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Creditors Rights and Authority to Sell own Objects of Warranties

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Abstract:

Binding of security rights over land carried out in accordance with the provisions of Law No. 4 of 1996 on Mortgage, namely: binding Encumbrance conducted before the Land Deed Officer, which was preceded by the credit agreement are secured by a security interest. Registration is done at the local Land Office. Encumbrance is only given to the land, or the land and buildings on it if it has been certified, while land and land and buildings on it are not yet certified, the bank first perform the certification of the land

Execution parate legal power to execute objects that serve as collateral Mortgage loans against borrowers who default form of sale through a public auction or sale under the hand is equal to the force of law through the execution of court decisions. In practice in the field, parate execution is not used to execute the Mortgage object which is used as collateral. Lenders still ask a court decision in advance in order to execute the Mortgage object.

Barriers arising in execution under the hand is: to whom money from the sale for the first time should be submitted; What about the rights of the other creditors (if any), meaning that the duty of who should draw up a list of divisions; agreement to sell under the hand must be included in the relevant Mortgage deed, or can be made separately at any time.

Keywords: Sell Yourself, Creditors, Guarantee

1.Introduction

During the New Order government, it was realized that economic development often ignore the legal aspects, where the law or legislation behind compared with the economic development. As excesses, avoid confusion in the field of law, which may cause doubts for the authorities to clarify a particular issue, which included criminal cases, civil cases or political cases. As we know that one direction of development in the field of law is to develop legislation that supports economic activity in the context of the era of free trade without harming the national interest. This suggests that the government should pay attention to joints determined to law in the development process, especially in economic development, such as in the fields of trade, export-import, financial institutions, including in this case in the field of banking.

In fact, the banks are often dealing with land issues. Duties and responsibilities of banking in developing the country's economy, many related to the guarantee, which is known as the Mortgage, the credit guarantee with land as collateral. Relating to Mortgage, as provided for in Article 51 of the BAL, the government has enacted Law No. 4 of 1996 on Mortgage. In order to realize economic development in harmony with the development of law and at the same time meet the needs of the community security institutions that can provide legal certainty on the traffic credit.

In this regard, with the enactment of the Basic Agrarian Law (BAL), the book II of the Civil Code repealed along on the earth, water and natural resources contained therein. BAL itself, but also recommends the establishment of a variety of other regulations, this is understandable considering that BAL is the key legislation, which still must be equipped with a variety of other regulations. Article 51 BAL, signaled to make a law on Mortgage for lands Properties, leasehold and Broking. Formulation of laws relating to security rights, it is very reasonable because there has been a variety of legal chaos, among them: the chaos created by the Directorate General of Agrarian / BPN; the chaos created by the Courts in Indonesia; banking practices in securing loans; people who became confused because preoccupied by the BUPLN (Agency for State Receivables and Auction Affairs).

The establishment of the National Security Law system which is characterized by modern Indonesian archipelago and patterned insight to support and help the smooth flow of capital and crediting activities is urgently needed. In addition, the law guarantees on the ground needs to be made uniform. As a first step, then on April 9, 1996 has enacted Law No. 4 of 1996 on Mortgage of Land along with objects related to the land.

Economic development and the need for security institutions that can accommodate the credit needs of the community, needs to be balanced with the extension of the guarantee institutions that already exist. These facts show how important fiduciary institution, as an insurance agency which allows to accommodate the credit needs, which can not be reached through other security institutions.

The importance of security rights institutions is due to the increasing development activities in general and development in the economic field in particular. That requires the availability of funds for the construction of a sizeable, largely obtained through lending activities. In this connection, it should, if the giver and the recipient of the credit as well as other parties involved to obtain legal protection "balanced" through a strong institution that guarantees rights and provide legal certainty.

Legal guarantees, security institutions and credit agencies are thus of course needed for economic development, domestic and foreign trade, capital investments of national and foreign investments are growing more rapidly. Crediting development, capital flows and the development of legal relations thus, has grown urged to obtain reservoirs.

