

Implementation of Fiat Execution Against Mortgage Rights Objects as a Result of Default at Kspps Anugerah Temanggung

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Abstract. *Sharia economic law in Indonesia is experiencing dynamics in solving the problems of its people, especially related to sharia economic disputes. The long process of the courts in examining and deciding sharia economic cases is a challenge for the world of justice to then innovate in creating faster and more effective means of litigation through what is called a small claim court or commonly called a simple lawsuit through Supreme Court Regulation (PERMA) No. 2 of 2015 in conjunction with PERMA No. 4 of 2019 concerning Procedures for Settling Simple Lawsuits and PERMA No. 14 of 2016 concerning Procedures for Settling Sharia Economic Disputes. This study aims to analyze the efforts of KSPPS Anugerah Temanggung and analyze the implementation of fiat execution of mortgage rights that are in default at KSPPS Anugerah Temanggung. The research method used in this study is the normative legal research type. The theoretical approach used is by using the theory of legal certainty and the theory of responsibility, as well as various other relevant legal theories in supporting the correct analysis of the implementation of fiat execution. The results of the study are the procedures for resolving defaults in the KSPPS Anugerah Temanggung murabahah contract: 1). Providing a warning letter, 2). Extension of financing, the remaining outstanding principal margin at that time is extended according to the member's ability and according to the agreement without any additional costs, 3). A family approach to executing collateral, 4). Providing a Delayed Delay Warning Letter (SPKT) with a period of two weeks, 5). Warning Letter (SP1) with a period of two weeks, 6). Warning Letter (SP2) with a period of one month, 7). Warning Letter (SP3) with a period of one month, 8). Strong Warning Letter (SPK), 9). Selling collateral by members selling through or to KSPPS at the agreed market price, and 10). Legal Path (Court or arbitration body). And the stages of the Fiat Execution of*

the object of mortgage rights as a result of Default at KSPPS Anugerah Temanggung are 1). Application for execution of mortgage rights, 2). Examination of auction files, 3). Aanmaning hearing, 4). Execution seizure, 5). Execution auction, and 6). Vacating.

Keywords: *Default; Execution; Fiat; Mortgage.*

1. Introduction

Sharia Cooperative is one of the non-bank Islamic financial institutions that is growing rapidly in Indonesia. The rapid growth of Islamic Cooperatives indicates that the Indonesian people really need their existence, as part of an alternative financial institution that provides services with a profit-sharing concept based on Islamic principles that are in line with the implementation of Islamic economics, especially since in fact the majority of the Indonesian population is Muslim, which is recognized or not, has contributed to the growth of Islamic Cooperatives in various regions in Indonesia.¹

The rapid development of Sharia Cooperatives in Indonesia is inseparable from the large portion of the middle and lower class society in Indonesia. Data from the National Committee for Sharia Economics and Finance (KNEKS) as of April 1, 2019, Of the total population of around 265 million, 40% are middle class and 20% are classified as lower class, plus approximately 25.67 million people are categorized as poor or 9.66% of the population. This is what makes the existence of Sharia Cooperatives relevant and very acceptable to the Indonesian people.

In running its business, Sharia Cooperatives often face the potential for disputes with members or parties involved in an agreement made by the Sharia Cooperative. For every type of dispute that occurs, the Sharia Cooperative as a service provider in the field of sharia microeconomics requires a quick resolution and settlement with a settlement result that can fulfill a sense of justice for both parties.

Efforts to reach consensus by conducting mediation, negotiation, and even restructuring or rescheduling offers are the main ways to resolve problematic financing or customer defaults, but these efforts often reach a dead end, so taking the legal route (litigation) is the last way that will certainly be taken by Sharia Cooperatives or other Sharia Financial Institutions (LKS).

However, as a last resort (optimum remidium), litigation efforts often take a long time and certainly are not cheap. However, these litigation efforts must

¹ Muhammad Ridwan, Management of Baitul Maal wa Tamwil (BMT), (Yogyakarta: UII Press, 2002), p.126.

be taken in any case to ensure that the financial rights of the Sharia Cooperative are fulfilled and customers are forced to fulfill their obligations.

