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Legal Protection of Flat Buyers Whose Land is Actually Being Secured with Hak Tanggungan

Abstract:

The study, entitled legal protection of flat buyers whose land is actually being secured with Hak Tanggungan, first aims to find out and analyze how disputes are resolved for flats buyers who experience law execution of their future apartment units because the land rights are secured. This is normative legal research that will explore the contents of statutory regulations. The results of this research are that several instruments exist as a unit in purchasing an apartment or apartment, one of which is PPJB, the status of the buyer is as a buyer, not bezitter, eignar, or non-litigation channels with specific steps prioritize detentor, the dispute settlement mechanism according to the agreement in the PPJB. Following statutory regulations, however, the buyer can still take the litigation route as a mechanism for settling the dispute, with compensation claims and suit for default based on the existing PPJB.

Keywords: PPJB, Flat, Hak Tanggungan

INTRODUCTION

The construction of flats is an alternative solution to housing and settlements, especially in urban areas where the population continues to increase. Flats' structure can reduce land use, making open urban spaces more spacious and optimally used as places. Terraced living that can accommodate as many and as many people as possible. The construction of

flat land use optimization vertically to several levels will be more effective than horizontal land-use optimization.¹

In an apartment building, some parts can be owned individually and separately, which are called apartment units, and some features are joint rights of the apartment unit owner. This common right includes common shares, everyday objects, and common land. Initially, the policy for building flats in big cities in Indonesia was stated in various laws and regulations, including Law Number 16 of 1985 concerning Flats (from now on referred to as UURS), implemented by Government Regulation Number 4 of 1988 concerning Houses. Susun (from now on referred to as PPRS).²

Not infrequently carrying out the construction of flats developers as the party that can carry out the construction of flats requires a lot of money to support the building's implementation. Therefore, developers usually apply for credit with guarantees to the bank, to increase the ability to build a flat to the developer, a construction loan can be provided with the imposition of a mortgage on the land to be used for the construction of flats, which the credit has been approved can be paid in stages according to the value and results of these development developments. In accordance with the rules of Law Number 4 of 1996 concerning Mortgage Rights to Land and Objects Related to Land (hereinafter referred to as UUHT).³

In terms of marketing carried out before the construction of the apartment is carried out, everything promised by the developer and / or marketing agent is binding as a Sale and Purchase Agreement (hereinafter

¹ Urip Santoso, *Hukum Perumahan*, Kencana, Jakarta, 2014 (selanjutnya disebut Urip Santoso I), p. 401

² *Ibid*

³ J.Satrio, *Hukum Jaminan, Hak Jaminan Kebendaan, Hak Tanggungan Buku I*, Citra Aditya Bakti, Bandung, 2002, p. 136

referred to as PPJB) for the parties. The process³⁴ of buying and selling flats before the construction of the flats is completed can be done through PPJB which is made in the presence of a notary.⁴ The¹ sale and purchase of apartment units is carried out by pre-ordering the unit to be purchased, which is then set forth in the preliminary agreement or sale and purchase agreement or better known as PPJB. With the aim of securing the interests of sellers /¹ developers, and prospective buyers of apartment units.⁵ The PPJB function is as a preliminary agreement which aims to bind or bond the parties which contain provisions regarding the terms agreed upon in the main agreement, namely the Sale and Purchase Deed (hereinafter referred to as AJB) which will later be drawn up in the presence of the Land Deed Making Official (hereinafter referred to as PPAT).⁶

When the apartment building is in the process of completing the construction of the flats and several units of flats have been sold with proof of PPJB ownership, in a situation where the developer does not pay the debt to the bank until it is due, the developer is considered to be in default because it cannot pay off the debt until it is due has been promised. The UUHT makes it easy for creditors to execute mortgage rights if the debtor is in default, as regulated in Article 6 and Article 20 of the UUHT, that the bank as a creditor has the right to execute the object of the security right by selling it through a public auction according to the procedure specified in

⁴ Hrip Santoso I, *Op.Cit*, p. 428

⁵ Tim Penulis Leks&Co, *Hukum Real Estate Bagian I Hukum Pertanahan, Perumahan, dan Rumah Susun*, Citra Aditya Bakti, Bandung, 2017, p. 41

⁶ Suriansyah Murhaini, *Hukum Rumah Susun Eksistensi, Karakteristik, dan Pengaturan*, Laksbang Grafika, Surabaya, 2015, p. 86

the regulation laws and regulations and collect the receivables from the sales proceeds.⁷

In conducting a public auction, a bank certainly cannot just carry it out, there must be clarity about the fate of the apartment unit buyers, especially for those who have made repayments for the sale and purchase of apartment units even though temporarily they only have PPJB as proof of legal ownership. Of course this is a complicated problem related to the consequences of developer defaults on the fate of the buyers and the efforts that can be made by buyers for the execution of the object of the mortgage..

