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Legal Protection of Banks as Creditors in Credit Agreements with Overlapping Land Guarantees

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Abstract: A credit agreement is an agreement between the debtor and the creditor. The creditor has the right to seize the collateral if the debtor defaults or does not fulfill his obligation to repay the debt. If it is found that the condition of the collateral object is a plot of land with multiple or overlapping certificates, the creditor needs protection to overcome this. Likewise, the debtor is responsible for replacing the lost collateral object because the collateral object is a plot of land with multiple certificates. This research is prescriptive normative research, conducted with a statutory approach and tracing legal materials using literature studies or library research. The data used is secondary data in the form of primary legal materials, secondary legal materials, and non-legal materials. The results of this study found a solution that in Article 1131 of the Civil Code states that the credit agreement binds all of the debtor's assets. Thus, if the debtor defaults and the collateral object cannot be executed, the creditor can file a lawsuit for the replacement of the collateral object followed by a collateral seizure. The debtor is also responsible for replacing the collateral, to fulfill the creditor's rights.

Keyword: Credit Agreement, Collateral, Overlapping

INTRODUCTION

Banks are one of the financial institutions operating in Indonesia. Banks carry out the duties and authorities stipulated in Law Number 7 of 1992 concerning Banking (hereinafter referred to as the “Banking Law”). Banks as business entities have the authority to manage public funds, especially their customers. Banks are authorized to collect funds belonging to people who have registered as customers, these funds are stored in the form of deposits or savings that can be accessed by customers whenever they want, and later the funds will be channelled back to customers in the form of other bank products, such as credit loans, and other bank products, which will aim to help and improve the standard of living of the community, especially its customers. Indonesia has a banking system consisting of the central bank, commercial banks, rural banks, and the Otoritas Jasa Keuangan (hereinafter referred to as “OJK”) (Fatwa, 2017).

There are 2 (two) types of banks, namely Commercial Banks and Rural Banks (hereinafter referred to as "BPR"), this is regulated in Article 5 of the Banking Law. In general, there are 3 (three) types of products issued by banks, including fund raising or funding, fund distribution or financing, and service products or services. Examples of funding products are savings and current accounts. Then, examples of financing products are credit loans, both consumption loans, investment loans, and working capital loans. Meanwhile, examples of services products are consulting services, management of export and import transactions, foreign exchange, and other services (Nuryati, 2011).

BPR is a type of bank that provides specialized services to small communities and/or micro, small, and medium enterprises. Because of this, BPR is a bank that provides softer requirements and service procedures, with a lower level of complexity when compared to commercial banks. This is done to make it easier for people to obtain credit products.

Commercial banks are divided into banks that run based on conventional principles, and banks that run based on sharia principles. Both aim to manage customer money. The difference is that Islamic banks are run in accordance with the provisions of the Islamic religion.

Credit is one of the bank's products. Credit is one of the products that are in great demand by the public. In general, credit is an agreement between the bank as a creditor who lends a certain amount of funds to the customer as a debtor with the inclusion of collateral belonging to the debtor as protection for the bank to obtain its rights. The value of the collateral must be higher than the value of the loaned debt. If one day the debtor does not pay his debt, this condition is called default. When the debtor defaults, the creditor will have the right to confiscate the collateral object, provided that all the requirements for an act to be said to be in default have been met. Therefore, banks also cannot be arbitrary in carrying out confiscation.

All of the respective powers and obligations of the debtor and creditor are set out in a credit agreement. The credit agreement binds all parties or parties in it. When the parties have signed the agreement, the parties have shown their consent or willingness to be bound by the agreement and are considered to have known all the consequences obtained when making a default.

Default occurs when one (1) or more parties break the contents of the agreement. Default is regulated in Article 1234 of the Civil Code. Default is when one of the parties to the agreement gives something, does something, or does not do something. When one or more parties default on the contents of the agreement, there will be consequences that arise and must be accepted. One form of consequence of default is the confiscation of collateral objects. Regarding the problems in this study, a debtor can be said to be in default if he does not fulfill his obligation to pay debts, then after going through certain procedures, the debtor still does not pay his debt, so the creditor can confiscate the collateral. This action is a manifestation of the principle of droit de preference, which is stipulated in Article 20 Paragraph (1) of Law Number 4 of 1996 concerning Mortgage Rights (hereinafter referred to as UUHT) (Muis, 2022).