In this context, Islamic economic law in Indonesia is experiencing dynamics in solving the problems of its people, especially related to Islamic economic disputes. The long process of the courts in examining and deciding Islamic economic cases is a challenge for the world of justice to then innovate in creating faster and more effective means of litigation through what is called a small claim court or commonly called a simple lawsuit through Supreme Court Regulation (PERMA) No. 2 of 2015 in conjunction with PERMA No. 4 of 2019 concerning Procedures for Settling Simple Lawsuits and PERMA No. 14 of 2016 concerning Procedures for Settling Islamic Economic Disputes.

In addition, for Sharia Cooperatives, holders of mortgage rights in the form of land certificate guarantees for contracts agreed between Sharia Cooperatives and their members based on PERMA No. 14 of 2016 can directly submit an execution application to the Religious Court without having to go through a long trial process which is then commonly called a fiat execution application.

Mortgage Guarantee with the direct execution of the said execution, by Herowati Poesoko, explained that the main function of the guarantee institution is on the one hand a need for creditors or banks to minimize the risk in credit distribution. On the other hand, the guarantee as a means of protection for the security of creditors, namely the certainty or repayment of the debtor's debt or the implementation of an achievement by the debtor or by the debtor's guarantor, if the debtor is unable to complete all obligations related to the credit.

According to Moch. Isnaeni, direct execution (*Parate Executie*) is because the right to guarantee property provides an easy collateral execution system. If the debtor defaults, the creditor has the authority to carry out easy, simple, and fast collateral execution, and that is by using the legal institution of *parate executie*.²

Before the UUHT was ratified and enforced, the institution of *parate executie* was already known and regulated in the legal system in Indonesia. Article 224 HIR/Article 258 RBg, has regulated the matter of *parate executie*. Other regulations are found in Article 1131 of the Civil Code which states that: "All objects of the debtor, both movable and immovable, both existing and new in the future, become collateral for all individual obligations."³

²Moch. Isnaeni. 2017. *Introduction to Property Collateral Law*, Yogyakarta; LaksBang Pressindo. Pp. 125-126.

³R. Subekti and R. Tjitrosudibio. 2002. *Civil Code*, Jakarta; Pradnya Paramita. Page 291

The formulation of Article 1131 of the Civil Code according to Kartini Muljadi and Gunawan Widjaja,⁴ shows that every action taken by a person in the field of wealth will always have consequences for his wealth, whether it is in the form of increasing the amount of his wealth (credit), or which will eventually reduce the amount of his wealth (debit).

It is also stated that a guarantee that arises due to law is a guarantee whose existence is designated by law, without any agreement between the parties, namely the provisions of which can be found in Article 1131 of the Civil Code.

In terms of the development of direct execution (*parate executie*), Herowati Poesoko explained that the implementation of *parate executie* during the period since the enactment of Law Number 5 of 1960 (UUPA) until the enactment of Law No. 4 of 1996, could not be implemented as expected by the bank as a creditor due to the Regulation of the Supreme Court of the Republic of Indonesia (MARI) with its decision No. 3210 K/Pdt/1984, dated January 30, 1996, which is one of the *ratio decidendi* of the Supreme Court decision in this case, if the auction is carried out by the Head of the Bandung State Auction Office on the orders of the original Defendant I (Creditor Bank) and not on the orders of the Chairman of the Bandung District Court, then according to MARI the public auction is contrary to Article 224 HIR, so the auction is invalid.

The Supreme Court's decision is related to the need for *fiat execution*, but with the enactment of UUHT, the provisions of *parate executie* are recognized and regulated, among others, in Article 6 of UUHT. Next, regarding the provisions of UUHT that regulate *parate executie*, it is related to its existence, because the provisions of Article 6 of UUHT have also been requested for a material review to the Constitutional Court, and based on Decision Number 70/PUU-VIII/2010, in its decision, it "Declares to reject the Applicant's application in its entirety." The review of Article 6 of UUHT which was rejected by the Constitutional Court, shows the existence of *parate executie* in the legal system of guarantees in Indonesia.

The execution auction of mortgage rights as described above still leaves problems related to the interpretation of the material content of the Mortgage Law itself which seems to be contradictory. These problems include those related to the implementation of the execution of the collateral object that is subject to mortgage rights based on the mortgage certificate which has executorial power based on the *irah-irah* "FOR JUSTICE BASED ON THE ONE ALMIGHTY GOD".

