

Land Rights as Security for Materials

Inggrid Kusuma Dewi
University Of Muhammadiyah Sumatera Utara
Email: inggridkusumadewi@gmail.com

ABSTRACT

Article 14 paragraph (3) of the Mortgage Rights Law states "The Mortgage Rights Certificate as referred to in paragraph (2) has the same executive power as a court decision that has obtained permanent legal force and is valid as a substitute for the grosse acte Hypotheek as far as it concerns land rights". The definition of executive power can be interpreted as "the right to sell the object of the mortgage right with one's own authority which is one manifestation of the priority position held by the mortgage right holder or the first mortgage right holder in the event that there is more than one mortgage right holder. The right is based on the promise of the mortgage right grantor that if at any time the debtor defaults, the mortgage right holder has the right to sell the mortgage right object by means of a public auction.

Keywords: Land Rights, Security, Materials.

A. Introduction

Borrowing and lending is closely related to the law of collateral, where the borrowing party will usually pledge an object that can be used as collateral for the borrowing and lending. In addition, it can also be required by the creditor, regarding the existence of collateral intended to further guarantee the certainty of the debt repayment, so that it can be carried out in accordance with what was agreed.¹

In addition, in other terms it is also often called "credit". Credit comes from the word "credere" which means: to believe, or to believe / to trust. The meaning of the word is that credit contains an element of trust from the bank to the customer to be able to use the credit as well as possible.

The provisions governing the principles of guarantee law, guarantee binding, guarantee institutions, execution and sale of guarantees, debt guarantees, and others

¹ J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan* cet. IV, (Bandung: PT Citra Aditya Bakti, 2002), Hal 9.

are fully mandatory and should be complied with by banks in the context of their credit-granting activities. Banks as business entities that must be managed based on the principle of prudence are inseparable from the applicable legal provisions in order to secure and protect their interests. Credit guarantees received by banks from debtors are included as one of the objects related to the interests of the bank. The credit guarantee must be believed to be a good and valuable guarantee so that it can fulfill its functions, including by paying attention to the related legal aspects including the legal aspects of guarantees.

Mortgage is one of the collateral objects that is often used in Indonesia. According to Article 1 number 1 of Law No. 4 of 1996 concerning Mortgage Rights on Land, mortgage rights on land and objects related to land, hereinafter referred to as mortgage rights, are:

The security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, including or not including other objects that are an integral part of the land, for the settlement of certain debts, which give a priority position to certain creditors over other creditors.

B. Research Methods

A research cannot be said to be research if it does not have a research method.² Research methods are one of the factors of a problem that will be discussed.³ The study was carried out using secondary data which was analyzed qualitatively using the Desk Research Method. The literature materials used in writing this research are several references originating from the results of research, studies and reviews of several papers which are then summarized into a work of scientific.

C. Analysis And Discussion

1. Material Collateral Recognized Under Positive Law in Indonesia

² Ismail Koto, "Perlindungan Hukum Terhadap Korban Tindak Pidana Terorisme", *Proceeding Seminar Nasional Kewirausahaan*, 2.1, (2021): 1052-1059.

³ Ida Hanifah, Ismail Koto, "Problema Hukum Seputar Tunjangan Hari Raya Di Masa Pandemi COVID-19", *Jurnal Yuridis* 8.1, (2021): 23-42.

As is known, the definition of objects contained in Article 499 of the Civil Code is that "objects are every item and every right that can be controlled by ownership rights. Goods have a narrow meaning because they are concrete and tangible, meaning they can be seen and touched, but rights refer to the meaning of intangible objects". This study will discuss more about one of the rights owned by objects. Property rights themselves have the meaning of rights inherent in an object that provide direct power over the object and can be maintained by everyone, meaning that property rights are absolute. These property rights can be distinguished according to their function into property rights that provide enjoyment and property rights that provide a guarantee. Burgerlijk Wetboek (hereinafter referred to as BW) has two terms, namely objects (zaak) and goods (goed). The broadest understanding of the term zaak is "everything that can be judged by people". Here objects mean objects as opposed to subjects or people in law. There is a saying that the object is used in a narrow sense, namely "as a visible object only, also used with the intention of someone's wealth". If the word object is used in the sense of someone's wealth, then the word includes invisible objects, namely rights, for example the right to receivables or collections.

