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The problematics of obtaining the building rights title upon the payment of the housing loan in real estate z Surabaya

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Abstract
Housing is one of the basic human needs. A majority of consumers buy a house with a Home Loan (in Indonesia also known as "Kredit Pemilikan Rumah") system through banks. The demand for housing that continues to increase from year to year is directly proportional to the dispute over land rights certification between consumers and developers. The purpose of this research is to understand whether Bank X as a home loan provider is responsible if the home loan has been paid off, meanwhile the land certificate in Real Estate Z has not been submitted to the consumer. Furthermore, to find a legal solutions as an effort to settle the dispute over the land ownership certificate of the land once the consumer has paid off the home loan in Real Estate Z. The type of research used is Normative or Doctrinal Jurisprudence by conducting a literature study of various legal theories, laws and regulations. The results showed that Bank X was not responsible for the disagreement over certificates of ownership of land rights because Bank X had fulfilled its obligations in providing home loan facilities to consumers. In addition, there is a clause in the Credit Agreement stated that the consumer as a Debtor has agreed not to sue the bank if the obligations of the Developer or Seller to the Debtor or Customer regarding to the completion of the building rights title certificate have not been fulfilled. Whereas the legal solution offered to the certificate of ownership rights over the land is deliberation and by arbitration.

Keywords: building rights title (HAK Guna Bangunan), sale and purchase agreement for land and building (Perjanjian Pengikatan Jual Beli), home loan (Kredit Pemilikan Rumah), breach of contract

Introduction

Housing and settlement is one of the basic human needs that is very influential in shaping the nation's personality [1]. The high demand for housing is directly proportional to the rapid development of businesses in the property sector. Based on the results of the Bank Indonesia Residential Property Price survey in 2018, as much as 76.73% of Indonesian people chose to rely on bank loans or Home Loans through banks in order to buy houses rather than making payments in cash [2]. In the housing procurement transaction on Home Loan, there are several parties that are related to one another and cannot be separated, namely consumers, developers, and banks.

The bank acts as a financial institution that has a position as an intermediary in providing credit. If someone receives a credit facility from a bank, it means he gains the trust of loan funds from the lending bank. In the credit agreement process, the customer, in this case as a debtor or recipient of credit, has agreed to the bank's requirements and filled out a form. Furthermore, if the request for a home loan application is approved by a bank, a home loan Agreement will be made. Mortgage agreements between customers and banks are included in the Consensual Agreement, which means that the agreement is valid and binding at the moment of reaching agreement. This resulted in the emergence of a Legal Relations in the form of rights and obligations between the bank and the customer called *Pacta Sunt Servanda* [3].

The high number of house sales through home loan is accompanied by an increase of cases regarding disputes in the housing sector. According to the Consumer Dispute Resolution Agency, there are more than twenty cases that must be handled in a year [4]. The problem concerns the quality or quality of house buildings, rising interest rates, information that is unclear or even misleading, unfinished legal documents, forgery, and so forth [5]. Referring to Article 1320 of the Indonesian Civil Code, the terms of agreement are:

1. there must be consent of the individuals who are bound thereby;
2. there must be capacity to conclude an agreement;
3. there must be a specific subject;
4. There must be an admissible cause.

[1] Arie. S. Hutagalung, Serba Aneka Tanah dalam Kegiatan Ekonomi, Badan Penerbit Fakultas Hukum Universitas Indonesia, Depok, 2002, h.7-175.
[2] CNN Indonesia, "Survei BI: 77 Persoen Konsumen Beli Rumah Pinjam ke Bank" (https://www.cnnindonesia.com/ekonomi/20190213113800-78-368827/survei-bi-77-persen-konsumen-beli-rumah-pinjam-ke-bank), accessed on 30 September 2019.
[3] *Ibid.,* h. 7-8
[4] Kartini L. Makmur, "Sengketa Perumahan Marak, UU Perlindungan Konsumen segera Direvisi", (https://www.hukumonline.com/berita/baca/lt533bebf488a51/sengketa-perumahan-marak--uu-perlindungan-konsumen-segera-direvisi/), accessed on 29 September 2019.
[5] Dina Mirayanti Hutauruk, "Sengketa Konsumen-Pengembang Properti diselesaikan lewat UU Perlindungan Konsumen", (https://nasional.kontan.co.id/news/sengketa-konsumen-pengembang-properti-diselesaikan-lewat-uu-perlindungan-konsumen), accessed on 29 September 2019.

