

ture). Also, some critics have pointed out that the admissibility of these written statements was eventually negated only for the formal reason that the immunity system has not been adopted. (In this sense, Judge Ohno's Concurring Opinion should be noted, as he pointed out that it had been clear from the outset that the accused's right to examine a witness could not be assured.) Therefore, with regard to the issue in this case, further discussion should be expected in the light of the spirit of the Constitution, the Code of Criminal Procedure.

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6. Commercial Law

Validity of the agreement that stocks obtained through an employee stock ownership plan at par value would be transferred at par value upon employees' retirement.

Decision by the Third Petty Bench of the Supreme Court on April 25, 1995. Case No. (ō) 1332 of 1991. A case, concerning stock issuance claim. 175 *Saibanshū (Minji)* 91.

[Reference: Commercial Code, Article 204 (1); Civil Code, Article 90.]

[Facts]

Company Y (defendant, appellee, final appelle, Fanshi Tsuda Kabushiki Kaisha), whose articles of incorporation restrict the transfer of stocks, introduced the employee stock ownership plan (hereinafter ESOP) in 1968 in order to help employees' asset planning and to enhance employee's loyalty to the company. The former employees of Company Y, Xs, including X1 (plaintiff, appellant, final appellant, Motoki Chiba) acquired Company Y's stock at par value, understanding the purpose and substance of the ESOP during the period from

1968 to 1979. Upon acquiring stocks, Xs agreed to Company Y that they would transfer their ESOP stocks at par value to a person the board of directors appointed. In May, 1986, Xs retired from Company Y and in December 1986, they brought a suit against Company Y, claiming that they are the owners of the stock and that stock certificates should be issued to them.

Company Y held a board of directors meeting in 1988 and adopted the resolution that A, the son of a representative of Company Y, be appointed as a transferee.

Xs asserted that notices of appointment of a transferee addressed to them were void. They claimed that the agreement that the ESOP stocks would be transferred at par value was obtained by coercions by Company Y and that such coercion would deprive them of their interest to collect invested capital. They also claimed that the purpose of the agreement was to protect the interests of the family of the company management. The trial court dismissed the claim and the Appellate Court dismissed the appeal.

[Opinions of the Court]

Appeal dismissed.

The agreement in question does not violate article 204 (1) of the Commercial Code and the public policy stipulated in article 90 of the Civil Code. Therefore, it is valid. The trial court ruled that the Xs' claim should be dismissed based on the judgment that the Xs lost their right to the ESOP stocks when company Y's board of directors appointed A as a transferee and sent notices to the Xs. The decision made by the trial court was reasonable.

[Comment]

The employee stock ownership plan is beneficial to employee for it contributes to the employees' asset planning and motivates employees to participate in the corporate management. It also benefits corporations by providing stable shareholders and enhancing employees loyalty to their corporations. The employee stock ownership plan is employed by more than 90% of listed corporations and by many non-listed corporations. In the employee stock ownership plan,

a corporation and an employee enter into a contract individually. Under the contract, the employee is prohibited from transferring shares acquired through the plan (hereinafter ESOP shares) while employed by the company. Upon retiring or leaving the plan, the employee is required to transfer, his or her ESOP shares to the corporation or to a person the corporation appoints. The price of the share which the employee will receive when transferring his or her ESOP shares is set at the time of purchase.

In this case, the issue is the validity of the agreement that employees would transfer ESOP shares to a person appointed by the board of directors at the same price as the purchase price (par value). This issue has been dealt with in many lower courts. The Supreme Court supported the lower court rulings and declined that such an agreement is valid. Two major issues are disputed in this case. The first one is whether the agreement violates article 204 (1) of the Commercial Code, which stipulates that the articles of incorporation may require the board of directors' approval upon the transfer of shares. The second issue is whether the agreement complies with public policy as stipulated article 90 of the Civil Code, even if it does not violate article 204 (1) of the Commercial Code.

