

Legal Analysis of Transfer of Mortgage Rights Objects as Collateral for Debts & Receivables Unilaterally by Creditors

Mohamad Rizalfikra Ngadi

Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Indonesia, E-mail:
Moh.rizalfikra@gmail.com

Abstract. *This research aims to analyze the unilateral transfer of objects of mortgage rights. The method used by the author in this thesis research is a normative legal research method using a statutory approach as the basic basis for research and analysis based on library study materials as well as literature and other scientific works. The type of data used in this research is Normative Juridical, namely by exploring various library sources and using a statutory approach as well as a conceptual approach such as applicable laws and laws that regulate the cases raised, as well as legal sources from various journals and scientific papers that discuss legal chapters. The results of the research discussion show that the unilateral transfer of mortgage rights objects by creditors as collateral for debts carried out by means of a cessie is declared valid because a Cessie can be carried out through an authentic deed or private deed, with the main conditions. The validity of a cessie is the notification of the cessie to the debtor for approval and recognition. The debtor here is the party who has a debt to the creditor as the debt provider. So cessie is the replacement of an old creditor with a new creditor. So it is justified by the Civil Code, especially Article 613 of the Civil Code. However, rights arising from an unlawful act by another person cannot be transferred because this is contrary to public order.*

Keywords: *Cessie; Civil; Code; Mortgage; Transfer.*

1. Introduction

Economic development, part of national development, is one of the efforts to realize just and prosperous welfare of the people based on Pancasila and the 1945 Constitution. In order to maintain the continuity of development, banking is also one of the financial institutions that is capable or has an active role and has a strategy. in economic development in a country, especially Indonesia. Bank financial institutions are engaged in credit activities, and various services

provided by banks serve financing needs.

Receivables arising from credit granting activities carried out by the Bank constitute a claim in the name of the debtor. The claim involves two creditors and debtors who previously entered into an agreement. As for Article 613 paragraph (2) of the Civil Code concerning agreements. Explains delivery, namely delivery based on a civil event to transfer ownership rights, carried out by someone who has the right to act freely (take ownership) of the object.¹

In a credit agreement, if the credit is paid off, the mortgage right is removed because it is an accessory. However, the opposite does not apply, which means if there is an error in the guarantee agreement as an accessory agreement in the form of a lack of accuracy in calculating land rights which causes the guarantee to be erased so that the credit is unsecured. The Mortgage Rights Agreement is created when it is recorded in the land books at the Land Office. According to Article 1 paragraph 5 of the Mortgage Rights Law, the Deed of Granting Mortgage Rights is a PPAT deed which contains the granting of Mortgage Rights to certain creditors as collateral for debt repayment.

This is in line with Government Regulation Number 37 of 1998 concerning Position Regulations for Land Deed Officials. Erna Sriyatmi stated two legal principles related to the implementation of the PPAT office. The two legal principles include: the principle of openness and the principle of prudence

Regarding who has the right to encumber the Mortgage Rights, it is regulated in Article 8 paragraph (1) UUHT which states, "The person giving the Mortgage Rights is an individual or legal entity who has the authority to take legal action against the object of the Mortgage Rights in question. "In the process of granting mortgage rights, it is also necessary to include the name and identity of the holder and grantor of the mortgage rights." This is in line with Republic of Indonesia Government Regulation Number 24 of 2016 concerning Amendments to Government Regulation Number 37 of 1998 concerning Position Regulations for Land Deed Officials which requires PPAT to be careful in making deeds and the PPAT's responsibilities in making said deeds.

In banking systematics, the term *cessie* is often used, where the bank or creditor allows the transfer of collateral rights objects unilaterally without having to confirm or notify the debtor as regulated in Article 16 paragraph (1) of the Law of the Republic of Indonesia No. 4 of 1996 concerning Rights. Encumbrance on Land and Objects Related to Land which states "If the receivables secured by the Mortgage Rights are transferred due to *Cessies*, Subrogation, Inheritance or

¹ibid p, 173

other reasons, the Mortgage Rights will also be transferred by law to the new creditor. In article 51 of Law No. 5 of 1960, the Agrarian Principles designated as land rights that can be secured by debts and encumbered with Mortgage Rights are Ownership Rights, Business Use Rights, Building Use Rights,²

If the disbursed credit experiences a jam, then there are various steps that can be taken to save the credit. It is said to be varied because the cause of the bad credit must first be looked at. If the credit can still be saved, then the action is to increase the amount of credit or extend the credit period. However, if it cannot be saved, then the final action is to confiscate the collateral guaranteed by the credit recipient (debtor). Before accepting or carrying out credit, both parties must make an agreement first so that the agreement has permanent legal force.²

Cessie is a receivable assignment agreement that is widely used by banks because it is a way to transfer claim rights to other parties and/or third parties to guarantee credit facilities or funds provided by the bank as a creditor. Funds provided by the bank through credit facilities require collateral, so that banks as creditors feel safe providing credit facilities. So the collateral can be sold by the bank as a creditor in accordance with the agreement that has been made. The sales proceeds can be used by the bank to pay off the debtor's debt.³

In the Civil Code Law, Article 1338 paragraph (1) concerning agreements, which states that all agreements made legally are valid as law for those who make them," in accordance with the principle of consensualism.

