

Protection Of Debtor Customer's Rights As Consumers In The Execution Of Mortgage Object Auction In Indonesia

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Abstract—The debtor customer as the consumer has rights that should be protected, such as the right of the information on when the auction of his mortgage object will be executed by the bank and the right to get a fair price over the auction. Therefore, this study tried to review and analyze how the consumer's rights protection as a debtor customer in the auction of their property which is used as a security of their loan to the bank. This study was a doctrinal legal research using the normative approach. After the primary and secondary legal materials were collected, they were then processed with inductive logic and prescriptively analyzed. The results indicated that the debtor customer's rights have been protected in the execution of the mortgage objects, provided that *paratexecutie/direct execution* must be agreed upon and the debtor shall be notified first if a public auction will be executed.

Keywords—*protection, debtor customer's right, execution, mortgage*

I. INTRODUCTION

Loan disbursement represents the main fund distribution activity of a bank. The loan disbursement by the bank is generally made by entering into an agreement. The agreement consists of the main agreement, namely the loan agreement and additional agreements in the form of a security agreement by the debtor. Generally, there are 2 (two) forms of securities, i.e. personal guarantee and material guarantee. In its practice, security frequently used is a material guarantee. One of the material guarantees is a land to be used as a security or called as a mortgage. An important role of security is to give the rights to the bank to get repayment of the loan provided with the collateral/security if the debtor is in default, does not pay the loan at an agreed time as said in the agreement. This is because not all customers who get loans from the bank can utilize their fund well and successfully.

The fact frequently happening in the field is that some debtors are late in paying their installment or interest. Whereas, before deciding to give a loan, the bank has made an in-depth analysis of loan application from the consumer. It is intended to avoid problems in the loan distributed to customers; however, although the bank has performed an analysis carefully, the risk of the non-performing loan still occurs. The non-performing loan is one of the banking business risks, and almost all banks have a case of non-

performing loan. It has compared to China, the adjustment of credit behavior requires the cooperation of relevant departments, therefore, the review and approval of the sub-branch can be observed and can be carried out according to the established credit policy [1].

Non-performing loan in the banking will be categorized as special mention, substandard, doubtful loans, or loss. Before deciding to make the execution of the mortgage object, the bank will take various measures to safeguard the loan such as rescheduling, reconditioning, or restructuring [2]. If these measures do not bring about the results as expected, then the last alternative taken is by the execution of the mortgage object.

The problem possibly arising in the future is that the practices done by the bank in assessing loan quality is not in accordance with the provisions of Bank Indonesia Regulation (PBI) No. 7/2/PB/2005, as well as the measures taken to deal with non-performing loan are not through rescheduling, reconditioning, or restructuring in advance, but the bank immediately categorizes these loans as non-performing loan. As a result, the execution of the debtor's mortgage object in the form of collateral is made immediately through an auction. Whereas the execution through auction actually should be the last solution for the creditor in getting a repayment of the non-performing loan after several other actions have been done by the creditor. Whereas as a consumer, debtor customer has rights that must be protected, such as the right to get information about when the auction of mortgage object will be made by the bank and the right to obtain a reasonable price for the auction. Therefore, this study was aimed at reviewing and analyzing how is the protection of the rights of debtor customer as a consumer in the auction of their property which is used as a security of his/her loan in the bank.

II. RESEARCH METHODS

This research is a legal doctrinal study because it seeks to find out legal rules, legal principles, as well as the doctrines in order to answer the legal issues [3], especially regarding the protection of the rights of debtor customer as a consumer. This research used the normative approach by which the research was done by investigating all laws and regulations as well as the relevant court rulings related to the protection of the customer debtor as consumers. After the primary and

secondary legal materials were collected, then they were processed using inductive logic, namely Inductive Logic thinking by drawing conclusions from the specific ones and analyzed prescriptively to provide arguments and judgments on legal issues based on legal rules that should be applied to the legal issues.

III. RESULTS AND DISCUSSION

A loan is usually granted based on certain security. This is preceded by a promise to provide a mortgage as security for particular loan repayment, which is stated in and is an inseparable part of the loan agreement or other agreements that give rise to such debt (Article 10 of Law No. 4/1996 on the Mortgage). The mortgage/encumbrance agreement shall be made before the Notary or Land Deed Officer under an authentic deed whose form is regulated by the Regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 3/1996.

Then, the mortgage deed shall be registered at the Land Office for the latest of 7 (seven) working days after the signing of such a mortgage deed. The Land Deed Officer (PPAT) shall send the mortgage deed and other necessary documents required by the Land Office. The registration is made by drawing up of mortgage certificate and recording it in the land book as well as copying such records on the land title certificate (article 13 paragraph (1), (2) Law No. 4 of 1996). When the mortgage deed has been registered at the Land Office, then the mortgage deed has executorial power.

