

Wanprestasi of Mudharabah Financing in Sharia Banking

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Abstract—This study aims to determine the completion of wanprestasi on mudharabah financing in sharia banking. To achieve these objectives, the normative juridical approach method is used. Conclusion, the existence of sharia banking in Indonesia is a bank which operates in line with Islamic sharia provisions, especially those concerning the procedures based on Islamic value. According to Law Constitution, number 10 in 1998 stated that Sharia Banks are Banks that carried out their business activities based on sharia principles while in their payment activities provide some services. The basic philosophy operation in Sharia banks relates all transaction included as efficiency, justice and corporate. Efficiency refers to the principle of mutual help synergistically to get the greatest profit. Sharia bank activities in terms of determining the price of their products are very different from conventional banks. Pricing in Sharia banks is based on an agreement between the bank and the customer which relates with the type of deposit and time period, it also will determine the average of profit share that the customer will receive. The products in Sharia banks include financing based on the profit-sharing principle (mudharabah). Sharia banks used Qur'an and hadith as the basic value in carrying out its activities. Sharia banks forbid the use of the price of their products with a certain interest. Basically, Sharia banks assume that bank interest is usury. Mudharabah financing is based on a contract or financing agreement between Shahibul Maal and Mudharib. The agreement is based on the agreement in general in the written form in Article 1320 of the Civil Code. The contents of the agreement include, among others, the agreement on financing based on the principle of mudharabah, profit sharing and regarding the risk of failure or loss of business or financed projects will be certified by Sharia banks as long as the failure or loss is not caused by mudharib. The parties of the mudharabah financing agreement are noticed to have defaulted if the party infringed the clause in the agreement. In the event of default resulted that problematic financing occurred, the solution is to conduct a financing restructuring, settlement through collateral, settlement through BASYARNAS, elimination of financing, bankruptcy application. Furthermore, to minimize the problematic financing, banks are required to apply prudential principles as stipulated in the law.

Keywords— Wanprestasi, mudharabah financing, Sharia Bank

I. INTRODUCTION

Banking institutions have a role as state development and function as intermediary financial institutions, namely collecting funds from the public in the form of deposits

and channeling to the community in the form of loans or other forms in order to improve people's lives. Law Number 10 of 1998 based on its operational principles, banks are divided into two, namely conventional banks which are based on the principle of interest and banks based on sharia principles. Sharia Banks consist of Sharia Commercial Banks and Sharia Rural Banks or which are currently referred to as Sharia People Financing Banks. One of the products issued at the Islamic People's Financing Bank is mudharabah financing. The principle of mudharabah is justice for the parties to the transaction, namely the existence of a balance in terms of obtaining profit or risk in accordance with its contribution to the promised business activities. The principle of profit sharing in mudharabah contracts reflects justice in this contract. The problem of sharing profits and risks in a business partnership is an important problem so that rules/norms that can avoid the parties working together from fraud, dishonesty, and betrayal that can damage the blessing of the business activity are needed. In addition to the principle of justice, in the mudharabah contract there are also principles of openness/honesty, interdependence/willingness, and the principle of trust. All of these mudaraba principles are a strong basis for promoting the economic balance of the community.

Mudharabah financing by Islamic banks is a legal relationship between shahibul maal and mudharib in mudharabah financing based on a contract or financing agreement. The agreement is based on the agreement in general in written form regulated in BW. The contents of the agreement include, among other things, the agreement for financing based on the principle of mudharabah, profit sharing and regarding the risk of failure or loss of the financed project business, as long as the failure or loss is not caused by mudarib. The parties to the mudharabah financing agreement, in this case Shahibul Maal and mudharib, are said to wanprestasi when the party has violated the clauses contained in the agreement agreed upon. As for the definition of financing, according to Law No.10 of 1998 Financing is the provision of money or bills that can be equated with that, based on an agreement or agreement between the bank and another party that requires the party financed to return the money or bill after a certain period of time with rewards or profit sharing. Based on this understanding, it can be concluded that financing is the provision of funds provision facilities to support investments that have been planned based on agreements between banks and other parties that require

the financed parties to return the money or bills after a certain period of time with compensation or profit sharing.

The requirements for obtaining financing facilities in Article 23 of the UUPS.

