

Executorial Power on Certificate of Liability Based on Credit Agreement

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Abstract. *The Mortgage Certificate has executorial power in the credit agreement at Bank Mandiri of Semarang City and to identify and examine obstacles in the execution and solutions. This theoretical framework is using the theory of Progressive Theory, Theory of Law Enforcement, Theory of Islamic Justice. The research method was used to obtain data in this study, using an empirical juridical approach, with descriptive analysis research specifications. The results of this study are: (1) The executive power possessed by the Mortgage Certificate is the same as the court's decision which has permanent legal force, this is because the Mortgage Certificate has included an title which reads " For Justice Based On The Almighty God" (2) Obstacles and solutions found in the execution process of mortgage rights at Bank Mandiri of Semarang City include resistance from the executed parties through civil lawsuits, through reporting to the police, through debt acknowledgment deeds, and time mobilization to defend the object of the auction /object of mortgage. (3) The position of the Debtor and Creditor in the Execution of SHT in the credit agreement at the Semarang City of Bank Mandiri, in the Civil Code Article 1320 requires 4 conditions in the agreement.*

Keywords: Legal Protection; Certificate; Block.

1. Introduction

Indonesia's national development is an effort to improve the welfare of the Indonesian nation. Another goal is to educate the nation's life, which means that education is available in a broad sense for all Indonesian people. Welfare and intelligence are manifestations of human development as mandated by Pancasila

which has been accepted as the philosophy and ideology of the State of Indonesia and the 1945 Constitution of the Republic of Indonesia.¹

Indonesia's development goals as affirmed in the preamble of the 1945 Constitution of the Republic of Indonesia in the fourth paragraph, namely to protect the entire Indonesian nation and the entire homeland of Indonesia and to promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace and social justice. To realize the goals of national development, national development must be carried out thoroughly and evenly in all fields and all circles are not only focused on one particular group or part of society.

Increased national development which is focused on the economic sector can improve the welfare of the community and for the sake of sustainable development, for this reason, both the government and the community really need the availability of large amounts of funds. This is a consequence where with the increase in development activities, the need for the availability of funds also increases, most of which are obtained through credit activities.²

The banking sector functions as a financial intermediary institution that has a very strategic role in financing various proactive business activities through banking credit activities. The definition of credit according to Article 1 number (11) of Act No. 10 of 1998 concerning Banking is: "Credit is the provision of money or claims that can be equated with it based on an agreement or loan agreement between the Bank and other parties which requires the borrower to repay debt after a period of time with interest.

The implementation of lending by the Bank is usually associated with various requirements, one of which is the guarantee of the credit agreement between the Creditor and the Debtor. The distribution of loan funds (credit) is carried out by the bank as a financial intermediary institution to people who need capital, always stated in an agreement as the basis for the legal relationship between the parties (creditors and debtors)." The implementation of lending has various requirements that have been determined and set forth in the credit agreement model between the debtor (customer) and creditor (bank).

Provisions regarding guarantees are intended to prevent risks that arise in the future, so that if in the future there is a default from the debtor, the bank has complete and perfect evidence to carry out a legal action.³ Article 8 of the Law of the Republic of Indonesia Number 10 of 1998, amendments to Act No. 7 of 1992

¹Janus Sidabalok, *Hukum Perlindungan Konsumen*, (Bandung: Citra Aditya Bakti, 2010), p. 1

²Hadi Setia Tunggal, *Undang-Undang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah Dan Peraturan Pelaksanaannya*, (Jakarta: Harvarindo, 2005), p. 18

³M. Bahsan, *Hukum Jaminan Dana Jaminan Kredit Perbankan Indonesia* (Jakarta : PT. Raja Grafindo, 2007), p. 73

concerning Banking, states that: "In providing credit, Commercial Banks must have confidence in the ability and ability of the Debtor to pay off his debts in accordance with the agreement". Article 8 explanation of the Act above, that "Credit provided by the Bank contains risks, so that in its implementation the Bank must pay attention to the principles of sound credit. To reduce this risk, credit guarantees are in the sense of confidence in the ability and ability of the debtor to pay off the debt in accordance with the agreement.

