

"LEGAL PROTECTION OF THE DEBTOR AGAINST THE EXECUTION OF RIGHTS DEPENDENT ON U.S. CREDIT GUARANTEE OF BANKING INSTITUTION IN THE FACE OF AN ASEAN ECONOMIC COMMUNITY (AEC) (ANALYSIS OF THE DECISION OF THE SUPREME COURT OF THE REPUBLIC OF INDONESIA NUMBER 803 K/PDT/2011)"

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ABSTRACT

Free trade became the main feature of the ASEAN Economic Community (AEC) makes banks into one financial institution of interest people who want to apply for credit if it faces a shortage of venture capital. One of the guarantees that can be pledged to obtain the loan is through Mortgage. Under the provisions of Article 6 of Act 4 of 1996 on Mortgage stipulates that if the debtor's breach of contract, the rights holder dependents have the right to sell the object of Encumbrance on its own power through a public auction, and take repayment of the receivable from the sale, one through parate execution. However, the implementation of the execution parate often raises legal issues, as is the case in the Supreme Court ruling of the Republic of Indonesia No.1429 K / Pdt / 2011. Author of the issues raised is how does the legal protection that can be given to the debtor in the face of the execution encumbrance? This research a legal study with normative juridical approach, using primary and secondary legal materials that are eksplanative. Based research note pricing limit to one of the obstacles in the execution parate security rights. further research should be hold to find methods of legal protection for debtors but still provide legal certainty in the recovery debt.

I. INTRODUCTION

Increased rate of the economy will lead to growth and development of the work done by the community, usually entrepreneurs in developing their business are always trying to increase their capital by way of loans on bank institutions. Bank has a strategic role in driving the wheels of the economy through the main activities, namely to collect public funds and channel them back into the community in the form of credit.

Loan disbursements should be based on the confidence and ability of banks to the borrowers ability to repay its debt, by carrying out the assessment based on the principle of 5-C, are character, capacity, capital, collateral, and the condition of economy. Besides lending should also be implemented in the form of a written agreement between the bank (lender) and the customer (debtor). The form and content of the agreement can be done by agreement of the parties, but still based on the provisions of contract law or the law of the engagement,

particularly with regard to the principles of contract law / engagement and terms of a legal contract / engagement.

One important clause stipulated in the loan agreement is a guarantee of a specially designated and tied in particular to guarantee the debt of the debtor. This guarantee provides protection for the lender in case of default or breach of contract. Thus, if the debtor does not fulfill its promise, the creditor may exercise its right to obtain a higher position than other creditors to obtain repayment of the credit. Land is one of the most preferred security object in lending. besides feels most secure, the land value will high and high. Binding can be done through Mortgage, which will provide the preferred position of other creditors.

Under the terms of Article 1 (1) of Law No. 4 of 1996 on Mortgage of Land and Their Bodies Relating to Land (UUHT) is an Encumbrance is:

Mortgage on land and objects related to land, hereinafter called Mortgage is a security interest that is charged to the land rights as intended by Law No. 5, 1960 regarding the Basic Regulation Agrarian, following or not following other objects that are installed on the land, for the repayment of certain debt, which gives precedence to the position that certain creditor to creditor-Other creditors.

Based on the foregoing, Encumbrance charged over land rights and objects on it in the form of buildings, plants and other outcomes that consistently is a unity with the land as collateral. Including the land rights is a form of property rights; Cultivation Rights; building rights; as well as the use rights on state land according to the applicable provisions shall be registered and transferable by their nature can also burdened Mortgage.

Implementation of the credit agreement often raises legal issues, including when the credit crunch. If the debtor can not pay and event of default resulting in a credit to be jammed, the creditors certainly would not be harmed and would take the debtor's repayment of debt by executing the object of Mortgage as loan collateral. The execution of the Mortgage as loan collateral is felt there are still some obstacles that barrier. As an example the case of the appeal made by the applicant appeal Mr Bambang Suseno debtor to creditor PT. Bank Rakyat Indonesia, Tbk, which in essence is a request for cancellation of the plan and the auction due to a default of the debtor as a result of the determination of price limits is considered too low by the debtor and the debtor harm, as well as a request for payment credits only in the form of principal without interest.

