

Juridical Review of the Position of Power of Sale as a Transfer of Land Rights (Analysis of Decision No. 529/PDT/2021/PT SMG)

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ABSTRACT

The transfer of land rights can be done through a sale and purchase process by the parties to the agreement. The sale and purchase can be through a power of sale, where the party in the sale and purchase agreement can represent another person through a power of sale to carry out legal actions. In case No. 529/PDT/2021/PT SMG, which had previously been decided by the District Court in decision No. 8/PDT.G/2020, the Plaintiff claimed and stated that he was the legal owner of the lands. However, in practice, the Plaintiff has given and released with a Power of Attorney to Sell and was not considered by the Panel of Judges. This study aims to determine whether a Power of Sale in Indonesian treaty law and to determine whether a Power of Sale can be the basis for the transfer and replacement of land rights. The method used in this research is normative juridical legal research using Library Research techniques. The results of the research findings reveal that based on Article 1792 of the Civil Code formulates the granting of power of attorney as an agreement between a person as a grantor with another person as a proxy, to carry out an act or action on behalf of the grantor. So that this power of sale can also be used in terms of land transfer.

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I. INTRODUCTION

Sale and purchase is one of the barter transactions of goods that have value, where one party sells the goods, and the other party buys them in accordance with the agreement. This situation is different from the provisions of buying and selling as stipulated in Article 1458 of the Civil Code which reads, "A sale and purchase is deemed to have occurred between the two parties when they have reached an agreement on the goods and price, even though the goods have not been delivered nor the price paid". Based on this article, it can be concluded that a sale and purchase agreement is considered to have existed since there is an agreement between the two parties.

A sale and purchase transaction is inseparable from the existence of an agreement / engagement, where there is an agreement between the parties to bind themselves to each other, with one party making a delivery of an object, and the other party will make a payment according to what was previously agreed upon, as stipulated

in Article 1457 of the Civil Code. Thus, the agreement creates rights and obligations for the parties who make it, in this case the seller and the buyer.¹

The law of the agreement has an open nature with the implementation of the principle of freedom of contract. This principle provides the widest possible freedom to anyone in entering into an agreement, provided that it does not violate legislation, public order, and decency. The provisions in an agreement are made by the parties themselves and are allowed to deviate from the articles in the law of the agreement. These articles are supplementary (*accessoire*), which means that they can be waived if agreed by the parties. If the parties to the agreement do not regulate something themselves, they will be subject to the applicable law.²

Sale and purchase is one way to obtain rights to a land or building. The acquisition of such rights is carried out in front of a Notary / PPAT (Land Deed Official) in order to carry out the transfer along with land registration at the land office to achieve legal certainty as stipulated in Law Number 5 of 1960 concerning Basic Agrarian Regulations.³ In addition, it is also regulated in Government Regulation Number 24 of 1997 concerning Land Registration, that one of the objectives of land registration is the realization of administrative order.

Practices in the field are also known as Power of Attorney to Sell in the sale and purchase process through the granting of power of attorney as formulated in Article 1792 of the Civil Code. The power of attorney is classified as a power of attorney with an authentic deed made before a Notary as contained in Article 1686 of the Civil Code, that an authentic deed is a deed in the form prescribed by law, made by or before a public official authorized to do so in the place where the deed is made.⁴ The purpose of an authentic deed is to strengthen the granting of power of attorney to become valid written evidence.

The power of attorney deed also contains the sentence "This power of attorney is granted with the right to transfer it to another party, either partially or wholly". This means that in one case, the Grantor is always deemed to have given the power to the Grantee to appoint another person as his substitute (*substitutie*) to transfer his power either partially or wholly. In all cases, the Grantor may directly sue the person appointed by the Grantee as his substitute (Article 1803 of the Civil Code).