2. Research Methods

This research is normative legal research, namely using the norms contained in the law with a conceptual approach and a case approach. The conceptual approach is an approach that understands the concepts, views or doctrines that develop in legal science. Meanwhile, the case approach is an approach taken by studying cases related to the research problem being faced

3. Result and Discussion

3.1. Legal Problems in the Transfer of Objects of Mortgage Rights by Creditors Unilaterally as Collateral for Debts and Receivables

² <https://www.djkn.kemenkeu.go.id/article/baca/15372/pengalihan-hak-tagih-dengan-Cessie.html>

³ <https://jdih.kemenkeu.go.id/fulltext/1960/5TAHUN~1960UU.htm>

The transfer of claim rights or cessie is carried out in accordance with several legal principles as follows: the principle of *nemo plus iuris*, the principle of cessie as an assessor institution, the principle of real (real) contracts, the principle of written levering, the principle of transparency to debtors.⁴ Cessie is regulated in the third chapter of book II of the Civil Code which provides the assumption that objects are objects and the regulation of cessie is part of the regulation of objects in general.⁵

In the transfer of the object of mortgage rights, Article 16 Paragraph (1) of Law No. 4 of 1996 concerning Mortgage Rights and the Civil Code Law is contradictory, because in the Mortgage Rights Law, credit agreements do not discuss the important points in detail. In the credit agreement and receivables that can be transferred by way of cessie must be because if this is not regulated in the credit agreement under the Mortgage Rights Law then at a later time it could be disputed by the debtor.

So in this case, problems or legal issues arise in the unilateral transfer of mortgage rights objects carried out by creditors as collateral for debts without the knowledge of the debtor due to unclear regulations and ambiguous arrangements which are detrimental to the debtor.

Basically, Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, in substance, the law only regulates the scope of mortgage rights which are conventional in nature so that the law does not yet contain a section that regulates specifically regarding credit agreements and unilateral transfer of collateral objects. Why, because the transfer of the object of mortgage rights carried out by means of cessie is just a term in banking.

Therefore, legal problems in the transfer of mortgage objects by creditors unilaterally as collateral for debts and receivables according to the concept of legal justice based on the author's description above must pay attention to the values or rules in carrying out the transfer of mortgage objects as regulated in the Civil Code Article 613 and also strengthened based on the views of experts according to Rachmad Setiawan and J. Satrio, handing over receivables in the name of and handing over other intangible objects is basically using a deed, either authentic or under the hand, handing over receivables in the name of

⁴Hartono Seorjopratiknjo, *Accounts Receivable, Payment Agreements and Mortgage Guarantees* (Yogyakarta: Notary Section, Faculty of Law, Gadjah Mada University, 1984). p. 39.

⁵Herlien Budiono, *General Teachings of Contract Law and Their Application in the Notarial Sector* (Bandung: Citra Aditya Bakti, 2010). p. 186.

handing over intangible objects. with the Cessie Deed and the ownership of the receivables in his name (and collateral) is completely transferred with the signing of the Cessie Deed.⁶

The cessie deed is not a legal instrument for transferring collateral for mortgage rights, for example changing the name of the certificate, but the cessie deed only contains the transfer of debt or claim rights which are registered at the local land office.

In the process of changing the name of a certificate where the buyer of the claim rights (cessionary) wants to change the name of the certificate, the land office makes the transfer of rights based on a decision or court order. The land rights cannot be transferred without a strong legal basis such as a decision. or court order. This is in accordance with the theory of legal certainty, where the court's decision or determination is the implementation of the law which guarantees that the law can be implemented.

So it is clear that the transfer of the object of the mortgage which is carried out by means of a cessie must obtain the consent of both parties in carrying out the transfer of the object of the mortgage right and if the creditor continues to carry out the transfer of the object of the mortgage right without the knowledge of the debtor, then the creditor can be sued by the court. the injured party or here called the debtor to obtain legal justice in this matter. And if the owner of the claim rights (cessionary) wants to transfer these rights to him, he can obtain legal certainty, namely by filing a lawsuit or decision with the local District Court.

3.2. Legal Implications That Arise Unilaterally Due to the Transfer of Dependent Objects Made by the Creditor Without the Debtor's Consent

The transfer of the Object of Mortgage Rights which is carried out from a cessie point of view is the act of transferring the right to collect debts as regulated in article 613 of the Civil Law Law. The handover is carried out by making a deed. The deed of transfer of debt collection rights is called a cessie deed. Cessie usually takes the form of transferring receivables in the name of a third party, where someone sells the rights to another person. The Civil Code does not recognize the term cessie, but Article 613 paragraph (1) of the Civil Code states that handover of receivables in the name of and other immaterial objects is carried out by making an authentic deed or private deed. with the rights over

⁶Akhmad Budi Cahyono, "Cessie as a form of transfer of receivables in the name of", Lex Jurnalica/ Vol. 2/ No. 1/December 2004, p. 15-16.

those objects being delegated to someone else.⁷

The transfer of mortgage rights is carried out by the new creditor at the land office in the jurisdiction where the object of the mortgage right is located and registered, by bringing documents relating to the transfer of credit, namely the identity of the transferor (old creditor) and the person receiving the transfer (new creditor). Deed of Agreement for Sale and Purchase of Receivables and Transfer of Rights to Claims (Cessie) made before a Notary as well as documents belonging to the debtor which were previously under the control of the old creditor.

