

A Study on the Realistic Dilemma and Countermeasures of the Mortgage Rule for Premises

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Abstract : With the development of the economy and society, the scope of mortgage subject matter continues to expand. Article 397 of the Civil Code stipulates the legal provisions on mortgage premises. Currently, China's regulations on mortgage premises are quite followed, and there are some difficulties in realizing mortgages in both theory and practice. Real estate plays a very important role in human life, which is not only the most important transaction object, but also the most important means of mortgage. In response to the problem, the existing reasons are analyzed, and the problem is discussed on how to solve the reality of the real estate mortgage rules of the dilemma. In order to fit with the socialist market economy concept, this paper mainly starts from the social market transaction level, in order to optimize the transaction market and promote the quality of real estate and real estate mortgage realization.

Keywords: Rules for Mortgages on Premises; Practical Dilemmas; Voluntary Principle; Joint Mortgages; Countermeasures and Recommendations

1. Introduction

Property and real estate play a very important role in human life, especially in economic life, not only as the most important transaction object, but also as the most important means of collateral. China's "Civil Code of the People's Republic of China" has been implemented since January 1, 2020, and both its Article 397 and Article 397 provide for this Article 397 of the Civil Code stipulates that the mortgage of a building or the mortgage of the right to use land for construction purposes shall follow the rules of "one mortgage for the premises"[1]. Article 397 of the Civil Code states that if a building is mortgaged, the construction land use right within the area occupied by the building shall be mortgaged together; if the construction land use right is mortgaged, the building on the land shall be

mortgaged together. The building on the land shall be mortgaged together with the land use right of the building. In China, the doctrine of "real estate and land as a whole" is practiced, and the rules of mortgage are also practiced, in which "joint mortgage" refers to the joint mortgage relationship, and the legally formulated joint mortgage relationship is still formed when the real estate and the land use right are separately established as mortgages. The rule of "joint mortgage" refers to the joint mortgage relationship, which is still formed when the property and land use right are created separately. Real estate and real estate, in our law, both for the independent individual existence, also can be as a unity of existence. But in practice, there are some operational problems, such as the more obvious is the phenomenon of property and real estate separate mortgage and separate mortgage. But in our country is the use of "together mortgage" rule, that is, if the real estate mortgage, the real estate will occupy the area of land use rights together mortgage; if the mortgage is the land use right, then the property on the land will be mortgaged together.

The determination of the rights of real estate and real estate has always been a major event in the national economy and people's livelihood, and over the years, the ideas of "house goes with the land" and "land goes with the house" have been deeply rooted in people's minds, and to a large extent, they can solve general civil cases. However, the abstract nature of the law makes the rule still exists a lot of controversy in theory and practice. In the light of specific cases and by comparing the application of the "one premises" mortgage rule between China and foreign countries, we will discuss the conflict of laws in China and put forward applicable suggestions, with a view to better exploring the "one premises" mortgage system suitable for China and promoting the improvement of China's relevant

legal framework. In order to explore a better mortgage system suitable for China and to promote the improvement of China's relevant legal framework.

2. The Reality of the Dilemma Posed by the "One Premises" Mortgage Rule

2.1 The One Premises Mortgage Rule is Inconsistent with Basic Principles of Civil Law

The basic principles of civil law mainly include the principles of equality, voluntariness, fairness, honesty, legality, public order and morality, and the green principle, and the rule of "real estate as one" mortgages violates the principles of equality and voluntariness[2]. Article 4 of the Civil Code and Article 5 of the Civil Code explain the concepts and basic requirements of the principles of equality and voluntariness, respectively, The mortgage rule of "real estate as a whole", when the right holder only wants to mortgage the land use right, it is against the will of the right holder to mortgage the building on the land together, which is against the will of the right holder and does not conform to the principle of voluntariness, and the mortgage together is a mandatory provision, which does not give the right holder the freedom of equal negotiation, and at the same time, does not conform to the principle of equality. The principle of equality.

2.2 Not Conducive to the Smooth Entry of Real Estate Into the Transaction Market

In real estate development, developers usually encounter a shortage of funds. In order to finance, they will obtain bank loans by mortgaging land use and other means. Once the house is sold, the price is obtained and then repaid. Our land mortgage follows the mortgage rule of "one house and one land", which is called "house goes with the land, land goes with the house". Ownership of buildings is an independent right and is not part of the land use right, and the land use right itself can be transferred independently. However, if only the land use right is allowed to be mortgaged and the ownership of the building is not mortgaged together, disputes may arise in which the two rights do not belong to the same subject of rights. In order to prevent such conflicts, it is necessary to regard the house and the land as a whole, thus requiring that "the house goes with the land and the land goes with the house"; however, if the land is mortgaged first and the house is built later, the value of the house is not included in the scope of

the mortgage. In practice, there are buyers of housing land use right has been mortgaged, according to the "urban real estate mortgage management measures" in article 37, can see that the commodity housing in the mortgage can be sold. For home buyers, there is a risk that the developer will not be able to repay the loan when it is due, the bank will exercise the mortgage, the buildings on the ground will be auctioned together, and after the house is auctioned for the original owner of the property, it becomes a question of whether or not they will be able to continue to live in the house. This greatly reduces the activity of the real estate transaction market and is not conducive to the smooth entry of real estate into the transaction market. Take the following case as an example.

