

Real Right Alternation and Its Adversarial Problem Under Registration Antagonism

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Abstract

With the continuous development of socialist market economy in China, real right alternation has become increasingly frequent, which is becoming the critical issue in the legislation of real right. In this legislation, a binary structure model has been adopted by China, which is based on registration essentials doctrine and supplemented by registration antagonism. This paper describes the registration antagonism in the real right alternation, and studies its adversarial problems.

Key words: Real right alternation; Registration antagonism; Adversarial problem

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INTRODUCTION

In Property Law of China, the “real right alternation” is defined as “the establishment, modification, transfer and elimination of the real right”. Meanwhile, according to its Article 9, it stipulates that “the establishment, modification, transfer and elimination of the material rights of real estate will take effect after the registration according to the law; while, without registration, it will not take effect, excepting otherwise stipulated by law.” In the material rights alternation of real estate, registration essentials doctrine has been adopted by China. However, in order to make legislation more suitable for the national conditions of China and life habit of people, registration antagonism has been also adopted.

1. REAL RIGHT ALTERNATION UNDER REGISTRATION ANTAGONISM

Registration antagonism was originated in Civil Law of France, which was established in the French Revolution. It used the method of registration to determine the ownership and the alteration of the real right of real estate. The ownership of real right can have legal effects in accordance with the consensus of the parties, while, without registration, it shall not oppose to the bona fide third party, in which, real right alternation only relate to the consensus of buyers and sellers, but have nothing to do with the registration.

1.1 Real Right Alternation of Movable Property in China

In Property Law of China, the principle of “delivery” is adopted in real right alternation of movable property. According to its Article 23, it stipulates that “the establishment and transfer of real right of a movable property will take effect after the delivery, excepting otherwise stipulated by law.” Therefore, the key to real right alternation of movable property in China is the delivery, which is used as a method to publicize the real right alternation, and once the delivery is completed, movable property is transferred from one party to another. Such model of real right alternation has fully reflected the value of negotiability and convenience of real right of movable property.

1.2 Real Right Alternation of Real Estate in China

In the real right alternation of real estate, the mode of real right alternation based on registration essentials doctrine and supplemented by registration antagonism, has been adopted by China. According to Article 9 of Property Law of China, it stipulates that “the establishment, modification, transfer and elimination of material rights of real estate will take effect after the registration according to the law; while, without registration, it will not take

effect, excepting otherwise stipulated by law.” And Article 14 stipulates that “the establishment, modification, transfer and elimination of real rights of real estate shall take effect since the registration occurs.” In China, apart from real estate, there are several other cases needed to adopt the mode of registration antagonism when the real right changes, such as special movable property, land management rights, easements, and the real right alternation not in accordance with the law.

Special movable property mainly refers to vessels, aircrafts, motor vehicles, etc. with large value and inconvenience for transactions, which is interposed between traditional movable and immovable property. Therefore, according to Article 24 of Property Law, it stipulates that “the establishment, modification, transfer and elimination of vessels, aircrafts, motor vehicles, etc. shall not oppose to the bona fide third party without registration.”

Due to the huge area of rural collective lands in China, and the long term farming habits of peasants, the model of registration essentials doctrine is not realistic for the real right alternation of rural collective land. So, the mode of registration antagonism is implemented in the real right alternation of land management rights and easements in China.

In terms of the real right alternation not in accordance with the law, mostly the ownership of the object is determined by the fact of the real right transaction. If the registration essentials doctrine is implemented, then there will be a blank period between the time of transaction is completed and that of the real right alternation is registered, in which the object would become ownerless, and also make the rights of buyers be infringed. So, in this case, the mode of registration antagonism is implemented in order to protect the interests of the parties.

1.3 Reasons for Registration Antagonism in Real Right Alternation of Real Estate Adopted by China

Reasons for the application of registration essentials doctrine and registration antagonism in China are mainly in the following.

First, registration antagonism can bring the litigants with more choices. In registration antagonism mode, the litigants can choose to register the property, so that their rights have the opposing effect to fight for covet from the third party. Also, they can choose not to register, and then also have the real right. Thus, the registration antagonism mode has provided the litigants with even greater legal choices in real right alternation.

