

by who want to gain it by adopting the single surname. It was mentioned that the current surname system prevents people who are unwilling to change his/her surname marrying. Denial of the sense of unity which the latter person wants to realize by legal marriage cannot be justified. In addition, the reasonability of legislation to exclude any exception was not pursued in this case. Despite the fact that the Court assumed the disadvantage from changing a surname could be eased by using a by-name, use of a by-name has no legal foundation, and thus provides no legal certainty. Usability of a by name does not grant reasonability to the legislature still avoiding any exception to the system. Moreover, international marriage does not lead to adopting a surname, since the family register only handles Japanese nationals. The current attitude shown by the Court to persist the family norms peculiar to Japanese nationals seems to be highly exclusive. This case revealed the Court's attitude to hesitate to mend the family norms which are based on legal marriage and the legitimacy of the child, and the approach from the respect of the individual in a family unit shown in case 2014 was retreated. Though there is no clear statement of why the court should have avoided intervening in the traditional family norms, a risk of a persisting "normative" family structure, which could entrap people out of this structure as deviant and blindly bury individuals into the collectivity of a family, must be recognized.

## **4. Law of Civil Procedure and Bankruptcy**

**X v. Y**

Supreme Court 1st P.B., November 30, 2015

Case No. (*ju*) No.2146 of 2014

69 (7) MINSHU 392

### **Summary:**

In a case where the first instance makes a judgment that a litigation had been closed upon the Settlement having been reached and only the defendant filed an appeal against the judgment, while the plaintiff filed

neither an appeal nor an incidental appeal, if the court of second instance holds that the settlement in the litigation is invalid and that there are grounds for part of the plaintiff's claims, the court (1) cannot render a judgment on the merits to revoke the judgment in the first instance and partially uphold the plaintiff's claim, because of the principle of prohibition of modifying the judgment in a prior instance in a manner disadvantageous to the appealing party, so (2) has no choice but to dismiss the defendant's appeal as a whole.

**Reference:**

Code of Civil Procedure Arts. 267, 302, 304, 305.

**Facts:**

X filed an action against Y, seeking surrender of a rented room (hereinafter referred to as the "Rented Room") and payment of damages in an amount equivalent to the rent, based on ownership for the Rented Room.

On May 8, 2013, X and Y reached a settlement in litigation (hereinafter referred to as the "Settlement"). Under this Settlement, Y shall vacate the Rented Room in exchange for receiving 2,200,000 yen from X. However, on May 22, 2013, Y filed a petition for the court to designate a date to continue the litigation that had already been closed, alleging the invalidity of the Settlement.

The court of first instance found the Settlement valid and rendered a final judgment to the effect that this litigation had been closed upon the Settlement having been reached.

Only Y filed an appeal against this judgment, while X filed neither an appeal nor an incidental appeal.

The court of second instance found the Settlement valid and determined that the Settlement is invalid and that there are grounds for part of X's claim, and rendered a judgment to revoke the judgment in the first instance, declare the invalidity of the Settlement, and order Y to vacate the Rented Room in exchange for receiving 400,000 yen from X and pay damages in an amount equivalent to the rent, while dismissing the remaining part of X's claim.

Y filed a petition for acceptance of final appeal, alleging that (1) the

court of second instance determined that the Settlement is invalid, but neither party seeks a declaration of the invalidity of the Settlement, and therefore, the court of second instance is illegal for adjudicating a matter that has not been claimed by the parties; (2) only Y filed an appeal against the judgment in the first instance, but the judgment of the second instance is more disadvantageous to Y, therefore, the second instance violates the principle of prohibition of modifying the judgment in a prior instance in a manner disadvantageous to the appealing party.

**Opinion:**

*Quashed and Decided by the Supreme Court (the Appeal Dismissed).*

“(1) A person who alleges the invalidity of a settlement in litigation is considered to be able to file an action to seek a declaration of the invalidity of the settlement. However, according to the case records, in this case, neither party seeks a declaration of the invalidity of the Settlement. Nevertheless, the court of prior instance rendered a judgment to declare the invalidity of the Settlement in the main text, and in this respect, the judgment in the prior instance is illegal for adjudicating a matter that has not been claimed by the parties, and such illegality apparently affects the judgment.

