

## THE COLLATERAL FOR LAND RIGHTS TRANSFERRED INTO SELLING AND BUYING OBJECTS

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### **Abstract**

*The purpose of this research is to analyze collateral benefits, mortgage security institution, principles of security law, the problem of good faith in debt agreement, legal protection for debtors if debt collateral objects are transferred into sale and purchase objects. The granting of credit to the debtor should be bound by a principal agreement and an accessory agreement for the collateral provided, but it happens that the debtor is bound by a principal agreement and a sale and purchase bond agreement along with a power of sale. When the debtor defaults, the name will be changed to the name of the creditor. The research method in this research is normative juridical research method, and the approach method used is Statute Approach, and Conceptual Approach. The result of the research is that debtors who have obtained debts from creditors and submitted land rights collateral, should be bound by an accessoir agreement, namely a mortgage right as in Act No. 4 of 1996, instead of binding the sale and purchase and power of sale. If this is still done by the creditor, the debtor can take a settlement method, namely: Alternative Dispute Resolution; Court.*

**Keywords:** Collateral; Debt; Purchase; Sale.

### **A. INTRODUCTION**

The business world is inseparable from capital, Capital is an important aspect of doing business.<sup>1</sup> One that can provide capital assistance is a savings and loan cooperative. Cooperatives as an alternative to applying for a loan / credit and the conditions are not too difficult. How to distribute credit to the community in accordance with the agreed agreement. Although this business promises alternative funding for the community, there are still many controversial things, including the imposition of relatively high-interest rates.<sup>2</sup> Lending is very important in obtaining capital. The credit sector is one of the largest sources of income even though it contains risks. The credit agreement between the debtor and the creditor is a reciprocal

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1 Naufal Nabawi, Kualitas Sumber Daya Manusia Dan Modal Usaha Pengaruhnya Terhadap Pengembangan Usaha Umkm, *AI – Ulum Ilmu Sosial Dan Humaniora*, Vol. 8, No. 1, April 2022, page.111-121

2 Mukti Fajar Nur Dewata, Reni Budi Setianingrum, The Self Regulation on Peer to Peer (P2P) Of Lending Industry in Indonesia as Problems and Prospects, *JPH: Jurnal Pembaharuan Hukum*, Vol. 9, No. 1, April 2022, Page.142-159

agreement based on trust. Therefore, it must assess the ability and ability of the debtor to repay the debt at maturity.

Money lending and borrowing activities often require the submission of debt collateral by the debtor to the creditor. In the face of frequent and abnormal fluctuations that negatively affect the overall economy as a whole, and the financial system in particular in some countries.<sup>3</sup> Debt collateral can be in the form of immovable objects, so that it is a material guarantee and or in the form of a debt guarantee promise so that it is a personal guarantee. In connection with debt collateral, it is necessary to know what is the law of collateral contained in the legislation so that parties related to the submission of credit guarantees can secure their interests.

Collateral is one of the most important elements in granting credit, one of which is a material guarantee known as a mortgage. Collateral can be defined as something that the debtor gives to the creditor to provide confidence that the debtor will fulfill obligations that can be valued in money arising from an engagement.<sup>4</sup> According to Sri Soedewi Mascjhoen Sofwan, the definition of security law is to regulate the juridical construction that allows the provision of credit facilities by pledging the objects purchased as collateral. Such regulations must be sufficient to ensure and provide legal certainty for credit institutions, both domestic and foreign. The existence of such collateral institutions must be accompanied by the existence of a large number of credit institutions with a long period of time and relatively low interest rates.<sup>5</sup>

The nature of the guarantee agreement is constructed as an *accessoir* agreement, which is an agreement that is associated with the main agreement in the form of a credit granting agreement. The position of the guarantee agreement which is constructed as an *accessoir* agreement guarantees a guarantee institution for the granting of credit by creditors. The guarantee agreement as an *accessoir* agreement has legal consequences, such as:

1. The existence of a principal agreement;
2. Its nullity depends on the principal agreement;
3. The principal agreement is void - also void;
4. Transfers with the transfer of the main agreement;
5. If the principal agreement is transferred due to *cessi*, subrogation, it will also be transferred without any special submission.<sup>6</sup>

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3 Tran Thi Van Anh, Nguyen Thi Nhung, Tran Thi Thanh, Dealing with Non-Performing Loans During the Bank Restructuring Process in Vietnam: Assessment Using the AHP and TOPSIS Methods, *Gadjah Mada International Journal of Business*, Vol. 22, No. 3, September-December 2020, Page.323-347

4 Hadisaputro, Hartono, *Pokok-pokok Hukum Perikatan dan Hukum Jaminan*, Yogyakarta, Liberty, 1984, Page.20.

5 Sofwan Sri Soedewi Mascjchoen, *Hukum Jaminan di Indonesia Pokok-pokok Hukum Jaminan dan Jaminan Perorangan*, Jakarta, BPHN Departemen Kehakiman RI, 1980, Page.25.

6 M.Bahsan., *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*, Jakarta, Rajawali Pres, 2012, Page.28.

Guarantees can be classified into several classifications based on certain points of view, for example, the way they occur, the nature of the object of the guarantee and so on. Guarantees due to laws are guarantees that are born or held such as general guarantees, privilege rights and retention rights listed in Article 1132 and Article 1134 paragraph (1) of the Civil Code (hereinafter referred to as the Civil Code). Guarantees due to agreements are guarantees that are born or held by agreements made by the parties, such as mortgages, fiduciaries and so on.

General guarantees, all creditors have the same position against other creditors, no creditor is prioritized or privileged from other creditors. Because general security is less favorable to creditors, it is necessary to surrender certain assets to be bound specifically as security for the repayment of the debtor's debt, so that the creditor concerned has a priority position over other creditors in the repayment of his debt. This kind of guarantee provides protection to creditors and the agreement will explain this. Special guarantees provide a position of precedence (preference) for the holder.

Based on research from Ade Dwi Aprilia<sup>7</sup> With the title of buying and selling land that is certified as debt collateral according to Law No. 5 of 1960, the substance of this research is that the process of buying and selling land is considered valid if it can show valid documents, Second, in the legal aspect the seller should have good faith in providing proof of ownership to the new and legitimate owner, third, regarding cases of buying and selling land certificates still often cause conflicts in the community when buying and selling transactions. Then Meyske Tanamal's<sup>8</sup> research with the title Sale and Purchase of Land and Buildings on Debt Collateral Objects with research results The results of this study indicate that the validity of the sale and purchase of land and buildings that have been used as debt collateral objects, namely if the sale and purchase is carried out has fulfilled the legal requirements of the agreement according to Article 1320 of the Civil Code, and the process of transferring sale and purchase of land and buildings used as debt collateral objects is carried out in several stages, namely that the certificate of the sale and purchase object must be redeemed first by settling / paying off the debt first, and after paying off the land certificate is then roya / removal of collateral rights at the Land Office. The next stage is the preparation of the sale and purchase and the stage of making a deed of sale and purchase before a Land Deed Official, including payment of the sale and purchase tax. Then the next stage is the registration of the transfer of rights or registration of the deed of sale and purchase at the Land Office.

The situation that occurs in the community is that the granting of credit to the debtor should be bound by a principal agreement and an accessory agreement for the collateral provided, but this is not the case when the debtor is bound by a principal agreement and a sale and purchase

7 Ade Dwi Aprilia, *Jual Beli Tanah Yang Bersertifikat Dijaminkan Hutang Menurut UU No 5 Tahun 1960*, *Madani Legal Review*, Vol. 6, No. 2, December 2022, Page.1-17

8 Meyske Tanamal, *Jual Beli Tanah dan Bangunan Atas Objek Jaminan Utang*, *Tatohi Jurnal Ilmu Hukum*, Vol. 2, No. 4, June 2022, Page.361-374

bond agreement along with the power to sell. When the debtor defaults, the name will be changed to the name of the creditor based on the deed that has been made between the debtor and the creditor.

