

주택임대차보호법상 최우선변제권에 대한 개선방안

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The Improvements of Preferred Right on the Housing Lease Protection Act

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요 약

주택임대차보호법 제8조1항에서 인정하고 있는 최우선변제권은 임차주택에 대하여 임차보증금이 일정금액이하인 소액 임차인의 경우에는 보증금 중 일정액을 선순위 조세채권 및 담보물권자 보다 우선하여 경매절차에서 우선 변제 받을 수 있는 권리로서 임차인 중 특별히 보호가 필요한 무주택 서민들을 위하여 기존의 사법질서를 무시하고 담보물권자들의 이익을 해치면서까지 인정되는 법정담보 권리이다. 그러나 최우선변제권은 법이 예상하고 있는 무주택 서민들의 주거생활의 안정을 기하는 순기능도 가지고 있지만 반면에 법이 인정한 특혜적인 보호를 악용하여 경매절차상 여러 이해관계인들에게 피해를 야기하는 역기능도 적지 않는데, 이에 대한 개선방안을 본 연구에서 제시하고자 한다.

▶ Keywords : 주택임대차보호법, 최우선변제권, 소액임차인, 임차권등기, 임차보증금

Abstract

The Preferred Right that recognized in Housing Lease Protection Act Article 8 Paragraph 1 is a legal security right. The case of a small tenant whose security deposit is less than a specific sum of money to lease housing, he can get preferential payment about his a specific sum of money of security deposit in an auction procedure. Like this the Preferred Right can protect the homeless commoner also it ignores the existing legal system. But the Preferred Right has the right function that contribute to stability of homeless people's housing, on the other hand, it has the adverse function that damages to several interested parties in an auction procedure by using legal

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preferential protection. So, about these problems, the improvement way will propose in this study.

▶ Keywords : Housing Lease Protection Act, Preferred Right, Small Tenant, Registration of Lease, Security Deposit

I. Introduction

In order to the basic residential life of human, the most essential requirement is home. For a long time, Korea has made the rapid urbanization from agrarian society to industrial society. Housing shortage has been very seriously by concentration of population in urban, In order to solve these housing shortages, government's ongoing housing policy that the development of new housing and reconstruction, redevelopment, etc are being made. But many common people do not own their homes and the leases that borrow a house from homeowners are being conducted. To protect these homeless tenants, the Housing Lease Protection Act that has enacted in March 5, 1981 and had been amended 12 times until 2011 is being enforced. Provisions about Jeon-se right or leases on Civil law are highly regard the contract by free will between the tenant and the landlord based on the individualistic legal notices and it has applying legal relationship of between the parties formal equally.

In most developed countries, the protection for tenants is being conducted as in terms of social welfare that country guarantees the human life to the people. However, the reality has become serious social problem. Due to the tyranny and wrong behavior of landlord who is economical strong the tenant who economic and social weak always being forced the landlord's unreasonable demands regardless of his decision. And harmed cases are occurred frequently.

Meanwhile, due to aging, nuclear families, urbanization and surged real estate's price in some areas, in the short term, our current society will be difficult to solve the housing problems. Also the

leases market is more likely to grow, it cannot be ruled out. To protect the tenant who social weak, the Housing Lease Protection Act is indispensable special act for the at least legal guarantee of the tenants.

Thus, the small tenants can receive the portion of his own bond priority than other mortgagee in an auction process by Civil Enforcement Act or National Tax Collection Act. Can get back the amount is based on the enforcement ordinance Article 3 and 4 of Housing Lease Protection Act and recognized the Preferred Right within the range of half of the home's value. So, in this study will comparing-examining the Preferred Right through the advanced research and seek the problems and improvements.

II. Review the Advanced Research

The Economy is more difficult, the more difficult to have a dream of Homeownership. And due to difficult economic conditions, living in the other's home feels like unfair. And just because they have no power, most common people got more damage. So, for these people, the Housing Lease Protection Act has enacted in March 5, 1981 and had been amended 12 times until 2011 is being enforced. But mental · economic distress of homelessness by tenancy are still now. In order to solve these leases problems, in Civil law has the law on leases but the Housing Lease Protection Act had enacted for special laws and it had made many problems between those with power.

Especially, for small tenant's Preferred Right, Jun-Ho Lee and Jin-Moon Kim said that when finish the moving-in report or transfer the house, the tenant of house has the right to preferential

payment for deposit in an auction or a public sale. The Junior creditor just has the right to preferential payment for deposit than other creditor. So, the tenant cannot be the first at Real Right Granted that registered before the moving-in report and qualified definite date on the contract. Definite date on lease certificate is write its definite date or its date-stamp for proves the existence of lease certificate at its present date by notary or court official, and in order to receive the definite date stamp, landlord's agreement is not need.