By transferring the Mortgage Rights to the New Creditor, the law actually provides legal protection to creditors holding Mortgage Rights in a credit agreement with mortgage rights from the beginning of the process of binding the credit agreement with the mortgage rights (this is what is called preventive legal protection). And legal protection for creditors if the debtor is proven to have committed a violation, for example committing an unlawful act or default (this is what is called repressive legal protection).

then receivables or dependent objects that are collateral to creditors can be transferred on the basis of a principal agreement made by the creditor and debtor, but this only applies when the debtor defaults or has bad credit. This is in accordance with the theory of Justice, because in this case The debtor may suffer a loss on the mortgage rights secured in the debt and receivables. If a transfer of mortgage rights occurs but the debtor does not experience a default or credit defect and the debtor is not provided with information regarding the transition, then the transfer is said to be invalid, because it does not comply with the regulations. applies, and the debtor has the right to file a lawsuit against the creditor because the creditor's actions violate the agreed agreement and violate the applicable laws and regulations.

If the dispute issue has reached the court, namely the debtor files a lawsuit against the debtor, the local district court will collect evidence and witnesses relating to the issue starting from the deeds or agreements that have been made and agreed upon jointly, as well as the parties. those related to the deeds include officials authorized to make the deeds and witnesses who were witnesses when the deeds were made. So that the local District Court will decide and make a decision that is valid and must be implemented by the defendant and plaintiff if there is no further legal opposition. The explanation above implements the theory of legal certainty, which according to Sudikno Mertokusumo (2007: 160), legal certainty is a guarantee that the law is implemented, that those entitled to it according to law can obtain their rights and that decisions can be

⁷Satrio, Law of Engagements, Engagements Born from Agreements. p. 33.

implemented. So a decision from a court that has permanent force or also called an *inkracht* can be used as legal certainty for debtors and creditors involved in a dispute and must be implemented.

So from the legal implications that arise unilaterally as a result of the transfer of mortgage rights objects carried out by creditors without the debtor's consent according to the concept of legal certainty and legal protection, in accordance with Article 28D paragraph (1) of the 1945 Constitution which reads "Every citizen of the Republic of Indonesia has the right on recognition, guarantees, protection and certainty of fair law as well as equal treatment before the law." And it is also strengthened based on the views of experts, according to Sudikno Mertokusumo, legal certainty is a guarantee that the law is implemented, that those who are entitled according to the law can obtain their rights and that decisions can be implemented.⁸ Meanwhile, according to Philipus M. Hadjon, legal protection is the protection of honor and dignity, as well as recognition of human rights possessed by legal subjects based on legal provisions against arbitrariness. Hadjon classifies two forms of legal protection for the people based on the means, namely preventive and repressive protection.

a. Preventive means that the people are given the opportunity to submit their opinions before the government's decision takes a definitive form to prevent disputes from occurring.

b. Repressive aims to resolve disputes. Legal protection is a guarantee provided by the state to all parties to be able to exercise their legal rights and interests in their capacity as legal subjects.⁹

4. Conclusion

Cessies are not expressly regulated in the Civil Code, so special regulations are needed to determine agreements related to cessies, because the transfer of receivables can give rise to social and/or other legal conflicts such as actions by other parties related to criminal matters. The application of article 613 of the Civil Code, with the transfer in the name of inanimate objects, must be known by the debtor, and by the creditor, in this case the Bank, in making a transfer letter signed by the parties, to prevent future incidents.

5. References

⁸<https://www.hukumonline.com/berita/a/theoretical-certainty-law-menrut-para-expert-lt63366cd94dcbc>

⁹<https://www.hukumonline.com/berita/a/theoretica-perlindungan-law-menrut-para-expert-lt63366cd94dcbc>

Budiono, H. (2010). General Teachings on Contract Law and Their Application in the Notarial Field. Bandung: Citra Aditya Bakti.

Hartono Seorjopratiknjo. (1984). In Debts and Receivables, Payment Agreements and Mortgage Guarantees (p. 39.). Yogyakarta: Notary Section, Faculty of Law, Gadjah Mada University.

<https://www.hukumonline.com/berita/a/theoretica-perlindungan-Hukum-menurut-para-Ahli-It63366cd94dcbc>.

<https://www.djkn.kemenkeu.go.id/article/baca/15372/pengalihan-hak-tagih-dengan>.

Civil Code Article 613.(nd).

Satrio. (nd). Law of Engagement, Engagement Born from Agreement. 33.

<https://jdih.kemenkeu.go.id/fulltext/1960/5TAHUN~1960UU.htm>.

Cahyono, AB (December 2004). Cessie as a form of transfer of receivables on behalf of. In LJ 15-16..