4. Law of Civil Procedure and Bankruptcy

Many important decisions concerning civil procedure, civil execution and bankruptcy laws were reported in the year under review. Amongst these, this paper will focus on the Tokyo High Court decision on the so-called additional joinder of parties and the Supreme Court decision on the exercise, after the adjudication of bankruptcy, of creditors' rights of subrogation based on a preferential right, a kind of lien, on the sale of goods.

1. A case in which it was held that it was not permissible to add an action against a third party to a pending action even if application to join the actions was made before the conclusion of oral proceedings (the main hearing) at first instance and met the requirements for the joinder of parties under the Code of Civil Procedure §59.

Decision by the Fifth Civil Division of the Tokyo High Court on Aug. 6, 1984. Case No. (*ne*) 1703 of 1984. A *koso* appeal claiming damages. 1152 *Hanrei Jihō* 140. 541 *Hanrei Taimuzu* 153.

[Reference: The Code of Civil Procedure §§59 and 232]

[Facts]

X (plaintiff, *koso* appellant) sued Y_1 (defendant) for ¥70,000,000 in damages owing to defects in certain land in 1980. In Feb. 1984, while the case was on trial at first instance, X filed an application with the court entitled "an application to amend the action and the parties," applying to join Y_2 (defendant, *koso* appellee) as an additional defendant to the action. X cited as authority for his application §§59 and 232(1) of the Code of Civil Procedure (CCP) and demanded that Y_2 should pay ¥70,000,000 jointly with Y_1 in damages, as Y_2 had unlawfully concealed serious defects of the land concerned when giving an "expert" opin-

ion.

The court at first instance considered that X had brought a new action against Y_2 and issued an order to X to affix revenue stamps worth ¥357,600 – a charge proportionate to the value of the claim. X, however, did not obey the order, so the court rejected his claim against Y_2 because of procedural deficiency (the Tokyo District Court decision on May 30, 1984). X filed a *koso* appeal from the decision.

In *koso* appeal X asserted as follows: It should be permissible to amend the action so as to add a new defendant to a pending suit if the application to make the amendment was made before the conclusion of the oral proceedings at first instance and met the requirements for joinder of parties under CCP §59. The amount claimed by X in this case was ¥70,000,000, and not ¥140,000,000. Thus the order to increase the amount of the revenue stamps and the decision which rejected the claim of X against Y_2 because of the noncompliance with the order were improper, X claimed.

[Opinions of the Court]

Koso appeal dismissed.

Amendment of an action as provided in CCP §232 means only the exchanging or additional amendment of a claim between the same parties. Amendments to the parties in an action is permissible only when special provisions such as CCP §§72, 74 and 216 are available (so-called legal amendments to the parties). In other words, an amendment to the number of parties is not permitted under CCP §232. In addition, there is no provision to the effect that without application of CCP §132 a new action may be joined to the pending action if a third party brings a new action against the defendant or if the plaintiff brings a new action against a third party. Even if such a joinder is permitted, in the new action the litigant parties cannot take advantage of a pending action. Further, due to the timing to file a new action, such a joinder is likely to cause delays in the pending action and can

be considered an abuse of the process of the court. Therefore, the joinder of a party in a pending action is not permitted, even though it may meet the requirements of CCP §59. (Precedents also dictate that such a form of an action is not permitted without the application of CCP §132. See the decision by the Grand Bench of the Supreme Court on Sept. 27, 1967, 21 *Minshū* 1925.) Accordingly, a person in the *koso* appellant's position who seeks judgment by means of adding a claim against a new defendant should in fact bring another action against the new defendant with the court and then a joinder of oral proceedings under CCP §132 should take place. In a case which is not suitable for a joinder of oral proceedings owing to its content or time factor, it would be mistaken to attempt to effect the joinder by way of an additional joinder of parties in the manner of the *koso* appellant.

[Comment]

In the case under review it was disputed whether or not a so-called additional joinder of parties was permissible. The main issue of the current case was whether or not the plaintiff might join an action against a third party to the pending action when he had not brought the action originally as one against co-defendants.

There are two types of additional joinder of parties: the case in which the third party voluntarily intervenes in the pending action as a co-litigant of the plaintiff or the defendant; and the case in which the plaintiff or the defendant joins an action against a third party to the action so as to compulsorily bring the third party into the action. There are some provisions in CCP on this subject; for example, intervention as co-litigant (CCP §75) is an example of the former case, and assumption of an action by succession to debt (CCP §74) is an example of the latter. A question of doubt is whether or not the additional joinder of parties should be permitted when there are no explicit provisions, as in the present case.

