

# **Summary of Constitutional Court Ruling No. 21-23/2551**

**Dated 26<sup>th</sup> December B.E. 2551 (2008)\***

**Re: Whether or not section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).**

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## **1. Summary of background and facts**

The Courts of Justice referred the application of Mrs. Rewadee Angkawatanakrawee, Mrs. Rakchanok Ratanapan and Gally White Korat Company Limited, a total of 3 applicants, to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) in the case of whether or not section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 272 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

1.1 In the application of Mrs. Rewadee Angkawatanakrawee, the third defendant in a civil case in the Lampang Provincial Court, the facts could be summarized as follows. The court had ordered the legal execution officer, Lampang Provincial Office of Legal Execution, to carry out the market sale of land and buildings of the third defendant in a market sale on 6<sup>th</sup> May B.E. 2548 (2005). Miss Yanisara Angkawatanakrawee made the highest bid of 3,000,000 baht but such bidder failed to deposit monies for the remaining sale price within the prescribed period. The legal execution officer therefore carried out another market sale of the land and buildings on 21<sup>st</sup> October B.E. 2548 (2005). In this market sale, there was a bid in the amount of 1,200,000 baht, which was a lower price than the previous market sale. The legal execution officer therefore suspended the market sale. Thereafter, in a market sale on 4<sup>th</sup> November B.E. 2548 (2005), there was a bidder in the amount of 1,350,000 baht, but the defendant protested such market sale price since the market sale on 6<sup>th</sup> May B.E. 2548 (2005) was made at the price of 3,000,000 baht, which was a higher price than the market sale on this occasion. The legal execution officer, however, found that the highest bid price was already an appropriate sale price, and therefore ordered the sale of assets at such price.

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The third defendant filed an application dated 24<sup>th</sup> November B.E. 2548 (2005) at the Lampang Provincial Court in request of the revocation of market sales and a referral of the defendant's objection by the court to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) that the provisions of section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 2, section 4, section 26, section 27, section 28, section 30 and section 272 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), since section 309 bis of the Civil Procedure Code, which provided for the right of interested parties to protest the price in a market sale of assets on only one occasion, was a restriction of rights in order to expedite the legal execution, being beneficial to the judgment creditor, especially commercial banks who were in the minority receiving such benefits.

1.2 In the application of Mrs. Rakchanok Ratanapan, defendant in a civil case in Prae Provincial Court, the facts could be summarized as follows. The court had ordered the legal execution officer, Prae Provincial Office of Legal Execution, to carry out the market sale of land and buildings of the defendant, a total of 2 plots, in the market sale on 14<sup>th</sup> March B.E. 2549 (2006). There was a bid for the land and structures in the first plot in the amount of 350,000 baht, but the market sale price was protested by the defendant. Subsequently, in the market sale on 28<sup>th</sup> March B.E. 2549 (2006), the legal execution officer found that the highest bid was an appropriate sale price, and that there had already been a price protest in the previous sale, thus an order was made to sell the land and structures in the first plot at the price of 350,000 baht to the highest bidder in the previous market sale who was bound by the offered price. The sale of land and buildings in the second plot was also ordered at the price of 2,650,000 baht to the bidder without a hearing of the defendant's protest.

The defendant filed an application dated 30<sup>th</sup> March B.E. 2549 (2006) at the Prae Provincial Court in request of the revocation of market sale and a referral of the defendant's objection by the court to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) that the provisions of section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 272 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), since the opinion was held that the provisions of section 309 bis paragraph one of the Civil Procedure Code, which provided for the right of an interested party to protest the price in the market sale of an asset which was deemed as too low on only one occasion, and paragraph four provided that the party whose application was dismissed did not have the right to file an appeal to the Court of Appeals or the Supreme Court, were restrictions of rights in order to expedite legal execution for the benefit of judgment creditors, especially commercial banks who were in the minority receiving such benefits.

1.3 In the application of Gally White Korat Company Limited, the first defendant, and Mr. Kriengkrai Serimanakij, the second defendant, in a civil case at Nakhorn Ratchasima Provincial Court, the facts could be summarized as follows. The court had ordered the legal execution officer, Nakhorn Ratchasima Provincial Office of Legal Execution, to carry out the

market sale of land and buildings of the first defendant, deed number 11156, Meunwai (Ban Koh) Sub-District, Muang District, Nakhorn Ratchasima Province, a total of 1 plot. In the market sale on 4<sup>th</sup> April B.E. 2549 (2006), the highest bid made was for the amount of 80,000,000 baht. The defendant had protested the market sale price. Subsequently, in the market sale on 25<sup>th</sup> April B.E. 2549 (2006), there was a bid for the price of 120,000,000 baht. The legal execution officer found that the price exceeded the market sale price on the previous occasion and therefore ordered the sale of assets at such price.

