

Summary of the Constitutional Court Ruling No. 34/2546

Dated 2nd October B.E. 2546 (2003)*

Re : The Civil Court referred the objection of a defendant (Mr. Suriya Upatisarong and others) to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), on whether or not section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940) as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), was contrary to or inconsistent with section 30 paragraph one and paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

The Civil Court referred the objection of the applicant, who was a defendant at the Civil Court in Case No. T. 19767/2541, to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The application could be summarized as follows. Nakornluang Thai Bank Limited (Public Company), as plaintiff, filed claims at the Civil Court against Murex Company Limited, the first defendant, as the principal debtor, and the second to sixth defendants as guarantors, for debts under overdraft contracts, discounted sale of promissory notes, mortgage foreclosure, guarantees, etc. In due course, the Bankruptcy Court issued an order accepting the application for business rehabilitation filed by the first defendant. The trial in relation to the first defendant was subsequently adjourned under section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), and the case against the first defendant temporarily stayed. As regards other defendants, since the plaintiff was still intent on proceeding with the case, leave was granted to reschedule the court appointment for examination of the plaintiff's evidence. The second, fourth and fifth defendants filed a motion to the Civil Court objecting that the Civil Court's adjournment of proceedings in relation to the first defendant, who was the debtor, in reliance of section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), without doing the same for the guarantors, was a case where the law was not equally applied and constituted a discrimination contrary to or inconsistent with section 30 paragraph one and paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The applicants requested that the Civil Court refer the objection to the Constitutional Court for a ruling.

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2. Preliminary issue

The Constitutional Court accepted the application for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

3. The issue considered by the Constitutional Court

The issue under the application which had to be considered by the Constitutional Court was whether or not section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998) was contrary to or inconsistent with section 30 paragraph one and paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). On this issue, the Constitutional Court held the following opinion. Section 30 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), contained provisions on the protection of rights and liberties of the Thai people by ensuring equality under the law as well as equal legal protection. After taking into consideration such constitutional provisions in conjunction with the provisions of the Civil and Commercial Code and the provisions of the Bankruptcy Act, B.E. 2483 (1940), on the rights and duties between creditors, debtors and guarantors, it was held that the provisions of section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), were aimed at protecting the debtor's business rehabilitation. Without such provision, an insolvent debtor would have no opportunity of rehabilitation; with every creditor exercising their right thus leaving insufficient assets for rehabilitation. It was therefore necessary to bar the creditors from filing civil claims on the debtor's assets and from filing insolvency claims against the debtor. Regarding the legal relationship between the creditor and the guarantor under the Civil and Commercial Code, the creditor was vested with the right to sue the guarantor under a guarantee contract upon the default of the debtor. In this respect, the guarantor was entitled to raise any defence that would have been available to the debtor as well as his/her own defence against the creditor's claims. If the guarantor satisfied the debts in lieu of the debtor, he/she was entitled to seek indemnity of the principal sum and interests as well as any loss or damages arising thereof from the debtor. Such indemnity rights were protected under section 90/27 paragraph two and section 101 of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), and remained in place throughout the duration of a business rehabilitation duly permitted, regardless of any subsequent court order canceling the business rehabilitation. Even if the court ordered an absolute receivership of the debtor's assets, the guarantor still maintained a right to file an application with the receiver for repayment of the debts within the time period prescribed by law.

Section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), was therefore neither contrary to nor inconsistent with section 30 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Section 30 paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), contained a prohibition of unjust discrimination against persons on the grounds of differences in origin, race, language, sex, age, physical or health conditions, personal status, economic or social standing, religion, education or political views which were not inconsistent with the constitutional provisions. Such acts which amounted to unjust discrimination were the varying treatment of persons of equal standing or under the same facts. Under the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), an application for a court order of business rehabilitation must meet all the requirements of section 90/3. Failure to satisfy any such requirement would result in a dismissal of the application by the court under section 90/10. Therefore, a court order to rehabilitate the business of any person and the adjournment of trial under section 90/12(4) must depend on the facts enumerated in section 90/3. Unjust discrimination was not possible. For this reason, an adjournment of trial of the debtor without an adjournment of trial of the guarantors in pursuance of section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), did not constitute an unjust discrimination under section 30 paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Therefore, section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), was neither contrary to nor inconsistent with section 30 paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

4. Ruling of the Constitutional Court

The Constitutional Court held that section 90/12(4) of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 4), B.E. 2541 (1998), was neither contrary to nor inconsistent with section 30 paragraph one and paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
