

Summary of the Constitutional Court Ruling No. 63/2548

Dated 29th December B.E. 2548 (2005)*

Re: Whether or not section 8 and section 10 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) were contrary to or inconsistent with section 4, section 26, section 29, section 30 paragraph one, section 33 and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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1. Background and summarized facts

The facts in the application could be summarized as follows. The State Attorney, Office of the Attorney-General, plaintiff, filed a lawsuit against Blischer Intergroup Company Limited, the first defendant, and 10 other persons at the Civil Court requesting for a bankruptcy judgment. The case was later transferred to the Central Bankruptcy Court as bankruptcy case no. L. 22/2543. The plaintiff stated that the plaintiff had considered the facts and official evidence obtained through investigations of the investigation officer, Economic Crime Division, Police Department, instigated by a petition of the Minister of Finance and complaints of Mr. Tawach Kuna-ek and 124 other persons under the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984), whereby it was found that between 18th July B.E. 2534 (1991) and 11th February B.E. 2537 (1994), the ten defendants jointly and regularly undertook the business of borrowing sums in defraudment of the public and jointly undertook to defraud the public by mass media advertising to the effect that the first defendant carried out the business of providing free holiday services to members for a duration of 4 days and 4 nights per year, and free holiday accommodation and exercise venues throughout the year. Services were offered exclusively to members, there being two member categories. The first category of members must pay a subscription fee of 30,000 baht per year and maintenance or membership extension fee in the amount of 2,500 baht per year. The second category of members must pay a subscription fee of 60,000 baht per year and maintenance or membership extension fee of 4,500 baht per year. It was advertised that the first defendant would give a return at a higher rate than the highest rate of interest payable by any financial institution under the law on loan interests of financial institutions. The ten defendants, however, never intended to undertake such a business. On the contrary, the real intention was to obtain the new membership subscription fees of 30,000 baht and 60,000 baht per person. In this case, 24,129 members of the public had

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subscribed as members and paid sums to the first defendant in a total of 727,440,000 baht. Such acts of the ten defendants amounted to an offence of obtaining loans in defraudment of the public under section 4 and section 5 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) as amended. The defendants were under an obligation to return such sums to the members of the public who were victims, which was an ascertainable amount of debt. An investigation into the assets and liabilities of the ten defendants had already been undertaken and it was revealed that the existing assets of the ten defendants were not sufficient to repay the debts. As a result, the ten defendants were insolvent and liable for definite sums. Thus, by virtue of section 10 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984), the plaintiff filed bankruptcy proceedings against the ten defendants in which the Central Bankruptcy Court gave an order of absolute receivership of the assets of all ten debtors.

The first and third defendants appealed the Central Bankruptcy Court's order and filed a motion at the Court of Appeals objecting that section 8 and section 10 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) were contrary to or inconsistent with section 4, section 26, section 29, section 30 paragraph one, section 33 and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). It was thereby requested that the Court of Appeals refer the application to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

2. Preliminary issue

The preliminary issue considered by the Constitutional court was whether or not the Constitutional Court had the power to accept the application for consideration under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held that the application was an objection that section 8 and section 10 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) were contrary to or inconsistent with section 4, section 26, section 29, section 30 paragraph one, section 33 and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which the Court of Appeals referred to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Constitutional Court could therefore accept the application for consideration.

3. The issues considered by the Constitutional Court

The issues considered by the Constitutional Court were whether or not section 8 and section 10 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) were contrary to or inconsistent with section 4, section 26, section 29, section 30 paragraph one, section 33 and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

Section 8 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) was a provision intended to protect the interests of the people who acted as lenders by preventing the borrowers from disposing of or hiding properties by various means. Even though measures were provided for proceedings before any conviction by the court, any seizures or attachments carried out by a competent official had to be supported by facts comprising the condition precedents for the exercise of powers provided by law. In other words, borrowers must be suspected of having committed an offence under section 4 or section 5 and were insolvent or had insufficient assets to repay debts whereby such state of being insolvent or having insufficient assets to repay debts logically had an impact on the borrowers who faced the risk of not getting a return of the defrauded property. Therefore, in order to protect the interest of the public who were lenders, the law had empowered a competent official to carry out preemptive seizures and attachments of such person's properties in order to obtain security for the return of defrauded properties to the lenders. Nevertheless, the competent official must first obtained the authorization of the Minister of Finance in order to exercise such powers, which was a means of conducting prior scrutiny over the exercise of powers by the highest authority in charge of such law. In addition, the law also provided that after the seizure or attachment of any person's assets, the competent official should refer the matter to a State Attorney for further bankruptcy proceedings. As such, this was a case where the law had provided for another layer of control by the Courts of Justice over the exercise of powers by competent officials pursuant to section 8. In sum, the law provided procedures for the exercise of powers to seize or attach properties of the borrower suspected of having committed an offence under the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) where were reasonable and fair to the borrower.

Section 10 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) was a provision which empowered the State Attorney to initiate bankruptcy proceedings against a person suspected of having committed an offence under section 4 or section 5 when the following criteria were met: (1) being insolvent or having insufficient assets for the repayment of debts; (2) being indebted to one or more lenders in a total amount of not less than one hundred thousand baht; and (3) the amount of debt was definitely ascertainable regardless of whether the debt was immediately repayable or due at a later date. Thus, the provisions of law were intended for bankruptcy proceedings against all borrowers suspected of having committed an offence under the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) on an equal basis. The reason for stipulating proceedings under the law on bankruptcy in the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) was because the law on bankruptcy had provided procedures for amassing the debtor's assets for the benefit of the creditors, regardless of whether or not the creditor was a plaintiff to the proceedings. Creditors could file an application for debt repayment to the receiver after a court order of absolute receivership and the receiver would manage the activities and properties of the debtor so as to prevent the debtor from any undertakings in relation to the activities or properties that may result in having insufficient assets for the repayment of debts to the creditors. The receiver would then allocate the

properties to the creditors after debtor was adjudged bankrupt by the court. These procedures were expedient and fair to the creditors and resulted in the return of property to creditors on an equal basis. Moreover, during the bankruptcy proceedings, the court must find facts under section 10 paragraph one before an absolute receivership could be ordered. In other words, the court must find facts that the borrower was insolvent or had insufficient assets to repay debts, indebted to one or more lenders in an amount of not less than one hundred thousand baht and the amount of debt was definitely ascertainable regardless of whether the debt was payable immediately or due at a later date. In addition, the court must also find that such person was a borrower suspected of having committed an offence under section 4 or section 5. Such provisions therefore provided for the court to exercise scrutiny over the exercise of powers by the competent officials under the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) prior to giving an order of absolute receivership.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 8 and section 10 of the Emergency Decree on Loans in Defraudment of the Public B.E. 2527 (1984) were neither contrary to nor inconsistent with section 4, section 26, section 29, section 30 paragraph one, section 33 and section 48 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