The material guarantee provides material rights to the mortgage holder. The obligation to submit debt guarantees by the borrower in the context of borrowing money is closely related to the agreement between the borrowing parties. Meanwhile, the obligation to submit debt guarantees is often also regulated and required by the regulations of the lender (Bank) and or applicable laws and regulations.⁴

The object of debt guarantee which is usually used in a banking credit agreement is based on laws and regulations, for example the object of collateral in the form of land will be guaranteed by Mortgage which is regulated in Act No. 4 of 1996 concerning Mortgage on land and objects related to land (hereinafter referred to as UUHT). Mortgage rights are security rights imposed on land rights as referred to in Act No. 5 of 1960 concerning Basic Agrarian Regulations (hereinafter referred to as UUPA), including or not including other objects that are an integral part of the land, for repayment of certain debts, which gives priority to certain creditors over other creditors (Article 1 paragraph (1) of the Mortgage Law).

The practice of credit, general guarantees are not satisfactory for creditors, because they do not create a sense of security and security for the loans given.⁵ With this general guarantee, the creditor does not know for sure how much the debtor's assets are now and will exist in the future, and to whom the debtor owes the debt.⁶ For this reason, the creditor requires the existence of certain objects designated for the credit or loan. In other words, creditors need special guarantees for them, both material and individual.⁷

Article 26 of Act No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land confirms that as long as there is no statutory regulation that regulates it, taking into account the provisions in Article 14 above, the regulations regarding the execution of the existing mortgage At the entry into force of this law, it applies to the execution of mortgage rights, what is meant by

⁴Ibid., p. 74

⁵Sri Soedewi Masjchoen Sofwan, *Hukum Jaminan di Indonesia: Pokok-pokok Hukum Jaminan dan Jaminan Perorangan*, (Yogyakarta: Liberty, 1980), p. 45

⁶Gatot Supramono, *Perbankan dan Masalah Kredit Suatu Tinjauan Yuridis*, (Jakarta: Djambatan, 1995) p. 59

⁷Sri Soedewi Masjchoen Sofwan, Op. Cit, p. 45-46

the regulations regarding the execution of the mortgages contained in this article, are the provisions stipulated in Article 224 of the updated Indonesian Regulation (*Het Herziene Indonesische Reglement, Staatsblad 1941-44*) and Article 258 of the Regulation of Legal Procedures for Regions Outside Java and Madura. Article 224 of HIR states that only Mortgage Deeds and Deeds of Debt Acknowledgment can be granted executive titles, while the inclusion of executive titles is carried out in a Mortgage Certificate which is not a copy of an authentic deed, and the inclusion is carried out by the Head of the Land Office who is not a public official. Thus, the strength of the Mortgage Certificate as a substitute for the grosse deed in the execution needs further study.

In practice, even though the receivables have been secured by Mortgage and have been equipped with executorial rights, by including title with the words "For Justice Based On The Almighty God", it turns out that in its implementation at Bank Mandiri of Semarang City it cannot be done easily, quickly and easily. Certain. This situation certainly raises a question mark, namely how big the actual power of the executorial rights, from the Mortgage Certificate which has been included with the title with the words "For Justice Based On The Almighty God".

2. Research Methods

This study uses the type of empirical juridical research. The empirical juridical approach is an approach based on applicable law and based on reality in practice.⁸ Data collection techniques used in this research are literature study and interviews, namely data collection by reading laws and regulations, official documents and literature that are closely related to the problems discussed based on secondary data and conducting interviews so that verbal interactions occur directly between the interviewer and the respondent.

3. Results and Discussion

3.1. Mortgage Certificate (SHT) Has Executive Legal Force in Credit Agreement at Bank Mandiri of Semarang City

The definition of executorial power over the grosse deed means that the execution (execution) of the grosse deed is equated with a judge's decision that has permanent legal force, so that the execution of the grosse deed can be executed directly without going through a normal lawsuit. Thus, the settlement of cases through the execution of this grosse deed is an exception from the

⁸Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, (Jakarta: PT Raja Grafindo Persada, 2009), p. 26

principle of general justice, namely that a person can resolve disputes based on lawsuits, or legal proceedings.⁹

Land Guarantee Before Act No. 4 of 1996 Prior to the enactment of Act No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, collateral for land was regulated in the Second Book of Chapter XXI Articles 1162 to Article 1232 of the Civil Code concerning Mortgages and in the Staatsblad of 1908 number 542 regarding Creditverband provisions.

