

Illegal Confiscation Action of Items Outside The Object of Collateral Rights by Bank Muamalat

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Abstract. *This journal research is based on the lawsuit case of PT. Gigantica Trigano against PT. Bank Muamalat Indonesia, Tbk and other defendants. This contentiosa case is ongoing in the Bandung City Religious Court where the Plaintiff disputes the matter of his belongings that are not included in the object of mortgage rights that have been confiscated by the Religious Court at the request of Bank Muamalat. According to the Defendant's reasons, the confiscation process has been in accordance with their SOP (Standard Operational Procedure), but according to the plaintiff, the process has violated several applicable laws (Mortgage Law, Article 1365 of the Civil Code and others) and is not in accordance with sharia principles. This is certainly very much related to the quality of the Mortgage Right deed made by the Notary/PPAT where they often do not make clear details regarding what is the object of the mortgage right in the Mortgage Right Binding Deed. The formulation of the problem in this journal research is: can the bank confiscate objects that are not objects of mortgage rights; Often the Deed of Mortgage Binding made by a notary does not detail in detail what is related/attached to the object of the mortgage; how to make a good and correct mortgage deed and in accordance with the sharia principles applicable in Indonesia, so as not to cause harm to other people/debtors in the future. The research method used is the empirical normative legal research method by conducting a study of library materials to collect secondary data. Normative legal research is carried out by examining library materials (literature) which are secondary data while empirical research is by analyzing cases in cases at the Bandung PA, West Java. From the analysis that can be understood, there are often arbitrary actions carried out by Islamic banks against debtors which are categorized as Unlawful Acts that can harm others. The conclusion of this study is: the bank as a creditor may not confiscate objects/goods that are not objects of mortgage rights. The notary/PPAT should describe in detail what objects/goods are attached to the object of the mortgage right and the notary should make a Deed of Bonding of the Mortgage Right independently without siding with the bank that gave*

them the order, because in principle the one who pays for the notary's services is the debtor, not the bank.

Keywords: Bank; Illegal; Mortgage; Seizure.

1. Introduction

In early January 2023, as a lawyer, I conducted a civil dispute study between the Plaintiff PT. Gigantica Trigano against PT Bank Muamalat Indonesia Tbk. Where the core of the dispute was the confiscation of the Plaintiff's goods that were not included in the object of the Mortgage Rights by Bank Muamalat Buahbatu Bandung Branch Office. The lawsuit contained contentiosa, where the parties submitted their respective arguments. The Plaintiff stated that the confiscation of goods outside the mortgage rights was an Unlawful Act. Meanwhile, the Defendant felt that the action was correct because it was in accordance with what was stated in the company's SOP (Standard Operational Procedure), so it was a legal action, according to him.

2. Research Methods

The legal research method used by the author is the normative-empirical legal research method where this method is basically a combination of the normative legal approach with the addition of various empirical elements. In this normative-empirical research method, it is also about the implementation of normative legal provisions (statutes) in their actions in every particular legal event that occurs in a society. In this normative-empirical legal research, the category used is Judicial Case Study. This approach is a legal case study approach due to the existence of a conflict so that it will involve court intervention to be able to provide a settlement decision.

The type of legal research that will be used in writing this thesis is normative empirical, conducting written legal study analysis reviewed from various aspects, namely theoretical, historical, philosophical, comparative aspects, and analyzing current applicable legislation, then explaining the shortcomings and weaknesses, so that it can predict the formation of legal regulations in the future. Research in a normative empirical legal manner with the consideration that the starting point of this research is regarding the analysis of the Credit Agreement Deed that is not in accordance with the provisions of Article 1320 of the Civil Code. So that it fulfills the sense of justice and legal certainty so that later it can be expected to provide input for improvements for Notaries who cooperate with banks to produce a Credit Agreement Deed that is much better and does not harm other parties in the future (*ius constituendum*).

