

purpose of the application of Article 1 (1) of the State Redress Act.

The factors determining illegality of the government failure to exercise its authority are: (1) purpose and objective of the law involved, (2) the nature of the rights/interests infringed by the failure, (3) whether it was able to foresee possibility of harms, (4) whether it was able to avoid causing such harms, and (5) whether the government's intervention was expected to avoid such harms.

This judgement found that the failure of the government to exercise its authority to enact ministerial ordinances based of the Labor Standards Act was extremely unreasonable and considered as illegal, and ordered the State to pay compensation for the damages caused by such failure. The court emphasized that, in light of the Act's objective to ensure that working conditions meet the needs of workers to live lives worthy of human beings, the authority of the Minister of Labour must be exercised 'at the right time' and 'as quickly as possible' to be in line with technological advances and the latest medical findings.

This is the judgement on 'workplace' asbestos case. There are also other type of asbestos cases brought by the construction workers affected by asbestos. These construction workers cases are still pending at several high and district courts.

3. Law of Property and Obligations

X v. Y

Supreme Court 3rd P. B., October 28, 2014

Case No. (*Ju*) 2007 of 2012

68 (8) MINSHU 1325

Summary:

This is a case in which the Supreme Court held that with regard to the money paid under the contract for contribution and distribution of money which is against public policy and therefore void, it is impermissible under the principle of good faith to refuse to return the money thus paid, by reason that the payment thereof constitutes performance for illegal cause.

Reference:

Civil Code, Art.1 (2), Art.90, and Art.708; Bankruptcy Act, Art.78 (1); Act of Prevention of Pyramid Schemes, Art.2 and 3.

Facts:

The Facts which was legally determined by the Tokyo High Court are as follows.

From around February 2010, the bankrupt company commenced the business involving contribution and distribution of money (hereinafter referred to as the “Business”). The Business is the operation of an organization for distribution of money which was designed to appropriate money that has been collected exclusively from newly recruited members for payment of dividends to persons who become members earlier, and it falls within the scope of a pyramid scheme provided in Article 2 of the Act on Prevention of Pyramid Schemes.

In March 2010, Y concluded a contract with the bankrupt company to become a member of the Business. Until December 2010, Y paid 8,184,200 yen to the bankrupt company as contribution under the said contract, and received 29,517,035 yen from the bankrupt company as dividend (hereinafter the part of the dividend which corresponds to the amount that remains after deducting the said amount received as dividend from the said amount paid as contribution, 21,332,835 yen, is referred to as the “Dividend”).

In conducting the Business, the bankrupt company recruited at least 4,035 members and received a total of 2,561,277,750 yen as contribution from them. On February 21, 2011, the bankrupt company was given an order of commencement of bankruptcy proceedings, and X was appointed as the bankruptcy trustee. In said bankruptcy proceedings, persons who incurred losses due to the Business account for the majority of the bankruptcy creditors.

On the facts above, Tokyo High Court dismissed the claim of X, holding that the Dividend corresponds to the performance for illegal cause and thus X may not demand the return of the Dividend, as provided in Art.708 of the Civil Code.

Opinion:

The Supreme Court *quashed* the decision of Tokyo High Court and *decided* as follows.

“The Dividend was paid to Y in the course of the Business which falls within the scope of pyramid scheme in which no person is allowed to be involved, and due to the mechanism of the Business, the money that other members contributed was the source of the Dividend. A considerable portion of the members of the Business incurred losses due to the failure of the bankrupt company, without receiving money that is equivalent to the amount of money they contributed, and they account for the majority of the bankruptcy creditors who have been unable to receive remedies for their damage. Given such facts, it would serve the principle of equity for X, who is the bankruptcy trustee for the bankrupt company, to seek the return of the Dividend from Y and aim for proper and fair liquidation by using the Dividend to make distributions through the bankruptcy proceedings to the bankruptcy creditors including those members who incurred losses. If Y were allowed to refuse to return the Dividend to the bankruptcy trustee, this would be equal to endorsing Y retaining unjust profit based on the losses incurred by other members who are victims. Such consequence is far from being considered reasonable.

