3. Law of Property and Obligations

X v. Casco Co. Ltd.
Supreme Court 3rd P.B., July 19, 2005
Case No. (*jyu*) 482 of 2005
58 (8) MINSHU 2225; 1883 HANREI JIHO 62;
1172 HANREI TAIMUZU 135

Summary:

A Moneylender is in duty bound to disclose information on dealing records on *bona fide* (*shingi-seijitsu-no-gensoku*), where the debtor claims disclosure of it.

Reference:

Civil Code, Article 709; Moneylending Act, Artsicles 17, 18, and 19.

Facts:

Y, who engages in the business of moneylending, holding a moneylending's license which the act concerning the regulation of a business of moneylending (hereinafter: the Moneylending Act), Art. 3 prescribes, lent X money, from February 26, 1992, to October 10, 2002, over 109 times, and received repayments by X over 129 times. The agreed interest rate was over the rate prescribed in the act for restricting the rate, Art. 1(1).

Lawyer A, on October 2002, complying with X's request for debt arrangement, claimed from Y the disclosure of all information on dealing records in past. But Y refused. A claimed the disclosure from Y any number of times, but Y refused it every time.

In this suit, X's claim to Y for restitution of the over-repayment, insisting that over-payment had arisen with regard to the interest paid where sum over the rate prescribed in the Interest Restriction Act, Art. 1(1) is allotted to the principal, along with it, for payment of *isharyo* for tort, insisting that a moneylender Y, though having a duty to disclose the dealing records for bona fide, refused X's claim of disclosure without good reason, so that the debt arrangement of X was delayed, and X

was put in a mentally insecure position. The claim for restitution of the over-repayment was allowed in the first instance, Y did not appeal against it.

The original court refused X's claim for *isharyo*:

(1) In the Moneylending Act and other statutes, there is no provision prescribing a duty for the moneylender to disclose dealing records. The Moneylending Act, Art. 19 is not the provision that prescribes a duty to disclose the dealing records. And furthermore, it is difficult to understand that the duty is reached on bona fide as a matter of course.
(2) In this case, X claimed disclosure of the dealing records without explaining any circumstances indicating that non-disclosure would have an influence on the process of X's debt arrangement, so it is difficult to affirm that Y's refusal is considered as infringing bona fide, so illegal in tort law, and having damages arise from it.
(3) This is to say that the damage is covered by approving the claim for restitution of the over-repayment, including the damages for delay, for X's mental strain from the debt arrangement being delayed is caused by the transactions of loan, and there are no circumstances from which the damages over it arise.

X filed a *jokoku* appeal.

Opinion:

The original decision was reversed, and the case was sent back to Osaka High Court.

(1) The Moneylending Act, Art. 19 and its enforcement regulations, Art. 16 imposes on a moneylender the duty to furnish each of its offices with a book concerning its business, to enter in the book a date of contract, a sum of loan, a rate of interest, a sum of repayment, a date of the repayment and matters prescribed in the act, Art. 17(1) and 18(1), and to keep this book. Where the moneylender infringes the provision of the act, Art. 19, penalties are imposed (Art. 49, Item 7).
(2) The act provides that the moneylender must deliver to a debtor a document mentioning the matters prescribed in Art. 17 (hereinafter:

the document in Art. 17) on the occasion of the contract of loan, and deliver immediately to the repayer the document mentioning the matters prescribed in Art. 18 (hereinafter: the document in Art. 18) on all such occasions of repayment (Arts. 17 and 18). The duty to furnish and keep the book concerning its business is considered as anticipating the fact that, in the case that lending and the repayment are repeated over a long time, it is possible for even a not so careless debtor to lose a part of the document in Art. 17 etc. delivered.

(3) Further the Moneylending Act, Art. 43(1) provides that a sum which the debtor paid the moneylender as the interest is regarded as a payment to a valid interest debt in delivering the document in Art. 17 etc., even though the sum is over the rate prescribed in the Interest Restriction Act, Art. 1(1) (the payment is called *minashi-bensai*), so it is possible to raise a dispute about *minashi-bensai* where the moneylender lends money at the interest over the rate prescribed in the Interest Restriction Act, Art. 1(1).

