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Auction Winner as a New Criteria in The Concept of Good Faith Buyer in Indonesia

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Abstract

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Good faith is a principle embodied under Article 1338 Paragraph (3) of the Indonesian Civil Code, which is required in every stage of a contract, including in a land sale and purchase contract. Under several decisions of the Supreme Court, good faith is considered to exist, for instance, when a buyer purchased a land through the auction of the State Receivables Affairs Committee (PUPN). Nevertheless, based on a conviction in the judicial practices, this article believes that purchases through official auctions are not necessarily the indicators for the existence of good faith principle in a land sale and purchase contract. Therefore, this study is focused on the concept of good faith buyer with a land object as well as the characteristic of auction winner as a good faith buyer protected by law. In conclusion, parties of a land sale and purchase contract through auction can be considered to have performed in good faith when they have fulfilled the criteria under Supreme Court Circular Letter and other criteria such as purchasing through state auction office in accordance with the applicable laws and regulations, purchasing in a reasonable price, and the auction winner is not the creditor himself who purchases at a price far below the collateral limit price.

Key Words: Good Faith; Sale and Purchase of Land; Good Faith Buyer; Auction.

A. Introduction

Article 1313 Chapter II Book III of Indonesian Civil Code defines contract as: “an act pursuant to which one or more individuals commit themselves to one another”. In other words, a contract is a situation when an individual promises to perform something with another individual or both of them promise to perform something (*overeenkomst*). The understanding of the contractual stages is divided into three stages, which include contract drafting stage (*precontractuele fase*), implementation stage (*contractuele fase*), and stage after contract implementation (*postcontractuele fase*).¹ In addition to fulfilling the requirements for validity of a contract as stipulated in Article 1320 BW, an contract must also be carried out in good faith according to the provisions in Article 1338 paragraph (3) of the Indonesian Civil Code. This principle requires contract to be based on good faith and propriety. Thus, it can be interpreted that honesty must be applied in the construction of a contract in order to achieve common goals. The implementation of the contract's substance between the parties must also be in accordance with the value of propriety in society. The said principle must exist in every contract and cannot be eliminated even if it is being agreed by the parties (*immutable*). If the provision of good faith is deviated, it could be ascertained that the contract's implementation may harm either one or all parties in the contract.

Normatively, besides being based on Article 1338 (3) of Indonesian Civil Code, the regulations on good faith are also regulated under Article 531 of the Indonesian Civil Code, which contains indication that *bezit* is in good faith if holder of authority “acquires the asset by obtaining its property rights wherein he is unaware of the defects or deficiencies therein”. Such normative provision functions as legal protection when there is a dispute on a land sale and purchase contract. In its implementation, the said provision became the basis for the belief in the judicial system that a good faith buyer has the right to obtain legal protection. However, it has become dilemmatic

¹ Ridwan Khairandy, *Itikad Baik dalam Kebebasan Berkontrak*, Jakarta: Fakultas Hukum Universitas Indonesia, 2005, p. 190

since good faith has yet to be defined under any laws and regulation. Thus, the regulations on good faith under the Indonesian Civil Code cannot minimize or eliminate potential occurrence of bad faith in an contract, including in a land sale and purchase contract. This fact is based on the data of the Directorate General of Land Disputes and Conflicts Handling, wherein the number of resolved land disputes/ conflicts in 2015-2019 period is 3.179 cases, and one of the cases that often arise is the result of land transfer through the sale and purchase contract.² The said data proves that the regulation on land sale and purchase contract in Indonesia has not been capable in suppressing the possibility of bad faith undertaken by one or all the parties.

Based on the above-mentioned issue, the formulation of problems are: first, what is the concept of good faith buyer with a land object? Second, the characteristic of auction winner as a good faith buyer protected by law. The aim of this article are first, to analyze the concept of good faith buyer with a land object. Second, to construct the new criteria of auction winner as a good faith buyer protected by law. This research uses a juridical normative research method³ because the focus of this article is to find the construction of the auction winner as a good faith buyer in Indonesian regulation which there is still exist legal vacuum (*leemten in het recht*) related to these criteria.

The approaches used in this research are the conceptual approach and statute approach. The conceptual approach aims to deepen understanding of the concepts and legal principles related to the issues at hand, which relate to the principles of good faith in the land sale and purchase. This approach is carried out by reviewing the opinions and understandings on legal science that can provide explanations for the author to find out notions so that the understanding

2 Department of Public Relations, Ministry of Agrarian and Spatial Planning / National Land Agency, "Cegah Masalah Pertanahan Melalui Peran Pimpinan", <https://www.atrbpn.go.id/?menu=baca&kd=i3XKbxqIscX3i+3rG40YZWSP8wHMH6+Lyl1iZWfjE2Og+6SxV/5MIqliw/+GB/yjK> accessed 12 November 2020.

3 Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, Jakarta: Rajawali Press, 2001, p. 13-14.

is manifested. Meanwhile, the statute approach is an approach which examines the legal regulations on land sale and purchase contract. This approach is carried out by reviewing the legislative regulations in Indonesia, also those related regulations outside of the legislative regulations, such as Circular Letters of the Supreme Court and Supreme Court Jurisprudence.

A number of researches have been done to discuss the definition of a good faith buyer. Such articles like “Legal Protection for Good Faith Buyers in the Sale and Purchase of Land”⁴ and “Legal Review on Good Faith in the Sale and Purchase of Land,”⁵ focus on the concept of good faith, this article goes further by explaining the criteria of when an individual shall be categorized as a good faith buyer in a land sale and purchase contract through auction. It provides more comprehensive understanding regarding the application of good faith in land sale and purchase contract through the auction which has consequences for legal protection for good faith parties therein.

B. The Concept of Good Faith Buyer with Land as an Object

1. The Concept and Regulation of Good Faith in Indonesia

Article 1338 of the Indonesian Civil Code contains fundamental principles for contract, which include the principle of consensualism, freedom of contract, contract binds as law (*pacta sunt servanda*), good faith principle (*bona fides*), and etc.⁶ One of the principles that has an essential role in Article 1338 BW is the good faith principle, as

⁴ Hamdaliah, “Perlindungan Hukum bagi Pihak Pembeli yang Beritikad Baik dalam Jual Beli Tanah”, *Lambung Mangkurat Law Journal*, Banjarmasin, Universitas Lambung Mangkurat, Vol.1, No.2, 2016, p. 150-169.

