

ON THE PROTECTION OF THE INTERESTS OF THIRD PARTY OF THE RURAL HOUSING DURING THE PROCESS OF EXPROPRIATION

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Abstract: In practice, the land expropriation is not only related to the houses-possessors, but also to the legitimate rights and interests of other stakeholders, which should be legally regulated and protected, moreover concerned by related departments. In reality, due to the comparatively sound laws and regulations of urban construction land and the relatively strong legal awareness of urban residents, urban land expropriation for more experienced. However, since the rights and interests of rural residents have not been adequately and effectively preserved, the interests of a third party is more largely ignored, a legal system to protect the interests of a third party needs to be established.

Keywords: The Third Party; Rural Housing; Rural Land; Expropriation; Expropriating Compensatory Funds

1. Introduction

The rural land herein refers to the rural land, collectively owned and legally entitled to use by rural residents, for the construction of housing and ancillary facilities, i.e. the homestead within the meaning of Chapter XIII of the Real Right Law of the PRC. Those for agricultural production and construction are excluded.

The rural housing(hereinafter RH) herein refers to the residential belonging to individual villager or family constructed on homestead above-mentioned, other houses for production and management, plants, warehouses, office buildings, etc., are excluded.

The third party herein refers to the parties, other than the rural-land-expropriation authorities and villagers, i.e., who have interests on the RH, different from the conception of the third party in the compensational agreement of the rural land expropriation. The parties therein are expropriation authorities and rural collective economic organizations (hereinafter RCEOs) instead of villagers, who exist as the third party therein.

2. Reasons of this Issue

2.1. Reasons of the Legislation

The first is the conflict of laws. The RH, as a kind of private property constructed by villagers, should be defined as a separate matter, which the owners have rights to lawfully possess, use, profit from and dispose. Since there are no specific laws and regulations adjust the expropriation of the rural land, the Land Management Law

is primarily referred to in practice, the RH, however, is regarded as an attachment to the homestead herein. Therefore, the independence of the RH is impaired, so that the purchase and mortgage of which is seriously limited.

The second is the legislative gaps. Because of legislative gaps before the Third Plenary Session of the Eighth session, the legitimacy of sale, mortgage and other legal acts of the RH were considerably controversial. And no break of lease with bargain, as a provision under the civil law, is not able to be applied to an administrative act to protect the lessee of the RH. Therefore, the interests of the third party are difficult to preserve in deed.

1. The legitimacy of sale or purchase of the RH. In general, the sales of the RH could be divided into three cases: Firstly, the RH is purchased by a villager living in the same village; secondly, the RH is purchased by an urban resident; thirdly, the RH is purchased by a villager living in another village. In the first case, the contract for sale is valid. Homesteads belong to RCEOs, so members of which can acquire their own land use rights according to the law. As long as the intention made by buyers and sellers is real, not infringes others' lawful rights, and the sale has been approved by the committee of their village, then the contract is valid. In the process of expropriation, therefore, the purchaser is entitled to acquire the expropriating compensatory funds (hereinafter Funds), who is not the third party discussed in this Article. In the second case, the contracts are usually considered invalid, for the homestead use rights, owned by villagers of RCEOs, belonging exclusively to specific legal subjects, shall not

be assigned to other subjects. Therefore, the acts of selling and purchasing an RH, as an attachment to the homestead, are invalid. In the third case, subject to the achievement of the membership of Village A by the purchaser before the judicial decision, the act of purchasing and selling an RH in Village A is invalid, since the purchaser, not a member of Village A, is also not a proper subject. In recent years, due to the sharp appreciation of the houses, a great number of villagers, who have sold their RHs, have brought lawsuits before benches, asked the benches to invalidate their housing purchase contracts, and the purchasers to reconstitute the RHs, in order to acquire the expropriation compensation.