The land can be used as collateral in obtaining credit. If the debtor in default and the lender has given a summons or a warning letter to the debtor, then the lender has also been negotiating, and if negotiations are not successful, then the execution / auction of the collateral objects. Regarding the execution of collateral objects can be done in two ways as stipulated in Article 20 paragraph (1) letter a and b Mortgage Act which stipulates that if the debtors default, then by:

- a. Mortgage holders first rights to sell the Mortgage object as referred to in Article 6, or
- b. Executorial title contained in Encumbrance certificate referred to in Article 14 paragraph (2), the object of Encumbrance sold through public auction in accordance with the procedures specified in the legislation for the settlement of accounts receivable Mortgage holders with previous right than other creditors.

In Article 11 paragraph (2) letter e UUTH, determined also about the possibility of inclusion of promise in the form of Mortgage Deed Granting a promise that gives power to the Mortgage holders to sell itself if the debtor default. Such rights, as the right to do parate execution. In this regard, if the debtor default Mortgage holder has the right to sell the objects Encumbrance on its own power. Regarding the pledge to sell it on its own power for mortgages under Article 1178 of the Civil Code. Article 1178 Civil Code determines:

All appointments by which authorized indebted have given object in mortgages, was canceled. But allowed to indebted first mortgages for, at the time it provides mortgages, expressly asked agreed that, if the principal is not repaid properly, or if the interest owed is not paid, it absolutely would be authorized to sell plots agreement in public, to take repayment principal, and interest and costs, of the sales revenue.

From the above article can be seen that the promise can only be granted to the holder of the first mortgage. According to Article 1178 of the Civil Code, the holders of first mortgages were given the possibility to request specified a promise that the holders of mortgages given power that can not be revoked for selling the object mortgages on its own power without the mediation of the court (that is to say without having to obtain a determination of the execution of the chairman of the local court) if the debtor break a promise. Sales itself remains to be done in public. From the sale of collateral encumbered auctions on the mortgages, the lender can take to pay off the debt of the debtor. The remainder of the proceeds after deducting the creditor accounts (of course, if still left), handed over to the debtor.

Relating to debt that cause collateral with land as collateral, then in Article 3 paragraph (1) of Law No. 4 of 1996 states that, "secured debt repayment with Mortgage can be a debt that already exists or has been agreed with a certain amount or the number that existed at the time the petition filed Mortgage can be determined based on receivables debt agreements or other agreements which give rise to the relevant accounts payable relationship".

Furthermore, Article 3 paragraph (2) of Law No. 4 of 1996 set "Encumbrance can be given to a debt originating from a legal relationship or to one or more debt from several legal relationship".

Relating to these provisions, the Mortgage is an additional agreement (assesoir) of the loan agreements or accounts payable as principal agreement.

According to Maria S.W. Sumardjono, "In essence Mortgage is a follow-up (accessoir) in the principal agreement, the agreement raises the legal relationship of debt. Thus, the existence, the transition, and the abolishment of Encumbrance depending on repayment of the secured debt".

1.1. Formulation of the Problem

Based on the background of the above problems, the problem is:

1. Is the authority's own creditors to sell collateral objects in accordance with Law No. 4 of 1996?
2. What are the barriers faced by lenders in making sales collateral objects?

2. Discussion

2.1. Understanding Mortgage

In Indonesian dictionary, Encumbrance is defined as goods that are used as collateral, while the guarantee itself means dependent on loans received. Mortgage under the provisions of Article 1 paragraph 1 of Law No. 4 of 1996 on Mortgage of Land along with objects related to ground is

"Mortgage on land and objects relating to land, hereinafter called the Mortgage is a security interest granted on land rights as stipulated in Law No. 5 of 1960 on Basic Regulation of Agrarian, following or not following other objects which are an integral part of the land, for the repayment of certain debt, which gives the position preferred to other creditors. "From the formulation of Article 1 paragraph 1 Mortgage Law, it is known that it is basically a Mortgage is a form of guarantee of repayment of the debt, with the previous right he object (collateral) in the form of rights over land are regulated in Law No. 5 of 1960 on the Basic Regulation of Agrarian or BAL.

