

The Legal Protection for Banking Parties through Buy Back Guarantee Agreements to Support Guarantees for Home Purchases with a Home Ownership Credit System

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Abstract. *This study aims to (1) determine and analyze the legal standing of the buy back guarantee agreement as a guarantee for the purchase of a house through a home ownership loan. (2) To find out and analyze the legal protection for banks through a buy back guarantee agreement as a supporter of a guarantee for the purchase of a house with a home ownership credit system. This research is descriptive with a sociological juridical approach. The data collected in the form of primary data and secondary data. Data was collected through field studies and literature studies. Data were analyzed with quantitative descriptive. The results of the study show that (1) The Legal Position of the Buy Back Guarantee Agreement is categorized as a guarantee agreement.*

Keywords: *Agreement; Guarantee; Protection; Purchase.*

1. Introduction

KPR is a banking product for financing the purchase of a house that is ready stock or indented. A ready stock house means a house that is ready to be built, ready for habitation and has installed the installation along with the electricity and water meter, while the indent house is a house that will be built after a buyer is carried out by the contractor through orders from the housing developer (hereinafter referred to as the developer). The buyer referred to here is an individual or legal entity who has fulfilled the requirements and has fulfilled his

obligations for the purchase of the house.¹ Article 1 Number 10 Regulation of the Minister of Public Works and Public Housing Number 21/Prt/M/2016 concerning Ease and/or Assistance in Acquisition of Houses for Low-Income Communities. Home Ownership Credit (hereinafter referred to as KPR) is one of the facilities that can help make it easier for Indonesian people to buy houses with financial assistance from banks.

Bank is a financial institution authorized to provide services to the public in the fields of finance, storage and financing (commonly referred to as credit). Supporting the business world, especially in the property sector, credit is the main support. Some of the payments made by Buyers are using credit facilities from banks, Home Ownership Credit (KPR). Based on the prudential principle of banks in providing Home Ownership Credit (KPR) facilities, an agreement is made cooperation between the Developer and the Bank, the content of which is that the developer is willing to buy back housing units that have been sold to consumers who on the other hand are debtors from the mortgage lending bank, if the consumer/debtor defaults and is unable to pay installments to the bank successively within a period of certain time according to the agreement.

The practice of buying and selling agreements with the right to buy back the seller (original owner) in this case having or being given the right to buy back the goods that have been sold, this is regulated in Article 1519 of the Criminal Code. Concretely, in law, what actually happened was not a sale and purchase, but a debt agreement with collateral in the form of a pawning institution. The purpose of this agreement is to strengthen the position of creditors both to debtors and to third parties, with the existence of a sale and purchase deed even though the terms of buying back have guaranteed the creditor's interest in fulfilling the debt, if in the future the collateral goods are transferred or burdened with the rights of a third party by the debtor, in this case the creditor can fight or *verzet* on the basis of property rights based on buying and selling. However, because the requirements for proof are heavy and the sale and purchase agreement with the right to repurchase land and/or house always occurs with an authentic deed, so for debtors who are in a state of urgency it will be difficult to prove that the deed is invalid and often the seller or debtor does not succeed to prove that what actually happened was a debt owed. So, it can be said that in the debt agreement there is usually an unbalanced situation, so that one party is not free to determine his will and the Buyback Agreement can also be interpreted as an abuse of circumstances/opportunities or abuse of economic power.²

¹Supriyono, Maryanto. (2013). *Buku Pintar Perbankan*. Yogyakarta: CV. Andi Offset. p.124.

²Dominika, Retno Wahyurini dan Endang Sri Kawuryan. (2018). "Perjanjian Beli Kembali (Buy Back Guarantee) Yang Dibuat Antara Pengembang Dan Bank Dalam Penyelesaian Masalah Kredit Macet" *Jurnal Transparasi Hukum*, No.1, Vol.I. p.5.

