7. Commercial Law

Tokyo District Court, March 29, 2001
Kagoya v. Kurosawa (Industrial Bank of Japan Case)
1748 HANREI JIHO 171

When a corporation carries out a share-transfer while a shareholder derivative suit is pending at court, the plaintiff shareholder, who has been deprived of the title of shareholder by the share-transfer, is disqualified as a plaintiff.

Reference:

Commercial Code, Article 267(1)(2); Code of Civil Procedure, Article 140.

Facts:

Industrial Bank of Japan ("the Industrial Bank") had provided a restaurant manager (A) with a series of loans of 100 billion yen in sum without inquiring into the financial status of A. A few years later, as the value of collateral that A had given to the Industrial Bank was lost, and as the Industrial Bank defended and appealed against a suit for executing avoidance power brought by trustees in bankruptcy after the court adjudicated A bankrupt, the Industrial Bank suffered an excessive loss through such loans.

Furthermore, the Industrial Bank, at the request of the Finance Ministry, carried out equity participation to the Nippon Credit Bank ("the Bank") and acquired stocks of the Bank in order to give relief to the Bank. In a while, the Bank was placed under the control of a public institution, and the value of shares of the Bank declined significantly. Consequently, the Industrial Bank also suffered a loss through such equity participation.

In April of 1999, the plaintiffs (Xs) who were shareholders of the Industrial Bank brought a shareholder derivative suit against the directors and auditors of Industrial Bank (Ys), claiming that such directors had violated their duty of care through the above-mentioned loans or

equity participation and that such auditors had been liable for failing to prevent the above-mentioned loans or equity participation and to bring such directors to account.

In September 2000, while this case was pending at the court, the Industrial Bank Fuji Bank, and Dai-ichi Kangyo Bank carried out a joint-share-transfer and created a holding corporation ("Mizuho Holdings"). As a result of this joint-share-transfer, Xs was deprived of the title of shareholders of the Industrial Bank of Japan, and got the title of shareholders of Mizuho Holdings. Consequently, Ys alleged that Xs were disqualified as a plaintiff and this suit was dismissed.

Opinion:

Claim dismissed.

The text, "Shareholders who have continued to hold one or more shares in the past 6 months", prescribed in the Commercial Code, Art. 267, para. 1, define the person who can bring a shareholder derivative suit. The "Shareholders" prescribed in such a provision, if one reads literally, could be interpreted as shareholders of the corporation which the defendant director belongs to. In the Commercial Code, there is no special provision for a plaintiff shareholder, who is deprived of the title of shareholders of the corporation which the defendant director belongs to through a share-transfer, so there is no reason to admit X as a plaintiff continuously. Also, there is no particular reason to interpret that such a plaintiff should have a qualification for maintaining a shareholder derivative suit in contradiction with the text of the Law. Therefore, we interpret that Xs are disqualified as a plaintiff.

Editorial Note:

In Japan, the creation of a pure-holding-corporation has been approved since the revision of the Antitrust Law carried out in 1997. And the systems for corporate reorganization have been reviewed for the past few years through a series of the amendments of the Commercial Law. The system for "Share-Transfer", as a part of such amendments, was introduced through an amendment of the Commercial Law carried out in 1999 in order to permit a corporation to create a hold-

ing corporation more smoothly. When a holding corporation is created through a share-transfer, an original corporation running a business becomes a wholly owned subsidiary of such a holding corporation, and the shareholders of the original corporation also become shareholders of such a holding corporation. As a result, it is said that the shareholders of the original corporation which has become a wholly owned subsidiary are not be able to participate in the business of the original corporation directly, and that a phenomenon, the so-called "Reduction of the Shareholders' Right", would arise, through the share-transfer.

The court in this case held that the Xs' titles as shareholders was affected by the "Reduction of the Shareholders' Right", and that was deprived through the share-transfer. And the court concluded that Xs were disqualified as plaintiffs of the shareholder derivative suit.

In view of the decision in this case, if a shareholder brought a derivative suit against a director and pursued his/her liability, once the share-transfer was carried out, the shareholder could no longer maintain the shareholder derivative suit and pursue the director's liability. To be sure, if a shareholder plaintiff should maintain a derivative suit and win such a suit after the share-transfer, the damages that a defendant director should compensate are paid not to the holding corporation of which the shareholder plaintiff has become a shareholder but to the original corporation which has become the wholly owned subsidiary of the holding corporation. So, the economic profits which the shareholder plaintiff gets should be less than before the share-transfer. Based on this assumption, the conclusion of the decision in this case is likely to be appropriate. However, if any shareholder derivative suits after the share-transfer should be dismissed based on the attitude of the decision in this case, the functions to deter the violation of the law and to discourage moral hazards, which are involved in the director liability system, will not be performed, once the share-transfer is carried out. Some who think such functions important would say that a shareholder plaintiff should be allowed to maintain a derivative suit when the share-transfer is carried out. The share-transfer results in the deprivation of the title of shareholder of the original corporation, irrespective of the will of such a plaintiff. If we consider the conditions that misconduct in corporations have occurred in succession and that a

shareholder can readily bring a derivative suit since the revision of the Commercial Law in 1993, such an argument seem to be more appropriate than the view of the decision in this case.

In the United States, a principle is perceived in case law, permitting a shareholder of a parent corporation to bring a derivative suit against a director of its subsidiary corporation, in turn, or permitting a shareholder of a subsidiary corporation to bring a derivative suit against a director of its parent corporation. From the standpoint of comparative law, such a principle should be introduced in Japanese Law somehow.

However, under the current law system, it is difficult to interpret that one shareholder that has a right to bring an action also means a shareholder of a parent corporation. Consequently, we might find some propriety in these findings which rejected the right of standing in a derivative suit. In the long and medium terms aspects, it would be preferable that legislation to permit a shareholder of a parent corporation to bring a derivative suit against a director of its subsidiary corporation is introduced.

8. Labor Law

Supreme Court 2nd P.B., March 24, 2000
Oshima v. Dentsu Inc.
54 (3) MINSHU 1155, 1707 HANREI JIHO 87,
1028 HANREI TAIMUZU 80, 779 RODO HANREI 13,
1725 RODO KEIZAI HANREI SOKUHO 10

Employers have a duty to organize their employees' work so that mental and physical illness will not result from an accumulation of excessive fatigue or stress. Judges cannot take the victim's mental state into consideration when deciding the amount of compensation, unless the mental state is demonstrably abnormal.