Second, the registration antagonism mode of real right of real estate is more consistent with traditional habits of the litigants. In real estate transactions, taking housing transactions for example, whether in rural or urban areas, a considerable number of people do not have the awareness of property rights registration; however, it does

not affect their daily life. Thus, in the traditional habits, once the real estate is delivered, the parties have agreed with the real right alternation of real estate.

Third, the application of registration antagonism can simplify transaction procedures, and save transaction costs as well as encourage trades. As the implementation of any kind of legal registration requires paying costs, if using the mode of registration essentials doctrine of real right alternation of real estate, it is bound to make more procedures in trading, and increase the costs of transactions. In the registration antagonism mode of that, the parties can decide whether or not to make a registration according to their wishes. If the parties do not make a registration, then it will reduce costs of the transaction so as to encourage people to trade more.

2. QUESTIONS RESEARCH IN REGISTRATION ANTAGONISM

2.1 The Third Party in Good Faith

According to Property Law of China, it stipulates that “the real right shall not oppose to the bona fide third party without registration.” Therefore, there are controversies about what is defined as the bona fide third person who shall not oppose to, as well as how to define good faith in academic community.

2.1.1 The Definition of “Good Faith”

According to Property Law of China, how to define “good faith” has become the focus of controversy in academic community. Generally, good faith is a psychological state of a person in the implementation of some behaviors in numerous laws; there are two explanations about it. The first one refers to a pure motive of a person, who does not have the subjective attitude of harming the interests of others; the second one refers to a subjective attitude of a person to take actions without knowing their actions would violate the laws and harm the interests of others. The former is a good faith in motives, but in the actual case, it is difficult to determine whether a person’s motives is in good faith; the latter is a good faith in actions, which may cause great mistakes, so how to determine good faith, there are much controversies in different national laws.

In the academic viewpoints, some believe that good faith is only the determination of the fact of the third party without the knowledge, and the determination that whether the behavior of the person is in good faith should be determined by negligence caused by acts. Another view is that, good faith is not only the determination of the fact of the third party without the knowledge; the identification of good faith should include legal evaluations, as well as the gross negligence caused by the behavior of a third party. In summary, it is considered that good faith is the subjective attitude of the third party that not knowing or impossible to know the real right alternation.

2.1.2 The Definition of “Shall Not Oppose to the Bona Fide Third Party Without Registration”

China’s relevant laws do not specify the scope of bona fide third parties; therefore, there are many controversies about the definition of the scope of bona fide third parties in the academic community. Generally, the third person is a person other than the parties related to real right alternation, but there are divergent views on the issue that whether the third person is all the persons outside the parties, or is still somewhat limited scope outside the parties.

Some scholars believe that the defining of the third party should follow certain criteria. Firstly, the third party should have a legitimate interest in the real right alternation besides the parties; secondly, the third party should have a valid and effective trading relationship with the parties; thirdly, the third party should be the person who has carried out the transactions based on the trust of real right alternation. Other scholars believe that the third party should possess the following requirements: firstly, the person enjoys the specific rights; secondly, the third party and the disputed party should face the same transfer of rights; thirdly, the third party should be the holder of the controversial property rights; finally, it should be effective publicized. Based on above views, at this stage in China, the definition of bona fide third parties should have the following conditions.

First, the third party should have the right to the disputed items, which has a conflict with that of the disputed parties. For example, the third person can be the transferee of the contract and management rights of the land, etc., or be the two people who enjoy the ownership of one item with two sales.

Second, the third party should face the same person with the disputed party. For example, person A has sold his car to person B without a registration, subsequently A turned to C for some borrowings and made this car as collateral with a registration, then B and C face the same person, that is A.

Third, the third person should publicize the property rights. According to Property Law of China, it stipulates that “in the real right alternation of special movable property such as vessels, aircrafts, motor vehicles, etc. and land management rights as well as easements, the conflict between the third party and the disputed party should be judged by the date of registration, the earlier registration takes precedence over the later one, and the registered takes precedence over the unregistered.” So, the third person should publicize the property rights effectively.

It can be concluded that a bona fide third party gets the real right from the same party with the disputed party, and there is a conflict of the real right between them, also the bona fide third party is not the party who have publicized the real right. A bona fide third party includes the transferee of ownership, the transferee of use right of construction land, the transferee and subcontractor of the

land contract and management rights, mortgagee, the later mortgagee and leaseholder.