The evidentiary power of an authentic deed and a deed under hand is not the same. If a person submits an authentic deed, then he does not need to prove anything else. Whoever denies it must provide proof, whereas in the case of a deed under hand if the deed is denied, then the person who uses the deed is given the burden of proof.⁵

In case No. 529/PDT/2021/PT SMG which was previously decided by the District Court in decision No. 8/PDT.G/2020/PN Bms, that the Convention Plaintiff/Reconvention Defendant with a lawsuit letter dated May 28, 2021 which was received and registered at the Registrar of the Banyumas District Court on May 28, 2021 in Register Number 8/Pdt. G/2021/PN Bms, has filed a lawsuit, the main claim of which is that the Plaintiff claims and declares to be the legal owner of the lands located in Kembaran Village, Kembaran District, Banyumas Regency with SHM number: 00643, SHM number: 00642, SHM number: 00668 and SHM issued by the head of the Banyumas Regency land office. In practice, the Plaintiff sold these lands through a Power of Sale, whereby he authorized another person to sell the land to the Defendant. However, this was not considered by the Panel of Judges and determined that the lands belonged to the Plaintiff. This is contrary to the function, purpose and position of the Power of Sale.

This writing certainly also looks at previous studies that discuss related to the Power of Attorney to Sell in the transfer of land. Among them are the authors Nurul Helmi, Teuku Yudi Afrizal, Fatahillah (2021) entitled *Juridical Review of the Absolute Power of Attorney to Sell Agreement in Land Sale and Purchase Transactions* and the authors Rezza Faundra A, Hirsanuddin, Sahnun (2020) in their research entitled *Selling and Purchasing Land Rights with Absolute Power of Attorney (Case Study No. 47/PDT.G/2019/PN.PYA)*. The differences and similarities between the two previous studies with this research are that, in the first study both discuss the position of the Power of Sale in the law of agreements regarding the transfer of land rights. The difference is that the author of the first previous study also discusses the legal impact caused by the absolute power of sale agreement in the sale and purchase transaction of land, while this study discusses whether the Power of Sale can be the basis for the transfer and replacement of land rights. The second previous researcher's similarity with the research conducted by the author is about the transfer of land rights using a Power of Sale. The difference lies in the

¹ Fadhila Restyana Larasati dan Mochammad Bakri, 2018, "Implementasi Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016 Pada Putusan Hakim Dalam Pemberian Perlindungan Hukum Bagi Pembeli Beritikad Baik", Program Studi Magister Kenotariatan Pasca Sarjana Fakultas Hukum Universitas Brawijaya, Jurnal Konstitusi, Volume 15 Nomor 4 Desember 2018, hlm. 2-3.

² Rumelda Silahahi, 2019, "Kekuatan Hukum Jual Beli Tanah Melalui Seorang Kuasa", Jurnal Rectum, vol. 1, no. 2, hlm. 1.

³ Made Ara Denara Asia Amasangsa, 2019, "Perjanjian Pengikatan Jual Beli (PPJB) Dalam Transaksi Pralihan Hak Atas Tanah Dan/Atau Bangunan", hlm. 2.

⁴ Nurul Helmi, Teuku Yudi Afrizal, Fatahillah, 2021, "Tinjauan Yuridis Perjanjian Kuasa Menjual Mutlak dalam Transaksi Jual Beli Tanah", Jurnal Ilmiah Mahasiswa Fakultas Hukum, vol. 4, no. 1. hlm. 4.

⁵ I.G. Rai Widjaya, 2008, "Merancang Suatu Kontrak", Megapion, Jakarta, hlm. 85.

formulation of the problem of the previous researcher who discussed the transfer of land rights through the Power of Sale in Case No. 47/Pdt.G/2019/PN.PYA, while the author refers to Decision No. 529/PDT/2021/PT SMG.

II. RESEARCH PROBLEMS

Based on the existing case, the author raises several problem formulations, namely how is the position of the Power of Sale in treaty law and legislation in Indonesia? And whether the Power of Sale can be the basis for the transfer and replacement of land rights?.

III. RESEARCH METHODS

This research is a normative legal research (legal research) using statute approach, conceptual approach and case approach. Techniques for collecting primary legal materials and secondary legal materials. The legal materials that have been collected are then analyzed in a qualitative descriptive and deductive method, namely explaining the general provisions governing sale and purchase and absolute power of attorney as the basis for transferring land ownership rights.