(2) Furthermore, a final judgment declaring that the litigation has been closed upon a settlement in litigation having been reached (hereinafter referred to as a "judgment declaring the close of the litigation by a settlement") is a procedural judgment that finally determines, with the force of *res judicata*, only the fact that the litigation has been closed. Therefore, compared with this, a judgment on the merits that partially upholds the plaintiff's claim is in a form deemed to be more disadvantageous to the defendant, regardless of the content of the settlement. Consequently, in a case where the court of first instance rendered a judgment declaring the close of the litigation by a settlement, and only the defendant filed an appeal and the plaintiff filed neither an appeal nor an incidental appeal, if the court of second instance renders a judgment on the merits to revoke the judgment in the first instance and partially upholds the plaintiff's claim, this would be in violation of the principle of prohibition of modifying the judgment in a prior instance in a

manner disadvantageous to the appealing party, and therefore the court of second instance should not be permitted to render such a judgment.

It is inappropriate for the court of second instance to dismiss only partially an appeal that has been filed against a judgment declaring the close of the litigation by a settlement, because this would lead to making the close of the litigation effective for only part of the claim subject to the settlement, although it should have become effective for the claim as a whole. Therefore, in the abovementioned case, if the court of second instance holds that the settlement in litigation is invalid and that there are grounds for part of the plaintiff's claims and therefore intends to render its own judgment without remanding the case to the court of first instance, it would have no choice but to dismiss the defendant's appeal as a whole.

This reasoning can be applied in this case as follows. Only Y, who is the defendant in the first instance, filed an appeal against the judgment in the first instance, which is a judgment declaring the close of the litigation by a settlement. Accordingly, if the court of a prior instance revokes the judgment in the first instance and partially upholds the claim of X, who is the plaintiff in the first instance, this would be in violation of the principle of prohibition of modifying the judgment in a prior instance in a manner disadvantageous to the appealing party, and therefore the court of prior instance should not be permitted to render such a judgment. Rather, even if the court of prior instance found that the Settlement is invalid and that there are grounds for part of X's claim, it would have no choice but to dismiss Y's claim as a whole, as long as it renders its own judgment without remanding the case to the court of first instance. Nevertheless, the court of a prior instance rendered a judgment to revoke the judgment in the first instance and order Y to vacate the Rented Room in exchange for receiving 400,000 yen from X and pay damages in an amount equivalent to the rent to X, while dismissing the remaining part of X's claim. Such a handling of the case by the court of prior instance involves a violation of laws and regulations that apparently affects the judgment.”

**Editorial Note:**

In this case, the court of first instance made a final judgment that this litigation had been closed upon the Settlement is valid, and only Y filed an appeal, but the court of second instance determines the Settlement is

invalid and made a judgment on the merits because there is no need for additional oral arguments (*see* Code of Civil Procedure Art. 307 (1)). However, the Supreme Court said that (1) the court of second instance is illegal for adjudicating a matter that has not been claimed by the parties; (2) the second instance violates the principle of prohibition of modifying the judgment in a prior instance in a manner disadvantageous to the appealing party. Especially, it would be a problem that ① whether the judgment in the second instance violates the the principle of prohibition of modifying the judgment disadvantageously; ② what should the second instance do if the court revokes the judgment of the prior instance and makes a judgment by itself because there is no need for remanding the case to the prior instance.

### **1. Adjudication a Matter not Claimed by Parties**

First, this new judgment determines that judgment of the second instance is illegal because it adjudicate the validity of the Settlement not claimed by parties. Some might say it is appropriate to adjudicate the validity, because an appellant who files an appeal against a judgment declaring the close of the litigation by a settlement generally seeks a declaration of the invalidity of the settlement. However, according to the precedent (*see* judgment of the Supreme Court 2nd P. B., January 21, 1972, 105 SHUMIN 13), a judgment declaring the close of the litigation by a settlement is a judgment that finally determines, with the force of *res judicata*, only the fact that the litigation has been closed. And the parties can file another action to seek a declaration of the invalidity of the settlement. Therefore, the court cannot make a judgment about the validity of the settlement without a party's petition.