The mortgage is a material guarantee of land along with fixtures related to and represents an integral part of the land for a particular loan repayment, which gives privileged rights to the creditor of the mortgage holder than other creditors. The guarantee given in the mortgage constitutes the privileged right for a creditor of mortgage holder than other creditors (Usman, 2013: 306). It means that if the debtor is in default, the creditor of mortgage holder has the right to make a sale of the land used as collateral through a public auction under the prevailing laws and regulations[4].

The purpose of the enactment of Law No. 4 of 1996 is to provide legal certainty for the creditor to get loan repayment when the debtor is in default. The loan which is secured by mortgage can be in the form of an existing loan or loan to be provided at certain amount at the time of execution. In addition, to provide legal certainty, easy execution is also the advantage of the mortgage. The execution of a mortgage can be done by the mortgage holder by applying for a public auction. One of the ways is through the *parateexecutie* which is an auction sale without asking for an approval of execution from the District Court.

According to the Law No. 4 of 1996, the execution of a mortgage can be done in three ways (Article 20 paragraph (1)) as follows:

- 1) The first mortgage holder can sell the mortgage object by upon his own power/direct

execution through a public auction as referred to in Article 6 of Law No. 4 of 1996

- 2) The executorial title set forth in the mortgage deed as referred to in Article 14 paragraph (2) of Law No. 4 of 1996

- 3) The execution can be done privately through the sale of mortgage object under the consent of the giver and holder of the mortgage as referred to in Article 20 paragraph (2) of Law No. 4 of 1996)

Article 6 of Law No. 4 of 1996 says that if the debtor is in default, the first mortgage holder may sell mortgage object by direct execution in a public auction. The proceeds of such auction are used as repayment of the loan. The conditions to be fulfilled in order to make a promise to sell mortgage object upon his own power/direct execution in accordance with what has been stated in the explanation of Article 6 of Law No. 4 of 1996, saying that the promise should be made at the time the mortgage is granted [4]. In addition to the presence of a promise to sell mortgage object upon his own power stated in the APHT (mortgage deed), another thing to be done is registering the APHT (mortgage deed) to the Land Office as an evidence that the mortgage has been effective. If it is linked to the explanation of the article, the provisions of Article 6 contain obscurity. In one side, Article 6 authorizes self-selling to the mortgage holder if the debtor is in default, but the explanation of the article says that if the mortgage holder wants to sell mortgage object by direct execution, it shall be promised in advance [5].

Thus, Articles 6 and 20 of Law No. 4 of 1996 says that if the debtor is in default then the mortgage molder (creditor) has the right to sell the mortgage object, either based on Article 224 HIR, or upon his own power. If the debtor is in default, then the mortgage holder has the right to sell the mortgage object upon his own power if the mortgage deed includes this clause. In addition, the right of the first mortgage holder to sell the mortgage object upon his own power through a public auction if the debtor is in default is actually more emphasized as efforts of loan repayment or fulfillment of performance. Whereas if the debtor is in default, the creditor as the first mortgage holder has the right to sell mortgage object upon his own power through an auction without going through a court by which the creditor can get an accelerated repayment of his loan. *ParateExecutie* may result from a promise (*beding*) given by the guarantor to the beneficiary, namely a promise to sell mortgage object upon his own power or what is commonly referred to as *beding van eigenmachtigeverkoop*[6].

Regarding the right of the first mortgage holder to sell mortgage object on his own power through a public auction when the debtor is in default and take full repayment of the loan from the sale proceeds, if it needs to be applied accordingly, then this explanation must be stated as one of the promises. As for the promise to sell mortgage object upon his own power, Article 11 paragraph 2 letter e of Law No. 4 of 1996 states that some necessary promises can be included in

the mortgage deed. The promise says that, among others, the first mortgage holder may sell mortgage object on his own power if the debtor is in default. As the right that has been promised, then its existence will only exist if it is expressly agreed upon by the debtor and creditor in the APHT (mortgage deed). A new promise is considered applicable and binding if it is agreed by both parties who make the promise. The promises listed in the mortgage deed made by creditor and debtor shall be legally binding when it is registered to the Land Office [6]. If the mortgage deed is registered in the Land Office, then the promises listed therein are also registered thereby they have binding power for the parties.

Based on these provisions, it is clear that the rights of debtor customer have been protected well, especially the right to get information about how to execute their land which is pledged as collateral with the creditor. Such protection is a necessity of prior agreement between the debtor and the creditor regarding the sale of mortgage object upon his own power. Likewise, about the sales mechanism, whether it is made through a public auction or made privately. It indicates that the debtor customer has been involved in determining the sale model to be applied by the creditor for his land which is pledged as security for the loan. In addition, considering that the mortgage object sold is the debtor's property, it must be executed in accordance with the principle of respect for the property of others. Therefore, in order to protect the debtor's rights, the promise that gives an authority to the mortgage holder (creditor) to sell the mortgage object if the debtor is in default shall be null and void.