⁵ Ashar Sinilele, “Tinjauan Hukum terhadap Itikad Baik dalam Jual Beli Tanah Jurisprudentie”, *Jurisprudentie*, Makassar, Faculty of Sharia and Law, Hukum Universitas Negeri Alauddin Makasar, Vol. 4, No. 2, 2017, p. 75-82.

⁶ Faizal Kurniawan, Xavier Nugraha, Luisa Srihandayani, “Implementing the Undue Influence Doctrine (Misbruik Van Omstandigheden) as a Reason for Annulment of Agreement in Indonesia: An Evolution of the Law Through Court Decisions”, *Journal of Talent Development and Excellence*, Vol.12, Num. 1, 2020, p. 3038-3039.

stipulated under Article 1338 Paragraph (3) BW. Further assessment indicates that, even though good faith has a fundamental position in Article 1338 of the Indonesian Civil Code, there is no explanation regarding the definition of good faith principle in the Indonesian Civil Code and other laws and regulations, whereas to understand a legal concept holistically, one must understand the definition first. This is in line with the classic adagium: "*Ad Recte docendum oportet primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet*", which means to understand something, it is necessary first to know its name, in order to obtain the correct knowledge.⁷

The meaning of good faith originated from the Hoge Raad Decision on February 9, 1923 (*Nederlandse Jurisprudentie*, p. 676), which provided a notion that a contract must be carried out with "*volgens de eisen van redelijkheid en billijkheid*", which means good faith must be implemented based on propriety and appropriateness. Propriety and appropriateness refer to "*redelijkheid en billijkheid*", which means covering all things that can be accepted by good reason, fair, and just, based on the objective norms that do not originate from the subjectivity of the parties.⁸ Thus, based on the said Hoge Raad Decision, a good faith contract is interpreted as a contract carried out in a proper and appropriate way, which is implemented properly, fairly, and justly based on objective norms. In case such contract is not carried out in good faith, then based on Article 1338 paragraph (3) *jo*. Article 1339 of the Indonesian Civil Code, the contract becomes null and void, and it does not bind the parties.⁹

Most jurisdictions in the world recognize the principle that par-

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- 7 Xavier Nugraha, John Eno Prasito Putra, Krisna Darari Hamonangan Putra, "Analisa Daluarsa Gugatan Pembatalan Perjanjian Akibat Adanya Penyalahgunaan Keadaan (*Misbruik Van Omstandigheden*)". *Galuh Justisi*, Vol. 8, Num. 1, 2020, p. 60.
 - 8 P.L. Werry cited by Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial*, Second Edition, Jakarta: Kencana Prenada Media Group, 2011, p. 135.
 - 9 Wahid Patrik cited by Tami Rusli, "Asas Kebebasan Berkontrak Sebagai Dasar Perkembangan Perjanjian Di Indonesia", *Jurnal Ilmu Hukum: Pranata Hukum*, Bandar Lampung, Universitas Bandar Lampung, Vol. 10, Num. 1, 2015, p. 24.

ties must fulfill their obligation in a contract based on good faith. In the United States of America, this principle is exclusively embodied under the Uniform Commercial Code, which stipulates that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement". However, this is slightly different from that in the United Kingdom, where there is no specific recognition of the principle of good faith in commercial contracts. Thus, there is no obligation for the parties who enter into the contract to apply the general principles of good faith. Good faith obligation can only be implied if it aligns with the parties' conscious intentions and contractual relationship.¹⁰

Conceptually, the good faith principle has undergone many developments. One of the developments is the differentiation related to good faith, which makes it divided into two types, namely subjective good faith and objective good faith.¹¹ First, good faith is subjective. This good faith begins when a legal relationship takes effect, which is usually in the form of a person's estimation that the conditions necessary for commencement of legal protection have been met.¹² In this condition, the law protects the party with good faith, while the party who does not have good faith (*te kwader trouw*) must be responsible and bear the risks. Second, good faith is objective, which is contained in the implementation of rights and obligations under the legal relationship. This good faith focuses on the actions of both parties as to the implementation of a certain matter.¹³

The above concept leads to the conclusion that good faith is divided into good faith at the time of legal relationship comes into effect and good faith at the time of exercising rights and obligations in a legal relationship. In the Indonesian Civil Code, the provision

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10 Jeannie Marie Paterson, "Good Faith Duties in Contract Performance", *Oxford University Commonwealth Law Journal*, 14:2,2014, p. 283-309.

11 Subekti, *Hukum Perjanjian*, Jakarta: Intermedia, 2008, p. 7.

12 Barnabas Dumas Manery, "Makna Dan Fungsi Itikad Baik Dalam Kontrak Kerja Konstruksi", *Sasi*, Ambon, Universitas Pattimura, Vol.23, Num. 2, 2017, p. 140.

13 Wirjono Prodjodikoro, *Asas-Asas Hukum Perdata*, Bandung: Sumur, 1992, p. 56-62.

which contains good faith principles can be found under Article 1963; Article 1977 Paragraph (1); and Article 1338 Paragraph (3) with the following analysis:

Table 1. The **Concept of Good Faith Based on the** Indonesian Civil Code

Article	Explanation
<p>Article 1963 An individual, who in good faith, and pursuant to a legal title, acquires immovable assets, interest, or several other acknowledgments of indebtedness which do not have to be paid to 19rer, shall acquire ownership thereof by prescription, after possessing such for a period of twenty years. An individual, who in good faith, possesses something for thirty years, shall acquire ownership thereof, without having to prove title thereto.</p>	<p>Article 1963 of the Indonesian Civil Code contains the meaning that good faith is a form of goodwill or honesty when someone starts to possess an asset it is assumed that the conditions needed to obtain said asset has been met.</p>
<p>Article 1977 paragraph (1) With regard to movable assets which do not comprise interest or debts which are not payable to bearer, the possession of such shall constitute absolute ownership</p>	<p>Whereas the existence of good faith in Article 1977 paragraph (1) relates to the way a third party obtains an asset due to ignorance of the ownership upon the defect can be forgiven with certain conditions.¹⁴</p>
<p>Article 1317 paragraph (3) Contract shall be executed in good faith.</p>	<p>This article indicates that good faith is the basis for carrying out all stages of the contract. The parties in carrying out all stages of the contract must pay attention to the principles of good faith by applying the norms of compliance and morality and not violating the decency and justice norms.</p>

Based on the above table, it can be concluded that the good faith under Article 1963 and 1977 paragraph (1) are subjective good faith, which begins when a legal relationship takes effect, whereas the

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14 Fitria Hudaningrum, "Hubungan Antara Asas Kebebasan Berkontrak, Pacta Sunt Servanda, dan Itikad Baik", *Jurnal Repertorium*, Surakarta, Faculty of Law, Universitas Sebelas Maret, Vol. 1, Num. 2, 2014, p. 48.

good faith under Article 1338 is an objective good faith that covers the whole contractual stages.