2.2. Collateral Lending

Collateral Lending According to Law No. 7 of 1992, guarantees the provision of credit is confidence in the ability and willingness to repay their debts in accordance with the agreement, Article 1131 and 1132 of the Civil Code and special guarantees (to be agreed upon, Article 1134 Civil Code). Collateral functions are:

- a. Gives the right and powers to the bank to get a settlement with the goods if the customer collateral pledge injury.
 - b. Giving impetus to the debtor to meet the credit agreement, especially regarding the repayment in accordance with the terms agreed so that he does not lose the assets that have been pledged.
 - c. To ensure that customers participate in the financing business. As we know the birth BAL No. 5, 1960 On September 24, 1960, among others, for the purpose of creating a unification of the law of the land; which was originally based on western law and customary law into rights to the land according to the BAL. Along with the BAL also specify that right, leasehold and Broking by BAL can be used as collateral to the Mortgage burdened. And according to article 51 BAL Encumbrance will be governed by the laws of its own. But in reality for more than 30 (thirty) years since the enactment of the BAL, Mortgage Law is not successfully enacted. So in accordance with the provisions of the old practice in the binding of collateral Properties, leasehold and Broking, namely:
 - a. Encumbrance that use mortgages as stipulated in the provisions of book II of the Civil Code.
 - b. Encumbrance which uses credietverband provisions stipulated in Government Gazette No. 1908 542 and its amendment. Given that the provisions of security institutions is derived from the colonial era that are based on the law of the land before the entry into force of the BAL, and in fact only temporary, then such provisions are not in line with the general principles of law the National Land and can not accommodate developments in the field of assurance credit as a result of economic developments. As a result of differences of opinion arise concerning the implementation and interpretation of the law guarantees on the ground, among others:
 - a. Is the object of a security interest also includes objects located thereon.
 - b. When does mortgage; whether since, made binding or after the deed is registered at the Land Registration Office.
 - c. Do not indivisible object of encumbrance to him is absolute.
 - d. how should the implementation executorial title in practice.
 - e. Really SKMH applies continuously throughout debtor still in touch with the bank. For banks and parties related to the issuance of Law Mortgage brings a lot of new dimensions, yet more guarantees and protection for all parties according to UUHT that Encumbrance over land and objects relating to land, hereinafter referred Encumbrance is security interest charged on land rights as stipulated in Law No. 5 of 1960 on the basis of Regulation Agrarian, following or not following other objects which are an integral part of the land for the repayment of certain debt, which gives preferred status to certain creditors to other creditors. In other words Encumbrance is a guarantee land rights to the repayment of certain debt, which gives the position preferent to certain creditors to other creditors. In a sense, that if a debtor default, creditors holders of Mortgage entitled to sell by public auction the land as collateral under the terms of the legislation is concerned, the rights preferent according UUHT not reduce the preference receivables State under the provisions of the law applies. Of provisions UUHT knotted existence of several important traits Mortgage, among others:
 - a. Provide preferred position (preferent) to the holder;
 - b. Always follow the pledged object that the object is in the hands of anyone;
 - c. Fulfilling the principle of specialties and publicity so as to bind third parties and ensuring legal certainty to the parties concerned; and
 - d. Object security right also includes the buildings, plants and works that have been or will there is a unity with the object in question;
 - e. Implementation of execution is easy and sure.
- Based on this, Encumbrance based UUHT in essence really is not much to be compared with Encumbrance according to the previous provisions. However, it must be recognized that there are here a lot of improvement made that aim to better ensure the parties concerned. Of course, these changes will have an impact for the parties concerned.
- With the UUHT carry important implications for debtors, among others:
- a. With the restrictions apply SKMHT, the debtors are encouraged to increase / process certification of land rights land his pledged that legal certainty can be realized, namely:
 - 1) within 1 (one) month after SKMHT granted for land rights that have been registered (Article 15 paragraph 3)
 - 2) within three (3) months after SKMHT granted for land rights that has not been registered (Article 15 paragraph 4)
 - b. Lack of legal certainty regarding the amount of debt paid by the debtor (article 15 paragraph 1).
 - c. Lack of certainty regarding when the birth of Encumbrance so in this case the debtor, grantor Mortgage and third parties are protected. Birth of Mortgage set on the date of the land book. Mortgage which is also the date of registration of Encumbrance by the land office. Date of birth Encumbrance is the seventh day after the receipt of the complete documents required for registration with the provisions of the seventh day if it falls on a holiday, book the land in question was given was dated the following working day (Article 13 paragraph 4).
- Certainty about when the birth of Encumbrance it gives a clarity when an Encumbrance exists so that confusion about the birth of Encumbrance before UUHT this out will not exist anymore.
- Before the release of UUHT, Article 23 BAL says that registration is a "tool strong evidence" regarding the abolishment of property rights as well as the validity of the transition and the imposition of such rights. Thus, the birth of the Mortgage is located at the time of loading deed made, not when at the time on registration which only serves as a "strong evidence" of it.