Furthermore, the Law No. 4 of 1996 also provides an opportunity for a creditor to sell the mortgage object privately, but that must also be done based on the agreement (Article 20 paragraph (2)). The consideration is to protect the interests of the debtor from the arbitrariness of the creditor as the mortgage holder because the inclusion from the beginning of the clause about this matter in the mortgage deed can give a very large flexibility to the creditor as the mortgage holder to make a sale with the privately made deed. The form of the agreement must be in writing, it can also be made privately or authentic in the form of telegram, telex, facsimile and can also be stated in a collective agreement but may also be in a separate approval letter. In addition, the sale with the privately made deed will increase price to a higher price, better price, or a more profitable price (*the best price is obtainable*). Whereas the execution of the sale can only be done after 1 month from the date of written notification by the guarantor and/or holder of the mortgage to the concerned parties (Article 20 paragraph (3) of Law No. 4 of 1996). This condition is intended to protect the relevant parties, such as the second and third mortgage holders as well as other creditors from the debtor. The date of written notification in question is the registered postal delivery date or the courier receipt date or the fax transmission date. In addition, the execution of the sale must be announced at least in the newspapers circulated in the relevant area and/or in the local mass media. Moreover, there

shall be no any objection from the parties in the execution of the sale. This freedom is intended to expedite the sale of mortgage objects and also to reduce the expenditure of execution costs which must be borne by the debtor. The agreement can only be made in case of a default, thus it should not be agreed upon and stated in the mortgage deed, but there must be the default first, then sales with privately made deed may be agreed (Article 20 paragraph (2) of Law No. 4 of 1996). This provision provides a protection for a debtor customer as a bank consumer to avoid loss of property (Law No. 8/1999).

Meanwhile, one of the conditions for the execution of mortgage auction is the copy or photocopy of the notification letter of the proposed auction execution to the debtor by the creditor, which is submitted at the latest of 1 (one) day before the auction is executed. It means that the creditor is required to inform the debtor in advance that the security in the form of a land title certificate that has been submitted to the creditor (Bank) will be auctioned as the debtor is deemed in default which is the delay in paying the loan. This provision is consistent with the substantive needs of debtor customer, namely obtaining fair information on the auction timing, so the customer has the opportunity to access the sale of their property which is used as a security for his loan in the bank.

The auction by State Assets and Auction Service Office (KPKNL) must be preceded by a written application letter complete with the required documents for the auction (Article 11 paragraph (1) and Article 12 paragraph (1) PMK No 27/PMK.06/2016). In addition to the fulfillment of the requirements, the auction executed by the KPKNL shall also be made in accordance with the procedures for the implementation of the auction.

The issue that still causes differences in interpretation which may produce a difference in the verdict of the relevant court in implementing *paratexecutie*, whether it still requires execution approval from the court or not. In verdict No. 56/PDT.G/2010/PN.MKL, the judge stated that the public auction or execution of mortgage object auction through *paratexecutie* was based on Article 6 of Law No. 4 of 1996 or through the executorial title pursuant to Article 14 paragraph 2 of Law No. 4 of 1996 without requiring execution approval from District Court. On the contrary, in verdict No. 26/PDT.G/2013/PN.Psp, the judge stated that the defendant committed an unlawful act because he had expedited the auction process and without the intermediary of the District Court. According to Han (2018:738), the difference will have implications for the lack of trust of the public in the court. For this reason, judicial transparency plays a major role in improving judicial credibility. Meanwhile, it's conducive to the realization that Judges make the similar judgments referring to the previous similar cases, which are helpful for the unification of referee criterion.

Thus, the existence of these differences can actually be surrendered to the creditor, whether it is based on

parateexecutie based on the executorial title. If the auction execution is performed based on the *parateexecuti* method, then no execution approval is required in the application for mortgage auction at KPKNL. For those who choose the execution auction method based on the executorial title, the execution approval is necessary because the executorial title is considered similar to a court ruling having the permanent legal force (*inkracht van gewijsde*). The *parateexecuti* represents the execution method prepared by the legislator as the main supporting pillar of the creditor (bank) in order to obtain the loan repayment [5]. Therefore, the execution of the sale through *parateexecuti* mandated by Law No. 4 of 1996 shall be implemented swiftly and straightforwardly as the quick execution will prevent the increase in the amount of interests that must be paid by the debtor. However, the *parateexecuti* must still be agreed upon, so this provision provides protection for debtor customer, especially the right to get information about the execution method to be performed by the creditor on his property which is pledged as security for the loan. Thus, the debtor customer has obtained the protection for their rights as a consumer in addition to by Law No. 8/1999 it is also protected by Law No. 4/1996.

IV. CONCLUSION

The protection of debtor customer in the mortgage object auction is indicated by the provision of the creditor's authority to sell the mortgage object where such mortgage object sales shall be agreed upon in advance; if it is not agreed on in advance, the creditor is required to conduct an auction through

the executorial title by asking for execution approval to the court, as well as provision which requires the creditor to notify the debtor about the proposed auction execution for at least 1 day before the auction.

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