Property rights are absolute rights that are opposed to relative rights, both are part of civil rights. Civil rights are detailed into two, namely First, Absolute rights or absolute rights consist of personality rights, for example the right to one's name, life, freedom, rights arising in family law, namely rights that arise due to the relationship between husband and wife, the relationship between a person and a child and absolute rights to an object, this is called property rights. Second, Relative rights (relative rights or personal rights), namely all rights that arise due to the existence of a debt relationship that can only be maintained temporarily by certain people. Property rights have superior characteristics when compared to individual rights.

Mortgage rights provide protection and special status to certain creditors from other creditors regarding the rights to the land that is guaranteed, with the note that if the debtor defaults, the creditor holding the mortgage rights can sell the collateral

through a public auction to pay off the debtor's debt. This main position certainly does not affect the debtor's debt repayment to other creditors, so this privilege is more attractive to the bank as a creditor because it can easily execute the collateral object if the debtor defaults.

The term guarantee is a translation of the Dutch language, namely "zekerheid" or "cautie", which in general is a way for creditors to guarantee that their bills will be met, besides that it is also the debtor's responsibility for their goods. In addition to the term guarantee, there is also the term or words collateral. Basically, the use of the terms guarantee and collateral is the same, but in banking practice the use of these terms is differentiated. The term guarantee means trust/confidence from the bank in the ability or capability of the debtor to carry out his obligations, while collateral is interpreted as goods/objects that are used as collateral to pay off the debtor's customer debt.

Mortgage is born from an additional agreement (accessoir) which has the advantage of giving birth to property rights from the main agreement. So the mortgage is born not from the obligation it supports but is born from a property agreement that is accessory, considering that the mortgage as a replacement for payment means the obligation itself after failing to pay voluntarily. Mortgage as a property right functions as a substitute for the default of an object of its parent obligation as its main agreement. As long as there are no laws and regulations governing it, the Mortgage is regulated based on Article 26 of Law Number 4 of 1999 concerning Mortgage Rights - by paying attention to the provisions in Article 14 paragraph (3) of Law Number 4 of 1999 concerning Mortgage Rights "The Mortgage Rights Certificate as referred to in paragraph (2) has the same executorial power as a court decision that has obtained permanent legal force and is valid as a substitute for the grosse acte Hypotheek as long as it concerns land rights. (4) Unless otherwise agreed, the land title certificate that has been marked with a note of the encumbrance of the Mortgage Right as referred to in Article 13 paragraph (3) is returned to the holder of the land title in question. As a property right over immovable property, the mortgage needs to be known to the public

and it is necessary to specifically specify which immovable property is encumbered by the mortgage and it is necessary to register it in a special register as well. This principle is called the "principle of publication and specification.

2. Characteristics of Mortgage Rights as Material Collateral

Land, in addition to being a place to live, can also be used as an object of collateral to obtain funds for work to meet the needs of life. Land collateral institutions that have the ability to provide strong legal certainty and protect both creditors and debtors are "Mortgage Rights". "Mortgage Rights are collateral rights to land for debt repayment whose creditor's position is prioritized over other creditors. Mortgage Creditors are preference creditors, namely creditors who are prioritized in obtaining debt repayment and have the right to execute directly with the parate execution institution". "So that if the debtor defaults, the creditor as the holder of the Mortgage Right can sell the Mortgage Right object through a public sale or auction". Basically, the Mortgage Right agreement is a follow-on agreement (accessoir) that follows the main agreement. The main agreement can be a debt agreement or a credit agreement. A debt or credit agreement with a Mortgage Right guarantee is not a collateral right that arises from the Law but arises from an agreement. Therefore, it must be agreed in advance between the creditor and the debtor in a debt agreement or credit agreement that the collateral object will be burdened with a Mortgage Right. The Mortgage Right guarantee process has 2 (two) stages, namely the first stage of granting the Mortgage Right which begins with the making of a debt agreement or credit agreement as the main agreement. The stage of granting the Mortgage Right by making a Deed of Granting the Mortgage Right (APHT) by and before the PPAT, the form and contents of which are determined by "Regulation of the Minister of State for Agrarian Affairs/Head of BPN Number 3 of 1996. In the APHT, promises by the parties can be included, as referred to in the provisions of Article 11 paragraph (2) of the UUHT". The second stage of registering the Mortgage Right by registering the Mortgage Right with the local Land Office, then the Mortgage Right is born. Given the importance of