2. *The Characteristic of Good Faith Buyer with Land as an Object*

The existence of dilemmas on whether good faith exists within contracts often occurs. One of them is on land sale and purchase contract which concerns the legal concept of transfer of land ownership. In practice, to determine whether there is good faith in the land sale and purchase, the Supreme Court has interpreted the definition of a good faith buyer even before the issuance of Law Number 5 of 1960 on The Basic Principles of Agrarian Law (UUPA). Among these interpretations are Decision Number 112 K/Sip/1955 and Decision Number 3447 K/Sip/1956. In both decisions, the Supreme Court defined a good faith buyer as a buyer who did not presume that the seller was not the only person entitled to the object. Furthermore, The Supreme Court, through Decision Number 242 K/Sip/1958, also stated that a good faith buyer is the one who was unaware of the existence of legal defects in the sale and purchase activity conducted. Therefore, it can be concluded that before the enactment of UUPA, the interpretation of good faith was based on those two conditions. First, the buyer did not presume that the seller was not the only person entitled to the object of sale and purchase. Second, the buyer was unaware of the legal defects in the said sale and purchase.

In 1960, the Government enacted UUPA in order to realize the existence of the unification of agrarian law, which was relevant to the nation's personality and spirit of unity.¹⁵ With the promulgation of UUPA, it simultaneously revoked the provisions within the Indonesian Civil Code that relates to land, earth, water, and the assets contained therein. As the law that regulates the land, UUPA provides the principle of legal certainty as contained in Article 19 paragraph (1) by the way the government conducts land registration through-

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15 Unip Santoso, *Hukum Agraria: Kajian Komprehensif*, Surabaya: Prenada Media, 2017, p. 67.

out Indonesia. Further provisions regarding the land registration are regulated under Government Regulation Number 10 of 1961 and Government Regulation Number 24 of 1997, which regulates the registration of land in the context of *rehtcadaster* to provide legal certainty and protection for land rights holders.¹⁶

The final output from the implementation of registration mechanism regulated under UPPA, Government Regulation Number 10 of 1961, and Government Regulation Number 24 of 1997 are the land book and land certificate which consists of an excerpt of the land book and measurement certificate. With land registration, a certificate acts as a publication that can become a powerful evidence of land ownership.¹⁷ The issuance of certificate must also be based on the good faith principle in which the person who obtains a right in good faith will remain as the legal right holder according to the law (positive publication system).¹⁸ In addition, there is also a principle of *nemo plus iuris*, which means that a person cannot transfer rights beyond his existing rights (negative publication system).¹⁹

In Indonesia, the issuance of a land ownership certificate can indeed be a strong evidence of land ownership, but this does not apply absolutely. This refers to the elucidation of Article 32 of Government Regulation Number 24 of 1997, which stated that in the event that it is unable to be proven otherwise, physical and juridical data written in the certificate must be deemed correct. Thus, when a party can prove otherwise, it can be the basis to annul the issuance of a certificate. Based on that circumstance, it can be concluded that the publication system of land registration in Indonesia uses the negative publication system with a positive tendency.²⁰ The positive tendency

16 Eri Karini, "Pendaftaran Tanah Sebagai Upaya Perlindungan Hukum Bagi Pemegang Hak Atas Tanah Dan Peranan Panitia Ajudikasi Dalam Proses Pendaftaran Tanah", *Asas Jurnal*, Lampung, Universitas Raden Intan, Vol. 10, Num. 1, 2018, p. 181.

17 Arie Sukanti, *Tebaran Pemikiran Seputaran Hukum Tanah*, Jakarta: Lembaga Pemberdayaan Hukum Indonesia, 2005, p. 81.

18 Adrian Sutedi, *Peralihan Hak Atas Tanah dan Pendaftarannya*, Jakarta: Sinar Grafika, 2010, p. 117.

19 *Ibid*, p. 118.

20 Bronto Susanto, "Kepastian Hukum Sertipikat Hak atas Tanah berdasarkan

protects people who transfer their land rights in good faith.

Furthermore, under Article 32 paragraph (2) of Government Regulation Number 24 of 1997, it is stated that in the event there exists a party claiming legal rights on a land which certificate has been legally issued in good faith, and actually possess it, the party is entitled to file a lawsuit only within a period of 5 (five) years from the issuance of the certificate. In practice, even certificates that have been issued for more than 5 (five) years still often be questioned both in the District Court (PN) and in the State Administrative Court (PTUN). However, the defendant commonly would fail in filing a demurrer on the basis of expiration since the judge considered that the national land law favors customary law that does not recognize *verjaring* (expired) institutions. One of them can be seen in the Decision of PTUN Bandung Number 64/G/2010/PTUN-BDG on 22 March 2011. In that decision, 62 certificates that have been issued for more than five years were annulled, among them were: Certificate of Ownership Number 911/Sub-District Cinangka issued on 19 April 1980 with the Site Plan Number: 1446/1979, Certificate of Ownership Number: 912/Sub-District Cinangka issued on 19 April 1980 with the Site Plan Number: 1447/1979, and Certificate of Ownership Number 913/Sub-District Cinangka issued on 9 April 1980 with the Situation Picture Number: 1448/1979.²¹

Concerning the existence of good faith principle in the land sale and purchase contract, judges' considerations in several Supreme Court (MA) decisions can also be reviewed. Among them are Supreme Court Decision Number 350 K/Sip/1968 and Number 3604 K/Pdt/1985, which stated that good faith is considered to exist when the buyer purchased the land through the auction of the State Receivables Affairs Committee (PUPN). In both decisions, substantially, the

Peraturan Pemerintah Nomor 24 Tahun 1997", *DiH: Jurnal Ilmu Hukum*, Surabaya, Doctor of Law, Faculty of Law, Universitas 17 Agustus 1945 Surabaya, Vol. 10, Num. 20, p. 76.