2. The legitimacy of contracts for RH mortgage. The possibility and legitimacy of establishing mortgages on RHs are controversial. Opponents argue that according to the Article 36 of the Guaranty Law of the PRC ("Where houses on State-owned land acquired in accordance with law are mortgaged, the land-use right to the State-owned land occupied by the houses shall be mortgaged at the same time. Where the land-use right to State-owned land acquired by means of granting is mortgaged, the houses on the State-owned land shall be mortgaged at the same time.") and the Article 128 of the Real Right Law of the PRC ("The holder of the right to the contracted management of land has the right, in accordance with the provisions in the law on the contracting of rural land, to circulate his/her such right. The circulated term may not be more than the remnant term of the original contract. Any contracted land may not be used for non-agricultural constructions without approval."), the principle of the mortgage on real estate in China is the inseparability of the housing property and the land property. The homestead shall definitely not be mortgaged according to the law, and this provision shall also be applied to the RH constructed on the homestead. If villagers mortgaged the RHs, the homestead within the scope of which would be deemed to be mortgaged together. Therefore, the contract for RH mortgage is invalid for violating prohibitions of laws and regulations. In addition, in the past, only the owners of the homestead, the RCEOs, were entitled to acquire the homestead use right certificate, pursuant to which the villagers' rights to build RHs on the homestead were determined. The villagers, however, unlike the urban residents, were not able to acquire credentials of their RHs. According to the registration effectiveness of real estate in China, no RHs without property credentials can be issued the mortgage registrations, and the mortgages cannot be established. Therefore, the contract cannot be performed ab initio and are invalid. [1]

The contrary view holds that although the law prohibits the act of mortgaging the homestead, it does not explicitly prohibit the separate establishment of mortgage of the RH. According to the "absence of legal prohibition means freedom" fundamental principle of civil law, it is

not illegal to mortgage the RH. Also, according to the Article 62.4 of the Land Management Law ("After the sale or leasing of housing, the application for the homestead shall not be approved"), since the sale of RH is not prohibited by law, the mortgage should not be prohibited, which is consistent with argumentum maiore ad minus. [2]

At present, the reform of the rural land system is launching at experimental units, and the rural housing mortgage is one of the major issues. Through investigation, the following common trends during the reform related to the rural housing mortgage are collected:

- I Issue the RHs credentials, which is the premise of the registration of the mortgage of RH.
- I The identity of the mortgagee is specific-mainly financial institutions, most of which are rural cooperative banks, and other enterprises and individuals are excluded.
- I The rural mortgager has other domicile or housing in case of the assignment of the mortgaged RH.
- I Based on the written agree by the rural collective economic organization, the location of which the RH belongs to, the homestead use right and the RH are mortgaged at the time. The mortgage shall be registered by the property management department, and promptly notified the land and resources bureau for record.
- I Extend the scope of the assignee of the collateral-the geographical limitation of the identity has expanded to villagers from the same town or even the same county. [3]

According to the instruction of carefully and steadily promoting the mortgage, hypothecation and assignment system of villagers' housing property, the RH being going to be mortgaged legally in the future is no doubt foreseen. The identity of the mortgagee, however, should be strictly limited, the main scope of which is the financial institutions. Non-financial institutions and individuals shall generally not be entitled to be the mortgagee. Therefore, in the process of the rural land expropriation, we need to further attend the protection of the mortgage of banks and other financial institutions.

3. Lack of legal protections of the lessees' interests caused by the conflict between provisions under the civil law and the administrative law. The legitimacy of the RH leasing is generally admitted, and no break of lease with bargain shows that compared with the protection of ownership, the protection of lease is superior. In prevailing laws, no break of lease with bargain is reflected by the Article 229 of the Contract Law (Any change of ownership to the lease item does not affect the validity of the leasing contract) and the Article 119 of the Opinions on the General Principles of the Civil Law (When any change of ownership to private houses in the lease term due to sale, gift or inheritance occurs, the original con-

tract shall be continually valid for the lessee and the new owner.). In the process of the rural land expropriation, however, no superior protection of lease is reflected. In practice, related matters are generally resolved by consultation between the leaser and the lessee after the accomplishment of the agreement on expropriation compensation between the government and the owner (leaser).

Actually, the lessee has to face a dilemma if he/she wants to claim the rights and interests. According to the Article 21 of the Interpretations on Issues for the Application of the Law to the Trial of Disputes about Urban Housing Leasing Contract, subject to the situations that the leaser sells the rental housing without a notification to the lease in a reasonable term or the right of preemption of the lease is violated in other methods, claims made by the lessee on the assumption of compensation liability by the leaser shall be upheld by the court, but claims on the determination on the invalidity of the housing sales contract signed by the leaser and a third person shall not be upheld by the court. Therefore, the only measure a lessee may adopt to protect the interests on the RH is to negotiate with or sue the leaser, in order to ask the leaser to assume the compensation liability.

