



The Legal Balance of Debtors and Creditors as Objects of Fiduciary Guarantee in Party Execution Post-constitutional Court Decision No. 18/PUU-XVII/2019

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Abstract. This study aims to analyze the criminal threats that creditors will obtain and third parties as executors of the execution of the object of fiduciary security after the Constitutional Court Decision Number 18/PUU-XVII/2019. This case has been decided in Gorontalo District Court Decision Number 45.Pdt.G/2019/PN. Gto, which has been confirmed in the High Court Decision Number 16/Pdt/2020/PT.Gto, the creditor's position, with the help of a third party (debt collector), has carried out a unilateral execution without a court decision. The debtor did not want it, so he filed a lawsuit against the law. The problem in this study is related to applying the Fiduciary Guarantee Law to the object of fiduciary guarantees and criminal threats to creditors and third parties after the Constitutional Court Decision Number 18/PUU-XVII/2019. This research method uses an empirical juridical approach, namely statutory, conceptual, and case approaches supported by primary and secondary data. The results show that the application of Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees to the execution of fiduciary guarantees and creditors through third parties (debt collectors) who withdraw the object of fiduciary guarantees is contrary to the Court's Decision. Constitution Number 18/PUU-XVII/2019, resulting in a legal vacuum in the Fiduciary Guarantee Law against the implementation of unilateral executions carried out by Creditors and Third Parties.

Keywords: Debtors and Creditors · Fiduciary Guarantee · Execution · Constitutional Court

1 Introduction

In the banking world, there is a guarantee institution based on trust, namely the Fiduciare Eigendom Overdracht (FEO). This guarantee institution was previously regulated in Article 1152 paragraph (2) of the Civil Code regarding pawning, which provided a condition that the possession of the pawned object was not with the pawnbroker. Pledgers cannot use FEO institutions recognized by Dutch jurisprudence in the Arrest Hoge Raad

dated 25 January 1929 and in Indonesia in the jurisprudence of Arrest Hoogerechtshof dated 18 August 1932 [1].

Since 30 September 1999, the Government has promulgated Law No. 42 of 1999 on Fiduciary Guarantees. His agency is known as Trustee Cum Creditore Contracia, meant is a fiduciary guarantee by the obligee that the obligee will transfer ownership of the thing to the obligee as security for the debt, and that the obligee will transfer ownership to the debtor when the debt is fully settled. there is an agreement to transfer [2].

In running their business and to obtain legal protection, business entities or individuals need to pay attention to several laws and regulations regarding consumer financing, such as Law No. 42 of 1999 on Fiduciary Guarantees, Decree of the Chief of National Police No. 8 of 2011, Ensuring the Implementation of Fiduciary Guarantees and Decision of the Constitutional Court No. 18/PUU-XVII/2019. Confidence Guarantee Act No. 42 of 1999 states that fiduciary means a transfer of title to an object provided that the object to which ownership is transferred is under the control of the owner of the object.

A trustee guarantee is a security interest in personal property (both physical and immaterial and immovable property), particularly as security for the repayment of certain debts giving priority to the recipient of the trustee over other creditors, in the sense of a mortgage under the Trustees Act No. 4 of 1996 unencumbered building. According to Sri Soedewi Masjchun Sofwan, guarantees are vital for securing funds allocated to creditors and for legal certainty.

Article 1131 of the Civil Code (KUHPerdata) determines that the general guarantees that the act has given have the nature of concurrency. All property of a debtor, whether movable or immovable or immovable, whether existing or new to exist later, becomes a guarantee for all of his engagements.

