



# Execution of Fiduciary Guarantee After the Decision of the Constitutional Court No. 18/puu-xvii/2019 in the Semarang State Court

Darmawan Tri Budi Utomol<sup>(✉)</sup>, Mieke Anggaraeni Dewi, and Icha Pratiwi

17 Agustus 1945 University, Semarang, Indonesia  
tbudarmawan@gmail.com

**Abstract.** Fiduciary guarantees were born because of the community's need for guarantee institutions other than mortgages and pawns, in pawn guarantees the object of collateral is contradicted by the provisions of Article 1152 of the Civil Code. That the object of the guarantee is in the power of the creditor (inbezitseling). In contrast to a pawn, the object of a fiduciary guarantee is still in the control of the debtor. In terms of the execution of fiduciary guarantees regulated in UUF, its implementation still raises legal problems in practice. The purpose of this study is to determine the implementation of the execution, the obstacles, and how to overcome the guarantee of fiduciary execution in the Semarang District Court after the Constitutional Court Decision No. 18/PUU-XVII/2019. The approach method used in this research is the normative juridical method. Based on the results of the research, the fiduciary recipient creditor may not carry out his execution (Parate Execution) but must submit a request for implementation to the District Court. Parate execution can be carried out if there is an agreement regarding default that has been determined in advance and the debtor is willing to submit the object of the fiduciary guarantee voluntarily. Fiduciary guarantees, lost goods, very large execution costs, damaged goods, goods controlled by third parties including goods for rent or sale to other people.

**Keywords:** Execution · fiduciary guarantee · Constitutional Court Decision No. 18 PUU-XVII 2019

## 1 Introduction

Fiduciary guarantees are regulated in the laws of the Republic of Indonesia in Law Number 42 of 1999 concerning Fiduciary Guarantees. The Fiduciary Guarantee Institution was born because over time and the rapid development of the economy has pushed the community's need for the availability of large amounts of funds to develop their business because it is seen by most people as a solution to get an injection of fresh funds into their business without having to hamper the running of the business as is the case if the acquisition of funds using a pawn [1].

This is considered by economic actors as an obstacle to developing their business, if the object of the pawn is goods that are a vital part of being able to carry out their

business activities, then automatically if they are made the object of the pawn, their business cannot run because the holder of the pawn will control the goods automatically [2].

It is different from the case if it is done on a fiduciary basis, the fiduciary object remains with the fiduciary giver and what turns to the fiduciary recipient is only the material rights or other terms that we usually know as borrowing and use. In practice, fiduciary guarantees often experience problems that cause disputes, among others, the fiduciary provider does not carry out its obligations to pay its debts to the fiduciary recipient, resulting in default. The fiduciary recipient can then immediately execute by asking the fiduciary object for goods to the fiduciary giver, but what often happens is the fiduciary giver is reluctant to hand over the fiduciary object to the fiduciary recipient.

This is something that often happens and is very detrimental to the fiduciary recipient who wants to pay off the debt from the fiduciary giver. In Article 30 of Law Number 42 of 1999 concerning Fiduciary Guarantees, it is stated that the fiduciary giver is obliged to surrender objects that are the object of the Fiduciary Guarantee in the context of implementing the Fiduciary Guarantee.

According to M. Yahya Harahap, requesting assistance from the authorized party regarding who is meant by the competent party in the implementation of taking the Fiduciary Guarantee object from the hands of the Fiduciary giver:

1. May the Police; or
2. District Court based on Article 200 paragraph (11) HIR

Creditors receiving fiduciary guarantees greatly benefit from having a fiduciary guarantee certificate as referred to in Article 15 sub 1, which contains the words “For Justice Based on God Almighty” which is intended as an executorial title, and in Article 15 sub 2 that the fiduciary guarantee certificate has the same power. With a court decision that has permanent legal force [3]. That the real power of execution based on this provision only applies to executions carried out by courts, both executions of judges’ decisions and executions with the help of fiduciary objects Article 29 paragraph (1) letter (a) of the Fiduciary Guarantee Law but does not apply to the execution of sellers privately over the fiduciary object Article 29 paragraph (1) letter (c) of the Fiduciary Guarantee Act.