During the process of expropriation, however, the rights and interests of the lessee are hard to protect as well. The compensation contract is negotiated directly by the competent authority with the owner of the RH. This mechanism avoids the application of the provisions of lessees' right of preemption under the Contract Law and the General Principles of the Civil Law, as well as no break of lease with bargain, which eliminates a lot of litigations and negotiations around the government, the owner (leaser) and the lessee, for the reason that the compensation contract is not a kind of contract for sale. What is more, within the prevailing legal system, the protection of the rights and interests of the lessee is primarily based on no break of lease with bargain, which is a legal principle of the civil law, or, rather, the real estate law. In contrast, the expropriation of the RH is a kind of coercive administrative act, instead of a civil act made by an equal subject, which shall not be regulated by the civil law. Therefore, the lessee cannot oppose to the expropriation, as an administrative act, or acquire prior protection according to no break of lease with bargain. Indeed, the majority of the lessees of RHs belong to the vulnerable groups economically who are unavailable to purchase their own domiciles and need the special and more favourable protection by law. During the expropriation of the rural land, the reasonable and lawful interests of the lessee are actually violated, since the interests of these vulnerable groups, who should have been specifically and favourably protected, have not acquired enough attention, and even, the legal basis to protect the interests is still lacking.

Recently, since the aim and guideline to protect villagers' usufruct of the homestead in accordance with the law, reform and improve the rural homestead system, choose a number of experimental units, carefully and steadily promote the mortgage, guaranty and assignment of the property rights of villagers' housing, and explore the channels for increasing incomes of villagers have been explicitly defined and decided, the theory basis of the mortgage, guaranty, assignment and lease of the RH has been established. It is a pity, however, that due to the long-time neglect and unreasonable points existing in the prevailing system of the expropriation, the reasonable interests of the third party on the RH have not yet been emphasized seriously by related departments in terms of the introduced policies at experimental units. In order to protect villagers' usufruct on their RHs, not only the regime to protect the interests of transfer (the villager), but also of the transferee (the third party) of the usufruct should be established and improved. Only a regime to this extent can serve as a comprehensive and effective legal protection of the property rights of villagers' RHs. Otherwise, the value of the villagers' RHs would be impaired and the interests of the villagers would be violated if the interests of the third party were still not protected by law, and the aim and guideline would not realize.

2.2. Reasons of the Disputes Settlement

The legitimacy of the ownership and the hypothec of the third party on the RH is controversial due to the legal gaps above-mentioned, the third party therefore does not have the right to bring an administrative action before the bench according to the scope of accepting cases of the Article 11 of the Administrative Procedure Law, and are almost unable to obtain the judicial remedy. The only opportunity for the third party to claim his/her interests before the bench as the Third Party to Administrative Litigation is when the individual villager or the RCEOs institute an administrative action. In such case, however, the third party has still to face the dilemma that there are no statutes to apply. As for the lessee, although he/she is reasonable to claim the interests for the leasing has violated by the expropriation, the expropriation, as an administrative act, is not obliged to be regulated by the civil law, and the lessee therefore is also almost unable to protect the interests through the litigation.

3. The Regime Conception of the Protection of the Third Party of the RH

3.1. The Reconstruction of the Legal Status of the RH

In order to protect the rights and interests of the villager and the third party, a fundamental premise is to radically change the awkward legal status of the RH, which means that the homestead and the RH should be comparatively separated, the situation that the RH served as an

attachment to the homestead must be sublated, and the RH should be regulated by law as an independent thing and obtain a complete protection by the real estate law. On this basis, the issue of the protection of the third party could possibly continue to be researched. The relative departments, therefore, must make the following preparations:

1. Issuing the ownership certificate of the RH to villagers. According to the legislation model of registration effectiveness of real estate, the change in ownership and the setting-up of mortgage on the real estate shall be effective after the registration, and the real right shall not be effective without the registration. For a long time, villagers were unable to obtain the certificates of the ownership of their RHs, limiting the property function of the RHs and the opportunities of the villagers to become wealthy. Although such provisions, in certain historical conditions, had been fitted to historical national conditions, and protected the rights and interests of villagers' land and the food security in our country, they are also an important factor consisting the urban-rural dual structure, and have exacerbated the social injustice. Therefore, the guideline to "protect villagers' usufruct of the homestead in accordance with the law, reform and improve the rural homestead system" arises at the historic moment. At present, the certificates have been issued at experimental units, which has broke the law problems long plagued the villagers and the third party.