In Article 1162 of the Civil Code, the definition of mortgage is formulated which reads: Mortgage is a material right on immovable objects, to take replacement thereof for the settlement of an agreement. From the sound of Article 1162 of the Civil Code, it can be seen that the mortgage right is a material security right on immovable objects. Furthermore, the articles of the Civil Code provide further explanations regarding the meaning of mortgages. Article 1167 of the Civil Code states that movable objects cannot be burdened with mortgages.

Furthermore, in Article 1168 of the Civil Code, it is determined that mortgages cannot be placed other than by those who have the power to transfer the objects that are burdened. Article 1171 paragraph (1) states that a mortgage can only be granted with an authentic deed, except in cases that are expressly designated by law. Furthermore, Article 1175 paragraph (1) of the Civil Code states that mortgages can only be placed on objects that already exist. Mortgages on objects that will only exist in the future are void. In Article 1176 paragraph (1) of the Civil Code then it is stated that a mortgage is only valid, the circulation of the amount of money for which it has been given is fixed and stipulated in the deed.

Execution of Mortgage is regulated in Article 6 of the Mortgage Law. In Article 6 it is determined that, if the debtor is in default, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through a public auction and take repayment of his receivables from the proceeds of the sale.

Mortgage aims to guarantee the debt given by the Mortgage holder to the debtor. If the debtor defaults, the land (land rights) that are burdened with the Mortgage Right is entitled to be sold through auction by the Mortgage holder

⁹Wahyuning Ajimat, Amin Purnawan, "Tinjauan Pelaksanaan Eksekutorial Terhadap Sertipikat Hak Tanggungan (SHT) Dalam Perjanjian Kredit Pada PT Bank Perkreditan Rakyat Sinar Mitra Sejahtera Semarang", in Jurnal Akta Unissula Vol. 4 No. 4, December 2017, p. 666.

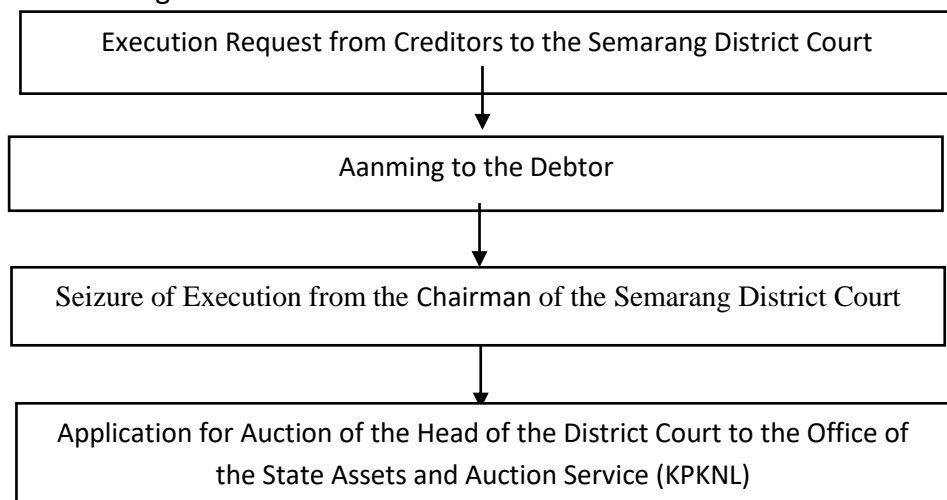
without the need for approval from the Mortgage provider and the Mortgage provider cannot express an objection to the sale.