21 Putu Ade Harriestha Martana, "Perlindungan Hukum Bagi Pemegang Sertifikat Hak Milik Atas Tanah Dalam Ketentuan Pasal 32 Ayat (2) Pp No. 24 Tahun 1997", *Jurnal Magister Hukum Udayana*, Denpasar, Master of Law, Univeristas Udayana, Vol 3, Num. 1, 2014, p. 13.

judge considered that buyers who legally purchased land through the PUPN auction must be protected by law since the juridical submission has been fulfilled, as much according to law, it must be deemed to have been legally transferred. However, a purchase through an official auction is not merely an indicator of the existence of good faith. Referring to the Supreme Court Decision Number 252 K/Pdt/2002, the auction winner is the creditor himself who purchases at a price far below the collateral for his credit. On the other hand, the Court in its decision not only considered the rights of buyers who believe that they have obtained it correctly, but also considered the rights of the holders of the original land rights. Such considerations can be seen from the Supreme Court Decision Number 1816 K/Pdt.1989 and Decision Number 4340 K/Pdt/1986, in which the judge stated that the buyer did not have good faith as he did not examine material facts related to the purchase he made, including the rights and status of the seller.

To create a benchmark for judges in deciding similar cases, through the Plenary Meeting of the Civil Chamber, the judges discuss and form an understanding that is subsequently outlined in the Supreme Court Circular (SEMA). Point VII of SEMA Number 7 of 2012 states that "Mortgage holders who have good faith must be protected even though it is later discovered that the guarantor of the mortgage right is an unauthorized person." Furthermore, point IX also contains a substance which states, "Protection must be given to buyers in good faith even though it is later discovered that a seller is an unauthorized person (in the sale and purchase of land). The origin owner can only file a claim for compensation against the seller who is not entitled." On those bases, SEMA Number 7 of 2012 clearly provides strong protection for good faith buyers".

Even though there has been sufficient protection for good faith buyers through SEMA Number 7 of 2012, the SEMA does not contain clear criteria regarding its definition. In order to strengthen good faith buyers of land objects, through SEMA Number 5 of 2014 concerning the Enforcement of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber of 2014 as Guide-

lines for the Implementation of Duties for Courts, the criteria of buyers that must be protected are formulated. Criteria of good faith buyers that need to be protected under Article 1338 paragraph (3) Indonesian Civil Code are as follows:

- a. Carrying out the land sale and purchase using legal procedures and documents as stipulated in the statutory regulations, namely: The purchase of land through the public auction or; The purchase of land before the Land Deed Official (in accordance with the provisions of Government Regulation Number 24 of 1997) or; The purchase of customary/unregistered land carried out in accordance with the provisions of customary law, namely made in cash and transparently (before/known by the local Village Head/Head of Sub-District).
- b. Conducting due diligence by examining matters related to the agreed land object, such as: The seller is an individual who entitled/has the rights upon the land, which is the object of sale and purchase, subject to proof of ownership, or; Land / object of sale and purchase does not fall under confiscation status, or; The land object of sale and purchase does not fall under collateral or security right status, or; For the certified land, National Land Agency (BPN) information and history of the legal relationship between the land and the certificate holder have been obtained.

Through SEMA Number 5 of 2014, it can be found that good faith in a sale and purchase of land, which has so far been vague and has not been defined in statutory regulations, is strengthened by two main criteria. First, the land sale and purchase must be carried out lawfully and in accordance with statutory regulatory procedures. Second, in carrying out these actions, due diligence must be applied, such as by examining the material facts and the validity of the transfer of rights to the land purchased. If the buyer proceeds to carry out the sale and purchase action even though it is known that there is a defect in the process of transferring the land rights, the buyer cannot be considered as having good faith. During its development, these criteria were refined through SEMA Number 4 of 2016 by adding more specific criteria for the purchase of customary/unregistered

land and related to the purchase at a reasonable price. Therefore, in SEMA Number 4 of 2016, the following criteria are formulated:

- a. Carrying out the land sale and purchase using legal procedures and documents as stipulated in the statutory regulations, namely: The purchase of land through the public auction or; The purchase of land before the Land Deed Official (in accordance with the provisions of Government Regulation Number 24 of 1997) or; The purchase of customary/unregistered land carried out in accordance with the provisions of customary law, namely made in cash and transparently (before/know by the local Village Head/Head of Sub-District) and preceded by research on the status of the land object of sale and purchase, which shows that it belongs to the seller; The purchase carried out at a reasonable price.
- b. Conducting due diligence by examining matters related to the promised land object, such as: The seller is an individual who entitled/has the rights upon the land, which is the object of sale and purchase, subject to proof of ownership, or; Land/object of sale and purchase does not fall under confiscation status, or; The land object of sale and purchase does not fall under collateral or security right status, or; For the certified land, BPN information and history of the legal relationship between the land and the certificate holder have been obtained.

Based on the substance of SEMA above, there exist a number of significant differences between SEMA Number 5 of 2014 and SEMA Number 4 of 2016. First, concerning the purchase of customary/unregistered land carried out in accordance with the provisions of customary law. In the provisions under SEMA Number 5 of 2014, customary land purchase only contains the criteria of made in cash and transparently. These criteria are different from the renewal of the provisions contained in SEMA Number 4 of 2016. Besides being made in cash and transparently, these criteria are added by an obligation to research the land status to find out that the seller really owns the land. Second, in relation to the purchase price, every purchase of land objects must be made at a reasonable price.

The enactment of SEMA Number 4 of 2016 has created the

criteria of good faith buyer comprehensively, which then concretely applied by the judges to assess whether a buyer should be protected. One of them is the Purwokerto District Court Decision Number 28/Pdt.G/2019/PN Pwt. SEMA Number 4 of 2016 became one of the bases of legal reasoning in the judge's decision. The panel of judges views that, the sale and purchase, in that case, has been carried out in accordance with the applicable local customary law, in which at the time the buyer has paid the price of the land to the seller, the land is transferred from the seller to the buyer (the buyer possessed the land), and also such sale and purchase has been carried out with due diligence by examining the issues on the agreed land object according to SEMA Number 4 of 2016, as an evidence to prove that by the absence of other parties objections upon the possession of that land, means that the buyer is a good faith buyer who needs to be protected. Thus, it can be concluded that SEMA Number 4 of 2016, which determines the criteria of a good faith buyer, in addition to setting a guideline for judges to determine whether good faith in the sale and purchase exists, also simultaneously provides legal certainty for buyers who purchase land in good faith.²²

To simplify the understanding of the concept of good faith, whether in the land sale and purchase, Indonesian Civil Code, UUPA, Jurisprudence, or even SEMA, it can be seen from the Table 2.