3. Result and Discussion

Based on the results of the literature review and case study, it can be stated that:

a. Based on the provisions in Article 17 of Law No. 39 of 1999 concerning Human Rights, which reads:

"Everyone, without discrimination, has the right to obtain justice by submitting applications, complaints and lawsuits, whether in criminal, civil or administrative cases and to be tried through a free and impartial judicial process, in accordance with procedural laws that guarantee an objective examination by an honest and fair judge to obtain a just and correct decision";

In the provisions of Article 4 of Law 21 of 2011 concerning OJK, the aim is to guarantee all activities in the financial services sector:

- a. carried out regularly, fairly, transparently and accountably;
- b. able to realize a financial system that grows sustainably and stably; and
- c. able to protect the interests of consumers and society.

Based on Article 1 number 1 Law no. 4 of 1996 concerning Mortgage Rights over Land and Objects Related to Land ("Mortgage Law"):

a. *"Mortgage rights on land and objects related to land, hereinafter referred to as Mortgage Rights, are security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, with or without other objects that are an integral part of the land, for the settlement of certain debts, which give a priority position to certain creditors over other creditors."*

b. According to Article 4 paragraph (4) of the Mortgage Law, Mortgage can also be imposed on land rights including buildings, plants, and existing or future works of art that are an integral part of the land as long as the burden is expressly stated in the relevant Mortgage Deed. This means that the burden on objects attached to the land must also be expressly agreed upon. This is because of the principle of horizontal separation in Mortgage (Article 1 number 1 of the Mortgage Law).

c. Regarding what is meant by objects that are one unit with the land, J. Satrio in his book entitled Guarantee Law, Property Guarantee Rights, Mortgage Rights, Book 1 (p. 83) argues that the words "constitute one unit" give the impression that the objects must be very closely united with the land. Furthermore, J. Satrio said that in everyday language, constituting one unit means "becoming one". Flower pots, bicycles and carts that are on the land cannot be said to be united with the land and therefore are not included in the scope of Mortgage Rights, if the land on which the objects stand is secured by Mortgage Rights.¹

¹ J. Satrio in his book entitled Guarantee Law, Property Guarantee Rights, Mortgage Rights, Book 1 p. 83

d. J. Satrio (ibid, page 82), as we summarize, also provides an example in the case of factory machines. Mortgage rights can only cover machines whose base is integrated with the ground on which the machine stands and the land is pledged (meaning the machine base, the base/foot of the machine is given a foundation that is cemented with the ground). For other machines, even though they are intended to be used for a long period of time in the factory concerned, they must still be pledged with a mortgage or fiduciary.²

e. Regarding what can be executed by the bank, you should look at the Mortgage Right agreement itself, what is included in the Mortgage Right object. Is it just the land, or the land and its buildings. In general, what is agreed as the object of the Mortgage Right guarantee is the land and buildings. If the land and buildings are agreed as the object of the Mortgage Right in the Mortgage Right agreement, then the creditor or Bank can execute the collateral object in the event of a default by the debtor (Article 6 of the Mortgage Right Law). However, the Bank may not participate in seizing the entire contents of the house in the building that is used as the object of the Mortgage Right because the contents of the house are not included in the objects used as the object of the Mortgage Right guarantee and cannot be guaranteed with the Mortgage Right.

Meanwhile, regarding the burden of objects attached to the land, it must also be agreed upon firmly. This is because of the principle of horizontal separation in Mortgage Rights (Article 1 number 1 of the Mortgage Rights Law). Regarding what is meant by objects that are one unit with the land, J. Satrio in his book entitled Guarantee Law, Property Guarantee Rights, Mortgage Rights, Book 1 (p. 83) argues that the words "constitute one unit" give the impression that the objects must be very closely united with the land. Furthermore, J. Satrio said that in everyday language, constituting one unit means "becoming one". Flower pots, bicycles and carts on the land cannot be said to be united with the land and therefore are not included in the scope of Mortgage Rights, if the land on which the objects stand is guaranteed by Mortgage Rights. J. Satrio (ibid, p. 82), as we summarize, also provides an example in the case of factory machinery. Mortgage rights can only cover machines whose base is integrated with the ground on which the machine stands and the ground is pledged (meaning the machine base, the base/foot of the machine is given a foundation that is cemented with the ground). For other machines, even though they are intended to be used for a long period of time in the factory concerned, they must still be pledged with a mortgage or fiduciary.³

In the provisions of Article 9 of the OJK Law it states: To carry out the supervisory duties as referred to in Article 6, the OJK has the authority: (letter c.).....

