

LEGAL PROTECTION FOR DEBTORS IN THE IMPLEMENTATION OF AUCTION FOR THE GUARANTEE OF MORTGAGE RIGHTS

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ABSTRACT

The purpose of this research was to examine and analyze the legal protection for debtors in the implementation of an auction for the guarantee of mortgage rights. The research method used in this research was normative legal research. The results of the research indicated that the legal protection for debtors in the implementation of the auction is guaranteed by the mortgage rights. (a) Preventive Legal Protection, with the implementation of auction for the guarantees of mortgages rights, namely through the Minister of Finance Regulation Number 27/MK.06/2016 concerning Auction Implementation Guidelines Article 14 (1) and Article 28 and for the execution can be carried out by legal resistance efforts or ordinary lawsuit done by the debtors to prevent auctions and executions; (b) Repressive Legal Protection, which is in the form of null and void and the auction implementation guarantees security rights or vice versa, namely the validity of the auction.

Keywords: Legal protection, Debtors, Auction, Guarantee, Mortgage rights.

INTRODUCTION

General Official is a position given to someone who is authorized by the rule of law in making authentic deeds. Notary as General Officer to him is given the authority to make authentic deeds. Therefore, a Notary is definitely a Public Official, but a General Officer is not necessarily a Notary, because a General Officer can be owned by a Land Deed Making Officer (PPAT) or Auction Officer. In accordance with its authority, a Notary is authorized to make authentic deeds stipulated in Article 15 paragraph (1) of Law Number 2 of 2014, including the following:

The authorized notary makes the authentic Deed of all acts, agreements, and stipulations required by legislation and / or desired by those concerned to be stated in the authentic Deed, guarantees the date of the Deed, keeps the Deed, gives the grosse, copies and quotes Deed all of them, as long as the making of the Deed is not also assigned or exempted to other officials or other people as determined by law.

In relation to the authority of the Notary in carrying out the act of making an agreement, the presence of a Notary as a public official is the answer to the community's need for legal certainty over each engagement that it carries out, especially engagement related to trade and daily life. The purpose of making written agreements before or made by a Notary is that the deed becomes an authentic deed that can be used as strong evidence if a dispute occurs between the parties or there is a claim from another party (Untung, 2005).

Subekti specifies that the engagement or covenant is a legal relationship (between property and wealth) between two or more persons, which entitles on to demand something other than the other, while the other is required to fulfill the demand (Malik, and Sri, 2018). One of the agreement deeds made by a Notary is a credit agreement deed or a financing agreement made by the bank to the creditor. Implementation of financing is generally carried out by entering into an agreement. The agreement consists of a principal agreement, namely a debt agreement and an additional agreement in the form of a guarantee agreement by the debtor.

Generally, there are 2 (two) forms of collateral, namely individual guarantees and material guarantees. In the practice of collateral that is often used is a material guarantee, one of which is land that is used as collateral or called Mortgage. Provision of collateral with Underwriting Rights is granted through the Deed of Granting Mortgage Rights (APHT) preceded and/ or by making a Procuration to Charge Mortgage (SKMHT) which is an integral part of the financing contract agreement (Usman, 2008).

Article 1320 regulates the validity of an agreement requires four conditions: (1) Agree that those who bind themselves; (2) Skills for making an engagement; (3) A certain thing; (4) A reason that is lawful. It is continued with Article 1321 which states that there is no agreement that is valid if the agreement is given due to an error, or obtained by coercion or fraud. The agreement referred to in Article 1320 paragraph (1) and Article 1321 implies that agreeing in a credit agreement between creditors and debtors, a loan agreement between banks and other parties requires the borrower party to repay the debt after a certain period of time with interest. According to the provisions of the banking law, it is clear that in terms of making the credit agreements between banks and customers who use bank services, they must be based on consent and agreement. The consent and agreement here must be interpreted by the existence of prior negotiations in establishing clauses (points) in a banking credit agreement. Banks are required to provide legal protection for customers as their contract partners.