C. The Characteristic of Auction Winner as a Good Faith Buyer Protected by Law

1. The Concept and Regulation of Auction Winner in Indonesia

There are two methods in order to gain land rights which are *originair* and derivatives. Firstly, *originair* acquisition of land rights refers to land rights that are obtained from the State's land or other parties. The examples of obtaining land rights from the State's land and other

22 Fadhila Restyana Larasati dan Mochammad Bakri, "Implementasi Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016 pada Putusan Hakim dalam Pemberian Perlindungan Hukum bagi Pembeli Beritikad Baik", *Jurnal Konstitusi*, Vol 15, Num. 4, 2018, p. 884.

Table 2. Timeline of Good Faith Concepts under the Indonesian Civil Code, UUPA, Jurisprudence, and SEMA

	Timeline	Substance
Indonesian Civil Code	<ul style="list-style-type: none"> - Article 1338 paragraph (3) - Article 1963 - Article 1997 paragraph (1) 	<p>Conceptually, good faith is divided into two :</p> <ol style="list-style-type: none"> 1. Objective good faith (Article 1338 paragraph (3)) 2. Subjective good faith (Article 1963 and Article 1977 paragraph (1)) <p>Neither in BW nor other laws and regulations can be found a definition of good faith.</p>
UUPA	<ul style="list-style-type: none"> - Article 19 paragraph (1) UUPA - Article 32 Government Regulation Number 24 of 1997 	<p>Land registration in Indonesia uses a negative publication system with a positive tendency.</p> <p>This positive tendency protects people who transfer their land rights in good faith.</p>
Jurisprudence	<ul style="list-style-type: none"> - Supreme Court Decision Number 252 K/Pdt/2002 - Supreme Court Decision Number 1816 K/Pdt.1989 - Supreme Court Decision Number 4340 K/Pdt/1986 	<p>Supreme Court Decision Number 252 K/Pdt/2002 good faith is considered not to exist since the auction winner is not a creditor himself who purchases at a price far below the collateral limit price.</p> <p>Based on Supreme Court Decision Number 1816 K/Pdt.1989 and Decision Number 4340 K/Pdt/1986, the buyer is considered to have no good faith since the buyer did not examine the material facts and the rights and status of the sellers.</p>
SEMA	<ul style="list-style-type: none"> SEMA Number 7 of 2012 SEMA Number 5 of 2014 SEMA Number 4 of 2016 	<p>SEMA Number 7 of 2012 protects holders of mortgage rights and good faith buyers, albeit it is later discovered that the guarantor or seller is unauthorized.</p> <p>Through SEMA Number 5 of 2014 and SEMA Number 4 of 2016 defined the existence of good faith when:</p> <ol style="list-style-type: none"> 1. The land object sale and purchase carried out through lawful procedures and documents according to the laws and regulations. 2. Apply due diligence or precautionary measures by examining issues on the agreed land object.

parties are Rights of ownership, Rights of cultivation, Right to use, and Right to manage. Second, Derivative acquisition of land rights is a land right that is obtained in derivative ways, namely through legal action such as inheritance or legal action such as the transfer of rights over land in the form of sale and purchase, exchange, grant, and auction.²³

One of the transfers of rights over land objects that often occur is the transfer due to auction. The term auction is regulated in Article 1 *Vendu Reglement* or the Auction Law, which is a Dutch colonial legacy and is valid until today,²⁴ namely : "Regular Sales" (*openbare verkopeningen*) is an auction or sale of goods which is carried out to the public with an increase or decrease in price or by putting a price inside a closed envelope, or to the people who were invited or previously notified about the auction or sale, or permitted to participate, and given the opportunity to bid on the price, agree on a price offered or entered a price on a closed envelope.²⁵ This definition was later regulated technically under Article 1 *Minister of Finance Regulation 27 /PMK.06/2016 Regarding the Instructions for the Implementation of Auction*, which stipulates, "Auction is the sale of goods open to the public with a written and/or verbal price offer which increases or decreases to reach the highest price, preceded by an Auction Announcement".

The land auction mentioned here is the sale of land rights or ownership of a flat (or apartment) open to the public by the auction office.²⁵ Further, the District/City Land Office issued a Land Registration Certificate. With the highest price-setting preceded by an auction announcement. The object of land auction is land rights, both registered and unregistered, and ownership of flats or apartment units that stands on rights of ownership, right to build, or rights to

23 Urip Santoso, *Op.Cit.*, p. 181

24 Adwin Tista, "Perkembangan Sistem Lelang di Indonesia", *Al-Adl: Jurnal Hukum*, Banjarmasin, Universitas Islam Kalimantan Muhammad Arsyad Al Banjari, Vol. 5, Num. 1, 2013, p. 46.

25 Kathleen C Pontoh, "Aspek Hukum Pemindehan Hak Atas Tanah Melalui Proses Lelang di Indonesia", *Lex Et Societatis*, Manado, Universitas Sam Ratulangi, Vol. 6, Num. 4, 2018, p. 149.

use over the State's land.²⁶

According to the Third Paragraph Number 5 of General Elucidation of Law Number 4 of 1996 on Mortgage Rights, the auctioned land must have been encumbered with a land mortgage since it is the only security right on the land. The implementation of the mortgage execution auction is an application of Article 6 of Law Number 4 of 1996 on Mortgage Rights, in which if the debtor is in default, the creditor has the right to sell the object of the mortgage upon his own will through public auction. This method aims to obtain the highest price for the mortgage object to pay off debts from debtors to creditors.²⁷ The auction execution of mortgage rights is carried out by the State Wealth and Auction Service Office (KPKNL) as the agency that possesses the authority to do so. The auction conducted by the KPKNL is done based on the provisions of the applicable laws.

In the auction of a land object, the seller is obliged to have a Certificate of Land in accordance with Article 25 paragraph (1) of the Regulation of the Minister of Finance Number 27/PMK.06/2016 on Instructions for Implementation of Auctions that regulated, "Implementation of auction of goods in the form of land or land and buildings must be equipped with Registration Letter (SKT) or Land Registration Certificate (SKPT) from the local Regional Land Office." The provision in this article requires an individual who will sell any land or building through auction by KPKNL to complete these requirements in order to justify the ownership status of the object.²⁸

Based on the Minister of Finance Regulation Number 27/PMK.06/2016, prior to the auction, the Head of KPKNL/Auction officials appointed to carry out an auction of a certain object, must conduct verification (checking) of the required documents for auction, so that the Head of KPKNL/Auction Officials received information regarding the formal legality of the subject and object of the auction.

