

Summary of Constitutional Court Ruling

No. 25/2547

Dated 15th January B.E. 2547 (2004)*

Re: The Supreme Administrative Court referred an objection of a plaintiff to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case of whether or not section 24 and section 26 of the Spirits Act, B.E. 2493 (1950), were contrary to or inconsistent with section 46 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

The plaintiff (Waiwat Limited Partnership) filed a plaint in the Central Administrative Court, claiming that the Constitution provided for the protection of rights and liberties of a person to engage in an occupation and the preservation or restoration of local wisdom. It was asserted that the undertaking of a business which produced and sold fermented rice flour was a local wisdom protected under the Constitution. It was therefore requested that the Central Administrative Court give judgment or an order against the defendant to rescind a contract which stipulated that the plaintiff should sell fermented rice flour in the places prescribed by the defendant as well as to order the relevant competent officials of the defendant to issue licenses to any applicant for fermented rice flour sales without restrictions across the country. The Central Administrative Court gave judgment as follows. Section 24 of the Spirits Act, B.E. 2493 (1950), provided that no person shall produce or sell spirits ingredients unless licensed by an excise official. Section 26 provided that a license issued pursuant to section 5, section 12, section 17 and section 24 shall be valid only in those locations specified in the license and the licensee shall display such license in a conspicuous place. The Rules of the Excise Department on the Production and Sale of Fermented Rice Flour, B.E. 2524 (1981), was issued in order to provide a guidance for excise officials in the exercise of discretion in considering license applications for the production and sale of fermented rice flour (spirits ingredient) under section 24 and section 26 of the Spirits Act, B.E. 2493 (1950). Such Rules were deemed lawful. In the case of the plaintiff who claimed that these Rules, which restricted the production and sale of fermented rice flour to licensed area, were contrary to or inconsistent with the Constitution, the Central Administrative Court held that the liberty to engage in an enterprise or occupation and to undertake fair and free competition under section 50 of the Constitution was not absolute.

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On the contrary, the State was able to enact laws to restrict such liberties. As the objective of the Spirits Act, B.E. 2493 (1950), was to control and inspect the production and sale of fermented rice flour in order to prevent the use of fermented rice flour for the production of illegal spirits, the restriction on such rights and liberties was therefore in accordance with the organization of the occupation and protection of consumers, which were objectives consistent with the provisions of the Constitution. In this instance, clause 5 of the Rules of the Excise Department on the Production and Sale of Fermented Rice Flour, B.E. 2524 (1981), was therefore not inconsistent with the Constitution. As for the plaintiff's claim that fermented rice flour was a local wisdom, the Central Administrative Court held that even though fermented rice flour was a local wisdom, the Spirits Act, B.E. 2493 (1950), had provided for the pre-licensing of the production and sale of fermented rice flour by an excise official. Therefore, this was a case addressed by a provision of law. The plaintiff was obliged to comply with such law. As a result, a judgment was given to dismiss the plaintiff's complaints.

The plaintiff appealed the Central Administrative Court's judgment to the Supreme Administrative Court, arguing that in the provisions of section 46 of the Constitution which stated that "persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law", the phrase "as provided by law" meant that the enactment of law must be consistent with the provisions of the Constitution. It followed that any provisions that were contrary to or inconsistent with the Constitution would be unenforceable, regardless of whether such law was enacted before or after the promulgation of the Constitution. Therefore, it was claimed that section 24 of the Spirits Act, B.E. 2493 (1950), which prohibited any person from producing or selling spirits ingredients, was a provision that was contrary to or inconsistent with section 46 of the Constitution.

The Supreme Administrative Court held that the adjudication of this case required the application of section 24 and section 26 of the Spirits Act, B.E. 2493 (1950). As the plaintiff objected in its appeal that such provisions were contrary to or inconsistent with section 46 and section 50 of the Constitution and there had not yet been a ruling of the Constitutional Court on such provisions, the Supreme Administrative Court referred the plaintiff's objections to the Constitutional Court for a ruling. In this connection, a temporary stay was imposed on the case pursuant to section 264 of the Constitution.

2. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 24 and section 26 of the Spirits Act, B.E. 2493 (1950), contained provisions that were contrary to or inconsistent with section 46 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 46 of the Constitution affirmed the rights of persons so assembling as to be a traditional community to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law. Section 50 paragraph one of the Constitution provided that a person had the liberty to engage in an enterprise or occupation and to undertake fair and free competition. Section 50 paragraph two affirmed that the restriction of liberties under paragraph one could not be imposed except by virtue of a law specifically enacted for maintaining the security and safety of the State or economy of the country, protecting the public in regard to public utilities, maintaining public order and good morals, regulating the engagement in an occupation, consumer protection, town and country planning, preserving natural resources or the environment, public welfare, preventing monopoly, or eliminating unfair competition. On the other hand, section 24 of the Spirits Act, B.E. 2493 (1950), prohibited any person from producing or selling spirits ingredients unless licensed by an excise official and section 26 provided that a license issued under section 24 would only be valid at the places specified on the license and the licensee must display the license at a conspicuous place.

In the case under this application, the applicant had received a license for the production and sale of fermented rice flour. However, the applicant was restricted to undertaking the fermented rice flour business only in the area specified on the license, namely the location of the applicant's office. The applicant was unable to engage in the trade of fermented rice flour freely across the country. As regards the applicant's objection that the restriction on production and sale of spirits ingredients in section 24, which included fermented rice flour, was an inconsistent provision and therefore contrary to or inconsistent with section 46 of the Constitution, the Constitutional Court was of the opinion that at that time there had not yet been an enactment of a law on the rights of persons assembling as a traditional community to conserve or restore local wisdom relating to fermented rice flour. Therefore, the applicant was unable to object that the Spirits Act, B.E. 2493 (1950), was contrary to or inconsistent with section 46 of the Constitution.

However, as regards whether or not section 24 and section 26 of the Spirits Act, B.E. 2493 (1950), contained provisions which were contrary to or inconsistent with section 50 of the Constitution, the Constitutional Court held as follows. Section 24 of the Spirits Act, B.E. 2493 (1950), was enacted in Chapter 5 on spirit ingredients. The word "spirit ingredients" appeared in various sections in Chapter 5 without any special definition assigned to it. Therefore, a definition of "spirit ingredients" would have to be derived from the general definitions in section 4, which provided that "spirit ingredients" meant flour used as spirit ingredients, fermented rice flour or other ingredients which were capable of producing alcohol in the production of spirits when mixed with other materials or other liquids. After considering fermented rice flour, the Constitutional Court was of the opinion that fermented rice flour was not a spirit ingredient in itself. It was a material used generally, especially amongst people within various local communities, for many purposes, such as food and

medicine. For this reason, section 24 of the Spirits Act, B.E. 2493 (1950), which prohibited the production or sale of spirit ingredients which was defined in section 4 as including fermented rice flour, to the extent that it prohibited the production or sale of spirit ingredients only where it meant fermented rice flour, was a restriction of a person's liberty to engage in an enterprise or an occupation and undertake in fair and free competition. Such provision was disproportionate to necessity and affected the essential substance of the liberty under the provisions of the Constitution. The provision was not in accordance with the exception for restriction of liberty under section 50 paragraph two of the Constitution, explained above. Section 24, only where such definition was applied, was therefore contrary to or inconsistent with section 50 of the Constitution and thus unenforceable. Moreover, section 26 of the Spirits Act, B.E. 2493 (1950), which provided that a license issued under section 24 would only be valid in the places specified in the license, was a section consequential to section 24. Therefore, once it was ruled that section 24, to the extent that it prohibited the production or sale of spirit ingredients only in relation to inclusion of fermented rice flour, was contrary to or inconsistent with section 50 of the Constitution, it followed that section 26, in relation to the enforcement of a license under section 24 only with respect to the licensing application for the production or sale of fermented rice flour, was therefore also contrary to or inconsistent with section 50 of the Constitution and unenforceable. As a result, section 24 and section 26 of the Spirits Act, B.E. 2493 (1950), to the extent of their applicability to fermented rice flour, were contrary to or inconsistent with section 50 of the Constitution.

3. Ruling of the Constitutional Court

By virtue of the reasons stated above, the Constitutional Court held that section 24 and section 26 of the Spirits Act, B.E. 2493 (1950), only in relation to the definition of "spirit ingredients" that referred to "fermented rice flour", were contrary to or inconsistent with section 50 of the Constitution and unenforceable under section 6 of the Constitution.