⁴Kartini Muljadi and Gunawan Widjaja. 2007. Property Law Series. Privileges, Pawns and Mortgages, Jakarta; Kencana.

This is due to the error of the UUHT and the Judicial institution in understanding the two execution institutions, namely between parate executie and execution based on the executorial title. The establishment of the judicial institution (jurisprudence) which was then followed up by the issuance of Law Number 4 of 1996 concerning Mortgage Guarantee has confused the understanding of parate executie with execution based on the executorial title, this has caused confusion in many circles, especially creditors holding mortgage rights. This has also caused fear for auction implementers, in this case the KPKNL, to accept the parate executie auction application based on Article 6 of the UUHT.

The confusion that exists is caused by, among other things, differences in understanding in Article 6 of the UUHT with the General Explanation number 9 of the UUHT and the Explanation of Article 14 paragraph (2) and (3) of the UUHT which states that the implementation of parate executie is carried out based on Article 224 HIR and Article 258 RBg which states that the *grosse acte hypothek* (now the Mortgage Rights Certificate), in the event of a default or breach of promise, has the force of a court decision whose execution is subject to and subject to civil procedural law on the basis of the order of the Chief Justice using court fiat. Meanwhile, the implementation of execution with the parate executie mechanism is in principle a simplified execution without the need to involve the court.

However, regarding the problems that still arise from the auction of execution of Article 6 of the mortgage law itself, if we look more closely, in principle it has been confirmed by the UUHT itself, where Article 20 of the UUHT does not actually contradict the method of executing mortgage rights, but instead creates a legal choice for executing mortgage rights in 3 (three) ways:

- a. Execution based on *grosse acte hypotheek* (Article 224 HIR and Article 258 RBg);
- b. Execution based on the executorial title in the Mortgage Certificate (Article 6 and Article 20 UUHT);
- c. Private execution based on the agreement between the grantor and the holder of the Mortgage Rights.

So in this case it is clear, regarding the execution auction of Article 6 UUHT, creditors are given a legal choice to execute their mortgage rights, either using the Fiat Executie, Parate Executie, or private sale mechanisms based on an agreement between the grantor and the mortgage holder, but how is the implementation of fiat execution by the Sharia Cooperative against its members who are in default of the agreed contract.

2. Research Methods

2.1 Types of Research

This research uses a normative legal research type, which examines/researches legal materials.⁵ Such legal research does not use field research because what is being studied are legal materials so that it can be said to be library based, focusing on reading and analysis of the primary and secondary materials. If so, then it is more appropriate to use the term legal science study as can be found in the legal literature in the Netherlands. The term "study" is the same as the Dutch term *bedrijven* or *beoefening* which can be found in the work of JH Bruggink who wrote; *het bedrijven van de rechtswetenschap*. Or, in the work of Jan Gijssels and Mark van Hoecke; *wetenschaps beoefening* and *de beoefening van de rechtstheorie*.⁶

2.2. Approach Method

This research method uses a Qualitative approach system, namely an approach using existing statutory provisions, a statutory approach, a case approach, and a legal concept analysis approach (Analytical and Conceptual Approach).⁷This approach is used to examine all laws and regulations governing the cancellation of Regional Regulations, so that consistency and conformity can be found between one law and another.

So that the method used tries to understand the problem as a whole (holistic) and can reveal certain secrets and meanings which are done by collecting data in a natural setting, using a systematic, directed and qualitatively accountable working method, so that it does not lose its scientific nature.⁸

2.3 Data Collection Methods

Legal materials studied and analyzed in normative legal research include primary, secondary, and tertiary legal materials. The technique used in collecting and analyzing these legal materials is by using

⁵Jhonny Ibrahim, *Theory and Methodology of Normative Legal Research*, Malang: Banyubiru publishing, 2006, p. 46.

⁶Ibid

⁷Peter Mahmud Marzuki, *Legal Research*, Jakarta: Kencana Prenada Media Group, 2010, p. 93.