PROBLEM FORMULATION

Legal Protection of Flat Buyer Whose Land is Actually Being Secured with Hak Tanggungan

RESEARCH METHOD

³¹ This research is a normative legal research with a statutory approach.

DISCUSSION

Security rights over land are rights that reside with the creditor, which authorizes the creditor to sell land specifically designated as collateral and collect the receivables from the sales proceeds if the debtor defaults or defaults. This authority is also accompanied by the right to repayment precedence over other creditors. In addition to granting droit de preference, the security right to land will also burden the land which is used

²⁴
⁷ Insadini P. Usanti dan Leonora Bakarbesy, *Hukum Jaminan*, Revka Petra Media, Surabaya, 2016, p. 105

as collateral even though it is in whose hands the land is located (*droit de suite*).⁸

Article 4 of the UUHT states what things can be used as objects of insurance rights, namely:

- a. Right of ownership;
- b. Cultivation Rights;
- c. Building Use Rights over state land and land management rights;
- d. Use rights over State land which according to the applicable provisions must be registered and according to its transferable nature can also be encumbered with security rights and land.
- e. Ownership rights to apartment units standing on freehold land, building use rights over state land and land management rights, as well as usage rights over state land and land management rights;
- f. Rights to land along with buildings, plants and existing or future works that are an integral part of the land, and which are the property of the land rights holder whose imposition is expressly stated in the Deed of Granting Mortgage concerned, such as temples, statues, gate, relief that is one unit with the ground.⁹

As an *accessoir* right, the birth of the Mortgage is based on the existence of a principal agreement, namely a debt-receivable agreement.¹⁰ Granting of Mortgage Rights is preceded by the debtor's promise to provide Mortgage Rights to creditors as collateral for debt repayment. This promise

⁸ Boedi Harsono, *Hukum Agraria Indonesia (Sejarah Pembentukan Undang – Undang Pokok Agraria, Isi dan Pelaksanaannya)*, Djambatan, Jakarta, 2007, h. 328

⁹ Riduan Syahrani, *Seluk Beluk Dan Asas – Asas Hukum Perdata*, Bandung, Alumni, 2010, h. 166

¹⁰ Kartini Muljadi dan Gunawan Widjaja, *Hak Tanggungan*, Jakarta, Kencana Prenada Media Group, 2005, h. 13

is set forth and is an integral part of the accounts payable agreement. the relationship of the agreement (privity of contract) between business actors (goods or services) and consumers, then the responsibility of business actors is based on Contractual Liability, namely civil liability based on agreements or contracts from business actors, for losses suffered by consumers as a result of consuming the goods it produces or utilizing the services it provides. The rights and obligations of the parties, especially the seller or developer, have been normatively regulated in several regulations, including in Articles 42, 43, and 44 of the UURS which confirms:¹¹

- (1) Developers can carry out marketing before the construction of flat is carried out.
- (2) In the event that the marketing is carried out before the construction of the apartment is carried out as referred to in paragraph (1), the construction actor must at least have:
 - a. Certainty of space allocation;
 - b. Certainty of land rights;
 - c. Confirmation of the tenure status of the apartment;
 - d. Flat construction permit; and
 - e. Guarantee for the construction of a flat from a guarantor institution.
- (3) In the event that marketing is carried out prior to the construction of the flat as referred to in paragraph (2), everything promised by the construction actor and / or the marketing agent is binding as a sale and purchase binding agreement (PPJB) for the parties.