The Definite date on lease certificate can get from the Court or Notary as payment of commission. At this point, to determining the priority with other owners is "Not the lease agreement date, but the date of received confirmation" So, after signing the lease agreement the Tenant have to receive a definite date as soon as possible for their rights. The deposit that recognized the Right to Preferential Payment by rank, there is no limit to the scope of its amount, even if many of the deposit, it can be applied [1].

Next, Kyeong-Sik Park said, in collection a small deposit, the limit of the deposit and the amount of preferred right should be higher According to the reality, it should apply by subdividing the range and apposite to the case each region rather than a prescribed amount comprehensively. And Two or more tenants in a house and If they have home community life at rental properties, each deposit should be calculated. The use of a small of tenant's Preferred Right is request for distribution to auction court or dividend without requirement like Lease Registration Command, Unlike the definite date hirer's right to preferential payment and it should be revised the law for protect the small tenants more [2].

Jae-Hoon Kim said "If the subtenant taking

delivery of housing and do a moving-in notification, should be protected the subtenant than the tenant by giving an opposing power to subtenant" also the Preferred Right should be revised based on the subtenant [3].

Young-Cheol Oh said, 'the Metropolis of Seoul is 75 million won' it prescribed in Enforcement ordinance Article 4. But in reality, Security Deposit of downtown and outskirts in Seoul, sometimes its differences are more than 10 times. Even in Seoul should be applied its range by region and subdividing, than determined amount of one kind comprehensively. And the amount of 75 million won is not realistic. Probably, in the outskirts of Seoul it might rent a house as this amount, but this amount should be higher than measured. And the first to receive reimbursement amount is too small. Due to its amount it too small, so there is more need to increase the amount of money to receive the first reimbursement [4].

Therefore, when viewed through previous studies, the Preferred Right for a small tenant ensures the protection of residential living and the Housing Lease Protection Act should be settled to fit the reality as soon as possible.

III. The Preferred Right of Small Tenants

1. Meaning of the Preferred Right

The small tenant who has the right to receive reimbursement the some of deposit for lease in preference to holder of a real right granted by way of security. And the deposit limit can receive the preferential payment than real right granted by way of security and it regulated small, so generally called a small deposit. This regulation is aimed at protect to guaranty money for lease of

tenant who is socially small [5].

Since August 21, 2008. following the authorization of 「Seoul Metropolitan Area Readjustment Planning Act」, overpopulated constraint district is under 60 million won, metropolitan city (except Gun area and Incheon) is under 50 million won, other areas are under 40 million won. And Preferred Right is priority reimbursement right within the Home value's (land included) range of 1/2 regardless of other holder of a real right granted by way of security's order of priority. Since August 21, 2008. following the authorization of 「Seoul Metropolitan Area Readjustment Planning Act」, can receive the amount of first preferential payment are overpopulated constraint district is under 20 million won, metropolitan city (except Gun area and Incheon) is under 17 million won, other areas are under 14 million won. If the house's prices exceed half of the home's value it can receive the first preferential payment to only half of amount of house's value [6].

As the opinions of many scholars that actually there are almost no protected small tenants by the first preferential payment, in July 21, 2010. Enforcement Ordinance of Housing Lease Protection Act Article 3 and 4 were revised. This amendment is to strengthen the protection of homeless people and to expand significantly the scope of Housing Lease's protection. Increased the deposit money which can receive the first and Ceiling of the protected deposit in each region as atomizing and increasing the range of protection to 4 steps. After 2010. 7. 21. The deposit for lease that contracted to rental housing is the metropolis of Seoul less than 75 million won, the overpopulation control area as the 「Seoul Metropolitan Area Readjustment Planning Act」 less than 65 million won, Metropolitan city, Ansan, Yongin, Gimpo and Gwangju less than 55 million

won, other area are less than 45 million won, Among them, the tenant who living in the metropolis of Seoul can get the first preferential payment than other holder of a real right granted by way of security less than 25 million won, as 「Seoul Metropolitan Area Readjustment Planning Act」 the overpopulation control area less than 22 million won, Metropolitan city, Ansan, Yongin, Gimpo and Gwangju less than 19 million won, other area are less than 14 million won.

