split, both positions agreed that it is desirable that this problem be settled by legislation soon. At present, legislation concerning ART is strongly required anyway. The Council in the Ministry of Justice has already finished examining the problems in order to draw up legislation as to the legal relationship with the parent of a child who is born by ART and published a tentative report in July 2003. The report also pointed out that there was a problem with regard to the utilization of frozen sperm after the donor's death. Unfortunately, although the Council paid some attention to this problem, it avoided examining it deeply. The reasons why the Council took such an attitude were that this issue needed careful examination from viewpoints such as the welfare of the child and the concern for the intention of the parents after considering what the legal system regarding medicine should be for this issue, and that it was not appropriate to make independent rules regarding the legal system of the relationship between the child and parents while the legal policies in the field of the medicine remained uncertain. Thus, the council excluded this issue from the subjects of its examination.

In addition, this case is pending in the High Court. So the expected judgment of the Court is attracting considerable attention.

P.S. According to the Japanese newspapers, the High Court granted judgment in this case on July 16, 2004, affirming the claim of the plaintiff.

5. Law of Civil Procedure and Bankruptcy

Hakusuitekku v. Tani
Supreme Court 1st P.B., July 3, 2003
Case No. (*jyu*) 1873 of 2002
1835 HANREI JIHO 72; 1133 HANREI TAIMUZU 124

Summary:

On the requirements for asking for a change to the dividend table (*haitohyo*) based on the true relationship of right, which differs from the statement of the collateralized claim in an auction-filing-document

(*keibai-moshitatesho*) in the suit of objection to dividend.

Reference:

Civil Execution Act, Articles 90 and 188; Rules of Civil Execution, Articles 60, 170 no.2 and no.4, and 173, para. 1.

Facts:

The *jokoku*-appellant (X) had received a setup of common flexible mortgage (*kyodo-neteitoken*), and then filed for the auction of real estate. But, the auction-filing-document (*keibai-moshitatesho*) included only the principal and did not include the interest and delinquency charges. The execution court, after paying the dividend money to the creditor who has priority to X, paid to X the dividend money equivalent to only the principal included in the auction-filing-document (*keibai-moshitatesho*), and then paid the rest of the money to the *jokoku*-appellee (Y), who was inferior to X. Then, X asked for more dividend money for the interest and delinquency charges within the limits of the maximum amount, and filed a suit of objection to the dividend against Y.

Opinion:

Reversed and remanded.

The meaning of the Rules of Civil Execution, Art. 170 no.2 and no.4, as the judgement of the original decision pointed out, consists in the execution by which auction proceeding shall be stabilized. It cannot be avoided being said that the applicant who filed the execution of only a part of his collateralized claim shall not be permitted to extend the amount of the claim filed in this proceeding. However, this conclusion is produced from the request for the estoppel, and the Rules of Civil Execution, Art. 170 no.2 and no.4 do not provide the substantive effect that the priority for the rest in the case of partial execution of a collateralized claim would be lost.

The proceeding of auction as the execution of security on real property starts when the predetermined documents (Rules of Civil Execution, Art. 181, para. 1) are advanced and proceeds on the assumption that what the party filed is true. Therefore, to realize the smooth proceeding of an auction, it can be said to be useful for the execution court to make the

proceeding follow the statement of the filing document, trusting that the filing document includes what the Rules of Civil Execution, Art. 170 no.2 and no.4, provide.

However, in the proceeding of an auction as the execution of security for only a part of the claim collateralized by the mortgage, the mortgage disappears by the sale, and the secured creditor loses the priority for the rest of the collateralized claim, beyond the effect on the dividend in this proceding. Therefore, when the creditor did not intend to file the partial execution of a collateralized claim and did not make mention of the partial execution on the auction-filing-document because of his mistake or clerical error, etc., it cannot be natural that the estoppel should result in forbidding the claim of his true right uniformly. It also cannot be said that the provisions of the Rules of Civil Execution, Art. 170 no.2 and no.4, planned that it should be so.