The defendant filed an application dated 4<sup>th</sup> May B.E. 2549 (2006) at the Nakhorn Ratchasima Provincial Court in request of the revocation of the market sale and referral of the defendant's objection by the court to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) that the provisions of section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 2, section 4, section 26, section 27, section 28, section 30 and section 272 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), since it was found that the provisions of section 309 bis paragraph one and paragraph four, which provided for the rights of the interested party to protest a market sale price that was too low on only one occasion, was a restriction of rights in order to expedite the legal execution of a case for the benefit of judgment creditors, especially commercial banks who were in the minority receiving such benefits.

Since in all three applications, each of the applicants had objected that section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 272 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which were in the same group of sections, the Constitutional Court therefore ordered on 23<sup>rd</sup> December B.E. 2551 (2008) to consolidate all three applications into one trial.

## **2. Preliminary issue**

The preliminary issue was whether or not the Constitutional Court had the power to admit these applications for ruling.

The Constitutional Court found that the first application had been admitted for consideration and was pending trial by the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The second and third applications were admitted for consideration and pending trial by the Constitutional Tribunal under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006). In this regard, section 35 paragraph one of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) provided that all matters provided by law as powers of the Constitutional Court or when an issue arose as to whether a law was inconsistent with the Constitution would be within the powers of the Constitutional Tribunal, and paragraph five provided that all cases or matters pending proceedings in the Constitutional Court prior to 19<sup>th</sup> September B.E. 2549 (2006) would be

transferred to the powers and responsibilities of the Constitutional Tribunal. Subsequently, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was promulgated on 24<sup>th</sup> August B.E. 2550 (2007) to replace the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) wherein section 300 paragraph one provided that the Constitutional Tribunal under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) would become the Constitutional Court, and paragraph three provided that the provisions of section 35 paragraph two, paragraph three and paragraph four of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) would continue to be in force until the enactment of the Organic Act on Constitutional Court Procedures. In addition, section 35 paragraph four provided that all cases or matters pending proceedings by the Constitutional Tribunal would be continued by the Constitutional Court, and upon the appointment of Constitutional Court judges, all such cases or matters pending proceedings would be transferred to the powers and duties of the newly appointed Constitutional Court. As a result, the Constitutional Court had the power to rule upon all three applications.

### **3. Issues considered by the Constitutional Court**

The Constitutional Court found that at the time of trial of all three applications, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) had already been promulgated. The constitutionality review of any provision of law had to be considered in the context of whether such provision of law was contrary to or inconsistent with the Constitution in force at the time of ruling by the Constitutional Court. As the provisions of section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 272 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) invoked by the applicant in asserting contrariness or inconsistencies of the provisions of law contained identical principles to the provisions in section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), these applications were therefore considered pursuant to section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The issue which had to be ruled upon by the Constitutional Court was therefore whether or not section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court made the following findings. Section 309 bis of the Civil Procedure Code was last amended by the Act Amending the Civil Procedure Code (No. 21) B.E. 2547 (2004). Section 309 bis paragraph one provided that the highest bidder in a market sale was bound by the bid price for a period of thirty days as from the bidding date, and where there was a protest in a market sale that the sale price was unreasonably low, in the subsequent sale, if the highest bid was not higher than the highest bid price in the previous market sale,

or no bids were made, the legal execution officer should execute the sale to the highest bidder in the previous market sale of assets. However, if the highest bid in the subsequent market sale of assets was higher than the highest bid in the previous market sale of assets, the legal execution officer should execute the sale to such highest bidder in the market sale of assets, without providing an opportunity for the judgment creditor, judgment debtor or interested persons in the enforcement of judgment to file another protest on the price of market sale. Moreover, section 309 bis paragraph four was also amended by providing that a case on a motion for the revocation of a market sale by reason that a market sale price that was unreasonably low due to a conspiracy amongst interested persons in making bids or due to dishonesty or gross negligence of a legal execution officer would be final in the court of first instance, whereas previously an appeal to the order could be made to the Court of Appeals. The reason for such amendment was stated as follows: “whereas the provisions of the Civil Procedure Code in relation to the suspension of enforcement of judgment with respect to the judgment creditor and the market sale of assets of the judgment debtor by the legal execution officer that is currently in force remained unclear in certain respects, therefore it was expedient to amend the provisions in order to carry out the enforcement of judgments in a just manner by safeguarding the rights of third parties interested in the enforcement of judgment as well as to enable the efficient and expeditious market sale of the judgment debtor’s assets that is fair to the buyer of assets in the market sale and in pursuance of the spirits of the Civil and Commercial Code on market sale.”

On the issue of whether or not section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 2, section 4, section 6, section 26, section 27, section 28 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court held as follows.

