

Juridical Analysis of Encumbrances and Execution the Object of Mortgage to Provide Legal Certainty Protection for Creditor (Research Study at PT. BPR Indobaru Finansia Batam)

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ABSTRACT

Banking institutions are financial institutions that have strategic value in the economic life of a country. Bank has the rights to hold collateral and charged by Mortgage Rights which the rights that takes precedence over other creditors. This study aims to determine the process of encumbering the Mortgage Right, its execution to the bank object of encumbrance and to figure out the implementation, constraints, and solutions during the process. The research in this study uses empirical legal research, supported by normative legal research. The research method uses sociological normative juridical. The result of the study explained that the Mortgage rights is carried out based on a debt agreement between the bank and the debtor called as credit agreement. Therefore, the Mortgage rights is accecoir which is a special agreement made by the main agreement. Mortgage rights cannot be divided unless being agreed previously by the parties. The validity of the Mortgage Rights is proven by the issuance of Mortgage Deed from the National Land office and registered on the Rights of Land Certificate. The existence of Law Number 4 of 1996 about Mortgage Rights to guarantee the debt granted by the bank as the holder of the Mortgage rights to the debtor. If the debtor breaks the agreement, then the land encumbered by the Mortgage rights can be sold by the holder of Mortgage right through the public auction and/or through underhand sales. The Mortgage rights provide the protection both in legal and economic terms to the bank as the holder of the Mortgage rights.

Keyword : *Mortgage Rights, Guarantee, Execution.*

INTRODUCTION

The function of law as a stabilizer that has a role to create balance in society with its purpose to accelerate economic development. The increase of economic development can affect to the needs of the society according to their needs. One of the funding providers that can issue in large amounts of financing is Banking. Bank as a creditor that provide funds certainly need guarantees and legal protection when distributing the financing to the debtors, both individuals and legal entities, even the existence Law of Guarantee can provide legal certainty and the ease of executing a guarantee..

In the general Law of Guarantee that applies in Indonesia, it can be divided into two guarantees which collateral material and personal guarantee . As the collateral is one of the requirement for credit terms, while the other requirements for the debtor's ability to repay the debt has been obtained, the guarantee can only be in the form of goods or claim rights financed with the credit in question. The mention of guarantees that guarantee certain objects that are agreed upon between creditors and debtors and or third parties, can be accepted as a logical consequence of the existence of material guarantees and individual guarantees .

The word of credit in the banking has the meaning of the ability to borrow money or the ability to enter into trade transactions or obtain delivery of goods or services with an agreement to pay later . The granting of credit is generally carried out in the presence of a principal agreement which is an agreement between the Parties and is approved by the Parties that made it. An agreement is an act in which one or more people bind themselves to one or more other people .

In practice, the most frequently used guarantees are collateral material, especially movable and immovable objects. In this study, the author only explains about the immovable guarantee that is encumbered by the Mortgage. The definition of Mortgage is a guarantee right that is encumbered on land rights as referred to Law No 5 of 1960 concerning Basic Agrarian Regulations, other objects which are an integral part of the land, the settlement of certain debts, which relates certain creditors to other creditors . The enactment of the Mortgage Law is a privilege for creditors where this rule can provide guarantees when the debtor defaults . The creditor may execute the guarantee through an auction and only take the auction proceeds based on the outstanding or the remaining amount of the debtor's debt, and if there is any remaining from the auction proceeds will be returned to the debtor in the manner agreed upon under the credit agreement.

The legal consequences that will be received by the Debtor as the Giver of Mortgage, if the promise is breached against the Credit Agreement or known as the event of default, then the land (land rights) that are encumbered with this Mortgage has the right to be sold by the holder of the Mortgage without the consent of the grantor and the mortgage giver cannot object to the sale. In order for the implementation of the sale to be carried out in an honest (fair), the holder of the first Mortgage has the right to sell the object of the Mortgage on his/her own power through a public auction and to take repayment of his/her receivables from the proceeds of the sale . It is possible that by agreement of the giver and recipient of the Mortgage, it can be carried out under the hands if in this way the highest price will be obtained that benefits all parties.

