Limited Company and 12 Finance Companies, dated 22nd December B.E. 2541 (1998), was contrary to or inconsistent with section 29 of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that:

(1) The Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962) (No. 4), B.E. 2541 (1998), which added section 3 bis to the Commercial Banking Act, B.E. 2505 (1962), was neither contrary to nor inconsistent with section 29 of the Constitution.

(2) The Notification of the Ministry of Finance Re: Conferring Approval for the Project on Business Merger Between Sahathanakarn Bank Public Limited Company, Krung Thai Thanakij Securities Public Limited Company and 12 Finance companies, dated 22nd December B.E. 2541 (1998), which was not issued by an organ exercising legislative powers and was not a provision of law under section 264 of the Constitution. The Notification was therefore not within the powers of the Constitutional Court to consider and rule upon.