The banking sector has a strategic position as an intermediary and supporting the payment system is a crucial factor in the development process. Accordingly, the necessary improvements and legal certainty to the National Banking system, especially with regard to the distribution of funds to the public through credit (Wakarmamu, 2015). The implementation of the granting of credit is generally done by having an agreement. The agreement consists of the principal Treaty, namely the Treaty of debts and

followed by additional agreements in the form of the granting of the guarantee agreement by the debtor (Pradita and M. Hudi, 2018).

The prudential banking principle in credit is regulated in the article 8 of the Act No. 10 of 1998. It states that bank must have faith based on thorough analysis or a good faith and debtors capacity to return the loan or the financing as written in the agreement. In the explanation of the article, it elaborates that a bank must analyze thoroughly some criteria, which are character, capital, capacity, collateral, and condition of economy to obtain the "trust" upon debtors. All of the criteria must be reviewed by the bank in order to give any credit approval. The main security in a credit application which is an additional security in material form, which is well known as "collateral" (Novenanty, 2018).

Financial institutions or banks provide credit due to guarantees that are used to guarantee loans obtained by the debtor. It can be interpreted that collateral is available every time to be executed, if necessary, it can be easily cashed to pay off debtor debts. Collateral value must be higher than the amount of capital or loan credit and the interest given by the creditor, considering a default or bad credit occurs, the guarantee can cover the loan and interest that given by the creditor (Musjtari, 2016).

The bank in granting credit by considering that the debtor can fulfill its obligation to repay on time for the credit received. In the practice, not all credit that has been issued by the bank can run and end smoothly. Many cases of loans problem happened since the debtors are unable to repay their loans on time as agreed in the Credit Agreement between the debtor and the banking company. Things that cause non-performing loans, for example, the debtor is incapable or due to a business downturn and the failure of the business which results in the reduced debtor business income or indeed the debtor does not want to pay due to the bad character of the debtor. Therefore, creditors defaulting must make reimbursement of costs (Sulastri, 2015).

In accordance with Article 1243 of the Civil Code provides an explanation that: Reimbursement of costs, losses and interest due to not fulfilling an agreement, then begin to be obliged, if the debtor, after being declared negligent in fulfilling the agreement, still neglects it, or if something must be given or made, can only be given or made within the time limit.

On the basis of Article 1243 of the Civil Code, the creditor attempts to take the repayment of the receivables by selling the collateral assets of the debtor by means of an auction. Auction is the sale of goods in public by means of bidding whether verbally and/or in writing through an effort to collect interested parties or prospective buyers (Dinar and I Ketut, 2018).¹ An important aspect for creditors in conducting an auction is to consider fairness against the selling value of collateral objects. The creditor is bound by the obligation to achieve the actual price as a good faith in the property of the debtor.

It is explained in Article 1338 paragraph (3) of the Civil Code which states that consent (agreements) must be carried out in good faith. The good faith of creditors in auctioning execution objects with standard prices as a form of respect for the property of others is very important for creditors. Therefore, creditors in the auction of executed goods need to pay attention to the purpose of auction to obtain the highest price.

In the practice, a counterproductive can occur since the creditor unilaterally determines the limit value of the auction object, therefore, the auction price becomes very unnatural and there is the potential for auction engineering by the "auction mafia" which has become a public secret. Considering this matter, there are many cases happened between creditors and debtors in the auction matters at prices below the limit. It is explained in Article 1 paragraph (28) Minister of Finance Regulation Number 27 / PMK.06/2016 concerning The Implementation Guidelines for Auctions explaining the definition of limit value is as the minimum price of goods to be auctioned and determined by the Seller.

Based on the case of legal resistance raises the concept of legal protection for debtors and creditors so that the importance of debtor and creditor proportionality can be maintained, as in the Underwriting Law which regulates legal protection for debtors and also provides protection against debtor's collateral assets against arbitrary determination of limit value officials who take advantage of their position in the auction process on the object of guarantee of such mortgage rights.

