

Legal Protection for Debtors in Credit Agreements with Collateral in the Form of Mortgage Rights Accompanied by Power of Attorney to Sell at PT. BPR Pasar Boja, Semarang City Branch

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Abstract. *Various social dynamics give birth to various forms of legal acts, one of which is in the form of agreements. The agreements that were made at first were only verbal and practical, the procedures were also not standard, and were made according to their wishes. As for the power of attorney to sell which was made simultaneously with the debt agreement, which raises legal issues regarding the validity or otherwise of the power of attorney to sell. And how is the legal protection for the debtor as the grantor of the power of attorney, whether they are harmed by the existence of the power of attorney to sell. The method in this writing is sociological juridical. A creditor's right that guarantees the return of his receivables when the debtor defaults is in a credit agreement with an authentic deed, which has executorial power and becomes the basis for the implementation of execution if the debtor defaults. While the power of attorney to sell which is made and signed by the creditor with the debtor at the time of credit disbursement or at the time of signing the credit agreement is contradictory, but when the power of attorney to sell is agreed upon by the creditor and debtor as an effort to resolve the occurrence of bad credit by the debtor as stipulated in Article 20 paragraph (2) of Law Number 4 of 1996 concerning Mortgage Rights. A sale and purchase agreement for the object of collateral in the form of a Mortgage Right between a creditor and a buyer based on a power of attorney to sell, if it does not fulfill the requirements of Article 20 of Law Number 4 of 1996 concerning Mortgage Rights above, does not provide legal protection.*

Keywords: *Agreement; Mortgage; Rights.*

1. Introduction

In everyday life, people interact with each other because humans are social beings. In the relationship created between members of society, it can be a legal relationship. One of them is a legal act in making agreements and power of attorney institutions. The agreements made at first were only verbal and practical, the procedures were also not standard, and were made according to their wishes. Due to the limitations of humans at that time, so that each agreement was in accordance with their wishes which were different from one another.

Article 1313 of the Civil Code states that "an agreement is an act in which one or more persons bind themselves to one or more other persons". In other words, with the existence of an agreement, one or more persons bind themselves to one or more other persons.¹

Along with the progress of time and human civilization, and because of the principle of freedom of contract, the field of agreements has experienced a lot of development and progress. Agreements regulated in the Civil Code and the Commercial Code (KUHD) referred to as Named Agreement (benoemd overeenkomst/ nominaat) or special agreement, namely an agreement that has its own name, such as a sale and purchase agreement, a lease agreement, a loan agreement, a borrowing agreement, an agreement for the granting of power of attorney, and others. The legal basis for a named agreement is contained in Chapter V to Chapter XVIII of Book III of the Civil Code.

The emergence of this agreement in practice is based on the principle of freedom of contract.² The activity of borrowing and lending money or what is usually known as credit in everyday life is not something foreign anymore, because credit is a common activity for society, both by urban and rural communities. Articles 3 and 4 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking state that the main function of Indonesian banking is as a collector and distributors of funds from the community aimed at supporting the implementation of national development towards improving people's welfare.

According to R. Subekti, credit means trust, a customer who gets credit from

¹Our Book Civil Law III on Words, <https://www.unsrat.ac.id/buku-kuhperdata-iii-tangan>, accessed on November 01, 2023.

² Sam Son's, (2016), Named Agreement (benoemd overeenkomst/ nominaat), <https://qickey.com/perkerjaan-bernama-benoemd-overeenkomst-nominaat/>, accessed on October 27, 2023

a bank is indeed a person who has received trust from the bank.

The business entity explicitly provides conditions to the Debtor to submit an item (object) as an object of collateral for the Debtor's debt to the Creditor. The debt collateral submitted will then be assessed by the business entity or Creditor before being accepted by the Creditor as an object of collateral for the loan provided. The assessment includes several aspects of assessment, namely the legal aspect and the economic aspect, which is then expected from the assessment to be able to conclude the feasibility of the collateral object/goods to be used as collateral for debt in the event of a breach of promise.

In order to achieve the desired goals of the Bank, especially in the disbursement or sale of credit guarantees, it is necessary to take security measures, namely by carrying out perfect binding on the credit guarantee object through regulations governing the guarantee institution. This is especially for the benefit of the Creditor so that they are not harmed by the Debtor who is in default so that they are unable to carry out their obligations in paying credit installments.