Therefore, in the suit of objection to a dividend as a litigation proceeding, when it can be proved that the statement of the collateralized claim in the auction-filing-document is based on a mistake or clerical error, etc., and, the true amount of the collateralized claim can be proved, we shall consider it possible to ask for a change to the dividend table (*haitohyo*) based on the true relationship of right.

Editorial Note:

Because of the request that the amount of the claim for execution should be decided at the time of filing and the smooth advance of the subsequent proceeding should be considered important, the Supreme Court took the position that those who have chosen the execution of a part of collateralized claim would lose the priority for the rest for reason of estoppel. However, at the same time, the Supreme Court permitted the allegations of the true relationship of right in the suit of objection to dividend, on the condition that it shall be proved that the statement is different from the truth because of a mistake or clerical error, etc.

Gifu Guarantee v. Ushimaru

Supreme Court 2nd P.B., March 14, 2003
Case No. (*jyu*) 751 of 2001
57 MINSHU 286; 1821 HANREI JIHO 31; 1120 HANREI TAIMUZU 100

Summary:

Whether the guarantor whose main debotor was the company the corporate entity of which had disappeared after the decision finishing the bankruptcy proceeding (*hasan-shuketsu-kettei*) could argue the extinctive prescription of the main debt or not.

Reference:

Civil Code, Articles 145, 166, and 446; Bankruptcy Code, Articles 4 & 282.

Facts:

The *jokoku*-appellant (X) was a credit guarantee association, which, based on the contract of consigning guaranty (*hosho-itaku-keiyaku*), guaranteed the debt which A company owed financial institutions. The *jokoku*-appellee (Y) joint-guaranteed (*rentai-hosho*) the exoneration-debt (*kyusho-saimu*) for which A would owe X. After the bankruptcy-decision (*hasan-senkoku*) of A, X paid the rest of A's debt and then filed the claims for the principal and the interest produced until the day of the decision. These claims were allowed without objection in the term of the investigation of claims. After the bankruptcy proceeding was finished, Y continued to pay the exoneration-debt (*kyusho-saimu*) to X over about 6 years (the payment was appropriated to the principal first). As a result, the payment of the principal of the exoneration-debt (*kyusho-saimu*) was finished. However, because Y did not pay the delinquency charges, X filed this suit against Y about 9 and a half years after the end of the proceeding. X claimed a payment of about 5,800,000 yen, the amount of the delinquency charges. On the other hand, Y argued the extinctive prescription of A's debt, and insisted that A's debt disappeared for reason of the extinctive prescription before X filed the suit, and so Y's guarantee disappeared as well as Y's debt.

Opinion:

Reversed and remanded.

When, after the bankruptcy-decision (*hasan-senkoku*) of a company, the corporate entity of the company disappeared after the decision finishing the bankruptcy proceeding (*hasan-shuketsu-kettei*), we shall consider that it also results in the disappearence of the debt which the company had owed, and, in this case, wituout doubt, it is impossible to conceive the extinctive prescription of the debt which no longer exists. This reason can be also applied when there is a guarantor for the debt. Therefore, the guarantor of the company which disappeared after the decision finishing the bankruptcy proceeding (*hasan-shuketsu-kettei*) cannot argue the extinctive prescription of the main debt, insisting that the extinctive prescription of the main debt was completed before filing of this suit.

Editorial Note:

After the bankruptcy proceeding finished, this judgment supposed, in principle, the corporate entity shall disappear, because there is no longer residual property to liquidate. And, as the Supreme Court indicated, (1) when the corporate entity of the company as the debtor disappears after the end of the bankruptcy proceeding, the debt of the company also disappears, (2) it is the same when there is a guarantor for the debt (exception to the adhesion (*fujyusei*) in the disappearance), and (3) the guarantor for the debt of the company cannot argue the extinctive prescription of the main debt after the disappearance of the corporate entity of the company.