

Summary of the Constitutional Court Ruling No. 35-36/2544

Dated 30th October B.E. 2544 (2001)*

Re : Are the Bankruptcy Act (No. 4), B.E. 2541 (1998), which added Chapter 3/1 to the Bankruptcy Act, B.E. 2483 (1940) and section 90/46 and section 90/58 of the Bankruptcy Act, B.E. 2483 (1940) contrary to or inconsistent with section 26, section 29, section 30, section 48, section 252 and section 335 (1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) ?

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1. Background and summarized facts

The Central Bankruptcy Court referred the objection of creditors in bankruptcy cases (business rehabilitation), a total of two applications, objecting that section 90/46 and section 90/58 of the Bankruptcy Act, B.E. 2483 (1940) were contrary to or inconsistent with section 26, section 29, section 30, section 48 and section 252 of the Constitution because such provisions of law allowed creditors valued at more than fifty per cent, regardless of how few of them they may be, to reach a resolution to accept a business rehabilitation plan. This was considered an unjust discrimination against creditors of values less than fifty per cent but who formed the greater number. This also opened the opportunity for the business rehabilitation planner to treat the creditors at will, which might be dishonest or unjust. The Central Bankruptcy Court or the Supreme Court could not exercise their impartial discretion to grant relief as appropriate or in accordance with the circumstances of the case. This was an exercise of powers by an organ of the State without due regard to human dignity and was a restriction of rights in property to an extent which exceeded necessity or affected the essential substance of the creditors' rights in properties. Moreover, such provisions of law also rendered ineffective the oath given by judges of the Central Bankruptcy Court and the Supreme Court to the King prior to the taking of office because they were not able to perform their duties in such a way as to deliver justice to the people in accordance with such oaths. As for the Bankruptcy Act (No. 4), B.E. 2541 (1998), which added Chapter 3/1 to the Bankruptcy Act, B.E. 2483 (1940), such provisions were contrary to or inconsistent with section 29 paragraph two in conjunction with section 335 (1) of the Constitution because such Act which added Chapter 3/1 on procedures relating to the rehabilitation of the debtor's business did not state any provision of the Constitution which authorised the enactment of the law which restricted the rights and liberties of persons as recognized by the Constitution.

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The debtor who requested for business rehabilitation and the planner objected to the application of the applicant, stating that the application did not contain any essential substance worthy of consideration by the Constitutional Court.

2. Preliminary issue

2.1 The Constitutional Court held that the debtors in the bankruptcy cases (business rehabilitation) were the same company and some of the issues submitted by the creditors (applicants) were the same. The two applications were therefore considered together.

2.2 The Constitutional Court ordered that the applications be accepted for consideration under section 264 of the Constitution.

3. The issues considered by the Constitutional Court

The first issue considered was whether or not the Bankruptcy Act (No. 4), B.E. 2541 (1998), which added Chapter 3/1 to the Bankruptcy Act, B.E. 2483 (1940), was contrary to or inconsistent with section 29 paragraph two in conjunction with section 335 (1) of the Constitution.

The Constitutional Court held that the applicant's objection that the Bankruptcy Act (No. 4), B.E. 2541 (1998) did not state the provisions of the Constitution authorizing the enactment of such bankruptcy law was an objection that the Bankruptcy Act (No. 4), B.E. 2541 (1998) was unlawfully enacted under the provisions of the Constitution, which under section 264 of the Constitution, the applicant was not given the right to object on such an issue. The Constitutional Court therefore did not have to consider this issue.

The second issue considered was whether or not section 90/46 and section 90/58 of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 5), B.E. 2542 (1999) were contrary to or inconsistent with section 26, section 29, section 30, section 48 and section 252 of the Constitution.

The Constitutional Court held that section 90/46 and section 90/56 of the Bankruptcy Act, B.E. 2483 (1940) already provided for the protection of creditors of values less than fifty per cent. Although creditors whose debt value exceeded fifty per cent could reach a special resolution to accept the business rehabilitation plan, the law still empowered the Court to consider whether or not such a plan contained all the items prescribed by law. Any proposals for debt repayment should not cause the unequal treatment of creditors in the same class, and when the proceedings under the plan had been successfully completed, the creditors would be repaid in an amount of not less than in the case where the Court passed judgment declaring the debtor bankrupt. In addition, in the consideration of a plan, the Court

had the discretion to issue an order of approval or disapproval to such a plan. Moreover, in the enactment of the Bankruptcy Act (No. 5), B.E. 2542 (1999) to amend the Bankruptcy Act, B.E. 2483 (1940), the preamble of such Act guaranteed that there were certain provisions of the Act relating to the restriction of rights and liberties of persons, which section 29 in conjunction with section 36 and section 48 of the Constitution so permit. As a result, such provisions did not affect human dignity, did not unjustly discriminate a person and was a restriction of rights in property within the scope of the Constitution and did not affect the essential substance of the rights in property. As for section 252 of the Constitution which provided for the giving of oath to the King prior to the taking of office of a judge, which was not relevant to section 90/46 and section 90/58 of the Bankruptcy Act, B.E. 2483 (1940), it was not necessary to rule on whether or not such provisions were contrary to or inconsistent with section 252 of the Constitution.

4. Ruling of the Constitutional Court

4.1 Section 264 of the Constitution did not give the applicant the right to object that the Bankruptcy Act (No. 4), B.E. 2541 (1998) was unlawfully enacted under the Constitution.

4.2 Section 90/46 and section 90/58 of the Bankruptcy Act, B.E. 2483 (1940), as amended by the Bankruptcy Act (No. 5), B.E. 2542 (1999), were neither contrary to nor inconsistent with section 26, section 29, section 30 and section 48 of the Constitution.
