



Sale and Purchase Binding Agreement As A Legal Protection On The Sale and Purchase of Mortgaged Land

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Abstract: The concept of sale and purchase of land in Indonesian positive law requires it to be made in a Sale and Purchase Deed by a Land Deed Official by first fulfilling the conditions that have been determined. However, in practice, the making of a Sale and Purchase Deed cannot always be done immediately due to requirements that have not been fulfilled by one or even all parties to the agreement. To overcome this condition, the parties can first bind the agreement by making a Sale and Purchase Binding Agreement (PPJB). The objective of the paper is to analyze the position of PPJB as legal protection on the sale and purchase of mortgaged land and to analyze the role of Notary in making PPJB of mortgaged land. In conclusion, as a reciprocal agreement, the PPJB is considered to always have a void condition. If one party does not carry out its obligations, the injured party can demand the implementation of obligations or cancel the agreement, accompanied by compensation for losses, costs and interest. The role of Notary in making PPJB of mortgaged land is to ensure the authenticity of PPJB so that it can be used as perfect evidence and to arrange the clauses in the agreement carefully and accommodate legal protection for the parties in PPJB.

Keywords: Sale; Purchase Binding Agreement; Mortgaged Land

1. Introduction

The rapid development of society nowadays is getting more dynamic and often leaves the development of law a few steps behind. The increasingly intense interactions between humans and complex needs make humans required to be creative and innovative to be able to realize the fulfillment of their needs properly and safely. Making an agreement is one of the interactions that is quite popular and is often carried out by the community. Through the agreement, two parties have an attachment to each other as well as causing legal consequences attached to the parties in it, both legal consequences in the form of rights that can be demanded for their fulfillment and obligations that can be enforced because there are justifying legal provisions and also legal consequences if the obligation is not fulfilled.

Similar to the forms of human interaction in general, agreements as one of the sources of engagement have the simplest form of performance and minimal risk to agreements with moderate and even high levels of complexity and risk. The principle of freedom of contract is the origin of the emergence of forms of agreements that previously did not

exist, because this principle allows a person to freely make agreements about anything, free to enter into agreements with anyone, and free to determine the form of the agreement, either written or oral. Freedom in the principle of freedom of contract is certainly not a free freedom, but freedom that is still limited by the provisions of the legislation which is mentioned in Article 1337 of the Civil Code that a cause in an agreement must not contradict with law, decency, and public order. Furthermore, an agreement must also be made based on good faith, so even though the implementation of the agreement has complexity and high risk, it will still be able to go well and provide benefits to the parties, not causing harm.

One form of agreement that is most often encountered and carried out by the community is sale and purchase. Sale and purchase is one of the easiest ways to fulfill human needs because of the essential elements of sale and purchase are very simple and easy, which consist goods and prices. Talking about human needs, it will lead to three things, clothing, food and shelter. Talking about the need for "shelter" or a place to live, of course it will also require land as a medium, so that indirectly land becomes one of the many basic human needs, not only a medium for building a place to live in but also for other activities. Departing from this condition makes land a potential object of sale and purchase, because in addition to functioning as a means of meeting needs it can also be used as an investment opportunity that tends to provide ever-increasing profits.

The concept of land sale and purchase based on Indonesian regulations is by making a Sale and Purchase Deed (AJB) by a Land Deed Official (PPAT) as an authorized official. The making of this AJB is carried out by first fulfilling the relevant requirements that have been determined. In practice, in the sale and purchase of land, PPAT is not always able to immediately make AJB due to the reason that there are requirements that have not been fulfilled by one or even all parties to the agreement, for example, it cannot meet the requirements to attach the original certificate of the land of the sale and purchase object because the certificate is still used as collateral to the Bank. At first glance, this condition is quite risky because buying an object that is being guaranteed. However, in practice it turns out that this happens a lot due to several factors, such as the trust factor because the sale and purchase is carried out with relatives or close friends, the selling price factor which is far below the market price because of its status as 'collateral', the humanitarian factor because they want to help sellers who are in need, and so on.