2. The retroactivity of the confirmation of the legitimacy of the interests of the third party. In order to protect the usufruct of the homestead more comprehensively and effectively, laws and regulations adjusting the rural land and housing will predictably be issued when conditions are ripe. The problem of whether the new law should adjust the existed sale and mortgage of the RH before its promulgation, i.e., the retroactivity of the new law, worth serious concerning by the academic and practical circles. The author considers that the new law should be retroactive in order to protect the ownership and mortgage of the third party, subject to the condition that the RHs had been mortgaged to natural persons or non-financial institutions, unless the natural persons fall within the specific scope-they and the mortgager are from the same RCEO.

Specifically, in terms of the sales of the RH, sales have normally existed for years, and the purchasers have in fact possessed the RHs and lived in the rural area for a long time, while the sellers have moved away already. If the contracts for sale were affirmed to be invalid, it would not only be contrary to the basic legal spirit of the protection of the transaction under the civil law in China, but also be harmful to the daily stability of the purchasers. The author, therefore, believes that, the new law should regulate that the sales of the RHs before it takes effect is not invalid, and the relative parties, including the sellers and the administrative departments, shall cooperate to

assist the purchasers to acquire the property right certificates of the RHs.

In terms of the mortgage of the RH, the legitimacy of the mortgage set up before the promulgation of the new law should be distinguished, depending on the subject of the mortgagee. If the mortgagee are banks or other financial institutions, for the purpose to preserve the security and interests of which, such existed mortgage should be identified valid, and the mortgage registration should be carried out as soon as possible. If the mortgagees are other institutions or individuals, the past mortgage should not be identified valid, even if the new law regulated that the RH is free to be mortgaged to other financial institutions and individuals. This is because that before there was no expressly published laws and regulations adjusting the behaviors of the mortgage of the RH, which caused arbitrary behaviors. If such mortgage was identified valid and registered, a large number of villagers would lose their RHs and have to live without domicile, which would be inconsistent with the constitutional preservation of the villagers and the security of land, and the legislative spirit of care and steady would not realize.

3.2. The Establishment of the Notary System of the Third Party Interests

In the process of the expropriation, the interests owned by the third party on the expropriated RH need often to be demonstrated, in order to claim rights and quell disputes and controversies. It is necessary therefore to establish the notarization mechanism of the third party interests to clarify the relative interests on the expropriated RH, for the purpose to maximally protect the relative parties and avoid the damage caused by the expropriation.

1. Subjects able to apply for notarization.

a. Purchasers of the RHs. Normally, the owners of the RH are surely the purchasers. Due to the existence of legal gaps, however, the affirmation, identification and issue of the certificates of the RHs would be completed in a relatively long time. Therefore, the case that the purchaser has not registered the ownership nor obtained the certificate during the process of expropriation is not able to be avoided in reality.

b. Mortgagees of the RHs. In the process of expropriation, the mortgagor and the mortgagee should reach a new agreement. Normally there are two kinds of situations, and both of them should be notarized. First, the parties of the mortgage could reach a new agreement and re-establish a new collateral, which should be notarized for the agreement on the change of collateral; second, if the parties could not reach a new agreement within a reasonable period announced by the competent authority, they should apply for the notarization of preservation for the Funds.

c. Lessees of the RHs. Lessees are entitled to apply the notarization for the leasing contract, in order to claim the specific part of the Funds.

In addition, notarizations for heirs, donees, and other disputers on the RH should also be included in the notary system, which are not researched herein, [4] since these subjects are irrelative with the Theme.