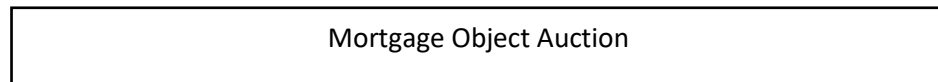
The provisions of Article 6 of the Mortgage Law, provide the right for the Mortgage holder to perform Parate executions. This means that the holder of the Mortgage does not need to not only obtain the approval of the Mortgage giver, but also does not need to request a decision from the Court to execute the Mortgage which is the guarantee for the debtor's debt in the event that the debtor is in default. The Mortgage Holder may directly submit and request the Auction Office to conduct an auction of the Mortgage object concerned. Because the authority of the holder of the first Mortgage is the authority granted by law.

The mortgage holder can come directly and ask the Head of the Auction Office to conduct an auction for the object of the mortgage in question. Because the authority of the first mortgage holder is the authority granted by law (the authority is owned by law), the head of the state auction office must respect and comply with this authority.

The Mortgage Certificate has the same legal force as the Court's Decision which has permanent legal force (*incraht*) and has executive power, where the Mortgage Certificate has been affixed with "For the sake of Justice Based on the One Supreme God" the purpose of which is to impose mortgage rights on guarantees from the debtor is that if the debtor fails to perform or is in breach of contract, then the Creditor Party in this case the Bank will no longer file a lawsuit to the Court, but only submit a request for an Execution auction of the Mortgage to the Court.

The execution flow of Mortgage objects at the Semarang District Court can be seen in the following scheme:





3.2. Barriers to Execution Based on Mortgage Certificate (SHT) and Solutions at Bank Mandiri of Semarang City

In practice in the field, there are still several obstacles experienced by Bank Mandiri of Semarang City in the implementation of the Mortgage Execution Parate. These constraints are in the form of obstacles faced at the beginning of the execution of the mortgage right, as well as other obstacles faced by the bank after the execution of the Mortgage Rights.

Creditors and debtors from the beginning bind themselves through a debt agreement with a mortgage attached. If based on the agreement the debtor is in default, then parate execution can be carried out through the KPKNL Auction. The auction process will usually be carried out quickly by the Bank and the KPKNL. Usually, delays or a debtor who is in default of payment in arrears for 4 months will be registered at the KPKNL. This process is fast and usually there are bidders, sometimes even single auctions are often held.

After the auction, the bank will get paid and if there is any remaining it will be given to the debtor, but at such an unbalanced price, it will cause a problem. So that essentially the mortgage can solve the problem, it creates new problems. The author sees many systematic methods used by debtors and banks. For example, the debtor filed a lawsuit against the law and also filed a third party resistance/derden verzet through a debt acknowledgment letter. Even the auction winner, who was previously attracted because the auction price was set at a small price, and imagined the profits to be made, is now a victim because he cannot enjoy the object of the auction, even though he has won the auction. Meanwhile, the Bank as the creditor will be burdened if it has to file for bankruptcy, because there are more than one debtor.

Settlement of non-performing loans in credit agreements with banking institutions with mortgage guarantees, that amicable settlement is an effort to settle loans based on an agreement between banks and debtors who still have good faith and are cooperative in efforts to resolve non-performing loans. Then the next settlement with collection is done by visiting the debtor directly, and the debtor is asked to make payments in a certain amount of his obligations to

the bank within a certain period of time as outlined in the Debtor's Declaration of Ability.¹⁰

The executorial power of the mortgage in this case is used arbitrarily by the creditor. Creditors and debtors should work together to solve bad loans, not cheat each other. Therefore, it is necessary to set a good limit price in accordance with the Regulation of the Minister of Finance No. 93/PMK/06. 2010/Concerning the Implementation of the auction. Article 35 states that the limit value is the responsibility of the seller/owner of the goods. In the case of mortgage rights, creditors should not automatically become owners, because the legal basis for property rights is obtained only through buying and selling, grants, exchange, and inheritance. The debt agreement only attaches mortgage rights to ensure the debtor continues to pay. For this reason, it is advisable to implement the Minister of Finance Regulation No. 93/PMK/06. 2010/Concerning the auction implementation regarding the limit price is carried out by debtors, creditors plus auction officials who have surveyed the limit price of the auction object. Thus it will produce a balanced limit value.