The bank as a creditor occupies the position of a separatist creditor, which is a creditor who holds control over the debtor's collateral. Creditors are given the right to confiscate collateral objects when the debtor has proven and the conditions for default have been met. However, what if a situation is created where a credit agreement, then the debtor defaults because the collateral object that he submits to the creditor is a Certificate of Ownership (hereinafter referred to as SHM) on land that overlaps, doubles, or can be called overlapping.

Double certificate or overlapping is a condition when 2 (two) SHM are issued on a piece of land with different owner names, both of which are officially issued by the Badan Pertanahan Nasional (hereinafter referred to as BPN) so that both are basically valid SHM. In *das sein*, if the conditions as above are found, then both SHMs are valid. However, in *das sein* a piece of land only has 1 (one) SHM with 1 (one) or more names of the owner, but there is no other SHM

whose object is the same piece of land. Conditions like this will certainly make it difficult for creditors to execute collateral confiscation if the debtor defaults.

This research will discuss how the protection of banks as creditors to be able to execute collateral confiscation on a land with double or overlapping SHM when the debtor defaults, as well as how the debtor's liability for submitting collateral objects in the form of SHM on a plot of land with double or overlapping certificates.

METHOD

In this study, the author conducted research using normative research methods. In normative research methods, sources in the form of secondary data are used. Normative legal research is research whose scope is on the nature and scope of law. This research is also in the realm of legal dogmatig, which is juridical technical explanation. In this study, using a statutory approach (statue approach). This approach discusses existing legal problems or issues by reviewing all relevant laws and regulations. Legal research uses legal materials as the basis of its research. This research uses primary legal materials and secondary legal materials, which are types and sources of secondary research.

RESULT AND DISCUSSION

A. Protection of Banks as Creditors on Dual Certified Collateral Land

The Civil Code of Indonesia (hereinafter referred to as the Civil Code) regulates credit guarantees and distinguishes guarantees based on their nature as follows (Kaliey, 2023):

a. General Guarantee, a general guarantee is an automatic guarantee that already exists and has been regulated in the legislation, so that without being included in the agreement it is automatically binding on the parties to it.
b. Special Guarantees, this type of guarantee is a guarantee that arises when promised and included in the agreement, the implementation of which must be based on the agreement of the parties, which is binding for the parties as well. This type of guarantee can be in the form of material guarantees and personal guarantees. This special guarantee is regulated in Articles 1820-1850 of the Civil Code.

Credit guarantees are needed by banks to guarantee the return of credit that has been given to creditors. To be used as collateral, collateral objects must first be bound or encumbered with mortgage rights (Fatma, 2014). There are several types of collateral binding, including the following:

a. Fiduciary, the type of fiduciary guarantee is a type of guarantee where the collateral object remains in the control of the debtor, so that in its implementation it relies on trust between the creditor and the debtor.
b. Pawn, the type of collateral pawn the amount of the loan must be close to but smaller than the value of the object that is pawned, and control of the collateral object or pawn object is in the hands of the creditor. The pledge creditor has the right to prioritize its repayment over other creditors (Qatrunnada, 2018).
c. Mortgages, mortgages are a form of material security. Mortgage creditors also have the right to prioritize their return or repayment. In mortgages, the creditor is only entitled to repayment of debts worth the collateral object or according to the agreement, but the creditor does not hold power over the object. Mortgages can only be encumbered by objects owned by others, the rights cannot be divided, can only be carried out by the person or party authorized to control the object, and only applies to objects that have existed before and not to objects that will exist in the future (Putra, 2023).

d. Mortgage rights, which are explained in Article 1 point 1 of UUHT, are security rights that are imposed on land rights as regulated in Law Number 5 of 1960 concerning Agrarian Principles (hereinafter referred to as UUPA), which are to be a unity with the repayment of certain debts. Mortgage creditors have the right to prioritize their repayment compared to other creditors.

