

RIGHT OF BUYERS OF LAND AND BUILDINGS THAT HAVE NOT BEEN CERTIFICATE IF THE SELLER IS DECLARED BANKRUPT

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ABSTRACT

In the perspective of Civil Law, sale-and-purchase transactions between a developer and the buyer of land and building (e.g., houses, stores, or apartments) under Sale and Purchase Binding Agreement on Land and Building is classified into the manifestation of freedom of making contracts as mentioned in Article 1338 Civil Codes. In Land Law, however, Act No. 5 Year 1960 about the Basic Regulation of Agrarian Affairs (i.e., UUPA) Jo, Government Regulation No. 37 1997 about Land Registry, the buyer's position as mentioned in Sale and Purchase Binding Agreement (i.e., PPJB) is very weak. In addition, the perspective of Bankruptcy Law that deals with PPJB implies the vague process for curators to do registry and settlement toward the position of the buyer based on Sale and Purchase Binding Agreement of Land Rights. So that in this paper the problem arises how the curator's attitude towards the unclarity in the process of managing and settling the position of the buyer based on PPJB land rights if the developer is declared bankrupt.

Keywords: Rights of Land and Building, Bankrupt, Purchase Binding Agreement.

INTRODUCTION

In Indonesia, the phenomenon of sale and purchase transactions between a developer and the buyer of land and/or building, whether in terms of residential houses, stores, or apartments, is commonly made under a binding agreement called "Sale and Purchase Binding Agreement" or termed as "PPJB". The existence of PPJB on rights of land is an agreement between the potential seller (i.e., the developer) and the potential buyer to sign the Deed of Sale and Purchase in the next future when all the conditions to make the deed have been completely done. Subekti (1998) argues that PPJB is an agreement between sellers and buyers before having sale and purchase transactions due to particular conditions to be met for the transactions, such as the absence of land certificate since it is still on process to be established. The problem in this paper is how the curator's attitude towards the unclear management process and settlement of the buyer's position based on PPJB land rights if the developer is declared bankrupt.

RESULT AND DISCUSSION

Towards the Perspective of Civil Law

In the perspective of Civil Law (i.e., Civil Codes), especially to Law of Agreement, PPJB is a supporting agreement that functions as prior agreement in which the pertinent parties are free to determine the type of the agreement (Budiono, 2004). As the legal relationship between a developer and the buyer in the form of PPJB is under Binding Law as mentioned in Volume III of Civil Codes, which is the heritage of Dutch Law that has still been currently applied, is classified into positive law in Indonesia. It is based on Article II of Transitional Regulation of the Constitution 1945 that “*every regulation applied up to the independence of Indonesia remains applied as long as the new ones are not enacted yet based on this law*” (Usanti et al., 2019).

Commonly, PPJB is made through either a notary deed or under-hand based on the principle of freedom in having contract as mentioned in Article 1338 Civil Codes that “*every legalized agreement is applied as the regulations for the pertinent parties within the agreement,*” or known as *Pacta Sunt Servanda*. The presence of *Pacta Sunt Servanda* is not apart from various influences of political and liberal economy philosophies that have spread out in 19th century (Khairandy, 2013) through individualism and liberalism under the growing economy ideology, *laissez faire*, by Adam Smith that stressed on the principles of no-intervention from government on economy and market activities (Gillies, 1993). This aimed to make the legislation and social thought able to create *the greatest happiness for the greatest number* (Gluck, 1979), and thus, it resulted in the freedom of having contracts as a new paradigm in Law of Contract (Khairandy, 2013; Huda, 2017).

Indeed, this PPJB, along with its principle of freedom in having contract, may bring advantages for the developers as they may do marketing and selling on land and buildings although the certificate of that object is still on process (whether the administration of its prime certificate or its splitting-up), even on the physic of the building which commonly not exist yet. In short, the buyers will practically have a sale and purchase transaction with a developer based on drafts only.

Towards the Perspective of Land Law

Toward the perspective of National Land Law, however, the registry of land in Indonesia is through Torrens system (Parlindungan, 1999) which basis is when an individual claims as the owner of land due to legislation or other causes, they should file a request that the pertinent land is under their name. The petition will be verified by a barrister and conveyance known as the examiner of title.