The first and second conditions are called subjective conditions because they involve the parties within an agreement. Meanwhile, the third and fourth conditions are objective conditions because related to the content of the agreement or the object of the agreement. An agreement becomes legal and legally binding for the parties who made it, if all four conditions are met [6]. If one of the four conditions is not met, it will cause a legal defect in an agreement known as "null and void". The contract of Sale and Purchase is regulated in Chapter V Article 1457 to Article 1540 of the Indonesian Civil Code. Article 1457 of the Indonesian Civil Code states that: "A sale and purchase is an agreement, by which one party is bound to deliver a certain matter, for which the other party shall pay a stipulated price."

Therefore based on the Indonesian Criminal Code Article 1457 through Article 1472, it can be understood that the process of buying and selling, among others [7].

1. If both parties have agreed on the price and the goods, even though the goods have not been delivered and the price has not been paid, this sale and purchase agreement is deemed ready,
2. Buying and selling that takes a trial period is considered to be temporary,
3. From when the down payment is received for purchases with a down payment.

The most important principle of an agreement contains clauses that are needed in accordance with the interests and agreements of the parties, as well as the rights and obligations (or also known as 'performance') that must be fulfilled and implemented by the relevant parties. Based [8] on Article 1234 of the Indonesian Civil Code, these performances may take the form of:

1. To hand over an item or give something;
2. To do an action or do something;

To not do an action or not do something.

If one of the parties does not carry out their obligations or does not fulfill their performances, then they can be blamed for breaking their promises (or also known as 'breach of contract') [9]. Non-fulfillment of obligations in an agreement, can be caused by two factors, namely [10]:

1. Because of the debtor's mistake, whether intentionally not fulfilling the obligations or due to negligence;
2. Due to circumstances of force (Overmacht, Force majeure), thus beyond the ability of the debtor, which means the debtor is innocent.

In regards to the compensation for the breach of contract, Article 1243 of the Indonesian Civil Code stipulates that: "Compensation for costs, damages and interests for the breach of an obligation only becomes obligatory, if the debtor, after having been declared to be in default, remains in default, or in case of obligations where he must give or produce something, is only given after the lapse of a period of time."

This study aims to understand whether Bank X as a home loan provider is responsible if the KPR has been paid off but the land certificate in Real Estate Z has not been handed over to consumers. Also to find out legal solutions as an effort to find a legal solution as an effort to settle the dispute over the land ownership certificate of the land once the consumer has paid off the home loan in Real Estate Z.

Method

Research Type

The type of research used is Normative or Doctrinal Jurisprudence by conducting a literature study using various legal theories and laws and regulations. Peter Mahmud Marzuki stated that legal research is a process of finding legal rules, legal principles, and legal doctrines in order to address the legal issues at hand [11].

Problem Approach

The approach in this study is based on the Statutes Approach, which is an approach carried out through the study of laws and regulations relating to the legal issues being studied. This approach also aims to study the consistency and suitability of a law with other laws. The results of the study produced arguments to solve the issue at hand. Another approach used is the Doctrinal Approach, which is an approach by looking at the doctrines of the legal experts contained in the literature.

Legal Research Sources

In analyzing legal issues, legal materials used by the authors are primary legal materials, secondary legal materials, and non-legal materials in which all of these materials are then arranged and used as a support in finding answers to legal issues that will be solved. The ingredients are:

1. Primary legal material, constituting material in the form of a law, covering the Civil Code, Act No. 5 of 1960 concerning Basic Regulations on Agrarian Principles, and Act No. 10 of 1998 concerning Amendments to Act No. 7 of 1992 concerning Banking, Act No. 4 of 1996 concerning Mortgage Rights and Objects related to Land, Act No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, and Act No. 1 of 2011 concerning Housing and Settlement Areas.
2. Secondary legal material is legal material in the form of doctrine, literature, principles, and jurisprudence.

