

주택임대차보호법 제3조의3 문제점에 대한 개선방안

Improvements for the Problem of Housing Lease Protection Act Article 3-3

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요약

주택임대차보호법 제4차 개정에서 신설한 임차권등기명령제도는 임대차기간이 만료 후 보증금을 반환받지 못한 임차인에게 임차주택에 임차권등기를 마치면 종전의 대항력과 우선변제권을 그대로 유지되며, 임차권등기 이후에는 주택임대차보호법 제3조 제1항의 대항요건을 상실하더라도 이미 취득한 대항력과 우선변제권을 상실하지 않는 것으로 정하고 있다. 따라서 임차인은 안심하고 자유롭게 주거를 이전할 수 있어 사회·경제적 약자인 임차인의 권익보호에 중점을 두고 있다.

그러나 현실에서는 고액의 임차보증금을 반환받지 못하여 자유롭게 주거를 이전할 수 없는 임차인들이 대부분이고, 어쩔 수 없이 임차권등기명령에 의한 임차권등기를 마쳐서 이주를 하였다 하더라도 빠른 시일 내에 임차보증금을 반환받지 못하는 등 여러 가지 문제점이 있는 바 이에 대한 개선방안을 본 연구에서 제시하고자 한다.

■ 중심어 : | 주택임대차보호법 | 임대차등기명령 | 대항요건 | 임차권 | 임대보증금 |

Abstract

The Lease Registration Instruction system that newly established in 4th opening a court of the Housing Lease Protection Act has regulated the following. After the lease expires, if finish the lease registering on the rental house to leaseholder who did not return the deposit. Previous opposing power and Priority Repayment Right are preserved intact. And after the leasehold registration, even if loss the claiming requisite of Housing Lease Protection Act's Article 3 Paragraph 1, already acquired opposing power and the Priority Repayment Right will not be lost. Thus, the tenants free to transfer its residences without anxiety. So it is focused on protecting tenant's rights who social and economic weak person.

But in reality, did not return the expensive lease deposit. So, most tenants cannot transfer freely their residences. Or even if migration as completing the lease registration unavoidably by Lease Registration Instruction, they cannot receive their lease deposit as soon as possible, like this there are many problems. So, propose the improvement plan by this study.

■ keyword : | Housing Lease Protection Act | Lease Registration Instruction | Claiming Requisite | Right of Lease | Lease Deposit |

I. Introduction

In modern society, as many people are living by various way and occupations. Unlike the past that two or three generations lived together in a house. 'Geese-Fathers', 'Weekend Couples' etc., like this, depending on the environment of work and family, the personally living people have been more and more. And based on the home's economic situation, the situation that to resolve residential Life is growing in the same way as 'One-room', 'Officetel', and 'Jeon-se'.

However, as increasing people who live in residential by tenancy relationship in the other's houses, also its problems are increasing too. Among them "In situations that after the leaseholder's lease terminated and did not return the deposit, if move to another place or move the resident registration, becoming lose the opposing power and priority repayment right that previous had. And return the receiving to deposit" were difficult practically.

But, following the Housing Lease Protection Act Article 3-3 (Lease Registration Instruction), it shows that "the leaseholder who did not return the deposit after the lease can apply to the Lease Registration Instruction at district court, or each city's courts". So, to resolve these problems, the Lease Registration Instruction procedure is regulated.

Therefore, this paper, through international institutions will review the opposing power, and request requirements for Korea's Lease Registration Instruction and its effects. And find the problems of current law, and tries to present its counterplans.

II. Study the opposing power through the foreign institutions

1. England

In the UK, Unlike Korea, leaseholder's obtaining opposing power is enough as the agreement between the two sides. And the object's transfer is not the requirements of obtaining opposing power. And even though the legal lease right was destroyed by lessor's termination or other reasons, it has been granted the right of continue living to the leaseholder. Also, unless there are special reasons, leaseholder's residences are more protected as prohibits the court's ruling of house transfer[1].

2. Japan

The opposing power of Japan's leasehold occurs by registering, like as the attitude of Korea's civil law. About this, the 'Tenancy Act' (借家法) occurs its opposing power by transfer of the building. In that case, the opposing power is occurring. Even if the simplicity-transfer and transfer of goods by claims of object transfer's handed over transfer of goods.