Referring to the things mentioned above, the author intends to conduct a discussion of how the legal protection that can be given to the debtor in the face of the execution of the security rights.

II. METHODOLOGY

This research is a law with normative juridical approach, using primary and secondary legal materials that are eksplanative.

III. DISCUSSION

According Roscoe pounds each individual / personal free to enter into agreements and interests in the agreement legally protected throughout has been agreed in the draft deed of agreement. This is in accordance with the provisions of Article 1338 of the Civil Code, that "All treaties made legally valid as law for those who make it." However, it should be noted that freedom of contract containing responsibilities that are able to maintain a balance to achieve well-being physically and spiritually, mismatched , aligned and balanced with the public interest.

Said agreements valid if it meets the four conditions, namely those who have agreed to bind himself; Ability to make an engagement; A certain thing; A cause that halal. In banking practice, the credit agreement is the legal basis for action when the creditor to the debtor if the debtor was in default. There are three kinds of actions are classified as in default, the debtor did not pay the loan installments; Debtors pay some loan installments (with interest), but are classified as non-performing loans in this case is if the debtor is less to pay one installment; Debtors pay off the loan after the term of the agreement expires.

In the event of default, the lender certainly would not be harmed and will take on a debt of the debtor by way of executing such guarantee. Related to the execution on the ground that made the object of Encumbrance, Article 6 UUHT stipulates that if debtors default, the first security rights holder has the right to sell the object of Encumbrance on its own power through a public auction, and take repayment receivable from the sale proceeds. In the Burgerlijk Wetboek (BW), those concept is known as parate execution as referred to in Article 1178 (2) of BW. With the concept of the above, holders of Encumbrance (creditors) do not first have to request prior approval to the grantor Encumbrance (debtor), and does not need to also ask the local court warrant to conduct the execution. It is enough if the holder of the first Mortgage apply to the Head of the State Property Office and Auction Country (KPKNL) local to carry out a public tender in order to object the execution of Mortgage.

Understanding the auction can be found in Article 1 point 1 Regulation of the Minister of Finance of the Republic of Indonesia No.27 / PMK.06 / 2016 On Implementation Guidelines Auctions (PMK 27 / PMK.06 / 2016) mentioned that the auction was the sale of goods which is open to the public with a price quote in writing and / or oral increased or decreased to achieve the highest price, which was preceded by the announcement of the auction. Based on such understanding, it appears that elements of the auction is a way of selling goods; preceded by collecting enthusiasts / participants of the auction; implemented by way of an offer or a special price formation is by way Bid orally or in writing that are competitive; participants who submitted the highest bid will be declared the winner / buyer.

One of interesting thing that is set in the PMK 27 / PMK.06 / 2016 is pricing limits a benchmark for participants in the auction bid price of the auction item, which in this case is the object of Mortgage. In Article 1 point 28 PMK 27 / PMK.06 / 2016 mentioned that the price of goods to be auctioned limit set by the seller. If you view on Article 6 UUHT indicates that what is meant by such sellers is the creditor as the holder of the first Mortgage. Especially in Article 11 (2) UUHT possible inclusion of promise in granting Mortgage Deed

promises and who gave authority to the holder of the first Mortgage (lender) to perform parate execution if the debtor defaults.

Determination of the limit value based by assessors who conduct independent assessment based on competence, as well as by the appraiser who is a party that originated from the seller, who performed the assessment is based on methods that can be accounted for. But the benchmark in determining the methods that can be justified that it is not specifically regulated in the legislation. So the potential for dissatisfaction and claims to be high, because there is a feeling that the rights and protections of the law been violated. Based on research conducted by PurnamaSianturiin 2008, one of the characteristics of a lawsuit filed by the debtor are related to the auction price is too low.

Although there are no specific rules which directly violated in determining the value of the limit is too low, but the action is already included in the tort categor. Because an unlawful act not only act which directly violates the law, but also the act which directly violates morality, religion, and manners which indirectly also against the law.