Land is the only collateral object that can be encumbered by a mortgage. Because it can be encumbered by mortgage rights, land is one of the objects that can be used as credit collateral. If you want to make land as credit collateral, the creditor and debtor first make a credit agreement, which will be followed by a collateral binding agreement. The collateral binding agreement does not stand alone, but is an accessor or additional agreement, and is an additional agreement to the main agreement, namely the credit agreement (Doly, 2011).

The only land that can be pledged is registered land. Land registration is carried out to protect and provide legal certainty to the parties involved, such as owners of land rights, as well as creditors of land rights. so that a land can be pledged is that the land must be registered land. The issuance of a Certificate of Ownership or SHM on the land by the local Land Office or BPN in the district or city where the land is located is proof that the Land has been officially and legally registered. SHM is included in the authentic deed, so it has strong and perfect evidentiary power, as long as there is no other evidence that proves otherwise, and accompanied by all data in the measurement letter and land book is appropriate and correct (Hulu, 2021). Article 34 Paragraph (1) of the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 21 of 2020 concerning Handling and Settlement of Land Cases (hereinafter referred to as Permen ATR / BPN 21/2020) explains that on a plot of land only 1 (one) certificate of land rights can be issued, unless otherwise provided by laws and regulations.

In some cases, there are often two or more SHMs issued in the name of different owners on a piece of land, and these certificates are issued by the BPN, so they should be legally valid and have binding force. This condition is called multiple certificates or overlapping. Overlapping can have several causes, including the following:

1. Inadequate technology
2. Issuance of new title deeds
3. Vacant land object
4. Negligence of human resources

Overlapping conditions can be detrimental to the SHM owners because it cannot be known and determined directly who is really entitled to the SHM, but must undergo a long court process first, so that it will cause material losses as well, especially since the parties must also follow a series of legal processes to determine who is the rightful owner of the SHM. Not only detrimental to the SHM owners, the overlapping condition is also detrimental to the bank as a creditor with the overlapping SHM. Overlapping will harm the creditor when the debtor defaults, because the creditor will find it difficult to seize the collateral.

When overlapping conditions such as the above occur, efforts are needed to avoid losses and provide protection to creditors to still be able to execute bail confiscation. Based on civil procedural law, there are several types of security seizures, including the following:

a. Confiscation of collateral objects against collateral objects owned by the plaintiff.

b. Confiscation of collateral objects against objects belonging to the debtor. This type of confiscation is carried out when the object belongs to the debtor.
c. Confiscation of collateral against movable objects. This type of confiscation is carried out when a credit agreement is not accompanied by certain collateral objects, or collateral objects in the form of fiduciary guarantees (Harahap, 2008).
d. Confiscation of immovable collateral objects. In this type of security seizure, the seized person looks after the collateral object, and the seized person is also allowed to use the collateral object on the condition that it does not cause a decrease in the value of the collateral object (Rorong, 2018).

When the debtor's SHM overlapped and the court ruled that the certificate was invalid and not legally binding, the debtor had no land rights and was in default of the credit agreement. Likewise, the dependents' rights have also been abolished. This is explained in Article 18 paragraph (1) letter d of the UUHT, which explains that a mortgage right on land can be abolished due to several causes, one of which is due to the abolition of land rights. Because the mortgage right is lost, the bank, which initially occupied the position of a separatist creditor, turns into a concurrent or ordinary creditor, namely a concurrent who does not hold a collateral object.

Based on the above conditions, a new issue will arise regarding how the legal protection of banks as creditors who lose collateral due to the abolition of mortgage rights. Article 18 Paragraph (4) of the UUHT explains that the abolition of a mortgage right due to the abolition of land rights does not cause the abolition of the guaranteed debt. So this article alone protects the creditor's position where the debt must still be paid by the debtor. Then, Article 1131 of the Civil Code can be one (1) solution to this problem. The article explains that all the debtor's assets, both existing and those that will exist in the future. This article provides protection to debtors, so that they can still get their rights. If at that time the debtor does not have assets to pay the debt, then the obligation to pay the debt remains tied to the debtor's assets obtained in the future.

