

# Protection of Third Parties as the Owner of Mortgage Rights Object

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**Abstract.** This study aims to discover how the legal protection obtained by third parties as owners of dependent rights objects in credit agreements and their application in Court Decision No. 134 / Pdt. G / 2020 / Pn. Skt. It is because until now, there are no laws and regulations governing legal protection that third parties can obtain. This research was conducted using the empirical approach method, and the research specifics were descriptive-analytical. The types of data used in this study are primary and secondary data with data collection methods through interview results. The data analysis method used is a qualitative descriptive method. In this study, it was found that in pledging its assets to guarantee debts of debtors, third parties get preventive and repressive legal protection. Preventive legal protection is obtained when third parties participate in the process of making Power of Attorney Imposing Mortgage (*Surat Kuasa Membebankan Hak Tanggungan/SKMHT*) and Deed of Granting Mortgage (*Akta Pemberian Hak Tanggungan/APHT*), while repressive legal protection can be in the form of filing a lawsuit and/or resistance.

**Keywords:** credit agreements, dependent rights, legal protection, third parties.

## 1 Introduction

The provision of credit is one of the government's efforts to make it easier for the community to obtain business capital and facilitate production activities. The bank owns this facility, which is intended for its customers. Banks are government institutions engaged in finance and based on the provisions of Law No. 10 of 1998 concerning Banking, banks have a main business activity, namely collecting funds from the public, these funds will later be channeled back to the community in the form of credit.

Article 1 of Law No. 10 of 1998 concerning Banking explains that credit is a facility for providing money or a claim that can be equated with it. The granting of credit is based on an agreement or loan agreement between two parties, namely the bank and another party, in which the borrower must repay the debt following the specified period has been determined with interest.

Customers who want to get credit facilities must apply for credit first. The application will be subjected to credit analysis. The credit analysis process is carried out both juridically and economically to assess whether the customer can pay the credit facilities given to him following the provisions of the credit agreement. If, after credit analysis, the customer is deemed able to repay the credit given to him, the application submitted by the customer can be approved by the bank. With the approval of the food credit application, a credit agreement will be written.

As the main agreement, the credit agreement is evidence for the parties regarding the limitations of the debtor's rights and obligations and also as a credit monitoring tool [1]. The deal will later be signed by the parties to the agreement and can guarantee the interests of both parties. The credit agreement is also the embodiment of the principle of freedom of contract, which is one of the conditions for the validity of an agreement.

In addition to the agreement, the existence of collateral/collateral can also guarantee the interests of the parties in the credit agreement. The credit agreement's guarantee is only addition and is not the main thing for the creditor. Still, the guarantee is important for the bank because if the debtor defaults, the bank will always try to make the debtor give rights and power to the bank to get repayment of his debt through the guarantee [2–4].

The most frequently encountered guarantees in credit practice are material, particularly Mortgage Rights. The definition of a mortgage is explained in Law No. 4 of 1996 concerning Mortgage Rights (from now on referred to as the Mortgage Law) Article 1 paragraph (1). Based on the article, it can be concluded that the definition of a mortgage is a security right that can be imposed on the land, related or not related to other objects that become an integral part of the land for the settlement of certain debts and giving priority to certain creditors against creditors others [5]. In the practice of binding collateral in credit agreements, not all objects that are pledged as collateral belong to the debtor. It is because no laws and regulations explicitly regulate the binding of collateral by using objects belonging to third parties to guarantee debtors' debts. The use of land owned by a third party to guarantee debt belonging to the debtor will not be a problem if there is no default in carrying out the agreement [6, 7].

As what is meant by default is a condition due to negligence or error, the debtor is unable to fulfil the achievements as specified in the agreement and is not in a state of coercion as for stating that default is not fulfilling or negligent in carrying out obligations as specified in the agreement made between creditors with debtors [8]. A debtor can be said to have defaulted if:

- a) The debtor does not perform his achievements at all
- b) Debtors are late in performing their achievements
- c) The debtor is wrong in carrying out his achievements

One concrete form of allowing the use of land owned by third parties to guarantee debtors' debts can be seen in Decision No. 134/Pdt.G/2020/Pn. Skt. In the decision, it is known that the debtor has received several credit facilities by pledging the land belonging to his parents, and the object of the dispute is land owned by a third party. Because the debtor is in default, the creditor has the right to execute the object of the guarantee. The execution caused third parties to suffer losses because their rights to the guaranteed land had to be lost [9].

There are no laws and regulations governing legal protection for third parties. Therefore, based on this explanation, in this study, two formulations of the problem will be discussed, namely:

1. What can legal protection be obtained by a third party as the owner of the Mortgage object?
2. How is the legal protection obtained by third parties in Court Decision No. 134/Pdt.G/2020/Pn. Skt?

## 2 Research Methods

The approach method used in this research is the empirical approach method. An empirical approach is a research approach used to describe the conditions seen in the field as they are [10].

Later, the data obtained from the research results will be processed using descriptive-analytical research specifications. The analytical descriptive research specification provides a specific description based on data collected systematically [11].