- d. The objects that are above the rights to the land that became the object of a security interest may be charged only if the Encumbrance previously agreed by both parties (Article 2, paragraph 2).
- e. Officials who violate or fail to comply with the provisions of Article 11, paragraph 1, Article 13 paragraph 2 and Article 15 paragraph 1 and its implementing regulations in accordance with Article 23 may be subject to administrative sanctions, such as:

- 1) verbal warning;
- 2) a written warning;
- 3) suspension from office;
- 4) dismissal from office.

With the administrative sanctions as provided for by Article 23 of the above will be able to oversee the tasks carried appointed officials in connection with the application / implication Mortgage Act to be implemented in accordance with the provisions outlined. So there are controls in terms of the implementation of official duties UUHT for mounting Mortgage.

f. With the release of UUHT, the title of execution issued by the former Chairman of the Court, now transferred to the National Land Agency example by affixing watchword "By Justice Based on God" on Encumbrance certificate. Before the birth of UUHT watchword like that affixed to the deed Mortgage. Before the birth of UUHT watchword like that affixed to the deed Mortgage made PPAT. Thus Encumbrance certificate that has the power executorial same court decision that has obtained permanent legal force and effect as a substitute grosse acte hypotheek along over land rights (Article 14).

g. According UUHT, unless agreed otherwise, the certificate of land rights that have been spiked with notes of loading Encumbrance be returned to holders of land rights. Thus the control of proof of land rights by banks should be based on the agreement.

h. According UUHT, unless agreed otherwise, certificates of rights over land that has been spiked with notes of loading Encumbrance be returned to holders of land rights. Thus the control of proof of land rights by banks should be based on the agreement.

2.3. *The authority Creditor Objects to Sell Yourself Mortgage Power on Self*

Explanation of Article 6 UUHT not in line with Article 6 itself. In Article 6 UUHT not determined that the right to do parate execution must be agreed in advance. However, the explanation of Article 6 provides that such indications. Among others in the explanation of Article 6 is determined:

"These rights are based on the promise given by the grantor Encumbrance that if the debtor in default, the holder of a security interest has the right to sell the objects Encumbrance through public auction without the approval again from lender Mortgage and subsequently take the settlement receivables from the sale of the former more than other creditors"

Promise to sell on its own power was in Mortgages under Article 1178 of the Civil Code. Mortgages promise in it called *beding van eigen machtige verkoop*. This promise can only be granted to the holder of the first Mortgage. According to Article 1178 of the Civil Code, the holders of Mortgages were first given the possibility to request specified a promise that the holder Mortgages given power that can not be revoked for selling the object mortgages on its own power without the mediation of the court (that is to say without having to obtain a determination of the execution of the chairman of the local court) if the debtor break a promise. The credit agreement will bear rights and obligations of the parties involved. In this case the debtor or grantor Mortgage with the bank or credit. When current loan agreement has been approved by the parties then all rights, obligations and conditions of the agreement must be executed by the parties as legally come into force as a law for the maker. This is regulated in Article 1338 of the Civil Code, which determines:

