selfish and irresponsible request for divorce as well as the hardship clause as a defence.

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4. Law of Civil Procedure and Bankruptcy

1. A case in which it was held that waiver of claim in a divorce suit is admissible.

Decision by the First Petty Bench of the Supreme Court on February 10, 1994. Case No. (*o*) 589 of 1993. A *jōkoku* appeal requesting retrial of a default judgment. 48 *Minshū* 388; 1505 *Hanrei Jihō* 63; 858 *Hanrei Taimuzu* 127.

[Reference: Code of Civil Procedure, Article 203; Personal Matters Procedure Act, Article 10.]

[Facts]

X (plaintiff, *kōso* appellant, *jōkoku* appellant) entered a lawsuit against Y (defendant, *kōso* respondent, *jōkoku* respondent) asking for divorce. Y claimed distribution of property against X, which was preliminarily subject to approval of this divorce action.

The court of first instance upheld X's divorce action and ordered X to distribute his property including land and buildings as well as 55,000,000 yen in response to Y's claim for distribution of property. X filed a *kōso* appeal. However, X made a statement on the date of the *kōso* hearing that X waived his claim for divorce.

The *kōso* Appellate Court affirmed the judgment of the court of first instance, holding that waiver of claim is not permitted when applying Article 10 of the Personal Matters Procedure Act (hereinafter referred to as PMPA), in a matrimonial action. X filed a *jōkoku* appeal and stated that the *kōso* Appellate Court's denial of waiver of the claim was caused by a mistake in construction and applica-

tion of Article 10 of the PMPA.

[Opinions of the Court]

The original decision was reversed amd remanded as follows: There is no rule which prohibits the waiver of the claim in a divorce suit, and there is no particular necessity to forbid the disposition of rights by parties intending to continue a marriage. Therefore, it should be recognized that waiver of claim is admissible in a divorce suit.

Under those circumstances, the preliminary claim for distribution of property made by the other party subject to approval of the divorce suit is recognized to lose validity by waiver of the divorce action as a matter of course. For the reasons mentioned above, we reverse, and according to the waiver of X's claim, we declare that this suit was ended on September 9, 1992.

[Comment]

Waiver of claim means a plaintiff's statement on the date of hearing admitting that his claim has no basis. On the contrary, the defendant's statement on the hearing date admitting that the plaintiff's claim has a basis constitutes admission of the claim. Under Article 203 of the Code of Civil Procedure (hereinafter referred to as CCP), when waiver or admission of claim is recorded, it is recognized that it has the same effect as a final decision, and the current lawsuit is ended as a matter of course.

Article 10(1) of the PMPA provides that in a matrimonial case the application of the provision regarding to admission of claim in Article 203 of the CCP should be excluded. (Article 26 of the PMPA relates to an adoption case and Article 32 of the PMPA relates to a parent and child relation case. Each applies Article 10(1) of the PMPA). Therefore, there is a question of whether the provision regarding waiver of claim should also be excluded from application in a matrimonial case.

Before this decision, there was no precedent in decisions of the former Supreme Court nor the present Supreme Court which mentioned this question. There were many different opinions in the decisions of the lower courts. This decision is the first one of the

Supreme Court which judged whether waiver of claim is admissible in a divorce suit.

Regarding this issue, there are various opinions. In general, there are three: The first insists that waiver of claim is admissible in personal matter suits in general. Its formal reason is that Article 10 of the PMPA excludes application of the provision regarding the admissibility of claim only. It is based on: (1) unilateral inquiry by the courts to continue a marriage, which is adopted in matrimonial cases (Article 14 of the PMPA). (2) in a divorce suit and in an action of nullity or dissolution of a marriage, when a claim is admitted, the marriage is continued as a result. This principle generally applies in an adoption case, but in a parent and child relation case, because unilateral inquiry by the court is not adopted, the waiver of claim found in a personal matter suit is not recognized to be admissible.