¹¹ Riduan, *Op.cit*, p. 20

Related to the PPJB implementation requirements:

- (1) The process of buying and selling flat units before the construction of the apartment is completed can be carried out through PPJB made in the presence of a notary.
- (2) PPJB⁶ as referred to in paragraph (1) shall be conducted after meeting the certainty requirements:
 - a. Land ownership status;
 - b. IMB ownership;
 - c. Availability of infrastructure, facilities, public utilities;
 - d. Construction of at least 20% (twenty percent); and
 - f. The thing that was promised

Related to the sale and purchase implementation:

- (1) The process of buying and selling carried out after the construction of a flat is completed through AJB
- (2) The construction of a flat in paragraph is complete as referred to in paragraph (1) if it has been published
 - a. Certificate of eligibility to function
 - b. SHM for flat unit or SKBG for flat unit

Requests for apartment units that are still in planning can occur at this time, the sale and purchase of apartment units at a time when the apartment is still in the planning stage is carried out by pre-ordering the unit to be purchased, which is then stated in the PPJB.¹² The binding of sale and purchase of apartment units may occur due to consumer demand to buy flats that have not been completed by the developer. The government

¹² Eman Ramelan, Andy J Hartanto, dan Agus Sekarmadji, *Perlindungan Hukum Bagi Konsumen Pembeli Satuan Rumah Susun/Strata Title/Apartemen*, Aswaja Pressindo, Yogyakarta, 2014 p. 23

specifically regulates this in Kepmenpera No. 11 / KPTS / 1994, the legal consequence of this regulation is that every sale and purchase agreement on a flat should follow the guidelines in Kepmenpera No. 11 / KPTS / 1994.

The PPJB was made here due to several reasons, among others:

- a. The certificate has not been issued on behalf of the seller, and is still being processed at the Land Office;
- b. The certificate has not been in the seller's name, and is still in the process of turning over the name of the seller's name;
- c. The certificate already exists and is in the name of the seller but the sale and purchase price that has been agreed upon has not been fully paid by the buyer to the seller;
- d. The certificate already exists, is in the name of the seller and the price has been paid in full by the buyer to the seller, but the requirements are not yet complete;
- e. The certificate was used as collateral at the bank and the roya has not yet done it.¹³

PPJB flat unit also contains the following:

a. The object to be traded

Flats as objects to be bought and sold are required to have the necessary permits, such as location permits, proof of control and payment of land, and building permits.;

b. Management and Maintenance of Common Parts, Common Objects, and Common Land which is the Obligation of All Residents

¹³ *ibid*, h. 24

Prospective buyers of apartment units must be willing to become members of the Association of Owners and Occupants of Flat Units (hereinafter referred to as PPPRS). The formation of PPPRS has been regulated in Article 74 UURS and Article 54 PPRS;

c. Developer Obligations

Before carrying out the initial marketing, the developer is required to report matters related to the initial marketing to the Regent / Mayor of the Level II Region with a copy to the State Minister for Public Housing If within a period of no later than 30 (thirty) calendar days as from the date stated in the receipt of the report there is no response from the relevant agency, the initial offering may be carried out.

d. Obligations of the Orderer

The subscriber is obliged to carry out all its obligations, both in the order letter and in the PPJB, and is subject to the terms and conditions of the PPPRS articles of association and other related documents. Every customer after becoming a buyer of a flat is also required to pay a management fee and utility charge.¹⁴

Some experts say that PPJB holders are bezitters, but it is necessary to further study the existence of bezitter and eigenaar which are related to the bezit incident. The right to bezit is the position of controlling or enjoying an object that is in the power of a person personally or as an intermediary for another person as if the property belonged to him. Bezit is a state of birth in which ² a person controls an object as if it were his own, which is protected by law by not questioning whose real ownership of the object is with whom.

¹⁴ *Ibid*, h. 42

Thus, for the existence of bezit there must be ² two elements, namely power over an object and the willingness to own the object. If he meets the requirements as determined, then he will get legal protection as a ruler (bezitter) without having to prove his rights. In the field of bezit, this principle does not apply when it comes to control of immovable objects.¹⁵

In this case, ² bezit must be distinguished from "detentie", where a person controls an object based on a certain legal relationship with another person (the owner of the object). So, a "detentor" does not have the will to own the thing for himself. The definition of bezit is close to or almost the same as the definition of property rights (eigendom). The difference in eigendom shows more of a ³⁶ legal relationship between the owner and the object, whereas in bezit it shows a real relationship between the owner and the object. In addition, in eigendom, a person can act as the owner (eigenaar) of an object because he is the owner.