Banks are required to strictly regulate the prudential principle as the basis for banks in conducting their business.³ This is regulated in Article 2 of Act No. 7 of 1992 concerning Banking as Amended by Act No. 10 of 1998 (hereinafter referred to as the Banking Law). In particular, the regulation of guarantees as one of the prudential principles of banks as stipulated in the provisions of the elucidation of Article 8 paragraph (1) of the Banking Law that guarantees are an important factor in preventing the risk of problems in lending, including mortgages for developers and Article 11 of the Banking Law also contains regulations concerning the provision of credit guarantees by Bank Indonesia, which in the explanation section of Article 11 of the Banking Law stipulates that guarantees in lending (including mortgages for developers) are an effort to maintain health and increase bank resilience.

The notary always insists on presenting the debtor because the debtor has signed the deed of sale and the certificate has changed its name to the name of the debtor, so that in the end the developer who carries out the contents of the Buy Back agreement is not able to have it back, in this case unable to reverse the name of the certificate back to the name of the developer and if the developer is not willing to carry out the contents of the buy back agreement, the bank will still experience credit congested. This research is to find out and analyze the legal standing of the buy back guarantee agreement as a guarantee for the purchase of a house through a home ownership loan. To find out and analyze the legal protection for the banking sector through a buy back guarantee agreement as a supporter of a home purchase guarantee with a home ownership credit system.

2. Research Methods

This research includes sociological juridical research. The approach method used is a sociological juridical approach. The research specifications used are analytical descriptive. The data sources used in this study were primary data and secondary data, the techniques of collecting legal materials used in this research were field studies and literature studies, then the data analysis method used qualitative data analysis.

3. Results and Discussion

3.1. Legal Position of Buy Back Guarantee Agreement as Guarantee Buying a House through Home Ownership Loans

³Lestari, Luh Made Asri Dwi. Putu Tuni Cakabawa Landra. 2019. Pengaturan Buy Back Guarantee Sebagai Jaminan Terkait Prinsip Kehati-Hatian Bank Dalam Kredit Pemilikan Rumah Bagi Developer Jurnal Hukum dan Kenotariatan. Vol 7 No.3. p.3

The regulation regarding the right to repurchase is regulated in Article 1519 of the Civil Code, which stipulates that the seller has the right to take back the goods that have been sold to the consumer with the replacement of the original price to the consumer. The developer who is domiciled as guarantor (borgh) for the settlement of the debtor's debt to the bank, has the right to withdraw the debtor's house that has been previously sold and is responsible for paying off all debtor's debt to the bank, provided that at that time the developer has not completed the construction of the debtor's house, or the developer has not submitted the original documents related to the Certificate of Land Rights, and other important documents related to the ownership of the house to the bank.⁴The engagement that arises in the buy back guarantee agreement will only be fulfilled by a third party if the debtor defaults, in other words, the obligation for the third party to fulfill the obligation in the buy back guarantee agreement has conditions, namely when the debtor defaults. When the debtor is declared in default by the creditor, immediately the third party is obliged to fulfill the engagement in the buy back guarantee.⁵

Article 1238 of the Civil Code states that a default can be in the form of the debtor not paying off the loan at all, paying off the loan but not on time, paying off the loan but not in accordance with the agreement, or doing something that according to the agreement should not be done.⁶Buy Back Guarantee, the guarantee is carried out by the developer on the basis of the right to "buy back" as regulated in Article 1519 of the Civil Code. Buy Back Guarantee agreements can be classified as material guarantees, to be precise, immovable property guarantees, with the object of the guarantee being the debtor's house. The imposition of power of attorney on the debtor's debt guarantee to the bank by the developer. The debtor's guarantee is an immovable object, namely the debtor's house unit, so this is termed the existence of a mortgage encumbrance made in the form of a Power of Attorney to give Mortgage Rights (SKMHT) by Notary and PPAT officials which bind the debtor and the developer.⁷

SKMHT is a letter or deed made by a Notary official and PPAT, which contains the power of attorney from the Collateral Owner (Proxy) to the Proxy to represent the Authorizer in granting Mortgage Rights to creditors on land/collateral

⁴ Paramartha, Nyoman Gede. Ni Ketut Supasti Darmawan, dan I Nyoman Sumardika, 2016. *Perlindungan Hukum Bagi Bank Terkait Perjanjian Kredit Kepemilikan Rumah Dengan Pengikatan Surat Kuasa Membebaskan Hak Tanggungan Disertai Perjanjian Buy Back Guarantee Di Kota Denpasar*, *Jurnal Ilmiah* Vol. 1. No.2.