Results and Discussion

Chronological

This case began with the purchase of a residential house on land with the status of Building Rights Title (Hak Guna Bangunan) on behalf of the management rights of Real Estate Z. On February 5, 2015, the consumer paid Rp. 25,000,000, - as a booking fee. After that, the consumer and the developer enters into a Purchase Agreement for Land and Building (Perjanjian Pengikatan Jual Beli) on Monday, February 23, 2015. Under this agreement the developer Z becomes the First Party and the consumer becomes the Second Party. As stipulated in the Article I of Purchase Agreement for Land and Building between the two parties,

[6] Suharnoko, Hukum Perjanjian (Teori dan Analisa Kasus), Prenada Media, Jakarta, 2004, h. 1.
[7] C. S. T. Kansil, Op. Cit., h. 236.
[8] Shinta Christie, Tesis: "Aspek Hukum Perjanjian Pengikatan Jual Beli Sebagai Tahapan Jual Beli Hak Atas Tanah Secara Angsuran", (Depok: Fakultas Hukum Universitas Indonesia), h. 4.
[9] Handy Raharjo, Hukum Perjanjian di Indonesia, PT. Buku Kita, Jakarta, 2009, h. 79.
[10] Djaja S. Meliala, Hukum Perdata dalam Perspektif BW, Nuansa Aulia, Bandung, 2014, h. 177.
[11] Peter Mahmud Marzuki, Penelitian Hukum, Orenada Media Group, Jakarta, 2005, h. 35.

which stated that:
The FIRST PARTY hereby commits itself now to later sell and surrender to the SECOND PARTY and the SECOND PARTY hereby commits itself to later in time to buy and accept surrender from the FIRST PARTY over a parcel of land and buildings as objects of sale and purchase, located in Z's Housing, situated Surabaya, East Java Province, in accordance with the picture of the situation attached to this Agreement which is marked in Yellow APPENDIX 1 - Picture of Situation and APPENDIX 2 - Object, Price & Method of Payment, henceforth will be called "Land and Buildings".
The object in the agreement are land and buildings with a land area of 171 m^2 and a building area of 219 m^2. The price that should be paid in full by the consumer is Rp 3,371,000,000 (three billion three hundred and seventy one million rupiah). Then, in Article III of Purchase Agreement for Land and Building explained about the instalment payment in 3 consecutive months. All payments to developers are made in the Marketing Office or by transfer to a first-party bank account. In accordance with the evidence of receipts, the consumer has paid off down-payment (DP) which is divided into 3 times the installment payment, namely:

1. As of March 17, 2015 amounting to Rp312,100,000
2. As of April 14, 2015 amounting to Rp337,100,000
3. As of May 15, 2015 amounting to Rp337,100,000