The incomplete sale and purchase requirements prevent PPAT from making AJB. So, as a form of breakthrough and expansion of the Principle of Freedom of Contract and the open nature of the agreement, the parties can ask for a Sale and Purchase Binding Agreement (PPJB) to be made first to a Notary as a binder for both parties so that the sale and purchase can be poured into an AJB if later the conditions for making AJB have been

fulfilled. The existence of this PPJB is a side agreement that accompanies the main agreement, which is the sale and purchase agreement. If the object of sale is mortgaged land, the validity period of the PPJB is until the end of the period for the grantor of the Mortgage to pay off its obligations to the beneficiary (e.g. Bank). The Seller must be based on the principle of good faith in the implementation of this kind of agreement because it has the potential to harm the Buyer if the Seller defaults in not fulfilling its obligation to pay off the debt. The sale and purchase object that is being encumbered by the Mortgage Rights can be executed if the seller who is also the grantor of the Mortgage Rights defaults. To anticipate this, it is necessary to ensure that there are adequate legal protection instruments for the Buyer so as not to be disadvantaged in this kind of case.

This article analyses legal standing of PPJB as a legal protection on the sale and purchase of mortgaged land, and also to analyze the role of Notary in making PPJB of mortgaged land

2. Legal Standing of Sale and Purchase Binding Agreement as a Legal Protection on the Sale and Purchase of Mortgaged Land

a. The Essence of Sale and Purchase Binding Agreement

Based on Article 1 point 11 of Government Regulation Number 12 of 2021 concerning Amendments to Government Regulation Number 14 of 2016 concerning the Implementation of Housing and Settlement Areas, it is stated that Preliminary Sales and Purchase Agreement or Sales and Purchase Binding Agreement (PPJB) is an agreement between the development actor and any person to sell and purchase a house or apartment unit that can be carried out by the development actor before construction for apartment houses or in the process of construction for single houses and row houses made before a notary. PPJB can be said to be a preliminary agreement, the principal agreement is the sale and purchase agreement. The sale and purchase agreement is basically included in the consensual agreement, which means that the agreement is considered to have been born when the parties have reached an agreement. However, because the object is land, the sale and purchase agreement becomes a formal agreement, in the sense that there are formal procedures that must be fulfilled to realize the agreement, in this case, the making of AJB by a PPAT. The making of AJB requires certain conditions which in practice cannot always be immediately fulfilled by the parties. The function of PPJB in this case is to bind the parties until the requirements for making AJB can be fulfilled.

Some things that prevent PPAT from making AJB include: 1) The buyer has not paid the full price of the goods; 2) The buyer and/or seller have not paid their respective tax obligations related to the sale and purchase; 3) The seller has not been able to

show the original certificate to the PPAT. The last requirement is necessary because it is mandatory for PPAT to firstly check the authenticity of the certificate to the Land Office to ensure its legality. If this cannot be fulfilled, the PPAT will refuse to make AJB. There are many possible reasons why the seller may not be able to fulfill this requirement immediately, one of which is that the certificate is still in the possession of another party because it is being used as collateral by the seller. This condition is the main issue of this discussion, because it occurs in many buying and selling practices in the community. It is possible to do this but it is certainly quite risky, especially for the purchaser. Therefore, it is important to examine in more depth what forms of legal protection are available to protect the parties concerned, especially the purchaser.

b. Sale and Purchase Binding Agreement as a Legal Protection on the Sale and Prchase of Mortgaged Land.

PPJB as a form of agreement refers to the rules of obligations in general contained in Book III of the Civil Code on Obligations, especially in the Chapter on Obligations originating from Agreements. An Agreement is an act by which one or more people bind themselves to one or more other people.¹ This definition has been debated among experts because it is considered to have several weaknesses:

1. The word 'act' refers to both tort and lawful acts, the word 'act' should be replaced with the word 'agreement'.
2. The word 'person' only refers to humans as legal subjects, whereas in addition to humans there are 'legal entities' which are included as legal subjects that can make an agreement. A person or legal entity can be called a party to an agreement. The word 'binding' means that the will only comes from one party, the more appropriate phrase is 'mutually binding' which indicates a consensus between the parties.
3. The definition in Article 1313 of the Civil Code does not mention the purpose of making an agreement, which should aim to create an obligation between the parties making the agreement. An obligation is a legal relationship between the parties to an agreement that creates rights and obligations for each party, which if violated will result in legal sanctions for the violator.