In the case under review the plaintiff X originally brought an

action only against Y_1, and then in the course of the proceedings intended to add Y_2 into the action as a defendant. Most academic theories affirm that this kind of form of joinder is permissible. The accepted theory holds that even if a plaintiff has not brought the action in the form of joinder of parties from the beginning, where application is made before the conclusion of oral proceedings at first instance and meets the requirements under CCP §59, the plaintiff may join a claim against a new defendant to the action. The reason that the accepted theory fixes the deadline as the conclusion of oral proceedings (the main hearing) at first instance is to guarantee the third party to be joined as a new defendant due process of law.

The main grounds of the accepted theory are as follows. Firstly, with regard to a joint suit, in addition to requirements for objective joinder of actions or joinder of claims — for example, the same rules of procedure must govern the adjudication of each of the claims, and the claims to be joined must fall within the common jurisdiction — there are the requirements for subjective joinder of actions or joinder of parties under CCP §59 that the claim of or against each co-litigant must be, to a certain extent, in common and relevant to each other. If those requirements are met, there is no problem if an additional joinder of parties to a pending action is made. Secondly, by permitting such form of joinder, the litigant party is guaranteed the right of seeking trial in the form of joinder. Additional joinder of parties being permitted, the effects of the joinder are brought about as a matter of course. On the other hand, when a party brings a separate action and then seeks the joinder of oral proceedings, whether or not the oral proceedings are joined is dependent upon the discretion of the court. Finally, by permitting this kind of joinder, overlaps of proceedings or inconsistencies in decisions can be avoided.

As regards precedents, there is no Supreme Court decision directly relating to this matter. Although the Tokyo High Court decision under review quoted the Supreme Court decision of Sept. 27, 1967 (21 *Minshū* 1925), the judgment in that case can-

not be accepted as a direct precedent, but merely as obiter dictum. That case dealt with the application for intervention as an independent party against one of the parties to a pending suit. The Supreme Court, holding that the real intention of the application could be deemed to bring a new action against the litigant in the pending action, permitted the joinder of actions by means of joinder of oral proceedings (CCP §132). Opinions of lower courts are divided. For example, the Sapporo High Court decision on Nov. 15, 1978 (377 *Hanrei Taimuzu* 88) held that the additional joinder of parties was permitted as far as it met the requirements of subjective and objective joinder of actions at first instance, and the Osaka District Court decision on Mar. 24, 1971 (640 *Hanrei Jihō* 79) rejected the additional joinder of parties against a new defendant because of the need for stability of legal proceedings. The current decision is the first High Court decision that rejected the additional joinder of parties and is very interesting in that the case bore directly on the issue.

It is questionable that the current decision made a general rejection of the additional joinder of parties. Certainly, bringing another action and then applying for a joinder of oral proceedings results in almost the same effects as an additional joinder of parties. But, as mentioned above, whether or not a new action may be joined depends on the discretion of the court based on its right to conduct the proceedings. In other words, a joinder of actions is not always permitted. Accordingly, as the accepted theory holds, it is necessary to permit the additional joinder of parties, especially in order to guarantee the right of applying for a trial in the form of a joinder. Further, there is a question of the costs of the parties. As disputed in the current case, if an additional joinder of parties is permitted, the litigant does not necessarily have to affix revenue stamps. From the aspect of reducing the costs of the parties it is necessary to permit this kind of joinder. Setting aside whether or not the additional joinder of parties is permissible in the respective concrete cases, it is submitted that joinder should be generally permitted, even if there is no provision for it in statute.

X has made a *jokoku* appeal to the Supreme Court. The judgment of the Supreme Court is looked forward to.

2. A bankruptcy declaration against a debtor and the exercise by the creditor of the right of subrogation based on the preferential right arising out of the sale of goods.