Consistent with Act No. 5 Year of 1960 about the Basic Law of Agrarian Affairs (i.e., UUPA) Jo., Government Regulation No. 24 of 1997 about the Registry of Land, it states that the only one authorized to make evidence on particular legal actions that deal with proprietary right of land and flat unit is Land Deed Official. Article 37 subsection (1) of Government Regulation No. 24 of 1997 about Land Registry mentions that the right transfer of land and flat unit through sale-and-purchase transactions, exchange, grant, corporation inclusion, and any legal action of right transferring through auction may only be registered with the deed the authorized Land Deed Official establishes under the applied regulation (Law, 1960; Law, 1997).

As the consequence, although the PPJB between a developer and the potential buyer is legally valid, the proprietary assurance of the land is still weak as the right transfer on PPJB is not registered yet in Land Bureau. Hence, the proprietary right of the land is not on behalf of the buyer's name, but still on the seller's name; the developer. It is in line with Article 32 subsection (1) Government Regulation No. 24 of 1997 about Land Registry that

“Certificate is the applied evidence of particular right, and it brings strong power for physical and juridical contexts mentioned within, as long as the data corresponds to what is mentioned in letter of measurement and the pertinent land deed.”

Thus, some questions arise. First, how does the bankruptcy law set the object of sale-and-purchase transactions on rights of land and building in the form of PPJB when the developer is defined bankrupt? Second, in practice, how is the process of registry and settlement of the object of sale-and-purchase transaction of land and building in the form of PPJB by curator?

The Characteristics of Bankruptcy Law

The term currently applied in Indonesia is *faillissement*, derived from Dutch. However, Britain, USA, and some other countries with common law tradition recognized the term bankruptcy. This term is derived from a term the Italian traders commonly used in the middle century; *bancarota* or bankruptcy. In literal meaning, it refers to being bankrupt (Lieberman & Siedel, 1989). Later, it is commonly used to call a debtor that fails to pay his/her debts, in addition to the business failure. Bankruptcy is anything related to being bankrupt. The term bankrupt it refers to stop paying (Khairandy, 2000). Bryan A. Garner, in his Black's Law dictionary, argued, Bankrupt is a person who cannot meet current financial obligations; an insolvent person (Garner, 2009). However, Peter J.M Declercq gave more detail explanation on bankruptcy, *“A bankruptcy petition has to state facts and circumstances that constitute prima facie evidence that the debtor has ceased to pay its debts”* (Declercq, 2002). Essentially, bankruptcy is a general confiscation to the debtor's assets for the creditor's interest.

From the historical context of the application of this bankruptcy law, three philosophies underline the application of this law. First, it is due to particular conditions the debtor may not be capable to pay his/her debts to the creditor. Second, it is due the fact that the debtor's assets are less than the loan he/she must pay. Third, it is due to the distribution of debtor's assets to all his/her creditors. In philosophical manner, therefore, this bankruptcy law is the manifestation or further implementation of Article 1131 and 1132 Civil Codes that toward the bankrupt debtors, in order to execute or distribute their assets for debt payment to all the creditors in fair and equal manner, it needs a specific procedural regulation called bankruptcy law. Bankruptcy is a commercial way out for individuals that deal with loans, in case that they have no longer capability to pay their debts to the creditors (Shubhan, 2008).

According to *Faillissements verordening*, this law aims to protect the creditors' rights related to the application of principles that assure their rights on the debtors' assets (Suyatin, 1993). This purpose is inferred from the definition of bankruptcy in *Memorie van Toelichting* that it is a legal confiscation on debtors' assets for the sake of the creditors' interests (Gautama, 1998). It is also consistent to the principle as mentioned in Article 1131 *Burgerlijk Wetboek voor Indonesie* (latterly called BW), *Alle de roerende en onroerende goederen van den schuldenaar, zoo wel tegenwoordige also toekomstige, zijn voor deszelfs persoonlijke verbintenissen aansprakelijk*. The law applies this principle to assure all creditors that their debtors will be able to pay their debts.

The existence of bankruptcy agency is expected to function as an alternative body to solve the debtors' liabilities to the creditors in more effective, efficient, and proportional ways. The aim of organizing UUK-PKPU as the novel bankruptcy law in Indonesia is for the sake of business interests to solve account payable issues in fair, quick, effective, and transparent ways.

In the practice of this issue, the new bankruptcy agency is expected to solve any bad credit in fair, quick, and effective manner. It is realized since all this time, the resolution of account payable issue through the execution of collateral agencies. For instance, the execution of collateral or fiduciary rights takes long time to conduct, not to mention if there is resistance from the debtor or the third party, and thus, it makes the resolution of bad credit through the existing collateral agencies takes more time (Yulianto, 2017).