Article 6 of Law Number 4 of 1996 concerning Mortgage Rights (hereinafter referred to as UUHT) explains that "if the debtor defaults, the first mortgage holder has the right to sell the mortgage object under his own authority through a public auction and to take payment of his receivables from the proceeds of the sale."

Power of attorney is the authority to represent to carry out legal actions in the interests and on behalf of the principal in the form of unilateral legal actions. In the sense that the obligation to carry out the performance lies only with one party, namely the person receiving the power of attorney.³The development of the broad granting of power of attorney based on the principle of freedom of contract is the fact that with the wider use of power of attorney institutions, the more problems that arise in connection with this need to be resolved.⁴

The deed of debt acknowledgement and power of sale are made separately, and the power of sale is made as collateral, in the event that the debtor does not fulfill his obligations to the creditor, the creditor can immediately sell the

³Herlien Budiono, Representation, Power of Attorney and Granting of Power of Attorney, Renvoi Magazine, Number 6.42.IV, 3 November 2006, p. 69.

⁴MU Sembiring, Several Problems Concerning Power, in Komar Andasasmita, Notary I Regulations of Position, Code of Ethics and Association of Notaries/Notariats, Indonesian Notary Association, West Java Region, 1991, p. 647.

land to another party and the proceeds of the sale are used to pay off the debtor's debt to the creditor.⁵ Article 20 paragraph (2) of Law Number 4 of 1996 concerning Mortgage Rights only regulates the possibility of selling the object of the Mortgage Right guarantee privately between the creditor and the debtor if the highest profitable selling price can be obtained and is carried out by mutual agreement.

The main objection to irrevocable power of attorney lies not in the deviation from the provisions of Article 1814 of the Civil Code or in the circumstances necessary for granting such power, but rather in the violation of the individual's right (freedom) to determine. In absolute power of attorney, the legal position of a person (the grantor of the power of attorney) is determined by another person (the recipient of the power of attorney) so that his freedom to determine himself is lost.⁶

Several cases in handling lawsuits for default of credit agreements between Creditors and Debtors accompanied by the making of a power of attorney to sell are the fact that until now there is still the practice of credit agreements with Mortgage Rights accompanied by the making of a power of attorney to sell with a Notary/PPAT deed by the Bank.

In the daily practice of Notaries, the creation of a Deed of Power of Attorney to Sell in the form of a Notarial Deed is something that is no longer foreign. According to the author, this right occurs due to legal ambiguity where the laws and regulations governing the granting of mortgage rights and power of sale are still open to multiple interpretations and there is no legal unification governing this matter. As in Article 20 paragraph (2) of Law Number 4 of 1996 concerning Mortgage Rights only regulates the possibility of selling the object of mortgage collateral privately between the creditor and the debtor if the highest profitable selling price can be obtained and is carried out by mutual agreement.

According to Herlien Budiono, such legal acts are contrary to the principle of being "against the public interest (van openbare orde) because the sale of collateral must be carried out voluntarily or in public through auction. Therefore, the granting of this kind of power of attorney to sell is null and

⁵Pieter Latumeten, *Voidability and Degradation of the Evidence Power of Notarial Deeds and the Model of the Deed*, Paper, XX Congress of the Indonesian Notary Association, Surabaya, 2009, p. 18.

⁶Herlien Budiono, *Collection of Civil Law Writings in the Notary Sector*, Citra Aditya Bakti, Bandung, 2007, p. 421.

void by law.⁷

Based on this background, the author is interested in conducting a study entitled "Legal Protection for Debtors in Credit Agreements with Collateral in the Form of Mortgage Rights Accompanied by Power of Attorney to Sell at PT. BPR Pasar Boja, Semarang City Branch".

2. Research Methods

The method used is a sociological legal method where this research not only examines the text of legislation but also the implementation of law in the field.

3. Results and Discussion

3.1. Legal Protection for Creditors in Credit Agreements with Collateral in the Form of Mortgage Rights Accompanied by Power of Attorney to Sell

The form of legal protection provided to creditors when the debtor defaults on a credit agreement with a Mortgage Right guarantee is by starting with the process or procedure for binding the credit with a Mortgage Right guarantee.

Credit agreements are usually followed by collateral agreements, so credit agreements are principal agreements while collateral agreements are accessory agreements, meaning the existence and termination of collateral agreements depend on the principal agreement (credit agreement). Credit agreements must precede collateral agreements, there can be no collateral agreement without a credit agreement. Since the credit agreement was signed, as a creditor, it has been noted that there is an obligation to hand over money to the debtor.