Decision Number 20 / Pdt.G / 2017 / PN.PLW The Plaintiff is Mahadi as the debtor who has the right to file a Lawsuit for Action against Actions committed by PT Bank Mandiri which was sold at the Auction on November 17, 2016 amounting to Rp 579,400. 000, - (five hundred million and hundred thousand rupiahs), which was previously auctioned on September 30, 2016 at a price of Rp. 826,000,000 (eight hundred twenty six million rupiahs). In the decision of the judge to win the debtor, the decision of the Underwriting Right or Collateral Ownership No. 05123 / Ukui, the area of 150 M² is returned to the creditor which must then be submitted to the Auction Winner by the debtor.

Based on the above case, it can be seen that the auction carried out by creditors at prices below the limit has been detrimental to the debtor, because the creditors in the auction are less concerned with the principle of justice. The principle of justice implies that in the process of conducting the auction must be able to fulfill a sense of justice proportionally for each party concerned. This principle is to prevent the occurrence of the Auction Official's favor with certain auction participants or to take sides only with the interests of the seller. For the implementation of the execution of the auction, the seller may not arbitrarily determine a limit value which results in the loss of the executed party (Usman, 2016).

¹ Gusti Agung Ayu Gita Pritayanti Dinar, I Ketut Westra and I Ketut Tjukup, *Good Governance In The Implementation of Banking Guaranty Auction With Security Right and Obstacles In Indonesia, International Journal of Current Research*, Vol 10, Issue 11, November, 2018, P. 75305.

Based on Article 1365 of the Civil Code which stipulates that every act that violates the law and brings harm to another person, it will require the person who caused the loss due to his/ her mistake to replace the loss. This is enough to prove that the losses suffered are due to illegal acts. The problem of causal relations is a central issue in acts against the law, because its function is to determine whether a person must be legally responsible for actions that cause harm to others (Prodjodikoro, 2000).

The auction is mainly related to the unilateral determination of the auction object limit value by creditors who are considered unreasonable, according to Sulastri, the auction value below the limit raises the concept of legal protection for debtors and creditors to be balanced. In this case, legal protection for debtors provides a perspective on the protection of debtors' collateral assets from the arbitrary determination of limit values.

Philippus M. Hadjon (1987) explained that there are two forms of legal protection, namely: (1) preventive legal protection, legal subjects are given the opportunity to submit objections or opinions before a government decision gets a definitive form. The aim is to prevent disputes. (2) Repressive legal protection aims to resolve disputes.

In relation to the implementation of auctions and execution of Underwriting Rights, which can be grouped as a form of preventive legal protection is the Minister of Finance Regulation Number 27 / MK.06 / 2016 concerning Auction Implementation Guidelines Article 14 (1) and Article 28 and for the execution of legal proceedings resistance or ordinary lawsuit made by the debtor to prevent auction and execution. Meanwhile, The Repressive Legal Protection has functions to resolve a dispute that occurs in the process of auction. In the Indonesian legal practice, partially, the handling of Legal Protection for the people can be categorized into two legal entities, namely through the General Judicial institutions and Government Agencies which are administrative appeal institutions (Salim and Erlies, 2016).

The form of legal protection is given to the parties involved, namely, especially the debtors in the auction based on justice. Salim (2016) argues that justice gives each person no claim so that everyone gets the same amount, not equality, but balance. Justice is formed by right thinking, carried out fairly and honestly and is responsible for the actions taken. A sense of justice and law must be upheld based on positive law to uphold justice.

The notary as an authentic deed maker in the credit agreement followed by the Deed of Giving Rights (APHT) in the implementation of problems occurs between creditors and debtors, because the creditor defaults and the debtor takes the attitude by conducting auction execution by selling land below the limit price as stipulated in the Regulations Minister of Finance Number 27/PMK.06/2016 Regarding Auction Implementation Guidelines explains the definition of limit value. The value of the auction object's unilateral value by the creditor who is considered unreasonable raises the concept of legal protection construction for the debtor so that the interests proportionality of both the debtor and creditor can be maintained, in an effort to ensure legal certainty to provide protection to consumers. Based on the identification of the problems described earlier, therefore, the formulation of the research problem in this research, is stated as follows: How is the legal protection of debtors in the settlement of non performing loans by the implementation of the auction of mortgage right guarantee?