Consequently, under the abovementioned circumstances, it is appropriate to construe that it is impermissible under the principle of good faith for Y to refuse to return the Dividend, by reason that the payment of the Dividend constitutes performance for illegal cause.”

And there is a concurring opinion by Justice KIUCHI Michiyoshi.

Editorial Note:**1. The Meaning of This Case:**

This is the first case where the Supreme Court has held, based on the principle of good faith, that a person who had benefited from a pyramid scheme could not, by invoking Art.708, reject the demand to return that benefit by the bankruptcy trustee of a person who had established that scheme.

2. The System of the Japanese Law of Unjust Enrichment:

The Art.703 of the Japanese Civil Code provides that “[a] person who has benefited (hereinafter in this Chapter referred to as “beneficiary”) from the property or labor of others without legal cause and has thereby caused loss to others shall assume an obligation to return that benefit, to the extent the benefit exists.”

However, the Art.708 of the Code also provides that “[a] person who has tendered performance of an obligation for an illegal cause may not demand the return of the thing tendered; provided, however, that this shall not apply if the illegal cause existed solely in relation to the Beneficiary.”

The Art. 708 is equivalent to the principle of Common Law, a so-called Clean-Hands principle. The provision intends to punish the “person who has tendered performance of an obligation for an illegal cause” by refusing the demand of that person to return the performance tendered, and it naturally follows that the beneficiary can retain the interests of that performance. This is sometimes fair and sometimes unfair. It produces different interpretations of how widely the Art. 708 applies.

3. The Structure and Range of the Decision:

The Art.3 of the Act of Prevention of Pyramid Schemes prohibits a person from joining the so-called Pyramid Scheme and Arts.5, 6 and 7 of the same act impose penalties against those such as a person that starts the Scheme or invites to the Scheme. The Tokyo District Court held that the Business of the bankrupt company in this case was illegal under these provisions of the Act and thus against the public policy, and that Y has no legal cause to retain the Dividend tendered by the bankrupt company to Y. The decision on this point has not changed from the first instance to the Supreme Court. The question here was whether Y could refuse the request from X by invoking Art.708 of the Civil Code. The Tokyo High Court, as well as the district court, held that the Dividend was tendered by the bankrupt company to Y “for an illegal cause” and thus X, who claims the return of that Dividend for the bankrupt company, is not allowed to demand Y to return that Dividend .

The Supreme Court did not agree with the High Court’s decision and held that it is impermissible under the principle of good faith for Y to rely on the Art 708 in order to refuse X’s claim to return the Dividend. The

reason for that judgment which the Supreme Court emphasizes is the balance between Y and the other victims of the bankrupt company's Business. The Dividend, which was tendered by the bankrupt company to Y, consisted of the money collected from the other victims of that company. If Y could reject X's claim to return the Dividend, it would mean that Y could retain the benefit at the cost of the other victims and that, on the other hand, the other victims could get no remedy. It would have been this unfairness that drove the Supreme Court to turn down Y's defense based on Art. 708 of the Civil Code.

To deny the application of Art. 708, there is another way of stating that the bankruptcy trustee is not "[a] person" himself under that Art, "who has tendered performance of an obligation for an illegal cause." But the counter argument could be raised that he should be regarded as the same as the bankrupt company "who has tendered performance of an obligation for an illegal cause" because the trustee is an agent for the bankrupt company in the bankrupt proceedings. In discussions about the bankruptcy trustee's legal position, more courts and scholars favor the latter view. The Supreme Court did not answer directly whether a bankruptcy trustee should be treated as if he were a bankrupt company "who has tendered performance of an obligation for an illegal cause". Rather, the Supreme Court denied the application of the Art. 708 by using a principle of good faith in this case. In other words, the Supreme Court did not want this result in all similar cases, but rather just want it in some specific case.

4. An Additional Remark:

The decision of the Supreme Court in this case has an English text at the website of the Supreme Court. The Summary, Facts and Opinion in this Note are extracts from there. Please see the website: http://www.courts.go.jp/app/hanrei_en/detail?id=1298

4. Family Law