Decision by the First Petty Bench of the Supreme Court on Feb. 2, 1984. Case No. (*o*) 927 of 1984. A case involving a main claim for declaration of the existence of a right to demand delivery of deposit and a counterclaim against it. 38 *Minshū* 431. [Reference: The Civil Code §304; The Bankruptcy Act §92]

[Facts]

Y (defendant · counterclaim plaintiff, *koso* appellant, *jokoku* appellant) sold three machine tools to A Company for ¥133,000,000 in May 1976. A Company resold them to B Company for ¥143,000,000 in June 1976. The money was not paid in either case. A Company then failed and was declared bankrupt on Oct. 3, 1977. X (plaintiff · counterclaim defendant, *koso* respondent, *jokoku* respondent) was appointed a trustee in bankruptcy. Y gained a garnishment and assignment order for ¥6,650,000 out of a claim for money based on the resale of the machine tools from A Company to B Company. The order was notified to both X and B Company on Apr. 11, 1979. Needless to say, the grounds for the garnishment, though unpublished, were the right of subrogation based on a preferential right, or a kind of lien, arising out of the sale of goods. B Company deposited money under the garnishment and assignment in the depository, for it was not clear to B Company which of X or Y should receive the payment. Thus, X brought an action against Y, seeking a declaration as to existence of the right to demand delivery of the deposit. Y brought a counter-action against X.

Both the first instance (Decision by the Tokyo District Court on Nov. 14, 1980, 1002 *Hanrei Jihō* 108) and the second instance (Decision by the Tokyo High Court on June 25, 1981) upheld

the claim of X and dismissed the counterclaim of Y. The decisions were based on almost the same grounds. That is, in the proviso of §304 (1) of the Civil Code seizure (garnishment) is required when a creditor with a preferential right attempts to exercise the right of subrogation. The spirit of the proviso should be interpreted as not merely intending to specify the claim which is the subject of the right of subrogation and to freeze it by prohibiting the debtor or the garnishee from disposing of it but also as publicizing the existence of the right of subrogation in connection with third parties, such as another creditor, and as intending to stabilize transactions. Accordingly, the creditor who has a preferential right, in order to exercise his right of subrogation, must seize the debtor's claim against the garnishee and publicize the existence of his subrogative right. That creditor, unless he seizes the debtor's claim which is the subject of the subrogative right before such claim is seized by or is transferred or assigned to another creditor, cannot insist on the exercise of his right of exclusive preference against the third party, such as another creditor seizing et al., by virtue of his right of subrogation. And as the adjudication, by virtue of which the bankrupt estate is formed, deprives the bankrupt of the right of administration to the estate and vests it exclusively in the trustee in bankruptcy (the representative of the bankrupt estate) who is a third pary, it can be considered to have the same effect as the claim which is the subject of the right of subrogation is seized by or is transferred or assigned to another creditor. Accordingly, a creditor who has a preferential right, unless he seizes the subject of the subrogative right prior to the bankruptcy adjudication, cannot claim the exercise of his right to obtain preferential satisfaction as a secured creditor against the trustee in bankruptcy who is a third party by virture of his right of subrogation.

Y made a *jokoku* appeal to the Supreme Court, submitting that the right of subrogation was a right similar to a statutory right of pledge and preferential to the debtor's claim against the garnishee, and that therefore, when a debtor became bankrupt, it was reasonable that such creditor should stand as a secured

creditor (the Bankruptcy Act §92) exercising his right outside the bankruptcy proceedings (§95), and thus there was no need to seize such claim prior to the bankruptcy adjudication.

[Opinions of the Court]

Jokoku appeal allowed.

In the proviso of the Civil Code §304 (1) it is provided that the preferred creditor who attempts to exercise his subrogative right must seize the object of the right, here the debtor's claim against the garnishee, before the payment or delivery of the money, etc.

The purpose of this provision can be regarded as follows.

By virtue of the said seizure by the preferred creditor, the garnishee is prohibited from paying or delivering the money, etc. which are the subject of the right of subrogation, and the debtor is prohibited from collecting debts from the garnishee or transferring these to third persons. Thus, the object of the subrogative right should be specified. By means of this, the effect of the subrogative right is to be maintained and unexpected damage to third parties is to be avoided.

Accordingly, different from the case of the payment by the garnishee or the transfer of the claim concerned to the third person by the debtor, in the case that a non-preferred creditor, based on his title, only obtained an order of seizure on the debtor's claim concerned, there is no reason to prevent the preferred creditor from exercising his subrogative right to it on account of the said seizure.

In the case where the debtor is declared bankrupt, the bankruptcy adjudication is only meant to pass the right of administration on the bankrupt's estate to the trustee in bankruptcy and to prohibit the creditors of the bankrupt estate from exercising their rights outside the bankruptcy proceedings. Title to the property of the bankrupt is never transferred to the bankrupt estate or the trustee by virtue of such adjudication.