Based on this formulation, an agreement is a consent between two parties who bind themselves to each other to create an obligation. PPJB also fulfills the elements contained in this definition, because PPJB occurs between prospective buyers and prospective sellers who both agree to enter into a sale and purchase by first binding each other and in good faith fulfilling their respective preliminary obligations as an effort to achieve the main goal of realizing the sale and purchase agreement.

1. Legal Terms of Agreement

¹ Article 1313 Civil Code.

a. Agreement of the parties

Agreement is the meeting of wills (meeting of minds) of the parties. The offering party's declaration of intent is called an offer, while the declaration of the will of the receiving party is called acceptance. The expression of the will of each party can be done in 2 ways: 1) an explicit statement (clearly and fully expressed); and 2) silent statements that are reflected through behavior (tacit/implied/understood without being put into words).²

An agreement is deemed not to have occurred if there is mistake, force/threat or fraud in the agreement.³ **Mistake** is an error regarding: 1) **Goods/objects** (error in materia), the essence (main thing and/or main nature) of the object of the agreement; and 2) **Person** (error in persona), the party (person / legal entity) with whom the agreement has been made.⁴ Signs of mistake are if the party who made the mistake had not made the mistake, then he would not have made the agreement. The other party to the agreement knows or should know that he is dealing with a party who is in error, because if the other party does not know or should not know that he is dealing with a person who is in error, it will be unfair if the party in error asks for the cancellation of the agreement when he already realizes that he entered into the agreement in a state of error.

Threat/force is an act that creates fear in a reasonable person that he or she or his or her wealth is threatened by a concrete loss. According to the doctrine, threat must be in the form of psychological force, not physical force, because if the threat is physical then the real agreement never takes place. If the threat is in the form of psychological force then the actual agreement still occurs but not based on the free will of the threatened party.

Fraud is deception, by providing false or untrue information so that the other party gives an agreement. The party committing fraud acts actively to take unilateral advantage for himself. The characteristic of fraud is that the deceived party will not give an agreement if it has not been deceived by the other party. Jurisprudence distinguishes between lies and fraud. A lie is a one-time conveyance of something that is not true, while fraud is a series of lies arranged on a matter.

b. Capacity of the parties (*Handelings Bekwaamheid*)

Civil law distinguishes between being able to perform legal acts (Bekwaam/competent/having capacity) and being authorized to perform legal acts (Bevoegd/having authority). A party to an agreement is said to have the capacity to make an agreement if the party has the right and is able to exercise that right. The provisions regarding capacity are as follows:

1) Person

² Article 1347 Civil Code.

³ Article 1321 Civil Code.

⁴ Article 1322 Civil Code.

Every person is competent to enter into an agreement if he is not declared incompetent by law.⁵ Those who are declared incompetent by Law are:⁶

a) Immature Person

People who are considered immature according to the Civil Code are those who have not reached the age of 21 years or have not married.⁷ In its current development, it turns out that the limitation of 'adult' has differences between one regulation and another. For example, Law of Notarial Profession states that a person can come to and make a deed before a notary at least 18 years old or married. Whereas the Law of Marriage states that marriage is only permitted if the man and woman have reached the age of 19 years. Thus, the Civil Code, the Law of Notarial Profession, and the Law of Marriage determine the age of maturity differently, so that in order to be considered an adult, it is not necessary to refer only to one regulation, it is also necessary to adjust what legal actions will be carried out.

The Supreme Court itself also made formulations as a result of the Plenary Meeting of Chambers to provide guidelines for the age of adulthood for the court, but the results of the Plenary Meeting still did not find an agreement so that the formulation for a person's maturity until now is still determined from the context of his legal actions and refers to what laws and regulations, which rules will then be used as a legal basis for measuring a person's maturity.

b) Persons under guardianship (*curatele*)

A person under guardianship is an adult who has rights but is legally considered incapable of doing those rights⁸, in order to carry out their rights, they need to be represented by a curator. For example, lunatics and spendthrifts.

c) Married women

A wife who will perform a legal act in the field of property law, cannot do it alone and must be accompanied by her husband.⁹ However, because it was seen as not respecting the equality of women, in 1963 the Supreme Court issued Supreme Court Circular Letter (SEMA) Number 3 of 1963 which instructs all courts under the Supreme Court to make the provisions of Article 108 of the Civil Code as a guideline only and since then married women are no longer considered as people who are not capable of carrying out their own legal actions. Some say that the SEMA revokes the provisions of Article 108 of the Civil Code, but this is still debatable, some argue that the SEMA cannot revoke the provisions of

⁵ Article 1329 Civil Code.