In general, the credit granting procedure at PT. BPR Pasar Boja, there are three stages explained by Mr. Koesharyadi, SH as the President Director, including:⁸

a. Submitting a credit application

To obtain bank credit, the first step is to submit a credit application to the relevant bank. The application must be accompanied by the required documents.

b. Credit file review

⁷Ibid, p. 69.

⁸Mr. Koesharyadi, SH, Interview, President Director of PT. BPR Pasar Boja in Semarang City, January 23, 2024, 15.00 WIB.

After the credit application is received by the bank, the bank will conduct a thorough and detailed study of the submitted credit application files. Meanwhile, if it turns out that the submitted credit files are incomplete and do not meet the specified requirements, the bank will ask the applicant to complete them.

c. Credit approval

After the credit application, the prospective debtor is deemed worthy of approval by the bank.

By making a credit agreement with a clause granting Mortgage Rights where the Mortgage Rights binding agreement is an accessory agreement that follows the main agreement. In Article 10 paragraph (1) of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, which states that "The granting of Mortgage Rights as a guarantee of certain payments is stated in and is an inseparable part of the relevant debt agreement or other agreement that gives rise to the debt". In the provisions of this Article, what is meant by a loan agreement or agreement is a form of credit agreement where the agreement must be made in writing.

The form of legal protection given to the creditor according to the provisions of the Mortgage Law is in the form of the credit agreement itself. This credit agreement functions as evidence and provides limitations on the rights and obligations of each party so that the credit agreement can guarantee the repayment of the creditor's debt, then a collateral binding process must be carried out with a clause granting Mortgage Rights if the object is fixed, namely land rights. Land rights are often used as collateral because they generally have a value or price that tends to be binding each year.

After the collateral binding process is carried out with the Mortgage Right granting clause by making the Mortgage Right by making the Mortgage Right Granting Deed by the Land Deed Making Officer (PPAT) which contains promises that protect the creditor, so that the credit agreement can guarantee the payment of the creditor's receivables, it is necessary to carry out the Mortgage Right encumbrance process in the form of a Title Deed which is carried out through 2 (two) stages, namely through the registration process and issuance of the Mortgage Right in the form of a Mortgage Right Certificate.⁹

⁹Wiwik Kristiana, SH, M.Kn, Interview, Notary in Semarang City, January 17, 2024, 13.00 WIB.

The form of legal protection provided to creditors when the debtor defaults according to the Explanation of Article 10 of Law Number 4 of 1996 concerning Mortgage Rights, is contained in the form of the credit agreement itself which is stated in writing, namely either in the form of a private deed or an authentic deed.

In the explanation given by Mr. Tris Imam Prapto Utomo, SH, "what guarantees the creditor's rights to recover his receivables when the debtor defaults is a credit agreement with an authentic deed."¹⁰This authentic deed has the advantage that it can be requested as a Grosse Deed of Acknowledgement of Debt, which has executory power and becomes the basis for carrying out execution if the debtor defaults.

3.2. Legal Consequences for Debtors Regarding the Use of Power of Attorney to Sell with Mortgage Guarantee

A power of attorney can be simply defined as an agreement between the principal and the recipient of the power of attorney, where the granting of power of attorney gives the recipient of the power of attorney the authority to carry out certain matters. The granting of power of attorney is regulated in Book III Chapter XVI starting from Article 1792 to Article 1819 of the Civil Code, while the power (*volmacht*) is not specifically regulated in the Civil Code or in other laws, but is described as one part of the granting of power. Article 1792 of the Civil Code states "The granting of power of attorney is an agreement by which a person gives power to another person, who receives it, to carry out a matter on his behalf".

This deed of power of attorney to sell is a power of attorney that has been prepared by the bank through a Notary in advance. Every time a credit facility is given to a customer or debtor, this power of attorney to sell is prepared by the bank, mostly motivated by the desire to facilitate the sale of collateral objects in the future if the debtor defaults or is in default. The granting of power of attorney given and signed by the debtor to the creditor on the same date as the date of signing the deed of debt recognition is still applied in practice. As stipulated in Law Number 4 of 1996 concerning Mortgage Rights, debt repayment guarantees using Mortgage Rights provide a privilege to the creditor as a preferred creditor.

¹⁰Mr. Tris Imam Prapto Utomo, SH, Interview, as Head of Remedial & Litigation of PT. BPR Pasar Boja in Semarang City, January 23, 2024, at 14.30 WIB.