In accordance with Article V of Purchase Agreement for Land and Building, the handover of land and buildings certificate is no later than 12 months after the date of the credit agreement, which is for the case of purchases using home loan credit facilities from banks, or after the second party has paid the payment to the first party according to this agreement whichever is the latest. While taking into account the conditions of handover that is in accordance with Article VI of this Agreement. However, until the payment has been declared paid by the bank as a provider of home loan facilities, the acceptance of the house certificate as promised has not been realized. Therefore, based on the description of the case, developer Z did indeed breach the contract's terms. Taken from Article 1243 of the Indonesian Civil Code, the meaning of breach of contract is:
"Compensation for costs, damages and interests for the breach of an obligation only becomes obligatory, if the debtor, after having been declared to be in default, remains in default, or in case of obligations where he must give or produce something, is only given after the lapse of a period of time."
In accordance with this agreement, a payment method scheme has also been determined. The second party chooses to use the home loan credit facility from Bank X. After the KPR has been running for 4 years, the consumer chooses to pay off part of the credit before the credit period ends. Precisely on August 23, 2019, consumers have received a statement of payment from Bank X. Repayment of part of this credit is used to shorten the credit period. Here is the following contents of the statement in full:
"We hereby inform you that your KPR X Credit Facility at PT Bank X, in accordance with Credit Agreement No. XXX.XXX/XXX.XX/KPR/2015 dated 04/06/2015 since August 1, 2019 has been declared fully paid."
In this case, it can be understood that the consumer has completed the payment obligation, but the consumer's rights, especially the legal certainty of land and building rights are ignored by the developer. Consumers have mediated several times, the results are only a promise. Dated January 2, 2018, the developer gave a Certificate explaining that;
"Certificate for land located in Block X No. XX No. XX covering an area of 171 m^2 is still in the process of handling the master certificate and is expected to be completed by March 2019."
However, until August 2019 - when the consumer has been declared paid by the bank, the process for the holding of the master certificate has not been completed. The developer again issued a second Certificate stating that
"The final certificate is still in the process at Badan Pertanahan Nasional or National Land Agency and is expected to be completed in May 2020".
Whereas according to Act No.5 of 1960 concerning Basic Regulations on Agrarian, it is stated that the transfer of land rights through buying and selling in Indonesia must be done with transparency and in cash. The nature of transparency and cash are the characteristic of buying and selling land according to customary law recognized under Article 5 of the Basic Regulations on Agrarian Principles which stated:
"The agrarian law that applies to earth, water and space is customary law, as long as it does not conflict with national and state interests, which are based on national unity, with Indonesian socialism and with the regulations contained in this Act and with the other laws and regulations. Everything is in accordance with educating the elements that rely on religious law."
In this case, the consumer who has completed the payment obligations are only equipped with Sale and Purchase Agreement for Land and Building (PPJB) dated February 23, 2015 and Statement from the Bank dated August 23, 2019. Proof of legal certainty for PPJB conducted under this hand is not as strong as the Authentic Deed of Sale. The Deed of Sale must be legalized by an Official Certifier of Title Deeds (or in Bahasa Indonesia called as "Pejabat Pembuat Akta Tanah"). Civil procedural law adheres to a formal proof system, in the sense that an authetic deed shall provide conclusive evidence before a judge, on the basis of Article 1868 and Article 1870 of the Civil Code.
Article 1868
An authentic deed is one which has been drawn up in a legal format, by or before public officials who are authorized to do so at the location where this takes place
Article 1870
An authentic deed shall provide conclusive evidence regarding the contents stipulated therein for the parties, their heirs or parties having rights therein.
In this case the Sale and Purchase Agreement for Land and Building is only an agreement between the seller and the buyer before the sale and purchase is carried out due to the elements that must be fulfilled for the sale and purchase. One of the reasons is that the land title certificate does not exist yet because it is still in the process [12]. In other words, sale and purchase agreement with fully paid payment in accordance with the agreed price does not result in the rights

[12] R. Subekti, Aspek-Aspek Hukum Perikatan Nasional, Citra Aditya Bakti, Bandung, 1998, h. 29.

to be transferred to prospective buyers [13]. The transfer of title upon land occurs only when a registration is made to the National Land Agency.

The Developer of Real Estate Z did breach the contract, as explained in the provisions contained in the Criminal Code.

Article 1457

A sale and purchase is an agreement, by which one party is bound to deliver a certain matter, for which the other party shall pay a stipulated price.

Article 1474

The seller has two main obligations; to deliver the sold assets and to safeguard them

Article 1475

Delivery is a transfer of the assets sold into the control and ownership of the buyer.

Article 1491

The obligation of the seller to the buyer to provide a warranty, ensures the following two matters, firstly, the safe and peaceful ownership of the assets sold; secondly, the security against any hidden defects in the assets, or those hidden defects which may cause cancellation of the sale.

