

Summary of the Constitutional Court Ruling No. 64/2547

Dated 4th November B.E. 2547 (2004)*

Re: The Ombudsman requested the Constitutional Court for a ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), on whether or not section 90/17 paragraph two of the Bankruptcy Act, B.E. 2483 (1940), had a problem of unconstitutionality.

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1. Background and summarized facts

The Ombudsman (applicant) filed an application together with an opinion dated 3rd June B.E. 2546 (2003) requesting the Constitutional Court for a ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The facts in the application could be summarized as follows. The applicant received a letter from the Chairman of the Senate Committee for Finance, Banking and Financial Institutions regarding Mr. Prachai Leawpairat, chief executive officer of Thai Petrochemical Industries Public Company Limited, who complained that he had not received justice from the Bankruptcy Court's order to reorganize the business of Thai Petrochemical Industries Public Company Limited, the debtor. In addition, it was claimed that provisions of the Bankruptcy Act, B.E. 2483 (1940), which related to such matters were contrary to or inconsistent with the Constitution. The applicant considered the complaint and reached an opinion as regards section 90/17 that there was a problem on constitutionality. In other words, the intent behind enacting the Bankruptcy Act (No. 4), B.E. 2541 (1998), was to offer an opportunity to a juristic person debtor facing liquidity problems to receive assistance in reorganization so as to avoid bankruptcy. Once the businesses of the debtor had been revived, the creditors would have a chance to recover repayment of debts. However, if the debtor was to be bankrupt, such event would have detrimental consequences on the national economy. Also, the amendments were made to the Bankruptcy Act, B.E. 2483 (1940), in order to enable a financial institution or a private party which gave financial assistance to a debtor with the knowledge that the debtor was insolvent to have the right to recover repayments even in the event of the debtor's subsequent bankruptcy. Such law was therefore directed at remedying economic problems as well as promoting the continuation of the country's trade business. After considering the provisions of law in the case of filing a petition for reorganizing the business of a debtor which was only allowed at a time when the Bankruptcy Court had not yet ordered the absolute receivership of the debtor's assets, i.e. the Bankruptcy Court had not yet adjudged the debtor bankrupt, the

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debtor still retained ownership of his various properties. Yet, the process of appointing a planner under section 90/17 paragraph two of the Bankruptcy Act, B.E. 2483 (1940), which was achieved through a resolution of creditors constituting not less than two-thirds of the total debts owed to the creditors voting in such a resolution, provided that persons other than the debtor itself nominated the planner. The debtor was not given a sufficient opportunity for obtaining a planner from its own nomination. In practical effect, this meant that the debtor was deprived of an opportunity to propose its own plans to the creditors or the court for consideration. Moreover, in the process of appointing a planner under section 90/17, the creditors would tend to appoint a planner who would substantially be in favour of conferring benefits on the majority of creditors without giving significance to the revival of the debtor's business. Otherwise, this might also be a channel for the majority of creditors to apply the process under section 90/17 to terminate the reorganization process. Even though the provisions of law granted the court with another level of scrutiny power over whether or not to approve the planner, the creditor still had the right to make another selection of planner for the court's approval. At that stage, the law did not provide the court with the discretionary power to approve or disapprove of the creditors' selection as in the first case. Such provisions therefore affected the essential substance of a person's right in property and the liberty to engage in an enterprise or occupation and to undertake a fair and free competition under section 48 and section 50 in conjunction with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The applicant therefore referred this matter together with an opinion to the Constitutional Court for a ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

For the benefit of this trial, the Constitutional Court gave opportunities to relevant persons under this application to make statements of additional opinions. Those persons consisted of Mr. Prasit Patumarak, Third Vice-Chairman of the Senate Committee for Finance, Banking and Financial Institutions, Mr. Prachai Leawpairat and his associates, the Director-General of the Department of Legal Execution and plan administration committee for the reorganization of Thai Petrochemical Industries Public Company Limited.

2. Preliminary issue

The Constitutional Court issued an order to admit the application for proceedings and consideration under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

3. The issue considered by the Constitutional Court

The issue which had to be considered by the Constitutional Court was whether or not section 90/17 paragraph two of the Bankruptcy Act, B.E. 2483 (1940), which provided that "...but in the event that the debtor also nominates a planner, the planner nominated by the debtor shall be the planner except where there is a resolution of creditors constituting not less