"All the agreements are made legally valid as a law for those who make it". Basically the credit agreement can be divided over the loan agreement and collateral agreements that do not / no collateral / in this case we are talking about a loan agreement with collateral. Bankers tend to provide credit will determine in advance what the guarantee or collateral of credit issued. For the bank to be determined from the beginning of what became collateral against loans will make it easier for banks to execute in the event of a default because it is clear what the collateral. Binding guarantee / collateral (contract) made by the Bank carried out through two (2) ways:

a. Binding guarantee / collateral conducted notariel; ie binding assurances made by both parties, both the debtor and creditor, before a notary / Officer of the Land Deed, Binding guarantee / collateral that is done is done to notariel Mortgage object that already has a certificate

b. Binding guarantee / collateral is done internally; binding guarantee / collateral internally binding assurance is conducted under the hand, only involves the bank / lender and debtor without involving a notary. Then the credit agreement by taking collateral in the form of Encumbrance is made, accompanied by the deed of acknowledgment of debt. Once the credit agreement is approved, it will be made Deed Granting Mortgage (APHT). On this basis, the National Land Agency (BPN) will publish Encumbrance Certificate in accordance with ranking filed by creditors. Encumbrance Certificate grosse that is the deed that will be used for the benefit of its creditors, in this case the Bank BRI Branch Medan, to protect the loans disbursement. Although Encumbrance Certificate which is a replacement grosse executorial title deed has, in its implementation in the field, still have to use Court Decision to execute the agreement contained in the Certificate of Mortgage. As mentioned above, each credit agreements give rise to rights and obligations of the creditor / bank by the debtor. The fulfillment of the rights and obligations that the so-called achievement. And if one party does not comply, then this is said with defaults. In this thesis, which discussed is if the debtor is in default. Execution Mortgage can be done two (2) types, namely:

1. Execution simplified or parate execution; Be Simplified execution or execution parate set forth in Article 6 of Law Mortgage. The purpose of the execution Encumbrance is if the debtor defaults, the creditor Mortgage holder has the right to sell it. If there is more

than one creditor Encumbrance, then these powers are at Mortgage holders first. Sales objects do Mortgage mandatory public tender produced by the Office of the Auction.

In carrying out the sale of Mortgage object and take repayment of its receivables apply special position in the possession Mortgage holders, namely *droit de preference* and *droit de suite*. To be able to use the authority to sell the object of Encumbrance on its own power, without the consent of the debtor, the debtor is required appointments as stipulated in Article 11 paragraph 2 of Act Mortgage. A promise that must be included in the Deed Granting Mortgage (APHT).

However, the sale of objects Encumbrance through public auction can crisis under Article 20 paragraph (2) of the Act Mortgage, which states if there is an agreement between the donor and the holder of Encumbrance then the sale can be executed under hand. If in this way, it will be obtained a high price that benefits all parties. The provision does not expressly specify mortgages may or may not be conducted sales under the right hand above the object mortgages, which raised doubts in society. There is concern over the arms sale and purchase under the mortgage object is an unlawful agreement so threatened null and void or be canceled. Therefore, the inclusion of the provisions of Article 20 (2) of the Act Encumbrance no doubts anymore. The legal basis for the implementation or execution *parate simplified execution* is Article 20 and Article 21 of the Law on Mortgage. Article 20 determines:

1. If the debtor in default, then by:

- a. Mortgage holders rights to sell the Mortgage object as referred to in Article 6 or
- b. Executorial title contained in the Encumbrance certificate referred to in Article 14 paragraph (2)

Object Encumbrance sold through public auction in accordance with the procedures specified in the legislation for the settlement of accounts receivable Mortgage holders with the right to prioritize rather than creditors.

