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Research Article

Juridical Review of Legal Smuggling on the Transfer of Land Ownership Rights Between Foreigners and Foreigners (Case Study of Decision Number: 274/Pdt.G/2020/PN.Dps)

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Abstract. In Indonesia, land regulations are regulated in the Basic Agrarian Law (UUPA) No. 5 of 1960, where the UUPA regulates the prohibition of land ownership rights for foreign citizens. The prohibition of ownership rights for foreign citizens is regulated in Article 21 of the UUPA, in accordance with one of the principles of agrarian law, namely the principle of nationality. This paper will examine the Denpasar District Court Decision Number 274 / Pdt.G / 2020 / PN Dps where there is ownership of land rights by foreign citizens. This study uses a normative legal research method with a statutory approach and an analytical approach. The technique of collecting legal materials through document studies, then the collected legal materials are analyzed using descriptive techniques equipped with a qualitative approach. The results of this study are that the Notarial Deed containing the transfer of land ownership rights from Indonesian citizens to foreign citizens is null and void and for this the Notary can be held accountable.

Keywords: Legal Smuggling, Indonesian Citizens and Foreign Citizens, Notary Accountability.

INTRODUCTION

The unitary state of the Republic of Indonesia based on the 1945 Constitution is a state of law that guarantees and protects the rights of citizens, including the rights of citizens to acquire, own and enjoy property rights. Land ownership is one type of property right that is very important for the state, nation and society of Indonesia as an agrarian society that is moving towards industrial development and so on.¹ Considering the ownership of land use rights, there is evidence that land ownership is an issue that needs to be very strictly protected. Strict safeguards aim to ensure that the granting of right status to individuals is done with strict selection, resulting in a truly fair distribution of right status.² Indonesia as a developing country that also requires the participation of external parties in its development process will certainly open opportunities for foreigners to invest. Since Indonesia's tourism potential is an attraction for foreigners, foreigners not only have investment plans but they also want to have property rights over the land because they know that Indonesia's tourism potential may be promising.

Land ownership in this case is very important for the state, nation and society aimed at industrial development. Land, which is a basic human need, will face various problems such as limited land both in quantity and quality compared to the needs that must be met. On the one hand, land has become a very important economic object, a material for trade and an object of speculation, on the other hand, it must be utilised and used for the greatest prosperity of the people.³

In the Agrarian Order, land is part of the earth's surface. Thus, Land in this sense is not Land that regulates all aspects of land, but only regulates one aspect, namely land in the legal sense of land use rights as part of land as referred to in Article paragraph (1) of the UUPA, specifically "Based on State control as referred to in Article 2, it is regulated that on the face of this earth, which is called land, there are various kinds of rights that can be granted and owned by oneself or together with other people and legal entities."⁴

Indonesia adheres to the principle of nationality in the land system, as Article 121 paragraph (1) jo. Article 26 paragraph (2) of the UUPA explains that "Only Indonesian citizens have ownership rights to land or may have relations with the earth and space without distinguishing between men and women and fellow Indonesian citizens, both native and descendant".⁵ Therefore, ownership rights to

¹ Adrian Sutedi, *Transfer of Land Rights and Its Registration*, (Jakarta: Sinar Grafika, 2009), p. 1.

² Asari Putri Kindangen, "A Juridical Review Of The Case Of A Foreigner Owning Military Rights Over Land Through A Nominee Agreement Under The Agraria Supplemental Bill No. 5 Lex Et Societatis VII, no. 2 (2019): pp. 55.

³ BoediHarsono, *Indonesian Agrarian Law: A Collection of Land Law Regulations*, (Jakarta: Djambatan, 2005), p. 32.