Act on Land and Building Leases (借地借家法) Article 31 Section 1 stipulates that when transfer the building, without the registration, the lease of the building takes effect to who acquired real rights about the subsequent building. Thus, unlike in Korea, only transfer of the buildings is the requirements of obtaining the opposing power[2].

3. France

French civil law's Article 1743 that established in 1804 was recognized opposing power to tenant from early as "A person who has obtained rental real estate by the sale, cannot be put away the tenant of the lease by a notarized document or a date confirmed document". With respect to regular long-term lease of real estate, those need to be registration. But protect the opposing power to do registration alone by tenant[3].

4. Germany

Looking at the historical process that had recognized the opposing power of leases in Germany, in the general laws of the State of Prussia, they adopted the principles that "Dealing does not disturb the lease" as abandoning the principle on Roman law that "Dealing is disturb the lease". And in the lease of real estate or personalty, that allowed the resistance on leasehold to third party or particular successor as recognizing the properties of real right[4].

III. Requirements of Application for Instructions of Lease Registration

After the lease terminated, the tenant who did not received the deposit as requiring the return of deposit, the required requirements for the 'registration command of housing lease right' to apply to the court are the following.

1. House Lease Should be Terminated.

In other words, in the following cases, tenant can application of 'Lease Registration Instruction': Leases should be terminated and when terminated by the termination of tenancy and in case of agreed cancel.

After the end of lease, if the tenant losing possession to homes for rent or tenants and their families have moved to other places, or as moving their resident registration to another place, the question which can apply for Lease Registration Instruction is raised to the tenants who lost requirements of resistance. Then, "Admitting to that the Housing Lease Protective Law Article 3-3 Paragraph 1, 2, Section 3 and Paragraph 5 will be reasonable".

Therefore, if the tenant has already acquired the opposing power and preferred right, prior to the

registered lease, the opposing power and preferred right are remain the same. And the tenant who have no opposing power and preferred right. And also the tenant who acquired the opposing power in the past, but temporarily lost its opposing power before registration of leasehold will get the opposing power and preferred right by registration of leasehold[5].

2. Should not be Received the Deposit

Reviewing that the tenant, who did not return the deposit, how can apply for the Lease Registration Instruction against whom, First, at the time of application of Lease Registration Instruction, if the tenant already acquired opposing power, the tenant can apply for the Lease Registration Instruction. Against the landlord if the ownership of rental housing remains to the lessor against the transferee who succeeded the landlord's position, if the rental housing has been transferred. and if did not get opposing power from the beginning or get the opposing power then lose, in that case, if the ownership of rental housing remains to the lessor, tenant can apply for Lease Registration Instruction to lessor. But if the rental housing has been transferred, can not apply anymore the Lease Registration Instruction to homes for rent against the assignee of rental housing[6].

IV. Lease Registration Instruction's Procedures

If tenant apply alone the Lease Registration Instruction to the court of competent jurisdiction, the court judged the decision of issue by precedence method of the written assessment, if it determined that the application has the reason, usually determined type of Lease Registration Instruction to

be issued. After delivered the Lease Registration Instruction to lessor, the court entrust the lease registration with a copy of court records to jurisdictional registry office without delay. And after the greffier filling out the lease registration in a Eul-Gu of register, then the greffier give a registration certificate[7]. Looking at the Lease Registration Instruction's procedures, regulations of Civil Execution Act is applied to trial for application of Lease Registration Instruction, lessor's complaint and trial to the determination of Lease Registration Instruction, cancellation and trial of Lease Registration Instruction or enforcement of Lease Registration Instruction, etc.

1. Court Hearing

The hearing about requested lawsuit of Lease Registration Instruction it may pass the defense or not, if pass the defense, the form of judgment or not pass the defense, in the form of decision, the Lease Registration Instruction will be issued or dismissed (Civil Execution Act Article 280 Paragraph 1, Article 281 Paragraph 1).

2. Served on Lessor

Except in special circumstances, in practice the Lease Registration Instruction is based on the way of written hearing without defense. And it issued by the form of decision. So, the court served first the original copy of judgment or decision about Lease Registration Instruction before entrust the registration of lease rights or even if pass the defense, because of lessor's special circumstances is same[8].

