

Making of a Procuration to Sell Together with a Credit Contract for a Collateral Object



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ABSTRACT: Issuance of the procuration to sell together with the credit agreement is basically contrary to Article 20 Paragraph (2) Mortgage Right Law. In the elucidation of Article 20 Paragraph (2) of the Mortgage Law it is explained that in the event that a sale through a public auction is not expected to produce the highest price, by deviating from the principle referred to in Paragraph (1) it is given the possibility of carrying out execution through private sales, provided that this is agreed upon by the grantor and the holder of the Mortgage Right, and the conditions specified in Paragraph (3) are met. His possibility is intended to accelerate the sale of Mortgage objects with the highest selling price. This means, selling under the hand is an alternative provided by Mortgage Law if ready execution is estimated to be no more profitable than private sales. As for the legal consequences of issuing a deed of power of attorney to sell contrary to Article 20 Paragraph (2) Mortgage Right Law as stipulated in Article 20 Paragraph (4) Mortgage Right Law is null and void. Thus, the deed of power of attorney issued by a Notary together with the credit agreement is null and void. This means that the deed of power of attorney to sell is deemed to have never existed, so it cannot be used as a basis for private sales.

KEYWORDS : Power of attorney to sell, Credit agreement, Lien object.

A. INTRODUCTION

The credit agreement is a principal agreement that is real in nature, followed by a guaranteed agreement as an accessor. The expiration of the guaranteed agreement depends on the principal agreement. The meaning of "real" is that the occurrence of a credit agreement is determined by the transfer of money by the bank to the debtor. Judging from its form, bank credit agreements are generally in the form of a standard contract, because the form of the agreement has been provided by the bank as a creditor, while the debtor only studies and understands well.¹ The debtor in the standard agreement is only able to accept or reject without any possibility of negotiating or bargaining. If the debtor accepts all the terms and conditions determined by the bank, then he is obliged to sign the credit agreement, but if the debtor refuses, then he does not need to sign the credit agreement.

However, in modern banking applications, the legal bond in credit is no longer just a loan agreement, but there is a combination with other forms of agreements such as power of attorney agreements and other agreements. The credit agreement as the principal agreement often gets less attention from the debtor because most of these agreements have been standardized by the bank. Debtors are usually less careful in mastering the contents of credit agreements due to lack of confidence and knowledge of the rule of law.² Based on Article 6 Mortgage Right Law that if the debtor defaults, the holder of the first mortgage right has the right to sell the object of mortgage on his own power through a public auction and collect the settlement of his receivables from the proceeds of the sale. This is confirmed in Article 20 Paragraph (1) letter b that the holder of the Mortgage right can execute the object of the Mortgage through an execution exercise based on the executorial title contained in the Deed of Granting Mortgage Rights as stipulated in Article 14 Paragraph (2) Mortgage Right Law.

Apart from going through parate execution, the execution of mortgage rights can be carried out by selling under the hands as stipulated in Article 20 Paragraph (2) of the Mortgage Right Law that based on a mutual agreement between the debtor and the creditor, the sale of mortgage objects can be carried out under the hands if this is profitable for the parties. The existence of the phrase "beneficial for the parties" indicates that the interests of the debtor and creditor must be balanced in the sale of mortgage objects under the hand. The sale of mortgage objects under the hand is carried out by making a power of attorney to sell as the basis for executing the sale of mortgage objects by the creditor. The practice of granting power of attorney to sell to pay off the debtor's debts still occurs, this is in accordance with the information and explanations submitted by Notaries in Sukajadi District, Pekanbaru

¹ Iswi Hariyani. 2010. *Restrukturisasi dan Penghapusan Kredit Macet*. Jakarta: PT Elex Media Komputindo, hlm. 19.

² *Ibid.*, hlm. 23.