2.1.3 The third party cannot oppose to after the registration

Property Law stipulates that “it shall not oppose to the bona fide third party without registration.” However, after registration, it does not mean that it can oppose to any third party, then, who is the third party that cannot be opposed to after the registration?

First, for the same movables, when the unregistered pledge is earlier than the registered mortgage, the mortgagee can not oppose to the pledge right. At this point, Property Law does not make provisions. However, we believe that both the registration and possession are ways of property rights publicity, although the publicity of possession is weak, as long as the parties has made the publicity on the real right, it should be protected by laws. Therefore, the registered mortgagee can not oppose to the earlier unregistered pledge right.

Second, the earlier owner of the lease. Relevant laws and regulations in China stipulate that “before entering into a mortgage contract, if the houses have been rented, the original lease rights are not affected by the mortgage right.” Therefore, the registered mortgagee can not oppose to the earlier lease right.

Third, persons holding maritime lien. China Maritime Law stipulates that “the maritime lien takes precedence over possessory lien on vessel in repayment, and possessory lien on vessel takes precedence over ship mortgage in repayment.” Therefore, the registered mortgagee can not oppose to the earlier maritime lien.

2.2 Adversarial Problem Caused by Registration Antagonism

In the mode of registration antagonism, the real right alternation needs go through many stages, if one person has obtained the ownership of something without registration, then another person also takes the opportunity to buy this object with registration, finally the controversy about the ownership of the items between two people would appear.

For example, a truck owner has transferred the truck to buyer A, at the same time, as seeing huge profits in trucking, in the case of knowing that the truck has been transferred, buyer B purchases the truck from the owner at a higher price and makes a registration. According to the registration antagonism, there are problems in the process of real right alternation in the following.

The first one is the problem of “one object sold by twice”. According to the antagonism, when the parties have made a consensus, buyer A has obtained the ownership of the truck. However, if the truck is not delivered nor registered, so it can be also sold to buyer B, or even other buyers by the owner, which the law does not prohibit. So, in registration antagonism, there will be a phenomenon of “one object sold by twice or even more times”.

The second one is the adversarial problem in registration antagonism. In the example above, according to the consensus in register antagonism, in the first transaction, the ownership of the truck has been transferred to buyer A. So, selling the truck again to buyer B by the owner is illegal, because only the bona fide third parties can obtain the ownership of the truck. However, since buyer B has made a registration, therefore, it is considered that buyer B obtain the truck ownership and can oppose to the bona fide third party in register antagonism, which deny the truck ownership of the former buyer A. If buyer A is considered not have the truck ownership because he do not register, then it violates the principle of “the establishment and transfer of real right can only have legal effects in accordance with the consensus of the parties” in antagonism.

Therefore, in registration antagonism, the real right alternation has two standards: one is the consensus of the parties; the other is the delivery and registration after the consensus. Among them, the first criterion can not oppose to the second one. According to the first criterion, the ownership of items in the case of being transferred already can be transferred again or even repeatedly. However, only the real right alternation under the second criterion can be protected by the law. Once a buyer has made the property registration, then all previous buyers will lose the ownership of items, which is not conducive to the normal transactions and the economic order.

CONCLUSION

Registration antagonism of real estate is more in line with national conditions and people’s living habits in China. But, under the registration antagonism, problems caused by the real right alternation should not be ignored. We have analyzed and discussed the issue of the third party in the real right alternation under the registration antagonism, as well as the inherent contradictions of registration antagonism, which would provide a positive reference to the reasonable management of real right alternation.

REFERENCES

- Qu, J., & Yan, H. Y. (2009). Analysis of the mode of real right alternation in China. *China Business & Trade*, (04X), 166-168.
- Liu, X. X. (2010). Discussion on the registration rules of the real right of real estate in property law. *Journal of Heilongjiang Administrative Cadre College of Politics and Law*, (6), 60-62.
- Wang, R. H. (2011). Registration essentials doctrine and registration antagonism should be adopted in real right alternation: The thinking about Article 9 of property law. *Decision and Information*, (7).
- Yu, G. Q. (2011). Discussion on registration antagonism of the real estate: The understanding and application of Article 24 of property law. *Legal System and Society*, (9), 59-60.