Law No. 42 of 1999 concerning fiduciary guarantees, Article 14, there are provisions regarding fiduciary guarantee certificates issued filed with the Registrar of Trustees and delivered to the creditor on the same day as the date of receipt of the application for registration. A trustee guarantee certificate, which is a copy of the trustee register, contains (1) the identity of the trustee's giver and recipient; (2) the date, number of the Fiduciary Guarantee deed, the name, and domicile of the notary who made the Fiduciary Guarantee deed; (3) Fiduciary guaranteed principal agreement data; (4) a description of the object that is the object of a fiduciary guarantee; (5) the value of the guarantee; and (6) the value of the object that is the object of the fiduciary guarantee. A Trustee Guarantee occurs on the same date that the Trustee Guarantee is entered in the trust register.

Based on the Constitutional Court Decision Number 18/PUU-XVII/2019 concerning the Review of Article 15 paragraphs (2) and (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees to the 1945 Constitution, which was submitted by two applicants, Aprilliani Dewi and Suri Agung Prabowo is related to the South Jakarta District Court Decision Number 345/Pdt.G/2018/PN.Jkt.Sel. In addition to the Court Decision above, there is one more decision that the author will examine, namely the Gorontalo District Court Decision Number 45/Pdt.G/2019/PN. Gto juncto Gorontalo High Court Decision Number 16/Pdt/2020/PT.Gto between RVY as the debtor and PT. MTF as creditor and PT. SPSB as a debt collector.

The case between RVY as the debtor and PT. MTF as creditor and PT. SPSB as a debt collector, was registered at the Gorontalo District Court on 26 September 2019 with

Case Number 45/Pdt.G/2019/PN. Gto. This is interesting because this case was recorded before the Constitutional Court handed down the Constitutional Court Decision Number 18/PUU-XVII/2019 on 06 May 2020 and was decided by the Gorontalo District Court after the Constitutional Court handed down its decision on 06 May 2020.

2 Research Method

This study uses a normative juridical research method, a researcher who uses various approaches to obtain information from multiple aspects of the problems studied. The approach has the meaning of an attempt to establish a relationship with people or methods to achieve an understanding and meaning regarding the execution of fiduciary guarantees carried out by creditors and third parties. This approach can be understood as a means to direct the problem under study [3].

3 Findings and Discussion

1. The Application of Law to The Execution of Fiduciary Guarantees Carried Out by Creditors and Third Parties

Economic and trade developments follow guarantee institutions. Evolving credit needs and the provision of credit facilities will always require collateral. This is for the security of providing credit, in the sense that the loaned receivables will be guaranteed to be paid off with a guarantee [4].

With general guarantees, creditors can enter into additional agreements with special guarantees with debtors. These special guarantees are by showing particular objects, Both the debtor's and the third party's as collateral for debt repayment. This additional guarantee in the form of a special guarantee makes the creditor a preferred creditor, i.e., If the debtor defaults, the preferred creditor has the right to sell the goods guaranteed to pay off the debt in full without worrying about other creditors [5].

The credit agreement must be written neatly so that everyone can know the agreement is a credit agreement and, as evidence, if one of the parties in the credit agreement defaults. Loan agreements can take the form of fraudulent agreements or loan agreements drawn up in front of a notary public by a notary known as a genuine deed or notary deed. So that it can be said that the credit agreement is the main agreement which means that the credit agreement is "Something that determines whether or not other agreements are canceled; evidence regarding the limits of rights and obligations between debtors and creditors to give something, do something and not do something that can be valued in money, so it can be said that the function of a credit agreement is as a credit monitoring tool" [6].

The object of the credit agreement is in the form of debt that can be collected, and the due date for collecting the debt is agreed upon in the credit agreement. Article 1234 of the Civil Code states, "The engagement is intended to give something, to do something, or not to do something." Based on Article 1234 of the Civil Code, debtors and creditors have the right to do something and not to do something. It is related to credit agreements that must meet the legal conditions of the agreement following the provisions of Article

1320 of the Civil Code, such as the existence of specific subjects and legal causes, where the two conditions are objective conditions of the agreement because they regulate the object of the agreement made.