⁴ General Elucidation of Law Number 5 Year 1960 on Basic Agrarian Principles

⁵ BachsanMustafa, *Agrarian Law in Perspective*, Cet.3, (Bandung: Remadja Karya, 1998), pp. 22

land cannot be granted and/or owned by foreigners and the transfer of ownership rights to foreigners is prohibited under the threat of null and void.⁶ So, the existence of the principle of nationality in the UUPA emphasises that only Indonesian citizens have property rights to land. In other words, foreigners are prohibited from owning land with property rights, and any legal entity wishing to be domiciled in Indonesia must fulfil the requirements set by the government. This is an effort to ensure that Indonesian land owned by the state or by individual Indonesian citizens is not controlled by foreigners who want to do business or live in Indonesia. If this is not maintained and there is no rule of law, then in the long run it is inevitable that in the future there will be many foreigners who control land in Indonesia both as a place to live and as a dynamic field of activity. Forms of industry, catering or control in the field of tourism. That way, the community will feel visited by invaders and can arbitrarily control every corner of the land that has economic potential and value. As a result, people's welfare will be reduced or even non-existent. Therefore, foreign ownership in Indonesia is prohibited by law.

For an Indonesian citizen who changes citizenship or a foreigner who through inheritance acquires any right other than a right of use, within one year from the change of citizenship or from the acquisition of the right, the right must be transferred or cannot be transferred, which will result in the land use right being returned to the State, then the transfer of the land use right becomes invalid according to the provisions of Article 21 paragraph (2) jo. Article 30 paragraph (2) and Article 35 paragraph (2) of the UUPA. Thus, it is not possible for foreigners to obtain land use rights in the land law system at all, except for of course, has a certain period of time and is therefore different from a holder whose basic right is not limited, except in the case of transfer of rights. However, the holder of a can still benefit from compensation if the term of the expires at a later date, as long as the building or object located there is still needed. However, this does not seem to be an obstacle for foreign nationals to invest outside the applicable rules. Indonesia as a tourist destination for foreign tourists is considered to be one of the determining factors for the number of investors who come to invest in the tourism sector. Currently, notarial deeds can even be a weapon for foreigners to control land in Indonesia, outside the limits of legal regulations. One of them is the case in Denpasar District Court Decision Number 274/Pdt.G/2020/PN Dps that occurred between Indonesian citizens and foreigners through notaries in Badung Regency, the area is expressly prohibited by law so that foreigners have the right to own land in Indonesia. In the verdict, the judge decided to cancel the notarial deed in the form of a lease purchase deed (PPJB) between an Indonesian citizen as the seller and a foreigner as the buyer. The judge ruled that the notarial deed was an agreement between an Indonesian citizen and a foreigner, which in law is called a nomination agreement. With this in mind, this article will take a closer look at whether the PPJB contains an appointment agreement or simply a sale

⁶ Maria S.W. Sumardjo, *Alternative Policy for Regulating Land and Building Rights for Foreign Citizens and Foreign Legal Entities*. Cet. 2. Kompas, Jakarta, 2008, pp. 45.

between a foreigner and an Indonesian citizen, which is clearly prohibited by the UUPA.

RESEARCH METHODS

The research method used in this research is a normative juridical legal research method that examines the law conceptualised as norms or rules applied in society and becomes a reference for community behaviour including political parties and state institutions. The research is conducted in the form of a normative legal approach, namely by examining library documents or secondary data as a basic research document by searching for regulations and documents related to the problem under study.⁷ This method as much as possible provides an overview to the reader through the methods used. Both research articles and reviews must explain the methods used. For research articles, the methods should explain the research location, data collection methods, and how the data was analysed. Meanwhile, in a review article, the method is written descriptively about the topic analysed, what theories and laws were used to analyse the topic, and the limitations of the research.

