

[Title]

Attachment and Set-offs

[Deciding Court]

Supreme Court

[Date of Decision]

23 December 1964

[Case No.]

Case No. 897 (o) of 1961

[Case Name]

Claim for Refund of Deposits

[Source]

*Minshu* Vol. 18 No. 10: 2217

[Party Names]

Final Appellant (Plaintiff, Intermediate Appellee): The State of Japan

vs.

Final Appellee (Defendant, Intermediate Appellant): The Shizuoka Bank, Ltd.

[Summary of Facts]

On 29 September 1953, X (The State of Japan) gave notice to Bank Y that it was attaching claims that A held against Bank Y for the repayment of over ¥740,000 in term deposits and installment savings (collectively, the “Deposits”). The purpose of the attachment was to collect over ¥1.75 million in tax arrears owed by A. Prior to this attachment Y had claims against A for loans on bills, and on 9 October 1953, pursuant to a set-off option agreement that Y had with A, Y expressed its intention to set off these claims against A’s claims to repayment against Y in an equal amount. Both the claims to the loans on bills and the claims to repayment were to fall due on dates after X’s attachment. X subrogated A’s interest and sued Y for the repayment of the Deposits. Both the court of the first instance and the originating court dismissed X’s claim with prejudice on the merits. X brought a final appeal.

[Summary of Decision]

Judgment reversed and the Supreme Court’s own judgment substituted.

“Just like attachment of a claim by way of execution, attachment of a claim under the old *National Tax Collection Act* (prior to its amendment by Act No. 147 of 1959) has the effect of prohibiting the obligor from performing that claim, and of prohibiting collection from the party in arrears or any other disposition of the claim. Accordingly, the result of attachment is to be taken as prohibiting the obligee and obligor related to the attached claim from making any disposition whatsoever of that claim, including by way of performance or collection.

It follows therefore that in the absence of any statutory provision to other effect, no third party obligor may use set-off to assert its interest in an attached claim against an attaching obligee. However as an exception to that rule, drawn from a converse interpretation of Article 511 of the *Civil Code*, which provides that “A third party obligor who has been enjoined from making payment may not assert set-off against any subsequently acquired claim against the relevant attaching obligee”, a third party obligor is understood as being able to assert set-off against an attaching obligee using a claim that it acquired prior to the relevant attachment. The reason for

that exception is that since a third party obligor holding a claim acquired prior to the relevant attachment has an existing expectation prior to the attachment of being able to be acquitted of the third party obligor's own debt obligation by setting this claim off against the attached claim, it would be unjust to deprive such third party obligor of such expected benefit as a result of any subsequent attachment. Given such legislative intent behind this provision however, the view is not justified that just because a claim was acquired by a third party obligor prior to attachment, that obligor may duly assert set-off of any such claim against an attaching obligee, irrespective of the date for its performance. Specifically, assuming of course that the two claims are already eligible for offset by the time of the attachment, even if the opposing claim has not yet fallen due by the time of attachment, if that claim falls due prior to the due date for the secondary claim (namely, the attached claim), according to the converse interpretation of Article 511 of the *Civil Code*, the correct view is that a third party obligor may duly assert set-off against an attaching obligee. That is because in such an event, if the attached claim falls due, thereby enabling the attaching obligee to demand the performance of that claim, since the primary claim will have already fallen due prior to that point, the third party obligor will be able to set off the primary claim against the attached claim, and it is this expectation of the third party obligor, of being able to set off the third party obligor's own opposing claim in the future, that merits protection. In the converse event (namely, where the opposing claim falls due after the attached claim falls due), the correct understanding is that the third party obligor is unable to duly assert set-off against the attaching obligee. That is because in such an event, where the attached claim falls due, thereby enabling a demand to be made for its performance by the third party obligor, the third party obligor's own opposing claim will not have fallen due by the time of attachment. It follows that not only can it not be said that at the time of attachment the third party obligor had a legitimate expectation of being able to acquit itself of its own debt obligation by setting off its own opposing claim against the attached claim, but it would also be difficult to describe that obligor as acting in good faith were it to, for example, assert set-off by rejecting performance of the attached claim (a claim that would have already fallen due) so as to wait for its own primary claim to fall due. There is accordingly no particular need to extend protection to such third party obligor.

