4. Law of Civil Procedure and Bankruptcy

For the year under review, this paper will focus on two decisions in the fieleds of Law of Civil Procedure and Bankruptcy: a Supreme Court decision on whether the prohibition of *reformatio in peius* may be applied to judicial proceedings concerning the distribution of property based on an action for divorce, and a case concerning a judgment of bankruptcy and a simultaneous discontinuance of bankruptcy followed by an execution, which was carried out against the debtor pending the hearing for granting a discharge of the debtor's liability.

1. May the prohibition of *reformatio in peius* be applied to judicial proceedings concerning the distribution of property based on an action for divorce?

Decision by the Second Petty Bench of the Supreme Court on July 20, 1990. Case No. (*o*) 695 of 1990. A *jokoku* appeal requesting divorce etc. 44 *Minshū* 975.

[Reference: Code of Civil Procedure, Articles 186 and 385; Personal Affairs Procedure Act, Article 15(1).]

[Facts]

The wife, X (plaintiff of case A, defendant of case B, *koso* respondent, *jokoku* respondent), and the husband, Y (defendant of case A, plaintiff of case B, *koso* appellant, *jokoku* appellant), married in 1972. They had a son, P. In 1986, X sued for divorce, custody of P, solatitum of 5 million yen, and the distribution of property based on divorce (case A). On the other hand, Y sued for divorce and custody of P (case B, the counterclaim of case A).

The court of first instance declared a divorce between X and Y, granted X custody of P, and ordered Y to give X certain real properties (with assessed value of 3.5 million yen) and 2.5 million yen as the distribution of property (decision by the *Aki* Branch of the *Kochi* District Court on December 22, 1988). Y filed a *koso* appeal.

The *koso* Appellate Court dismissed Y's appeal and revised

the distribution of property to 8 million yen (decision by the *Takamatsu* High Court on February 7, 1990). Y filed a *jokoku* appeal.

Y argued the following: X had not filed an incidental appeal. In spite of this circumstance, the *koso* Appellate Court changed the original judgment to Y's disadvantage, and thus according to the prohibition of *reformatio in peius* as provided for in Code of Civil Procedure (hereinafter referred to as "CCP") Article 385, this change is unlawful.

[Opinions of the Court]

Jokoku appeal dismissed.

With regard to the distribution of property based on an action for divorce in accordance with the Personal Affairs Procedure Act Article 15(1), the court may determine whether to permit the distribution or not, and the amount and method of distribution, not according to the claim of an applicant, but according to the discretion of the court itself. Although the court adjudicated the amount and method of distribution to the applicant's advantage, that is, more than was demanded by the applicant, this adjudication is not unlawful under the CCP. Article 186. Therefore, even if the court of first instance determined a fixed amount and a fixed method of distribition, and then, only the respondent filed an appeal, when the appellate court considers that the amount and method are not reasonable, the appellate court may change the decision of the court of first instance and determine an amount and a method of distribution which it considers to be reasonable; and it is reasonable to interpret the law to mean that the so-called "prohibition of *reformatio in peius*" may not be applied to this case.

[Comment]

One of the most important rules of the content of formal adjudication is that the court must not grant relief greater than or different from that demanded by the plaintiff (CCP. Article 186). This is a manifestation of the so-called "principle of party disposition." Not only the court of first instance, but also the appellate court must adhere to this rule. Therefore, although the whole case is

transferred to the appellate court on *koso* appeal, the court may adjudicate no more than is demanded by the appellant (CCP. Articles 385 and 377(1)); nor may the appellate court change the original judgment to the appellant's disadvantage, unless the respondent has filed an incidental appeal (the prohibition of *reformatio in peius*). However, because the prohibition of *reformatio in peius* is based on the principle of party disposition, this prohibition is not applied to matters to which the principle of party disposition is not applied; that is, matters to which the appellate court must investigate on its own initiative (e.g., competence of the court below and procedural capacity of parties).

Thus, in the case of judicial proceedings concerning the distribution of property based on an action for divorce, when the appellant files an appeal against the decision by the court of first instance and the respondent has not filed an incidental appeal, may the appellate court change the original judgment to the appellant's disadvantage?; should the prohibition of *reformatio in peius* be applied to this case?