The difference between eigendom rights and land rights is that eigendom rights are subject to BW originating from western law while land rights are subject to UUPA which are derived from customary law. Eigendom rights are broadly regulated in BW for all objects, both tangible and intangible, while ownership rights to land and other property rights over immovable objects have written regulations in the UUPA..¹⁶

So, it can be analyzed that the buyer of the apartment unit with PPJB ownership is deemed not to fulfill the characteristics of being a bezitter or eigenaar. This is because to become a bezitter must fulfill several elements as

²⁷ Moch. Isnaeni, *Pengantar Hukum Jaminan Kebendaan*, Revka Petra Media, Surabaya, 2014, h. 44

¹⁶ Ian Thong Kie, *Studi Notariat Dan Serba – Serbi Praktek Notaris*, Ichtiar Baru Van Hoeve, Jakarta, 2013, h. 168

regulated in Article 529 in conjunction with Article 1977 BW, and eigenaar regulated in Article 570 BW. So, it can be concluded that the legal position of the buyer of the apartment unit is as a buyer as evidenced by a PPJB deed or can also be mentioned as a buyer in good faith.

In the event that there is an action that is detrimental to consumers, Article 21 UURS contains criminal sanctions for developers who violate Article 18 UURS (in relation to the habitable permit and the building has been completed). So that consumers can take criminal action against developers, but criminal sanctions are not what consumers expect. Consumers expect compensation for losses they have suffered, in the event that it is possible for consumers to file claims for compensation based on default or illegal acts.

If the buyer is going to file a suit for default, it is enough that he shows the agreement that was violated through the PPJB made between the developer and the seller, and the developer will be burdened with evidence to state that there is no default. However, when going to file a lawsuit against the law, the buyer must be ready to prove and demonstrate that not only is an act contrary to the rights of others or contrary to his own legal obligations, but there is also an element of error by the developer. Regarding the claim for compensation requested, for default, the amount can certainly be estimated because it is in the agreement. As for acts against the law, it is up to the judge to assess the amount of compensation.

In PPJB apartment units, the buyer does not yet have full rights to the object of sale, which in this case is a flat unit. The buyer has full rights over the apartment unit if the sale and purchase deed has been signed, so that consumers who have made installment payments on the object of sale and

purchase can get legal certainty. Currently the agreement that is often carried out by the parties is a standard agreement, that is, the agreement or clause cannot and cannot be negotiated or offered by other parties.¹⁷ This standard agreement tends to harm the less dominant party. In simple terms, a standard agreement has the following characteristics:

- a. The agreement is made unilaterally by producers whose position is relatively stronger than consumers;
- b. Consumers are not at all involved in determining the contents of the agreement;
- c. Made in writing and in bulk;
- d. Consumers are forced to accept the contents of the agreement because they are driven by necessity.¹⁸

PPJB implementation of flat units must have legal protection for both the buyer of the apartment unit and for the developer. In relation to the standard agreement on the ³⁵ standard agreement, it can be seen that the business actor and the consumer have an agreement legal relationship, which by law occurs when the sale and purchase transaction is carried out..

In the act of default, if the parties (both the developer and the buyer) do the interpretation, then the parties who feel they have suffered a loss must prove the loss suffered. The occurrence of default in an agreement has consequences for the parties who do it. If the developer defaults, then as a result the developer must compensate for the loss, the object which is the object of the engagement, since the default is the responsibility of the developer, if the agreement arises from a reciprocal engagement, the buyer

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¹⁷ St. Remy Syahdeini, *Kebebasan Berkontrak Dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank*, IBI, Jakarta, 1993, p. 69

¹⁸ *Ibid*

can request cancellation of the agreement. Claims for default can be in the form of cancellation of the agreement, fulfillment of the agreement, payment of compensation, cancellation of the agreement with compensation, fulfillment of the agreement with compensation, adjusted to the statutory regulations that govern the provisions.¹⁹

Legal protection and dispute resolution that has been regulated in the UURS, some of these provisions impose an obligation on the seller to meet technical, administrative and civil requirements, with the threat of ¹² both administrative, civil and criminal sanctions.²⁰ The legal protection provided by the PPJB as a manifestation of the Law which was formed by the buyer and the developer is stated in the provisions concerning Development and Delivery as contained in the PPJB, which generally confirms that the developer will physically and gradually hand over the apartment unit to the buyer no later than - by no later than 6 (six) months. If the time limit has passed but the developer is still unable to deliver the apartment unit, the developer will pay the buyer a fine of 1% (one percent) per day of the buying and selling price (before Value Added Tax), calculated from the first day after the expiration of the period. in Article 5 paragraph (2) for the next 3 (three) months.