Incidentally, where a certain term or condition is fulfilled, such as that a future attachment takes place, in respect of a claim and an obligation that are mutually opposing and have accrued between an obligee and an obligor, a set-off option like that indicated by the lower court, namely that irrespective of their due dates, the claim and the obligation immediately become eligible for offset, enabling set-off to be carried out by expression of intention to complete the set-off option, will, in respect of claims in existence at the time of attachment when attachment occurs, immediately cause the attached claim to be extinguished by set-off on the grounds that eligibility for offsetting has arisen, regardless of the fact that eligibility for offsetting had not been reached at that time and regardless, moreover, of whether the attachment occurs before or after the due dates for the two claims. However, such a special set-off agreement is to be allowed that effect only if it falls within cases where due assertion of set-off is permitted under the converse interpretation of Article 511 of the *Civil Code* cited above. Specifically, with respect to an opposing claim that a third party obligor acquired prior to attachment, as between a primary claim and a secondary claim where the due date for that opposing claim falls before the due date of the attached claim (namely, the secondary claim), a set-off option as described above will legitimately protect the third party obligor's expectation of future set-off, and only in this case is it reasonable to take the view that this set-off option may be validly asserted against the attaching obligee. It must be said however that such an option may not be asserted against an attaching obligee in other cases – that is, set-off options that fall within cases where due assertion of set-off is not permitted even under the converse interpretation of Article 511 of the *Civil Code*. That is because to recognize the effect of such set-off option in the latter case would be to cancel the effect of the attachment as a result solely of a special agreement between

private individuals, and it must be said that not even the principle of the freedom of contract would permit such an outcome. It follows that whilst it is possible to duly assert such a set-off option against an attaching obligee with respect to claim reciprocity where the due date for the primary claim fails either at the same time or prior to the secondary claim, it must be stated that it is not possible to duly assert set-off against an attaching obligee that is based on such a set-off option in respect of other kinds of claim reciprocity.

On further reflection, applying these principles to the case before this Court, since there is neither an assertion nor any proof that any of the primary claims and secondary claims in question were designated in particular by the parties as open to set-off, if set-offs are made in the order stipulated under Articles 512 and 489 of the *Civil Code*, excluding the secondary claims in the form of the deposit claims of ¥27,000 deposited on 22 April 1953, ¥23,000 deposited on the same date and ¥50,000 deposited on 1 May 1953, since the due dates for the other deposit claims fall either on the same day as, or after the due dates for the primary claims in the form of the claims to the loans, it is possible to take the view that on the basis of the set-off option described above, it will be possible to duly assert extinguishment by that set-off against the attaching obligee (namely, the Final Appellant). Turning, however, to the situation with respect to these three other secondary claims, among the primary claims the claim of ¥100,000 for the loan dated 14 August 1953 that will fall due before these will, for the same reasons described above, be extinguished, through set-off against the secondary claims in the form of the claims to the ¥50,000 deposited on 9 April 1953 and of ¥50,000 deposited on 17 April 1953. As a result, these will fall due prior to all other primary claims, and it follows that, invoking the set-off option described above, it must be said that it is not possible to duly assert extinguishment through set-off in regard to these three other deposit claims against the attaching obligee (namely, the Final Appellant).

At the trial proceedings, the Final Appellee asserted that its pledge over the attached claims and the set-off option described above could be duly asserted against the Final Appellant, because the Final Appellant knew of the existence of the same at the time of the attachment in question. Whilst the trial court made no decision on this point, in view of this Court's pronouncements on the effect of this set-off option, the attaching obligee's knowledge or otherwise of the existence of the pledge or option is irrelevant. Furthermore, even if the Final Appellant did know of the existence of the pledge, the Final Appellee may not duly assert this against the Final Appellant since the Final Appellee acknowledged that the statutory requirements for due assertion against a third party had not been met in respect of the pledge.

It follows that where the lower court ruled that the set-off option described above could be duly asserted against an attaching obligee in all the circumstances, only that part of its ruling where it allowed the defense of extinguishment through set-off of the three deposit claims described above must be described as unlawful for misconstruing the law. Accordingly since the Appellant's arguments are warranted with respect to this part, the ruling of the lower court is to be reversed. There is no basis however to the arguments of the Appellant concerning the remainder of that ruling."