Based on the object of a specific subject matter in the credit agreement, the debtor has the debtor's obligations in the credit agreement following the subject matter in the form of debt that must be returned on time as agreed. The debtor's responsibility is to fulfill the payment of loan funds (credit) periodically (in installments) Up to payment to consumer finance companies, under the provisions of Article 1763 j.o Article 1764 of the Civil Code [7].

Article 30 of the Trustee Guarantee Act stipulates that the trustee is obliged to present the object that is the subject of the trustee guarantee when making the trustee guarantee. With this article, the author argues that if the fiduciary recipient (the creditor) Do not act arbitrarily in performing trustee guarantees, then when the fiduciary giver (the debtor) breaks his promise, he must present the item that is the subject of the credential. However, suppose the debtor feels that the creditor's actions are arbitrary in executing the fiduciary guarantee. In that case, the debtor can file a lawsuit against the law against the creditor.

According to the Constitutional Court Decision No. 18/PUU-XVII/2019, which was strengthened by another Strengthened by Constitutional Court Decision No. 71/PUU-XIV/2021 and Constitutional Court Decision No. 2/PUU-XIX/2021. The right of execution by the creditor becomes null and void. This is because the power of execution owned by the creditor with the help of a third party can no longer be carried out without a court decision with permanent legal force. The decision of the Constitutional Court Number 18/PUU-XVII/2019 makes debtors bolder in filing lawsuits against the law and defending their rights to the object of fiduciary guarantees, as in the Gorontalo District Court Decision Number 45/Pdt.G/2019/PN.GTO juncto Gorontalo High Court Decision Number 16/PDT/2020/PT.GTO.

In case Number 45/Pdt.G/2019/PN.GTO started when RVY sued PT. MTF Gorontalo Branch as Defendant I and PT. SPSB as Defendant II. On 28 December 2017, the plaintiff entered into a consumer financing agreement with Defendant I. The total price of the vehicle, Items subject to trustee guarantee, is IDR 141,500,000 and the monthly installments are IDR 3,152,000 for 48 months. The plaintiff is actively paying monthly installments from 3 February 2018 (1st installment) to March 2018 (14th installment) out of 48 months. When he wanted to make the 15th and 16th payments along with the fine through the Marisa Post Office, the contract number was an error. Then the plaintiff tried to make a payment at the Marisa Branch of Bank Mandiri, but the result was still not connected. Plaintiff contacted Defendant I to be able to activate Plaintiff's contract number.

On 30 April 2019, Defendant I ordered Defendant II (debt collector) to collect the arrears of credit installments from the plaintiff. The plaintiff's agreement will make payments for 3 (three) months (installments 15, 16, and 17) on 6 May 2019. Defendant II does not take the object of the vehicle. Then one day before the agreed date, Defendant II confiscated the object of the vehicle in the middle of the Trans Sulawesi road, Palopo Village, Marisa Subdistrict, which Defendant II deserted by threatening and forcibly lowering the plaintiff's uncle, who was carrying the vehicle without leaving any documents.

The judge, in this case, has decided that the actions taken by Defendants I and II by taking or confiscating the object of fiduciary security on behalf of the plaintiff are illegal and against the law. This is further strengthened by the Gorontalo High Court Decision Number 16/Pdt.G/2020/PT. Gto, who in one of their legal considerations, stated: “If the Appellant/Defendant I will authorize to make a withdrawal following the explanation of Article 30 of the Fiduciary Law in line with the Regulation of the National Police Chief Number 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees” [8].

The author has the same view as the judges at the first level and at the appeals level, which stated Defendant I and Defendant II had committed an unlawful act by forcibly taking the object of fiduciary security from Plaintiff. With the Gorontalo State Decision Number 45/Pdt.G/2019/PN. Gto juncto Gorontalo High Court Decision Number 16/Pdt/2020/PT. Gto makes a legal balance between debtors and creditors regarding the withdrawal of fiduciary objects.