Iron sued Heilongjiang province a real estate development limited company and an asset management company limited company in Heilongjiang province branch of the first instance of the case of sale and purchase contract dispute is as follows: Heilongjiang province a real estate development limited company is a city of a district construction unit. Tiemou funded the purchase of the district housing, according to the provisions of article 15 of the contract, the seller should be in the commercial housing delivery within 180 days after the use, with the registration of ownership needs to be provided by a real estate development company in Heilongjiang province, the information provided by the property rights registration authority for the record. If, due to the seller's responsibility, the buyer can not obtain the certificate of ownership of real estate within the specified period, the two sides agreed that the buyer does not withdraw, the seller paid 0.01% of the price of the house to the buyer to pay liquidated damages. Heilongjiang province, a real estate development limited company had purchased housing construction work in progress and ancillary land use right, state-owned construction land use right were mortgaged to two different banks, the original mortgagee will be the corresponding rights transferred to an asset management company limited by shares in Heilongjiang province branch, and mortgage registration. In this case, the real estate development company in order to finance, has been mortgaged land use right on the building for sale, the law expressly

provides, without the consent of the mortgagee, shall not be disposed of, iron mou purchased the house is therefore unable to apply for ownership registration.

2.3 Restrictions on the Freedom of Rights Holders to Dispose of Land and Housing

China's Civil Code stipulates the basic rule that "the house goes with the land, and the land goes with the house", which aims to emphasize the "unity of the house and the land", i.e., it emphasizes that the transfer of rights must ensure that the rights are ultimately vested in the same subject of rights. Take the following case as an example.

Wang Mou and Jiang Mou, Tang Mou and other private loan dispute case as follows: the defendant Jiang Mou on November 20, 2017 to the plaintiff Wang Mou borrowed 180,000 yuan, issued a loan note, at the same time, the defendant will be all the houses as collateral security. Jiangmou in the loan every month after repayment of 2700 yuan, repayment of six months totaling 16,200 yuan; Defendant Zhangmou in seven repayments totaling 70,000 yuan. The plaintiff filed a lawsuit with the court because he was unsuccessful in claiming the money from the defendant. In this case, although the land is not mortgaged together, because the house in question exists within a certain range of land use rights, whether or not the range of land occupied by the house in question is mortgaged, it will lead to the land occupied by the house in question is also mortgaged together. The judgment in this case was to discount, sell or auction the mortgaged real estate house according to law. In practice, the land use right occupied by the house would be mortgaged together. In addition, the original mortgagor wished to mortgage only the house, but in accordance with the law, it was necessary to mortgage "the house and the land as a whole", and the exercise of the original mortgagor's right to the land-use right was restricted by the mortgage on the house, i.e., restricting the right holder's freedom to dispose of the land and the house.

3. Suggested Countermeasures to the Conflict of "One Premises" Mortgage Rules

3.1 Implementation of the Voluntary Principles of the Civil Code

The Civil Code may give the parties the right to negotiate on the manner in which the mortgages are to be acted upon, and under the premise of a

joint mortgage, depending on the nature of the land and real estate, each mortgagee may have the right of first refusal on the other part of the joint mortgage that exceeds its own mortgaged portion, and give the parties the freedom to negotiate on an equal footing on the manner in which the mortgage is to be exercised, and to respect the will of the right holders, subject to the premise that the joint mortgage is not to be violated. Voluntary exercise of the right of first refusal, can avoid the mortgage on premises and land, reduce the value of the house or land, or in the realization of the mortgage, can be in full respect of the rights and interests of the right holder for consultation, in the face of rotten buildings and other engineering situations, depending on the circumstances of the separate mortgages, can't let the mortgagor to the rotten buildings affect the mortgagee's interests in the realization of the real life of real estate, land, avoiding the waste of resources. The rule of mortgage in our country has been practiced for a long time, appropriate mortgage is not a denial of mortgage, mortgage is in line with the basic national conditions of our country, based on the development of the real society, appropriate to the rotten building and so on, whether it is on the rights and interests of the rights of the person protection, or waste of resources, there is a certain significance of reality exists.