There are several steps that debtors can take to keep their rights, including the following.

1. The first solution is that the bank, as the creditor, can file a lawsuit with the court for a change of collateral followed by confiscation of collateral.
2. The Second solution, apart from going through the court, the replacement of collateral can also be submitted due to the goodwill of the debtor. In accordance with Article 1338 of the Civil Code, agreements and agreements must be carried out based on the good faith of the parties. Therefore, if the debtor makes a good faith effort to replace the collateral object, which was previously a cancelled overlapping land certificate, the bank as a creditor does not need to file a lawsuit in court.

B. Liability of a Customer as a Debtor who Uses Overlapping Land Certificates as Credit Collateral

Multiple or overlapping land certificates are one of the reasons why debtors cannot fulfil their obligations to include collateral objects in a credit agreement, with this the debtor commits default. When certificates are overlapping, there will be a party who is determined to be the legal owner of the SHM, while the other party is the party whose SHM is considered invalid. The debtor is deemed to have defaulted if, during research and settlement of the case, it turns out that the debtor is the party whose certificate has been cancelled, so the creditor loses its right to use the certificate as collateral and also loses the authority to execute a security seizure.

The cancellation of the debtor's SHM results in the loss of the collateral object causing losses to the creditor, hence the need for legal protection for the debtor. Article 1237 Paragraph (2) of the Civil Code states that when the debtor is negligent in submitting the collateral object, the debtor is responsible since the debtor's negligence. In this case, since the debtor's certificate was cancelled by a court decision, the debtor is responsible for providing compensation in the form of a replacement collateral object or repayment of debt to the creditor.

The debtor has the responsibility and obligation to overcome the situation where the collateral is lost so that it cannot be executed by the creditor when the debtor defaults. This responsibility can be in the form of compensation for costs, compensation, or payment of interest to the creditor, which must be done when the debtor has brought himself into a situation that is unable to submit the collateral object or does not take care of the collateral object so that it remains maintained and can be used. This is regulated in Article 1236 of the Civil Code (Nurdianto, 2018).

The loss suffered by the creditor can be caused by the debtor's negligence, it can also not be caused by the debtor's negligence, but due to force majeure or overmacht. In the event that the debtor defaults due to the loss of collateral due to the cancellation of the debtor's double certificate, it is basically not the debtor's intention to do so. As explained earlier, multiple certificates can be caused by various causes. In this condition, the Bank no longer has the right to seize the collateral. The bank's initial position is as a separatist creditor where the bank is the creditor holding the collateral. However, since the security object is abolished due to the loss of mortgage rights on the security object, the bank's position drops to a concurrent creditor, or ordinary creditor, which is a creditor who does not hold a security object. Therefore, in order for the bank to retain its right to obtain the collateral, it must replace the collateral.

The second method is when there is no good faith from the debtor to replace the collateral, namely through a court lawsuit. When the debtor defaults, Article 1365 of the Civil Code explains that any party who commits an unlawful act and causes harm to another person, that party is obliged to compensate both material and immaterial damages. Followed by Article 1131 of the Civil Code which states that all of the debtor's assets, both movable and immovable objects, are bound by the agreement and become collateral for the obligations he has made.

The value of the substitute security object must not differ significantly from the value of the claim, debt, or the value of the money in dispute, and must be balanced. This is stipulated in Supreme Court Circular Letter No. 5 of 1975 on Security Confiscation (hereinafter referred to as SEMA 5/1975). Then, the replacement of collateral objects takes precedence over movable objects, if the value does not meet the value of the debt, then proceed to the debtor's immovable objects.

C. The Role of Notary in Resolving Double Certificate Problems

A credit agreement is a notarial agreement in the form of a party deed or deed of party, where the Notary is a party to the agreement, which in its position is authorized to certify the contents of the agreement. Not only that, the Notary is also obliged to consider the substance of the agreement. If the Notary finds that there are Articles or clauses that conflict with the laws and regulations, the notary has the right to reject the contents of the agreement, by providing education or information to his client regarding how it should be in the laws and regulations (Maya Fachriah, Afif Khalid, and Muhammad Aini, 2015).