than two-thirds of the total debts owed to the creditors voting on the resolution which selected another person to become the planner...” was contrary to or inconsistent with section 48 and section 50 in conjunction with section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court was of the opinion that section 48 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), conferred protection on the rights of a person in property, the restriction of which should be in accordance with provisions of law. Section 50 provided a recognition of the liberty to engage in an enterprise or an occupation and to undertake fair and free competition, the restriction of which was only allowed by virtue of provisions of law specifically enacted for a common benefit and to the extent of necessity, provided that the essential substances of the rights and liberties were not affected. A law enacted to restrict such rights and liberties must be generally applicable and not directed at any particular case or person in accordance with section 29. As regards the Bankruptcy Act, B.E. 2483 (1940), and its subsequent amendments, in the chapter on procedures for reorganization of the debtor’s business, the law contained an important principle which enabled a debtor that was a limited company or a public limited company or other juristic persons provided by law which was facing financial problems and was insolvent to receive financial assistance for a possible revival of the business. In the reorganization process, the law provided for the appointment of a planner to analyze the situation and problems pertaining to the business and to prepare a reorganization plan. Such plan would then be proposed to a meeting of creditors and the court for approval and thereafter put into effect in order to remedy the problems of the declining business so as to revive the business to its original state. Under the Bankruptcy Act, B.E. 2483 (1940), the fact that a debtor was insolvent was sufficient to entitle a creditor to petition for the debtor’s bankruptcy. Once a court ordered a receivership of the debtor’s assets, it followed that the debtor’s rights in property and the liberty to engage in an enterprise or occupation and to undertake fair and free competition would be restricted for the reasons of preventing the debtor from incurring more debts and consolidating the assets with a view to repaying the creditors. As regards, business reorganization, the law provided that a debtor must also be insolvent. Therefore, the rights of a debtor were not different from the case where the court ordered the absolute receivership of a debtor’s assets since once a court ordered reorganization of a business, the powers and duties of administering the business and assets of the debtors also terminated. Upon a court order to appoint a planner, the powers and duties of administering the business and assets of the debtor and all the rights of the debtor’s shareholders, except the right to receive dividends, would devolve to the planner. However, as a safeguard for the debtor’s business during the administration of the business by the planner, the law prohibited the planner from entering into any juristic acts or otherwise that would incur charges on the debtor’s assets pursuant to section 90/12(9) of the Bankruptcy Act, B.E. 2483 (1940).

Upon consideration of section 90/17 paragraph two of the Bankruptcy Act, B.E. 2483 (1940), the Constitutional Court held that such provisions tended to grant more rights to the debtors than the creditors. This was because the creditors needed a resolution comprising not

less than two-thirds of the total amount of debts owed to the creditors voting on the resolution before they were able to secure a person nominated by the creditors as the planner. In the event that the debtor was able to compromise with a certain section of the creditors, the result might be a failure of the creditor's meeting to secure a two-thirds resolution. Thus, the planner would be a person nominated by the debtor. Nonetheless, the law granted an opportunity for the creditors to select a planner because once a court admitted a reorganization petition for consideration; the law barred a bankruptcy petition against the debtor. Where a bankruptcy petition had already been filed, the proceedings would be stayed. Even a judgment creditor could not enforce the judgment on the debtor's assets. The objective was to enable the debtor's business to continue as a going concern and to have the creditors cooperate in the successful reorganization of the debtor's business in accordance with the legislative intent. This was especially true in the grant of financial assistance to the debtor for the benefit of business reorganization. The selection of a planner by a resolution of the creditors under section 90/17 paragraph two did not have the effect of immediately installing the selected person as a planner. The provisions of law, especially section 90/17 paragraph three, paragraph four and paragraph five, which provided that the court had discretionary power to appoint any person selected by a resolution of a meeting of the creditors as planner in accordance with the circumstances of the case, did not impose a mandatory rule on the court to appoint such persons selected by all resolutions of meetings of i.e. creditors. Moreover, the Bankruptcy Act, B.E. 2483 (1940), contained provisions which protected the debtor's businesses, i.e. they provided that the Minister of Justice had the power to issue a Ministerial Regulation on the Registration and Prescription of Qualifications for Planner and Plan Administrators, B.E. 2545 (2002); and the planner must be a person in the register of the Commission for Consideration of Planners and Plan Administrators whereby the planner must possess the qualifications and must not have the prohibitions provided in the Ministerial Regulation and the planner was obliged to provide security for indemnifying any damages arising from the performance of duties in the capacity of a planner to the Business Reorganisation Office, Legal Execution Department. Such legal rules had the objective of protecting the debtor's business from an attempt by the creditor-appointed planner to formulate plans that favoured the creditors' interests or takeover the debtor's business. Therefore, even though the appointment of a planner had an impact on the rights of a person in property under section 48 of the Constitution or resulted in a restriction of the liberty to engage in an enterprise or an occupation and to undertake fair and free competition under section 50 of the Constitution because the planner would be the person clothed with the powers and duties of administering the businesses and assets of the debtor and result in the termination of the powers and duties of the debtor's executives to administer the debtor's businesses and assets, this was necessary as a measure for insolvent debtors. Also, this would enable the planner to analyze the situation and problems pertaining to the business and formulate a business reorganization plan that could be administered to revive a declining business to its original state. This was a case provided for and authorized by the Constitution pursuant to section 48 paragraph one and section 50 paragraph two. The appointment of a planner in accordance with the rules set out in section 90/17 paragraph two, even if it would

restrict the debtor's rights and liberties, was a restriction imposed to the extent that was necessary and did not affect the essential substances of such rights and liberties. In addition, section 90/17 paragraph two was generally applicable and was not specifically directed at any particular case or person in accordance with section 29.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 90/17 paragraph two of the Bankruptcy Act, B.E. 2483 (1940), which provided that "...but in the event that the debtor also nominates a planner, the planner nominated by the debtor shall be the planner except where there is a resolution of creditors constituting not less than two-thirds of the total debts owed to the creditors voting on the resolution selecting another person to become the planner..." did not present any problems of constitutionality.
