

Summary of the Constitutional Court Ruling No. 49/2545

Dated 12th September B.E. 2545 (2002)*

Re : Are section 38 septem 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 sex of the Finance, Securities and Credit Foncier Business 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. 5), B.E. 2541 (1998) contrary to or inconsistent with section 29 and section 30 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

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1. Background and summarized facts

Mr. Kritsadang Nutjaras, the applicant, was a defendant in a lawsuit filed against him by Nawathanakij Finance Securities Public Company Limited, the plaintiff, at the Bangkok South Civil Court in Case Decision No. Y. 1607/2540. The court passed judgment in accordance with a settlement agreement on 2nd July B.E. 2540 (1997). Thereafter, Thai Thanakarn Bank Public Limited Company filed an application dated 28th February B.E. 2543 (2000) with the Bangkok South Civil Court requesting for the permission to substitute the plaintiff as a party to the case. It was argued that on 22nd December B.E. 2541 (1998), the Ministry of Finance had issued a Notification Re: Merger of businesses between Saha Thanakan Bank Public Limited Company and Krung Thai Thanakij Finance Securities Public Limited Company with 12 other finance companies which transferred all assets and liabilities in 12 finance companies to Krung Thai Thanakij Finance Securities Public Limited Company and Saha Thanakan Bank Public Limited Company. The plaintiff was one of the 12 finance companies. When the plaintiff's business was merged into Saha Thanakan Bank (thereafter renamed as Thai Thanakarn Bank Public Limited Company) pursuant to the already mentioned Notification of the Ministry of Finance, all assets and liabilities in the plaintiff were transferred to Thai Thanakarn Bank, including the applicant's debts owed to the plaintiff. The effect of the transfer of business from the plaintiff was to give to Thai Thanakarn Bank, the transferee, the power to substitute the plaintiff in this case pursuant to section 38 septem 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 sex of the Finance, Securities and Credit Foncier Business Act, B.E. 2522

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(1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979) (No. 5), B.E. 2541 (1998). Thai Thanakarn Bank therefore applied for the court's permission to substitute the plaintiff as party to the case and amend the name of the plaintiff in the case to Thai Thanakarn Bank Public Company Limited.

The applicant filed a total of 2 motions to the Bangkok South Civil Court, dated 18th May B.E. 2543 (2000) and 7th August B.E. 2543 (2000), objecting to Thai Thanakarn Bank's application to substitute the plaintiff in the case. It was counter-argued that the provisions in the two Emergency Decrees referred to by Thai Thanakarn Bank were inconsistent with section 29 paragraph one of the Constitution because the provisions conferred rights to the transferee of businesses to participate in an existing case at its convenience, such as by adducing new evidence to refute evidence which had already been submitted, cross-examining witnesses who had already been examined and refuting evidence which had already been taken. This also included the immediate right to substitute the plaintiff as judgment-creditor without having to comply with any of the stages under the Civil Procedure Code and the Civil and Commercial Code, which took advantage of and took away the rights and liberties of the other party inconsistent with section 29 paragraph two of the Constitution because the law was intended to apply to a specific case. In other words, such Emergency Decrees had specifically been enacted for application to the case of the Ministry of Finance's merger of 12 finance companies with Krung Thai Thanakij Finance and Securities Public Company Limited and Saha Thanakan Bank Public Company Limited and not for general application. The Emergency Decrees were also inconsistent with section 30 paragraph one because they caused an inequality in the protection under the law that was accorded to individuals. In other words, such provision resulted in the transferee of business being at an advantage in the case proceedings due to the immediate ability to become a party to the case without having to comply with the procedural stages under the Civil Procedure Code. A request was therefore made for the court to dismiss Thai Thanakarn Bank's application to substitute the plaintiff as party to the case and to impose a temporary stay on this case and refer the applicant's opinion to the Constitutional Court for consideration.

The Bangkok South Civil Court referred the objections of the applicant (Mr. Kritsadang Nutjaras), the defendant in Case Decision No. Y. 1607/2540, requesting that the Constitutional Court make a ruling under section 264 of the Constitution.

2. Preliminary issue

Could the Constitutional Court accept the application for consideration under section 264 of the Constitution?

The Constitutional Court held that this was a case where the applicant, the defendant in a case, objected that provisions of law which were to be applied by a court to the case were contrary to or inconsistent with the Constitution, and there had not yet been a ruling of the Constitutional Court relevant to such provisions. Therefore, when the Bangkok South Civil

Court referred the applicant's objections to the Constitutional Court, the Constitutional Court accepted the application for consideration under section 264 of the Constitution.