3. Entrust and Registration

If greffier who is in jurisdictional register office filling it in 'Eul-gu' section by entrust of the court

which issued the command. Then the enforcement of Lease Registration Instruction to homes for rent will be done, if the Lease Registration Instruction takes effect as sentenced by a judgment or notice by determine, without delay, entrust the writing of lease registration to greffier of registry office which has jurisdiction over the rental of housing with a copy of court records. (Regulations on Lease Registration Instruction's Procedure Article 5). And if the greffier registered on the lease by the court's entrust, should fill the lease contract day, guarantee the amount of rent, started day to occupy the rental housing, Finished resident day, the date of receipt of confirmation on lease contract at 'Eul-gu' in the register of buildings and should be written the purpose of registration as Housing leasehold. If there are any arrangements of the balance, it should be written (Regulations on Lease Registration Instruction's Procedure Article 6). Greffier, after completing the lease registration by the court's entrust, should be sent to the court of entrust by writing a registration certificate (Regulations on Lease Registration Instruction's Procedure Article 7)[9].

4. The Tenant's Appeal

The tenant can appeal to decision that dismiss the application of Lease Registration Instruction (Housing Lease Protection Act Article 3-3 Paragraph 4). With respect to this appeal, shall apply provisions for appeal by Civil Procedure Act Part 3 of Chapter 3. (Regulations on Lease Registration Instruction's Procedure Article 8). This appeal is not limited the period of raise and as usual appeal, as long as there is a real benefit of appeal can sue at any time, until all of the deposit to be returned. If unregistered house has entrust of registration by Lease Registration Instruction, the greffier applying the provisions of the

Real Property Registration Act Article 134 (Registration of disposal restriction of unregistered real estate) and after registering the preserved registration of ownership in Gap-gu, should register the house lease registration in Eul-gu.

5. The Lessor's Objection

As long as lessor has a registration of lease right available, lessor can apply the formal objection without the period to against the decision of the Lease Registration Instruction, there is no restriction on its reasons. On the other hand, a formal objection does not stop the enforcement of Lease Registration Instruction (Civil Execution Act Article 283). If there is an exception, the court has to set a date for pleading and shall notify to the parties to a suit. The court announcement the permit, change or cancel of all or part of all or part of Lease Registration Instruction, in this case, the court may order the provision of a suitable mortgage (Civil Execution Act Article 286).

If the lessor make an immediate appeal, the tenant cannot move easily even the registration of lease right had finished. Because, if the registration of lease right is canceled by lessor's appeal, the tenant's opposing power and preferred right cannot be maintained. So, there are not many tenants who give the lease house with the risks[10].

6. Cancellation of the Lease Registration Instruction by Lessor 's Alteration of Circumstances

The lessor can apply its cancellation after the registration of lease right when the reason for the registration of lease right extinguished of circumstances were changed or providing mortgage prescribed by the court. And the court which ordered the registration of lease right will be trial the final

decision for these applications (Civil Execution Act Article 288).

V. Effect of Lease Registration Instruction

1. The Effective Time

Lease Registration Instruction, it shall become effective in the following cases. When by judgment, at sentence. When by determination, at the notice to lessor with a great way. In the latter case, it noticed as a way passed to lessor the script of determination by special delivery mail. When that mail delivered to lessor, then shall become effective.

2. The effect of 'Registration of Lease Right'

2.1 Opposing Power and Acquisition of Preferred Right

If the registration of lease right by execution of Lease Registration Instruction ended, the tenant shall acquire the opposing power and preferred right at the same time as registration (Housing Lease Protection Act Article 3 Paragraph 5).

In the tenant still did not get the opposing power and preferred right state, if the lease registered, judge whether the acquisition of opposing power and preferred right, at the time of its registered. For example, at the time of registration of lease, if the 'Real rights granted by way of security' such as mortgage, etc. settled in rental housing already, if tenant did registration of lease right, he cannot resist to the buyer who won the auction procedure for execution of security right. Also cannot receive dividends prior to the mortgagee. However, prior to the payment date of proceeds from the sale, if the priority real rights granted by way of security was

dissipated, the opposing power or preferred right of lower priority lease are not destroyed nor shall survive[11].