The data used in this legal research are secondary data and primary data. Secondary data obtained from library materials collected through literature studies relevant to the problem to be discussed. While the primary data in this study were obtained from interviews with several sources, namely:

- a. The legal division staff of PT Bank Negara Indonesia (Persero) Tbk Jakarta, namely Mr. Resi Pranacita, S.H.
- b. The head of the branch of PT Bank Perkreditan Rakyat Binalanggeng Mulia Sragen, namely Mr. Budiarto, S.Sos.
- c. Notary/PPAT (*Pejabat Pembuat Akta Tanah* or Land Titles Registrar) having an office at the Mirai Trade Center Ruko Complex Block A No. 5, Jl. Raya Boyolali-Klaten Km. 1 Kemiri, Mojosongo, Boyolali namely Mr. Nurhidayat Cahya Purnama, S.H., M.Kn.

The data collection method used in this study was carried out in two ways. The first way is to do a literature study, namely by studying, reviewing, and reviewing legal materials in the form of primary, secondary, and tertiary legal materials. In addition to this method, a second method will be conducted, namely interviews. Once collected, the data will be analyzed using a qualitative descriptive method. The data obtained will be qualified according to the research problem. After that, the data will be described by analyzing the data obtained from the research results.

## 3 Results and Discussion

The credit agreement is the main agreement that contains the rights and obligations of the parties to the agreement. Because lending is an act that always contains risk, collateral is needed to minimize risk so that the credit that has been given can be returned on time.

Collateral is not the main thing in an agreement, but it is important because Article 1 No. 23 of the Banking Law explains that collateral is a guarantee given by debtor customers to banks to obtain credit facilities. The guarantee is an anticipatory step that the bank can take because if the debtor defaults, the bank can withdraw the funds that have been distributed by executing the object of the guarantee in the credit agreement. So, it can be said that the existence of a guarantee will provide certainty in paying off the debtor's debt if the debtor defaults or goes bankrupt.

One form of guarantee that is often encountered in the practice of granting credit is Mortgage Rights. A mortgage is a form of guarantee that can be imposed on the land, whether or not the following objects are integrated with the land. The holder of the Mortgage Guarantee will have a priority position for the settlement of certain debts. A land is an object in Mortgage Rights. It is because the land will always experience an increase in price from

year to year; besides that, the land is also easy to trade and difficult to embezzle because it has proof of ownership rights.

In providing guarantees, not all collateral objects belong to the debtor. Often, the debtor uses the property of a third party to guarantee the credit application he submits. This act may be carried out because the Mortgage Law does not mention prohibiting using land owned by third parties to guarantee debtors' debts. However, this is also not explicitly regulated in the laws and regulations. If traced based on the General Principles of Civil Law, it can be concluded that an act can be carried out as long as it is not prohibited by law and does not violate public order and morality.

By not regulating the use of land owned by third parties to guarantee debtors' debts, legal protection for third parties is also considered lacking. If traced later, third parties will get 2 (two) legal protections, namely preventive legal protection and repressive legal protection.

### **3.1 Legal Protection Obtained by Third Parties**

Legal protection is an effort to protect a person's interests by allocating power to him to act in the context of his interests [12]. The Mortgage Law has regulated legal protection for creditors if the debtor defaults. If it is related to the practice of giving credit in this study, the parties to the credit agreement are not only creditors and debtors but also third parties. It is because nowadays, sometimes debtors who apply for credit do not use their land as collateral objects in their credit agreements. The guarantee of land rights belonging to third parties to guarantee debtors' debts must be based on the approval and permission of the third party as the owner of the object of collateral. The approvals and permits are stated in the form of a written agreement to anticipate disputes in the future. Basically, legal protection is divided into (2) preventive legal protection and repressive protection.

#### **Preventive Legal Protection**

Preventive legal protection is legal protection provided to prevent disputes or violations from occurring. There are no arrangements regarding preventive legal protection that can be provided for third parties. Still, several conditions can be considered preventive legal protection for third parties.

Third parties' involvement in imposing Mortgage Rights can be considered a form of legal protection provided to third parties. It is because the involvement of a third party from the beginning to the completion of the Deed of Granting Mortgage (*Akta Pemberian Hak Tanggungan/APHT*) will provide awareness to the third party that their act of handing over assets to guarantee the debtor's debt will have legal consequences.

In imposing Mortgage Rights, the Notary/PPAT will explain the things listed in the APHT and the legal consequences that will occur later. If the third party still agrees to give the land to guarantee the debtor's debt, the granting of the mortgage must be carried out by the third party as the provider of the mortgage before a notary, and this is regulated in Article 5 paragraph (1) of the Mortgage Law. The procedure for granting a mortgage with land owned by a third party is preceded by a promise to grant a mortgage as collateral for the debtor's debt in the main agreement. Suppose a third party guarantees the land to the bank as a guarantee for the repayment of the debtor's debt. In that case, the third party as the owner of the land rights will later participate in signing the Power of Attorney for Granting Mortgage Rights (from now on referred to as SKMHT or *Surat Kuasa Membebankan Hak Tanggungan*) together before a Notary/PPAT.