IV. RESULT AND DISCUSSION

1. The Position of Power of Attorney to Sell in the Law of Treaty and Civil Code

Subekti provides his understanding of buying and selling which is defined as a reciprocal agreement in which the seller promises to give up ownership of an item, while the buyer promises to pay a price consisting of a sum of money in return for the acquisition of the property rights. A sale and purchase agreement is an agreement/agreement/contract in which one party (seller) binds himself to hand over property rights to objects/goods to another party (buyer) who binds himself to pay the price in the form of money to the owner, as explained by jurist Suryodiningrat.

Based on Article 1457 provides a definition of sale and purchase, that sale and purchase is an agreement to hand over goods that have value, where one party sells the goods, and the other party buys them by agreement. It can be concluded that the sale and purchase agreement is a reciprocal agreement. Therefore, this sale and purchase agreement is different from the agreement referred to in Article 1313 of the Criminal Code, which reads: "an agreement is an act by which one party binds himself to one or more other people". The conditions for the validity of an agreement are explained in Article 1320 of the Civil Code, namely the existence of those who bind themselves, the ability to make an agreement, a certain thing, and a halal cause.

The sale and purchase binding agreement is a preliminary agreement made before the implementation of the main agreement or the main agreement. As has been explained about its definition, the position of the sale and purchase binding agreement as a preliminary agreement, the sale and purchase binding agreement serves to prepare or even strengthen the main agreement / principal. The contents of the sale and purchase binding agreement which is a preliminary agreement can be in the form of promises from the parties which contain provisions regarding the conditions that must be agreed upon for the validity of the main agreement.

In addition to promises, usually in the binding agreement of sale and purchase also includes the right to grant power of attorney to the buyer. This happens if the seller is unable to attend the signing of the sale and purchase deed in front of the land deed official (PPAT), either because of the remote location, or because there are obstacles and so on. The granting of power of attorney usually only takes effect after all the conditions for buying and selling land rights at the land deed official (PPAT) have been fulfilled.

From a legal perspective, the granting of power of attorney is an agreement as explained in the provisions of Article 1792 of the Civil Code which reads: "The granting of power is an agreement by which one person authorizes another person, who accepts it on behalf of conducting an affair. Almost the same definition is given by Suryodiningrat (1996: 10) as follows: "the granting of power is an agreement in which a person gives power (authority) to another person who accepts it and on behalf of the grantor of the power of attorney who performs legal acts (the law that says "carry out a business)".

In general, it can also be formulated that the granting of power of attorney means only for acts of taking care of goods or acts of management only, not for performing legal acts such as: transferring, encumbering and so on. This must be done by granting power of attorney expressly mentioning the action.

From the definition of power of attorney in Article 1792 of the Civil Code, the following conclusions can be drawn: a. Power of attorney is an agreement. b. To perform a legal act. c. The existence of a representative, namely someone on behalf of another person conducts a business. In other words, a power of attorney agreement must fulfill these three main elements. If even one of the three main elements is missing, then the agreement made is not a power of attorney agreement as intended by

Article 1792 of the Civil Code. Thus, the distinction of the three main elements is merely a division to facilitate discussion and does not constitute a separation, because the three main elements are a complete and unified whole.

In the power of attorney agreement, there are several main characteristics, namely the recipient of the power of attorney directly has the capacity as the representative of the grantor, the granting of power of attorney is consensual, which is made based on an agreement and the binding force of the power of attorney action is only limited to the authority given by the grantor, as well as in terms of the responsibilities of the parties in granting power of attorney. The granting of power of attorney can be submitted and accepted in various ways, namely by public/authentic deed, by an underhand writing, by an agreement, and orally (Article 1793 Civil Code).⁶

2. Power of Sale as a Basis for Transfer and Replacement of Land Rights

Based on Article 26 paragraph (1) of Law Number 5 of 1960 concerning Basic Agrarian Principles, it is explained that, "Sale, purchase, exchange, donation, gift by will, gift according to custom and other actions intended to transfer property rights and their supervision are regulated by Government Regulation", as well as in Government Regulation of the Republic of Indonesia Number 24 of 1997 concerning Land Registration, it can be concluded that sale and purchase is one of the ways in transferring land rights.