The interpretation of article 15 paragraphs (1), (2), and (3) UUF in the execution of fiduciary guarantees that are in the hands of the debtor, the creditor who receives the fiduciary guarantee assumes that the Fiduciary Guarantee Certificate with a court decision has permanent legal force, has taken arbitrary actions to the fiduciary recipient to execute the object of the fiduciary guarantee, even without going through the correct legal procedure so that the debtor feels aggrieved. The debtors named Apriliani Dewi (Petitioner I) and Suri Agung Prabowo (Petitioner II) on February 15, 2019, filed a petition for judicial review of the provisions of Article 15 paragraph (2) and paragraph (3), Law Number 42 Year 1999. Thus, Constitutional Court Decision No. 18/PUU-XVII//2019 was published. Based on the decision of the Constitutional Court, The trustee-recipient must file an application for enforcement of the collateral against the non-contractual trustee-provider in the district court.. The purpose of this study was to determine the implementation process, obstacles, and overcoming the execution of fiduciary guarantees at the Semarang District Court.

## 2 Findings and Discussion

### 1. Execution of Fiduciary Guarantee Object at Semarang District Court

Fiduciary guarantees in the field of civil law are simply interpreted as granting the right to the fiduciary giver to keep control of the object that is the object of the fiduciary guarantee based on trust. Then followed by a registration system to provide guarantees to the fiduciary recipient and parties who have an interest in the object/goods in a real and definite way [4].

The execution of fiduciary guarantees carried out by the Semarang District Court is execution with the help of a judge. It is said to be executed with the help of a judge because if the debtor defaults, the fiduciary guarantee agreement made with a notarial deed and then registered with the Fiduciary Guarantee Office has executorial power that can be executed immediately, as is the case with a judge's decision that has permanent legal force or in *Kracht van gewijsde* [5].

A fiduciary guarantee is a follow-up to the loan agreement, when the debtor defaults, the creditor can apply for execution to the Head of the District Court by registering the request for execution to the clerk to be recorded in the register book [6]. The request for execution is filed in the District Court whose jurisdiction includes the making of a debt agreement with a fiduciary guarantee. If the object that is the object of the fiduciary guarantee is outside the jurisdiction of the Semarang District Court, the Chairperson of the Court will request execution assistance from the Chief Justice of the Court whose jurisdiction includes the object that is the object of the fiduciary guarantee [6]. The authority to refuse or carry out executions rests with the District Court that is requested for execution assistance. The Head of the District Court who is requested for execution assistance will carry out the execution and the results of the execution will be submitted to the Chairman of the Court for whom the request for execution is being submitted [5].

After the creditor has paid the cost of the application for enforcement, the Registrar will notify the Chief Justice of the existence of the application for enforcement for the purposes of the trustee. The cost of an application for execution in each court is different, for the Semarang District Court, the execution fee or *Skum* that must be paid by creditors is Rp. 500,000, - (five hundred thousand rupiah) [7]. This means that if the object of the fiduciary guarantee that is executed does not experience obstacles so that it does not experience resistance from the debtor, the costs incurred will be smaller, but if there is resistance from the debtor the execution must be delayed many times, and the costs to be incurred by the creditor are very high. Large and disproportionate to what the creditor wants to realize, even the execution costs can exceed the price of the fiduciary guarantee object sold at auction [7]. The Chief Justice will then summon the debtor and warn him to repay his debt to the creditor. This term is commonly known as *aanmaning*, through a determination from the Head of the District Court [5].

*Aanmaning* is carried out twice if the debtor remains stubborn to immediately pay off his debt to the creditor, but if at the first warning the debtor arrives then it is then submitted to the parties whether mediation is carried out or directly to the execution process of the object of fiduciary security [5]. If the agreement reached by the debtor is not able to pay off his debt, then the Chairman of the Court through a letter of determination will place an executorial confiscation on the object that is the object of the fiduciary

guarantee so that the naughty debtor cannot transfer the object that is the object of the fiduciary guarantee. The Head of the District Court, then the object that is the object of the fiduciary guarantee is followed up with real execution as well as a decision from the Head of the District Court to be sold at auction to cover the debt from the debtor plus other costs such as costs for conducting the auction [8].

## 2. Obstacle That Arise in Execution of Fiduciary Guarantees at the Semarang District Court

Some of the problems that arise in the execution of fiduciary guarantees are fiduciary guarantees made only by private deed or debt agreements with fiduciary guarantee objects that are not carried out by notarial deed and registered with the Fiduciary Guarantee Office within 7 (seven) days, lost goods, very large execution costs, damaged goods, goods controlled by third parties including goods for rent or sale to other people [9]. These problems become obstacles and obstacles in the implementation of the auction of fiduciary object executions, however, the Semarang District Court will continue to strive so that the fiduciary object execution auction can still be carried out as an effort to resolve bad loans.

Obstacles commonly encountered in enforcing trustee guarantees in Semarang District Court are trustee guarantees issued on the basis of private conduct, very high enforcement costs, lost goods, damaged goods, and goods for rent. or products managed by a third party, including those sold to others. The following explains why these impediments often interfere with the performance of fiduciary guarantees.