⁸Hadari Nawawi and Hilmi Martini, *Applied Research*, (Yogyakarta: Gadjah Mada University Press, 1996), p.175.

documentary studies. Documentary studies are studies that examine various documents.⁹

Furthermore, the data obtained in this study will be collected through observation,¹⁰ in-depth free interview¹¹ and literature studies were carried out in the following stages:

- a. In the initial stage, in addition to conducting a literature study, namely by inventorying laws and regulations, books and other literature as secondary data sources related to the focus of the problem, initial observations will also be carried out. This technique is carried out to obtain a general and relatively comprehensive picture of what is covered in the focus of the problem to be studied, thus it is expected to obtain a comprehensive picture of the object of the problem to be studied.
- b. After the observation is carried out, a free and in-depth interview will be conducted using an unstructured interview method, in order to have more freedom in obtaining information by first preparing a general description of the questions that will be asked.
- c. Document study, namely examining various documents and materials related to the problem being researched.

2.4 Data Analysis

Data analysis is defined as the process of organizing and sorting data into patterns, categories, and basic descriptive units so that themes can be determined and working hypotheses can be formulated as based on the data.¹² In this research, qualitative data analysis will be carried out, namely data analysis that does not use numbers, but rather provides descriptions in words of the findings in primary and secondary legal materials, then the meaning is taken as statements and conclusions.¹³

⁹Salim HS, Erlies Septiana Nurbani, *Application of Legal Theory in Thesis and Dissertation Research*, p. 19.

¹⁰S. Nasution, *Qualitative Naturalistic Research Methods* (Bandung: Tarsito, 1998), p.73

¹¹Sanafiah Faisal, *Qualitative Research: Basics and Applications* (Malang: Yayasan, 1990), p.80

¹²Salim HS, Erlies Septiana Nurbani, *Application of Legal Theory in Thesis and Dissertation Research*, p. 19.

¹³Ronny Hanitijio, *Legal Research Methodology and Jury Metrics*, (Jakarta: Ghalia, 1998), p. 98.

3. Results and Discussion

3.1 Factors and Efforts to Resolve Defaults at KSPPS Anugerah Temanggung

3.1.1 Factors Causing Default in Financing at KSPPS Anugerah Temanggung.

Default or problematic financing often occurs in Islamic financial institutions, therefore considerations and principles of caution in implementing financing need to be carried out correctly, the factors that cause default also vary, such as internal factors from the Islamic financial institution itself or external factors such as from the customers of the Islamic financial institution.

In murabahah financing at KSPPS Anugerah Temanggung there are problems in the installment payment process such as late payments, there are several factors that cause problematic financing, these factors include:

a. Internal Factors

1) KSPPS Employees

Account Officer (AO) in this case, whose job is to analyze each transaction or financing that will be provided, in its implementation, is often less thorough and less careful in the process of assessing potential customers, resulting in incorrect financing targets.

2) Financing systems and procedures

Then the internal factors that cause default are the financing systems and procedures that have been established and approved by members who apply for financing at KSPPS Anugerah Temanggung, in several cases violations or defaults were found on the agreements that had been agreed upon, this factor is related to ineffective supervision or monitoring from KSPPS.

Supervision is basically very important for KSPPS because with supervision or monitoring, KSPPS as the fund provider can determine whether members can be trusted to have used the funds according to the agreement.

b. External Factors

The next thing that causes default in KSPPS is one of the external factors, where the member who violates, there are several reasons why the member becomes default.

First, the member's business condition is declining, this causes the member to experience payment failure because his business is declining and the results of his business are not enough to return the financing so that a default occurs.

Second, Force Major, a situation where many things happen beyond human control, such as natural disasters and death, this situation has a huge influence on the implementation of financing repayment.

Third, there is bad faith from members by delaying payments and the funds provided are not used according to the agreement, resulting in default.

3.1.2 Efforts to Settlement Defaults in Financing at KSPPS Anugerah Temanggung.

The fact in the field is that almost all Islamic financial institutions (KSPPS) in general, the efforts made to reduce problematic financing, namely requiring collateral in the form of BPKB or land certificates. With the existence of collateral or collateral, if members are really unable to fulfill their obligations, the collateral will be sold.