The principle of bankruptcy law as mentioned in the general explanation in the sixth paragraph of Act No. 37 Year 2004 (Law, 2004) about UUK-PKPU is: fair, quick, transparent, and effective. The last three principles (i.e., quick, transparent and effective) contains quick process and security procedures on bankrupt assets for the sake of the creditors' interest. The principle of fairness, on the other hand, aims to consider the interests between the debtor and the creditor in fair and proportional manner.

Initially, the norms of bankruptcy law in Indonesia apply the provision of Faillissement verordenen Stb. Year 1905 No. 217 Jo. Stb. Year 1906 No. 348 based on Article II of Transitional Regulation of the Constitution of the Republic of Indonesia (i.e., UUD 1945) that had been applied before its revision. Due to the provision of Faillissement verordenen Stb. Year 1905 No. 217 Jo. Stb. Year 1906 No. 348, most of the norms is no longer corresponds to the current legal needs and development. Even, Jerry Hoff argued that this Faillissement verordenen, in fact, seemed to be "*dead letter*" (Hoff, 2000). Therefore, the government of the Republic of Indonesia established Government Regulation in lieu of the law No. 1 Year 1998 that turned into Act No. 4 Year 1998 about Bankruptcy and the Adjourment of Debt Payment (i.e., PKPU), which was more completely enacted in Act No. 37 Year 2004 about UUK-PKPU.

In accordance to Article 1 subsection (1) of UUK-PKPU, bankruptcy is defined as the general confiscation to all the debtor's assets which settlement is conducted by a curator under the supervision of Superintendent Judge. The petition of bankruptcy statement is conducted only if all the conditions of bankruptcy are completely met. Article 2 subsection (1) of UUK-PKPU mentions that the condition of bankruptcy is

"The debtor with two or more creditors and is not capable to fully pay his/her debts, at least one with due date point and payable, is considered bankrupt due to law, whether on behalf of his/her own request or one of his/her creditors."

The regulation implies that in order to be considered bankrupt:

1. The debtor should have 2 (two) or more creditors. It means that when the debtor only has one creditor, she/he may not be able to use the provision of bankruptcy;
2. The debtor does not fully pay at least one of his/her debts that has reached the due date and payable.

A condition that the debtor should have more than one creditor is consistent with Article 1132 Civil Codes that regulates the distribution of the bankrupt assets to all the creditors. In this case, the condition is not about the amount of the account payable, but the number of creditors that deal with the pertinent debtor, in which the debtor should have at least two creditors.

Therefore, in Indonesia bankruptcy law, the judge, in making his decision, does not need to see or consider the debtor's financial capability. If the evidence shows that the debtor has two or more creditors and not capable to pay at least one of the creditors, he/she is considered bankrupt.

Given the decree of Commercial Court toward debtors, it results in legal consequences, both toward the bankrupt debtors, creditors, and other related parties. It is consistent with the decree of a high authority that:

“Consider the petitioner is bankrupt along with all the legal consequences.”

In general, there are three legal consequences of the statement of being bankrupt. First, the statement is immediate. It is consistent with Article 8 subsection (7) of Act No. 37 year 2004 that

“The verdict of petition for being bankrupt as mentioned in subsection (6) that completely contains all the legal considerations that underline the verdict should be expressed in public trial and executed in prior although a legal action will be proposed.”

With this immediate verdict, the curator may do his task; executing the settlement since the statement of being bankrupt is established, without needing to wait for a verdict with fixed legal power.

Second, it only deals with the assets of the bankrupt debtor. The statement of being bankrupt for debtors is consistent to Article 24 UUK-PKPU that with the statement of being bankrupt, the debtor by law will lose his right on his assets, including the bankrupt assets, since the date on which the verdict has been expressed, including for the sake of consideration of the statement itself. As mentioned in Article 21 UUK-PKPU, bankruptcy involves all the debtor's assets on which the statement of being bankrupt is expressed as well as all the issues during the bankruptcy. Therefore, since the statement of being bankrupt is expressed, the debtor will lose his right to manage his assets. In short, the bankrupt debtor will lose his authority (i.e., bevoegd) and competence (i.e., bekwaan) on all his assets, since the authority will turn to the curator.