⁶ Article 1330 Civil Code.

⁷ Article 330 Civil Code.

⁸ Article 433 Civil Code.

⁹ Article 108 Civil Code.

the Civil Code on the grounds that the position of the two is not equal. Others agree that the Civil Code is not considered as a law, but only as a document that describes a group of written laws and therefore the provisions in the Civil Code are considered still valid only if they have not been replaced by a positive legal provision or as long as it is still considered valid by the Supreme Court.

2) Legal Entity

A legal entity is declared capable of making an agreement if the legal entity has actually had the status of a legal entity as evidenced by a decision letter authorizing the establishment of the entity as a legal entity issued by the relevant Ministry, for example the establishment of a Limited Liability Company authorized by the Ministry of Law and Human Rights.

c. A particular thing

An agreement must have an object, which is something / goods / objects that can be agreed upon.¹⁰, has value, and can be determined at the time the agreement is made. The number of objects is not a condition for the validity of the agreement, although the number must also be determined or calculated at a later date. The object of the agreement does not have to exist at the time the agreement is made, but can be something that must exist at a later date, for example, the sale and purchase of a house that is still to be built. However, objects in the form of inheritance that have not yet been opened are not allowed.

d. A lawful cause

The agreement must have a cause / causa which is the content of the agreement. If there is no causa in the agreement, it causes the agreement to have no legal force.¹¹ A lawful agreement is one that does not conflict with laws and regulations, decency, and public order.

In the case of sale and purchase of mortgaged land, it is necessary to study the validity of this object to be used as the object of the agreement. If this object is proven to be contrary to laws and regulations, decency and public order, it is sufficient to be the reason that this object causes the agreement to be null and void. However, it turns out that the sale and purchase of mortgaged land is permissible. It can be seen in Article 22 E paragraph (2) of Government Regulation Number concerning the Implementation of Housing and Settlement Areas: "In the event that land and/or buildings become collateral at the time of Marketing, the development actor can explain to prospective buyers."

So, basically, the sale and purchase of this object is permissible. It's just that the level of risk is higher, especially for the buyer, because of the *Droit de Suite*

¹⁰ Article 1332 Civil Code.

¹¹ Article 1335 Civil Code.

nature of the Mortgage (following the secured object in whomever's hands it is). Even though the object of the mortgage has been transferred to another party, the creditor holding the mortgage right still has the right to sell it through a public auction if the debtor defaults. Therefore, it is important to stipulate in the PPJB that the seller is obliged to pay off his debts within a certain period of time in order to lift the mortgage on the land being sold. It is also important to regulate the consequences that the seller will receive if he fails to fulfill his obligations within the agreed period, in order to protect the interests of the buyer.

2. Legal Effects of The Agreement

a. All Requirements Can Be Fulfilled

- 1) The agreement shall apply as law to the parties that make it.
- 2) The agreement cannot be revoked/canceled unilaterally, **unless**:
 - Because of the agreement of the two parties who made the agreement;
 - The enactment of a nullity condition agreed by the parties. An obligation with a voidable condition is an obligation whose validity ends with the occurrence of a certain event. If the certain event occurs, the situation returns to its original state, it is considered as if there was never an obligation and the debtor is obliged to return what he has received..¹²

In relation to this void condition, it is considered to always exist in agreements that are reciprocal in nature. If one party does not fulfill its obligations, the injured party can choose whether he can demand that the defaulting party fulfill its obligations, or choose to cancel the agreement, along with compensation for losses, costs and interest.¹³

So if the PPJB on land that is being encumbered by Mortgage Rights gives the buyer the right to demand fulfillment of obligations or submit a cancellation accompanied by compensation for losses, costs and interest if the obligations given to the seller to pay off his debt to the Mortgagee are not fulfilled until the agreed period. If the seller has also made a payment for the purchase of the land, either a full payment or a payment with a deposit, the seller is also obliged to return the payment.

