

Legal Protection of Third Parties in Credit Agreements with Liability Guarantee

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Abstract. *This study aims to find out and analyze the implementation of mortgage agreements in Semarang Regency, to find out and analyze legal protection for third parties in Credit Agreements with Mortgage Guarantees in Semarang Regency, and to find out and analyze examples of mortgage deed. The research approach method used in this thesis is a sociological juridical research method. This research specification uses descriptive analysis. The type of data used in this research is primary data which includes the 1945 Constitution; Act No. 2 of 2014; Mortgage Laws; Code of Civil law; the Criminal Code, as well as secondary data containing books and other supporting documents. Research data collection with interview techniques and study of documents or library materials. The data analysis method used in analyzing the data is a qualitative analysis of the interactive model as proposed by Miles and Huberman. The results of the study indicate that the implementation of credit with mortgage guarantees at the bank has a procedure regarding the provisions, the conditions that must be carried out from the time the customer's application is submitted until the loan is paid off by the bank. Legal protection for third parties in the implementation of mortgage guarantee objects is regulated in Article 1 paragraph (1) No. 8 of 1999 concerning the Consumer Protection Act.*

Keywords: Agreement; Credit; Execution; Mortgage; Protection.

1. Introduction

The provisions contained in article 1 paragraph (3) of the 1945 Constitution of the Third Amendment, Indonesia is law.¹One consequence of the rule of law is that various actions and policies issued by the government must be based on laws and regulations. Mochtar Kusumaatmadja changed the legal notion of tool (tool) into law as an instrument (instrument) to build society. Mochtar Kusumaatmadja argues that the notion of law as a means is broader than the

¹Diana Halim Koentjoro, (2004), *Hukum Administrasi Negara*, Bogor: Ghalia Indonesia, p.35

notion of law as a tool.² Mochtar Kusumaatmadja said that law is a tool to maintain public order.³

Law enforcement aims to provide and guarantee legal certainty, justice and truth and respect human rights. One of the sources of law in the applicable law in Indonesia as commonly stated in the discussion of the Indonesian legal system is the statutory regulations. In addition to statutory regulations, it is also necessary to be supported by organizing a comprehensive National Legal System by recognizing and respecting religious law, customary law by carrying out updates to Dutch inheritance law which is still in effect.⁴

The development of the national economy, the Indonesian people in meeting various needs of their life of course need funds, so that banks have helped meet the needs of funds for economic activities. Banking credit in this case distributes funds to the public in the form of credit. The bank before giving credit to the borrower will make a credit agreement first.

Broadly speaking, the bank is a company engaged in finance. Banking activities are always related to the financial sector, so talking about banks cannot be separated from financial problems. Thus, the government can assign the banking sector to carry out a program aimed at developing certain economic sectors, or to give greater attention to cooperatives and weak economic groups or small entrepreneurs in order to improve the standard of living of the people at large.⁵

Most of the lending and borrowing activities associated with the requirements for the submission of loan guarantees are carried out by individuals and various business entities. Business entities generally expressly require the borrower to submit an item as an object of guarantee for the debt of the borrower. The debt guarantee offered (proposed) by the borrower will generally be assessed by the business entity before being accepted as the object of collateral for the loan it provides.

Mortgage is used by creditors (banks) to obtain guarantees for repayment of debts from debtors. The definition of Mortgage is a form of security right on land and other objects that are an integral part of the land, which are used by creditors (usually banks) to obtain guarantees for repayment of debts from

²Mochtar Kusumaatmadja, cited in Sidharta, (2006), *Karakteristik Penalaran Hukum dan Konteks Ke-Indonesiaan*, Jakarta: Utomo, p. 415.

³Mochtar Kusumaatmadja, (2006), *Konsep-Konsep Hukum dalam Pembangunan (Kumpulan Karya Tulis)*, Bandung: Alumni, Second Printed, p. 14.