3. The issues considered by the Constitutional Court

The issue to be considered was whether or not section 38 septem 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 sex of the Finance, Securities and Credit Foncier Act, B.E. 2522 (1979), as amended by the Emergency Decree Amending the Finance, Securities and Credit Foncier Act, B.E. 2522 (1979) (No. 5), B.E. 2541 (1998), were contrary to or inconsistent with section 29 and section 30 paragraph one of the Constitution.

The Constitutional Court held the following opinion. Section 29 of the Constitution was a provision which guaranteed the stability of rights and liberties. The restriction of rights and liberties as recognized by the Constitution could not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by the Constitution and only to the extent of necessity and provided that it should not affect the essential substances of such rights and liberties. Section 30 was a provision which guaranteed equality. For the purposes of protecting the rights and liberties of the Thai people, the provision guaranteed that all persons were equal before the law and should enjoy equal protection under the law.

The reasons for the enactment of the Emergency Decree Amending the Commercial Banking Act, B.E. 2505 (1962) (No. 4), B.E. 2541 (1998), which added section 38 septem to the Commercial Banking Act, B.E. 2505 (1962), were stated that there was a necessity to have a law to remedy problems on the standing and operations of commercial banks and engender stability and strength. Commercial banks were given the ability to effect business mergers amongst themselves or with other financial institutions, or transfer businesses between themselves or other financial institutions. Owing that this was a case of emergency which was an unavoidable necessary urgency to preserve the stability of the national economy, it was necessary to enact the Emergency Decree. Therefore, section 38 septem of the Commercial Banking Act, B.E. 2505 (1962) provided principles for the case where commercial banks merged businesses with each other or with other financial institutions or where there was a transfer of business from one commercial bank to other commercial banks or financial institutions and there was a lawsuit in court to enforce the claim rights. In such a case, the merged commercial bank or financial institution or transferee of businesses had the right to substitute the party to the case. In that regard, new evidence could be adduced to refute submitted documents. Witnesses whose testimony has been taken could be crossed examined. Evidence that had been taken could also be objected to. Moreover, where the court had passed judgment to enforce such claim right, there was also the right to substitute as the judgment-creditor. This was beneficial for the economy and finance of the country.

As for the Emergency Decree Amending the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979) (No. 5), B.E. 2541 (1998), which added section 67 sex to the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979), the reason for enactment was that because amendments had been made to the law on commercial banks in order to enable commercial banks to effect business mergers or transfers expediently as part of the solution to the economic crisis which had occurred and at the same time, finance, securities and credit foncier businesses were also able to effect business mergers and transfers, it was therefore necessary to amend the provisions on such matter in the same manner as the amendments made to the law on commercial banks in order that there be consistency in the business mergers or transfers between commercial banks and financial institutions under the two laws. Owing that this was a case of emergency which was an unavoidable necessary urgency to preserve the stability of the national economy, it was necessary to enact the Emergency Decree. Hence, the provision in section 67 sex of the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979) on the cases of business mergers or transfers between finance or credit foncier companies with or to a financial institution where a lawsuit had been filed in court to enforce claim rights, in which the merged or transferee financial institution had the right to substitute the party to the case and adduce new evidence to object to submitted documents, cross-examine witnesses whose testimony had been taken, object to evidence which had been taken as well as to substituted as a judgment-creditor in the case where the court had passed judgment to enforce the claim right, was for the benefit of the economy and finance of the country.

Section 38 septem of the Commercial Banking Act, B.E. 2505 (1962) and section 67 sex of the Finance, Securities and Credit Foncier Business Act, B.E. 2522 (1979) were provisions applicable to all creditors and debtors. Under the principles and practical procedures provided by those two sections, the merged or transferee commercial bank or financial institution was given the opportunity to substitute as a party to a case as provided by law. There was no relevance to the factual investigations from its beginning. There was the ability to refute submitted documents, cross-examine witnesses whose testimony had been taken and object to evidence that had been taken because these were the rights of a right holder under the law as a substitute of the original parties. Such granting of rights to the creditor did not restrict the rights and liberties of the debtors or affected the essential substance of the rights and liberties recognized by the Constitution because the debtors still retained the right to raise any defence under section 308 paragraph two of the Civil and Commercial Code as well as retained the right to fight the case in court under the Civil Procedure Code. The only difference was that repayment of debts under the judgment had changed to repayment to the substituted creditor instead of the original creditor because the debts had been transferred by law.

4. Ruling of the Constitutional Court

The Constitutional Court, by 14 Constitutional Court judges, held that section 38 septem 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 sex of the Finance, Securities and Credit Foncier Business 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. 5), B.E. 2541 (1998), were neither contrary to nor inconsistent with section 29 and section 30 paragraph one of the Constitution.

One Constitutional Court judge considered that section 38 septem and section 67 sex above contained provisions in some parts which were contrary to or inconsistent with section 30 paragraph one of the Constitution.