2. The period of the third party submitting notarizations to competent authorities.

According to the Article 30 of the Notarization Law of the PRC, "if the notarial office, upon examination, considers that the certification materials offered by the requester are genuine, lawful and enough, and that the matter under request for notarization is true and lawful, it shall issue a notarial certificate to the party concerned within 15 days after it accepts the notarization request. However, the time for force majeure, supplementing certification materials or verifying the relevant information shall not be included in the aforesaid time period." For the purpose of the special and more favourable protection of the relative parties in expropriation of the rural land, at least 15 days in excess of the legal notarization period, i.e., totally 30 days, should be defined as the basic period to submit notarizations, since the reasonable time of the preparation for certification materials to the notarial office, the submission of the notarization to the competent authorities, and, especially, the extra time the third party has to spend due to the remote rural domicile, should be taken into account. In addition, in case of the situation for force majeure, supplementing certification materials or verifying and investigating the relevant information, the period to submit shall be extended.

3.3. The Distribution of Expropriating Compensatory Funds

a. The distribution to the purchasers of the RHs. In the past judicial practice, the Funds were distributed by the court between the seller and the purchaser. The decisions, however, have been divided significantly among different regions. For instance, the Funds were distributed between the purchaser and the seller at the rate of 7 : 3 in Beijing, while the rates in Shanghai and Qingdao are 8 : 2 and 5 : 5 respectively. [5] As we have already considered, however, the premise of these decisions is the invalidity of the sales contract of the RH, based on which the Funds were distributed between the parties. In the future, since the assignment of the RH would serve as lawful and valid, the continually application of the approaches in the past would be inconsistent with the legal logic and the approaches ought to be differed depending on situations.

Where the ownerships on the RHs set up after the enforcement of the new law, the Funds should be distributed to the purchasers as a whole, since the sales of the RHs would have been lawful and valid at that time, and

the aforesaid premise of the distribution of the Funds between purchasers and sellers would have been no longer in existence.

Where the purchasing behaviors before the enforcement of the new law, although the legitimacy of which would have been retroactively identified, the main aim value of such provisions is to preserve the safety of transaction. On the one hand, the parties were, at any rate, subjective at fault after all, when they reached the purchase agreement. Therefore, it is actually unfair to distribute the Funds to the purchasers as a whole. On the other hand, for the sellers would have got the income due to the sales of the RHs, they should not obtain a high proportion of the Funds to prevent a secondary income. The proportion of the Funds distributed to the purchasers therefore should be the major, which, at least 7 : 3, should be proper according to the experiences.

b. The distribution to the mortgagors of the RHs. In the process of expropriation, if the guaranteed claims are still undue, the Funds should be submitted to a competent authority for keeping, the provision of which could refer to the Article 191 of the Real Right Law ("Where a mortgagor alienates, upon consent of the mortgagee, the mortgaged property during the mortgage term, the money generated from such alienation shall be used to pay off debts to the mortgagee in advance or be submitted to a competent authority for keeping. The value exceeding the obligee's rights shall be attributed to the mortgagor, and the gap shall be paid off by the obligor. Without the mortgagee's consent, a mortgagor may not alienate the mortgaged property during the mortgage term, unless the transferee pays off the debts on behalf of the mortgagor so as to terminate the mortgage right."). Specifically, the procedure is that, firstly, the mortgagee submits the notarization of mortgage to the competent authority; secondly, the competent authority reviews the materials; thirdly, the Funds are escrowed to the competent authority within the scope of guaranty, and the remaining part of the Funds is delivered to the owner. In addition, the fruits of the subject matter accrued during escrow belong to the obligee.

c. The distribution to the lessees of the RHs. If the expropriated RH has been leased, the persons who actually lose their domiciles are the lessees rather than the lessors, and the lessees may bear a lot of time and economic costs to relocate. In order to protect of the lessees of the RHs, the lessee should be one of the parties to participate the agreement on compensation and resettlement for demolition, which refers to the Article 13 of the Regulations Regarding on the Administration of Urban Housing Removal ([W]here a leased housing is to be demolished, the demolisher shall sign an agreement on compensation and resettlement for demolition with the demolishee and the lessee). Such charges may be relative:

- I Relocation subsidies, which shall be paid by the competent authority, in order to compensate the costs occurred because of the relocation.
- I Awards of earlier removal, which are actually paid by local governments, in order to encourage earlier relocations. In reality, since the men who actually relocation are the lessees, awards of earlier removal should be imposed directly to the lessees.
- I Temporary placement subsidies(transition costs). When they arrange accommodations their selves, the lessees should accordingly obtain the temporary placement subsidies.
- I Compensation for additions.

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