(4) It is, then, appropriate to think that the Moneylending Act aims to protect the interest that the debtor gets a loan from a moneylender under the appropriate management of moneylending by imposing the duty to furnish and keep the book concerning its business with a punishment, and for prevention of disputes about a loan between a creditor and a debtor, including about *minashi-bensai*, for speedy settlement of any dispute arisen, on occasion of a doubt arising about the content of a debt, by making it clear with the book.

(5) In addition to the above spirit of the Moneylending Act, where a debtor can not correctly grasp the content of the debt, he generally has difficult in making a plan of repayment, and is able to claim for restitution of the over-repayment. Besides, it is possible for the debtor to suffer a great loss, for instance, to be compelled to comply with a demand for payment. On the other hand, it is easy for the moneylender to disclose the content of the debt based on the book kept by him, and there is no special load for him. In consideration of this, a moneylender is obliged to disclose the dealing records based on the book kept by him, as an incidental duty of a money loan contract to which the Moneylending Act is applied, on bona fide, where the debtor claim disclosure of it unless there are special

circumstances that the claim of disclosure is abuse. When the moneylender refuses the disclosure of the dealing records infringing this duty, his conduct shall be illegal, and form tort.

(6) According to the above points, it is not inferred that X's claim for disclosure of the dealing records has the above special circumstances. The above refusal of disclosure by Y is illegal, and the mental damage that X suffered by it is not in a position that the claim for restitution of the over-repayment admitted compensates for the damage, and so damages for tort shall be admitted.

Editorial Note:

It has been hitherto argued whether a Moneylender is in duty bound to disclose information on dealing records. The Opinion was divided into that denied the duty to disclose, which the original court accepted, and that which affirmed the duty. If the duty were affirmed, it was been argued where the duty was imposed. This decision accepts the opinion affirming the duty, and holds that the duty to disclose is in principle imposed in a money loan contract to which the Moneylending Act is applied. A learned man poses the question whether the Supreme Court qualifies the duty to disclose as an incidental duty of a money loan contract to which the Moneylending Act is applied, while the court makes its infringement a tort.

It is notable that even if the debtor gets restitution of the over-repayment (i.e. even if he or she has no material loss), it forms a tort when the moneylender refuses a claim for disclosure of the dealing records without good reason. The Supreme Court holds that on that occasion the moneylender should pay *isharyo* to the debtor. From the point of view of traditional opinion, the condition of damage may be lacking when liability of tort is admitted in this case. So the court ordered payment of the damages for mental damage (*isharyo*). But in fact how is it mental damage? Such an *isharyo* is often used in Japanese case law. Scholars find the expression of sanction a function of tort law in it. In Anglo-American law, punitive and nominal damages take the function, but Japanese law has no such institution. In Japan *isharyo* is substituted for it. This case is an example. The necessity of sanction in this case is based on the fact that the moneylender refused the disclosure

of dealing records necessary for the exercise of the right of the debtor, in spite of plural claims.

4. Family Law

X v. The Commissioner of the Social Insurance Agency[1]

Tokyo High Court, May 31, 2005
Case No. (*gyo-ko*) 241 of 2004
1912 HANREI JIHO 3

Summary:

A niece who had had a *de facto* marriage with her uncle, one of the prohibited degrees, for approximately 42 years is not eligible for a survivor pension on the grounds that (a) the Employees' Pension Insurance Act Art. 3(2) does not intend to grant eligibility to a spouse of a *de facto* marriage contrary to orderly marriage under Civil Code; (b) the prohibited degrees under Civil Code Art. 734(1) is regarded as offending the public interest, and even the flight of time can by no means cure this impediment to marriage; (c) the Employees' Pension Insurance Act Art. 3(2), granting eligibility to a spouse of a *de facto* marriage, shall not be construed as a provision which admits unlawful marriages with impediments to marriage; (d) the fact that their marriage was accepted by their community does not make it unnecessary to consider ethical problems; (e) the social insurance system is not a quid pro quo. Thus the District Court's decision which revoked the Social Insurance Agency's rejection of the niece's application for a survivor pension shall be reversed and the niece's claim be dismissed.

Reference:

Civil Code, Article 734, Paragraph 1; Employees' Pension Insurance Act, Article 3, Paragraph 2 and Article 59.

[1] The details of the District Court's decision have been introduced at 24 WASEDA BULLETIN OF COMPARATIVE LAW 84–88.