### a. Fiduciary Guarantee with a private deed

If the loan agreement with the fiduciary guarantee is not made before a notary and registered with the Fiduciary Guarantee Office within 7 (seven) days after the loan agreement is made if the debtor is in default and the creditor submits an execution request to the Chairman of the Semarang District Court, the Head of the District Court will reject the request for execution because the debt agreement with the guarantee of a fiduciary object made with a private deed does not have executive power so that it will be detrimental to the creditor itself.

### b. Huge execution costs

One of the inhibiting factors in the execution of the execution is the very large execution cost, for example, the execution of a motorcycle which costs Rp. 10,000,000, - (ten million rupiah) with an execution fee of Rp. 8,000,000, - is very disproportionate to the costs incurred by the creditor with what he gets later because, not necessarily the execution goes smoothly as expected by the editor, it could be that the goods to be executed have been destroyed.

### c. Items lost

Lost items are the most common factor found in the practice of carrying out executions at the Semarang District Court, if the execution encounters obstacles like this, the court does not easily believe the facts on the ground.

The debtor must be able to prove whether the object that is the object of the fiduciary guarantee is really lost or intentionally deleted, if the debtor intentionally removes the object that is the object of the fiduciary guarantee and at that time the

object has been placed for executorial confiscation, the debtor's actions can be subject to Article 231 of the Criminal Code. Regarding escaping the object of confiscation, but if the act is carried out before the object of the fiduciary guarantee is placed for executorial confiscation, the debtor's actions may be subject to Article 372 of the Criminal Code concerning embezzlement with a threat of imprisonment of 4 (four) years.

The object that is the object of the fiduciary guarantee is in the control of the debtor and he is required to maintain and care for the object, if the object is lost, the debtor is obliged to prove that the lost item was not intentional on his part. The object of confiscation or embezzlement which is punishable by imprisonment for 4 (four) years.

d. Damaged goods

Another obstacle, in this case, is that goods that become objects of fiduciary damage are almost the same as the explanation of lost goods, only that the difference is that if the goods are lost, the debtor is obliged to prove that the goods/objects that are the object of the fiduciary guarantee are lost and not intentional by the debtor, while in the case of Debtor's damaged goods to prove that the goods are damaged, not intentionally. The debtor is required to repair the damage to the object that is the fiduciary guarantee because the debtor must care for and maintain the object that is the object of the fiduciary guarantee so that the price at the time of sale at auction does not decrease and harm the creditor.

e. Goods controlled by third parties include:

Items for rent

The obstacle that is most often encountered in the field is the possibility of the fiduciary giver renting out goods that are the object of the fiduciary guarantee, in a case like this, according to theory, of course, the first fiduciary holder has the right to the object because the fiduciary giver is no longer entitled to take legal action on the object that has become The object of the fiduciary guarantee, in this case, is leased, because the material rights have been transferred to the fiduciary holder and the fiduciary giver is only as a bezitter and not as an eigenar.

Items sold to other people

Goods that are deliberately sold by the fiduciary giver to other people are also obstacles encountered in the field, in the case of fiduciary guarantees where the fiduciary giver is unable to pay off his debt to the fiduciary recipient then sells goods that are the object of the fiduciary guarantee to make a profit. If the debtor's actions were carried out before the executorial confiscation was placed, the fiduciary recipient can report it to the authorities on charges of embezzlement and if the executorial confiscation has been placed through a previous decision by the Head of the District Court, the fiduciary giver can also be subject to criminal sanctions regarding escaping the confiscated object as regulated in Article 321 of the Criminal Code. With the threat of imprisonment for 4 (four) years.

3. How to Overcome the Obstacles That Arise in the Execution of Fiduciary Guarantees at the Semarang District Court

Obstacles to the enforcement of trustee guarantees in Semarang District Court and how to overcome the above obstacles are as follows:

a. Fiduciary Guarantee with a private deed

Creditors who wish to enter into a debt agreement with the object of a fiduciary guarantee, are legally obligated to make it before a notary so that the fiduciary guarantee deed has executorial power as Article 15 paragraph 1 UUF at the head of the deed has the same power as the judge's decision that has been in *kracht van gewijsde*, not only that but also must be registered with the Fiduciary Guarantee Office under the scope of the Ministry of Law and Human Rights, and if at the time the debtor breaks his promise, the creditor can directly apply for execution to the Head of the District Court whose jurisdiction includes the object of the fiduciary guarantee.