RESEARCH METHOD

The research method used in this research is qualitative research method. Qualitative research is a type of scientific research. In general terms, scientific research consists of an investigation that: (a) seeks answers to a question; (b) systematically uses a predefined set of procedures to answer the question; (c) collects evidence; (d) produces findings that were not determined in advance; (e) produces findings that are applicable beyond the immediate boundaries of the study qualitative research share these characteristics, additionally, it seeks to understand a given research problem or topic from the perspectives of the local population it involves. Qualitative research is especially effective in obtaining culturally specific information about the values, opinions, behaviors, and social contexts of particular populations (Family Health International, 2019).

This research is a normative juridical research (Istanto, 2007). The approach that is used in this research are statute approach, and conceptual approach (Mazuki, 2005). *First*, the statutory approach is done by reviewing all laws and regulations relating to the legal issues being addressed. For this study, the law approach provides an opportunity for researchers to study whether there is consistency and conformity between a law with other laws or between the Law and the Constitution or between regulations and laws relating to governance Village and village laws as well as government regulations on regional apparatuses, particularly on the role of fostering and monitoring. The result of this study is an argument to solve the issues (Marzuki, 2005). *Second*, it is called the conceptual approach. The conceptual approach goes from the views and doctrines that develop in the science of law. By studying the views and doctrines in law science, the researcher finds ideas that give rise to the legal notions, legal concepts, and legal principles which is relevant to issues encountered in relation political in oil and gas issue is the backdrop for the researcher in developing a legal argument in solving the studied issues (Marzuki 2005). The Materials that is used in this study are primary, secondary and tertiary materials (Soekanto, 1986).

DISCUSSION

1. The Notion of Legal Protection

Legal protection is to provide protection to human rights that are harmed by others and the protection is given to the community so that they can enjoy all the rights given by law or in other words legal protection is a variety of legal efforts that must be given by law enforcement officials to provide security, both mind and physical from interference and various threats from any party (Raharjo, 2000)

Legal protection is the protection of dignity and dignity, as well as recognition of human rights possessed by legal subjects based on legal provisions of arbitrariness or as a collection of rules or rules that can protect something from other things. Regardless to consumers, it means that the law provides protection for the rights of customers from something that results in not fulfilling these rights (Hadjon, 1987).

According to Muchsin in the journal Mamudi (2017) legal protection is a matter that protects legal subjects through the applicable laws and regulations and is forced to implement it with a sanction. Legal protection can be divided into two:

- a. Preventif Legal Protection
Protection provided by the government with the aim of preventing before the occurrence of violations. This is available in the legislation with the intention to prevent a violation and provide signs or limitations in carrying out obligations.
- b. Repressive Legal Protection
Repressive legal protection is final protection in the form of sanctions such as fines, imprisonment, and additional penalties given when a dispute has occurred or an offense has been committed.

2. The Legal Protection for Debtors in the Settlement of Non Performing Loan by the Implementation of Auction of Mortgage Rights Guarantee

Legal protection for debtors in the settlement of non-performing loans with the implementation of auction guarantees of mortgage rights can be classified as follows:

- a. Preventif Legal Protection
Preventive legal protection in providing protection for debtors in resolving non-performing loans with the implementation of auction guarantees of mortgage rights through Minister of Finance Regulation Number 27 / MK.06 / 2016 concerning Auction Implementation Guidelines Article 14 (1) and Article 28 and for legal resistance or ordinary lawsuit carried out by the debtor to prevent the occurrence of auctions and executions.