2. The Legal Characteristics of Preferred Right

The precedents said about the legal characteristics of Preferred Right that The Housing Lease Protection Act's legislative purpose is to ensure the stability of people's residential living by regulating the exceptions for Civil law about residential buildings (Housing Lease Protection Act Article 1), The purpose of regulation that the tenant can receive amount of security deposit than other holder of a real right granted by way of security preferentially is to protect the small tenants. Even if most tenants' deposit money were so small but it is too big property to them. So, in case of the small tenants, even if other status of security right holder were damaged, guarantee the collection of small tenant's deposit money is more important. And that comes out from the social guaranteed consideration and it is the escape clause of the Civil law [7].

Among the small rent deposit, the value of home's security is drop in like the amount that can be received the first preferential payment. And can see the result that the amounts of homeowner's mortgage loans were decreases like value of housing's security. So, in the law diffusion ratio of house of Korea the Constitutional Court said, the Housing Lease Protection Act was enacted to protect socially the tenants who are the social weeks as secure the tenant's security deposit and

stabilizing the safety of housing that basic human needs essential to life. It is to ensure the minimum livelihood of small tenants as sacrificing the right like holder of a real right granted by way of security, etc. In other words, the Article 8 which is to protect the tenant expressed that the regulation is aimed at promoting the small tenant's residential stability and living, also secure the minimum deposit money to them by giving recognition that an absolute right to preferential payment to small tenant the lease deposit in auction procedure etc [8].

3. Requisites for Preferred Right

First, the First preferential payment which can get the preferential payment than other real right granted by way of security is get the preferential payment that is amount of the Article 3 only to the Security Deposit that corresponded to Decree of the Housing Lease Protection Act Article 4.

About the corresponding point of a small tenant, the confrontation between the view that when dividend then [9] and when seizure then [10]. But in Precedents said that “when did the first lease contract, the deposit money were too much so the tenant did not corresponded the small tenants on the Housing Lease Protection Act since the main purpose of the actual lease agreement were use and profit of housing. But after that, if the tenant did the small tenant as reduced his deposit money justly by the new lease agreement, these tenants can protected as small tenants by the same Act. Unless there are special circumstances such as the lease is nullity”. Although the point is not clearly stated, in content, In the process of renewal if the deposit money were under the limit of enforcement ordinance of the Housing Lease Protection Act Article 4 by reducing the amount of guarantee, it shows the small tenants [11].

However, the judgmental point of a small

deposit first preferential payment's application is not the point of lease contract, but the point of rental housing's senior settlement of easement. In other words, the range and dividends of small tenants which can get the right of the first priority reimbursement is determined by on the basis of the first mortgage date [12].

Second, The Preferred Right has to small tenant who have the requisites for counteraction such as transfer the house or resident registration. And the requisites for counteraction must be equipped before the registration for entry of decision on the commencement of auction to housing and it must exist to end of the request for distribution [13]. In addition, if the housing tenant finish the registration for Jeon-se right separately to strengthen its position, when he lose the requisites for counteraction of the Housing Lease Protection Act Article 3 Paragraph 1, then he lose the opposing power on the Housing Lease Protection Act and the Right to Preferential Payment. As losing the requisites for counteraction that the resident registration the small deposit right to preferential payment on the same Act Article 8 Paragraph 1 has lost too [14].

Third, if the lease houses sold by auction of public auction. Then the tenant can attend the auction procedure and exercise the Preferred Right. So if in the case that transferred by a juristic act such as just sale and exchange, etc. Then the problem is just exercise the opposing power, not the acknowledging the Right to Preferential Payment or Preferred Right.

Fourth, have to the request for distribution to the auction court [15]. The small tenant doesn't show on the registration and unless the small tenant doesn't request for distribution, the auction court cannot know its existence. So during the auction process, the small amount lease relationship can destroyed or shut down. And as

mentioned earlier, the small tenant who has the opposing power can do the preferential payment claim and claim for recapture of deposit to grantee. So the Preferred Right has been recognized to the small tenant [16]. Thus if the small tenant did not the request for distribution and the junior creditor received its amount, the small tenant cannot the claimed for restitution of unjust enrichment to junior creditor. Also, the small tenant who has the opposing power cannot withdrawal after the end of the request for distribution (Civil Execution Act Article 88 Paragraph 2). It changes the burden that the buyer should be taken by withdrawing the dividend requirements.

How to request for distribution is as follows : Following the regulation of Civil Execution Article 48, be submitted to the court a written request for distribution that written the amount of request for distribution with attaching a copy of the lease which contained the deposit money or the resident registration which contained a moving-in notification. Only leaseholder shall request for distribution, Reported to the right as just interested parties is not enough to recognize the request for distribution; request for dividend. But the lease and resident registration were reported with the notice on a right, regardless of paper's title, if the real contents are request for distribution then acknowledge as the request for distribution. Like this, the Precedent is so flexible [17].