Obstacles and solutions found in the mortgage execution process, The author presents it in the table below:

No.	Obstacles	Solution
1.	Debtor Resistance in Civil	In a number of these lawsuits, some of them were carried out by the debtor before the execution of the mortgage rights was carried out.
2.	Criminal Debtor Resistance	Debtor resistance is not only carried out in the civil realm. But there is also something done through criminal reporting. In addition, debtors who do not want to carry out voluntary auctions usually involve the police so that the civil domain is brought to the criminal

¹⁰Gilang Bayuaji, "Pelaksanaan Penyelesaian Kredit Macet Yang Diikat Dengan Hak Tanggungan Di Pt Bank Tabungan Pensiunan Nasional Mitra Usaha Rakyat Cabang Tegal", in Jurnal Akta Unissula, Vol 4 No 1, March 2017, p. 11.

		realm.
4.	Deployment Time	In some cases, executions were delayed because the disputing parties, especially the losing (executed) parties, mobilized a mass of supporters. This condition becomes more complicated if the execution applicant also mobilizes his supporters. Not only can execution be delayed, but this can also trigger horizontal conflicts between the two supporters of each. Then the solution for the execution can be suspended for the next execution to be determined again at a later date.

3.3. Position of Debtors and Creditors in Executing Execution of Mortgage Certificates (SHT) in Credit Agreements at Bank Mandiri of Semarang City

The validity of an agreement requires 4 (four) conditions based on Article 1320 of the Civil Code, namely:

- 1) Agree on those who bind themselves;
- 2) The ability to make an engagement;
- 3) A certain thing;
- 4) A lawful reason.

These four elements, in the developing legal doctrine, are classified into:¹¹If the two main elements have been fulfilled, then the agreement can be called a valid engagement. The terms of the agreement and the skills of the parties carrying

¹¹Kartini Muljadi & Gunawan Widjaja, 2004, *Perikatan Yang Lahir Dari Perjanjian*, (Jakarta: Raja Grafindo Persada), p. 93

out the agreement are subjective conditions, in the event that the subjective conditions cannot be fulfilled, the legal consequences of the agreement can be canceled (*veerneetigbaar*) or can be requested for cancellation by one of the parties. However, this does not necessarily cause the agreement to be null and void, but the agreement can be requested for cancellation by one of the parties.¹²

These conditions are different from the conditions contained in the objective conditions, where the objective conditions are directly related to the object or the existence of the subject matter which is the object of the agreement (the nature of the goods or services in the agreement). If one of the objective conditions cannot be fulfilled, the legal consequence of the agreement is that the agreement becomes null and void (*nietigbaar*) or with the understanding that the engagement born of the agreement cannot be enforced. The engagement is invalid, if the object is not certain or cannot be determined¹³.

The agreement is an agreement or agreement between the parties to adhere to the principles, namely the principle of *pacta sun servanda* and the principle of freedom of contract as stated in Article 1338 of the Civil Code. If the meaning of *pacta sun servanda* is related to the provisions of Article 1338 of the Civil Code, and is associated with an agreement, then there are several very essential principles to be applied to determine the authority of the arbitration jurisdiction.¹⁴ If the parties agree to use arbitration in the agreement, if it turns out that in the future there is a dispute or dispute regarding the implementation of the agreement they made, whatever dispute occurs, the parties will use arbitration as a solution. A valid agreement is an agreement that meets the requirements as stated in Article 1320 of the Civil Code, and has legal consequences, namely:¹⁵

- 1) Act as law for those who make it. Based on the provisions of Article 1338 of the Civil Code, that the agreement applies as a law for the parties, meaning that the agreement has binding and coercive power and provides legal certainty to the parties who make it. If there is a violation, then he is

¹²Ibid, p. 94

¹³ Deen, Thaufiq., Ong Argo Victoria & Sumain. (2018). *Public Notary Services In Malaysia*. JURNAL AKTA: Vol. 5, No. 4, 1017-1026. Retrieved from <http://jurnal.unissula.ac.id/index.php/akta/article/view/4135>

¹⁴Harahap, Yahya, 1986, *Segi-Segi Hukum Perjanjian*, (Bandung: Alumni), p. 88

¹⁵Muhammad, Abdulkadir, 2000, *Hukum Perdata Indonesia*, (Bandung: Citra Aditya Bakti), p. 9

considered to have violated the law so that he can be given certain legal sanctions.