26 Urip Santoso, *Pendaftaran dan Peralihan Hak Atas Tanah*, Jakarta: Kencana, 2010 p. 383.

27 Adrian Sutedi, *Hukum Hak Tanggungan*, Jakarta: Sinar Grafika, 2010, p. 128.

28 Made Ray Adityanata, I Nyoman Bagiastra, "Upaya Memperoleh Kepastian Hukum Demi Hak Dari Pemenang Suatu Lelang" *Jurnal Kertha Semaya*, Faculty of Law, Universitas Udayana Vol. 8 No. 5 Tahun 2020. p. 783

Thus, it confirmed that the auction carried out by the auction official has met the requirements and can be carried out in accordance with the applicable procedure so as not to cause legal defects and the appointment of the auction winner is legally valid.

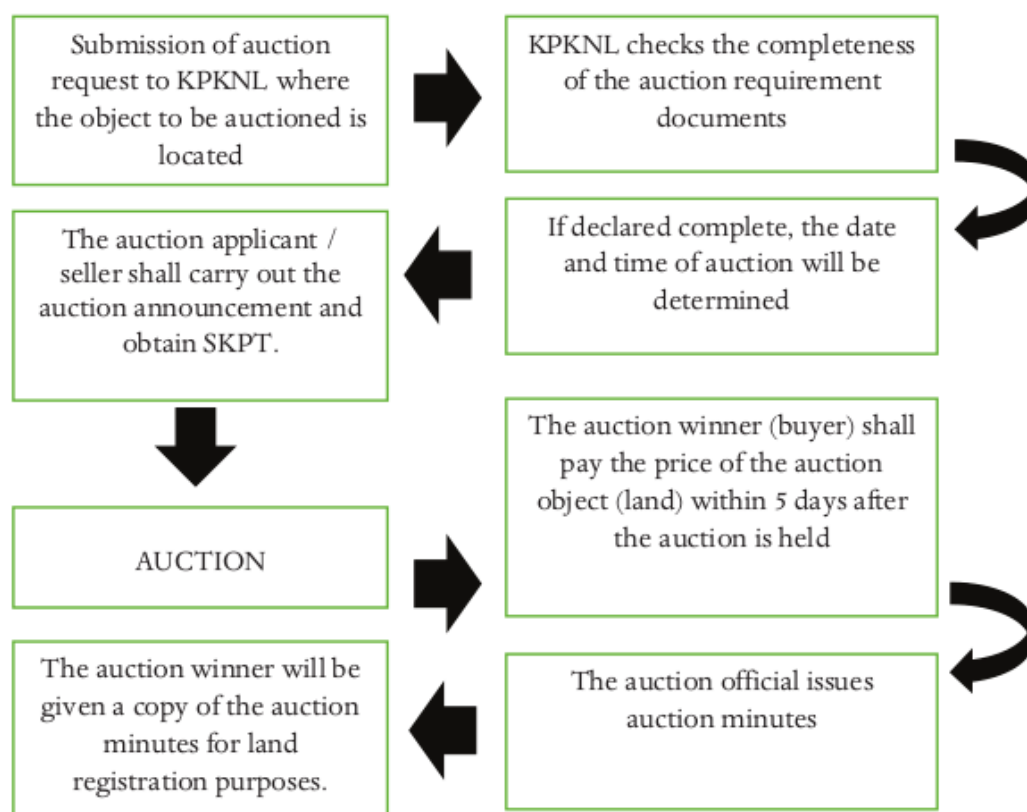
Prior to the auction, the seller is obliged to announce the object that will be auctioned. This announcement's issuance has provided an opportunity for third parties who feel aggrieved to file a lawsuit before the auction. The acquittal of Auction Payment by the Buyer is made through the account of KPKNL or Auctionhouse or a particular account in the name of the Class II Auction Officer or directly to the KPKNL Receiving Treasurer / Class I Auction Official / Auctionhouse / Class II Auction Official. In the event that the Seller submits the original ownership documents to the Auction Officer, the Auction Official is obliged to submit it and/or the object that is being auctioned to the Buyer. Such action must be performed in no later than 1 (one) business day after the Buyer shows the receipt or proof of payment settlement and submit the proof of payment for Duty on the Acquisition of Land and Building Rights (BPHTB) if the auctioned object is in the form of land and/or building.

After the buyer has paid off the auction object, the auction official will legally issue minutes of the auction and declare the buyer as the winner of the auction. According to Article 1 Number 35 Regulation of the Minister of Finance Number 27 / PMK.06 / 2016, minutes of the auction is minutes of implementation of auction prepared by the auction official. This document is an authentic deed and has impeccable evidentiary power.

After the issuance of the auction report or the auction minutes by the official from the Auction Office, there has been a transfer of land rights from the original right holder as auction seller to another party as auction buyer. However, such transfer of rights is only known by both parties, the third party has no knowledge on it. Thus, afterward, the auction must be registered at the local District / City Land Office since land registration has an open nature.²⁹

²⁹ Urip Santoso II, *Op.Cit.*, p. 388.

Figure 1. Land Auction Procedure Through KPKNL



2. Action Winner as a Good Faith Buyer

Legally, the auction winner has legal certainty for the auction object he purchased.³⁰ Suppose there is a claim by a third party to the District Court regarding the auction object, in that case, it does not significantly affect the validity of ownership of the object as long as the auction process is carried out in accordance with the applicable procedure. Based on the consideration that the object is being sold through an auction process, the Auction Office as the authorized person, has guaranteed that the seller of the auction objects are clearly known and the requirements for auction registration have been fulfilled. Further, before the auction official grants the auction request, the auction official must verify the documents submitted by the seller/owner of the auction object.

³⁰ Megarisa Carina Mboeik, "Hak Sempurna yang Melekat pada Pemenang Benda Tidak Bergerak", *Jurnal Kenotariatan Narotama*, Surabaya, Universitas Narotama, Vol. 1, Num. 2, 2019, p. 137.