⁴Deasyi Soeikromo, (2011), *Penyelesaian Kredit Macet Melalui Parate Esekusi Hak Tanggungan Dikaitkan dengan Kepastian Hukum Pemenuhan Hak Kreditor Dalam Rangka Pengebangan Hukum Jaminan di Indonesia*, Disertasi, Pascasarjana UNPAD, p. 2

⁵Mohammad Djumhana, (2003), *Hukum Perbankan di Indonesia*, Bandung: Citra Aditya, p. 66.

debtors. Each debtor has an obligation to submit achievements to creditors. The debtor has an obligation to pay the debt. The foreign term for the obligation is called Schuld, the debtor also has another obligation, namely Haftung. The debtor allows his obligation for his assets to be taken by the creditor as much as the debtor's debt, in order to pay off the debt if the debtor does not fulfill his obligation to pay the debt.⁶

Engagements are born from the law as a result of the actions of people who violate the law as regulated in Article 1345 of the Civil Code, the law stipulates the obligation to perform achievements. Problems will arise if one of the parties turns out to be in breach of contract or breach of contract.

Act No. 4 of 1996 concerning Mortgage Rights. Mortgage guarantee institutions are used to bind the object of debt guarantee in the form of land or objects related to the land in question. The Mortgage Law stipulates that if the debtor defaults, the data creditor will execute the Mortgage Article 20 paragraphs (1) and (2) of Act No. 4 of 1996 concerning Mortgage Rights. provides an understanding that, if the debtor is in default, the Law on Mortgage provides three alternative types of creditor receivable fulfillment, namely (i) using the right to sell on its own power through a public auction using the right to sell on its own power through a public auction provided for in Article 6 Law on Mortgage to the first Mortgage holder,⁷

An engagement if the debtor defaults so that the creditor can realize the promised performance himself at the expense of the debtor based on the power granted by the judge, if the debtor is reluctant to carry out the achievement.⁸As is known, to carry out the execution, one condition must be met, namely permission from this judge, as a result of the enactment of a legal principle, namely that people are not allowed to become judges themselves. A creditor who wants the implementation of an agreement from a debtor who does not fulfill his obligations must ask for court assistance, but it often happens that the debtor himself has given his consent from the start that if he is negligent, the creditor has the right to exercise his rights according to the agreement without having to ask for an intermediary judge.

The execution of mortgage rights can be carried out in three ways, namely through the auction process, executive parate and through underhand sales. Meanwhile, according to the Mortgage Law, in Article 20 paragraph (1) letter a

⁶ Soenandar Taryana, Fathurohman Djamil, Darus Badruzaman Mariam, Rmy Sjahdeini Sutan, Soeprapto Heru, (2016), *Kompilasi Hukum Perikatan*, Bandung: PT Citra Aditya Bakti, p. 8-9.

⁷Act No. 4 of 1996 concerning Mortgage Rights.

⁸Sugiyono, Heru. 2017. *Perlindungan Hukum Terhadap Pihak Ketiga Sebagai Pemilik Jaminan Ketika Tidak Dilaksanakannya Prinsip Kehati -Hatian Oleh Bank Dalam Perjanjian Kredit Dengan Memakai Jaminan*. Jurnal Yuridis Vol. 4 No. 1, p.98-109

and the guarantee of Mortgage can be carried out in three ways, namely: Execution Title, Execution Parate and Underhand Sales.

According to Sutarno, in practice the sale of collateral based on a power of attorney is not easy to implement because the Land Deed Official (PPAT) requires the debtor to be present in person to sign the deed of sale and purchase, because the debtor is afraid that one day the debtor will demand the cancellation of the sale and purchase if the sale of the debtor's collateral turns out to be below the market price, so very detrimental to the debtor or the owner of the guarantee. The provisions of article 20 paragraph (2) which regulates the sale of mortgage objects through underhand sales based on an agreement between the giver and the holder of the mortgage. This article is a breakthrough contained in the Mortgage Law when compared to the old provisions contained in mortgages to provide legal certainty guarantees for the parties, because this effort will give the parties an agreement to settle their debts based on their own agreement. The law only regulates the limits as specified in Article 20 paragraph (3) and so on. The implementation of this provision, legally, will provide legal certainty for the parties, because with an agreement to sell the object of collateral under the hand, it means that each party has stated its agreement.

Underhand sales can be carried out when the land owner who is burdened with Mortgage is still cooperative and is still willing to be present to make and sign the deed and documents related to the sale of the land as the object of the Mortgage.

The procedure is different from the sale of the object of Mortgage through a public auction as an implementation of the provisions of Article 6 of the Law on Mortgage, the sale of the object of Mortgage cannot be fully carried out by the bank as a creditor for the implementation of the auction because there are several obstacles often used banking with sales under the hand. Because the implementation is more effective and efficient.