² J. Satrio ibid, p. 82,

³J. Satrio. 1997. Law of Guarantee, Property Guarantee Rights, Mortgage Rights, Book 1. PT Citra Aditya Bakti., p. 143.

d. carry out supervision, inspection, investigation, consumer protection and other actions against financial services institutions, actors and/or supporters of financial services activities as referred to in laws and regulations in the financial services sector;

- If the land and building are promised as the object of Mortgage Rights in the Mortgage Rights agreement, then the creditor or Bank can execute the collateral object in the event of a default by the debtor (Article 6 of the Mortgage Rights Law). However, the Bank may not participate in seizing all the contents of the house in the building that is used as the object of the Mortgage Rights because the contents of the house are not included in the objects used as the object of the Mortgage Rights guarantee and cannot be guaranteed with the Mortgage Rights.

In accordance with the provisions in Article 1 point (1) of Law No. 4 of 1996 concerning Mortgage Rights states that:

"Guarantee rights over land and objects related to the land, hereinafter referred to as "mortgage rights", are guarantees imposed on land rights as intended in Law no. 5 of 1960 concerning Basic Agrarian Principles Regulations, whether or not the following are other objects which are part of the property, for the repayment of certain debts, which gives certain creditors a preferred position over other creditors."

Basically, the Bank does not have the right to seize movable objects that are not the object of collateral rights, because for collateral objects in the form of movable objects, the binding is carried out by a fiduciary deed as regulated in Article 29 paragraph (1) letter b Law No. 42 of 1999 concerning Fiduciary Guarantees ("Fiducia Law").

Based on the provisions of Mortgage Rights Article 1 number 1 Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land ("Mortgage Law") states:

"Mortgage rights on land and objects related to land, hereinafter referred to as Mortgage Rights, are security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, with or without other objects that are an integral part of the land, for the settlement of certain debts, which give a priority position to certain creditors over other creditors."

According to Article 4 paragraph (4) of the Mortgage Law, Mortgage can also be imposed on land rights including buildings, plants, and existing or future works of art that are an integral part of the land, provided that the burden is expressly stated in the relevant Mortgage Deed. This means that the burden on objects attached to the land must also be expressly agreed upon. This is because of the principle of horizontal separation in Mortgage (Article 1 number 1 of the Mortgage Law).

Based on Law No. 8 of 1999 concerning Consumer Protection, which is a legal umbrella act for customers who basically have a weak position, especially in terms of legal protection for bank customers as consumers.

The bank's actions in confiscating the Plaintiff's movable property have violated the provisions of Articles 368, 406, 335 and 55 of the Criminal Code, concerning criminal acts of confiscation, damage and unpleasant acts.

b. Things that need to be considered by a Notary in making a Deed of Granting Mortgage Rights must clearly and firmly describe which goods are bound by mortgage rights and which are not. This is very useful for the parties in the event of a seizure by the bank, it is clear which can be seized and which cannot, so that the debtor or other party will not be harmed. A Notary must master knowledge regarding agreements and deed-making techniques as regulated in Law Number 2 of 2014 concerning the Position of Notary/UUJN. A notarial agreement deed is written and authentic evidence that can be used at any time as strong and even perfect evidence for the parties who make agreement.⁴The judge must consider it to be perfect evidence that does not require additional evidence as long as it is not proven otherwise.⁵

c. Based on explanation of Article 2 of Law no. 21 of 2008 concerning Sharia Banking, explains that business activities based on Sharia Principles, among other things, are business activities that do not contain the following elements:

a. **Usury**, namely, the addition of income illegally (batil) including in transactions for the exchange of similar goods of different quality, quantity and delivery time (fadhl), or in lending and borrowing transactions which require the Customer Receiving the Facility to return funds received in excess of the principal loan due to the passage of time (nasi'ah);

b. **Maisir**, namely transactions that are dependent on an uncertain situation and are based on chance;

c. **Gharar**, namely a transaction where the object is unclear, not owned, its whereabouts are unknown, or cannot be delivered at the time the transaction is carried out unless otherwise regulated in sharia;

d. **Haram**, namely transactions whose objects are prohibited in sharia; or

⁴ Mulyoto, 2012, Agreement; Techniques for Making and Laws of Agreements That Must Be Mastered, Cakrawala Media, Yogyakarta, Page 1