There are several roles of Notary in making party deeds or akta partij, which include the following:

a. Get to know the parties
b. Listening and listening to the information and wishes of the parties
c. Evaluate the content or substance of the agreement
d. Provide advice on the contents of the agreement
e. Rejecting the wishes of the parties that are contrary to the laws and regulations
f. Checking the authenticity of the parties' documents
g. Putting the wishes of the parties into the deed
h. Making the deed outline
i. Signing the deed

Notary in his position is authorized to make *partij* deed. However, most credit agreements are made using a standard agreement, the substance of which is prepared by a Notary based on the wishes and requests of the bank, so in his duties the Notary is obliged as follows (Agussyah, 2024):

a. Prepare the contents of the agreement according to the request of the bank as a creditor
b. Give directions and explanations related to procedures in accordance with the provisions of laws and regulations
c. Ensure several things, such as:
    1. The correctness of the data
    2. Confidentiality of bank documents
    3. Completeness of documents that are the responsibility of the Notary
d. Provide understanding and counselling to the bank
e. Drafting the final document based on the agreement with the bank
f. Verifying incorrect information
g. Maintain the confidentiality of data related to the bank as a creditor and customer data as a debtor, including regarding the amount of the loan, collateral objects, and others.
h. Registering the deed of credit agreement with the local district court by entering it into the register book. Every deed registered in the register book is a deed that has been prepared and authorized by a Notary. This is done so that if there is a problem in the future, it can be resolved in accordance with applicable legal procedures. This is also done to give legal force to the deed of credit agreement.

Because the majority of credit agreements are standard agreements, the Notary can only give directions to the debtor. When one day the debtor defaults, the notary can only do several things, including the following:

a. Check and ensure the validity and correctness of the documents owned by the parties
b. Ensure that the authorization of the land office when issuing a letter of protection for bank credit settlement

Protect the bank legally during the dispute, before the expiration of the Notary's obligation to protect the bank.

CONCLUSION

A credit agreement is an agreement between the debtor and the creditor. The credit agreement includes all provisions regarding the implementation of the agreement, including the rights and obligations of each party, the amount or nominal amount of money loaned, to the object or object that is the guarantee of the agreement. The credit agreement is binding, which has the same binding force as the laws and regulations for the parties.

Generally, a credit agreement is followed by an accessor agreement that regulates

collateral objects. Collateral is one of the important elements in a credit agreement, which is useful to ensure security and provide legal protection for each party, especially creditors. The existence of collateral objects provides protection to the creditor, that when the debtor defaults, the creditor can seize the collateral.

In some situations, sometimes a condition is found where the collateral object is in the form of a Certificate of Ownership on a plot of land, but there is another SHM, on the same plot of land, this condition is called overlapping. Conditions like this can be detrimental to various parties, including debtors, creditors, and third parties. The debtor and the second party are legally the rightful owners of the land, but for some reason there is an error that causes this overlapping condition.

Overlapping can make it difficult for the creditor to execute a security seizure, when the debtor defaults. This is because there are 2 (two) names of owners on the land, so to carry out execution, problem solving must be carried out first, to determine whether the debtor is the legal owner of the land. When the debtor is declared the rightful owner, the creditor can still carry out the execution, but if it is decided that the debtor is not the rightful owner of the land or the SHM is canceled, the creditor does not have the right to execute the security seizure.

When the debtor is declared not to be the legal owner of the land, the debtor does not have the right to execute a security seizure. Even so, the debtor still has to and is obliged to be responsible for the debt. The debtor must replace the collateral to fulfill the creditor's rights. If the debtor is in good faith, it can voluntarily submit an application for replacement of collateral objects. However, if the debtor does not act in good faith to apply for the replacement of collateral, Article 1131 provides protection to the creditor. The article states that when the debtor binds himself to a credit agreement, all of his assets are bound to the agreement, both movable and immovable objects, and both existing and future assets. With the existence of this Article, when the creditor loses the authority to conduct a security seizure against the debtor's SHM which is canceled, the creditor can demand the replacement of the security object.

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