3.2 Legal Provisions to Improve the Rules on Mortgages on Premises in the Civil Code

The provisions of the Civil Code on the mortgage rule of "real estate as one" are too brief, which leads to the generalization of the law, and the real life is changing rapidly, which makes the law out of line with the society. From this level, I believe that the law should be made more specific, the relationship between different buildings and land, how to meet the specific conditions of the "real estate as a whole" detailed, to avoid the emergence of a building within the houses of some tenants can be mortgaged, and some tenants can not be mortgaged housing situation. The second room is most people's lifelong goal, if only for the land and even the property of the parties, not in reason, although the law is merciless, but as a judge has relative discretion, the author believes that you can set up a touting clause, "housing and land as one" exceptions, combined with the specific status quo specific

analysis, reasonable Protect the interests of the parties, such as "room with the land", can give the parties to the auction price of the right of first refusal, reasonable relaxation of the period and so on. In addition to the specific formulation of the law, the supreme court can issue guiding cases every year, in practice, the existence of the mortgage conflict with the judicial interpretation of the method to deal with timely, to avoid the lagging effect of the law.

In practice, our registration implementation of the real estate register, although our registration agency has been unified, but as long as still two real estate registers will be difficult to achieve a truly integrated registration. Two immovable property register whether in the registration behavior or in the specific operation, still can't avoid two registers on the state is not the same, also will lead to two mortgage rights do not belong to the same mortgagee situation. Real estate and real estate belongs to two different real estate, first of all, different types, can not exist in a same type of real estate registry, and secondly, the parties have the right of independent choice, can choose one of their own registration, choose to register the mortgage effect has occurred, not registered the party in accordance with the "real estate" mortgage rules have also occurred at the same time. The unregistered party, although in accordance with the "real estate" mortgage rules have also occurred at the same time the mortgage effect, but an immovable property register on the status of the state changed, another immovable property register on the status of the state will not be changed at the same time, the result is bound to be an immovable property registry of the state of real time, and another immovable property registry on the state of the state of the state is bound to be wrong. The author suggests that a new registry can be created or the two previous real estate registries can be merged, the name can be called "real estate real estate joint registry". In the real estate registration columns do not distinguish between real estate and real estate, only set up a unified registration item, note real estate and real estate mortgage registration status. In this way, it not only reduces the cumbersome registration matters of the registration department and the trouble of changing the rights at a later stage, but also facilitates the parties to know the registration status of the real estate as soon as they check it.

3.3 Improving Market Transparency in Real

Estate and Land Transactions

Transparency refers to the quality and quantity of information provided to participants, as well as the consistency of rules and regulations related to market property rights. From an investor's perspective, highly transparent real estate and land transaction markets not only facilitate the flow and reliability of information, but also make it more difficult for investors to detect inefficiencies in real estate and land transaction markets. On the other hand, low transparency creates additional risks and transaction costs. Transparency has improved in more than 80% of markets since 2012, although growth has generally been "slow and steady" in most markets. But there are still many real estate transactions that are not transparent to the market.

The exchange of information is integrating emerging markets into the real estate transaction market at a faster pace. Especially through the Internet. From a real estate perspective, this has many implications for investment. With the expanding horizons of research and brokerage firms, information about almost any market is available in minutes. Advances in spatial imagery from satellites and aerial photography will also provide more research and analysis tools for information exchange, which has led to increasing transparency in real estate and land nationwide. In general, the more transparent a country is, the easier it is to conduct business in the real estate industry, leading to increased real estate capital flows. Increased transparency in real estate and land allows investors to be more aware of the specifics of each type of resource and to inspect properties and land before investing, making investment risks more manageable and facilitating real estate market transactions. Consumers will also be able to understand property and land information before purchasing a home, making it safer and more reliable.

4. Conclusion

The doctrine of integration of real estate has penetrated into all aspects of life, from the beginning of the concept we can find that the existence of the doctrine of "integration of real estate" in order to solve the practice of real estate and real estate belonging to different right holders of disputes. Although the provisions of the law has been clear "real

estate" mortgage rules, the law does not have a clear explanation of "mortgage", "together mortgage", resulting in practice problems, the main recommendations are still in the registration system. The main recommendation is still in the registration system, to create a highly efficient mechanism, the unification of two different real estate registry, which can solve the procedural problems, but also to solve the practical problems, and secondly, with the development of society, and the active use of emerging technologies to create a highly transparent real estate and land transactions market, so that real estate to form a more open market, and to promote the development of the market economy. The real estate market is closely related to the overall

economy, and regulating and expanding the real estate market can improve the real estate industry's ability to promote and stimulate national economic growth and development.

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