Assessment of the ability of prospective recipient customers, especially banks, must examine the customer's expertise. Recipients of facilities in their field of business and/or management capabilities of prospective customers so that Islamic banks and/or UUS feel confident that the business to be financed is managed by the right person. Mudharabah practices in Islamic banking often occur a lot of irregularities, among others, the occurrence of bad credit which initially begins with wanprestasi (broken promise/breach of contract), which is a condition in which the debtor is unwilling and unable to fulfill the promises made in the credit agreement including financing agreement. In the event of a dispute or problem in mudharabah financing, then the formulation of the problem in this study is how to settle the wanprestasi of mudharabah financing in sharia banking?

II. DISCUSSION

The birth of Law Number 21 of 2008 made Islamic banks more free to carry out their business activities. One form of product in Islamic banks is mudharabah financing or profit sharing. In Article 20 Number 4 the Compilation of Sharia Economic Law is mentioned:

"Mudharabah is cooperation between fund owners or investors with capital managers to conduct certain businesses with profit sharing."

Mudharabah comes from the word dharb which means to hit. Or rather is the process of someone hitting his leg on a business trip. Technically, mudharabah is a contract of cooperation between parties, namely the first party (Shahib al-mal) provides all (100%) capital, while the other party becomes the manager. The same thing was expressed by Abdurrahman Al. Jaziri who gave the meaning of mudaraba as an expression of giving assets from someone to other people as business capital. But the profits obtained will be shared by the two of them, and if the loss is borne by the capital owner.

Business profits on a mudharabah basis are divided according to the agreement stated in the contract. If the loss is borne by the capital owner as long as it is not due to the manager's negligence. If the loss is caused by negligence or fraudulent management, the manager must be responsible for the losses incurred. In the mudharabah contract, for financing products, it is also called profit sharing.

Mudharabah is divided into two parts, First, mudharabah mutlaqah, which is a cooperation agreement between sahibul mall and mudharib which is not limited to the specifications of the business, place and time while within limits justified by syara law '. Second, mudharabah muqayyadah, that is, this cooperation effort in the agreement will be limited to the will of sahibul mal, while in a form that is lawful.

Mudharabah philosophy, namely humans created by Allah SWT with various advantages and disadvantages. There are people who have excess assets, there are people who lack assets, there are people who have an expertise, but do not have the capital to carry out work, there are people who have capital but do not have time to take care of some of their assets. For the occurrence of balance, the needy need to help people who are lacking in a fair manner.

The principle of profit sharing in mudharabah is different from the principle of fixed interest where the bank will collect the recipient of the financing (customer) one fixed amount of interest regardless of the profits generated by the customer, even if the loss and economic crisis occur. With the principle applied in mudharabah financing as outlined in the form of contract, it must prioritize the principle of justice and not be allowed to violate sharia signs. The problem is that not all shohibul mall/capital owners/capital customers in mudharabah financing do not yet have an understanding of risk management for mudharabah financing contracts. Therefore, many irregularities occur in mudharabah financing even though the agreement on mudharabah financing is carried out in the presence of an agreement. An agreement can be said to be valid and recognized by law, must fulfill the conditions set forth in Article 1320 of the Civil Code which reads:

For the validity of an agreement four conditions are needed:

1. Agree that those who bind themselves.
2. Agreement to make an agreement.
3. A certain thing.
4. A reason that is lawful.

Deviation in mudharabah financing, namely wanprestasi, which is a debtor who is unwilling and unable to pay. wanprestasi comes from Dutch, which means bad achievement, which according to the dictionary of wanprestasi means negligence, negligence, breach of contract, and not keeping promises in the agreement. Wanprestasi can be interpreted as not performing due to the debtor's fault, either because of intentional or negligent. According to J. Satrio, wanprestasi is a condition where the debtor does not fulfill the agreement or does not fulfill it as it should be and all of them can be blamed on him. According to Yahya Harahap, wanprestasi as the executor of obligations that are not properly carried out on time or done improperly, giving rise to the obligation for the debtor to provide or pay compensation, or by wanprestasi by one of the parties, the other party can demand the cancellation of the agreement.

In principle, wanprestasi means not doing anything that is an element of achievement, concretely it can be formulated as follows: doing something, not doing something, and giving up something.

Debtor wanprestasi can be in the form of:

- 1) The debtor has absolutely no achievements.
- 2) Debtors have wrong achievements.
- 2) Late debtors have achievements.

