

# Summary of Constitutional Court Ruling No. 24-25/2551

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

**Re: Whether or not section 309 bis paragraph one of the Civil Procedure Code was contrary to or inconsistent with section 6, section 29, and section 41 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 applications of Mr. Bunchai Wasunthara and Mr. Pasit, or Pornchai, Dejgulgornsiri, or Gulgornsiri, made pursuant to section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) in conjunction with section 35 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), a total of 2 applications, in the case of whether or not section 309 bis paragraph one of the Civil Procedure Code was contrary to or inconsistent with section 6, section 29 and section 48 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

1.1 In the application of Mr. Bunchai Wasunthara, the first defendant in a civil case at the Chachoengsao Provincial Court, the facts could be summarized as follows. The Court had ordered the legal execution officer, Chachoengsao Provincial Office of Legal Execution, to conduct the market sale of 2 plots of land owned by the first defendant. The legal execution officer had appraised the value of the land at the time of seizure at 900,000 baht. In the market sale on 5<sup>th</sup> April B.E. 2549 (2006), there was a bid for 460,000 baht but the plaintiff protested that such price was unreasonably low and that the sale should be transacted at 630,000 baht. The legal execution officer therefore postponed the market sale and directed the highest bidder to enter into a contract to be bound by such bid price for a period of 30 days as from the bid date. Subsequently, in the market sale on 26<sup>th</sup> April B.E. 2549 (2006), the plaintiff offered the highest bid in the amount of 470,000 baht. The legal execution officer found that such bid represented an appropriate price and therefore ordered the sale of the assets at such price.

The first defendant filed a motion dated 9<sup>th</sup> May B.E. 2549 (2006) at the Chachoengsao Provincial Court in request of the revocation of the market sale and filed a statement dated 31<sup>st</sup> July B.E. 2549 (2006) requesting the Chachoengsao Provincial Court to refer the

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first defendant's objection to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) as follows. It was asserted that in the market sale on 26<sup>th</sup> April B.E. 2549 (2006), the plaintiff in his capacity as the creditor had offered a bid at 470,000 baht, which was higher than the bidder in the previous market sale by only 10,000 baht. The first defendant had protested the price as being too low but the legal execution officer dismissed the protest, claiming that a protest had already been made in the market sale on 5<sup>th</sup> April B.E. 2549 (2006). The assets were therefore sold to the plaintiff at the price of 470,000 baht, which was lower than the appraisal value almost by one-half, and lower than the price previously protested by the plaintiff by 160,000 baht. This was a result of section 309 bis paragraph one of the Civil Procedure Code which gave the legal execution officer an opportunity to execute the sale of judgment debtor's assets if in the market sale of assets on this occasion there was a higher bid than the previous market sale without having to hear the protest of the asset owner. As a result, the domain of a person's property rights was denied protection. Such provision served the interests of the creditor, enabling the legal execution officer and creditor to rely on the channel provided by such provision in expediting proceedings without due regard to the value of the assets. Such provisions prejudiced the essential substance of the ownership in assets. Thus, section 309 bis paragraph one of the Civil Procedure Code was enacted in violation of section 29 and section 48 and therefore subject to section 6 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). As a result, such provision was unenforceable.

1.2 In the application of Mr. Pasit, or Pornchai, Dejgulsornsiri, or Gulsornsiri, the first defendant in a civil case at the Chachoengsao Provincial Court, the facts could be summarized as follows. The court had permitted the legal execution officer, Chachoengsao Provincial Office of Legal Execution, to conduct the market sale of land and buildings owned by Mr. Silpachai Dejgulsornsiri, or Gulsornsiri, the second defendant, consisting of a total of 5 plots in a market sale on 11<sup>th</sup> January B.E. 2549 (2006). The legal execution officer had determined the market sale procedure for all 5 plots of land by selling the first, fourth and fifth plots as one parcel and the second and third plots as another parcel pursuant to a statement filed by the plaintiff. Subsequently, in a market sale on 10<sup>th</sup> May B.E. 2549 (2006), the plaintiff made a bid for the first, fourth and fifth plots in the amount of 1,040,000 baht and for the second and third plots in the amount of 520,000 baht, comprising a total of 1,560,000 baht. The defendant, however, filed a protest to the sale price of all such land. The legal execution officer therefore suspended the market sale. Thereafter, in the market sale on 24<sup>th</sup> May B.E. 2549 (2006), the first defendant filed a motion to the legal execution officer requesting for the market sale of all 5 plots as one parcel which was not objected to by the plaintiff. The legal execution officer thus determined the starting bid by applying the bid made by the plaintiff in the prior market sale in the amount of 1,560,000 baht. In this market sale, the plaintiff offered the highest bid in the amount of 1,610,000 baht, which was a higher bid than in the previous market sale. The legal execution officer therefore ordered the sale of assets at such price.