The principle of party disposition in the CCP. Article 186 is applied not only to civil procedures concerning claims on property rights, but also to personal-affairs procedures controlled by the principle of inquisition. For the principle of party disposition is not the principle ruling the collection of materials for an action. However, the distribution of property based on an action for divorce in accordance with Personal Affairs Procedure Act Article 15(1) is essentially a matter of domestic relations adjustment (see Domestic Relations Adjustment Act, Article 9(1) *otsu* 5). So, in this judicial proceeding, according to most judicial opinions and academic theories, the applicant has only to file a claim for the distribution of property itself and it is within the discretion of the court to determine the amount and method of the distribution of property (see the decision by the Second Petty Bench of the Supreme Court on July 15, 1966, 20 *Minshū* 1197); and, even if the applicant has filed a claim for the amount and method of the distribution of property, the court is not restricted by this claim (see the decision by the *Fukuoka* High Court on February 27, 1961, 12 *Kaminshū*

386). Therefore, the principle of party disposition of subject matters should not be applied to this proceeding; the prohibition of *reformatio in peius* should not be applied to judicial proceedings concerning the distribution of property based on an action for divorce. This is the opinion of the Supreme Court.

On the contrary, there is the opinion which, while regarding the prohibition of *reformatio in peius* as a manifestation of the principle of party disposition, affirms the application or corresponding application of the prohibition only to cases that may not be opened by official competence among the non-contentious jurisdiction; that is, to cases that do not concern the public interest or guardianship. Accordeing to this opinion, the prohibition of *reformatio in peius* should be applied to judicial proceedings concerning the distribution of property, because the proceedings are opened by the motion of a party and do not concern the public interest or guardianship.

In my opinion, it is reasonable that the prohibition of *reformatio in peius* be applied to judcial proceedings concerning the distribution of property on an action for divorce, because the prohibition of *reformatio in peius* is originally based on a simple sense of the protection of the interest of appellant. However, in fact, the prohibition of *reformatio in peius* will not be applied to the method of the distribution of property, because it is very difficult to judge whether a certain method operates to the appellant's advantage or disadvantage in consideration of the particular circumstances.

2. A case concerning a judgment of bankruptcy and a declaration of simultaneous discontinuance of bankruptcy, followed by an execution which was carried out against the debtor pending a hearing for granting a discharge of the debtor's liability.

Decision by the Third Petty Bench of the Supreme Court on March 20, 1990. Case No. (*o*) 717 of 1988. A case objecting to a claim. 44 *Minshū* 416; 725 *Hanrei Taimuzu* 66; 1345 *Hanrei Jihō* 68.

[Reference: Civil Code, Article 703; Bankruptcy Act, Article 366. 12.]

[Facts]

On August 21, 1985, X (plaintiff, *koso* respondent, *jokoku* respondent) was adjudged bankrupt and simultaneously a discontinuance of bankruptcy was declared. On August 28, 1985, X filed a petition for a discharge of liability. On July 4, 1986, about one year later, the bankruptcy court granted a ruling of discharge to X and the ruling became irrevocable on August 9. On December 20, 1985, pending the hearing, X acquired a claim to A (not a party to this suit) for damage caused by A (the damage was caused by a traffic accident, which caused his wife's death).

On the other hand, Y (defendant, *koso* appellant, *jokoku* appellant) was a creditor and his claim arose out of causes existing prior to the adjudication of bankruptcy and should thus be treated as a "bankruptcy claim" in the bankruptcy proceeding. In April 1986, pending the hearing for discharge, Y levied X's claim against A. Then, bofore the bankruptcy court granted a discharge, Y was granted distribution from execution of his claim.

In opposition to this execution, X brought a so-called "action opposing a claim" against Y. Then, after the grant of discharge became irrevocable, X amended the action and, asserting that the repayment through the execution had lost legal ground by the grant of discharge, claimed restitution of the money received by Y as unjust enrichment.

In the first and second instance, the courts allowed X's claim. Y submitted a *jokoku* appeal.

[Opinions of the Court]

Original decision (the *Matsue* Branch of the *Hiroshima* High Court on March 25, 1988) reversed; the decision of the first instance court (the *Tottori* District Court on June 26, 1987) repealed; and the respondent's (plaintiff's) claim dismissed.

It is reasonable to interpret the law as follows; when the bankruptcy court declares a discontinuance of bankruptcy, an execution based on a bankruptcy claim against the bankrupt can be allowed. Furthermore, even if the bankrupt is granted a discharge of liabil-

ity after the distribution on the execution of the claim, repayment through the execution will not lose legal ground.