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City, who often issue power of attorney to sell at the request of creditors. One of them, according to Hj. Megawati, S.H. M.Kn., that creditors always ask for power of attorney to sell to debtors. The same thing was also expressed by the notary Dr. H. Hermoliza, S.H and Alferi, S.H. that the power of attorney to sell was made at the request of the creditor, even though before the power of attorney to sell was made the notaries first explained that the power of attorney to sell was not important and was not needed because the collateral object was bound/encumbered by mortgage rights³

The conditions for making a power of sale together with the credit agreement are still being applied to one of the State-Owned Enterprises (or in Indonesia we can call it Badan Usaha Milik Negara (BUMN)). The bank still uses the power of attorney to sell at the beginning at the same time as signing the credit agreement. Each credit must use a deed of attorney to sell based on Article 12A of the Banking Law, namely minimizing auctions due to bad credit, avoiding an auction tax of 10% of the transaction value, and organizing asset sales against bad loans.⁴ Making the power of sale together with the signing of the credit agreement makes it appear as if the binding collateral for land rights is the power of sale, not a mortgage right. Even though it has been determined in the Mortgage Right Law that mortgage rights are the only guaranteed institution for land rights. As described above, the power of sale can be used as the basis for executing collateral, but not the power of sale as practiced by the state-owned bank. The power of attorney to sell that is justified by the Mortgage Right Law is the power of attorney to sell issued after the debtor defaults which results in the collateral object having to be executed to pay off the debtor's debt. So based on these introductions, then the formulation of the problem in this study is whether the power of attorney to sell provides legal certainty in the mortgage agreement to creditors and how is the validity of the power of attorney to sell against collateral objects burdened with mortgage rights.

B. RESEARCH METHOD

This research uses normative legal research, normative legal research or library law research, namely the methods or methods used in legal research which are carried out by examining existing library materials.⁵ The type of research that will be used is Theoretical Research, namely research that adopts a more complete understanding of the basic concepts of legal principles and the combined effects of a series of rules and procedures that touch certain areas in an activity.⁶ In this study, the research approach that researchers used was the Statue Approach and Conceptual Approach. Prescriptive research is research that provides guidelines on what should be done.

C. RESULT AND DISCUSSION

1. The Procuration to Sell Provides Legal Certainty in the Mortgage Agreement to Creditors

a. Kedudukan surat kuasa menjual setelah diundangkannya Undang-Undang Nomor 4 Tahun 1996 tentang Hak Tanggungan

The sale of Mortgage objects based on the Mortgage Right Law or other terms of execution of the Mortgage object, can be seen later in the provisions of Article 6 of Law Number 4 of 1996 concerning Mortgage Rights, where Article 6 regulates that if the debtor defaults, the mortgage object can be sold for settlement of receivables through a public auction, it means that it can be understood that based on Article 6, banks or creditors are not allowed to sell mortgage objects themselves. The sale of the mortgage object by the creditor individually can be carried out as long as the provisions of Article 20 paragraph 2 of the Mortgage Right Law which regulate the agreement between the giver and the mortgage holder, the sale of the mortgage object can be carried out privately if in this way the highest price can be obtained and the beneficial to all parties, based on this provision associated with a power of attorney for sale, the sales process using a power of attorney for sale is permitted to have an agreement between the creditor and the debtor to sell the collateral object for mortgage rights, the agreement between the creditor and the debtor is an agreement agreed upon after default by the debtor or after the credit is jammed.

In the case of a power of attorney to sell that has been prepared by the creditor and signed at the time of granting or distributing credit to the debtor or simultaneously at the time of signing the credit agreement between the creditor and the debtor, then the power of attorney for sale is not recognized Mortgage Right Law, so that such a power of attorney to sell does not legally have any legal standing, the sale of the object of mortgage carried out by the creditor based on the power of attorney for sale is contrary to the provisions of Article 6 and Article 20 of the Mortgage Right Law so that the power of attorney to sell has the effect of being null and void, because objective conditions are not fulfilled as stipulated in the terms of the validity of the agreement article 1320 of the Civil Code.

³ Muhammad Eddo Afrian. 2016. *Kuasa Menjual sebagai Alternatif Penyelesaian Sengketa Kredit Macet Di Kecamatan Sukajadi Kota Pekanbaru*. Jurnal Online Mahasiswa Fakultas Hukum. Volume III No. 2. hlm. 10. <https://www.neliti.com/publications/187381/kuasa-menjual-sebagai-alternatif-penyelesaian-sengketa-kredit-macet-dikecamatan>. Diakses pada tanggal 10 Oktober 2022.

⁴ *Ibid.*, hlm. 11.