If 3 (three) months after the time limit has passed, and the developer is still unable to deliver the apartment unit, the buyer can cancel the agreement and the developer will return the sale and purchase price which has actually been received by the developer from the buyer provided that the buyer is required to provide all original receipts and notification letters

¹⁹ Ejan Ramelan, *Op. Cit*, p. 180

²⁰ Andi Hamzah dkk, *Dasar – Dasar Hukum Perumahan*, Rineka Cipta, Jakarta, 2006, p. 52

regarding the cancellation to the developer at least 30 (thirty) days prior to the cancellation and then the developer will return the money along with fines that must be paid by the developer on the day and date the buyer signs the cancellation document for the purchase of a flat by the buyer.

The settlement of disputes regarding flats is regulated in Article 105 UURS, namely:

- (1) The settlement of disputes in the apartment sector shall first be attempted based on deliberation to reach a consensus;
- (2) In the event that a dispute settlement through deliberation to reach a consensus cannot be reached, the injured party may sue through a court that is within the public court or outside the court based on an option agreed by the parties to the dispute through alternative dispute resolution;
- (3) The settlement of disputes outside the court as referred to in paragraph (2) shall be carried out through ⁸ arbitration, consultation, negotiation, mediation, conciliation, and / or expert judgment in accordance with the provisions of laws and regulations;
- (4) The settlement of disputes outside the court as referred to in paragraph (3) does not eliminate criminal responsibility.

In connection with this consumer dispute resolution, the method of resolving disputes outside the court can be ⁸ in the form of arbitration, consultation, negotiation, mediation, conciliation and / or expert judgment. By this means that consumer disputes are resolved first by direct meetings between consumers and business actors, or through the assistance of third

parties.²¹ With consultation or negotiation, a bargaining process occurs to reach an agreement on the resolution of consumer disputes that occur between business actors and consumers.²²

By means of arbitration, consultation, negotiation, mediation, conciliation and / or experts, there are third parties who help the disputing parties find a way of settlement between them. The third party referred to here is a neutral party, not taking sides with one of the parties to the dispute. Here the third party does not give a decision on the dispute, but helps the parties find a solution. It is hoped that this deliberative settlement of disputes is intended so that the settlement of disputes between the parties, without using a legal attorney or a companion for each party, so that answers to the problem can be found by peaceful means.²³

As is well known, the model of civil dispute resolution in court or settlement through litigation is generally based on two basic patterns, namely:

- a. The existence of default or broken promise of one of the parties, where for this lawsuit must be based on the existence of a contractual relationship (privity of contract) between the parties (plaintiff and defendant);
- b. There is an act that violates the law, where in a lawsuit based on an unlawful act, there is no need to precede a contractual relationship between the parties, but the most elementary is that there is an act

²¹ Yusuf Shofie, *Penyelesaian Sengketa Konsumen Menurut Undang – Undang Perlindungan Konsumen, Teori Dan Praktek Penegakan Hukum*, Citra Aditya Bakti, Bandung, 2002, p.35

²² *Ibid*, h. 37

²³ Jimmy J Sihombing, *Cara Menyelesaikan Sengketa Di Luar Pengadilan*, Visimedia, Jakarta, 2011, p. 67

that harms the other party and there is a clausal relationship between the act and the losses incurred as a result of his mistake.²⁴

In the event that a claim is filed in court, the process or stages in the examination of the claim for compensation will be questioned in relation to the accountability of the business actor. According to Article 48 of the UUPK, consumer dispute resolution through the courts refers to the provisions of the general court.

CLOSING

Conclusion

Relying on PPJB, the buyer of the apartment unit is not yet the owner, as long as the transfer of property rights has not been fulfilled. Buyers also cannot be classified as *bezitter*, *detenter* and *eigenaar*. The dispute resolution mechanism can be carried out by means of litigation and non-litigation, by referring to existing regulations, and referring to the agreed PPJB. Settlement through non-litigation channels is prioritized, with certain mechanisms agreed in the PPJB. The lawsuit filed by the buyer is a lawsuit for default, because there is already an agreement between the developer and the buyer.

Recommendation

There is a need for increased supervision by the Government and related institutions with regard to advertisements, standard agreement clauses, building quality standards, the importance of issuing certificates of legality

standard for sale and / or certificates of acceptance of function or the like. As well as limiting the developer's authority in buying and selling apartment units if there is an opportunity for a violation.

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