The purpose of this research is to analyze collateral benefits, mortgage security institution, principles of security law, the problem of good faith in debt agreement, legal protection for debtors if debt collateral objects are transferred into sale and purchase objects.

## **B. RESEARCH METHODS**

This study uses a normative juridical approach, the normative (doctrinal) method is generally associated with legal practical and professional work to solve a specific legal problem. Terms such as legal doctrine, black-letter law (black-letter law), formalism, doctrinalism, and legal-dogmatic research are all used to indicate the type of legal research related to the principles, rules, and concepts governing specific fields or institutions and analyze the relationships between them to resolve legal ambiguities and gaps.<sup>9</sup> Normative legal research should describe existing laws in a given field as consistently as possible to inform audiences how those laws apply. Most important in this type of normative research is that doctrinal descriptions must also go beyond textual explanations.<sup>10</sup>

## **C. RESULTS AND DISCUSSION**

### **1. Collateral Benefits**

Juridically, the function of collateral is to provide certainty of debt repayment in a debt and credit agreement or certainty of realization or achievement in an agreement, by entering into a guarantee agreement through collateral institutions known in Indonesian law.<sup>11</sup> In order to understand and solve legal problems, activities that contain philosophical reflection activities must also be carried out, namely based on ontological studies (meaning/nature), epistemological (understanding) and axiological (benefits) of Legal Science.<sup>12</sup> According to Thomas Suyanto, the functions of collateral in granting credit are:

- a. Gives the creditor the right and power to obtain repayment with these collateral goods, if the debtor commits a breach of promise or does not repay the debt at the time specified in the agreement;
- b. Ensure that the debtor participates in the transaction to finance the business or project, so that the possibility of abandoning the

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9 J. Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research. In R. van Gestel, H. Micklitz, & E. L. Rubin (Eds.), *Rethinking Legal Scholarship*, Cambridge, Cambridge University Press, 2017, Page.207–228.

10 Tunggul Ansari Setia Negara, Normative Legal Research in Indonesia: Its Origins and Approaches, *Audito Comparative Law Journal*, Vol. 4, Issue. 1, 2023, Page.1-9

11 Harun Melati S., *Analisis Terhadap Hak Jaminan Resi Gudang Sebagai Salah Satu Bentuk Pengikatan Jaminan Kredit Pada Lembaga Perbankan*, Jakarta, Tesis Universitas Indonesia, 2010, Page.32.

12 Ade Saptomo, Rocky Marbun, Anis Mashdurohaturun, The Epistemological Errors in Regulation of Absolute Competence on Mortgage Disputes in Credit Contracts, *IJLR: International Journal of Law Reconstruction*, Vol. 7, No. 1, April 2023, Page.1-11

- business or project to the detriment of oneself can be prevented or at least the possibility of being able to do so is minimized;
- c. Encourage the debtor to fulfill the credit agreement, especially repayment in accordance with the agreed terms so as not to lose the assets that have been pledged.<sup>13</sup>

According to Fieda Husni Hasbullah, the benefits or uses of special guarantees are:

- a. Special guarantees can guarantee the realization of the main agreement or debt and credit agreement;
- b. Special guarantees protect creditors from losses if the debtor defaults;
- c. Guarantee that creditors get repayment from pledged objects;
- d. Guarantee that the debtor performs the promised performance, so that by itself it can guarantee that the debtor's debts can be paid in full;
- e. Guarantee that the debtor participates in the transaction financed by the creditor<sup>14</sup>

The function of collateral is:

- a. Providing legal certainty for creditors and debtors, for creditors, namely legal certainty to obtain return of principal and interest, for debtors legal certainty to repay the principal and interest that has been determined.
- b. To provide convenience in obtaining credit for debtors and debtors are not worried about developing their business.
- c. Providing security for a mutually agreed debt and credit agreement.

