

of the child of thirteen willing staying with a non-custody parent and refusing to go back has not been respected as his free will on the grounds of psychological influence and one-sided information from the parent living together, should not be bypassed. In conclusion, it can be said that the judgement has posed future topics of discussion about the necessity of developing the support system which reflects the child's will and feeling, such as utilizing the system of a child's proceedings representative and formulating guidelines about that.

## 4. Law of Civil Procedure and Bankruptcy

**X v. Y**

Supreme Court 2nd P.B., April 18, 2018

Case No. (*Kyo*) 13 of 2017

72 (2) MINSHU 68

### **Summary:**

In the case where, in the procedure for compulsory execution for shares regarding which certificates are not issued (excluding book-entry transfer shares), after sales of such shares were carried out on a sale order by an execution court, a motion to oppose distribution on execution was filed with regard to the amounts of distribution for obligees stated in the distribution list, and a statutory deposit of money equivalent to the above amounts of distribution was made, if a bankruptcy proceeding has been commenced to the obligor before the grounds for the statutory deposit by the obligor are extinguished and the entrustment of the payment of deposit money is conducted, Article 42, paragraph (2), main clause of the Bankruptcy Act, applies to such a procedure for compulsory execution.

### **Reference:**

Article 42, paragraph (2), main clause of the Bankruptcy Act, Article 91, paragraph (1), item (vii), Article 92, paragraph (1), Article 166, paragraph (1), item (ii) and paragraph (2), and Article 167, paragraph (1) of the Civil Execution Act, Article 61 and Article 145 of the Rules of

Civil Execution, and Article 30, paragraph (1) of the Deposit Regulation

**Facts:**

The appellant obtained an attachment order (hereinafter referred to as the “Attachment Order”) against shares held by the obligor A, which consisted of shares for which certificates were not issued (excluding book-entry transfer shares prescribed in Article 128, paragraph (1) of the Act on Book-Entry Transfer of Corporate Bonds and Shares; the same applies hereinafter). After execution sales of the above shares were carried out on a sale order by court, a motion to oppose distribution on execution was filed with regard to the amounts of distribution for X and another person stated in the distribution list. Therefore, a statutory deposit of money (hereinafter referred to as the “Deposit Money”) equivalent to the above amounts of distribution on execution was made. Before the grounds for the statutory deposit were extinguished, bankruptcy proceeding had been commenced to the obligor, and, the obligor’s bankruptcy trustee Y filed a petition to seek revocation of the Attachment Order to the execution court.

Under the above process of facts, on the premise that the procedure for compulsory execution pertaining to the Attachment Order (hereinafter referred to as the “Procedure for Compulsory Execution”) ceases to be effective against the bankruptcy estate pursuant to Article 42, paragraph (2), main clause of the Bankruptcy Act, the execution court rendered by its authority a decision to revoke the Attachment Order. Therefore, in this case, whether the main clause of the same paragraph applies to the Procedure for Compulsory Execution is in dispute.

**Opinion:**

*Dismissed*

In the case where, in the procedure for compulsory execution against shares for which certificates are not issued, after sales of such shares were carried out based on a sale order, an action to oppose distribution on execution was filed with regard to the amounts of distribution for obligees stated in the distribution list, and a statutory deposit of money equivalent to the above amounts of liquidating distribution was made, if bankruptcy proceeding has been commenced to the obligor before the grounds for the

statutory deposit are extinguished and the entrustment of the payment of deposit money is conducted, it is appropriate to understand that Article 42, paragraph (2), the main clause of the Bankruptcy Act applies to such procedure for compulsory execution. The reasons are as follows.

Article 42, paragraph (2), the main clause of the Bankruptcy Act prescribes that when an order of commencement of bankruptcy proceedings is rendered, the procedure for compulsory execution that has already been initiated against property that belongs to the bankruptcy estate based on bankruptcy claims shall cease to be effective against the bankruptcy estate. When the compulsory execution has already ended at the time of the above order, the main clause of the same paragraph does not apply to the procedure.

In the procedure for compulsory execution against shares for which certificates are not issued, in the case where the sales of such shares were carried out on a sale order by court, the execution court shall implement distribution on execution, etc. (Article 167, paragraph (1) and Article 166, paragraph (1), item (ii) of the Civil Execution Act). Furthermore, in the case where a motion to oppose distribution on execution was filed with regard to the amounts of distribution for obligees stated in the distribution list, and a statutory deposit of money equivalent to the above amounts of liquidating distribution was made, if the grounds for such statutory deposit have been extinguished, entrustment of the payment of deposit money is to be conducted by the court clerk as implementation of distribution on the execution, etc. (Article 167, paragraph (1), Article 166, paragraph (2), Article 91, paragraph (1), item (vii), and Article 92, paragraph (1) of the Civil Execution Act, Article 145 and Article 61 of the Rules of Civil Execution, and Article 30, paragraph (1) of the Deposit Regulation). It can be said that the above deposited money does not belong to the obligee who is to receive distribution, etc. until the above entrustment of the payment is conducted. Therefore, it can be understood that the above procedure for compulsory execution in such a case naturally has not ended at the time when a court execution officer received the proceeds based on a sale order, and even thereafter, until the above entrustment of the payment is conducted, and when bankruptcy proceeding has been commenced to the obligor before the above entrustment of the payment is conducted, Article 42, paragraph (2), the main clause of the Bankruptcy

Act applies to the procedure.