With regard to the issue involving article 204 (1) of the Commercial Code, case law approves the validity of such an agreement. The main rationale is that the article does not directly govern the validity of an individual contract between a corporation and a shareholder. On the contrary, many scholars argue that article 204 (1) of the Commercial Code governs whenever a corporation becomes a party in the sale of shares or the coercion of a transferee. They argue that it is violative of the article to restrict the transfer of shares by entering a contract with individual shareholders. This argument maked thorough it follows that any contract to which a corporation is a party would be void, regardless of the substance of the contract. However, some of them argue that this kind of contract is void unless a contract is entered into by a corporation and a shareholder as part of a promise concerning share ownership, for a legitimate purpose such as an employee stock ownership plan, and that the shares are transferred at a fair price. Exception is made for a contract which does

not unduly hurt shareholders' interests. According to this argument, the agreement in this particular case would be void because the sale price is the same as the purchase price, and therefore it is not a fair price.

Even if the agreement, as this court held, does not violate article 204 (1) of the Commercial Code, and freedom of contract applies, one must consider whether it complies with the public order provision stipulated in article 90 of the Civil Code. Courts have ruled that an agreement under which shares are transferred at the purchase price is valid. The reasoning is that a limitation on the transferee is not prohibited if the party entered into the agreement voluntarily, and understood the purpose of the employee ownership plan. Further, employees' opportunities to collect invested capital would not be unduly restricted by the fact that the purchase price and the sales price are the same because the purchase price is not market value. Recently some scholars have criticized the courts' rulings. They argue that under such an agreement, employees cannot earn capital gains and that employees' opportunities to collect invested money are not sufficiently protected when taking the fall in buying power into consideration.

The 1966 reform Act allowed the restriction on the transfer of shares through application of the articles of incorporation. The 1990 reform Act provided shareholders of corporations whose articles of incorporation restrict the transfer of shares with pre-emptive rights. These reforms made the doctrine of transferability of shares less restrictive for closely held corporations. It can be said that freedom of contract applies to a contract to which a corporation is a party, even when involving a limitation on the transfer of shares. The issue here should be the reasonableness of the substance of a contract. It must be noted that the coercion of a transferee by a corporation may provide opportunities for shareholders of closely held corporations to collect invested capital, as those shares have no marketability and shareholders may have difficulty in finding the transferee. Considering the legitimacy of an employee stock ownership plan, the coercion of sales may not be unreasonable. Therefore, the reasonableness of the price at the time of transfer should be the sole benchmark to use in determining validity of the agreement. The price at the time of

transfer must be the price by which the employee-shareholders can earn capital gains, that is market value, in order for it to be reasonable and to secure the employee-shareholders' opportunities to collect invested capital. With regard to this issue, the agreement in the instant case, under which the price at the time of transfer is par value, should be void, for it does not set a reasonable price.

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7. Labor Law

A case which held that a series of conduct such as close supervision of workers, isolating them and violating their privacy only because they are members of the Communist Party or party sympathizers constitutes tort — Case of Kansai-Denryoku

Decision by the Third Petty Bench of the Supreme Court on September 5, 1995. 680 *Rōhan* 28.

[Reference: Civil Code, Article 709.]

[Facts]

Y (defendant, *kōso* appellant, *jōkoku* appellant) is an electric company. X1-X4 (plaintiffs, *kōso* appellees, *jōkoku* appellees) are employees of Y. X1-X4 are members of or sympathizers with the Communist Party, and also they are the left-wing minority of the labor union whose members are the employees of Y.

In 1960, resisting the renewal of the Japan — US Security Treaty Agreement, the Japanese labor movement arose, which caused a lot of damage to the business activities of Japanese companies. Later, Y was afraid that the same situation which arose in 1960 would occur at the time of the next renewal of the Agreement in 1970. Y asked the union to cooperate in protecting the business activities of Y, and