⁵Dona Budi Charisma. 2015. *Buy Back Guarantee and Legal Development of Guarantees Contemporary In Indonesia*. Private Journal Vol. III No. 2.

⁶Meliala, Djaja S.(2015). *Perkembangan Hukum Perdata Tentang Benda Dan Hukum*.p. 75.

⁷Lestari,Luh Made Asri Dwi dan Putu Tuni Cakabawa Landra. (2019). "Pengaturan Buy Back Guarantee Sebagai Jaminan Terkait Prinsip Kehati-hatian Bank Dalam Kredit Pemilikan Rumah Bagi Developer ",*Jurnal Kertha Semaya*, No.3, Vol.VII, p.3.

belonging to the Authorizer. The Authorizer, namely the debtor, binds himself to the Authorized Person (guarantor) namely the developer through the existence of SKMHT related to the settlement of the debtor's credit debt to the bank. Article 1338 paragraph (1) of the Civil Code states that, "All agreements made legally valid as law for those who make them", this means that all agreements made according to law or legally, as regulated in Article 1320 of the Civil Code, are binding as law against the parties. According to Civil Law experts,⁸ Each debtor has an obligation to submit achievements to creditors, in a foreign language this obligation is called Schuld. The debtor also has other obligations, namely in order to pay off debts, the obligation to let his assets be taken by creditors as much as the debtor's debt, if the debtor does not fulfill the obligation to pay debts to creditors. A legal right gives rise to other legal obligations.

In form and content, this buy back guarantee deed resembles the form of a guarantee agreement (personal guarantee or corporate guarantee), which in Article 1820 of the Civil Code is known as borgtocht, only the legal subject of the buy back guarantee is different from borgtocht. This is because in borgtocht the guarantor is a third party (personal guarantee and/or corporate guarantee) who initially did not have a legal relationship with the debtor, while in a buy back guaranty, the person or legal entity that previously had a legal relationship with the debtor was the guarantor. . Judging from the legal consequences in the event of a debtor default,⁹

In the buy back guarantee agreement, the developer is responsible for buying back the housing unit that has been sold to the debtor, if the purchase of the housing unit is made through bank financing, and there is a bottleneck in the installment of credit payments. Article 1840 of the Civil Code stipulates that the guarantor who has paid off his debt, by law, replaces the creditor with all his rights against the original debtor. Thus, even though the guarantor has carried out the obligations in accordance with the buy back guarantee, it does not necessarily result in or give the guarantor the right to replace the position of the main creditor. This is often known as subrogation as regulated in Article 1400 of the Civil Code.¹⁰

⁸Badruzaman, Mariam Darus, et.al. (2014).Kompilasi Hukum Perikatan, Dalam Rangka, p.82.

⁹Kusnadi, Isra.(2014).Perlindungan Hukum Bagi Bank Terhadap Pembelian Rumah Indent Secara Kredit Pemilikan Rumah (Kpr) Melalui Developer Perumahan (Studi Pada Pt. Bank Negara Indonesia (Persero) Tbk. Jurnal article public Premise Law Vol 1 No.1

¹⁰Sofwan, Sri Soedewi Masjchoen. (2013). *Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan*. Yogyakarta : Liberty Offset.