There is no reason to distinguish this case from that of the

said garnishment by the non-preferred creditor. Therefore, it is reasonable to conclude that the preferred creditor can exercise his right of subrogation even after his debtor has been declared bankrupt.

[Comment]

Based on the sale of goods, and concerning any arrears and any interest arising from them, a special preferential right is to be given to a seller as a statutory lien on the goods concerned (the Civil Code §322). And when the obligor (buyer) resells the goods concerned to a third party, the obligee (the said seller) can assert his preferential right on the claim for money that the obligor obtains by such resale, the obligee being a preferred creditor by virtue of his subrogative right. But in order to exercise such right of subrogation, the preferred creditor must seize the claim for money due from accounts which the obligor holds against the garnishee who is the sub-buyer before the garnishee makes payment to the obligor (the Civil Code §304). That is, unless the preferred creditor makes the seizure, he cannot assert his right against other creditors.

In the case in which the obligor is declared bankrupt, is it impossible for the preferred creditor to assert his preferential right against the trustee in bankruptcy by virtue of his right of subrogation as an exercise of the right of preferential satisfaction of secured creditor in bankruptcy unless he seized the claim for money which the obligor obtained by the resale prior to the declaration of bankruptcy? Or can he exercise his right of subrogation against the trustee by getting an order of seizure in spite of the bankruptcy declaration? This was the issue in the current case.

A preferential right on the sale of goods is treated as a right of preferential satisfaction of a secured creditor in bankruptcy (the Bankruptcy Act §92 providing that the rights of a secured creditor in bankruptcy can be exercised in principle outside the bankruptcy proceedings). Accordingly the exercise of the right of

subrogation based on the said preferential right is, if permitted, also regarded as that of a secured creditor's right in bankruptcy. So it is very important for a vendor of goods to ascertain whether a right of subrogation exists.

With regard to this problem, as reviewed in this bulletin, vol. 1, decisions of the lower courts were divided. Completely opposite decisions were possible, depending on which court and which division of it dealt with the case (See Waseda Bulletin of Comparative Law, vol. 1, 1981, p. 81). The case law was rather confused.

Many lower courts' decisions were reported since then. Among them, the decisions holding that a preferred creditor can not assert his preferential right against the trustee in bankruptcy who is a third party, unless he seizes the claim for money which the obligor obtained by the resale, which is the object of the subrogative right, prior to the adjudication of bankruptcy, predominated.

The Supreme Court, for the first time, considered the problem and, against prevailing trends, held that a preferred creditor could exercise his right of subrogation against the trustee by obtaining an order of seizure of the object of the right even after a debtor had been declared bankrupt. The current case is very important not only in practice but also for academic theorists.

Which opinion concerning this problem is to be preferred depends on the interpretation of the aim of the seizure demanded in the exercise of the subrogative right, the effect of the adjudication of bankruptcy, the legal status of the trustee in bankruptcy and so on. But the argument in relation to such points is very complicated and, as is clear from comparing opinions of the current decision with those of its original court, such interpretation does not always lead to the same conclusion.

In short, the basis of those opinions in favour of the exercise of the right as represented by the current decision seems to accept the following argument: it is improbable that the creditor who has a preferential right on the sale of goods will seize the claim for money which an obligor obtains by the resale prior to

the adjudication of bankruptcy against the obligor, and if exercise of the subrogative right were not admitted, it would be meaningless that the preferential right on the sale of goods is provided as a statutory lien without public notice and a right of preferential satisfaction of secured creditor in bankruptcy.

On the other hand, the opposite opinion represented by the majority of the lower courts seems to consider that the unsecured creditors should be protected from unexpected damage which may arise out of the lack of the public notice on the said preferential right.

Certainly, the desirability of the preferential right on the sale of goods is questionable because of a lack of public notice. But since such right is provided as a statutory lien in the Civil Code and also as a right of preferential satisfaction of secured creditors in the Bankruptcy Act, it is submitted that the conclusion of the Supreme Court in the current case is reasonable. Above all, the seller of such goods as cannot be registered and as are intended for resale from the beginning has no effective means of securing his money in Japan. Accordingly, the current decision is very significant for the protection of such seller of goods in such circumstances as a debtor's bankruptcy.

By Prof. Tetsuo Kato
Noriyuki Honma

5. Criminal Law and Procedure

a. Criminal Law

1. A case in which a judgment of the Supreme Court was given on "imminent and unjust violation" as an element for self-defense.