2. Fiduciary Criminal Threats for Creditors and Third Parties (Debt Collectors) Who Perform Unilateral Execution of Fiduciary Guarantee Object

Pursuant to Article 9 of 2011 Police Commissioner Ordinance No. 8 Concerning Ensuring Performance of Signal Guarantees, it states: (1) If the guarantee recipient appoints a third party to carry out the execution, the application is submitted by attaching a cooperation agreement for the execution of the fiduciary guarantee between the recipient of the fiduciary guarantee and a designated third party; (2) All consequences arising from the actions of a third party in executing following paragraph (1), the recipient of the fiduciary guarantee and the third party must be responsible under the provisions of the legislation.

Based on the above provisions, the case between the Petitioners and PT. Astra Sedaya Finance Should have been avoided in Decision No. 18/PUU-XVII/2019 of the Constitutional Court, if PT. Astra Sedaya Finance, in using third-party services, acts following applicable regulations. By criminal law, third parties and PT. Astra Sedaya Finance must be responsible when withdrawing the vehicle object as stated in the South Jakarta Court Decision Number 345/Pdt.G/2018/PN.Jkt.Sel.

Third parties here are defined as debt collectors, namely individuals, groups, or business entities appointed and given the task and/or authority to secure the object of fiduciary guarantees by financing companies c.q consumer financing to consumers who are past the payment due date (usually 3 (three) months or more, depending on financing companies c.q consumer financing). In this case, if the third party does not include employees of consumer finance companies, then criminal responsibility must still be borne alone. However, in this case, consumer finance companies have given third-party services a mandate to withdraw the object of fiduciary guarantees.

Criminal liability of PT. Astra Sedaya Finance (as the mandate giver) and third parties (debt collectors) (as the mandate recipient) have fulfilled the three requirements stated by Hasbullah F. Sjawie, namely:

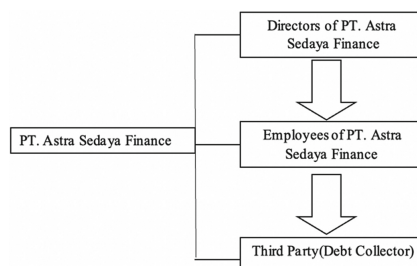
- a. Actus reus, Acts committed within the scope of his authority, or the act is still within the duties and authority of the corporation. The actions of PT. Astra Sedaya Finance gave a mandate to third parties to withdraw the object of fiduciary security carried

out on 11 January 2019. This was contrary to the South Jakarta Court Decision No. 345/Pdt.G/2018/PN.Jkt.Sel states that PT. As Unlawful Acts, Astra Sedaya Finance and two third parties, Idris Hutapea and M. Halomoan Tobing. Idris Hutapea and M. Halomoan Tobing work under the mandate given by PT. Astra Sedaya Finance to withdraw the object of the fiduciary guarantee.

- b. The act was done intentionally(*mens rea*).In the explanation of point 1, paragraph 1 above, it can be interpreted that PT. Astra Sedaya Finance and third parties have committed acts intentionally because it has been stated by the South Jakarta District Court Decision No. 345/Pdt.G/2018/PN.Jkt.Sel is an unlawful act. However, on 11 January 2019, the object of the fiduciary guarantee was withdrawn with arbitrary and coercive actions.
- c. The act was carried out by a competent person mentally or physically. In criminal law, there are reasons for eliminating criminals, namely reasons for justification and reasons for forgiveness which are contained in the Criminal Code (KUHP): (a) Justifying reasons, reasons that remove the unlawful nature of a criminal act and view from the side of the act (objective in nature) (Article 50 of the Criminal Code); (b) The excuse of forgiveness, the reason that erases the guilt of the perpetrator of a crime, while the act is still against the law and viewed from the side of the perpetrator (subjective) (Article 44 of the Criminal Code).