4. The Effect of Preferred Right

If the tenancy deposit tenant who is on the enforcement ordinance of Housing Lease Protection Act Article 4 exercised the Preferred Right by request for distribution, They receive the certain amount of deposit money which related the same Act enforcement ordinance Article 3 that

including value of the land and within the half of the housing amount's scope priority than other the Real right granted by way of security. However, there are some differences between the housing bid price in auction and collection money of deposit for lease depending on the number of small tenants.

First, in the housing value (including land value), deduct the expenses for auction, necessary expenses and profitable expenses to preserve and improve the real estate by the third acquisition of security. after then they distribute following : the small lease deposit bond, the final three months wages, the final three years severance pay and accident compensation. If these bonds were competing, regard as the same rank and dividend. Thus, if the amount of aggregates of small tenant exceeds the half of the housing value (including land value), its amount limited as the percentage of small lease security within the half of range. So, maybe it cannot receive the certain amount from small lease security in same Act enforcement ordinance Article 3. In this sentence, 'the Housing' means the registered house as well as not registered house and the first right to preferential payment right acknowledged both [18].

On the other hand, to receive the First Preferential Payment from the price for sale of the land, the owner of the Buildings and Land must be the same.

However, the tenant of small tenant those who finished the opposing power and confirm the date, if lease Buildings and Land are in auction as well as in case of only a land is in auction, they can exercise the Preferred Right to the conversion price of land and this Preferred Right has the character that the Legal Real Right Granted by Way of Security. So it acknowledged protecting the tenant based on the value of lease housing and landing which is the purpose of lease at the valid

of lease. So, even if the owners of lease housing and land were different, it recognized too [19]. Also, what can receive the first preferential payment in conversion payment of land is only if there was a building at the time of setting the Mortgage. After setting the Mortgage, if acknowledging the right to preferential payment to small tenant, a mortgagee may get unsuspected damages and its scope is too unreasonably expanded and it is unfair. So, in this case the small tenant cannot receive the preferential payment about the conversion payment of land [20].

On the other hand, there are many different views about acknowledgment to small subtenant who subleased the house from tenant, among them the established rule of Supreme Court said a sublessor(lessee) acknowledged the same Preferred Right to small subtenant who has the right to preferential payment by Housing Lease Protection Act Article 8. To small subtenant, recognized the Preferred Right unconditionally, there are many uneasiness which makes lawlessness that a sublessor (lessee) reducing the amount of Security Deposit and mass-produce the small subtenant after then request for distribution to subtenant.

The small tenant who recognized the Preferred Right has to note one thing is in case that lease to house that already leasehold registered. If tenant registered leasehold, even after that he loses the opposing power, it is no problem to receive the preferential payment. However, these institutions for the protection of tenants have become unfavorable to other tenant. Small tenant who leased on the registered lease housing cannot receive the first preferential payment. In other words, acknowledging the small tenant who leased on the registered lease housing and give them the first preferential payment, other tenants those who will receive the preferential payment or other

creditor's distributed amount will decrease so they will make a loss. Thus, to be recognized the Preferred Right of small tenant; the particular attention is required to a registration by the right of lease registration command and registered housing by Civil law.

Finally, the transfer of House. About the problem which is the small tenant should be transfer the rental housing to receive the amount of first preferential payment. There are no regulations in the Housing Lease Protection Act and have many opposition views. The Housing Lease Protection Act Article 8 Paragraph 2 does not following the same Act Article 3-2 Paragraph 3 and to receive the lease deposit money of first preferential payment, it related simultaneous with transfer the rental housing and cannot give the dividend before finished performance of obligation. So, rental housing must transfer to a purchaser [21], this opinion is about deposit of dividend. About this, Looking at the practice and precedent, the Security Deposit mortgage the tenant's most debt, and surplus money is contained too. Collecting the deposit for lease and do not returning rental housing, it makes impossibility the security for claim. So, returning rental housing is essential.

5. Problems and Improvements of the Preferred Right

5.1 The Problems

In the Constitutional Court [22], The Legislative purpose that recognizing Preferred Right of small deposit enacted that "Ensure small tenant's minimum right to live by can be avoided the worst that small tenant kicked out of rental housing without a penny by an auction process. In other words, in the auction procedure, as acknowledging an absolute right to preferential payment to

minimum rent deposit of small tenant who has the small size, secure them the minimum return of the deposit, through this, this regulation is to promote small tenant's live and residential stability.

