NOMINEE AGREEMENT: A SOLUTION FOR FOREIGNERS TO CONTROL LAND IN BALI

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Abstract

The purpose of this study is to find out the legal basis of the nominee agreement and to find out the nominee agreement that is used as a solution by foreigners in controlling land in Bali. This research method uses the type of empirical legal research. The legal basis for the nominee agreement is Article 21 and Article 26 of the Basic Agrarian Law (BAL). In addition, there are also other legal bases, namely Articles 1320 and 1313 of the Civil Code. Juridically, the nominee agreement cannot be used as a solution by foreigners to control land in Bali. Land tenure that can be taken by foreigners is with usufructuary rights and rental rights.

Keywords: Agreement, Foreigner, Land, Nominee

1. INTRODUCTION

Nominee agreement is a name loan agreement between a foreigner and an Indonesian. Nominee agreement is used by foreigners with aim of being able to control land in Bali. Agrarian regulations, regarding land tenure, where only Indonesians may own land in Indonesia. This provision very clearly stipulates that only Indonesians can have property rights, the property rights referred to are ownership rights over land. In other words, foreigners are not allowed to have ownership rights over land.

Regarding prohibition for foreigners to own land, so foreigners are looking for legal loopholes in order to own land in Bali. Such loophole is obtained by borrowing names from the Balinese by making agreements that led to the ownership of the land by foreigners. These agreements are make "to transfer ownership rights to land by making Indonesian citizens as shields, therefore the nominee agreement in the case says to be a form of law smuggling" (Saraswati & Westra, 2018). The Supreme Court ruling has prohibited the existence of nominee agreements, even nominee agreements are said to be law smuggling.

Related to that, Government Regulation No. 103 of 2015 concerning Ownership of Residential or Residential Houses by Foreigners Domiciled in Indonesia (hereinafter referred to as PP Residential Residents) provides opportunities for occupancy or including domicile in Bali. Based on Article 4 of this Government regulation (PP) on Foreigner Housing, it stipulates that "Residential or residential houses that can be owned by foreigners as referred to in Article 2 paragraph (1)" are:

"a. Single house on land:
1. Right to Use; or
2. Rights to Use over Property Rights which are controlled based on an agreement on the granting of Rights to Use over Property Rights with deed of Land Deed Making Official.

b. *Sarusun* (units of flats) which built on a land plot with Right to Use".

This provision provides an opportunity for foreigners to reside in Indonesia. The residence for the foreigner is given over right to use over right of ownership. Thus, based on this government regulation, foreigners are allowed to have rights to use, not ownership rights. This right to use must be understood "as the right to use or collect produce from land that is directly controlled by the State or land belonging to another person who gives the authority and obligations specified in the decision to grant it by the official authorized to give it or by agreement with the owner of the land" (I. P. I. M. Putra et al., 2013). Thus, if foreigners have right to use, they can enjoy the results.

In practice in Bali, foreigners wish to live for a long time because foreigners have business interests and meet their life's needs. If foreigners have right to use only, then very little time will be given or very little time to reside in Bali. According to Article 6 of the Government Regulation on Foreign Residents, it stipulates that:

"paragraph (1) A single house that is given on land with right to use as referred to in Article 4 letter a number 1, is given for a period of 30 (thirty) years.

paragraph (2) Right to Use as referred to in paragraph (1) can be extended for a period of 20 (twenty) years.

paragraph (3) "In the event that the extension period as referred to in paragraph (2) expires, Right to Use can be renewed for a period of 30 (thirty) years."

The regulation has provided an opportunity for foreigners to have usage rights. Regarding the period of time of use rights that are permitted, first it is given for thirty years, then it can be extended for twenty years and then it can be extended again or a second extension, namely for thirty years. Thus, the total term a foreigner can hold is eighty years. The time given may still feel insufficient for foreigners to carry out their business activities in Bali. "One of the factors that causes foreigners to nominee agreement is the existence of pragmatic economic factors" (I. W. E. A. Putra & Agung, 2016). Therefore, foreigners want to stay in Bali for a long time.

