

Summary of the Constitutional Court Ruling No. 14/2544

Dated 26th April B.E. 2544 (2001) *

Re : Is the Bankruptcy Act, B.E. 2483 (1940) in the part which provided for the powers to administer property after a Court order for an absolute receivership of the debtor's assets contrary to or inconsistent with section 29 paragraph one and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

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1. Background and summarized facts

The Nakhon Ratchasima Provincial Court passed a judgment on 5th July B.E. 2528 (1985) ordering Nakhon Ratchasima Tham Mai Company Limited, the first defendant, and Mr. Phaiboon Ratanaset, the second defendant, to jointly pay the amount of Baht 224,111.29, with interests at the rate of 15 per cent per annum calculated as from 22nd April B.E. 2528 (1985) until complete repayment, to Bangkok Bank Limited, the plaintiff. Subsequently, on 4th July B.E. 2538 (1995), the plaintiff filed a claim at the Nakhon Ratchasima Provincial Court that both defendants had not repaid the debts to the creditor under the judgment and therefore requested for a Court order for an absolute receivership of both defendants' assets and declare both defendants bankrupt under the Bankruptcy Act, B.E. 2583 (1940). The Nakhon Ratchasima Provincial Court passed a judgment on 24th January B.E. 2540 (1997) ordering the absolute receivership of the first defendant's assets and dismissing the claim against the second defendant. The first defendant appealed to the Court of Appeal. The Court of Appeal Region 1 affirmed the Court of First Instance's judgment.

The first defendant filed an application at the Nakhon Ratchasima Provincial Court on 4th February B.E. 2541 (1998) that, whereas the provisions of the Bankruptcy Act, B.E. 2583 (1940) which were to be applied to the case empowered the official receiver to administer the assets of the debtor before the Court declared the debtor bankrupt, which was before the case was final and prior to the debtor being bankrupt, the debtors should have the right to administer his own assets which were rights recognized under section 4 and section 48 of the Constitution. The Court's application of the provisions of the Bankruptcy Act to the case might restrict the rights of the defendant to administer his own property, which was contrary to or inconsistent with section 29 paragraph one of the Constitution. A request was therefore made for the Court to impose a temporary stay on the adjudication

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of the case and the receivership of the debtor as well as to refer the application to the Constitutional Court for consideration.

The first defendant filed an appeal to the Supreme Court against the judgment of the Court of Appeal Region 1 on 4th September B.E. 2541 (1998). On 15th July B.E. 2542 (1999), a statement was submitted to the Nakhon Ratchasima Provincial Court that the first defendant had submitted an application on 4th February B.E. 2541 (1998). The Court ordered that a copy of such application be forwarded to the plaintiff who did not make any objection. A request was therefore made for the Court to impose a stay and refer such an application to the Constitutional Court for consideration.

On the appointment date for the reading of the Supreme Court Order on 29th July B.E. 2542 (1999), the Nakhon Ratchasima Provincial Court held that as the first defendant objected that provisions relating to the powers to administer properties after a Court order for the absolute receivership of the defendant's assets under the Bankruptcy Act, B.E. 2483 (1940) were contrary to or inconsistent with the Constitution, the reading of the Supreme Court Order would be withheld and the application of the defendant was referred to the Constitutional Court for consideration under section 264 of the Constitution.

2. Preliminary issue

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

The Constitutional Court held that this was a case where the first defendant in a bankruptcy case filed an application at the Nakhon Ratchasima Provincial Court while the case was being considered by the Supreme Court objecting that the Bankruptcy Act, B.E. 2483 (1940), in the part relating to the powers of the official receiver in the administration of the debtor's properties prior to a Court order to declare the debtor bankrupt, was contrary to or inconsistent with section 29 paragraph one of the Constitution. This case could be deemed as one where the Supreme Court was going to apply such provisions of law to a case and where there had not yet been a ruling of the Constitutional Court in relation to such provisions. Moreover, the defendant's objections that prior to being a bankrupt, he should have the rights to administer his property pursuant to section 4 and section 48 of the Constitution, was a substance which deserved consideration. When the Nakhon Ratchasima Provincial Court withheld its reading of the Supreme Court Order and referred the objection to the Constitutional Court for consideration, the Constitutional Court, by a majority of 11 votes to 3 votes, held that the application could be accepted for consideration under section 264 of the Constitution.

3. The issue considered by the Constitutional Court

The issue considered was whether or not the Bankruptcy Act, B.E. 2483 (1940), in the part relating to the powers to administer properties after a Court order for the absolute receivership of the debtor's assets, was contrary to or inconsistent with section 29 paragraph one and section 48 paragraph one of the Constitution.

The Constitutional Court held as follows. The Bankruptcy Act, B.E. 2483 (1940) was enacted with the purpose of administering the properties of an insolvent person for the benefit of all the creditors and the public who could be harmed by the acts of the debtor. In this regard, the Court was vested with the power to order the absolute receivership of the debtor's assets or dismiss the case under section 14. The official receiver was empowered to perform any act in relation to the property under section 22 after a Court order for the receivership of the debtor's assets. However, the Constitution provided for the protection of the rights and liberties of a person under Chapter I General Provisions in section 4 and under Chapter III Rights and Liberties of the Thai People, from section 26 to section 65, especially section 29 paragraph one which prohibited the restriction of rights and liberties of a person which was recognized by the Constitution and section 48 paragraph one which provided for the protection of the rights of a person in property, whereas the scope of such rights and liberties were in accordance with the provisions of law. On the other hand, the enactment in section 22 of the Bankruptcy Act, B.E. 2483 (1940) empowered an official receiver to administer and dispose of the debtor's properties or do any acts necessary to complete the remaining activities of the debtors as well as to collect and receive monies or properties receivable by the debtor or which the debtor had the right to receive from others and to settle or file claims or defences in any case in relation to the properties of the debtor. Such provisions could be deemed as a restriction of the rights of the debtor and possessed the characteristics of a provision prohibited by section 48 paragraph one of the Constitution for restricting the rights of a person in property and prohibited by section 29 paragraph one of the Constitution for restricting the rights and liberties of a person as generally recognized by the Constitution. Nevertheless, such provisions were in accordance with the exceptions for such prohibitions because the restriction of rights in property of an insolvent debtor created a necessity for the benefit of the creditors and the general public to prevent the insolvent person from incurring more debts. This did not in any manner affect the essential substances of such rights.

4. Ruling of the Constitutional Court

The Constitutional Court unanimously held by 12 votes that the Bankruptcy Act, B.E. 2483 (1940), in relation to the part on the powers to administer properties after a Court order for the absolute receivership of the debtor's assets, was neither contrary to nor inconsistent with section 29 paragraph one and section 48 paragraph one of the Constitution.