The following are the reasons for this: when the declaration of discontinuance of bankruptcy becomes effective, the bankruptcy proceeding is conclusively finished, and even if a petition for discharge of liability has been filed, since there are no provisions which can be deemed grounds for continuance of restrictions against bankruptcy creditors, the restriction of creditors' executions, accompanied by adjudication, dissolves after the termination of bankruptcy proceedings. Thus, bankruptcy creditors are allowed to exercise their rights after the declaration of discontinuance of bankruptcy becomes effective. When the grant of discharge becomes irrevocable, a bankrupt will be discharged from liability for all of his debts in bankruptcy, except for the distribution through the bankruptcy proceedings (Bankruptcy Act, Article 366. 12). But there are no provisions for the recourse of the effect of discharge of liability, therefore, repayments through execution pending the hearing for discharge will not lose legal ground.

[Comment]

I. According to the current Bankruptcy Act, bankruptcy claims cannot be enforced except through bankruptcy proceedings (Bankruptcy Act, Article 16), and individual applications of execution cannot be allowed; if an execution has been already initiated at the time of the adjudication of bankruptcy, it will be dismissed (Article 70(1)). As the case may be, a grant of discharge becomes irrevocable soon after the termination of the bankruptcy proceedings. Thus, creditors cannot often attach the later-acquired properties of bankrupts.

On the other hand, where it is clear at the stage of adjudication that the bankrupt's estate is not sufficient to pay administrative expenses of the bankruptcy proceedings, the bankruptcy court shall not proceed, but shall adjudge the debtor bankrupt and simultaneously declare a discontinuance of bankruptcy (Article 145). Accordingly, in cases of discontinuance of bankruptcy, the bankruptcy proceedings shall terminate at the same time of the adjudication,

and discharge proceedings will start after them; thus, in cases of discontinuance, there is an interval between the termination of the bankruptcy proceedings and the discharge proceedings. Therefore, it is arguable whether bankruptcy creditors can carry out executions in that interval.

The main issue in the case is this matter, and it may be divided into two issues; these are, ① whether a bankruptcy creditor can carry out an execution against a debtor, in a case of declaration of bankruptcy and simultaneous discontinuance of bankruptcy, pending the hearing for discharge, and ② if the execution is legitimate, whether the money acquired through the execution can be recovered by the bankrupt as unjust enrichment on the part of the creditor.

II. With regard to the first issue, both judicial opinions and a majority of academic theories have acknowledged that such executions are legitimate. The reasons for this are because although bankruptcy claims cannot be enforced except through the bankruptcy proceedings (Article 16), once the declaration of discontinuance of bankruptcy has become irrevocable, the bankruptcy proceedings terminate and Article 16 will be no longer applied; since the discharge proceedings are independent of the bankruptcy proceedings in the narrow sense, Articles 16 and 70(1) cannot be applied to the discharge proceedings. Furthermore, there are no provisions which prohibit execution against a bankrupt pending discharge proceedings. Therefore, even if a petition for discharge is filed, an individual application of execution against the bankrupt can be allowed after the declaration of discontinuance of bankruptcy has become irrevocable.

On the other hand, recently, a new theory in opposition to the above-mentioned theory has been asserted, which emphasizes the close relation of bankruptcy proceedings and discharge proceedings, and which contends that an individual application of execution cannot be allowed pending the discharge proceedings. It can be said that this theory values the purpose of discharge, which aims at providing the bankrupt with a fresh start.

Indeed, as a legislative argument, it is worth considering taking discharge proceedings as a part of bankruptcy proceedings in the

wide sense. But, as an interpretation of the current Bankruptcy Act, it is natural to think that the two proceedings are independent of each other. Therefore, considering the above-mentioned discussion, it seems that the Supreme Court reached the correct conclusion in this decision.

III. With regard to the second issue, academic theories have variously split and there were no decisions by the Supreme Court on this issue before this decision. In this decision the Supreme Court held that, as there was nothing which provided for recourse of the effect of discharge, the repayment through the execution, which had been carried out pending the hearing for discharge, would not lose legal ground, and thus the Court denied restitution of the money as unjust enrichment.

The Bankruptcy Act, Article 366. 11 provides that a discharge becomes effective after the ruling for discharge becomes irrevocable, and there is nothing which provides for recourse of the effect of discharge. Therefore, as interpretation of the Act, it is reasonable to think that, even if the grant of discharge becomes irrevocable, the effect of the repayments which were carried out before the grant of discharge became irrevocable should not be influenced by the discharge.

For these reasons, this decision, which denied the restitution of the money as unjust enrichment, seems to be reasonable. This decision, as the first Supreme Court decision concerning these problems, will almost certainly have a great influence on future theory and practice.

Prof. TETSUO KATO
TAKASHI KONDO
KEN YAMAMOTO