In fulfilling this desire, foreigners are looking for loopholes or ways to be able to own land in Bali. The desire to own land in Bali is surely not allowed. The method taken by foreigners is making a nominee agreement or borrowing a name. Name loan agreement is with Indonesians or Balinese. Nominee agreement can be done by way of marriage or without marriage. This method, as explained above, constitutes legal smuggling. Surely legal smuggling is prohibited by government regulations and laws. In fact, even though nominee agreement was prohibited, it is still carried out because nominee agreement is considered to provide a solution for land ownership by foreigners in Bali. With a nominee, foreigners will be able to own land for an unlimited period of time and can enjoy the land at will. Even though it is impossible for foreigners to get property rights. foreigners are only allowed to have rights to use. Therefore, it is very important to do research by examining the legal issues in the nominee agreement. This research explores the theme "Nominee Agreement: A Solution for Foreigners to Control Land in Bali".

Based on this background, this study aims to understand about nominee agreement based on the Civil Code and understanding that nominee agreement can be used as a solution to land tenure by foreigners in Bali.

2. RESEARCH METHOD

Research was "a scientific activity including analysis and construction that was conducted methodically, systematically, and consistently" (Soekanto, 1984). This type of research was empirical juridical or empirical legal research. Empirical legal research was "a method by observing or researching directly into the field in order to obtain accurate truth in the process of perfecting this research" (Soekanto, 1984).

3. RESULT AND DISCUSSION

3.1. Nominee Agreement Based on the Civil Code

The nominee agreement is also called the name lending agreement, so to examine the nominee agreement begins with basing thoughts on the arrangement of the agreement. The arrangement of the agreement is stated in Civil Code. Based on Article 1313 of Civil Code that "An agreement is an act by which one or more people bind themselves to one or more other people". Regarding nominee agreement, foreigners will bind themselves to Balinese. The binding aims to make a nominee agreement.

Based on Article 1320 of the Civil Code, it determines that the legal requirements for an agreement are;

"1) The agreement of those who bind themselves;
2) Capable of making an agreement;
3) Regarding a certain matter; and
4) Something lawful cause " (Utama & Purwanto, 2019).

The terms of the validity of this agreement determine validity of an agreement including nominee agreement. The first requirement is there is an agreement between foreigners and Balinese. Second, the ability to make an agreement. Third, a certain thing and fourth, namely the existence of a lawful cause. In this regard, the first and second conditions have been fulfilled by the "foreigner with the Balinese", while the third and fourth conditions are not fulfilled or do not meet the legal requirements of agreement. The existence of something meant that there is an agreement on land ownership by foreigners and an agreement by borrowing names (Jayanti & Wita, 2016). This condition is not met because the agreement could not be made by borrowing a name. While the fourth requirement that there is a cause that is not allowed. In the nominee agreement, the cause is having ownership rights over land. Ownership of land rights by foreigners is surely not allowed. Regarding the nominee agreement based on the Civil Code, the validity is:

“Their agreement that binds him. Regarding the main points in the agreement regulated by the parties. The parties to the agreement have agreed. Agreements occur because of the same desire or occur reciprocally. Competence to make an agreement The parties who make the agreement are legally competent. In principle, every person who is an adult or *akil baliq* and healthy mind is competent according to law. A certain thing as third condition, it is stated that an agreement must be about a certain matter, meaning what is agreed upon, the rights and obligations of both parties if a dispute arises. The type of goods intended in the agreement must be determined at least. A lawful cause the fourth condition for a valid agreement is the existence of a lawful cause. What is meant by the causa of an agreement is the content of the agreement itself, it may not be about something that is prohibited. Related

to this, the nominee agreement does not fulfill the elements of a lawful cause because it involves the transfer of land rights from Indonesian citizens to foreign citizens indirectly which is prohibited in Article 26 paragraph (2) of the BAL. Thus causing the nominee agreement to become invalid/valid and has no legal force that binds the parties" (Jastrawan & Suyatna, 2019).

The validity of the name loan agreement (Nominee) when viewed from the article mentioned above, this agreement violates Article 1320 paragraph (4) namely regarding a lawful cause, this is because the name loan agreement (Nominee) violates Article 21 paragraph (1) of the Law Number 5 of 1960 concerning Basic Agrarian Regulations, the legal consequence is that the agreement is null and void. Null for the sake of law according to Article 1265 states that "A null condition is a condition which if fulfilled will abolish the agreement and bring everything back to its original state, as if there had never been an agreement. This condition does not delay the fulfillment of the engagement; he only obliges the creditor to return what he has received, if the intended event occurs (Larasati & Sudantra, 2013).