- There are sufficient reasons according to law, for example:

¹² Article 1265 Civil Code.

¹³ Article 1267 Civil Code.

- A lease agreement made orally may be terminated unilaterally by notice of termination in accordance with local custom.
 - The grantor may terminate the power of attorney agreement unilaterally and the grantee must return the power of attorney obtained.
- 3) The agreement must be performed in good faith

Good faith is the will of a human being who is honest, loyal to obligations or agreements, obedient to reasonable and fair business standards in a particular trade or business, or does not intend to deceive or gain unfair advantage.

b. Subjective Requirements Can Not Be Fulfilled

The subjective requirements of the agreement are conditions relating to the subject of the agreement (person or legal entity), which are agreement and proficiency. If the subjective conditions are not met, the agreement can be canceled (**voidable**). Voidable means giving 2 options for the agreement, namely: 1) continue the agreement; or 2) cancel the agreement. In principle, an agreement can be canceled if the agreement in its implementation has the potential to cause harm to certain parties, not only the parties directly involved in the agreement but also includes other parties who are third parties outside the agreement.

Cancellation of the agreement by one of the parties to the agreement can be done if: 1) there has been an unfree agreement of the parties to the agreement, either due to oversight, coercion, or fraud. Cancellation for this reason also provides the basis for the right for the party applying for cancellation to claim compensation, costs, and / or interest. 2) The existence of legal incompetence of the party who made the agreement. In this case, the party who is entitled to apply for cancellation is the incapable party or his/her guardian/representative.¹⁴

Cancellation of the agreement by a third party outside the agreement is also possible. As the essence of the principle of personality which means that the agreement is only valid between the parties who make it. The agreement cannot bring benefits or losses to third parties unless there is an agreement about it. In the encumbrance of Mortgage Rights, generally the Mortgagee (Creditor) will ask for a promise from the Mortgagee (Debtor) not to transfer in any form the object of Mortgage Rights without the knowledge of the Mortgagee. In this regard, it is also important for the Buyer to know whether the sale of the land that is being encumbered by the Mortgage Rights has been approved by the Mortgagee because if the Mortgagee has been promised by the Mortgagee not to transfer the object of the Mortgage Rights, it will provide legitimacy for him to cancel the PPJB between the prospective seller and the prospective buyer.

¹⁴ Article 1446 – 1450 Civil Code.

c. Objective Requirements Can Not Be Fulfilled

Objective conditions of the agreement are conditions relating to the object of the agreement, which are certain thing and a halal cause. If these objective conditions are not met, the agreement becomes null and void. Null and void is a condition considered that there was never an agreement in the first place so that all conditions must be restored as before. Without anyone submitting a cancellation, before the law this agreement is considered to have never existed and even if someone submits a cancellation, the Judge must confirm that there is nothing that needs to be cancelled because it was considered that there was never an agreement in the first place. That is why it is important to pay more attention to the fulfillment of the objective requirements of this agreement because of its strict legal consequences.

3. The Role of Notary in the Making of Sale and Purchase Binding Agreement of A Mortgaged Land

a. Ensure the Authenticity of Sale and Purchase Binding Agreement

An authentic deed is "a deed in the form prescribed by law, made by or before a public officer authorized to do so in the place where it is made"¹⁵. An authentic deed provides perfect evidence for the parties and their heirs or those who get rights from them, about what is contained in it "¹⁶

According to R. Subekti, an authentic deed is a binding evidence, in the sense that what is written in the deed must be believed by the judge, that is, it must be considered true, as long as the untruth is not proven. And it provides perfect evidence, in the sense that it does not require additional proof. It is binding and perfect evidence.¹⁷

According to C. A. Kraan, authentic deeds have the following characteristics:

1. A writing, intentionally made solely to serve as evidence or a proof of the circumstances as mentioned in the writing is made and declared by an authorized official. The writing is also signed by or only signed by the official concerned.
2. A writing shall, until proven otherwise, be presumed to have come from an authorized official.
3. Statutory provisions that must be fulfilled; the provisions regulate the procedure for making it (at least containing provisions regarding the date, place where the deed was made, the name and position / position of the official who made it c.q. data where it can be known about these matters).
4. An official who is appointed by the State and has the character and work of independence (*onafhankelijk*) and impartiality (*onpartijdigheid*) in carrying out his/her office.