Referring to the articles above, the developer which in this case has a position as a seller has been negligent. This is certainly very detrimental to the buyer. It can be understood that the legal protection towards the fulfillment of consumer rights when the seller defaults or breach the contract, which is carried out underhanded is not maximum yet, thus the process drags on.

Legal Solution

Based on Article XVII concerning Settlement of Disputes written in Sale and Purchase Agreement for Land and Building, it is stated that:

1. Any dispute or difference of opinion between the Parties in connection with this Agreement will be resolved by an amicable settlement.
2. If within 60 (sixty) days after the dispute or dissent and the amicable settlement is not reached, the Parties agree to settle it at the first and last level by the means of arbitration through the Indonesian National Arbitration Board (BANI) in Jakarta. This in in accordance with the Constitution of the Republic of Indonesia Number 30 in the year of 1999 concerning Arbitration and Alternative Dispute Resolution, the following amendments and additions thereafter.
3. The agreement of the Parties to settle the dispute by means of arbitration negates the right of the Parties to submit the dispute resolution to the District Court.
4. The Parties agree that the decision of BANI is final and binding on the Parties. As for the execution of the BANI decision, its execution may be requested from the local District Court.

With this article, it is understood that both parties, both the Seller and the Buyer, have two legal solutions to the settlement of land rights that have not been finalized yet. The legal solution offered is resolved by amicable settlement and the second is done by arbitration.

The word arbitration is derived from the Latin word *arbitrare*, which means the power to get things done according to wisdom [14]. Quoted from Article 1 (1) of Act no. 30/1999, arbitration is defined as:

"Disputes outside the general courts based upon an arbitration agreement entered into in writing by the disputing Parties"

Arbitration as a settlement of civil disputes between parties outside the general court, the parties agreed to appoint third party personnels as arbitrators or arbitral tribunal, which is based on the agreement of the parties expressly stated. These third parties can be individual, institutional (institutional) arbitration, or temporary (ad hoc) arbitration. Ad hoc arbitration is an arbitration formed specifically to settle or decide certain disputes. However, it should be noted that the parties must truly understand the nature of arbitration and formulate their own law of procedure [15]. Whereas institutional arbitration is an arbitration body that is permanent so that it will continue to exist even if the dispute being dealt with is resolved. In Indonesia, the body that is active in resolving national and international trade disputes is called Badan Arbitrase Nasional Indonesia or BANI Arbitration Center.

An arbitration award can save time, money and is not publicly exposed; therefore the good name and company internal secrets are relatively more secure [16]. Dispute resolution through arbitration is relatively quicker than litigation in the general court, because in an arbitration there is no attempt to appeal, cassation, or case review [17]. In connection with the quick time of dispute resolution, it will affect the cost of arbitration that is not as expensive as the costs of ordinary judiciary [18].

Talking about the choice of law (choice of law, proper law or applicable law) of the national law within a particular country does not mean that the country's judicial body is automatically authorized to resolve the dispute. The role of choice of law here is the law that will be used by the judiciary (court or arbitration) to [19]:

1. Determine the validity of a trade contract.
2. Interpreting agreements in the contract.
3. Determine whether an achievement has been implemented or not (the implementation of a trade contract).
4. Determine the legal consequences of violations of the contract.

The law that will apply may include several laws. These laws are: (1) the law that will be applied to the subject matter of the dispute (applicable substantive law or lex cause); and (2) the law that will apply to proceedings (procedural law). Whereas in determining the applicable law, the applicable principle is the agreement of the parties based on the freedom of the parties in making agreements

[13] Supriyadi, "Kedudukan Perjanjian Pengikatan Jual Beli Hak atas Tanah dalam Perspektif Hukum Pertanahan", Arena Hukum, Vol. 9 No. 2, 2016, h. 221

[14] R. Subekti, Arbitrase Perdagangan, Bina Cipta Publisher, Bandung, 1992, h. 1.

[15] Huala Adolf, Hukum Perdagangan Internasional, Rajawali Press, Jakarta, 2006, h. 58.