Based on the provisions of the Civil Code above, agreements with nominee agreement are not known or regulated. In the practice of land ownership, the only way to “give foreigners the possibility to own land that is prohibited by the BAL is by borrowing the name (Nominee) of a Balinese in buying and selling, so that formally it does not violate regulations. However, if examined further, regarding Article 1320 of the Civil Code regarding the validity of an agreement in the fourth condition which states that the cause is lawful (Jastrawan & Suyatna, 2019). Therefore, in view of Article 26 paragraph (2) of the BAL which states that "Any sale and purchase, exchange, gift, gift by will and other acts intended to directly or indirectly transfer property rights to foreigners, to a citizen who, in addition to Indonesian citizenship, has foreign citizenship or to a legal entity, except for those stipulated by the Government referred to in Article 21 paragraph (2), is null and void because the law and the land fall to the State, provided that the rights of other parties burdening them remain in progress and all payments that have been received by the owner cannot be claimed again. Thus, the agreement made has legal consequences, namely null and void. If one looks at the "object of agreement, namely land, the land which became object of this agreement will become a prohibited object when its ownership is transferred from Balinese to foreigners through this nominee agreement" (Hetharie, 2015). The problem arises when the foreigner borrows Balinese names, but the land is controlled and even owned by foreigners.

The foreigner is said to own land, because behavior shown to the land as if owner of the land and is in full possession of land rights. Meanwhile, the Balinese who lent their names are not allowed to control let alone own the land. The Balinese are only allowed to enjoy their rights as stated in the agreement. "According to Indonesian contract law, a person is free to enter into an agreement with any party he wants, in accordance with the principle of freedom of contract. The law only regulates certain people who are incompetent to make agreements, arrangements regarding this matter can be seen in Article 1320 of the Civil Code. From this provision it can be concluded that everyone is free to choose the party he wants to make an agreement, as long as that party is not an incompetent party. The provisions in the civil law give freedom to foreigners and Balinese to enter into loan agreements. In this case, permissibility surely has been agreed upon by both parties.

3.2. Nominee Agreement as a Solution for Land Control by Foreigners

Bali as one of the developing areas which is a land area and islands and has natural wealth and culture or traditions has attracted many foreign nationals to invest in Indonesia. Besides that, the development of investment in Indonesia is inseparable from the existence of mixed marriages between Indonesian citizens and foreign citizens as one of the solutions for foreigners to have ownership rights to land in Bali. Several areas in Bali, especially in this case the regency and city areas, as well-known tourist areas to foreign countries have become one of the destinations for various parties to invest, both domestic and foreign investors (Sari & Darmawan, 2015).

The areas that became targets of these foreigners are in fact areas that provide very large profits or maximum benefits so that the areas chosen by foreigners are strategic areas, therefore foreigners are obliged to own land, "The investor is not a party entitled to own land with ownership rights in the territory of Indonesia. For example, foreign citizens who intend to build a residence or company in Indonesia (Dharma et al., 2016). For that, foreigners definitely need land as a place of business or residence and a nominee agreement is the solution.

The Agrarian Law regulates land allotment for Indonesians based on the state constitution. Its partiality can be seen in “only Indonesian citizens have the right to own land in Indonesia.” These conditions make investors concerned to find other ways to deal with this matter (Putrayasa & Sukranatha, 2019). This method was circumvented by foreigners who surely have an interest in the land. The interest is "by making a nominee agreement between Indonesian citizens and foreign citizens, namely by using the name of another party who is an Indonesian citizen who is appointed as a nominee to be registered as the owner of the land" (Putrayasa & Sukranatha, 2019).

In connection with that, "a nominee agreement is an agreement entered into by foreign citizens with Indonesian citizens in carrying out legal actions, namely carrying out buying and selling activities on land objects in Indonesian territory by borrowing the names of Indonesian citizens" (Savitri & Purwani, 2013). Furthermore, the Indonesian citizen takes legal action in the process of buying and selling transactions based on statutory provisions and then registers at the land office in accordance with the ownership rights to the land listed in the name of an Indonesian citizen.