The second view insists that waiver of claim is not admissible in general when applying Article 10 of the PMPA. It is based on the idea that a conflict with respect to a status matter brought in a personal matter action cannot be entrusted to voluntary resolution by the parties, thus there is no disposition at will. Therefore, it says that as Article 10 of the PMPA is not applicable to admission of claim, waiver of claim should not be admitted either.

The third opinion asserts that waiver of claim in a personal matter suit is not admissible in general, but it is permitted as an exception in a claim for divorce or dissolution of an adoptive relationship. As a divorce by agreement and a dissolution of adoptive relationship by agreement are permitted under the Civil Code, marriage or adoption itself can be annulled by the parties at their will. In this view, there is not a sufficient legislative reason to say that settlement as well as waiver or admission of claim are not permitted.

Though the current decision seems to be decided based on the first view discussed above, as the current case is a divorce suit, the solution would be the same if it had been based on the third view mentioned above. Since it was decided focusing on a waiver of claim in a divorce suit, whether waiver of claim is admitted in other kinds of personal matter suits in general is the unanswered question, and this issue must be considered carefully. Up to now, there have been

some precedents which permitted waiver of claim in a claim for dissolution of adoption, holding that it helps to retain an adoptive relationship (see decision by the Tokyo High Court on July 28, 1938, 518 *Hōritsu Shinpō* 20, and decision by the Tokyo District Court on March 29, 1938, 27 *Hōritsu Hyōron* (*Minso*) 267).

2. A case in which it was held that the first dishonor of bills and notes can be recognized as "suspension of payment" as provided in Article 104(2) of the Bankruptcy Act.

Decision by the First Petty Bench of the Supreme Court on February 10, 1994. Case No. (*o*) 126 of 1990. A *jōkoku* appeal requesting retrial of a default judgment. 171 *Saibanshū* (*Minji*) 445.

[Reference: Bankruptcy Act, Article 104(2).]

[Facts]

A Corporation dishonored a promissory note with a total face value of about 360,000,000 yen. Its due date had been December 5, 1985. The following details caused the dishonor of the note; A Corporation was having difficulty in raising funds for the payment of notes due on December 5. A Corporation asked Y Bank (defendant, *kōso* appellant, *jōkoku* appellant), with which A Corporation had dealings, to lend A Corporation 40,000,000 yen on December 4, and Y Bank agreed. Afterward, C Bank planned to finance A Corporation on December 5, so A Corporation asked Y Bank to pay for the deficiency of funds through the payment of notes from A Corporation's fixed-term account.

Y Bank paid 60,000,000 yen at 3 o'clock on the same day and deposited it in A Corporation's account at C Bank. When C Bank did not finance A Corporation, A Corporation had to prepare itself for the dishonor of notes. Y Bank insisted that if the notes were dishonored, the 60,000,000 yen ought to be paid back. C Bank deposited 60,000,000 yen in A Corporation's account at Y Bank at 10 o'clock on December 6.

A Corporation managed to raise a total of 11,000,000 yen (approximately) from December 6 through December 20, and avoided the second dishonor of bills and notes. Then A Corporation made

a petition for the commencement of reorganization at the Maebashi District Court on December 23 and got protection on December 25. The Maebashi District Court dismissed the petition of reorganization on the ground that there was little feasibility. The Maebashi District Court made an adjudication of bankruptcy on its own initiative on December 24 and X (plaintiff, *kōso* respondent, *jōkoku* respondent) was appointed as a trustee in bankruptcy.

Y Bank offset A Corporation's credits of 256,000,000 yen (approximately) against 141,000,000 yen (approximately), including deposit money of equal value. X claimed that the deposit money was charged after suspension of payment of A Corporation which happened when the first dishonor of notes arose because of a shortage of funds, and that Y Bank had known of these circumstances. Alleging that the offset was an invalid action prohibited under Article 104(2) of the Bankruptcy Act, X brought a lawsuit for the return of its deposit.