## 2. Mortgage Security Institution

Basically, the imposition of mortgages must be done solely by the grantor of the mortgage.<sup>15</sup> Article 1 point 1 of Act No. 4 of 1996, a mortgage on land and objects related to land (hereinafter referred to as a mortgage) is a security right that is imposed on land rights along with or without other objects that constitute an entity with the land, for the repayment of certain debts, which gives priority to certain creditors against other creditors.

The characteristics of a hak tanggungan, as stated in Article 3 of Act No. 4 of 1996, are as follows:

- a. Giving priority or precedence to the holder, as Article 1 point 1 of Act No. 4 of 1996, as well as what is referred to in Article 20 paragraph (1) b of Act No. 4 of 1996, among others, states that the object of

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13 *Ibid.*

14 Frieda Husni Habullah, *Hukum Kebendaan Perdata, Hak-hak Yang Memberikan Jaminan (Jilid 2)*, Jakarta, Indo Hill Co, 2005, Page. 20

15 Susilowati, Yuniar Pradhana Mukti and Gunarto, Legal Consequences of Mortgage Right Imposition on Uncertified Land (Letter C) in Case The Grantor Is Passed Away, *Jurnal Akta*, Vol. 5, Issue. 2, June 2018, Page.427-434

the mortgage right is sold through a public auction according to the procedures specified in the laws and regulations for the repayment of the receivables of the mortgage right holder with the right of precedence over other creditors.

- b. Always following the object guaranteed by whoever the object is located, as Article 7 of Act No. 4 of 1996 in the explanation of the article states, that this nature is one of the special guarantees for the interests of the holder of the mortgage right. Even though the object of the mortgage right has changed hands and belongs to another party, the creditor still exercises its rights through execution if the debtor is in default.
- c. It fulfills the principles of specialty and publicity, so that it can bind third parties and provide legal certainty to interested parties.
- d. Easy and certain execution.

Requirements for the object of mortgage rights, among others:

- a. Can be valued in money, because the debt guaranteed is in the form of money;
- b. Including rights that must be registered in the public register because they must meet the requirements of specialty and publicity;
- c. Has a transferable nature because if the debtor is in default, the object used as collateral will be sold in public;
- d. Requires appointment by law.

### **3. Principles of Security Law**

Some principles of security law as stipulated in the Civil Code are as follows:

- a. The position of the borrower's property

Article 1131 of the Civil Code states that the borrower's assets are fully collateral (dependents) for his debt. The article stipulates that all of the borrower's assets, both in the form of movable and immovable property, both existing and future, are collateral for the borrower's debt. This provision is one of the main provisions in the law of guarantees, the lender will be able to demand repayment of the borrower's debt from all the assets concerned, including assets that will still be owned in the future. The lender has the right to demand repayment of the debt from the property that will be obtained by the borrower in the future. The principle contained in Article 1131 of the Civil Code is that the law regulates the right to collect creditors or creditors for transactions with debtors.<sup>16</sup>

- b. Position of the lender

Based on Article 1132 of the Civil Code, the position of the surety can be divided into 2 (two) groups, namely:

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16 Theresya Ronauli Sibarani, Roida Nababan, Besty Habeahan, Perlindungan Hukum Bagi Kreditor Atas Pailitnya Seorang Kreditor (Studi Putusan No. 09/Pdt.Sus/Pailit/2015/Pn.Niaga.Jkt. Pst), *PATIK : Jurnal Hukum*, Vol. 8, No. 3, December 2019, Page.179-188

- 1) Who have a balanced position in accordance with their respective receivables, and
  - 2) Which has a position of precedence over other lenders based on a statutory regulation.
- c. Prohibition of promising ownership of the object of debt collateral by the lender
  - d. The lender is prohibited from promising to own the object of debt collateral if the borrower breaks the promise, this is regulated in Article 1178 of the Civil Code as well as Article 12 of Act No. 4 of 1996.