Therefore, the author is interested in discussing more deeply and explaining in detail about the juridical analysis of encumbrances and execution the object of mortgage to provide legal certainty protection for creditors..

LITERATURE REVIEW

The author obtained the data from legal sources that apply in Indonesia, that is The 1945 Constitution of the Republic of Indonesia; Civil Law; The Act No 5 of 1960 concerning Basic Regulations of Agrarian Principles, State Gazette of the Republic of Indonesia Year 1960 No 1960-104; The Act No 4 of 1996 concerning Mortgage Rights, State Gazette of the Republic of Indonesia Year 1960 No 42; The Act No 10 of 1998 concerning amendments to The Act No 7 of 1992 concerning Banking, State Gazette of the Republic of Indonesia year 1992 No 182; The Act No 2 of 2014 concerning amendments to The Act No 30 of 2004 concerning Notary Positions, State Gazette of the Republic of Indonesia No 5491; Regulation of the Minister of Agrarian and the spatial/Head of national Land Agency No 9 of 2019 concerning Electronically Integrated Mortgage Services, State Gazette of the Republic of Indonesia Year 2019 No 686; Regulation of the Minister of Agrarian and the spatial/Head of national Land Agency No 5 of 2020 concerning Electronically Integrated Mortgage Services, State Gazette of the Republic of Indonesia Year 2020 No 349; Regulation of the Minister of Finance of the Republic of Indonesia No 27/PMK.06/2016 concerning Guidelines for the Implementation of Auction, State Gazette of the Republic of Indonesia Year 2016 No 27; Bank Indonesia Regulation Number 3/12/PBI/2001 concerning Requirements and Procedures for Implementing Government Guarantees on Payment Obligations for Rural Banks.

RESEARCH METHODOLOGY

The specification of this research only analyzes to the level of dethesis, which analyzes and provides facts systematically that will be easier to understand and conclude . Specifically, according to the type, characteristic and purpose of Soerjono Soekanto's specification of legal research, it is divided into normative legal research and empirical or sociological legal research .

In writing this thesis the author uses empirical legal research methods that are supported by normative legal research methods. Normative legal research is also known as library research or document study, it is because mostly carried out on secondary data. Normative legal research is the research that study more about laws. From the results of the study, it will be conceptualized into a norm or rule that applies in a community environment.

Empirical Legal Research is often referred to as sociological research or field research, where the research is based on primary data, which the data is obtained directly from the community through field research. This study connects the law to efforts with the intention of fulfilling the wishes of the community in understanding the intent of the title written by the author. Based on the explanation above and observed to several variables and problem formulations in this thesis, related to the type/specification of the research, this thesis research is the normative legal research, supported by sociological/empirical legal research.

The approach method is an explanation of what methods will be applied by author in the research to be carried out . In this study, the author uses the Normative Juridical Approach and Sociological Juridical Approach. First, the Normative Juridical Approach Method is an approach that is carried out based on the main legal material by analyzing theories, concepts, legal principles, articles and laws and regulations related to research that is related to its application in practice .

DISCUSSION

1. ENCUMBRANCE & EXECUTION THE OBJECT OF MORTGAGE RIGHTS.

There are 3 (three) aspects in the regulations that must be known, aspects of justice, aspects of benefits and aspects of legal justice, including other foundations such as philosophical foundations, sociological foundations and juridical foundations . The activity of guaranteeing the certificate of land rights in the Law of Guarantee will be encumbered with a guarantee right to the land called Mortgage Rights. Mortgage rights are guarantee rights that encumbered on land rights as referred to Law No 5 of 1960 concerning Basic Agrarian Regulations, the following or not the following other objects which are an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors . According to Prof. Boedi Harsono S.H., Mortgage Rights is the control of land rights, containing the authority for the creditor to do something about the land that is used as collateral, but to sell it if the debtor is in breach of contract and takes from the proceeds wholly or in part the payment of the debtor's debt to him .