3.2. Legal Protection for Banking Parties through Buy Back Agreement

The Guarantee to Support Home Purchase Guarantee with Home Ownership Credit System. Arrangements/conditions for cooperation between banks and housing developers in the provision of Indent Home Ownership Loans (KPR) are determined by internal parties in accordance with the Standard Operating Procedure (SOP) in cooperating with developers who are regulated by a special division that handles consumer and retail products in Indonesia.¹¹In addition, it is also regulated in Bank Indonesia Circular Letter number 15/40/DKMP dated September 24, 2013 concerning the Application of Risk Management to Banks that provide credit or property ownership financing, property-backed consumer loans or financing, and motor vehicle loans or financing, as referred to in number IV letter f, it is stated that in order to apply the prudential principle in granting mortgages, the Bank may enter into a cooperation agreement with the developer which at least contains the developer's ability to complete the property or house in accordance with the agreement with the debtor or customer.¹² The cooperation agreement between the bank and the developer, the bank has the right to demand achievements while the developer has the obligation to carry out the agreement in good faith.

Buying houses, both ready stock and indent through bank mortgages, especially mortgages, begins with a house sale and purchase agreement between the consumer and the developer, an agreement born out of agreement. This process is then continued with the making of a credit agreement between the home buyer (debtor) and the Bank as the party that finances the purchase of the house, along with the loading of the house with Mortgage Rights.¹³ In such a legal construction, henceforth the buyer is the debtor of the banking and is the creditor, and the house and land belonging to the debtor will become collateral for repayment during the agreed period. Therefore, the occurrence of legal responsibility between the developer and the bank is due to the emergence of a legal event that was born through an agreement between the bank and the debtor with the stipulation that the condition of the house purchased by the debtor is still indented so that the developer is fully responsible for the completion of the construction of the house financed by the bank as a provider of funds.

¹¹Yudianto, I Dewa Putu . (2015). Perlindungan Hukum Bagi Bank Terhadap Pembelian Rumah Indent Secara Kredit Pemilikan Rumah (Kpr) Melalui Developer Perumahan (Studi Pada Pt. Bank Negara Indonesia (Persero) Tbk. Jurnal USU, Vol 1 No.1.

¹²Anadi, Yandri Radhi. (2019). Kekuatan Hukum Akta Buy Back Guarantee Dengan Kuasa Menjual Bagi Pihak Developer. Jurnal Hukum dan Kenotariatan Vol 1 No. 1.

¹³Lestari,Luh Made Asri Dwi dan Putu Tuni Cakabawa Landra. (2019). "Pengaturan Buy Back Guarantee Sebagai Jaminan Terkait Prinsip Kehati-hatian Bank Dalam Kredit Pemilikan Rumah Bagi Developer ",Jurnal Kertha Semaya, No.3, Vol.VII, p.3.

The developer is fully responsible for completing the construction of the debtor/consumer's house as a form of fulfilling the promises that have been mutually agreed upon and stated in the cooperation agreement. The procedure for granting credit is the stages that must be passed before a credit is decided to be disbursed. The goal is to make it easier for banks to assess the feasibility of a credit application.¹⁴The procedure for granting and assessing credit by the banking world in general is not much different from one bank to another. The difference may only lie in how the bank evaluates it and the requirements it sets with the consideration of each bank.

In general, the procedure for granting credit can be distinguished between individual loans and loans by a legal entity, then it can also be viewed from the point of view of whether it is for consumptive or productive purposes. The bank's assessment is seen from the credibility of the developer listed in the information on Bank Indonesia (BI) and the project proposed for cooperation with the bank. In general, banks always implement a risk management system before collaborating with developers. So, only developers who are eligible or in accordance with the bank's criteria can cooperate with the bank. This means that this cooperation facility is not given to developers arbitrarily, but through a selection process from the bank