The transfer of land rights, both in the form of switching and transferring can occur if the material requirements in the sale and purchase of land are met, namely the landowner or holder of land rights as the seller has the right and authority to sell his land rights, while the buyer must meet the requirements as the subject of land rights which are the object of land sale and purchase.⁷

The seller/buyer may act alone or by proxy. Whether the seller/buyer is acting alone or through a proxy, his/her identity must be clear. If the seller/buyer is a person (human), then the identity is: name, age, nationality, occupation, place of residence. If the seller / buyer is a legal entity, then his identity is: name, legal form (limited liability company, foundation, state company, ministry company and others), position, management. All of this can be known from the deed of establishment / articles of association / statutory regulations for its formation.⁸

If the seller/buyer in this case is acting through a power of attorney, then a special power of attorney to sell must be in place. A general power of attorney, which is normally only for acts of management, does not apply to selling. The power of attorney must be expressly to sell the land being sold. The power of attorney must be in writing; an oral power of attorney cannot be used as a basis for the sale of land. A notarized power of attorney is preferable.⁹

A notarized power of attorney cannot be used as a basis. This is because fraud can occur, because the power of attorney can be forged. However, a legalized or authentic power of attorney is less likely to be forged, because there are public officials involved in granting the power of attorney, who will certainly investigate the identity and authority of the grantor and the grantee.¹⁰ Power of attorney to sell is one form of special power of attorney, which is made following the making of an agreement to bind the sale and purchase of land rights before a notary.

The sale and purchase deed is one of the requirements for proving the transfer of land rights, which states the source of juridical data. And the authority in making a deed of transfer of land rights as explained in Article 1 paragraph (1) of Government Regulation Number 24 of 1997 concerning Regulations on the Position of Land Deed Officials explains that PPAT is a public official who is authorized to make authentic deeds regarding certain legal acts concerning land rights or property rights over apartment units.¹¹

If you want to ensure legal certainty regarding the control or transfer of land rights, it is necessary to register the transfer of land rights. Based on the agreement to bind the sale and purchase as the initial agreement, the transfer of land rights can be immediately made a deed of sale and purchase before a PPAT. Because the PPAT deed is proof that a legal act of transferring land rights has been carried out, the parties concerned must appear directly to carry out the signing of the sale and purchase deed. In making a power of sale deed, the deed must include three things, namely the beginning of the deed or the head of the deed, the body of the deed and the end or closing of the deed.

⁶ *Ibid.*, hlm. 85

⁷ Urip Santoso. 2015. *Op.Cit.*, hlm. 134.

⁸ *Ibid.*, hlm 6.

⁹ *Ibid.*, hlm 7.

¹⁰ *Ibid.*, hlm. 8.

¹¹ *Ibid.*, hlm 67.

The granting of power of attorney can be done with or without the provision of wages to the person granted power of attorney, adjusted to the agreement of the grantor and the recipient of the power of attorney. If the granting of power of attorney does not determine the amount of wages for the proxy, Article 1794 of the Civil Code determines that the proxy may not request a greater wage than that specified in Article 411 of the Civil Code for guardians, namely "all guardians, except fathers, mothers, and participant guardians, may calculate wages of three percent of all income, two percent of all expenses, and one and a half percent of the capital they receive. Unless they prefer to receive a fee determined by will or by an authentic deed referred to in article 355 of the Civil Code, in which case they may not calculate a greater fee".¹²

Power of attorney that is no longer allowed to be made, namely absolute power of attorney relating to land. This is based on the Instruction of the Minister of Home Affairs dated March 6, 1982 Number 14/1982 juncto Jurisprudence of the Supreme Court dated April 14/1988 Number 2584. This prohibition is due to the fact that the making of absolute power of attorney is widely abused by parties who conduct disguised sale and purchase of land. The reason is that the absolute power of attorney clause always includes the phrase "irrevocable power of attorney", so that the recipient of the power of attorney can carry out any action, both management actions and ownership actions on the land in question. Meanwhile, the making of an absolute power of attorney for transactions other than the sale and purchase of land is still possible, because the law of agreements is only regulatory in nature and can arise due to the agreement of the parties involved.¹³