- 2) Cannot be withdrawn unilaterally. The agreement made is legally binding on the parties who made it and cannot be withdrawn or canceled unilaterally without the consent of the other party.
- 3) The agreement must be executed in good faith. The point is that the implementation of the agreement must heed the norms of propriety and decency.

3.4. Example of Deed of Mortgage Certificate (SHT) at Bank Mandiri of Semarang City

The Deed of Granting Mortgage ("APHT") regulates the terms and conditions regarding the granting of Mortgage from the debtor to the creditor in relation to debts that are guaranteed by the Mortgage. The granting of this right is intended to give priority to the creditor concerned (preferred creditor) over other creditors (concurrent creditors) (Act No.4 of 1996 or "UUHT"). Thus, the Granting of Mortgage is as a guarantee for the repayment of the debtor's debt to the creditor in connection with the relevant loan/credit agreement.

Land as an object of Mortgage may include other objects which are an integral part of the land. This is possible because of its physical nature to become one unit with the land, both existing and future, in the form of permanent buildings, perennials and handiwork, provided that these objects belong to the right holder or to another party (if the object is -the object belongs to another party, the person concerned/owner must also sign the APHT).

The procedure for encumbering Mortgage begins with the stage of granting Mortgage in front of the authorized PPAT and is proven by APHT and ends with the stage of registration of Mortgage at the local Land Office.

In the APHT, a promise to insure the object of the mortgage can be stated as a follow-up to the holding of a loss insurance agreement. If the object of the mortgage is destroyed, the creditor can submit a claim to the insurance company on behalf of the debtor, namely as the beneficiary of the debtor to receive compensation money as repayment of the debtor's debt. In the event of bad credit, the object of the mortgage is destroyed if the object of the mortgage is insured, the creditor may request compensation from the insurer by submitting a claim on behalf of the beneficiary of the debtor against the object of the insured mortgage. Meanwhile, if the object of the mortgage is not insured to take

payment of the debtor's receivables, the special guarantee will turn into a general guarantee, which is subject to Article 1131 of the Civil Code.¹⁶

4. Conclusion

The executive power of the Mortgage Certificate (SHT) in the credit agreement at Bank Mandiri of Semarang City is the same as the court's decision which has permanent legal force, this is because the Mortgage Certificate has included instructions which read "For the sake of Justice Based on the Almighty God. One". The way to exercise the executive power possessed by the Mortgage Certificate is carried out in two ways, namely direct execution based on the provisions of Article 6 of the Mortgage Law and execution through the executorial title regulated in Article 20 paragraph (1) of the Mortgage Law. The obstacles and solutions found in the execution process of mortgage rights at Bank Mandiri of Semarang City included resistance from the executed party through a civil lawsuit, resistance from the executed party through reporting to the police, third party resistance through a debt acknowledgment deed, and the mobilization of time to defend the object of the auction/mortgage object. Position of Debtors and Creditors in Executing the Execution of Mortgage Certificates (SHT) in Credit Agreements at Bank Mandiri of Semarang City. The agreement is an agreement or agreement of the parties, adhering to the principles, namely the principle of *pacta sunt servanda* and the principle of freedom of contract as stated in Article 1338 of the Civil Code. If the meaning of *pacta sunt servanda* is related to the provisions of Article 1338 of the Civil Code, and is associated with an agreement, then there are several very essential principles to be applied to determine the authority of the arbitration jurisdiction.

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¹⁶Ariel Doni Dharmawan dan Maryanto, "Kekuatan Hukum Sertifikat Hak Tanggungan Dalam Hal Musnahnya Obyek Hak Tanggungan Karena Bencana Alam Di Kabupaten Grobogan", dalam *Jurnal Akta*, Vol. 5 No. 1 March 2018, p. 176.

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