2.2 Keep the Opposing Power and Preferred Right

If tenant already acquired the opposing power or preferred right before the registration of lease right, its opposing power or preferred right are still preserved. After over the registration of lease right, although the claiming requisite lost, already acquired opposing power and preferred right are not lose (Housing Lease Protection Act Article 3 Paragraph 5).

Also the Lease Registration Instruction is just institutions to the opposing power and preferred right who had previously acquired, even if the loss the occupation of house or move the resident Registration and this purport that to grant the real right to 'Registration of lease right' is not, so the tenant cannot apply the auction directly by the lease right registration of house. Therefore, even tenant finish the registration of lease right, to receive the deposit actually, as claim the lawsuit of restoration about security deposit, obtain the 'cause of enforcement right (schuldtitel)' and should apply for the forced auction.

2.3 Exclusion of the Right of the First Priority Repayment about Small Deposit

The tenant who leased later the house which finished registration of lease right (if the purpose of the lease is part of the house, that portion only) by the enforcement of Lease Registration Instruction have no right to receive the priority reimbursement by Housing Lease Protection Act Article 8. In other words, it exclude the right to receive that the First Priority Repayment of small deposit.

Like this, exclude the First Priority Repayment

Right to small sum leased tenant after registration of lease right. It is due to use the First Priority Right by small sum leased tenant, to prevent unexpected damage for other tenants who apply the registration of lease right. Because, after the registration of lease right, tenant believed that his Preferred Right is subsist and after move other place, if small sum leased tenant lease the house, because of small sum leased tenant's First Priority Repayment, Preferred Right of tenant who evicted with registration of lease right will may be nominal. Especially after the registration of lease right, in case of tenant who vacate a rent house, cannot know the small leased tenant's move-in or existence. So to increase the effectiveness of Lease Registration Instruction system it is an inevitable measure. However, don't exclude small leased tenant's First Priority Right in the review process of amendment, as allowing the exclusion of First Priority Right in relation about registered owner and their equal standing, or senior rental owners. The opinion that 'as excluding the First Priority Right, minimize the damage of a small leased tenant and it is necessary to clarify the relationship of position since cancellation of lease by return the rental deposit' is raised[12].

2.4 The Delay Charge for Security Deposit

Transfer duty of rental house for tenant, return duty of the deposit for lessor are in concurrent conditions. so, if tenant did nominal transfer after finished registration of lease right, lessor's debt that returnable deposit will be the delay in performance tenant. due to this, from then until return the deposit, tenant can claim to lessor the charge of delayed damages.

2.5 Cost and Burden of Lease Registration Instruction

Tenant can charge a fee about the application of Lease Registration Instruction and any subsequent related with registration of lease right. (Housing Lease Protection Act Article 3-3 Paragraph8). In other words, the application of Lease Registration Instruction is caused by lessor who did not his best the deposit refund duty registration of lease right. So, impose the related costs to lessor. Because, its costs were caused by lessor's attributable reasons.

VI. Problems and Improvements of Lease Registration Instruction System

To secure the lease deposit for the tenant, Lease Registration Instruction system is doing that when the lease has finished, if lessor does not return the lease deposit, tenant can apply the Lease Registration Instruction unilaterally. However, this system has the following problems. First, application the Lease Registration Instruction, its application process is complicated and doing tenant alone who has no professional knowledge is too hard. So, using possibility of non-homeowners is low. After the registration of lease right, by the enforcement of Lease Registration Instruction. The tenant who leased house is not recognized the right of the first priority in the Housing Lease Protection Act Article 8. and Following the Civil Execution Act Article 283, lessor can make a formal objection without the limitation of period as long as there is Lease Registration Instruction validly. Thus, if registration of lease right canceled by approving of lessor's a formal objection, tenant can lose the opposing power. Actually, above all, in order to move after the registration of lease right, even if not return the existing deposit, there should have the extra money for rent another house. But, most small tenants, they doesn't have enough

extra money. In addition, Lease Registration Instruction system has a blind spot that in contract expiration returns the deposit and etc. it doesn't its role as Safety Plate, and also can't receive enough the compensation from mental and physical damage.