In this preventive legal protection, legal subjects are given the opportunity to submit their objections or opinions before a government decision gets a definitive form. The aim is to prevent disputes. Preventive legal protection is very significant for government actions based on freedom of action because with preventive legal protection the government is encouraged to be careful in making decisions based on discretion.

- b. Repressive Legal Protection
Repressive legal protection has functions to resolve a dispute that occurs during the process of auction. In Indonesian legal practice, partially, the handling of legal protection for the people can be grouped into two legal entity, namely: through the General Judicial institution and Government Agencies which are administrative appeal institutions.

The principle of legal protection toward the government actions rests on and derives from the concept of recognition and protection of human rights because according to history from the west, the birth of concepts about the recognition and protection of human rights is directed at the limitations and laying down of people's obligations and the government. The second principle that underlies legal protection against acts of government is the principle of the rule of law. Associated with the recognition and protection of human rights, recognition and protection of human rights has a central place and can be linked to the objectives of the rule of law.

Repressive legal protection is the final protection in the form of sanctions such as fines, imprisonment, and additional penalties given when a dispute has occurred or an offense has been committed. In this case repressive legal protection in providing protection for debtors in the settlement of non-performing loans by conducting an auction of collateral rights, namely in the form of null and/ or invalid, the auction implementation guarantees mortgage or vice versa, namely the validity of the auction.

The following are legal protection in the case of non-performing loan settlement with the implementation of the auction of mortgage rights guarantees that are settled through the general court, namely the case in decision Number 20 / Pdt.G / 2017 / PN.PLW, and Auction Officer of the State Wealth Service and Auction Office (KPKNL) as Defendant II, where the principal matters are: for 2 (two) years the Plaintiff has fulfilled the obligations and has never been in arrears or late making Credit payments to Defendant I. When running the three businesses carried out by the Plaintiff experienced problems, so that the Plaintiff had difficulty making credit payments to Defendant I, resulting in a late payment. Therefore, Defendant I issued a warning letter to be carried out for Auction on the Guarantee of Land Rights to the Plaintiff. On December 14, 2016, the Plaintiff received warning letters I, II, III and a Wanpretation Statement sent simultaneously, with details: (a) The First Warning Letter dated December 22, 2015; (b) Second Warning Letter dated 31 December 2015; (c) The Third Warning Letter dated January 18, 2016; (d) Default Statement dated February 9, 2016. However the Warning Letter I, II, III issued by the Defendant is only sent at the same time with a different date, therefore the actions of Defendant I that make an auction without procedure are in the form of Warning Letter I, II and III are very detrimental to the Plaintiff and constitute Unlawful Actions so that the Plaintiff is proper and entitled to file this claim.

Based on the facts of the court, the judge considered the following:

- 1) In the Conference: it has been considered that there is no other person's subjective rights violated by the actions of Defendant I and Defendant II in the implementation of the Underwriting Right on Collateral which is the Right of Defendant I as the First I (First) Holder of Mortgage Rights granted by the Act to Execute Mortgage Execution, so that Defendant I and Defendant II cannot be categorized as having committed illegal acts (*onrechmatige daad*).
- 2) In the Reconstruction: It has been considered in the principal case, there is no subjective rights of others violated by the Acting Reconant/ Defendant I's Actions in the implementation of the Underwriting Rights auction for Collateral which

is the Right of the Plaintiff's Reconstruction/ Defendant I as the Rank I Holder First) given by the Law to Execute Mortgage Execution, so that the Defendant/ Plaintiffs' Conferences in Article 2 of the Deed of Bonding Rights (APHT) have been signed and have agreed that "If the Second Party (Plaintiff in Reconstruction) use his power to sell Mortgage Objects, the First Party (Defendant in Reconstruction) will provide an opportunity to interested parties to see the Object of the related Underwriting Right and at the time specified by the Plaintiff in Reconstruction and immediately vacate or order to vacate and hand over the Object of Mortgage Rights refer to the Plaintiff in the Reconstruction or the Party appointed by the Plaintiff in the Reconstruction so that the the plaintiff can then use it in the widest definition.