b. Huge execution costs

The way to overcome the obstacles that arise because of the large costs that must be incurred by creditors to get their debts repaid is to reduce execution costs to a minimum so that creditors do not use other alternative methods, for example using the services of a decollector which tends to be easier and cheaper costs but is an act of criminal offense and may be subject to Articles concerning confiscation and unpleasant acts, does not even rule out the possibility of being subject to Article 365 Paragraph (2), (3) or (4) regarding persecution. The next solution is to simplify the procedure for carrying out executions in the District Court so that it is not complicated so that creditors are more likely to use thuggery methods by using the services of the debt collector [12].

c. Lost items

If the item that is the object of the fiduciary guarantee is lost at the time of the execution auction, the District Court office seeks to have the debtor prove that the item that was the object of the auction has been lost, especially with witness evidence [4]. If the debtor intentionally omits or misleadingly provides information about the lost goods will be subject to criminal sanctions because the act is a criminal act, then it can be criminalized with a maximum imprisonment of 1 (one) year and a maximum of 5 (five) years or a fine of at least Rp. 10,000,000,- (ten million rupiah) and a maximum of Rp. 100,000,000,- (one hundred million rupiah) [10].

d. Damaged goods

If the goods that are the object of the fiduciary guarantee are damaged when the execution auction is to be carried out, the Semarang District Court seeks that the debtor carries out the finishing process or repair process until it is completed with the repair costs borne by the debtor then only then the auction is carried out [6]. Another opinion also adds that it is the responsibility of the debtor under his control to maintain and maintain the goods that are the object of the fiduciary guarantee so as not to be damaged and make their value at the time of sale of the auction fall [10].

e. Goods are controlled by third parties who include:

1) Items for rent

If the goods are controlled by a third party because they are rented out, then in the implementation of the auction it is possible not to be carried out by the Semarang District Court, the auction is still carried out, namely by informing the prospective buyer, so that if there is an auction participant who still decides to buy, he is considered ready to accept the risks that are likely to arise. In this

case, the third party is only compensated for the loss of the rental costs incurred after the auction is over [5].

2) Good sold to others

If the goods are controlled by a third party because they are transferred, namely by selling to someone else, the Semarang District Court advises creditors to take over the rights of fiduciary goods/objects controlled by third parties by filing a lawsuit with the debtor through the court as the costs are borne by the debtor by adding the amount of the existing debt [10]. In this case, the implementation of the auction is postponed until it waits for a decision/determination from the court, as stipulated in Article 25 paragraph (1) of the Regulation of the Minister of Finance No. 93/PMK.06/2010 concerning Instructions for the Implementation of Auctions and Article 11 paragraph (1) of the Regulation of the Director General of Receivables and State Auctions No. PER-03/KN/2010 concerning Technical Guidelines for Auction Implementation. The postponement of the auction is due to a lawsuit by creditors based on the executory title contained in the Fiduciary Guarantee Certificate by Article 15 paragraph (2) of the UUJF, this is as confirmed in the Circular letter of the Director General of Receivables and State Auctions No. SE-16/PL/2004 concerning Guidelines for the Implementation of Fiduciary Auctions, that the implementation of the auction execution of fiduciary objects is carried out with the help/assistance of a judge [5].

### 3 Conclusion

1. Execution of Fiduciary Guarantees at the Semarang District Court After the Constitutional Court Decision No. 18/PUU-XVII/2019 Recipients of fiduciary rights or creditors of fiduciary recipients may not carry out their executions (Execution Parate) However, you must file an application for enforcement in the district court. Foreclosure can be effected where there is a pre-established default agreement and the debtor is willing to voluntarily surrender an item of fiduciary collateral. The Constitutional Court's decision said that not all enforcement of fiduciary bonds need to be carried out by courts. In the case of a fiduciary bond where there is no default agreement between the obligee and the debtor and the debtor objects to the voluntary submission of fiduciary security purposes, all legal mechanisms and procedures for executing the fiduciary bond certificate should be executed and applied. Strong Court Decisions. Permanent Rights.
2. Overcoming obstacles in the execution of fiduciary guarantees at the Semarang District Court. Fiduciary guarantees made only by private deed or debt agreements with fiduciary guarantee objects which are not carried out by notarial deed and registered with the Fiduciary Guarantee Office within 7 (seven) days, lost goods, very large execution costs, damaged goods, goods controlled by third parties, including goods for rent or sale to other people.
3. Overcoming obstacles in the execution of fiduciary guarantees at the Semarang District Court, fiduciary guarantees with under-handed deeds should be made at the time of making a debt agreement with fiduciary guarantees in front of a notary so

that a fiduciary guarantee deed will be made which later when registered with the Fiduciary Guarantee Office has executive power. The way to overcome the obstacles of lost goods, large execution costs, damaged goods, and goods controlled by third parties, including goods for rent or sale to other people is to apply to the Chairperson of the Court to confiscate collateral for the object of fiduciary security from the debtor.

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