The principles of Mortgage consist of giving a preferred position to the holder of the Mortgage. This means that the holder of the Mortgage has the right to take precedence in obtaining repayment of his receivables than other creditors for the proceeds of the sale of the object that is encumbered by the Mortgage. In applying the Mortgage, it must be in accordance with the principle of speciality and the principle of publicity, which means that the principle of speciality is intended for objects that are encumbered with the Mortgage, which must be clearly written, where it is located, how wide it is, its boundaries and proof of ownership in the Deed of Granting Mortgage . While the principle of publicity is the encumbrance of Mortgage Rights must be known by the public and registered at the Office of the National Land Agency.

Mortgage has a characteristic that cannot be divided unless it has been expressly agreed in the Deed of Granting Mortgage. This means that a Mortgage is a completely encumbrance the object that of Mortgage. Always follow the object in the hands of whoever the object is. This means that the object that is used as the object of the Mortgage is still encumbered by the Mortgage, even though it is in the hands of whoever the object is. Mortgage rights is a special agreement (accessoir) that must be based on the main agreement in which the agreement creates debt law (credit agreement).

Land rights that can be encumbered with Mortgage Rights are Ownership Rights, Building Use Rights, Cultivation Rights . The subject of the mortgage is the giver of the mortgage and the holder of the mortgage, the giver of the mortgage is an individual or legal entity that has the authority to take legal action against the object of the mortgage in question . Mortgage holder is an individual or legal entity as the party who owes the debt.

The legal basis for carrying out a legal act of encumbrance and registration of Mortgage can be seen in Law No 4 of 1996 concerning Mortgage on Land and Objects Related to Land. The process of encumbrance of mortgage has the participation of a Notary and/or Land Deed Making Officer (PPAT) as the authorized official in making deeds related to the encumbrance of mortgage, such as credit agreements, power of attorney for encumbering mortgage rights, and deeds of granting mortgages. Deeds made must be explained explicitly and clearly to ensure that the parties have fully understood what is contained in the deed. According to R. Soegondo Notodisoerjo, this reading must be carried out clearly so that it can be caught by the parties and witnesses .

Deeds made by Notaries and/or Land Deed Making Officials (PPAT) are a form of creating legal certainty, where the agreements made by the Debtor and Creditor are all contained in the deeds. In the credit agreement there are clauses that always and need to be included in a credit agreement where the clause is something that must be understood by the debtor as the credit recipient. In the credit agreement, the credit recipient is also not free to determine for himself the purpose of using the credit because the credit is given by the Bank to the Debtor and there must be an agreement that agreed upon by both parties.

The Deed of Granting Mortgage regulates the terms and conditions regarding the granting of mortgage which is intended to give priority to creditors (preferred creditors) over other creditors as also affirmed in the Mortgage Law. With the issuance of the Regulation of the Minister of Agrarian Affairs of the Republic of Indonesia Number 9 of 2019 concerning Electronically Integrated Mortgage Services, all procedures related to registration and encumbrance of Mortgage Rights become online registration. The online Mortgage Registration can be done with the 2 door methods. The first registration is carried out by the Land Deed Making Officer until the issuance of the introduction to the deed and then the registration will be continued by the creditor. Notary and/or PPAT after registering will provide a letter of introduction to the deed to the bank, and the bank will continue the registration of mortgage rights.

In the things that the debtor defaults, the debtor is obliged to voluntarily submit his guarantee to the creditor for the settlement of his debt and is obliged to vacate the object of collateral so that the creditor can use his rights in executing the object of the guarantee. If the debtor does not carry out his obligations, then the debtor is considered unable to cooperate in terms of paying off his debt .