Representatives of PT. Astra Sedaya Finance is an employee with a mandate from the Company's Board of Directors. The Company's Board of Directors is indirectly responsible for this legal event. Article 1 number 5 of Law Number 40 of 2007 concerning Limited Liability Companies. The responsibilities of the Board of Directors are regulated in Article 92 paragraph (1), Article 97 paragraph (1) to paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies. The process of granting a mandate from PT. Astra Sedaya Finance to third parties through employees of PT. Astra Sedaya Finance is described as follows:

The Process of Giving Mandates From Consumer Financing Companies to Third Parties Chart



Based on the chart above makes it easier for the author to determine the provisions and criminal liability that PT. Astra Sedaya Finance must accept through the Board of Directors and employees as well as a third party (Debt Collector) as an external party from PT Astra Sedaya Finance, which harms the applicants in the Constitutional Court Decision Number 18/PUU-XVII/2019. According to the author, several articles in the

Criminal Code (KUHP) state that the criminal acts committed by PT. Astra Sedaya Finance.

3. Criminal Threats for Creditors and Third Parties (Debt Collectors) Who Perform Unilateral Execution of Objects of Fiduciary Guarantees after the Decision of the Constitutional Court Number 18/PPU-XVII/2019

In the Gorontalo District Court Decision Number 45/Pdt.G/2019/PN. Gto, the Judge decided Defendant I and Defendant II had committed an unlawful act by taking the object of fiduciary security from Plaintiff's hands. This was confirmed by the Gorontalo High Court Decision Number 16/Pdt/2020/PT. Gto, in one of their legal considerations, stated: "If the Appellant/Defendant I will authorize the withdrawal following the explanation of Article 30 of the Fiduciary Law in line with the Regulation of the National Police Chief Number 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees."

According to the author, the Fiduciary Guarantee Law does not regulate criminal threats for creditors who withdraw the object of fiduciary security outside a court decision. The Fiduciary Law cannot regulate public order, such as the forced withdrawal experienced by RVY in Case Number 45/Pdt.G/2019/PN. Gto juncto Gorontalo High Court Number 16/Pdt/2020/PT. Gto. RVY had good intentions by negotiating with PT. SPSB (debt collector) and PT. Gorontalo Branch MTF to make installments on a predetermined date, i.e., 6 May 2019. Due to the arrogant attitude of PT. SPSB and PT. MTF, on 5 May 2019, without the right to forcibly withdraw the object of fiduciary security from Uncle RYV, MH, who was driving a car at that time.

This case made RVY unable to do business because the vehicle, which was the object of the fiduciary guarantee, had been forcibly taken by PT. SPSB (debt collector) and PT MTF Gorontalo branch so that the judge at the Gorontalo District Court stated that the actions of PT. Gorontalo branch MTF and PT. SPSB (debt collector) is illegal and is against the law. Legal actions violated by PT. Gorontalo branch MTF and PT. SPSB (debt collector) is an act that can be criminalized in Article 362 of the Criminal Code, Article 368 paragraph (1) of the Criminal Code, and Article 372 of the Criminal Code.

The case began when PT MTF forcibly took the object of the fiduciary guarantee with the help of PT. SPSB (debt collector), on 5 May 2019, in the morning or at least at a specific time in April 2019, PT. SPSB (debt collector) with 7 (seven) people sent by PT. MTF carried out prevention/confiscation in the middle of the Trans Sulawesi road, Palopo Village, Marisa District on a deserted street by the debt collector forcibly and threatened and took RVY's uncle from the car and without leaving any letters and they immediately went to take RVY's car and left RVY's uncle named MH with fear and trauma, so he went home using a bendor transportation and came to RVY's house and informed RVY of the incident which at that time was confused about transporting Pohuwato KPU logistics goods at RVY's uncle's house.

There is a principle of legality in criminal law "nullum delictum nulla poena sine lege," introduced by von Feurbach, a German criminal law scholar. A legal theory, "vom psychologischen zwang," states to find an act prohibited in a rule not only about the type of activity that must be written clearly but must also be accompanied by a criminal threat according to the act [9].