Banks need information about data held by prospective credit recipients. Where the data is important for banks to assess the condition and ability of customers, thus fostering bank confidence in providing credit. With the supporting data, the bank can assess the customer's ability to manage their business. Banks can also assess the customer's ability to repay the requested credit, whether later it can be returned or not. The role of the bank in the field of credit is not merely to provide credit as long as there is sufficient guarantee, but the bank also fosters the customer's business, so that the business of bank credit customers can run smoothly. The most important thing after the credit agreement is made and the funds have been disbursed by the bank to the debtor customer is how to monitor the use of credit. Is the use in accordance with the proposal submitted to the bank when applying for credit. A wise step taken by the bank in this case is to monitor the use of the credit that has been given. Through credit monitoring, it is clear that credit recipients are being monitored every step of the way. The goal to be achieved is actually so that credit does not become problematic in the future. In the context of good credit management, banks must orderly do the following:¹⁵

¹⁴Kasmir. (2012) *Dasar-dasar Perbankan*. Jakarta: PT RajaGrafindo Persada. p.124

¹⁵Saliman, Abdul R. (2015). *Hukum Bisnis Untuk Perusahaan, Teori dan Contoh Kasus*, Jakarta: Kencana Prenada Media Group. p. 16.

- Monitor the fulfillment by customers of all credit terms that have been mutually agreed upon between the debtor and the bank;
- Monitor the proper fulfillment by customers or debtors, especially the payment of interest and installments in an orderly and timely manner in accordance with the agreement;
- Monitor business and financial developments of customers, including liquidity capabilities and fulfillment of debtor obligations to parties other than banks (eg suppliers, customers and so on).

The supervision carried out by the bank to the developer is by holding or blocking the debtor's mortgage disbursement funds as long as the construction of the house purchased by the debtor has not been completed. This is done to oversee the developer's work in house construction and the use of bank mortgage funds. With the gradual disbursement or blocking of the disbursement of debtor mortgage funds carried out by the bank, the bank and debtor will be highly protected against developer default or misuse of disbursement funds made by the developer which results in the development process being hampered and even stalled. To protect the money disbursed through credit from the risk of loss, the banks make a security fence. Under the best conditions or with the best possible analysis. The risk of bad credit is unavoidable. The security fence that is made is usually a guarantee that must be provided by the debtor. The purpose of the guarantee is to protect credit from the risk of loss. The risk or loss that occurs in the provision of this indent mortgage facility is the developer's default due to delays in building and completing the house and the presence of unfavorable building conditions due to lack of supervision by the developer supervisory staff. In addition, the loss or risk that arises is the default of the debtor, namely the loss in paying monthly mortgage installments at the bank when the condition of the house is still under construction.

The company guarantee as another form of guarantee for the bank's legal protection in the future. In order for the credit provided by a bank to get a guarantee of the return of principal and interest, use an insurance institution in the transaction because there are other dangers that cannot be reached by the banking supervision system.¹⁶ The bank (creditor) will request that the debtor (borrower) cover an insurance, in order to maintain the return of credit if the debtor is unable to repay the loan (default). Because the debtor must cover the insurance, the premium payment must also be charged to the debtor. With insurance that guarantees the repayment of debtors' debts as a result of death or against fire/loss from home, the bank is highly protected. That is, when the debtor dies during the credit period, insurance will pay off the debtor's debt to

¹⁶Kawuryan, Endang Sri (2018) Pengaturan Buy Back Guarantee Sebagai Jaminan Terkait Prinsip Kehati-Hatian Bank Dalam Kredit Pemilikan Rumah Bagi Developer. Jurnal transparasi hukum Vol 1, No 1.

the bank after the requirements have been met by the debtor's heirs. Likewise, when there is a fire / loss to the house building, the insurance will cover it but for all the contents in the house is not the responsibility of the insurance. This insurance only covers the building of the house (physical or the structure of the house).

4. Conclusion

Legal Position of the Buy Back Guarantee Agreement as a guarantee agreement. If the debtor defaults, the third party will buy back the debtor's property, so that the proceeds from the sale can be used by the debtor to pay off his debt to the creditor. Legal Protection for Banks using retention funds or KPR funds that are still blocked by the bank in operational accounts (escrow accounts), company guarantees and insurance.

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