A credit agreement deed can also be a protection for third parties because the deed will explain the parties involved, the amount of money to be paid, the due date of payment, and detailed information about the collateral used to guarantee the debtor's debt. In making the credit agreement deed or SKMHT and APHT, the Notary/PPAT must prioritize the authenticity of the data because if the Notary/PPAT is negligent and violates the provisions for making SKMHT and APHT,, the Notary/PPAT may be subject to administrative sanctions. This is following the provisions of Article 23 of the Mortgage Law. This is also a form of protection for third parties [13].

With the formulation of Article 12 of the Mortgage Law, there will be 5 (five) days. The common case provides third-party protection. The article explains the prohibition of granting a mortgage which contains a promise if the debtor defaults. Then the creditor by law will become the owner of the object of the mortgage, and if in the granting of the mortgage there is still such a promise, the credit agreement is considered null and void by law.

### **Repressive Legal Protection for Third Parties**

Repressive legal protection is the legal protection given after a dispute or violation occurs. If the debtor is found to be in default, according to what was agreed, the creditor can execute the object of the guarantee. Because the third party has approved to guarantee the debtor's debt using his land rights, if the debtor defaults, the execution of the object of the guarantee will continue as it should. Upon executing the guarantee object, a third party may file a fight and/or lawsuit to the court as a form of repressive legal protection.

The submission of such legal remedies also does not guarantee that the execution of the object of the guarantee will be cancelled. After an attempt is made, the court must follow up and determine the ownership status of the mortgage, cancel and/or delay the execution, and instruct the bank to return the object of collateral to a third party as the legal owner [14–16].

Based on the Circular Letter of the Supreme Court of the Republic of Indonesia (SEMA RI) No. 4 of 2016 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber of 2016 as a Guide to the Implementation of Duties for the Court. It is explained that the execution process or the auction is legally completed if the object of execution or the auction has been submitted to the Execution Applicant or the winner of the auction. Objections to the submission must be submitted as a lawsuit, not a fight.

### **3.2 Heading Legal Protection in Court Decision No. 134/Pdt.G/2020/Pn. Skt.**

In Court Decision No. 134/Pdt. G/2020/Pn. Skt, a debtor, filed a lawsuit against the creditor, PT. Bank Rakyat Indonesia Solo Baru Branch. The lawsuit was filed because the creditor executed the object of the guarantee even though the creditor did not feel he was in default of the credit agreement.

Both of them are bound to a credit agreement for ten years aimed at financing home ownership which is recorded in the Certificate of Ownership Number 642 and is registered in the names of Freddy Pakaya and Mrs Listyowati. In the decision, the object of the dispute is the land belonging to the debtor's parents as a third party; therefore, the party who has the right to file a lawsuit and/or resistance is a third party, but in this case, the debtor is the one who filed the lawsuit. In filing the lawsuit, it is carried out by himself without a special power of attorney from a third party as the owner of the mortgage object, which is stated in written form.

When the lawsuit was received and registered at the Registrar of the Surakarta District Court, namely on July 15, 2020, the auction process for the disputed object had not been completed, and the auction object had not been sold, so if it is based on SEMA RI No. 4 of 2016 concerning the Enforcement of the Formulation of the Results of the 2016 Supreme Court Plenary Meeting as a Guide to the Implementation of Duties for the Court, legal remedies that can be taken by third parties are resistance efforts.

After going through the trial, it was revealed that the debtor had not carried out his obligations since November 2019. Therefore, it is clear that the debtor has defaulted. The case is also considered to be lacking in parties (*plurium litis consortium*) because the plaintiff carried out the filing of this lawsuit without a special power of attorney given by a third party as the owner of the mortgage object to the plaintiff, namely the debtor or the law office handling this case.

By the time the object of the dispute has been auctioned and sold, on August 6, 2020, the auction's winner should have been Ms Monica Octaviany, also a party to this case. The non-participation of the auction winner in litigation is also why the lawsuit contains a formal defect of the parties (*plurium litis consortium*). Due to these reasons, the bank won this case because the plaintiff's claim was unacceptable (*Niet ontvankelijke verklaard*). The plaintiff is also responsible for paying court fees during the lawsuit being processed in court.

#### 4 Conclusion

Based on this explanation, it can be concluded that the use of land owned by third parties to guarantee debtors' debts may be carried out. Still, there is no clear regulation regarding the use of land owned by third parties to guarantee debtors' debts, and this causes legal protection for third parties to be considered minimal.

However, some circumstances can be considered legal protection for third parties. Legal protection obtained by third parties can be divided into 2 (two) preventive and repressive legal protection. Preventive legal protection can be obtained when a third party is present in imposing Mortgage Rights; doing a detailed deed following the authenticity of the data can also provide preventive legal protection for third parties. While repressive legal protection can be carried out after the execution of the mortgage object is carried out by submitting an attempt to fight or a lawsuit to the court, in submitting these efforts, a third party must be able to explain the reason for the submission of the effort.

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