In the things that the debtor is in breach of contract, the bank as the creditor has the right to sell the object of the mortgage on its own power through a public auction and to take the settlement of his receivables from the proceeds of the sale The execution of mortgage is regulated in Article 20 to Article 21 of the Mortgage Law Number 4 of 1996 which if the debtor is in breach of contract, the mortgage holder has the right to sell the object of the mortgage as referred to in Article 6 of the Mortgage Law No 4 of 1996. All methods of execution of Mortgage are returned to the initial legal basis, namely the Auction Law (Vendu Reglement, Ordonantie February 28, 1908 Staatsblad 1908: 189 as has been amended several times recently by Staatsblad 1941:3); Auction Instructions (Vendu Instructie, Staatsblad 1908:190 as amended several times recently by Staatsblad 1930:85); and Minister of Finance Regulation (PMK) No 27/PMK.06/2016 concerning Auction Implementation Guidelines .

In executing the object of credit guarantees in the world of banking, the term AYDA stands for Foreclosed Collateral. Foreclosed collateral is an asset obtained by a Rural Bank for Credit settlement, either through an auction, or outside the auction based on voluntary submission by the owner of the collateral or based on a power of attorney to sell outside the auction from the owner of the collateral in the event that the Debtor has been declared congested . The Power of Attorney to Sell which is commonly used by the bank is the power to sell which is made in a notary deed in front of notary. The takeover of the collateral must be accompanied by a statement letter of the handover the collateral or a power of attorney to sell from the debtor, and an affidavit paid off letter from the Rural Bank to the debtor. In carrying out the execution of the guarantee, the bank must apply the precautionary principle and carry out the execution in accordance with the applicable rules, the bank can take the guarantee easily, as for what must be done, of course, by speaking persuasively first, if there is no agreement, it will be continued in a way that has been provided for in law to execute.

2. FACTORS OBSTACLES, SOLUTIONS IN THE ENCUMBRANCE AND EXECUTION OF MORTGAGE OBJECTS.

Bank in receiving a credit guarantee there are 2 considerations that must be passed: first, the guarantee must be marketable, meaning that at the time of execution the guarantee is easily sold to pay off the debt contained in the bank. Second, the guarantee must be secured, the credit guarantee can be legally binding, in accordance with the provisions of laws and regulations which in the event of default, the bank has the juridical power to carry out execution actions . Banking institutions in choosing collateral must be very selective and pay close attention to the credit period and the expiration date of the rights. Due to the fact that in the field there are still guarantees whose validity period has expired so that the mortgage cannot be encumbered, or even the existing mortgage is lost due to negligence or lost control by the bank and the notary and PPAT partners who assist in the completion of the

extension of the rights over the land. Mortgage rights is a protection provided by law to the bank, so that if there are several things that cause the installation of mortgage to be constrained, then there is no legal certainty that will be held by the bank party as the creditor

Several stages will be carried out by the bank, one of them is checking the certificate of land rights which will be attached to the mortgage rights to the National Land Agency. Before taking legal action regarding certain land parcels, the parties need to know the data regarding the land parcels . Checking certificates is an activity carried out to find out physical data and juridical data saved in land registration maps, land registers, measuring documents, and land books. The function of checking land rights certificates is to find out whether the land certificate is being blocked, is being pledged elsewhere, or is in a civil or criminal dispute.

In practice, many certificates of land rights have been checked until the encumbrance of mortgage rights is unilaterally blocked by the National Land Agency. One of them is the blocking of certificates encumbered by mortgage rights due to the location of land that is included in the protected forest area. Due to the very rapid population growth in Batam, of course will simultaneously requires land to be used as residential and housing land. The target is to get land as a residential site and housing that is fast and cheap, the community and certain parties are more likely to choose land as their housing site in protected forest areas or areas in Batam .

In the case of land rights certificates that have been encumbered with mortgage rights, it certainly makes it difficult for the bank as the mortgage holder to eliminate the mortgage if the debtor has paid off his obligations and/or execute the mortgage if the debtor defaults. This difficulty certainly makes it difficult for the banking sector to offer and/or sell guarantees to prospective buyers, because potential buyers also do not want to buy land that is still being blocked.