⁵ Ibid, pp. 1-2

e. **cruel**, namely transactions that cause injustice to other parties. What is meant by "economic democracy" is sharia economic activities that contain values of justice, togetherness, equality, and benefit.

▪ Implementation of Protection for Sharia Bank Customers According to PBI No. 6/24/PBI/2004, Sharia banking business activities require banks to apply sharia principles and prudential principles in carrying out their business activities.

Based on the provisions of Article 8 paragraph (1) of Law No. 10 of 1998 concerning Banking, it states that: "In providing credit or financing based on Sharia Principles,....." Sharia Principles consist of:

a. *Partnership Principle (Ta'awun)*

The principles underlying Islamic banks in providing assistance to the community in the field of Islamic finance

b. *Principle of Justice (Mutual Consent)*

This principle allows for equal rights and obligations between customers and banks based on the consent of each party without any coercion.

c. *The Principle of Benefit (Kemaslahatan)*

Sharia banks prioritize benefits for all efforts carried out by the company and are in accordance with sharia rules.

d. *The Principle of Balance (Tawazun)*

This principle illustrates that the bank and the customer are one entity.

e. *The Principle of Universality (Rahmatan lil 'Alamiin)*

This principle makes Islamic banks not only intended for Muslims, but in the principle of muamalah everyone can transact with Islamic banks.

Sharia principles are more clearly explained in Article 1 point 13 of Law No. 10 of 1998 concerning Banking, which states as follows: "Sharia principles are rules of agreement based on Islamic law between a Bank and another party for the storage of funds or financing of business activities or other activities that are stated to be in accordance with sharia, including financing based on the principle of profit sharing (*mudharabah*), financing based on capital participation (*musyarakah*), the principle of buying and selling goods to obtain profits (*murabahah*), or financing of capital goods based on the principle of pure rental without choice (*ijarah*) or with the option of transferring ownership of goods rented from the bank by another party (*ijarah wa iqtina*)".

Based on Article 55 of Law No. 21 of 2008 concerning Islamic Banking, which reads:

(1) Settlement of Islamic Banking disputes is carried out by courts within the Religious Court environment.

(2) In the event that the parties have agreed to a dispute resolution other than as referred to in paragraph (1), the dispute resolution shall be carried out in accordance with the contents of the Agreement.

(3) Dispute resolution as intended in paragraph (2) must not conflict with Sharia Principles.

Before making a Deed of Granting Mortgage Rights, the Notary/PPAT must pay attention to the requirements for the validity of the agreement. Have the parties met the requirements for the validity of the agreement or have not met the requirements for the validity of the agreement. The following is a table that explains the requirements for the validity of an agreement according to the Civil Code and outside the Civil Code.

TABLE 1.

Valid conditions of the agreement Validity requirements agreement according to the Civil Code	Valid conditions for agreements outside the Civil Code
1. Agreement of those who bind themselves;	1. Must be done in good faith;
2. Capable of making an agreement;	2. Must not be contrary to custom;
3. A certain thing and;	3. Must be based on the principle of propriety/appropriateness;
4. A lawful cause.	4. Must not violate/not conflict with public order. ⁶

1. Regarding the word agreement, there are several theories that can be used as guidelines, namely:⁷

1) Will theory This theory assumes that parties are only bound to things that they truly desire.