The Instruction of the Minister of Home Affairs consisted of five dictums, which contained orders to all Agrarian officials, subdistrict heads, and other land officials (including PPATs) not to carry out the transfer of land rights on the basis of absolute power of attorney. In other words, it is prohibited to make a power of attorney for the transfer of land that is absolute in nature.¹⁴ The transfer of rights in relation to new land occurs when a deed of sale and purchase is made and signed on the land being transacted, and when the name has been changed/registered at the land office. According to Article 39 paragraph (1) of Government Regulation No. 24/1997 on Land Registration, it is stated that a deed made by a PPAT is a strong basis for the registration of transfer of rights to land.¹⁵ In relation to this, if a transaction cannot be made a deed by a PPAT as a strong basis for registration of transfer of rights for land due to the fact that it is still in the process of land registration or related to tax management, an agreement can be made which is commonly made with a binding agreement for sale and purchase (PPJB).¹⁶

The granting of absolute power of attorney in connection with a binding agreement for sale and purchase of land is considered not identical to the prohibited power of attorney as stipulated in the Minister of Home Affairs Instruction Number 14 of 1982. Therefore, in the case of the sale and purchase of land, the comparison of the deed of sale and purchase between the seller and the buyer, where the seller authorizes the making of the sale and purchase to another person.¹⁷ It is easier to know whether or not an absolute power of attorney is prohibited according to the applicable laws and regulations by knowing whether or not there is a strong reason and the existence of a main agreement on which the power of attorney is made, for example, PPJB which is accompanied by the making of a power of attorney.¹⁸

Thus, in case No. 529/PDT/2021/PT SMG, which had previously been decided by the District Court in decision No. 8/PDT.G/2020/PN Bms, where the Plaintiff/Reconviction Defendant had sold his land through the granting of power of attorney to A, and sold the land to the Defendant/Reconviction Defendant. The granting of power of attorney to sell was valid before a Notary or was notarized. Based on the previous explanation, it is legally valid that there was a sale and purchase of land between the Defendant/Reconviction Plaintiff and the Plaintiff/Reconviction Defendant through A as the recipient of the power of sale, and legally belonged to the Defendant/Reconviction Defendant. This is based on Article 1792 of the Civil Code regarding the granting of power of attorney and sale and purchase as a transfer of land rights as contained in Law Number 5 of 1960 concerning Basic Agrarian Regulations and Government Regulation Number 24 of 1997 concerning Land Registration.

¹² Frans Satriyo Wicaksono. 2009. *Membuat Surat-Surat Kuasa*. Jakarta: Visimedia, hlm. 2-3.

¹³ *Ibid.*, hlm. 13.

¹⁴ Dodi Oktarino, "Apakah Dilarang Membuat Kuasa Menjual Tanah?", melalui <https://pakarsolusi.com>.

¹⁵ Frans Satriyo Wicaksono, *Loc. Cit.*

¹⁶ *Ibid.*, hlm. 20.

¹⁷ *Ibid.*, hlm. 14.

¹⁸ *Ibid.*, hlm. 14-15.

V. CONCLUSION

Based on the discussion in the previous chapters and referring to the results of the research that the author has conducted, it can be concluded as follows:

1. Power of Attorney to Sell is recognized and valid according to the law as stipulated in Article 1792 of the Civil Code which occurs due to the delegation of power and authority from the Grantor to the Grantee to represent his interests. The Power of Attorney to Sell has the same position as an agreement in general contained in the Law of Treaties. The Power of Attorney to Sell is included in an authentic letter, the validity of which must be proven in court. The agreement has an agreed period of time, meaning that as long as the specified time period is still valid, the validity in terms of action is still legally valid, and vice versa.
2. Sale and purchase is one of the methods in the transfer of land rights regulated in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles and Government Regulation of the Republic of Indonesia Number 24 of 1997 concerning Land Registration. Based on the Civil Code, the legal sale and purchase of land can be conducted using a Power of Attorney to Sell.

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