The first defendant filed a motion dated 31<sup>st</sup> May B.E. 2549 (2006) at the Chachoengsao Provincial Court requesting for the revocation of market sale of all 5 plots of land due to

alterations in the procedures of market sale. It was asserted that the legal execution officer was obliged to prescribe rules and re-notify interested parties of the procedures. Such proceedings, however, were not taken. The first defendant also filed a statement on 18<sup>th</sup> September B.E. 2549 (2006) at the Chachoengsao Provincial Court requesting the court to refer the first defendant's objection to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) that section 309 bis paragraph one of the Civil Procedure Code was contrary to or inconsistent with section 6, section 29 and section 48 of the Constitution. The reason stated was that section 309 bis paragraph one of the Civil Procedure Code granted an opportunity to the legal execution officer to execute the sale of judgment debtor's assets upon the mere condition that if a protest of the price had already been made in the prior market sale of assets, in the subsequent market sale if the price was not lower than the prior market sale, the legal execution officer was able to execute the sale of assets without having to hear the protest made by the owner of the assets. Such a provision resulted in a denial of protection for the domain of a person's rights in property despite the unfairness of the price. The provision served the interests of the creditors and legal execution officer, whereby creditors had relied on the channel provided by this provision to expedite proceedings without regard to the undervaluation compared to the official appraisal or median price due to the need to complete the market sale of assets in an expeditious manner. The opinion was therefore held that such provisions were prescribed beyond the extent of necessity and impinged upon the domain of price value to the point of prejudicing the essential substance of ownership.

Since in both applications, each of the applicants had objected that section 309 bis paragraph one of the Civil Procedure Code was contrary to or inconsistent with section 6, section 29 and section 48 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which were sections in the same cluster, the Constitutional Court therefore ordered on 23<sup>rd</sup> December B.E. 2551 (2008) to consolidate the trial of both applications in one case.

## **2. Preliminary issue**

The preliminary issue was whether or not the Constitutional Court had the power to admit this application for consideration.

The Constitutional Court found that the Constitutional Tribunal had admitted both applications for consideration under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006). The Constitution of the Kingdom of Thailand B.E. 2550 (2007) was subsequently 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 for the continued application of section 35 paragraph two, paragraph three and paragraph four of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) until the enactment of the Organic Act on Constitutional Court Procedures. Section 300

paragraph four further provided that all cases or matters pending proceedings in the Constitutional Tribunal would be assumed by the Constitutional Court under this section, and upon the appointment of Constitutional Court judges under this Constitution, all such cases or matters pending proceedings would be transferred to the powers and duties of the newly appointed Constitutional Court. Thus, the Constitutional Court had the power to admit both of these applications for consideration.

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

The Constitutional Court found that at the time of trial of these applications in the Constitutional Court, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) had already been promulgated. The constitutionality review of any provision of law thus had to be considered in respect to whether or not such provisions were contrary to or inconsistent with the Constitution in force at the time of ruling by the Constitutional Court. However, since section 6, section 29 and section 48 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) which was invoked by the applicants in asserting that provisions of law were contrary to or inconsistent with provided identical principles to section 6, section 29 and section 41 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), these applications were therefore considered pursuant to section 6, section 29 and section 41 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The issue which had to be ruled by the Constitutional Court was therefore whether or not section 309 bis paragraph one of the Civil Procedure Code was contrary to or inconsistent with section 6, section 29 and section 41 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 principle of market sale of judgment debtor's assets to enable the market sale of judgment debtor's assets to proceed expeditiously and in a just manner for all interested parties. In the first market sale, it was provided that the legal execution officer should 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 in the market sale of judgment debtor's assets was unreasonably low so as to give an opportunity to the judgment creditor, judgment debtor or person interested in the enforcement of judgment, whether or not such person was the protestor, to find a buyer who would offer a bid at the required price in the subsequent market sale. In such a case, the highest bidder would be bound by the bid price for a period of thirty days as from the bidding date, and in the subsequent sale, if there was no higher bid than the highest bid in the previous market sale or no bids were made, the legal execution officer would 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, the legal execution officer would execute the sale to the highest bidder in such market sale of assets.

From such provisions, even though in the subsequent market sale of judgment debtor's assets an opportunity was given to the judgment creditor, judgment debtor or person interested in the enforcement of judgment to file a protest that the price was unreasonably low, such provision was enacted in order to enable the market sale of judgment debtor's assets to proceed efficiently, expeditiously and in a just manner for the buyer of assets in the market sale. Otherwise, if another opportunity to protest was given, a protest of similar kind might be made on every occasion, preventing the market sale of judgment debtor's assets from being completed, which would not be fair on the *bona fide* purchaser of assets in the market sale. At the same time, upon consideration of the protestor of price, such provision had already given an opportunity to the protestor to file a protest of the price and find a buyer who would offer a bid at the required price in the first market sale, and if the market sale conducted by the legal execution officer resulted from a conspiracy between persons involved in the auction, or from the dishonesty or gross negligence of the legal execution officer in the performance of functions, the protestor of price could still file a motion at the court to request for an order to revoke the market sale pursuant to section 309 bis paragraph two of the Civil Procedure Code.

Even though such provision amounted to a certain restriction on the rights of the protestor of price in the market sale, the restriction of a person's rights in property was imposed pursuant to provisions of law in accordance with the exception under the final provisions of section 41 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), which stated that "the extent of rights and the restriction of such rights shall be as provided by law." In addition, the restriction of such rights was imposed by that was generally applicable and to the extent of necessity for fairness on all parties concerned without prejudicing the essential substance of the rights and liberty as provided under section 29 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 6, section 29 and section 41 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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

By virtue of the foregoing reasons, the Constitutional Court held that section 309 bis paragraph one of the Civil Procedure Code was neither contrary to nor inconsistent with section 6, section 29 and section 41 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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