2) Theory of statement or belief Here the parties are bound to the things that have been stated, with the understanding that from the other party there is an

⁶ Ibid, pp. 34-35

⁷ Wirjono Prodjodikoro, Principles of Contract Law, Mandar Maju, Bandung, 2000, p. 29

assumption and belief that the statement is in accordance with the true wishes of the party making the statement.⁸

Judging from the valid conditions of this agreement, the parts of the agreement are distinguished, namely the core part

(*young family*), The core sub-sections are called *essentialia* and the non-core parts are called *naturalia* and *accidentalia*.⁹

a. Essentials This section is a characteristic that must be present in an agreement, a characteristic that determines or causes the agreement to be created (*constructieve oordeel*)

b. Nature This section is an inherent characteristic (*natuur*) of the agreement so that it is tacitly attached to the agreement, such as guaranteeing that there are no defects in the item being sold (*vrijwaring*)

c. Accidentalia This section is an inherent characteristic of the agreement which is expressly agreed upon by the parties.

Article 1330 of the Civil Code only states that those who are not competent to make contracts are:

- a. immature people
- b. those who are placed under guardianship
- c. women, in cases stipulated by law and on

generally everyone makes these agreements.

A Notary/PPAT in making a notarial agreement deed must be honest, careful, thorough, impartial to either party and understand all the regulations relating to the deed he or she will make.

As for the prohibitions in making agreements for Notaries. Prohibitions for Notaries in making agreements:¹⁰

a. Notaries are prohibited from making deeds of agreements that favor one party.

b. Notaries are prohibited from making agreement deeds that conflict with previously made deeds.

⁸Purwahid Patrik, *Basics of Contract Law*, Mandar Maju, Bandung, 1994 pp. 56-57

⁹ Mariam Darus Badruzaman, 2005, *eka Business Law*, Alumni, Bandung, p. 25

¹⁰ Mulyoto, 2012, *Agreement; Techniques for Making and Legal Agreements That Must Be Mastered*, Cakrawala Media, Yogyakarta, Pg. 17 Vol 5 No 1 January 2018 *Things that Notaries Need to Pay Attention to When Making...*(Yogi Hanapiah)

c. Notaries are prohibited from making a deed of unilateral revocation of a power of attorney agreement where the deed of power of attorney has been signed by both parties (the principal and the person receiving the power of attorney).

d. Notaries are prohibited from disclosing the contents (everything regarding the deed they have made) and all information they have obtained for the purpose of making the deed.

a. Notaries are prohibited from not reading the contents of the deed to the parties, unless the parties have read it themselves, understood it and agreed to it, as stated in each page initialed by the parties/applicants, witnesses and the Notary, while the last page is signed by the parties, witnesses and the Notary.

f. Notaries are prohibited from making deeds of agreements that are contrary to law, public order and/or morality.

g. Notaries are prohibited from making simulated deeds (fake deeds), especially for purposes that are contrary to the law. Notaries must pay attention to representation in agreements. Representatives by law are not allowed to be substituted, representative institutions in private law are divided into 3 (three), namely:¹¹

- Representation becomes contractual, namely representation due to the granting of power of attorney, regulated in articles 1792 to 1819 of the Civil Code.

- Organic representative, namely a person who is positioned in one of the organs of a legal entity representing the legal entity.

- Legal representative, namely a person who because of his position as a parent, for example, represents his underage child or a husband and wife, if one of them dies, then the husband/wife who survives longer (is still alive), becomes the legal guardian of his biological child.

From the provisions of Article 108 paragraph 2 of the Civil Code, it can be concluded that a married woman, in order to enter into an agreement, requires assistance or permission (written power of attorney) from her husband.¹²

For small agreements that can be included in household needs, the wife has been authorized by her husband, thus the wife is included in the group of people who are not competent to make an agreement. The difference with a child is that if a child is not yet an adult, he must be represented by his parents or representative, while a wife must be assisted by her husband. If someone makes an agreement alone, but the one who appears in front is his representative. But

¹¹ Ibid, p. 18

¹²Subekti, Contract Law, Intermasa, Jakarta, 1990, p. 19

someone is assisted, meaning he acts alone, only he is accompanied by another person who helps him, this assistance can be replaced with a power of attorney or written permission.