Based on this fact, in general, land buyers using the auction mechanism are protected by their rights because they are buying and selling openly and transparently through a trusted state auction institution. This is reinforced by the existence of the Indonesian Supreme Court Jurisprudence No. 323K / Sip / 1968, which states that: "An auction that has been carried out in accordance with the applicable provisions and won by a good faith buyer, cannot be annulled and the said good faith buyer must be given a legal protection."

In the implementation of auction for the execution of land mortgage, obstacles may arise from third parties, such as the debtor does not voluntarily accept the execution of the mortgage right, either when the object of the Mortgage Rights is going to be executed, before the auction or after the auction is completed. One example is filing a lawsuit against the object of the mortgage, which is being auctioned at the local District Court to delay or cancel the auction.³¹ In addition to the creditor who is harmed as he does not immediately receive a disbursement of bad debts caused by the debtor's default, the auction winner as a good faith buyer is also significantly disadvantaged as he cannot directly enjoy the rights to the auction object that he has legally won.

In its development, the buyer of a land object through auction by the state office is increasingly clarified as the qualification of a good faith buyer. As such, it needs to be protected by law. The latest example is the jurisprudence of the Supreme Court Number 6/Yur/Pdt/2018 on The Criteria of Good Faith Buyer in the Land Sale and Purchase. This jurisprudence is a follow-up of SEMA Number 7 of 2012, SEMA Number 4 of 2014 and SEMA Number 4 of 2016 on The Criteria of good faith buyer. This jurisprudence is an improvement to SEMA No. 7 of 2012, SEMA No. 4 of 2014 and SEMA No. 4 of 2016 on The Criteria of Good Faith Buyer. The rule of law upheld in this jurisprudence is that if the sale and purchase of land was made before a Land Deed Official (PPAT) and in accordance with applicable

³¹ Anton Suyatno, *Kepastian Hukum Dalam Penyelesaian Kredit Macet: Melalui Eksekusi Jaminan Hak Tanggungan Tanpa Proses Gugatan Pengadilan*, Jakarta: Kencana, 2018, p.234.

laws and regulation, or purchased through the state auction office, then the land buyer is a good faith buyer. Therefore, the criteria for the auction winner as a good faith buyer have become permanent jurisprudence, this shows that in the case of a dispute between a third party (the debtor) and the auction winner. In most cases, judges are of the view that auction winners are good faith buyers and should be protected by law. According to Supreme Court Jurisprudence Number 6/Yur/Pdt/2018, the criteria for winning land auction in good faith are as follows:

1. The land sale and purchase is carried out before the PPAT and in accordance with the provisions of the applicable laws.
2. Purchasing through the state auction office in accordance with the procedures in the applicable laws and regulations.

Some decisions that are being the source of the decisions in the Supreme Court Jurisprudence Number 6/Yur/Pdt/2018 on the Criteria Good Faith Buyer in the land Sale and Purchase, are detailed in the Table 3.

3. Legal Protection for Auction Winner as a Good Faith Buyer with Land as an Object

To ensure that the auction winner as a good faith buyer will not be harmed in the future by the debtor who sues the land object of the auction, a comprehensive legal protection mechanism is needed. According to Philipus M. Hadjon, there are two kinds of legal protection to cover, which are:³²

- 1) Preventive legal protection
- 2) Repressive legal protection

Preventive Legal Protection is legal protection in which the people are allowed to submit objections or opinions before a government decision takes a definitive form. Preventive legal protection aims to prevent a dispute / violation from occurring. On the contrary,

³² Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia : Sebuah Studi Tentang Prinsip-Prinsipnya, Penanganannya Oleh Pengadilan Dalam Lingkup Peradilan Umum Dan Pembentukan Peradilan Administrasi*, Peradaban, 2007, p. 3-5.

Table 3. Source of the Supreme Court Decision Number 6/Yur/Pdt/2018

Case Number	Legal Norm	Judge Argumentation
52 K/ Pdt/2005	Auctions that are conducted in accordance with the applicable legal procedures shall not be annulled.	That auctions conducted in accordance with applicable legal regulations and procedures shall not be annulled. The winner of a public auction conducted by the State Auction Office is qualified as a good faith buyer and must be protected by laws and regulations.
158 K/ Pdt/2005 (Between PT. Bumijawa Sentosa as Plaintiff and PT. Mitra Bangun Griya as Defendant)	A land buyer through an auction is considered as a party with good faith.	“Whereas as buyer of the auction of Assets Under Restructuring, the Plaintiff has legal certainty upon the transfer of rights on the Assets Under Restructuring (Article 27 paragraph (2) of Government Regulation Number 17 of 1999), even in the Elucidation of Article 27 paragraph (1) of the said Government Regulation, the Assignee or Buyer of Assets Under Restructuring is considered as a good faith party, and therefore must be protected by law.”
901 K/ Pdt/2007 (Between PT Bank Niaga vs Han Moy)	The auction winner is considered a good faith buyer because the auction is carried out in accordance with applicable legal procedures	“That the auction process was done in accordance with applicable laws, since it is carried out against a collateral encumbered with mortgage rights. As the Debtor is in default/negligent (bad debts), the principle of the object pledged as collateral can be auctioned off and the principle of "accelerated time" applies. That the auction buyer is a good faith buyer, therefore it must be protected.”
3135 K/ Pdt/2015 (Between Neneng Sariandewi as Plaintiff and Lusiana as Defendant)	The auction winner is considered as a good faith buyer and is legally protected if the auction is carried out legally and according to procedure.	Whereas the reasons for the petition for cassation as contained in the cassation memorandum cannot be justified and <i>Judex Facti</i> did not wrongly apply the law as the Defendant of the Convention, now the Cassation Defendant, has purchased the land of the case from the legal auction procedure and it is proven that the Cassation Respondent, Lusiana, is a good faith auction buyer. Therefore, the land ownership of the case a quo has been transferred from the Cassation Appellant to the Cassation Respondent

repressive legal protection arises after a dispute/violation occurs, in this case, is carried out through a judicial body.³³ Examining Indonesia's positive law related to auctions, there exists a form of preventive legal protection for good faith buyers of the auction manifested in the Minister of Finance Regulation 27/PMK.06/2016 on Auction Implementation Guidelines. Article 4 regulates that auctions carried out according to applicable provisions shall not be annulled. This provides legal certainty to the auction winner who has won the auction object based on legal procedures at the state auction office. As such, the interference from third parties may be avoided in the future.