the Mortgage Right guarantee as a land guarantee institution that has a special position, the government should provide convenience in the guarantee process.

The Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (BPN) has issued a digital or electronic Mortgage Right (HT) service. This is regulated in the "Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 9 of 2019 concerning Integrated Electronic Mortgage Rights Services". Electronic HT services are known as the Electronic Mortgage Rights System ("HT-el System"). The HT-el system as referred to in "PMATR/BPN No. 9 of 2019" is a series of mortgage rights service processes in the context of maintaining land registration data organized through an integrated electronic system.

Several types of services contained in this HT-el System include Mortgage Rights registration, Mortgage Rights transfer, creditor name changes and deletion of Mortgage Rights. The Electronic System is a series of electronic devices and procedures that function to prepare, collect, process, analyze, store, display, announce, send, and/or distribute electronic information. Based on "Article 7 paragraph (1) of PMATR/BPN No. 9 of 2019", those who can use the HT-el System service are called HT users, namely individuals/legal entities as creditors and State Civil Apparatus of the Ministry tasked with serving Mortgage Rights, namely the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (BPN). At the beginning before the HT-el guarantee process is carried out, users must first be registered with the HT-el System as regulated in "PMATR/KBPN No. 9 of 2019."⁴

The contract law expert then also explained that the existence of mortgage rights is based on the philosophical idea that debts must be paid. This philosophical idea then gave rise to theories and dogmas that formed a system that paying debts must be on time and in accordance with the nominal amount in the agreement. As an illustration, this legal relationship occurs through an agreement that gives rise to a debt

⁴ IGA Gangga Santi Dewi, Mira Novana, "Kebijakan Penjaminan Tanah Melalui Hak Tanggungan di Indonesia", *Law, Development & Justice Review*, 3.1 (2020), 58.

obligation with Schuld as the debtor's obligation to perform and Haftung as a guarantee of fulfillment of the performance with all of his assets as regulated in Articles 1131, 1132, and 1133 BW. When there are obstacles in fulfilling the performance, then a default may occur which gives rise to a dispute. Therefore, one of the legal remedies that may also occur is through the execution of collateral objects such as mortgage rights. Through this illustration, he explained that the regulation of collateral law is an important instrument in supporting the creation of a business climate with accommodative, adaptive, facilitative, and anticipatory characteristics. "The provisions of the mortgage law are intended as protection for creditors to guarantee the fulfillment of performance, but this does not mean that this protection is a form of arbitrariness," he said. The characteristics of a mortgage as a strong guarantee institution are that it provides a priority or precedence to its holder (preference), always follows the object that is guaranteed in the hands of whoever the object is (droit de suite/ zaaksgevolg), fulfills the principles of specialty and publicity, and is easy and certain to execute. This shows that the characteristics of the legal principles of mortgage guarantees are identical to property rights that originate from the second book of the Burgerlijk Wetboek. Therefore, the execution of mortgage guarantees can be carried out through parate execution, executorial title, and/or underhand sales. In closing, he reiterated that the development of dynamics and dynamics in business requires a paradigm that is able to capture the business process and pour it into the formulation of appropriate legal rules in order to build a legal system. "The legal system of guarantees, especially mortgage rights, should be built on a comprehensive scientific foundation so that it can provide logical consequences for its implementation," he concluded by emphasizing.

D. Conclusion

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