Therefore, the judge decides: where in the case of the case is to sentence the Plaintiff to pay the cost of the case which to this day has been set at Rp. 894,000.00 (Eight Hundred Ninety Four Thousand Rupiahs. Then in Reconstruction: the judge decides to punish the Defendant Reconstruction/ Plaintiff's Conferencing to vacate the Collateral namely the Right of Ownership/ Collateral Right of Ownership object No. 05123 / Ukui, the area of 150 M2 along with the building in above, registered in the name of Mahadi (Mahadi: Defendant in Reconstruction), located in Ukui Village, Ukui Subdistrict, Pelalawan Regency, Riau Province and submitting it to the Plaintiff in the Reconstruction, which will then be handed over to the Auction Winner by the Plaintiff in the Reconstruction which is in a good condition so that the Auction Winner can enjoy/ master Collateral in the widest definition.

The form of legal protection is given to the parties involved, namely, especially the debtors in the auction based on justice. Salim argues that justice gives each person no claim so that everyone gets the same amount, not equality, but balance. Justice is formed by right thinking, carried out fairly and honestly and is responsible for the actions taken. A sense of justice and law must be upheld based on positive law to uphold justice (Salim,2016).

Justice is formed by the right thinking, carried out fairly and honestly and is responsible for the actions taken. A sense of justice and law must be upheld based on Positive Law to uphold justice in law in accordance with the reality of the people who want to achieve a safe and peaceful society. Justice must be built in accordance with the ideals of the law (*Rechtidee*) in the state of law (*Rechtsstaat*), not the state of power (*Machtsstaat*). Law functions as protection of human interests, law enforcement must pay attention to 4 elements (Ishaq, 2009). (1) Legal certainty (*Rechtssicherheit*); (2) Benefits of law (*Zweckmassigkeit*); (3) Legal justice (*Gerechtigkeit*), (4) Legal guarantees (*Doelmatigkeit*).

Law enforcement and justice must apply the right line of thought with evidence and evidence to realize legal justice and the contents of the law must be determined by ethical beliefs, fair or not. Legal issues become evident if the legal instruments carry out well and fulfill, comply with the rules that have been standardized so that there is no misuse of rules and laws that have been carried out systematically, meaning using codification and legal unification for the realization of legal certainty and legal justice (Ishaq, 2009).

In the perspective of Law Number 8 of 1999 concerning Consumer Protection (UUPK) associated with cases of civil cases that the author examines, the points to be highlighted are concerning the application of the principle of consumer/ Debtor protection, namely: Principle of Justice is the principle that is most often violated by a party, since in this case the business actor (producer) should be fair in creating an item/ service both in the manufacturing process and in the price determination process. With a high sense of justice, there is no party who feels disadvantaged in this regard. As an effort to protect the law for debtors in the settlement of non-performing loans by conducting an auction of guarantees of mortgages, based on cases as a decision Number 20 / Pdt.G / 2017 / PN.PLW can be said to have been based on justice.

CONCLUSION

Legal protection for debtors in resolving non-performing loans with the implementation of auction guarantees of mortgage rights, can be grouped as follows: (a) Preventive Legal Protection, with the auction of guarantees of mortgage rights through Minister of Finance Regulation Number 27 / MK.06 / 2016 concerning Auction Implementation Guidelines Article 14 (1) and Article 28 and for the execution can be carried out by legal measures of resistance or ordinary claims made by the debtor to prevent the occurrence of auctions and executions; (b) Repressive Legal Protection, namely to settle in the event of a dispute. In Indonesian legal practice, partial handling of Legal Protection for the people can be grouped into two bodies, namely: through the General Judicial institution and Government Agencies which are administrative appeal institutions. In this case, repressive legal protection in providing protection for debtors in the settlement of non-performing loans by conducting an auction of collateral rights that is in the form of null and void the implementation of auction guarantees of mortgage or otherwise is the validity of the auction.

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