The third party as the buyer of the Mortgage in practice often encounters obstacles when physically controlling the object of the Mortgage that has been purchased through a Mutual Agreement because it turns out that the object of the Mortgage is still controlled by the original owner, so that third parties who have nothing to do with the debtor's debts and creditors cannot fully control. This last situation is often determined and identified as a hidden legal relationship (hidden defect) between the debtor and other parties before the granting of mortgage rights is carried out with the creditor.

Based on the above background, the formulation of the problem in this study are: (1) How is the Implementation of Credit Agreements with Mortgage

Guarantees in Semarang Regency?; (2) What is the legal protection for Third Parties in Credit Agreements with Mortgage Guarantees in Semarang Regency?

2. Research Methods

The research approach method used in this thesis is a sociological juridical research method. Sociological juridical research emphasizes research that aims to obtain legal knowledge empirically by going directly to the object.⁹This research specification uses descriptive analysis, namely research that in addition to providing an overview, writing and reporting an object or an event will also draw general conclusions from the problems discussed. Sources of data come from primary data and secondary data. Data collection methods include interviews, Study of Documents or Library Materials. The data analysis method used in analyzing the data is a qualitative analysis of the interactive model as proposed by Miles and Huberman.

3. Results and Discussion

3.1. Implementation of Credit with Mortgage Guarantee in Semarang Regency

The implementation of credit with mortgage guarantees at Bank Mandiri has a procedure regarding the terms and conditions that must be carried out from the time a customer application is submitted until the loan is paid off by the bank. After the conditions at Bank Mandiri have been met, then there will be requirements from the Mortgage registration process at the notary side to be submitted to the BPN.

The Deed of Granting Mortgage mentions the special requirements which include the name and identity of the holder and giver of the mortgage, the domicile of the parties, a clear designation of the debt or debt whose repayment is guaranteed with the mortgage, and a clear description of the object of the mortgage. After the mortgage assignment process has been carried out and the APHT deed has been signed by both parties, to fulfill the publicity requirements, the APHT must be registered at the local land office. The registration process must be carried out no later than 7 (seven) days after the APHT Deed is signed.¹⁰

Guarantees have a very important position and benefits in supporting economic development. Because the material of this institution can provide benefits to

⁹Soejono, Soekanto. (2005). *Pengantar Penelitian Hukum*. Jakarta: Universitas Indonesia Press

¹⁰ Article 13 paragraph (2) of Act No. 4 of 1996

creditors and debtors. Benefits for creditors can provide security against closed trade transactions, and can also provide legal certainty for creditors.¹¹

The bank credit agreement, the role of the Notary, through the deed he made, provides legal certainty for the parties, namely the bank as the creditor and the customer as the debtor. This legal certainty guarantees the rights and obligations of each party in the credit agreement as stated in the authentic deed. Remembering that the authentic deed made by and before a notary is a perfect means of proof¹².

Everyone needs legal certainty and authentic evidence for their actions. Therefore, the agreement or bond made by the 3 parties of the Bank legally requires the assistance of a Notary in his capacity as a public official who has the authority to make an authentic deed. Authentic agreements or bindings made by the Bank with its customers, require the assistance of a Notary. This happens because the Notary is authorized to make a form of authentic deed that is able to provide legal protection to the parties to the agreement.

The implementation of credit, especially those carried out in banking business activities, requires collateral. Collateral is needed to guarantee the repayment of debt / debtor credit in the event that the debtor defaults or breaks his promise not to pay off his credit. In banking business activities, credit guarantees are generally in the form of land encumbered with Mortgage Rights. Providing legal certainty guarantees in bank credit agreements requires an authentic deed, namely a deed made by and before a Notary.

Legal certainty as one of the objectives of the law can be said to be part of efforts to realize justice. The real form of legal certainty is the implementation or enforcement of the law against an action regardless of who does it. Legal certainty can predict what will be experienced if you take certain legal actions. Certainty is needed to realize the principle of equality before the law without discrimination.