2. Upon agreement giver and Mortgage holders can be implemented under the hand if thus it can be obtained the highest price that benefits all parties

3. Implementation of the sales referred to in paragraph (2) can only be done after the expiration of 1 (one) month from the notified in writing by the grantor or holder of Mortgage to the parties concerned and published at least two (2) letters are not there are those who demur.

4. Every promise to carry out the execution Mortgage in a manner contrary to the provisions of paragraph (1), (2) and (3) null and void
5. Until the announcement for tender was issued, the sale referred to in paragraph (1) can be avoided with the repayment of debt secured by this Mortgage as well as the costs of execution that has been issued.

Article 21 determines:

If the giver of security rights is declared bankrupt, the holder of Encumbrance remains authorized to perform all the rights acquired under the provisions of this Act.

2. Sues Mortgage Through Local District Court; By using the event execution as provided for in Article 224 or Article 258 HIR RBG. In Article 26 of Law Encumbrance determined that as long as there are no regulations that govern it, with regard to the provisions of Article 14 of Law Encumbrance existing mortgages are the norm of the entry into force of the Act Mortgage, Mortgage apply to execution. Upon the request of the holder of a mortgage lender, the chairman of the District Court gave the order for a debtor to meet its obligations and when the order was ignored, then ordered his execution without required filing first. In this transition period, Law Encumbrance also confirms that before there are special rules that regulate execution Mortgage Rights, the legal provisions applicable to the execution of the execution of mortgages Mortgage with Mortgage delivery certificate as a basis for implementation.

2.4. *Obstacles in Doing Sales Collateral Objects*

Weaknesses arise in the execution under the hand of this are:

- a. to whom the proceeds of the sale for the first time must be submitted.
- b. what about the rights of creditors on the other (if any), meaning that the duty of who should draw up a list of divisions
- c. agreement to sell under the hand must be included in the relevant Mortgage deed, or can be made separately at any time.

Law No. 16 of 1985 that, in addition to the institutional set up under the arms sales as outlined above, also a new institution called *roya partial*

In the provisions of Law No. 4 1996 in Chapter V, Article 20 and 21 explicitly and clearly has set about the execution Encumbrance, and the above provision has provided an alternative to carrying out executions Mortgage meant that with two (2) ways:

- a. Sale through a public auction in accordance with the procedures prescribed by law.
- b. Sales under hand by mutual agreement.

Execution by taking the first ordinance explicitly stated to be in accordance with the procedures specified in legislation in force. But until the enactment of Law No. 4 of 1996 there has been no legislation that will set but still refers to the provisions stipulated in the Law of Civil Procedure in force, namely Indonesia governing *Parate Execution Institutions* referred to in Article 224 HIR / 258 RBG for areas outside Java and Madura. It had to be taken by the government policy for unity of understanding and certainty regarding the use of the provisions in the execution of Mortgage question.

3. Conclusion

1. Binding of security rights over land carried out in accordance with the provisions of Law No. 4 of 1996 on Mortgage, namely: binding Encumbrance conducted before the Land Deed Officer (PPAT), which was preceded by the credit agreement are secured by a security interest. Registration is done at the local Land Office. Encumbrance is only given to the land, or the land and buildings on it if it has been certified (SHM, SHGU, HGB), while for the land as well as land and building on it that has not been certified, then the bank must first do the certification of the land

2. The legal force parate execution to execute objects that serve as collateral Mortgage loans against borrowers who default form of sale through a public auction or sale under the hand is equal to the force of law through the execution of court decisions. In practice in the field, parate execution is not used to execute the Mortgage object which is used as collateral. Lenders still ask a court decision in advance in order to execute the Mortgage object.

3. Barriers arising in execution under the hand is: to whom money from the sale for the first time should be submitted; What about the rights of the other creditors (if any), meaning that the duty of who should draw up a list of divisions; agreement to sell under the hand must be included in the relevant Mortgage deed, or can be made separately at any time.

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