Third, due to the general confiscation. It is consistent with Article 1 subsection (1) UUK-PKPU that:

“Bankruptcy is the general confiscation on all assets of the bankrupt debtor, and the settlement will be conducted by a curator under the supervision of Superintendent Judge as mentioned in this Act.”

This general confiscation brings several consequences, as follow.

1. All assets of the bankrupt debtor is under the curator's settlement;
2. No creditor will have the settlement;
3. Any existing confiscation by law is no longer applied and should be abolished;
4. The curator has an authority to do any settlement on the bankrupt assets although the statement of bankruptcy is still on the process of legal action.
5. All the debtor's assets under the third party's authority should be returned into bankrupt assets;
6. Any detention on the bankrupt debtor should be immediately abolished.

The Existence of PPJB in the Legal Norms of Bankruptcy

The existence of PPJB on right of land and building in Bankruptcy Law in Indonesia refers to the agreement of transferring the assets of the bankrupt debtor in prior to the statement of bankruptcy. It is mentioned in Article 34 UUK-PKPU that:

“Unless otherwise specified by law, the agreement of transferring the right of land, transfer of title of ship, the imposition of collateral right, mortgage, or fiduciary assurance agreed in prior may not be executed after the statement of being bankrupt has been expressed.”

Similarly, Article 37 subsection (1) UUK-PKPU mentions that:

“If an agreement as mentioned in Article 36 UUK-PKPU has been agreed to transfer commodity in particular period of time, and the pertinent party that should transfer the object is considered bankrupt before he/she does the transfer, the agreement will be abolished immediately since the statement of being bankrupt is expressed, and the injured party due to this abolishment may put themselves as the concurrent creditor to get compensation.”

In Indonesia bankruptcy law UUK-PKPU, particularly in the explanation of Article 2 of UUK-PKPU, the intended creditor in bankruptcy involves separatist creditor, preferent creditor, and concurrent creditor. Concurrent creditor is those that should share with other creditors in proportional way (i.e., *pari passu*) based on the amount of each debts, the selling revenue of debtor's assets without being charged by any collateral rights. The common term for concurrent creditor is unsecured creditor. This creditor is equal in position, and they have rights to have the revenue of selling the debtor's assets after being charged by the obligation of his debts on the preferent creditors.

Toward the priority of creditors in bankruptcy, it is specifically mentioned in Article 189 subsection (4) UUK-PKPU that the settlement:

1. To the creditor with privileged right, including those with denied privileged right;
2. To those with security seizer, fiduciary, collateral right, mortgage, or any collateral right of other objects, as long as they do not get settlement based on the provision as mention in Article 55, the settlement is able to be executed from the selling revenue through which they have privileged right over the collateral assets.

Based on that provision, the priority order of creditors in the process of bankruptcy is as follow:

1. Creditors with privileged right by law have higher position rather than the creditor with civil collateral right such as: account receivable/ tax revenue (Article 21 subsection (7) of Act No. 6 Year 1983 as amended by Act No. 9 Year 2004) about the General Provision and Procedures of Taxation that: the State has priority on tax revenue over taxpayer's goods and bankruptcy expense (as the provision of Article 191 UUK-PKPU in which all the expenses of bankruptcy charged to each of the material objects is part of bankrupt assets, and thus, the settlement is prior to separatist creditors.)
2. Special Preference Receivables (Article 1139 BW) and General Preference Receivable (Article 1149 BW); any receivables that deal with particular objects of bankrupt assets.
3. Separatist creditors or creditors with collateral right, including collateral right, mortgage, fiduciary, and pledge.
4. Concurrent creditors; those without particular collateral object.

Therefore, in the process of bankruptcy settlement, and based on the legal regulation of bankruptcy applied in Indonesia, the buyer as the concurrent creditor will be in the last rank of asset distribution rather than other creditors. Thus, they may get nothing the process of bankrupt asset distribution since in the value of the assets in the process of settlement by curator will be much lower than the actual amount of debts the bankrupt debtor should pay.

However, article 36 subsection (1) of UUK-PKPU mentions that: in terms on which the statement of being bankrupt is expressed, there is a reciprocal agreement that has not or partly completed yet. Hence, the party that deals with the debtor may ask for assurance on the implementation of that agreement in particular period of time as agreed by the curator and the pertinent party. With this article, the buyer of land and building that has transaction based on the PPJB may ask the curator to turn that PPJB into the Deed of Sale and Purchase through Land Deed Official.