RESULTS AND DISCUSSION

Legal considerations in Legal Contravention of Denpasar District Court Decision Number 274/Pdt.G/2020/PN Dps

According to UUPA, it is prohibited to grant ownership rights, business use rights, and building use rights to foreigners or foreign legal entities. Foreign nationals and foreign legal entities domiciled in Indonesia can be granted a hak pakai. Based on the type of legal entity, there is also a distinction between public legal entities and private/civil legal entities.⁸ Public legal entities (foreign representatives, representatives of international organisations) and civil legal entities. However, in very specific cases, foreigners may acquire and use land equivalent to the right of ownership, commercial use rights, and construction rights. These very limited rights are granted only for a period of 1 (one) year, specifically for Indonesian citizens who change citizenship and foreigners who acquire such citizenship through Ab Intestato inheritance.⁹ Thus, for foreign nationals there is absolutely no possibility of obtaining land use rights in the land law system, except for the right of use. The same applies to foreign legal entities. However, foreigners, in this case foreign investors, can own land in Indonesia through domestic companies under the category of Foreign Investment (PMA) based on the Indonesian legal system. For residence, foreigners can rent a house owned by an Indonesian or if they want to build their own house, they can control and use the land with the right of use or right of lease. According to the

⁷ I Made Pasek Diantha. Normative Legal Research Methodology in Justifying Legal Theory, (Denpasar: Prenada Media, 2016), p. 12.

⁸ Maria S.W Sumardjono, Alternative Policies for Regulating Land and Building Rights for Foreign Citizens and Foreign Legal Entities, (Jakarta: Kompa, 2008). p. 44.

⁹ Michael Wisnoe, Thesis: Ownership of Land Rights for Foreign and Dual Nationals, Depok: Faculty of Law, University of Indonesia, 2012, p. 46.

law, the right to rent and the right to use a house can be granted for a period of up to 25 (twenty-five) years.¹⁰

Policies relating to foreigners and legal entities in the land sector are regulated in:

1. Article 33 paragraph (3) of the 1945 Constitution
2. Law No. 5 Year 1960 on the Basic Regulation of Agricultural Principles (UUPA)
3. Law No. 25 Year 2007 on Foreign Investment
4. Law No. 20 Year 2011 on Flats
5. Presidential Decree 1992
6. Government Regulation No. 40/1996 on Building Rights Title, Business Rights Title and Land Use Rights.
7. Government Regulation No. 41 Year 1996 on Home Ownership.

For foreigners, permanent ownership of land under Article 21 of the UUPA is prohibited and for legal entities wishing to reside in Indonesia must fulfil conditions set by the government. This is an effort to ensure that Indonesian land controlled by the state or owned by individual citizens is not purchased by foreigners who wish to live or open businesses in Indonesia. If there is no ban on foreign ownership, in the long run most of Indonesia's land will be controlled by foreigners, either to open businesses such as hotels, restaurants, etc., or to create living spaces. Thus, the territory of Indonesia could return to colonial rule and there is no possibility of the Indonesian state disappearing because not owning land is a condition for the establishment of a state and a symbol of sovereignty. In addition, the phenomenon that will be observed is that Indonesian citizens (WNI) become workers in companies with foreign capital, while land ownership is already controlled by foreigners. If this happens, the welfare of the community will decline and it is not impossible that in a short time foreigners will control part of Indonesia's territory. Therefore, land belongs to the state and Indonesian citizens are not allowed to acquire property rights for the benefit of foreigners.¹¹

With foreigners residing in Indonesia, one of the practices of land ownership in Indonesia is that foreigners want to own and control land in Indonesia by using property rights. Since the provisions of the UUPA expressly prohibit foreigners from owning land in Indonesia, the way foreigners circumvent the current law is by signing nominal agreements with Indonesian citizens so that they can control land in Indonesia with property and rights.¹² In Indonesian law (Civil Code), there are no special provisions regarding this name borrowing agreement because this name borrowing agreement is an agreement signed between a foreigner and an Indonesian citizen. This name lending agreement is part of a special agreement in the Civil Code, especially an anonymous agreement or commonly referred to as an agreement without a name. This name lending agreement is very likely to cause disputes or

¹⁰ Ida Bagus Wyasa Putra, *Tourism Business Law*, (Bandung: Refika Aditama, 2003), p. 87.

¹¹ Michael Wisnoe, Thesis: *Ownership of Land Rights for Foreigners and Dual Citizenship*, Depok: Faculty of Law, University of Indonesia, 2012, p. 46.

