

Summary of Constitutional Court Ruling

No. 43/2547

Dated 1st June B.E. 2547 (2004)*

Re: Are section 38 quarter paragraph one of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 67 quarter paragraph one of the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), contrary to or inconsistent with section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

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1. Background and summarized facts

Bank Thai Thanakhan Public Company Limited, the plaintiff, filed claims against Mr. Supnet Kuslasaiyanont, the first defendant, Mrs. Jureerat Kuslasaiyanont, the second defendant, and Mr. Pichet Kuslasaiyanont, the third defendant, at the Nakhon Ratchasima Provincial Court for breach of loan agreement and mortgage foreclosure. The plaintiff sought a court order to enforce the payment of sums in the amount of 1,479,984.67 baht to the plaintiff with interest at the rate of 15 percent per annum of the principal amount of 956,655.04 baht accruing from the day following the date of case filing. All three defendants (the applicants) filed defences to the claims as well as an objection that the contract which assigned the assets and liabilities of First City Investment Finance Public Company Limited to Krungthai Thanakij Securities Public Company Limited and the contract which assigned the assets and liabilities of Krungthai Thanakij Securities Public Company Limited to the plaintiff by virtue of the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), and section 38 of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), were unlawful because those provisions of law relied on by the plaintiff were contrary to or inconsistent with the Constitution and therefore unenforceable under section 6 of the Constitution. It was contended that both Emergency Decrees relied on by the plaintiff were enactments of laws which restricted the rights and liberties of engaging in an occupation

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of the three defendants and First City Investment Finance Public Company Limited, being a case which did not fall within section 50 paragraph two of the Constitution. The applicants also stated that such problem had never been ruled by the Constitutional Court. Thus, it was requested that a referral be made to the Constitutional Court for a ruling under section 264 of the Constitution.

The Nakhon Ratchasima Provincial Court held that this was a case where the parties objected that provisions of law were contrary to or inconsistent with the Constitution and there had not yet been a ruling of the Constitutional Court on such provisions. A temporary stay was therefore imposed on the case and the three defendants' (applicants) opinion was referred to the Constitutional Court for a ruling.

2. Preliminary issue

The preliminary issue was whether or not the Constitutional Court could accept this application for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. In this case the applicants were defendants and they had submitted an application to the Nakhon Ratchasima Provincial Court objecting that section 38 quarter of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 67 quarter of the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), were contrary to or inconsistent with section 50 of the Constitution, being provisions that were going to be applied by the Nakhon Ratchasima Provincial Court to a case. Therefore, the Constitutional Court could accept this application for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

3. The issues considered by the Constitutional Court

The issues which had to be considered by the Constitutional Court were whether or not section 38 quarter paragraph one of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 67 quarter paragraph one of the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), were contrary to or inconsistent with section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 50 of the Constitution was a provision which was directed at protecting the liberty of engaging in an enterprise or an

occupation and of undertaking free and fair competition. The restriction of such liberty was not permitted. Nonetheless, there were exceptions for cases of restriction of liberties by virtue of provisions of law specifically enacted for the purpose of maintaining national and economic security, etc. After considering the provisions of section 3 bis of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 3 bis of the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), (No. 5), B.E. 2541 (1998), it was conceivable that both laws involved the restriction of the liberty to engage in an enterprise or an occupation enacted by virtue of section 50 paragraph two of the Constitution.

The provisions of section 38 quarter paragraph one of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), essentially dealt with the merger or transfer of businesses of a commercial bank in a case where there was an urgent necessity to do so in order to enhance the stability of the financial institution system. This was consistent with the intent behind the enactment of the law on commercial banking and was in accordance with section 50 paragraph two of the Constitution. As regards section 67 quarter paragraph one of the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), the essential substance dealt with mergers between finance companies and other financial institutions or the transfer of businesses to other financial institutions in the case where there was an urgent necessity to do so in order to remedy the status or operations of a financial institution. This was also consistent with the intent behind the enactment of the law on finance, securities and credit foncier businesses and was in accordance with section 50 paragraph two of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court, by a majority of 12 votes to 2 votes, held that section 38 quarter paragraph one of the Commercial Banking Act, B.E. 2505 (1962), as amended by the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962), (No. 4), B.E. 2541 (1998), and section 67 quarter paragraph one of the Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), as amended by the Emergency Decree on Finance, Securities and Credit Foncier Businesses Act, B.E. 2522 (1979), (No. 3), B.E. 2540 (1997), were neither contrary to nor inconsistent with section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
