

Summary of the Constitutional Court Ruling No. 33/2544

Dated 11th October B.E. 2544 (2001)*

Re : Are section 11, section 58 paragraph four and section 72 paragraph two subparagraph (2) of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

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1. Background and summarized facts

The Parliamentary Ombudsman sent a letter dated 16th July B.E. 2544 (2001) referring a matter together with an opinion to the Constitutional Court. In this case, Senator Mr. Sak Kosaengrueng and company, a total of 116 persons, requested for a consideration of the constitutionality of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) in the following cases:

1.1 In the case of section 58 paragraph four, it was provided that the Thai Asset Management Corporation (AMC) could submit an application to the Court for an order of absolute receivership of the debtor's and guarantor's assets, as the case might be, without having to proceed with an inquiry. Section 72 paragraph two subparagraph (2) provided that AMC could submit an application to the Court for a declaration of bankruptcy of the debtor and the guarantor and in which case the Court should immediately order the receivership of the debtor's and guarantor's assets without having to conduct an inquiry. Such provisions were amendments which prevented the Court's exercise of independent powers and provided for the AMC to exercise powers in lieu of the Court.

1.2 In the case of section 11, it was provided that the law on establishment of the Administrative Court and Administrative Court procedure would not apply to proceedings on the administration of low quality assets by the AMC under this Emergency Decree and the issue of rules or regulations, orders, rulings, license and other acts of the committee and the executive committee which were related to the management of low quality assets under this Emergency Decree were inconsistent with section 276 of the Constitution because they prevented the filing of claims and case proceedings at the Administrative Court and were cases which could not proceed in the Courts of Justice.

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The Parliamentary Ombudsman submitted the following opinion to the Constitutional Court:

(1) Section 58 paragraph four of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001), which empowered the AMC to proceed with the submission of an application to Court for the absolute receivership of the debtor's or guarantor's assets without having to conduct an inquiry, and section 72 paragraph two subparagraph (2) of the said Emergency Decree, which empowered the AMC to submit an application to the Court for a declaration of bankruptcy of the debtor and the guarantor and provided for the Court to immediately order the receivership of the debtor's and guarantor's assets without having to conduct an inquiry, resulted in an amendment or modification of the bankruptcy procedure specifically for its application to cases within the powers of the AMC. Such a case was contrary to or inconsistent with section 235 of the Constitution because the provisions allowed the AMC to exercise powers on behalf of the Court in the consideration of facts prior to a court order for the absolute receivership of the debtor's and guarantor's assets without an inquiry.

(2) Section 11 of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001), which provided the non-application of the law on establishment of Administrative Court and Administrative Court procedure to proceedings on low quality assets by the AMC and to the issue of rules or regulations, orders, rulings, licenses and other acts of the committee and executive committee in relation to the administration of low quality assets under this Emergency Decree, was contrary to or inconsistent with section 276 of the Constitution because it excluded the AMC from the jurisdiction of the Administrative Court even though the AMC was a State agency within the supervision of the Government.

The Parliamentary Ombudsman therefore requested the Constitutional Court to make a ruling under section 198 of the Constitution on whether or not section 11, section 58 paragraph four and section 72 paragraph two subparagraph (2) of the Emergency Decree on Thai Asset Management Cooperation, B.E. 2544 (2001) had problems on constitutionality.

2. Preliminary issue

The Constitutional Court received the application from the Parliamentary Ombudsman and reached a resolution to accept the application for consideration and ruling on 19th July B.E. 2544 (2001). In conjunction with the consideration of this case, the Constitutional Court received a statement of the Council of Ministers and heard statements from Mr. Sak Kosaengrueng, a senator, who was the applicant to the Parliamentary Ombudsman, as well as a statement of the Office of Fiscal Policy, the Ministry of Finance.

3. The issues considered by the Constitutional Court

The Constitutional Court ruled on the following two issues pursuant to the application of the Parliamentary Ombudsman:

First issue. Whether or not section 11 of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) had a problem on constitutionality.