Besides, on the application process of the Lease Registration Instruction, there are some problems that difficulty of delivery to notice to the lessor for the command, and who has the registration of lease right, and if he going to move after a motion with address the original rental house, then, the actual housing is in auction. In this case, it is pointed out as issue that cannot notice about the tenant who finish the register by Lease Registration Instruction[13]. However, these procedural issues, such as delivery is much improved as established rule of the Supreme Court. And moreover, seek improvements to their problems that the system's procedural problems are not difficult. Among issues of the Lease Registration Instruction System. Realistically urgently to be improved thing is that the system which is trying to help to collect the deposit as lease ended is some useful for economical wealthy tenant. But, for small homeless people's collection of deposit that is main protector by Housing Lease Protection Act, is not useful[14].

Most ordinary persons are lease normally cheaper housing, In the case of cheaper housing, unlicensed and unregistered buildings are many cases. In this case, the Lease Registration Instruction does not apply itself. Furthermore, even if leased the registered buildings, lessor receive deposit from new tenant, and pay to existing tenant. That is common practice. But in fact, if new tenant does not appear in that housing, they cannot return the deposit. So, moving to another place is very difficult to small ordinary persons who must be moved as applying to the Lease Registration Instruction. Because, existing lease deposit is like their all property to them.

To improve ways of Lease Registration Instruction system's problems, in terms of financial, the government lend the money in security for Lease deposit, the introduction of measures such as Guaranteeing the return of Lease deposit and in legal terms, apply for the Lease Registration Instruction to tenant, after a certain period finished registration of lease right, give a right to auction. If the right to auction was recognized, it will be a method to force the performance of a duty for lessor's lease deposit, and it will be a good method for tenant who can collect his lease deposit in the shortest time[15].

If it is predict enough that the tenant cannot receive the deposit or the lease term had expired, then it should be legislated for the tenant who leased unregistered buildings and housing can apply for the registration of housing lease.

VII. Conclusion

Housing is the most basic conditions to keep humans dignity and to enjoy their life. Therefore, ensure the stability of housing by legal, first, it is consistent in the spirit of the Constitution that ensure human dignity, secondarily it is an essential requirement to maintain the stability of the society.

In resolving the housing problem, all households have each housing is the ideal. But, lack of supply of housing and the variance of income, etc. due to these practical reasons, the lease is commonplace. Because about half of households in Korea are solving their housing problems rely on Jeon-se or leasing, in our civil law, stipulates and protect Jeon-se right. Also trying to protect the tenant as separate the provisions on leasing. In other words, Housing Lease Protection Act was established No. 33795 by historical request in March 5, 1981 and in April 12, 2011 revised twelve

times to No. 10580. It greatly increases the rights of tenant and gradually it was able to protect tenant's rights effectively.

Lease Registration Instruction system is newly established procedures for tenant who did not receive the Lease deposit after the end of the lease. It had allowed him to apply the Lease Registration Instruction exclusively. And it ensure freedom of movement also acknowledge the opposing power to tenant who finished registration of lease right by Lease Registration Instruction.

The Housing Lease Protection Act Article 3-3 Paragraph 1 about Lease Registration Instruction's requirements of application, was defined the tenant who did not receive the deposit after the lease ends. And as allowing the application of Lease Registration Instruction to tenant in same Act Article 3 Paragraph 1 who does not have or lost temporary the opposing power, the opposing powers scope of the acquisition was broadened. It has the greatest significance.

Our civil law has been recognized the Claim to the Auction which is a real right to person of leasehold rights. Because, tenant can acquired the opposing power and preferred right by Lease Registration Instruction. So the way to grant a right to auction for who has registration of lease right will have to be considered actively by legislative.

In addition, although its numbers are small, the small tenant who lives in Unregistered or unlicensed housing cannot apply the Lease Registration Instruction. Because, there is no way. Therefore, the way that to recognize the Lease Registration Instruction for them should be reviewed positively.

The registration command system has the limit that did not considered the housing leaseholder due to considering housing tenant who is social and economic weak. So, the harmonic tenant protection system is need and the study will be continued.

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