For the above reasons, Article 42, paragraph (2), the main clause of the Bankruptcy Act applies to the Procedure for Compulsory Execution. The determination in the prior instance, which held that the execution court can revoke the Attachment Order by its authority, taking the point of view that goes along with this conclusion, can be affirmed as legitimate.

### **Editorial Note:**

Article 42, Paragraph (1), the main clause of the Bankruptcy Act says that in the case prescribed in the preceding paragraph, the procedure for compulsory execution which has already been initiated against property that belongs to the bankruptcy estate shall cease to be effective against the bankruptcy estate. The issue in this case is whether at the time the shares had been judicially sold, the proceeds of the shares belonged to the bankruptcy estate or not.

### **1. The controversies before the Decision**

Before Supreme Court, 2nd P.B., decision of April 18, 2018, MINSHU Vol.72, No. 2, at 68 (hereinafter referred to as the “Decision”), there is no disagreement on the point that the procedure for compulsory execution which shall cease to be effective under Article 42, Paragraph (1), the main clause of the Bankruptcy Act is limited to the one which is appending at the time an order of commencement of bankruptcy proceedings is rendered. In other words, it has been assumed that the compulsory execution which has already ended at the time of the above order is not subject to Article 42 (refer to Supreme Court, 1st P.B., decision of December 13, 2001, MINSHU Vol. 55, No. 7, at 1546), as the compulsory execution is located at final stage of realization of the claim and affects the property of the debtor determinately and finally, as a result, it is needless to revoke the compulsory execution which has already ended at the time of the above order.

Additionally, the end time of the compulsory execution in the case where an action to oppose liquidating distribution is filed and a statutory deposit of money is made is not obvious from the previous research. However, generally each compulsory execution is thought to be completed at the time the provided act which is located at final stage has been

completed.

## **2. Consideration of the Decision**

### **(1) X's hope for being paid from the Deposited Money**

When a motion to oppose distribution on execution is filed with regards to the amounts of distribution for an obligee stated in the distribution list on the distribution day, and a statutory deposit of money is made, entrustment of the payment of deposit money is to be conducted by the court clerk. And, only after entrustment of the payment of deposit money has been conducted, the deposited money is appropriated to the claims (refer to Supreme Court, 3rd P.B., decision of October 27, 2015, *MINSHU* Vol. 69, No. 7) and the provided act which is located at the final stage has been completed. The Decision is considered to have been decided that the Procedure for Compulsory Execution had not ended yet and have not accepted X's argument from this standpoint.

On the other hand, A did not file the opposition to distribution on execution, therefore, X's claim could have been paid from the Deposited Money, if the opposition to distribution and the motion to oppose distribution on execution had not been filed. Seen from this standpoint, there might be the opinion that the Procedure for Compulsory Execution should be regarded as having been already completed substantively so as to protect X's hope for being paid from the Deposited Money. However, even after the distribution date an obligor can file a motion to oppose a grant of a certificate of execution, Article 34, Paragraph (1) of the Civil Execution Act or a motion to oppose execution, Article 35, Paragraph (1) of the Civil Execution Act, until an obligee has been paid fully. In short, in this case, unless X has been paid by the entrustment of the payment of the Deposit Money, X's hope is uncertain and weak. In other words, X's hope is not worth protecting. In this case, the Procedure for Compulsory Execution can not be regarded as having been already completed substantively.

### **(2) Loss of effect under Article 42, Paragraph (1), main clause of the Bankruptcy Act**

Loss of effect under Article 42, Paragraph (1), the main clause of the Bankruptcy Act means that an effect of a disposition of execution does not occur substantively without the revocation of the disposition of execution.

Nevertheless, even if a bankruptcy trustee can ignore the disposition of the execution which ceased to be effective and sell the property subject to the execution, the appearance of the disposition of the execution still exists. Therefore, in the case where a bankruptcy trustee files a motion to seek revocation of the disposition of the execution which exists as a formality, there is a question whether the executive agency can revoke the disposition of the execution. The Decision has affirmed the determination in the prior instance as legitimate which revokes the Attachment Order pursuant to the practice of the Tokyo District Court. Regarding above the question, the Decision is considered to take an affirmative position.

### **(3) Etcetera**

In addition, The Decision expressly excludes “book-entry transfer shares”. An execution against “book-entry transfer shares” is carried out according to Article 150-2 et seq. of the Rules of Civil Execution. The reason for the Decision to exclude them is assumed to be due to the difference in applicable articles between the Shares and “book-entry transfer shares”.

### **3. The importance and the scope of the Decision**

The Decision is very important in that the Decision has concluded for the first time as the Supreme Court that Article 42, Paragraph (1), the main clause of the Bankruptcy Act applies in the case where bankruptcy proceeding was commenced to the obligor after a statutory deposit of money was made in the procedure for compulsory execution against shares of which certificates are not issued and before the entrustment of the payment of the deposit money is conducted.

The scope of the Decision is considered to extend to the interpretation of Article 39, Paragraph (1) of the Civil Rehabilitation Law and Article 50, Paragraph (1) of the Corporate Reorganization Act, which are equivalent to Article 42, Paragraph (1), the main clause of the Bankruptcy Act. Therefore, even if A had become subject to an order of commencement of civil rehabilitation proceedings or reorganization proceedings in this case, the Procedure for Compulsory Execution would have been stayed.