⁵ Soerjono Soekanto. 2007. *Pengantar Penelitian Hukum Cet 3*. Jakarta: Universitas Indonesia (UI-Press), hlm. 1-2.

⁶ Peter Mahmud Marzuki. 2006. *Penelitian Hukum*. Jakarta: Kencana, hlm. 32.

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b. Legal Protection for Creditors against Buying and Selling Transactions of Mortgage Objects using a Power of Attorney to Sell

According to Rachmadi Usman, the elements contained in the guaranteed formulation are as follows:⁷

- a. A series of legal provisions, both originating from written legal provisions and unwritten legal provisions. Written guarantee legal provisions are legal provisions originating from laws and regulations. While the legal provisions of unwritten guarantees are legal provisions that are maintained in society;
- b. The guarantee law provisions govern the legal relationship between the guarantee giver (Debtor) and the guarantee recipient (Creditor). The guarantor is referred to as the Debtor, namely the debtor in a certain debt-receivable relationship, who surrenders a certain object as collateral to the recipient of the guarantee (Creditor). In this case, those who can act as guarantors can be people or legal entities that will get certain credit facilities or owners of objects that are the object of certain debt guarantees. The recipient of the guarantee is referred to as the Creditor, namely the party who owes a certain debt, who accepts the delivery of a certain object as collateral from the guarantor. In this case, the recipient of the guarantee can be an individual or a legal entity. The same as the legal entity referred to here is a bank or non-bank financial institution;
- c. There is a guarantee submitted by the Debtor to the Creditor. Because the guaranteed debt is in the form of money, the guarantee here must be valued in money; and
- d. The guarantee given by the guarantor is intended as a guarantee for the repayment of certain debts, which means that the imposition of collateral material is carried out with the intention of obtaining debt, loans or credit given by a person or legal entity to a person or legal entity based on trust. The imposition of collateral material is intended to guarantee the repayment of certain debts to creditors if the debtor is in default.

Thus, the provision of credit must be stated in a written credit agreement, either by private deed or notarial deed. The credit agreement here functions as a guide for the bank in planning, implementing, organizing, and supervising the granting of credit by the bank, so that the bank is not harmed and the interests of customers who entrust their funds to the bank are properly guaranteed. Therefore, before extending credit, the bank must ensure that all legal aspects related to credit have been completed and have provided adequate protection for the bank.⁸

Article 1320 of the Civil Code which refers to a condition for the validity of the agreement, the mortgage object cannot be sold privately because it is contrary to article 20 in the Mortgage Law. It can be understood that the making of a power of attorney to sell together with the credit agreement for the mortgage object is contrary to paragraph (4) in the Civil Code regarding "halal/lawful causes". Regarding a lawful/halal cause, Article 1337 of the Civil Code emphasizes that "A cause is prohibited if it is prohibited by law or if it is contrary to good decency or public order". The legal consequences arising from the use of the Power of Attorney to sell do not have legal validity for the creditor. For a power of attorney to sell that does not fulfill the elements in Article 1320 paragraph (4) regarding a lawful/halal cause, the objective requirements of an agreement are not fulfilled, therefore it can be declared null and void by law. That is, the use of the Power of Attorney to Sell on the object of the Mortgage is legally deemed to have never existed or was declared legally null and void since the issuance of the Power of Attorney to Sell was born, thus it is very clear that the Power of Attorney Agreement in this case the Power of Attorney to Sell does not provide the slightest legal protection for creditors. against the collateral object that has been encumbered with the Mortgage Right.

Thus, the sale of the mortgage object carried out by the creditor using a selling power of attorney that does not comply with the mechanism of Article 20 of Law Number 4 of 1996 concerning Mortgage is a sale that is contrary to the provisions of Law Number 4 of 1996 concerning Mortgage or sale of object of mortgage which is legally flawed. It is this legal defect in the agreement on the object of mortgage that then has legal consequences for not protecting the creditor and the buyer from the object of guarantee for the mortgage. Dependents, then legal protection will be obtained both by the creditor and by the buyer of the mortgage object guarantee, because the sale and purchase agreement of the mortgage object carried out by the creditor with the buyer does not contain legal defects or is not contrary to law.