According to I Nyoman Employees as an intermediary for buying and selling land, that "This nominee agreement, between foreigners and Balinese people since the beginning of the agreement there is bad faith from foreigners to violate the provisions of agrarian regulations with the intention of being able to own and control land in Indonesia with ownership rights. This bad intention arises when a foreigner clearly knows that in the provisions of the Basic Agrarian Law (BAL), he cannot own and control land in Indonesia with ownership rights, but in a way that is not justified by law, namely under the guise of a nominee agreement, the foreigner can own and control the land in Indonesia. Bad intentions of this foreigner are also supported by the Balinese whose name was lent for reasons of co-workers, friends, acquaintances, as well as material rewards from foreigners. Apart from the Balinese, the notary/Land Deed Official also legalized the nominee agreement with the words issued in the agreement, even though a notary/Land Deed Official certainly knows the law clearly (interview on 20 June 2021)”.

According to Ni Putu Numawati, an employee of the licensing service bureau office, "the occurrence of a nominee agreement is due to a lack of knowledge, lack of experience and lack of understanding of a notary who always thinks that the deed he makes is valid if the parties have agreed, and each party is able to take legal action. In addition, there are economic-pragmatic factors that are considered by each party, both foreign citizens, Indonesian citizens and notaries to make a nominee agreement as a result of violation of laws and regulations, in this case are Articles 21 and Article 26 of the BAL. (interview on 20 June 2021)". Violation of these articles is a solution to the control of land rights by foreigners in Bali. Whether or not the nominee agreement is valid is determined by the court, not by the parties, not even the notary. If one day there is a dispute between Balinese people and foreigners related to the nominee agreement, it will end in court. Only then will it be known whether the nominee agreement is valid or not.

According to Subekti, "the agreement made between the foreign citizen and the Indonesian citizen is based on a false cause, namely an agreement made on the pretext of hiding a cause which is actually not permissible" (Subekti, 1992). Agreements made by borrowing the name are agreements that are prohibited or not allowed. In principle, the agreement must fulfill a validity. Likewise in nominee agreement, "but often not paying attention to the objects and causes that are allowed" (Winanto, 2003). The provisions of Article 26 paragraph (2) of BAL, then "a nominee agreement is an agreement that was canceled from the start, because the nominee agreement was made illegally, it does not have binding legal force. Because the nominee agreement is an invalid agreement because it has violated the provisions of laws and regulations invitation, especially in this case the provisions of Article 21 paragraph (1) Basic Agrarian Law (BAL)". The Basic Agrarian Principles are very basic provisions in the ownership of land rights in Indonesia.

Basically, Nominee agreement is intended to give all the authority that may arise in a legal relationship between "the person giving the power of attorney over a plot of land which according to Indonesian land law cannot be owned by the Balinese as the recipient of the power of attorney. However, in practice it is possible for a default to occur by the party receiving the power of attorney (Wiratama & Djaja, 2013). The default can also be used as a reason for canceling the agreement. However, in practice nominee agreement is often done because the parties, both foreigners and Balinese, both feel lucky. Foreigners can control land in Bali, so they are free to treat the land. Meanwhile, Balinese people also feel lucky because land certificate is still in his name. With the hope that one day the land will become his property. In this case, "the lack of knowledge of a Notary official who considers that the deed he made is valid if the deed has been approved by the parties without regard to the object of the agreement and the causes allowed by law. The legal consequence of a nominee agreement if a dispute occurs between the parties is an invalid agreement because it has violated the provisions of laws and regulations, then the nominee agreement is an agreement that is canceled from the start. The nominee agreement is null and void because it does not meet the objective requirements. Article 1320 of the Civil Code. As a result of this being null and void, foreign investors are not allowed to invest in Bali for long. However, with the Government regulation (PP) for Residents of Foreigners, it has provided an opportunity for foreigners to invest in Bali for a long time.

4. CONCLUSION

Based on the description of the discussion above, it can be concluded as follows:

1) The legal basis for the nominee agreement is the Civil Code, where in this case nominee agreement does not fulfill the objective of agreement for a cause that is permissible/*halal*. Therefore, nominee agreement does not meet the objective requirements of agreement. As a result of not fulfilling objective conditions.
2) Nominees can be used as a solution in land control by foreigners. Even though the Civil Code and Basic Agrarian Law strictly prohibit ownership, in practice the name borrowing agreement is still carried out by foreigners. In practice, nominee agreements are still made by the parties with the aim of anticipating disputes and legal protection for foreigners. Regarding whether or not, nominee agreement is valid is determined by the court, not by the parties, not even the notary. If one day there is a dispute between Balinese people and foreigners related to the nominee agreement, it will end in court. Only then will it be known whether the nominee agreement is valid or not. In other words, the court has the authority to determine whether a nominee agreement is valid or not.

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