3.2. Legal Protection Against Third Parties in Credit Agreements with Mortgage Guarantees in Semarang Regency

¹¹Geraldine Andrews and Ricard in Moh Isnani. (1996). *Jaminan-jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia*. Bandung: PT Citra Aditya Bakti. p. 14

¹² 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>, see to Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani. (2020). *Code of Ethics and Position of Notary in Indonesia*. Sultan Agung Notary Law Review 2 (4), 397-407, <http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/SANLaR/article/view/13536>

The debtor has a breach of contract or does not fulfill his performance, an execution will be carried out on the collateral object. However, according to the explanation from Mr. Arif Nur Rakhim as Micro Banking Manager of Bank Mandiri in the process of executing mortgage collateral for the first process, it will be carried out with a family process, so we always convey to the debtor every billing process that when billing the debtor cannot pay, it will proceed to the billing process auction and we also convey that when we enter the auction process automatically, our position as a channeling unit cannot help much because the stages will be more difficult, because there, of course, the stages are already different. Bank Mandiri prioritizes underhand sales with third parties or buyers from debtors or from Bank Mandiri. This underhand sale is intended to accelerate the sale of the mortgage object at the highest selling price and benefit all parties.

The reality in the field is that there are many objects of mortgage guarantees that will be executed with the underhand sales execution process not running smoothly, such as the case in Semarang Regency where the guarantee of the mortgage object cannot be controlled by a third party or the buyer. According to the explanation from Mr. Arif Nur Rakhim as Micro Banking Manager of Bank Mandiri, if the position has entered the auction, it has been conditioned by the auction agency, if the object cannot be controlled by a third party, we will submit it to the authorities such as a court who can decide on the asset who will be given. If it is from the bank itself, it can only submit to the auction process or have discussions with the debtor to resolve it.

According to information from Mr. W. Tri Marwoto Sulistiyanto, SH, M.Kn. as a Notary of Semarang Regency, to resolve the case and provide legal protection to third parties or the buyer in the object of the guarantee of the Tangungan Agreement, by confronting all parties, the debtor, the creditor and the buyer or third party in deliberation first. The Mortgage Agreement actually cannot guarantee the object of the mortgage that is being leased, but there are many cases like this, if it has been leased by a second party or debtor, then you have to wait for the lease to be completed. If the asset certificate has been pledged at the bank and the second party or debtor enters into an agreement, the lease agreement is actually void. There are so many cases where the assets are pledged in the bank after making a lease agreement, after that the second party or debtor is also stuck in payment and a sale and purchase will be executed but the assets are also leased so that the third party or the buyer cannot control all of the assets. Usually the agreement with a notary is an underhand agreement, it can also be a notarial agreement, the notary should first check whether the certificate is being pledged at the bank, if there is no evidence that the asset is being pledged at the bank. But one day they will not know that the certificate is

being guaranteed at the bank, a lease agreement deed is made but in the course of time they do not know that it has been pledged at the bank¹³.

Every legal relationship will give rise to opposite rights and obligations or each party in a legal engagement will have their respective rights and obligations that must be fulfilled. If these rights and obligations are not fulfilled, it will cause harm to one of the parties involved in the engagement, therefore, to protect and reduce problems, legal protection is needed.

The basis of the agreement is affirmed in Article 1335 of the Civil Code which reads "An agreement without cause or which has been made for a false or forbidden cause has no power." Article 1337 of the Civil Code "is prohibited by law or if it is contrary to decency, good or public order". This agreement may not be implemented because it violates public order. The laws and regulations are also coercive so that the parties cannot deviate if they are violated, it will result in the agreement being null and void by law.

Claims for Rights are an effort that aims to obtain legal protection for the rights of a person through a judicial process that is justified by law to prevent *eigenrichting*¹⁴ in exercising their rights, resulting in unlawful acts that can harm other parties.

Settlement of the problem chosen by both parties by carrying out the execution of underhand sales, the problem that needs to be solved is regarding the validity of the sale of the mortgage object by the bank, based on a power of attorney to sell under the hand of the mortgagee. Execution under the hands of its implementation must meet several requirements, including an agreement between the party giving the mortgage (the debtor) and the party receiving the mortgage (the creditor).¹⁵

The Mortgage Agreement should not guarantee the object of the mortgage that is being leased, but there are many cases like this, if it has been leased by a second party or debtor, then they have to wait for the lease to be completed. However, if you wait for the lease agreement to be completed, there is no justice for the buyer. So, if the asset certificate has been pledged at the bank, the lease agreement that has been made by the debtor is actually invalid. Similar to the