The Constitutional Court held by 10 votes to 3 votes that section 11 of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) was neither contrary to nor inconsistent with section 276 of the Constitution because section 276 of the Constitution provided for the jurisdiction of the Administrative Court. As for the characteristics of disputes in detail which were stated as that which was provided by law, the words “as provided by law” other than referring to the Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999), which directly provided on the powers of the Administrative Court, also referred to other laws which provided for the powers of the Administrative Court. Section 9 of the Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) provided an exception that cases which were within the jurisdiction of the Juvenile and Family Court, the Labour Court, the Tax Court, the Intellectual Property and International Trade Court, the Bankruptcy Court or other specialized Courts were excluded from the jurisdiction of the Administrative Court. Therefore, when section 11 of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) provided for the non-application of the law on establishment of the Administrative Court and Administrative Court procedure to proceedings on low quality assets by the AMC under this Emergency Decree and to the issue of rules or regulations, orders, rulings, licenses and other acts of the committee and executive committee related to the administration of low quality assets under this Emergency Decree, such as a case where only claims made in relation to the administration of low quality assets by the AMC and cases on the issue of rules or regulations, orders, rulings, licenses and other acts of the committee and executive committee related to the administration of low quality assets were excluded from the jurisdiction of the Administrative Court. In addition, section 271 of the Constitution stated that “the Courts of Justice have the powers to try and adjudicate all cases except those specified by this Constitution or the law to be within the jurisdiction of other courts,” which meant that the Constitution or other provisions of law could provide that any type of case could be within the jurisdiction of any Court. If a type of case was provided as being within the jurisdiction of any Court, such a case would not be within the jurisdiction of the Courts of Justice. Or if a type of case was excluded from the jurisdiction of any Court, such a case would be within the jurisdiction of the Courts of Justice. The case of administration of low quality assets by the AMC and the acts of the committee and executive committee related to the administration of low quality assets were cases relating to disputes on assets. Such cases possessed the characteristics of civil cases or bankruptcy cases, which when excluded from the jurisdiction of the Administrative Court pursuant to section 9 of the Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) and section 11 of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001), such cases would be within the jurisdiction of the Courts of Justice pursuant to section 271 of the Constitution. Therefore, section 11 of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) was therefore neither contrary to nor

inconsistent with section 276 of the Constitution and did not have any problems on constitutionality.

Second issue. Whether or not section 58 paragraph four and section 72 paragraph two subparagraph (2) of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) had a problem on constitutionality.

The Constitutional Court held by 10 votes to 3 votes that section 58 paragraph four and section 72 paragraph two subparagraph (2) of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) were neither contrary to nor inconsistent with section 235 of the Constitution because section 235 of the Constitution provided for the prohibition of the enactment of a law having an effect of changing or amending the law on the organization of Courts or on judicial procedure for the purpose of its application to a particular case. In other words, the enactment of any law (1) if it resulted in the change or amendment of the law on organization of Courts or judicial procedure (2) for its application to a particular case was prohibited. Such a law, if enacted, would be contrary to or inconsistent with section 235 of the Constitution. In the case of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001), section 58 paragraph four provided that “if the debtor or the guarantor who is in a position to carry out proceedings does not cooperate with the AMC in the restructuring of debts as ordered by the AMC or disposes of or conceals his properties, the AMC shall proceed with the submission of an application to the Court for an order of absolute receivership of the debtor’s and guarantor’s assets, as the case may be, without having to conduct an inquiry, and the Court and official receiver shall forthwith proceed under the law on bankruptcy” and section 72 paragraph two subparagraph (2) provided that “in the case where the debtor does not consent to (1), the AMC shall proceed with the submission of an application to the Court for a declaration of bankruptcy of the debtor and the guarantor and the Court shall immediately order the absolute receivership of the debtor’s and guarantor’s assets without having to conduct an inquiry.” This could be deemed as resulting in a change or amendment to bankruptcy case procedures because it was provided that the Court should order the absolute receivership of the debtor’s and guarantor’s assets without conducting an inquiry whereas section 14 of the Bankruptcy Act, B.E. 2483 (1940) provided on bankruptcy case procedures that “in the consideration of a bankruptcy case under the application of the creditor, the Court shall search for the truth as provided in section 9 or section 10. If the Court has discovered the truth, the Court shall order the absolute receivership of the debtor’s and guarantor’s assets. On the other hand, if the truth was not discovered or the debtor could prove that he/she may be able to repay all debts, or there are other reasonable causes where the debtor should not be bankrupt, the Court shall dismiss the claims.” The result was a change or amendment to such bankruptcy case procedure which was applicable to all bankruptcy cases filed with the Court under the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001), not to any one particular case. Section 58 paragraph four and section 72 paragraph two subparagraph (2) of the Emergency Decree on Thai Asset Management Cooperation, B.E. 2544 (2001)

were therefore neither contrary to nor inconsistent with section 235 of the Constitution and there was no problem on constitutionality.

4. Ruling of the Constitutional Court

The Constitutional Court held unanimously that section 11 of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) was neither contrary to nor inconsistent with section 276 of the Constitution and section 58 paragraph four and section 72 paragraph two subparagraph (2) of the Emergency Decree on Thai Asset Management Corporation, B.E. 2544 (2001) were also neither contrary to nor inconsistent with section 235 of the Constitution and there was no problem on constitutionality.