Under the provisions of Article 1365 of BW states that "Any unlawful act that causes damage to others, obliging the guilty cause harm, menggati losses." That is, an action can be regarded as an act against the law if it meets the elements, ie the act should be against the law; the act must result in losses; The deed must be done with an error; between acts and damages arising there must be a relationship clause.

In banking practice, the content of the credit agreement can be submitted to the parties is not contrary to the provisions in Article 1320 of BW. This causes the position of the parties becomes unbalanced, the debtor always proffered standard agreement that has been prepared by the creditor. As a result, the debtor has been placed in a weak position and do not have the right to choose and accept the terms offered overall in the credit agreement. Moreover, not all debtors to understand the language in the agreement and knowing the rules of law regarding credit guarantees. So should the creditor is obliged to provide sufficient warning and formulated with clear language to the debtor in case of default until the process execution Mortgage.

Based on the Supreme Court's decision No. 1429 K / Pdt / 2011 (MA No.1429 K / Pdt / 2011) shows that the objections filed by the debtor has been rejected. In deciding a case on appeal, the Supreme Court (MA) refers to the provisions of Article 30 paragraph (1) of the Act Nomor.5 of 2004 on First Amendment Act of 1985 Nomor.14 About the Supreme Court (Supreme Court Act), which stated that the Supreme court overturned the verdict or the determination of the courts of all jurisdictions because: (a) is not authorized or exceeded; (B) any implement or violate any applicable laws; (C) fails to meet the conditions required by the legislation which threatens negligence by the cancellation of the decision in question.

If it is based on the applicable rules, the execution Mortgage undertaken by creditors through KPKNL already done the applicable rules. However, the law is not limited to the adherence to the rule of law, but also concerning the legal protection of the public. In the theory of John Locke stated that the ideal society is not in violation of basic human rights, commonly called rights. Likewise, the law made by the State is to protect the basic rights that people can develop themselves personally, role and contribution to the welfare of human life.

Plato said that the Good country is the State based on the legal arrangements were good. The idea is then further reinforced by his student Aristotle. According to him, a good

country is governed state with a constitution and sovereign law. There are three (3) elements of a constitutional government, such the Government carried out in the public interest; The Government carried out according to the law which is based on the provisions of the general and not laws made arbitrarily were put aside convention and constitution; The Government of the constitution means the government carried out the will of the people and not be impositions held in despotic rule.

In relation to the rule of law, there is a theory put forward by Hans Kelsen on the level of rule of law, which is then refined by his student Hans Nawiasky. According to the fundamental norms of the country is the highest legal norm in a State which is not formed by a norm that is higher again, so that he will be dependent upon the underlying legal norms. That is, a legislation should be sourced and based on the norms of higher force, sourced and based on the norms of higher again, up to the highest norm called basic norm.

Pancasila as the basic philosophy of the State of Indonesia has hinted about justice for all Indonesian people as mentioned in point 5th Pancasila. Justice is also included in regard to the value limit Mortgage object to be executed. If the determination of this limit is only handed over to the debtor, this certainly will harm the interests of the debtor. During this time there is an indication that lenders sell loans and not seek reasonableness of the price of goods sold.

Especially in the era of the ASEAN Economic Community (AEC), which makes free trade as the main feature, create a banking institution has a strategic role in developing the economy. So it should be carried out reforms and evaluation of the rules of law regarding Mortgage loan and execution of the benchmark in determining the limit value objects pertanggungjawaban Mortgage. So in the end will have implications for the legal protection of debtors who still scored a reasonable price on his property, so that the sale of objects can be maximum valued which Encumbrance both the creditor and the debtor.

III. CONCLUSION

The government should reassess the rule of law in determining the value of the object execution limit Mortgage. Because it raises many legal issues. Especially in the era of the ASEAN Economic Community (AEC), which makes the competition becomes increasingly fierce, making people in need of legal protection of the State. Further research is needed more by experts, academics, researchers for an inadequate method of determining the value of the object execution limit Mortgage. So that the community is able to competence with other countries in MEA's era.

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