### **2. Is the judgment of the second instance more disadvantageous to Y ?**

In this case, the first instance only declares the close of the litigation, so there is a room to examine whether the judgment of the second instance is more disadvantageous to Y.

There might be some arguments about the the principle of prohibition of modifying the judgment disadvantageously in relation to the judgment declaring the close of the litigation: ①comparing a determination of a

second instance with the *res judicata* of the judgment declaring the close of the litigation ; ② comparing a determination of a second instance with the *res judicata* of the settlement in litigation. And there might be a view that ③ it is no problem to make a judgment on the merits because the judgment declaring the close of the litigation does not contain a decision on the merits (*see* Case Comment, 1421 HANREI TAIMUZU 101, 102 (2016)). It seems that the second instance in this case stands ③, but the Supreme Court stands ①.

About an appeal against the judgment declaring the close of the litigation, there are few academic arguments, so this new judgment needs to be discussed academically.

### 3. What should the court of second instance do?

(1) Can the court of second instance make a judgment on the merits?

If the judgment of the court of second instance in this case is illegal because of a violation of the principle of prohibition of modifying the judgment disadvantageously, what judgment should the court enter? At this point, the following discussion will be helpful: in the case only a plaintiff filed an appeal against dismissal, if the court of second instance determines that the claim is filed properly but the claim cannot be allowable, can the court dismiss the claim on the merits?

According to the precedent (*see* judgment of the Supreme Court 3rd P. B., December 17, 1985, 39 (8) MINSHU 1821), because a dismissal judgment on the merits is more disadvantageous than a dismissal judgment, the court can only dismiss the appeal (cannot dismiss the claim).

However, this precedent of the Supreme Court is criticized by academics. Some says that the appellant normally wants the court to decide the merits through the appeal against the dismissal judgment. And another one says that making the dismissal judgment binding is improper from the viewpoint of judicial economics, because there is a high possibility that the plaintiff files the same action again.

This new judgment stands on existing precedent and decides that the second instance shall dismiss the appeal when the determination of the second instance is disadvantageous to the appellant. Therefore, the above-mentioned critical opinions will also criticize this new judgment. That is to

say, if the second instance dismisses the appeal in this case, the dispute between X and Y about the validity of the settlement is not concluded, and it is unavoidable that X or Y will file another action.

(2) Can the court of second instance dismiss the appeal partially?

Although the second instance has no choice but to dismiss the appeal about the part that is not well-grounded, it seems possible for the court to uphold the appeal about the part that is well-grounded. However, the Supreme Court decided that the court of the second instance has no choice but to dismiss the appeal as a whole, because such a dismissal “would lead to making the close of the litigation effective for only part of the claim subject to the settlement, although it should have become effective for the claim as a whole”.

Even a settlement in litigation may involve a person who is not a party in litigation or a matter that has no relation to the claim in the action. So, the validity of settlement has to be determined as a whole (*see* Case Comment, 1421 HANREI TAIMUZU 101, 103 (2016)). If the appeal is dismissed partially, the judgment of the first instance about that part remains valid, but such a situation is inappropriate for one with the nature of a settlement; the wholeness of settlement. This point also has not been discussed well academically, so it needs to be examined.

#### **4. The conclusion of this judgment**

This new judgment decided that the court of second instance has no way but to dismiss the whole appeal, because of the principle of prohibition of modifying the judgment disadvantageously and the nature of settlement. However, as mentioned above, such a judgment cannot resolve the dispute, and X or Y will bring another action. Even if this new decision of the Supreme Court is proper in the light of theory, there is room to examine whether this decision is proper in the light of a case resolution.

## **5. Commercial Law**

**X v. Seico Fresh Foods, K.K.**  
Supreme Court, March 26, 2015