But, to receive first preferential payment, the degree of Security Deposit's certain amount is too low than actual deposit money for Jeon-se, a number of tenants those who corresponds to small tenants of small deposit is weak [23]. Moreover, if the Preferred Right of a small deposit doesn't have the priority opposing power, they cannot receive amount of guaranty money for lease.

Like this, through the suggestions of small deposit that is not fit real economy July 21, 2010. Revising the Housing Lease Protection Act enforcement ordinance Article 3 Paragraph 1 and Article 4, and it rose up a range of tenants and a range of first preferential payment's amount. But, the basic framework is still retains. So, it is difficult to solve the problems.

In addition, the small deposit first preferential payment system abused that if who has the opposing power before the registration of request for auction to rent housing, he can receive the preferential payment than other a rightful person of real right granted by way of security. Like this, using this system many tenants are abusing [24]. Due to the occurrence of simulated tenants, priority rightful person suffer a serious loss and other tenants receive the threats to collect the leaseholder's lease deposit.

Like this, Preferred Right of Small Deposit is to ensure homelessness's housing life. But actually, it is hard to re-renting with amount of first preferential payment and many simulated tenants produced by simulated weak point of law. In the auction and public auction, to protect every tenant those who must receive deposit safely and to real right granted by way of security of house. So unified protection system is urgent.

5.2 The Improvements

Range of deposit which for tenant of small deposit who can receive the first preferential payment is not fit to reality and amount of first preferential payment is too small. Therefore, improvements are as follows: First, if two tenants are in one house and they live together, regarded as one tenant and adding up each deposit is not fit very realistic. If individuals become adults, they live independently configure the householder and it is reality. And because most individuals have the guarantee of property rights and freedom of privacy, the tenant must be protected their deposit independently, if not it is like infringement of property rights and freedom of privacy.

Second, like most auction and public auction, it occurred by leaseholder's none servicing of the debt. So, in this case many tenants can suffer from disadvantages. So, exercise Preferred Right by small tenant be changed to protect the small tenant preferentially, unlike tenant's right to preferential payment who has definite date. And without request for distribution to auction court and report the exercise of priority to Default Disposition Agency.

Third, when housing tenant sublet a house with leaseholder's consent and if the subtenant receive that house and finish the moving-in notification. Tenant can get the opposing power. In fact, if subtenant who living in rental house, finish the moving-in notification, the tenant who is not living that house has the opposing power and protected, thus subtenant can be protected too. But if the tenant has the problem, subtenant will have too. Whether the tenant or subtenant, their social status are not difference. And subtenant's subletting deposit is move to tenant. So, tenant dose not lose the money. By renting a house, lease to two or more is same. In this case, there is

no damage to tenant. Because tenant have received a subletting deposit already. So, if subtenant transfer the house and finish the moving-in notification, the Preferred Right have to amend based on a subtenant. Legal sublease subleased with leaseholders agree. So leaseholder shall be responsible for subtenant.

IV. Conclusions and Recommendations

December 31, 2011 According to the announcement of the current government, Korea's substantial diffusion ratio of house is 112.9 percent [25]. But, about half of all people are still living in other house by rental. The meantime rental market was center of Jeon-se but not changed center of monthly rent and many troubles will occur. So, maintenance and foundation of conciliation of dispute organization is need and this situation was very urgent. The Government has been trying to protect the homeless people by enforcement of Housing Lease Protection Act which is special law of Civil law. It has revised 12 times such as Preferred Right system.

But accordance with the rapidly changing flow, there are new issues to be supplemented. To the tenants those who are current economic mainstream of our society, rental deposits is like their whole property. Preferred Right of rent deposit which ensured to protect the practical tenant is moving as leaseholder's economic situation. It is Korea's reality. In foreign practices or legislations it cannot be found. It is unique characteristic in the form in Korea. And its protection is weak, rather than foreign country.

So, In this study thinks, the Preferred Right of tenant who is social · economical weak must be improved as follows:

First, extent of the deposit and amount of first

preferential payment which eligible for Preferred they should be measured higher to fit the reality. And should be applied subdividing by each region.

Second, if two or more tenants are in one house and they live together, shall be calculated the deposit by regarded them as each tenant.

Third, exercise of Preferred Right by small tenant should change the law to protect every tenant those who must receive deposit safely and without request for distribution.

Fourth, if subtenant receives the house and finished moving-in notification, subtenant will acquire opposing power and be protected as a top priority. And the Preferred Right must be made a revision, based on the subtenant.

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