¹² Rachmat Aditya, "LEGAL CONSEQUENCES OF NOMINEE AGREEMENTS IN THE OWNERSHIP OF LAND BY FOREIGN CITIZENS," *Repository Faculty of Law Unpas*, 2019, p. 5

problems because it is an agreement that has not been specifically regulated in positive law.¹³

Nominee is a term commonly used in the common law legal system, the concept of owning property on behalf of another person. The concept of nominee has never been recognised and there is not even a legal framework based on Continental European law or Anglo-Saxon law applicable in Indonesia. The increase in the number of foreign investors entering as nominees since the 1990s is due to the high investor interest supported by the relatively low incentives for Indonesian foreign investors. The word nominee is taken from Latin and translated back into English as "by name of or under the name of designation of ..." and then translated into Bahasa Indonesia as "by name of or under the name of designation".

Black's Law Dictionary has its own explanation of what a nominee is:¹⁴

"1. A person who is proposed for an office, membership, award or similar title, or status. An individual seeking nomination, election or appointment is a candidate. A candidate for election becomes a nominee after being formally nominated. 2. A person designated to act in place of another usually in a very limited way. 3. A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others."

A person who is authorised to act on behalf of someone to perform certain acts based on an agreement between that party and another party, the authorising party can be referred to as the beneficiary, all of which have been agreed and agreed by both parties at the time of accepting the agreement. Usually the nominee is described as follows: "a. a person who has been appointed to an office or nominee; or b. a natural person whose name is registered but whose ownership actually belongs to another party." Thus, based on the previous explanation, it can be affirmed that the concept of agent is known to have two parties, one of the first parties acting as an agent is responsible as the party who registers the statutory administrative arrangements for the legal owner/ownership, then the beneficiary is the party who will receive all forms of profit or loss if borne by the nominee. In the de jure concept, the nominee is considered as a party who has legal rights to a legal object as stated in the agreement, which has the right to transfer, sell, owe, provide means of guarantee and use anything in accordance with the wishes of the legally registered owner, otherwise according to the de facto concept, the beneficiary is not the legal owner of the goods. The existence of an appointment agreement results in foreign nationals as investors conducting transactions using the personal data of Indonesian citizens to identify the owner of their accommodation business premises. Some expatriates believe that the appointment agreement is more beneficial than the use of convenience. This happened in the Denpasar District Court case with verdict No. 274/Pdt.G/2020/PN.DPS, the plaintiff with the abbreviation BI owns land with title

¹³ Ifada Qurrata A'yun Amalia, "Legal Effects of Cancellation of Agreement in Decision Number 1572 K/PDT/2015 Based on Articles 1320 and 1338 of the Civil Code," *Journal of Business Law* Vol.1, No. 1 (2019), p. 61.

¹⁴ Lucky SuryoWicaksono, "Legal Certainty of Nominee Agreement for Limited Liability Company Share Ownership", *Ius Quia Iustum Law Journal*, Vol. 2, No. 1 (2016), pp. 48.

certificate number: 6196 /Canggu measuring 790 m2. On this land, the first defendant and second defendant persuaded the first plaintiff to build a villa and rent it out to other parties, after which the profits from the management of the villa were divided between themselves. Defendant I and Defendant II then asked the Plaintiff to sign a deed over the land belonging to the Plaintiff at the office of Defendant III (Notary and PPAT NS). The Plaintiff sold, deed No.85 dated 14 October regarding a statement of sale and purchase, was notarised. Notarial Deed No. 86 dated 14 October 2011 concerning a land lease contract, Deed No. 87 dated 14 October 2011 concerning a lease extension, Deed No. 88 dated 14 October 2011 concerning a sale and purchase contract/agreement between the claimant as seller and respondent I and respondent II.

CONCLUSION

The main conclusions of the research can be presented in a short conclusion section, which can stand alone or form a subsection or results section of the study. In this section can also give thanks to people and parties who have supported research.

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