Further, repressively, the winner of the auction for the execution of mortgage rights will be subjected to Article 200 Paragraph (11) HIR, which emphasises that if the winner of an auction for the execution of mortgage rights cannot exercise control over object purchased through a legal auction process, the winner of the auction may request assistance from the District Court to vacate the object. This type of protection has been reflected in the Decision Number 724 PK / Pdt / 2008 (Kadariati Solihin, et al vs PT Bank Artha Graha and Genta Teruna) on 20 January 2010. The plaintiff, Kadariati, wanted the execution of the auction object in the form of a 1,735 m² plot of land to be annulled. The dispute started when the plaintiffs granted land to the first defendant, Ir. Dicky, to make it easier to transfer the ownership of the Freehold Certificate, but the inheritance rights of the heirs, which are the plaintiffs, remained and were attached to the aforementioned land and buildings. However, without the plaintiff's knowledge, the defendant I already pledged the land based on the grant deed to Bank Artha Graha as the creditor.

When the Defendant I defaults, the collateral object in the form of the land was auctioned off at the state auction office which Genta Teruna then won with Minutes of Auction Number 745 / 1995-96 dated 27 November 1995. Based on these legal facts, the Judge stated that an auction that has been carried out cannot be annulled since the buyer through auction must always be considered as a good faith

³³ *Ibid.*

buyer because it was purchased from an open auction. Genta Teruna bought the land through the state auction office in a procedural, honest and open manner, making him the winner of the auction, in good faith, and protected by law.

11

4. Auction Winner as a New Criteria in the Concept of Good Faith Buyer in Indonesia

According to the description of the case, it has been shown that the auction winner for land objects that fulfil the criteria of the auction winner as a good faith buyer, gets a form of legal protection. However, such criteria can be expanded as in the development, the auction winner for land objects is not always protected by law. Several conditions cause this to occur, one of them is when the auction winner does not fulfil the auction procedure according to the procedure and has bad faith.³⁴ For instance, the decision of the Supreme Court Number 252 K/Pdt/2002 upholds a legal principle that the auction winner is declared as a bad faith buyer and thus unprotected by law if he is the creditor himself who purchases through auction the object at a price far below the collateral limit price.

The next condition, even if the auction winner has no bad faith, a sale value of an auction object which is lower than the standard limit can also annul an auction execution, as seen in the Jakarta District Court Decision Number 92/Pdt.G/2012/PN.Jkt.Sel. in which there is a difference in the determination of the limit value proposed by the bank as creditor/defendant, namely the Customer Credit Business Unit cq. PT. Bank Central Asia, Tbk, amounting at Rp. 1,413,160,000, - (one billion four hundred thirteen million one hundred and sixty thousand Rupiah), which is far from the property guarantee appraisal report by PT. Bank Commonwealth in the amount of Rp. 3,394,300,000, - (three billion three hundred ninety-four million three hundred thousand Rupiah). Based on these legal facts, the judge states that the act of the defendant, the KPKNL, which had conducted the

³⁴ Widodo Dwi Putro et. al, *Penjelasan Hukum: Pembeli Beritikad Baik: Perlindungan Hukum bagi Pembeli yang Beritikad Baik dalam Sengketa Perdata Berobyek Tanah*, Jakarta: Leip, 2016, p. 10

5 auction, was an act against the law by setting the auction price too far below the estimated price based on market value. As a result, the right of the auction winner is not protected by law and the object of auction returns to the debtor with collateral status. Indeed it is very detrimental to the winner of the auction since he is unable to enjoy the rights of the auction object that he has purchased.³⁵

In a further elaboration, based on the Jurisprudence of the Supreme Court Number 6/Yur/Pdt/2018, the criteria for the winner of a land auction as a good faith buyer can be made clear and complemented by the existence of legal protection exception as the result of the abuse of the situation by the auction winner. Thus, it does not fulfill the criteria of a good faith buyer as reflected in the Jakarta District Court Decision Number 92/Pdt.G/2012/PN.Jkt.Sel. and Supreme Court Decision Number 252 K/Pdt/2002.

Table 4. New Criteria of Land Auction Winner as a Good Faith Buyer

No	Source	Criteria
1.	Supreme Court Decision No.6/Yur/Pdt/2018	Purchased through the state auction of- fice and carried out with legal procedures based on the prevailing laws and regula- tions.
2.	Jakarta District Court Decision Number 92/ Pdt.G/2012/PN.Jkt.Sel.	Purchases at a reasonable price in accor- dance with the price limit determined by laws and regulations
3.	Supreme Court Decision Number 252 K/Pdt/2002.	The auction winner is not a creditor that purchases a price far below the collateral limit price.

Thus, by fulfilling the above criteria, the comprehensive legal protection for the good faith winner of an auction can emerge. In the event that there exists a lawsuit that impedes land ownership by a good faith buyer, in general, land buyers through auction are pro- tected by their rights as long as the purchase was made through a

35 Nita Setyani Putri, *Keabsahan Lelang Objek Jaminan Debitor Bank Umum Se- cara Langsung Tanpa Melalui Restrukturisasi Kredit*, Thesis, Faculty of Law, Universitas Airlangga, 2018, p. 65.

trustworthy institution, namely the state auction office, and in accordance with the legal procedures and at a reasonable price.

D. Conclusion

The concept of a good faith buyer of land objects has dynamic and significant developments starting from the regulation in the Indonesian Civil Code to the issuance of SEMA No. 4 of 2016. The explanation regarding the criteria for a good faith buyer provides a guide for judges to determine whether an individual is considered as a good faith buyer. Under SEMA No. 4 of 2016, it is stated that a land buyer is considered as a good faith buyer, if he carried out the land sale and purchase in accordance with laws and regulations and based on the principle of due diligence.

According to Supreme Court Jurisprudence Number 6/Yur/Pdt/2018, a land auction winner can be characterized as a good faith buyer protected by law if he purchases the land through the state auction office. However, there are two new criteria that should be used as an indicator of land auction winner as a good faith buyer protected by law, for example, by buying a price below the price limit while having the role as a creditor. This indicates that the current laws and regulations do not provide definite criteria for a good faith buyer in the land sale and purchase through auction.

In terms of providing more comprehensive legal protection, it is recommended that the Supreme Court provide more definite guidelines regarding good faith buyers specific to land sale and purchase activity through auction as outlined in the form of SEMA, to serve as guidelines for judges to examine cases and in decision making.

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