¹⁵ Article 1868 Civil Code.

¹⁶ Article 1870 Civil Code

¹⁷ R. Subekti, *Hukum Pembuktian*, Jakarta: Pradnya Paramita, 2005, p. 27.

5. The statement of fact or act mentioned by the official is a legal relationship in the field of private law..

Based on the provisions of Article 1 number 7 Law of Notarial Profession, it is stated that a Notarial deed is an authentic deed made by or before a Notary according to the form and procedure stipulated in the Law of Notarial Profession or it can be said that a Notarial deed can be called an authentic deed if it fulfills the following conditions:

1. The deed must be made by (door) or in the presence of (ten overstaan) a Public Official.
2. The deed must be made in the form prescribed by law.
3. The public official by or before whom the deed is made must have the authority to make the deed. Notary's authority includes 4 (four) things:
 - a) The notary must be authorized as far as the deed to be made is concerned.;
 - b) The notary must be authorized insofar as it concerns the persons for whose benefit the deed is made.;
 - c) The notary must be authorized as far as the place where the deed is made; and
 - d) The notary must be authorized as far as the time of making the deed is concerned.

b. Drafting Clauses in Agreements and Accommodating Legal Protection for Parties in Sale and Purchase Binding Agreement

Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws.¹⁸ Notaries are authorized to make authentic Deeds concerning all deeds, agreements, and stipulations required by laws and regulations and/or desired by the interested parties to be stated in an authentic Deed, guarantee the certainty of the date of making the Deed, keep the Deed, provide a grosse, copy and quotation of the Deed, all insofar as the making of the Deed is not also assigned or excluded to other officials or other persons stipulated by law.¹⁹ In addition to these authorities, Notary is also authorized:²⁰

1. certifying signatures and establishing the certainty of the date of letters under hand by registering in a special book;
2. record underhanded agreement by registering them in a special book;
3. make a copy of the original of the underhanded agreement in the form of a copy containing the description as written and described in the letter concerned;
4. matching the copy with the original letter;
5. **provide legal counseling in connection with the making of the Deed;**
6. make deeds related to land; or
7. make a Deed of minutes of auction.

The role of the Notary to provide legal counseling in the arrangement of PPJB of mortgaged land is also an important part, so it is not just making PPJB but as a form of official responsibility, the Notary should first explain to the parties regarding the

¹⁸ Article 1 number 1 Law of Notarial Profession.

¹⁹ Article 15 paragraph (1) Law of Notarial Profession.

²⁰ Article 15 paragraph (2) Law of Notarial Profession.

potential risks that can occur from the agreement as well as provide solutions to the parties as a form of legal protection. If the input provided by the Notary is accepted and agreed upon by the parties, then subsequently as a person who has the ability to compile a good and correct contract, the Notary should pour all essential matters in the PPJB deed completely, clearly, and accommodate all legal interests of the parties in order to minimize the occurrence of risks for the parties in the future.

Important things that need to be considered and stated by a Notary in preparing PPJB, especially PPJB of mortgaged land are:

1. a clause on the seller's obligation to pay off his debts within a certain period of time so that the land sold can be freed from the Mortgage.
2. sets out the consequences that the seller will receive if he fails to carry out his obligations within the agreed period, which can be in the form of demands for implementation of obligations, or cancellation of the agreement along with compensation for losses, costs and interest.
3. determines the seller's obligation to return the payment that has been given by the purchaser.
4. ensure that the seller has obtained the consent of the third party (recipient of Mortgage) that he will transfer the object of Mortgage.

4. Conclusion

As a reciprocal agreement, the PPJB is considered to always have a void condition. If one party does not carry out its obligations, the injured party can demand the implementation of the obligations; or cancel the agreement, accompanied by compensation for losses, costs and interest. The role of the Notary in the making of the Agreement of Sale and Purchase on the mortgaged land is to ensure the authenticity of the PPJB so that it can be used as perfect evidence and to arrange the clauses in the agreement carefully and accommodate legal protection for the parties in the PPJB.

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