The court of first instance granted X's claim holding as follows: suspension of payment under the Bankruptcy Act should be construed as the debtor's action which declares that generally and continuously he could not pay the debt having fallen due because of inability to pay. Therefore, the said dishonor of notes by A Corporation was recognized as suspension of payment. The *kōso* Appellate Court affirmed, holding as follows: since suspension of payment should be construed as the debtor's action which declares that he is an insolvent, if insolvency exists objectively, dishonor of bills and notes is to be recognized as suspension of payment even when it is the first dishonor. Y filed a *jōkoku* appeal.

[Opinions of the Court]

Original decision affirmed.

In the current case, the amount of the first dishonor of notes due to shortage of funds was 360,000,000 yen, and it happened when A Corporation had a lot of debts and became insolvent. Accordingly, the first dishonor of notes is recognized as "suspension of payment" provided under Article 104(2) of the Bankruptcy Act, even if the approximately 11,000,000 yen in bills and notes which matured

afterwards were paid to avoid a dishonor.

[Comment]

The principal issue of this case concerns whether the first dishonor of bills and notes is recognized as suspension of payment. Suspension of payment is a criterion for a prohibition against offset (Articles 104(2) and (4) of the Bankruptcy Act) and the avoidance of a crisis (Articles 72(2)–(4) of the Bankruptcy Act), as well as a premise to presume the insolvency which is the basis of the bankruptcy (Article 126(2) of the Bankruptcy Act).

For the meaning of suspension of payment, there are three opinions in general. The first one views suspension of payment as a debtor's action which declares that generally and continuously he cannot pay the debt having fallen due because of inability to pay. This view is commonly held and most precedents also hold it. The second one separates the function of suspension of payment. It insists that the criterion for a prohibition against setoff, in order to be recognized as suspension of payment, requires not only the debtor's action but also objective insolvency, and this condition has to continue until the adjudication of bankruptcy. According to this view, the latter factor is more important. The latter one also separates the function of suspension of payment. However, it has the view that the aim of suspension of payment as a criterion for a prohibition against setoff is to prevent from diminishing property of the bankruptcy and bringing about substantial unfairness among the creditors. Therefore, according to this view, suspension of payment is the objective insolvency.

The question is at which point suspension of payment can be said to have occurred. In particular, the first dishonor of bills and notes becomes an issue because there can be an unusual case in which the ability to pay resumes later. After the first dishonor of bills and notes is recorded, if they dishonor bills and notes for the second time within six months from the due date of first dishonored bills and notes, suspension of transactions with banks occurs. Until now, there is little objection to the view that the second dishonor and the suspension of transactions with banks are recognized as suspension of

payment.

The situation in which the second dishonor of bills and notes causes the suspension of transactions with banks is based on the 1971 amendment of clearing house rules. Until the amendment, the act of suspending transactions with banks brought about by dishonor of bills and notes was too harsh. So, in order to promote payment after dishonor, this amendment allowed the postponement of the suspension of transactions with banks until the second dishonor had occurred, not the first one. From the above, it could be said that the first dishonor of bills and notes is not necessarily recognized as suspension of payment, because the first dishonor is not be linked directly with suspension of transactions with banks.

On the other hand, some recent precedents acknowledge the view that only the first dishonor of bills and notes may be recognized as suspension of payment (see decision of the Tokyo District Court on August 27, 1991, 778 *Hanrei Taimuzu* 255). The current decision is significant, because the Supreme Court decided for the first time that even the first dishonor, if its objective financial standing is insolvency and the dishonor demonstrates that, it is possible to be recognized as suspension of payment with respect to a prohibition against setoff.

Nevertheless, of course, even if there is a dishonor of bills and notes, if it is the first dishonor, transactions in bills and notes may continue. Moreover, even if the suspension of transactions with banks is adopted, there may be a case in which suspension of payment is avoided. (see decision of the Nagoya District Court on July 24, 1984, 707 *Kinyū Shōji Hanrei* 43). Therefore, it is obvious that the first dishonor of bills and notes does not bring about suspension of payment immediately.

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