B. The Legitimacy of the Power of Attorney to Sell Against Collateral Objects Encumbered with Mortgage Rights

1. The Validity of the Power of Attorney to Sell Against Collateral Objects Encumbered with Mortgage Rights When Credit is Current

The sale of collateral objects for mortgages based on a power of attorney to sell is carried out when the credit is current, this cannot be carried out because sales can only be carried out in the event of default which must meet the requirements as mandated in Article 20 paragraph (2) and paragraph (3). Then when the debtor has been confirmed to be in default, sales can be carried out under the hand with prior approval from the debtor. so that in the event that the sale of the mortgage object based on a power of attorney to sell is carried out when the credit is current, it causes the sale of the mortgage object to become invalid due to the non-

⁷ Rachmadi Usman. 2008. *Hukum Jaminan Keperdataan*. Jakarta: Sinar Grafika, hlm. 2.

⁸ Rachmadi Usman. 2001. *Aspek-Aspek Hukum Perbankan Indonesia*. Jakarta: Gramedia Pustaka Utama, hlm. 264.

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fulfillment of the requirements to be able to carry out the sale of the mortgage object as the basis of the sales power of attorney as a conditional agreement.

2. The Legitimacy of the Power of Attorney to Sell Against Collateral Objects Encumbered with Mortgage Rights in the Event of Bad Credit

In the event of bad credit, then the last course taken is the implementation of collateral execution. The process of executing the collateral item is the last step in accordance with the agreement if there is a clause in the agreement that cannot be fulfilled by the debtor as a credit borrower. Usually, the implementation of private sales can be carried out when the landowner who is burdened with Mortgage is still cooperative. He is also willing to attend again to draw up and sign deeds or documents related to the sale of land which is the object of Mortgage Rights.⁹ The other alternatives are:

- a. The collateral owner carries out the sale and purchase before the authorized Land Deed Making Officer (or in Indonesia we can call it Pejabat Pembuat Akta Tanah (PPAT)). The collateral owner will directly deal with the prospective buyer and immediately sign the deed of sale and purchase of the land in question. In such conditions, usually the collateral owner himself is looking for a buyer to get the highest price, so that he still gets the remainder of the sales price of the said collateral after a portion is deducted by the creditor to pay or pay off the remaining debts.
- b. The collateral owner is present to draw up and sign the Deed of delivery of collateral as well as the Deed of Authorization to Sell to the person appointed by the creditor. When at any time the creditor finds a buyer for the relevant collateral, he can carry out the Sale Purchase Deed using the Deed of Authorization to Sell.

From the description above as well as the provisions regarding the permissibility of underhand sales of mortgage guarantees if they meet the conditions specified in Article 20 paragraph (2) and paragraph (3) which the author has described, it can be concluded that in terms of selling collateral objects of mortgage rights based on a power of attorney to sell made at the time of bad credit, this is possible for the sale and purchase of mortgage collateral objects provided that if the debtor has been confirmed to be in default, and must be based on agreement and agreement between the giver and the mortgage holder as stipulated in Article 20 paragraph (2) and paragraph (3)) Mortgage Right Law. so that the sale and purchase of collateral objects of mortgage rights based on a power of attorney to sell which is carried out at the time of bad credit, as long as the procedure is in accordance with the specified requirements, it is declared valid.

D. CONCLUSION

The sale of mortgage collateral objects carried out by creditors using a power of attorney to sell that does not comply with the mechanism of Article 20 of Law Number 4 of 1996 concerning Mortgage is a sale that is contrary to the provisions of Law Number 4 of 1996 concerning Mortgage or sale of objects legally flawed mortgage rights that do not provide legal certainty to creditors.

The sale of the object of mortgage guarantee based on a power of attorney to sell which is carried out when the credit is current causes the sale of the object of guarantee of mortgage to be invalid due to the non-fulfillment of the requirements to be able to carry out the sale of the object of guarantee of mortgage as the basis of the power of attorney to sell as a conditional agreement. The sale of collateral objects of mortgage rights based on a power of attorney to sell which is carried out at the time of bad credit, as long as the procedure is in accordance with the specified requirements, it is declared valid.

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⁹ Irma Devita Purnamasari. 2012. *Kiat-Kiat Cerdas, Mudah, dan Bijak Memahami Masalah Hukum Jaminan Perbankan*, Cetakan II. Bandung: Kaifia, hlm. 62.