[16] Elois Henderson Bozari, "Public Policy Exception to International Arbitral Award", Texas International Law Journal, Vol. 30, 1995, h. 209.

[17] Huala Adolf, *Op. Cit.*, h. 207.

[18] Ida Bagus Wyasa Putra, Aspek-Aspek Hukum Perdata Internasional dalam Transaksi Bisnis Internasional, Refika Aditama, Bandung, 2000, h. 78.

[19] *Ibid.*

(party autonomy) which are general legal principles [20].

In this case, the buyer or consumer can submit a request for compensation to the developer by filing a lawsuit at BANI Arbitration Center. The respondent is addressed to the Real Estate Developer Z. Considering that Developer Z has made a default or breach of contract in accordance with Article V of Purchase Agreement for Land and Building, which states that the handover of land and buildings is not later than 12 months after the date of the credit agreement for the case of a purchase using a credit facility from the Bank, or after the second party pays off to the first party all prices of land and buildings according to this agreement - whichever is the latest, taking into account the terms of the handover in accordance with Article VI of this Agreement.

The Credit Agreement has regulated the Consumer or Debtor Customer and Bank X in providing credit facilities. In Part I letter (h) concerning Credit Provisions, if the Debtor experiences late payment, a penalty will be imposed on the total arrears in loan installments (principal and interest) in the amount of the prevailing credit interest rate plus 2% per annum. Likewise, if the Developer has broken a promise, this must also be applied by the Arbitration while looking at the material and immaterial losses suffered by the Consumer. Considering from the early payment of booking fee until the end of the home loan installment, the consumer has a good faith in fulfilling his obligations in a timely manner.

Compensation arising from breach of contract happens if there are parties to the agreement that do not carry out their commitments as set forth in the agreement. Then according to the law they can be held liable, if the other party in the agreement suffers a consequence [21]. Developer Z as the seller has been late in fulfilling his achievements, in the sense that the time specified in the agreement is not fulfilled. Instead, the developer can be asked for compensation for these interpretations.

Bearing in mind that the Civil Code details the losses (which must be replaced) in three components as follows [22]: (Vide Article 1239, 1243).

1. Cost
2. Loss
3. Interest

Costs are any money (including fees) that must be incurred significantly by the injured party, in this case as a result of the default. Whereas what is meant by "loss" is the declining state (decrease) in the value of the creditor's wealth as a result of the existence of default from the debtor. Whereas what is meant by "interest" is the profit that should have been obtained but could not be obtained by the creditor due to an act of default from the debtor [23].

Conclusion

1. Bank X is not responsible for this breach of contract case caused by the Developer Z that is based on the relationship Bank X has fulfilled its obligations in providing home loan credit facilities to consumers. The position of Bank X in this agreement is only limited as an intermediary. Bank X cannot be blamed for providing unsecured credit facilities because the applicable Banking Act does not require it. And lastly there is a clause in the Credit Agreement that the Debtor Customer has agreed not to sue the Bank if the Developer or Seller has not fulfilled the obligations of the Developer or Seller to the building settlement. In this case, Bank X does not fully apply the principle of Prudential Banking. Though the mortage is needed to avoid risks that are not desired by the Bank in the future.
2. There are two legal solutions to the settlement of land rights that have not yet been completed. The legal solution offered is resolved by amicable settlement and the second is done by arbitration. If the amicable settlement of dispute is deemed unsuccessful, the Consumer and Developer agree to resolve it at the first and last level by arbitration through BANI Arbitration Center. The basis for the request for dispute in Arbitration is addressed to Real Estate Developer Z which contains a request for compensation for breach of contract that occurs in accordance with Article V of Purchase Agreement for Land and Building. Upon the breach of contract, the Consumer suffered material and immaterial losses.

[20] *Ibid.*
[21] Munir Fuady, Konsep Hukum Perdata, PT Raja Grafindo Persada, Jakarta, 2014, h. 1-224
[22] *Ibid.*, h. 223.
[23] *Ibid.*, h. 224.

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