According to the author, an additional article is needed in the Fiduciary Guarantee Act relating to the withdrawal of the fiduciary guarantee object so that there is a legal balance between creditors and debtors in entering into a financing agreement with a fiduciary guarantee deed as stipulated in Article 4 of Law Number 42 of 1999 concerning Fiduciary Guarantee which reads: “Fiduciary guarantee is a follow-up agreement from the main agreement that creates an obligation for the parties to fulfill an achievement.”

In article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, it is stated that “The fiduciary giver is prohibited from transferring, mortgaging or leasing to other parties objects that are objects of fiduciary security which are not inventory items, except with prior written approval from the fiduciary recipient” [10].

The criminal provisions referred to are Article 36 of the Fiduciary Guarantee Law, which states, “A fiduciary provider who transfers, mortgages, or rents out objects that are objects of fiduciary security as referred to in Article 23 paragraph (2) which is carried out without prior written approval from the fiduciary recipient, shall be sentenced to a maximum imprisonment of 2 (two) years and a maximum fine of IDR 50,000,000 (fifty million rupiahs)” [11].

According to the author, through this research, he stated: “By conducting an in-depth study of the Gorontalo District Court Decision Number 45/Pdt.G/2019/PN. Gto juncto Gorontalo High Court Number 16/Pdt/2020/PT. Gto and the Constitutional Court Decision Number 18/PUU-XVII/2019, as well as various legal books, legal theories, and views of experts, the author will provide two additional new articles relating to the prohibition of execution of creditors with the help of third parties and criminal provisions for creditors and third parties who carry out unilateral executions without a court decision.

4 Conclusion

Based on the description of the discussion above, it can be concluded as follows. The application of law to the execution of fiduciary guarantees carried out by creditors and third parties as parties who have a weak position in terms of bargaining the content and terms of the provisions contained in the credit agreement because there are clauses that the creditor has made to proclaim the position of the debtor. Making a credit agreement does not apply to the legal terms of the agreement under Article 1320 of the Civil Code, so it seems to force each other's will. These creditor rights are overridden because the court must conduct the process of forfeiture and sale of collateral through litigation against the court to determine whether the debtor is in default.

Criminal threats related to unilateral executions carried out by creditors by involving third parties (debt collectors) against fiduciary guarantee objects experiencing lousy credit can be carried out through preventive actions such as an in-depth analysis of the 5C principles to assess the debtor's ability to pay their debts and credit restructuring, as well as repressive measures in the form of supervision of credit quality and the provision of subpoenas which contain the quality and classification of credit intending to enable debtors to repay their debts. The requirements for parate execution in Article 15 of Law no. 42 of 1999 concerning Fiduciary Guarantees.

Legal Balance Between Debtors and Creditors as Subjects of Fiduciary Guarantee in Unilateral Enforcement. 18/PUU-XVII/2019, which in one of its legal considerations stated: “If the Appellant/Defendant I will authorize the withdrawal following the explanation of Article 30 of the Fiduciary Law in line with the National Police Chief Regulation No. 18/PUU-XVII/2019. 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees. Article 362 of the Criminal Code (Theft), Article 368 paragraph (1) of the Criminal Code (Extortion), and Article 372 of the Criminal Code (Embezzlement) have fulfilled the elements of an unlawful act that harmed RVY so that RVY could report to the local Police so that it could be processed further by showing the Court’s Decision State of Gorontalo 45/Pdt.G/2019/PN. Gto juncto Gorontalo High Court No. 16/Pdt/2020/PT. Gto, already have permanent legal effect due to the absence of an appeal from PT. MTF and or PT. SPSB. This has created a legal vacuum because of the criminal provisions in Law No. 42 of 1999 on Fiduciary Guarantees for creditors and third parties who have unilaterally executed the object of fiduciary guarantees.

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