#### **4. The Problem of Good Faith in Debt Agreement**

The principle of an agreement does not always have to be written and if it is made orally the agreement is still valid and binding for the makers like a law. Based on Article 1320 of the Civil Code, there are 4 (four) conditions for a valid agreement, namely:

- a. The existence of an agreement;
- b. Has the capacity to act;
- c. A certain thing;
- d. Halal cause.

The occurrence of debt and credit in general has fulfilled the four conditions as mentioned in the article. An agreement is bound by Article 1338 of the Civil Code regarding the principle of good faith in carrying out the agreement. What has been agreed must not be denied, but must be carried out according to the contents of the agreement in good faith. The purpose of this principle is intended so that the debtor remains consistent with the promised performance, so that it will not harm the creditor.

The principle of good faith in the agreement is actually not enough to be recognized only in the implementation of the agreement, but it needs to be done when the parties make an agreement. In making a debt agreement, it must be based on the good faith of the creditor and debtor.<sup>17</sup> It is necessary that in the deed of agreement, especially in the closing section, it is stated firmly and clearly, that the deed of debt is made in good faith by both parties who promise. They are expected to uphold good faith and act consequently in implementing the agreement as stipulated in Article 1338 paragraph (3) of the Civil Code.

Deviations from the principle of good faith in the implementation of agreements often occur, especially by debtors for various reasons. When a default occurs, there is usually a violation of the principle of good faith in the implementation of the agreement because the debtor does not actually keep his promise.

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<sup>17</sup> Ayesha Haiqa Nurlette, Keabsahan Perjanjian Jual Beli Kosmetik Secara Online, *Journal Of Lex Generalis*, Vol. 2, No. 3, 2021, Page.1-13

## **5. The Role of Debt Recognition Letter in Granting Credit**

The occurrence of a debt and credit agreement and then the acknowledgment of the debtor's debt, at first glance, is meaningless because it is motivated by the idea that the agreement is proof that the debtor has owed the creditor, so there is no need for further acknowledgment. If the debt and credit agreement is made in writing, it is easy for the creditor to show that the debtor has made a debt, but if the agreement is oral, it is not enough for the creditor to make a statement and still needs other evidence in the form of a debtor's acknowledgment. The debtor's acknowledgment of his debt shows that the debtor really has a debt to the creditor and has not been paid.

Civil procedural law is known as a debt acknowledgment sheet made in writing in a notarial deed, the legal basis is Article 224 HIR which regulates debentures and mortgages with the development of time mortgages have been replaced by mortgage rights as Act No. 4 of 1996 concerning Mortgage Rights.

The letter of debt in Article 224 HIR is still valid until now, there is no new provision that replaces it. The letter of debt in question is a letter of acknowledgment of debt, in the form of the contents of the acknowledgment of debt in the form of a unilateral statement from the debtor about the amount of unpaid debt.

The letterhead of the debt acknowledgment deed is inscribed with the words "For the Sake of Justice Based on God Almighty", resulting in the deed taking the form of a grosse deed. With such an irah-irah, a deed of acknowledgment of debt has executorial power if the debtor fails to repay the debt (default) and the creditor can file the execution of the grosse deed of acknowledgment of debt to the court without going through a civil lawsuit. A debt acknowledgment letter made under the hand does not have executorial power and its function is only as a complement to the debt and credit agreement.

Actually, a grosse deed of acknowledgment of debt can serve as collateral for debt and credit as long as the amount of debt does not change because if the debtor defaults on his debt, the creditor can file for execution with the court without first going through the lawsuit procedure.