When it decides to turn the PPJB into the Deed of Sale and Purchase during the process of bankruptcy, the curator is authorized to settle all the bankrupt assets and executes the process of sale and purchase in front of Land Deed Official (i.e., PPAT), and furthermore, the object of land and building will be registered to the local Land Bureau in order to make it registered on behalf of the buyer's name in the registry book in the local Land Bureau. This body will also establish the Certificate of Land and Building on behalf of the buyer's name as the strong evidence over the proprietary of the that land and building as mentioned in Article 32 of Government Regulation No. 37 Year 1997 about Land Registry.

Toward the legal norms of bankruptcy law that deal with the object of land and building transaction in the form of PPJB between a developer and the potential buyer over the right of land and building, there is confusion on bankruptcy law. In one hand, the PPJB is considered null when the developer is considered bankrupt (it is consistent with Article 34 UUK-PKPU). On the other hand, the curator may turn the PPJB into the Deed of Sale and Purchase through Land Deed Official (as mentioned in Article 36 UUK-PKPU).

PPJB in the Practice of Bankruptcy Settlement

In the practice of settlement on bankrupt assets by curator toward the object of land and building transferred through PPJB, there are three resolutions. First, the object of land and building which certificate is registered on behalf of the developer's name is considered as the part of bankrupt assets, and it will be settled along with other bankrupt assets. Based on the PPJB, in addition, the buyer may participate as a concurrent creditor. As a concurrent creditor, the buyer has neither preference nor rights to have any privilege on payment, but the equal position with other concurrent creditors in which the selling revenue will be distributed proportionally to all the concurrent creditors.

Second, based on the PPJB, the buyer may ask the curator to turn the PPJB into the Deed of Sale and Purchase through Land Deed Official (i.e., PPAT). Hence, the curator will set the process of establishing the deed in front of PPAT in order to make it on behalf of the buyer's name. However, this procedure requires several conditions, including: there should be a good coordination between the buyer and the curator, the process of splitting up the prime certificate from the developer has been completely conducted, and no objection from other creditors.

Third, the buyer has participated as a creditor having a legal action in the process of that bankruptcy. He/she ask the Superintendent Judge to establish a statement that the object of land

and building he/she has bought from the developer with that PPJB is excluded from the bankrupt assets, and as the result, he/she may directly turn to sign the Deed of Sale and Purchase on the object of land through Land Deed Official. If the objection from other creditors is found during the process, the buyer may file other lawsuit through the judge (Commercial Court), and this lawsuit will have a process of hearing in Commercial Court, through which the judge will decide whether the object of land belongs to bankrupt assets or not.

CONCLUSION

From the perspective of Civil Law, the existence of Sale and Purchase Binding Agreement (i.e., PPJB) of Right of Land and Building between a developer and the potential buyer is the manifestation of the freedom of having contract as mentioned in Article 1338 of Civil Codes, through which every agreement or contract between parties is applied as rules for them. It is called the principle of “*Pacta Sunt Servenda*”. On the other hand, drawing on the perspective of Land Law in Indonesia, particularly the Act No. 5 Year 1960 about UUPA Jo., Government Regulation No. 37 Year 1997 about Land Registry, particularly Article 32 subsection (1) and Article 37 subsection (1), the buyer’s position on that PPJB is very weak as the right transferring of land and building is not registered yet in local Land Bureau. Hence, the object of land and building is still registered under the name of the former owner.

In the perspective of bankruptcy law, however, if the developer is defined bankrupt, confusion on that legal regulation may exist. In one hand, Article 34 Jo., Article 37 subsection (1) UUK-PKPU mentions that the PPJB of right of land and building between a developer and the buyer is defined null, and thus, the existing object within the PPJB is seen as the bankrupt assets in which the buyer may participate as a concurrent creditor in the process of bankruptcy. On the other hand, Article 36 UUK-PKPU mentions that the buyer may ask the curator to turn the PPJB into the Deed of Sale and Purchase which will latterly be registered on behalf of his/her name in order to make the object in PPJB excluded from the list of bankrupt assets.

Due to the confusion on bankruptcy law in Indonesia, it implies dissimilarity on curators’ treatment toward the buyer’s position based on the PPJB during the process of settlement. Some of them may include the object within PPJB into bankrupt assets, and some others may exclude the object.

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