Section 309 bis paragraph one of the Civil Procedure Code was a provision which laid down principles on the market sale of a judgment debtor’s assets in order to enable the market sale of a judgment debtor’s assets to proceed in an expeditious and just manner for all parties concerned. In the first market sale, it was provided that the legal execution officer had to postpone the market sale in the event that the judgment creditor, judgment debtor or person interested in the enforcement of judgment filed a protest that the highest bid made in the market sale of the judgment debtor’s assets was unreasonably low so as to provide an opportunity for the judgment creditor, judgment debtor or persons interested in the enforcement of judgment, whether or not such person was the protester, to find a buyer who would make a bid at the required price in the subsequent market sale. In such a case, the highest bidder would be bound by his/her bid for a period of thirty days as from the bidding date. In the subsequent market sale of assets, if there was no higher bidder than the highest bid in the previous market sale, or no bid was made, the legal execution officer would execute the sale to the highest bidder in the previous market sale. However, if the highest bid in the subsequent market sale of assets was higher than the highest bid in the previous market sale, the legal execution officer would execute the sale to the highest bidder in such market sale of assets.

According such provisions, even though in the subsequent market sale of assets of a judgment debtor, no opportunity was given to the judgment creditor, judgment debtor or person interested in the enforcement of judgment to protest the price as being unreasonably low, nevertheless such provisions were enacted in order to enable the market sale of judgment debtor's assets to proceed in an efficient, expeditious and just manner for the buyer of assets in the market sale. Otherwise, if another opportunity was given to protest the price, such a protest might be made on every occasion, preventing the market sale of judgment debtor's assets from being successfully completed, which was not fair on the *bona fide* purchaser of assets in the market sale. At the same time, upon a consideration of the provisions on the protester of the price, such provisions had already given an opportunity to the protester of the price to file a protest of the price and find a buyer who would offer the required price in the first market sale, and if the market sale conducted by the legal execution officer resulted from the conspiracy of persons interested in the auction, or from the dishonesty or gross negligence of the legal execution officer in the performance of functions, the protester could still file a motion at court in request of an order to revoke the market sale pursuant to section 309 bis paragraph two of the Civil Procedure Code. Even though such provisions constituted a restriction of certain rights of the protester of the price in the market sale, the restriction was only imposed on a person's right in property pursuant to the provisions of law which were generally applicable and only to the extent of necessity in fairness to all related parties on an equal basis without prejudicing the essential substance of the rights and liberties under the provisions of section 29 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Section 309 bis paragraph one of the Civil Procedure Code was therefore neither contrary to nor inconsistent with section 2, section 4, section 6, section 26, section 27, section 28 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

As for section 309 bis paragraph four of the Civil Procedure Code, which introduced the amendment that "an order of the court under paragraph two shall be final" in place of the prior provision that "an order of the court under paragraph two shall be appealable to the Court of Appeals and a judgment or order of the Court of Appeals shall be final," it was found that even though section 309 bis paragraph four of the Civil Procedure Code, as amended, was a restriction of a party's right to appeal a judgment or order of the court of first instance to the Court of Appeals, such restriction of rights was intended to enable a case of a motion for revocation of market sale of a judgment debtor's assets under section 309 bis paragraph two to proceed in an expeditious and just manner for all parties concerned on an equal basis without prejudicing the essential substance of the rights and liberties. Section 309 bis paragraph four of the Civil Procedure Code was therefore neither contrary to nor inconsistent with section 2, section 4, section 6, section 26, section 27, section 28 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

On the issues of whether or not section 309 bis paragraph one and paragraph four of the Civil Procedure Code were contrary to or inconsistent with section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court held as follows.



Section 309 bis paragraph one of the Civil Procedure Code was a provision which laid down the principles on the market sale of judgment debtor's assets. None of the provisions were directly related to the trial and adjudication carried out by the Courts of Justice under section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The only issue which remained was therefore whether or not section 309 bis paragraph four of the Civil Procedure Code was contrary to or inconsistent with section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Section 219 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was a provision which laid down the general principle on the trial and adjudication of cases by the Courts of Justice whereby proceedings were carried out according to the hierarchy of the court, i.e. the court of first instance, Court of Appeals and Supreme Court. The provision did not guarantee the right of a party to trial in all three levels of the Courts of Justice. This was evident in the final provisions of section 219 paragraph one of the Constitution which provided that "except as provided otherwise by this Constitution or other laws." In other words, the law could provide for a special jurisdiction of a court or that the trial of a case be final in any court. Section 309 bis paragraph four of the Civil Procedure Code, therefore, was neither contrary to nor inconsistent with section 219 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

As for section 219 paragraph two, paragraph three, paragraph four and paragraph five, such provisions referred to the powers and duties of the Supreme Court in the trial and adjudication of cases, which was not relevant to the issues in this application. A ruling was therefore not required for those provisions.

#### **4. Ruling of the Constitutional Court**

By virtue of the foregoing reasons, the Constitutional Court held that section 309 bis paragraph one and paragraph four of the Civil Procedure Code were neither contrary to nor inconsistent with section 2, section 4, section 6, section 26, section 27, section 28, section 30 and section 219 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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