## **6. Legal Protection for Debtors if Debt Collateral Objects are Transferred into Sale and Purchase Objects**

Based on statutory provisions, the provision of credit is accompanied by the provision of collateral for the debt. Events that occur in the community, the collateral provided for the debtor's debt is not bound by an accesoir agreement, namely the granting of a mortgage on an immovable object of land rights, but is bound by a sale and purchase bond agreement and a power of attorney to sell if the debtor defaults on the debt that has been given. This is not in accordance with the provisions of Act No. 4 of 1996 concerning Mortgage Rights. If the debtor feels aggrieved by this situation, it can be done to resolve

through:

a. Alternative Dispute Resolution

Alternative Dispute Resolution as perceived today as a dispute resolution mechanism is done through negotiation, mediation, arbitration, conciliation, and/or other hybrid processes.<sup>18</sup> Alternative Dispute Resolution, which is regulated in Chapter II of Act No. 30 of 1999 concerning Alternative Dispute Resolution and Arbitration, is actually not a new thing in people's lives, only the regulation has just been included in the Law. In the same vein, it must be emphasised that in trying to identify the relationship between conflict and dispute under International Arbitration Law, one key aspect of this development is that the philosophy of Alternative Dispute Resolution thrives on the protection of interest of the parties in such a dispute or conflict. The whole essence is that disputes or conflicts in Office establishment are better resolved through Alternative Dispute Resolution Mechanism.<sup>19</sup> The APS institution is a peace institution that has been known since tens or even hundreds of years ago. Indonesian people, most of whom live in rural areas and are more familiar with customary law, when facing differences of opinion or disputes, generally resolve them by meeting then negotiating and seeking agreement. If there is a deadlock, they usually ask for help from a third party. The third party who is asked for help does not adjudicate, but provides advice or the best possible solution. If the parties to the dispute are unable to reach an amicable settlement, they submit the dispute to the court.

b. Through the Court

Disputes between creditors and debtors can be resolved through civil suits in court. The selection of the court as a place to resolve disputes is due to several advantages possessed by the court, including being a ready-made institution, the place is easy to find, has coercive measures such as confiscation, executes its own decisions.

Deviations from the principle of good faith in the implementation of agreements often occur, especially by debtors for various reasons acknowledgment of debt can be a guarantee of debt and credit as long as the amount of debt does not change because if the debtor defaults on his debt, the creditor can apply for execution to the court without having to go through the lawsuit procedure first. Events that occur in the community, the collateral provided for the debtor's debt is not bound by an accessory agreement, namely the granting of a mortgage on an immovable object in the form of land rights, but is bound by a sale and purchase binding agreement and a

18 Meria Utama and Irsan Irsan, General Overview on Selecting and Drafting Construction Contract Disputes Resolution, *Sriwijaya Law Review*, Vol.2, No.2, 2018, Page.152,

19 Bosede Remilekun Adeuti, Resolving Office Establishment Dispute in Nigeria through Alternative Dispute Resolution Mechanism: An Evolving Regime, *Sriwijaya Law Review*, Vol. 5, Issue. 1, January 2021, Page.116

power of attorney to sell if the debtor defaults on the debt that has been given.

#### **D. CONCLUSION**

Debtors who have obtained debts from creditors and submitted collateral for these debts, should be bound by an accessory agreement, namely the submission of mortgage rights in accordance with Act No. 4 of 1996 concerning Mortgage Rights, instead of binding the sale and purchase and power of sale. If this is still done by the creditor, then the debtor can do a settlement method, namely: Through Alternative Dispute Resolution; Through the Court. The letterhead of the debt acknowledgment deed is inscribed with the words "For the Sake of Justice Based on God Almighty", resulting in the deed taking the form of a grosse deed. With such an irah-irah, a deed of acknowledgment of debt has executorial power if the debtor fails to repay the debt (default) and the creditor can file the execution of the grosse deed of acknowledgment of debt to the court without going through a civil lawsuit. A debt acknowledgment letter made under the hand does not have executorial power and its function is only as a complement to the debt and credit agreement.

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