In the practice of murabahah financing at KSPPS Anugerah Temanggung, several members were found to have problems with the financing. The problematic financing caused losses to KSPPS so that cash flow was hampered. In these cases, not all experienced problematic financing or defaulted on payments. Many members were compliant and carried out the agreement to the maximum.

In murabahah financing, there are several groups of members who are categorized based on whether they are smooth or have problems in their ability to pay murabahah financing installments, these groups are:

- a. Smooth group, namely the group that carries out financing agreements in accordance with the contents of the contract agreement and completes the agreement on time.
- b. The group to be considered is members who are assessed by the KSPPS Anugerah Temanggung to receive special monitoring because it is assessed that there is a possibility of problematic financing in this group.
- c. The less smooth group, namely members who are starting to have a little problem with their financing installments, such as late payments.
- d. Doubtful group, namely members who are starting to have problems with installments or financing repayments, this group is late in paying installments for more than 3 months.
- e. The default group, namely members who have not paid and have no good intentions to pay even though they are late in paying.

According to Mr. Supri Yatno as Admin at KSPPS Anugerah Temanggung, the steps in resolving defaults on murabahah financing that are carried out are not standard as stated in the murabahah contract agreement, as long as members have good intentions, communication, and cooperation to pay off late financing payments, late fines are not imposed by KSPPS considering the conditions of members in the field who may be experiencing a decline in sales or members experiencing a disaster and as long as members have good intentions to pay off their obligations.

Then, according to the procedure for resolving defaults in the KSPPS Anugerah Temanggung murabahah contract, the first step taken by KSPPS is to provide a warning letter, then if the warning letter is heeded and responded to by the member, then the financing is extended, the remaining outstanding principal margin at that time is extended according to the member's ability and according to the agreement without any additional costs, then a financing extension letter is made which is signed by the member and may not charge administration fees except for stamp duty and insurance costs.

Furthermore, the steps to resolve default in the event of maturity and members not having good intentions, the warning letter given is not heeded, then the KSPPS takes a family approach to execute the guarantee.

Before reaching the execution of the guarantee, the steps taken by the KSPPS to resolve the default in the murabahah contract are to provide a Delayed Delay Warning Letter (SPKT) with a period of two weeks, then if the member still does not pay or does not respond, a Warning Letter (SP1) is given with a period of two weeks, if the member does not respond or does not heed SP1, a Warning Letter (SP2) is given with a period of one month, then if there is no response, a Warning Letter (SP3) is given with a period of one month, then from all the warning letters given if the member does not respond and has no good faith, a Strong Warning Letter (SPK) is given.

Then, if the member cannot pay or settle his/her obligations and in good faith to pay, then the KSPPS Anugerah Temanggung party will sell the collateral by selling it through or to the KSPPS at the agreed market price, then the proceeds from the sale will be used to pay off the remaining debt of the member, if there is a remainder it will be returned to the member.

Judging from the group of members who experience problematic financing, it can be concluded that the problem faced by KSPPS is the delay in installment payments, so the method or approach used to resolve the problem is a family approach. If a settlement outside the court cannot be achieved, then KSPPS can take legal action. In this case, there are two methods that can be taken, namely the district court or arbitration body.

4. Conclusion

Efforts to resolve defaults in the KSPPS Anugerah Temanggung murabahah contract include 1). Providing a warning letter, 2). Extension of financing, the remaining outstanding principal margin at that time is extended according to the member's ability and according to the agreement without any additional costs, 3). A family approach to executing collateral, 4). Providing a Delayed Delay Warning Letter (SPKT) with a period of two weeks, 5). Warning Letter (SP1) with a period of two weeks, 6). Warning Letter (SP2) with a period of

one month, 7). Warning Letter (SP3) with a period of one month, 8). Strong Warning Letter (SPK), 9). Selling collateral by members selling through or to KSPPS at the agreed market price, and 10). Legal Path (Court or arbitration body). The implementation of fiat execution on the object of Mortgage Rights (HT) with several stages, the stages of the Implementation of Fiat execution on the object of mortgage rights as a result of Default at KSPPS Anugerah Temanggung are 1). Application for execution of mortgage rights, 2). Examination of auction files, 3). Aanmaning hearing, 4). Execution seizure, 5). Execution auction, and 6). Emptying.

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