According to Subekti, a power of attorney is defined as an agreement between the grantor and the recipient of the power of attorney or an agreement between the grantor of the power of attorney, in which a person grants power or authority to another person who receives it, to and on behalf of him carry out or do something, the purpose of carrying out or doing something is to carry out a legal act, namely an act that has legal consequences or gives rise to a legal consequence.¹¹

sale of the object of Mortgage Rights based on the Mortgage Rights Law or another term for the execution of the object of Mortgage Rights, can be seen later in the provisions of Article 6 of Law Number 4 of 1996 concerning Mortgage Rights, where Article 6 regulates that if the debtor defaults, the object of Mortgage Rights can be sold to settle receivables through a public auction. In the provisions of Article 20 paragraph (2) of Law Number 4 of 1996 concerning Mortgage Rights, which regulates that based on the agreement of the grantor and holder of Mortgage Rights, the seller of the object of Mortgage Rights can be executed privately if in this way the highest price can be obtained and which benefits all parties, based on this provision associated with the power of attorney for sale, then the sales process using the power of attorney for sale is permitted by an agreement between the creditor and the debtor to carry out the sale of the object of Mortgage Rights collateral, this agreement between the creditor and the debtor is an agreement agreed upon after the occurrence of default by the debtor or after the credit has experienced a jam.

In the statement of Mr. X, as a Debtor of PT. BPR Pasar Boja Semarang City Branch, he opined that "the Power of Attorney to Sell that was made was very irrational, as if the principal gave full freedom to the person receiving the power of attorney to freely carry out legal actions against the collateral that was pledged".¹²

The Power of Attorney to Sell cannot be used as a legal basis for the debtor's debt repayment, especially since the collateral has been burdened with a Mortgage Right, so of course the collateral will be subject to the provisions of the Mortgage Right Law. This is because the right to sell, transfer and assign a land right is the absolute authority of the debtor himself. The principle of *Nemo Plus Iuris Ad Alium Transferre Potest Quam Ipse Haberet*, explains that a person

¹¹R Subekti, *Various Agreements*, Bandung, Alumni, 1999, pp. 140-141.

¹²Mr. X, Interview, Debtor of PT. BPR Pasar Boja Semarang City Branch, in Semarang City, December 28, 2023, 15.00 WIB.

cannot transfer rights to another person more than the rights he has. In other words, the grantor of the power of attorney cannot grant more power than he has.¹³

The legal consequences arising from the use of the Power of Attorney to Sell do not have legally binding force for the creditor. For a power of attorney to sell that does not fulfill the elements in Article 1320 paragraph (4) regarding a/sub that is lawful, then the objective requirements of the agreement are not fulfilled, therefore it can be declared null and void by law. This means that the use of the Power of Attorney to Sell against the object of the Mortgage Right is legally considered to have never existed or is declared to be legally void since the creation of the Power of Attorney to Sell was born.

4. Conclusion

What guarantees the creditor's rights to recover his receivables when the debtor defaults is in a credit agreement with an authentic deed. The authentic deed itself has the advantage that it can be requested for a Grosse Deed of Debt Acknowledgement which has executorial power and becomes the basis for the execution if the debtor defaults. However, based on the General Explanation Number 9 and Explanation of Article 14 paragraph (2) of the Mortgage Law, a Land Rights Certificate has been issued as a replacement for the Grosse Deed of Debt Acknowledgement which has the same function. Based on the provisions of Law Number 4 of 1996 concerning Mortgage Rights, a power of attorney for sale cannot be used to sell the object of the Mortgage Right in the settlement of the debtor's bad credit, the provisions of Article 20 paragraph (2) of Law Number 4 of 1996 concerning Mortgage Rights, are the basis for the sale of the object of the Mortgage Right privately, not through a public auction, however, this private sale can only be carried out with the requirement that there is an agreement between the debtor customer and the bank, especially regarding the selling price, which is believed to be the highest price that can benefit both parties, meaning that the sale and purchase agreement for the object of the Mortgage Right guarantee between the creditor and the buyer which is based on a power of attorney for sale does not meet the requirements of the provisions of Article 20 of Law Number 4 of 1996 concerning Mortgage Rights.

¹³Agus Pandoman, Primary Regulations for Publicity-Non-Publicity Deed Engagements, Volume I, Lecture Module, p. 128.

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