In this case, the Ministry of Environment and Forestry of the Republic of Indonesia and the National Land Agency of Batam City work together to re-clarify, evaluate, and at the same time if deemed necessary to revise the existing forestry plan . In addition, it is expected that the competent institutions can provide announcements regarding land located in the protected forest area to be blocked before the certificate of land rights is encumbered with the mortgage rights, so that creditors can refuse to provide credit facilities to debtors who own land in the protected forest area.

The creditor as the recipient of the mortgage does not necessarily have security in dealing with the debtor's resistance because of an objection to the execution of the object of the mortgage either through public auctions or underhand sales. Objections experienced by the debtor can occur before the execution. The form of resistance carried out by the debtor can be in the form of resistance before the auction which aims to postpone the auction and resistance after the auction which aims to cancel the auction. If the debtor in default makes a fight by filing a lawsuit against the request for an execution auction, the court will postpone the execution auction process and choose to hear the resistance or lawsuit from the debtor. So that one of the characteristic of mortgage is easy and definitely not easy and uncertain because they have to wait for the decision of the resistance or lawsuit from the debtor.

In principle, the settlement of bad debts against claims or resistance in the execution of the mortgage object can only be carried out if it has obtained a judge's decision with permanent legal force (inkrah) in the sense that no legal action is taken after the decision. So that in practice the decision will be the basis for conducting an auction for the execution of the object of the mortgage. With the lawsuit from the debtor, the auction winner as the buyer of the collateral object cannot enjoy the object because have to wait approximately 7 months until the decision is made.

CONCLUSIONS AND RECOMMENDATIONS

1. CONCLUSIONS

Legal arrangements concerning the encumbrance and execution the objects of mortgage to provide legal certainty protection for bank creditors in binding credit with debtors based on Law No 4 of 1996 concerning Mortgage Rights. Mortgage registration for this digital era has used an electronic system which is regulated in the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No 9 of 2019 in conjunction with the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No 5 of 2020 concerning Electronically Integrated Mortgage

Services. Based on Article 20 paragraphs 1 and 2, when the debtor is in default, the bank has the right to sell the collateral through a public auction or an underhand sale on condition that the highest price is obtained that benefits all parties. As for auction activities carried out by banks, they must comply with all the rules stipulated in the Auction Law (Vendu Reglement, Ordonantie 28 February 1908 Staatsblad 1908: 189 as amended several times, recently by Staatsblad 1941:3); Auction Instructions (Vendu Instructie, Staatsblad 1908:190 as amended several times, recently by Staatsblad 1930:85) and Regulation of the Minister of Finance of the Republic of Indonesia No 213/PMK.06/2020 about Instructions for Auction Implementation.

2. SUGESTION

Regarding the encumbrance and execution the object of mortgage to provide legal certainty protection for creditor, the author suggests that the debtor must know the contents of the credit agreement and the contents of the deed of granting mortgage which if there are clauses that are considered detrimental to the debtor, the debtor can ask for clarification of the clause to the bank, and if necessary the debtor can ask to remove or replace the clauses which does not burden the debtor. The author suggests that at the time of binding, the bank is obliged to clearly explain the legal risks if the debtor breaks his promise and explain how the mechanism of the auction and what kind of benefits will be obtained by the debtor as the holder of land rights. The author suggests that the bank take a guarantee that is in accordance with the credit that will be given to the debtor so that there is no big loss if the debtor breaks his promise. Likewise, the debtor must provide a guarantee that is in accordance with the credit that will be received by the bank which can cover the amount of debt owned by the debtor. In the execution, bank only required to take the proceeds of the sale to cover the debts of the debtor, if there is an excess then the bank is obliged to return it to the debtor. Debtors who already know about execution have an obligation to follow and release collateral voluntarily. The author also suggests to prospective debtors to be able to ask questions and understand the deeds signed in the process of credit agreement.

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