¹³ Chuasanga A., Ong Argo Victoria. (2019). *Legal Principles Under Criminal Law in Indonesia and Thailand*, Jurnal Daulat Hukum, Vol 2, No 1 (2019) <http://jurnal.unissula.ac.id/index.php/RH/article/view/4218> , see to Yaya Kareng, Ong Argo Victoria, R. Juli Moertiyono. (2019). How Notary's Service in Thailand. Sultan Agung Notary Law Review, 1 (1), 46-56, <http://jurnal.unissula.ac.id/index.php/SANLaR/article/view/4435>

¹⁴ Judgmental acts

¹⁵ Sjahdeini, Sutan Remy. (1999). *Hak Tanggungan Asas-Asas, Ketentuan-Ketentuan Pokok dan Masalah yang dihadapi oleh Perbankan*. Bandung: Alumni, p. 67.

case above, legal protection for third parties in the implementation of mortgage object loans regulated in Article 1 paragraph (1) is "all efforts to ensure legal certainty to provide protection to consumers."¹⁶

Similar to the case above, legal protection for third parties in the implementation of mortgage object loans regulated in Article 1 paragraph (1) is "all efforts to ensure legal certainty to provide protection to consumers."¹⁷

Legal Protection for Third Parties in Credit Agreements with Mortgage Guarantees in Semarang Regency the buyer of the mortgage object which is then leased can occupy the asset. The lease agreement is declared null and void due to the non-fulfillment of the objective conditions of the agreement regarding a lawful cause or cause, which cause is the assets are being pledged in the bank but the assets are in fact being leased to other parties, after that the second party or debtor is also stuck in payments and a sale and purchase will be executed but the assets are also leased so that the third party or the buyer cannot control all of the assets. The lease agreement will be invalid because it is not in accordance with article 1320 of the Civil Code. According to Article 1320 of the Civil Code which reads "the conditions for a valid agreement are: Agree that those who bind themselves have the ability to make an engagement, a certain thing, a lawful cause."

In this case to resolve the dispute above by then, the lease agreement is invalid because the guarantee that is being guaranteed by the debtor will be executed by means of underhand execution. After getting a buyer, a sale and purchase agreement will be made with the buyer. So that the seller's debt can be paid, and the tenant of the asset has been given a refund by the seller. If the asset certificate has been pledged at the bank and the second party or debtor enters into an agreement, the lease agreement is actually void. Thus, the lease agreement is terminated and the buyer can occupy the assets he has purchased.

The law must provide protection for all parties according to their legal status because everyone has the same position before the law. Law also has a useful interest in managing human rights and interests, so that the law has the highest authority to determine human interests that need to be regulated and protected.

The problem described above shows the relationship between the theory of legal protection that every legal relationship will give rise to opposite rights and obligations or each party in a legal engagement will have their respective rights and obligations that must be fulfilled. If these rights and obligations are not

¹⁶ Article 1 paragraph (1) of Act No. 8 of 1999 concerning Consumer Protection.

¹⁷ Ibid.

fulfilled, it will cause harm to one of the parties involved in the engagement, therefore, to protect and reduce problems, legal protection is needed.

Legal protection must look at the stages, namely legal protection born of a legal provision and legal regulations provided by the community. Basically, the rule of law is an agreement by the community to regulate the behavioral relationship between members of the community and between individuals and the government which is considered to represent the interests of the community. In general, protection means protecting something from dangerous things, something that can be in the form of interests or objects or goods. In addition, protection also contains the meaning of protection given by someone to someone who is weaker.

4. Conclusion

Legal protection for third parties in credit agreements with mortgage guarantees in Semarang Regency is Article 1320 of the Civil Code which reads "the legal requirements of an agreement are: Agree that those who bind themselves have the ability to make an engagement, a certain thing, a lawful cause." In this case, the agreement is declared null and void because of the non-fulfillment of the objective conditions of the agreement regarding a lawful cause or cause, which cause is the assets are being pledged in the bank but the assets are in fact being leased to other parties, after that the second party or debtor is also stuck in payments and a sale and purchase will be executed but the assets are also leased so that the third party or the buyer cannot control all of the assets. In the mortgage agreement, it is actually not allowed to guarantee the object of the mortgage that is being leased, but there are many cases like this if it has been leased by a second party or debtor, the lease agreement will be invalidated. Similar to the case above, legal protection for third parties in the implementation of mortgage object loans is regulated in Article 1 paragraph (1) No. 8 of 1999 concerning the Consumer Protection Act.

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