Debtors do not fulfill their performance obligations, for two reasons, namely; because of intentional or negligent, so there is an element of wrong with him and the force (*Overmacht*). The debtor does not fulfill the obligation because he is negligent and because it is not fulfilled the obligation can be blamed on him, in this case the *wanprestasi* debtor said, negligence is a factor that brings important legal consequences, because with the element of negligence on the debtor we can state that the debtor *wanprestasi* and this if bring other consequences, namely regarding compensation obligations. Losses arising from the inability of the debtor to give or do something that is required due to the existence of a coercive condition or because of an event outside of human control, in such case the debtor cannot be sued compensation by the creditor, as a result of the *overmacht*, the debtor's performance obligation is removed and further consequences that the debtor does not need to compensate the creditor.

To determine the time of default, the Law determines the path of a solution, namely in Article 1238 of the Civil Code, namely:

"The debtor is negligent, if he is with a warrant or with a certificate of that kind has been declared negligent, or for the sake of his own agreement, if this determines, that the debtor must be considered negligent with the passing of a predetermined time".

Based on the aforementioned article, the legislator creates an atmosphere to determine when the debtor is in a negligent condition called a subpoena. Here the purpose of the subpoena is a notification from the creditor to the debtor which contains the provision that the creditor requires immediate achievement of the achievements or within the period specified in the notification. While subpoena is not needed if the debtor has admitted that he is in a negligent state or the debtor refuses to make achievement and if it has exceeded the stipulated time limit. In the event that the debtor does not fulfill the obligations properly and is not fulfilled the obligation there is an element of wrong with him, then there are legal consequences for the demands of the creditor that can befall him.

Creditors' rights if the *wanprestasi* debtor is as follows:

1. The right to demand compliance.
2. The right to demand the termination of the engagement or if the agreement is reciprocal demanding the cancellation of the engagement.
3. The right to claim compensation.
4. The right to demand compliance with compensation.
5. The right to demand termination or cancellation of the agreement with compensation.

According to J. Satrio due to *wanprestasi* as mentioned in Article 1236 of the Civil Code in the event that the debtor is negligent in fulfilling his obligations, the creditor has the right to demand changes in losses, costs and interest. Legal consequences such as this befall the debtor

both in the agreement to give something to do something or not do something, then Article 1237 of the Civil Code, that since the debtor is negligent, the risk of the object of engagement becomes the debtor's responsibility, if the agreement is reciprocal then under Article 1266 the creditor has the right to demand the cancellation of the agreement with or without being accompanied by claims for compensation, but all of that does not reduce the right of the creditor to continue to demand fulfillment, termination and fulfillment or termination of the agreement with compensation.

R. Subekti stated that there were four types of penalties or *wanprestasi* from debtors:

- i. Pay for losses suffered by creditors.
- ii. Cancellation of agreement or called agreement resolution.
- iii. Risk transfer.
- iv. Paying the court fee if it arrives before the judge.

In *mudharabah* financing, *mudharib* / customers who experience problem financing need to be saved. Islamic banks need to take steps, namely by doing: Financing restructuring; Settlement through guarantees; Settlement through *BASYARNAS*; Financing write off (write off); Request for bankruptcy. To minimize the occurrence of problematic financing, banks are required to apply the precautionary principle in providing financing to their customers as stipulated in the Banking Act.

III. CONCLUSION

The birth of Law Number 21 of 2008 concerning Sharia Banking makes Islamic banks more flexible in carrying out banking practices based on sharia principles. One form of product issued by Islamic banks is *mudharabah* financing. *Mudharabah* philosophy, namely humans created by Allah SWT with various advantages and disadvantages. There are people who have excess assets, there are people who lack assets, there are people who have the expertise, but do not have the capital to carry out work, there are people who have capital but do not have time to take care of some of their assets. For the occurrence of balance, the needy need to help people who are lacking in a fair manner. The profit-sharing agreement between *Shohibul Mal* and *Mudharib* often results in a problem agreement / agreement. The agreement is carried out in accordance with the legal terms of the agreement of Article 1320 of the Civil Code then not implemented according to the agreement so that a *wanprestasi* occurs. The steps of Islamic banks in solving financing problems are by doing: Financing restructuring; Settlement through guarantees; Settlement through *BASYARNAS*; Financing write off (write off); Request for bankruptcy.

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