When making a notarial agreement deed, efforts should be made to ensure that it contains elements of completeness, truth, clarity and validity. The meaning is:¹³

☒ Contains elements of clarity, meaning:

- Starting from the title of the deed, it must contain/reflect in broad outline the substance of the contents of the deed.
- The editorial of each article must not have different meanings or have more than one meaning/can be interpreted differently.
- Do not move on to another article before completing the wording of that article.
- Contains in detail everything that must be regulated in the deed/agreement.

☒ Contains elements of truth:

- Try as much as possible to seek material truth. This can be done by providing legal advice to the parties in relation to the deed to be made and submitted due to legal consequences and sanctions in the event of not stating or conveying anything other than the truth.

Regarding the nullity and cancellation of contracts, the contracts are regulated in Book III, Part Eight, Chapter IV (Article 1446-Article 1456 of the Civil Code). This section only briefly regulates part of the nullity, especially agreements made by those who are incompetent, namely those who are minors, placed under curatele, and defective in will. Defects in will occur due to coercion, error, deception and abuse of circumstances.¹⁴

The cancellation of an agreement is divided into:¹⁵

1. Can be cancelled if the subjective conditions are not met, namely:

- There is no agreement, and
- The absence of capacity to act and the parties making the agreement.

2. Void by law, if the objective requirements are not met, namely:

¹³ Ibid, p. 26

¹⁴ Habib Adjie, 2011, Cancellation and Revocation of Notarial Deeds, PT. Refika Aditama, Bandung, Page 4

¹⁵ Mulyoto, 2012, Agreement; Techniques for Making and Laws of Agreements That Must Be Mastered, HorizonMedia, Yogyakarta, Pages 44-45 Vol 5 No 1 January 2018: 112 - 116

- *There is no cause/object of the agreement*
- *Does not contain a cause that is justified according to law.*

3. Void by law due to non-existence, namely due to:

- There is nothing essential/main in the agreement.
- Failure to fulfill the requirements required by law, for example: PT, Foundation was established without a notarial deed (not notarized).
- Fiduciary agreements are made only under hand (not notarized)
- The establishment of a CV does not have a Limited Partnership.

Notaries must be honest, independent, careful and impartial, and must follow all regulations, not limited to notary job regulations but also all regulations related to the deed to be made.¹⁶

In drafting a business contract, so that the drafting of the contract is truly safe and strong from a legal perspective, it is advisable to draft the contract in as much detail as possible so that in the future if a dispute arises, it can be minimized as much as possible or even avoided.

4. Conclusion

In making a mortgage deed, a notary/PPAT needs to pay attention to the applicable provisions, for that reason the Notary/PPAT must use the principle of caution in making a mortgage deed, in order to minimize future errors by paying attention to important things in making the deed. Notaries/PPATs at Islamic banks must have extensive knowledge of agreements in order to make a good and correct mortgage deed, in accordance with sharia principles.

5. References

Mardjono Reksodiputro, Legal Reform in Indonesia, paper presented at the VII National Law Seminar, 12 October 1999.

Civil Code (KUHPer). Law No. 5 of 1996 Concerning Mortgage Rights

Law no. 7 of 1997 concerning Agrarian Affairs

The Great Dictionary of the Indonesian Language, Balai Pustaka, Jakarta, 1993.

Habib Adjie, 2011, Cancellation and Revocation of Notarial Deeds, PT. Refika Aditama, Bandung, Page 4

¹⁶ Ibid, p. 27

Mulyoto, 2012, Agreement; Techniques for Making and Laws of Agreements That Must Be Mastered, Cakrawala Media, Yogyakarta

Mariam Darus Badruzaman, Various Business Laws, Alumni, Bandung, 2005

Purwahid Patrik, Basics of Contract Law, Mandar Maju, Bandung, 1994

Ridwan Khairandy, 2004, Good Faith in Freedom of Contract, Postgraduate Program, Faculty of Law, University of Indonesia, Jakarta

Subekti, Law of Contracts, Intermasa, Jakarta, 1990

Indonesian Legislation Journal Volume 4 no.4 December 2007 Justice Journal
Vol. 3, No. 6 Year 2003/2004.

Constitutional Court News, (ed) No.19, April-May, 2007.