

The Nature of the Difference in the Validity Period of the Power of Attorney to Impose Mortgage Rights

A.A. Gde Wahyu Anggara; Moch. Isnaeni; Endang Prasetyawati; Krisnadi Nasution

Doctoral Program, Faculty of Law, University of 17 August 1945 Surabaya, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v9i4.3715>

Abstract

The regulation regarding the difference in the time limit for the validity of the Power of Attorney to impose Mortgage Rights (SKMHT) which is regulated in Article 15 of Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land gives birth to a vague norm (vague norm), in particular in the provisions governing the SKMHT deadline that is valid until the end of the main agreement, because with the given period of time it seems there is no obligation to follow up the SKMHT process to the Deed of Granting Mortgage Rights (APHT). This study will analyze the nature of the difference in the period of SKMHT for certain loans. This research is a normative legal research using a statutory approach, a conceptual approach, a historical approach and a philosophical approach. The results of the research conclude that the provisions for differentiating the period of SKMHT for certain loans are intended to facilitate the implementation of small-scale loans but on the other hand ignore legal certainty. The existence of these provisions places creditors in a position that is prone to being harmed in the event of a blockage on the object that is used as collateral. Such a condition has a legal consequence that the creditor cannot become a preferred creditor anymore due to the inability to install Mortgage Rights.

Keywords: *Power of Attorney to Impose Mortgage; Term; Certain Credit*

Introduction

In banking practice in Indonesia, lending is generally followed by providing guarantees by credit applicants, so credit applicants who cannot offer guarantees find it difficult to obtain credit from banks. In general, in every agreement made by the parties between creditors and debtors, as well as bank credit agreements, of course, the creditor has made a prior assessment of the prospective customer as a debtor later on, as stipulated in the banking law known as 5 C. If the bank after examining the prospective debtor is deemed worthy according to the bank's assessment, the bank will determine that he will be the customer. A debt agreement is made, known as a bank credit agreement.

The function of the guarantee as one aspect of the assessment in credit analysis is a means of security against the possibility of a debtor not repaying the credit he received. In credit implementation, collateral in immovable objects or land is the most accepted guarantee by every bank because the land has a high economic value and will not experience a decline in value. This is understandable because if credit is released without any collateral/collateral, then the risk will be very large because if the business

financed by the credit fails or suffers a loss and the debtor is no longer able to repay the loan, the bank as the creditor will be at a loss, due to bad credit.

The promulgation of Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (UUHT) is an answer to the development of the World of Trade and Banking, which urgently requires the existence of a Guarantee Rights Institution that is strong and capable of providing legal certainty for investors. Party in the Distribution of Banking Funds through Banking Credit which contains fairly high risk. Therefore, we need a Guarantee Rights that can provide a strong guarantee and have legal certainty. Protection and provision of balanced legal certainty in UUHT are given to creditors, debtors, mortgage givers, and related third parties. This can be seen from the statement that Mortgage Rights have the characteristics of material rights, which can be defended against third parties, always follow the object in the hands of whoever the object is in (Droit de Suite), it is easy and sure to carry out its execution, and provides a preferred position to creditors.

The existence of UUHT aims to provide a basis for the enactment of a strong guarantee institution, namely Mortgage Rights. The presence of UUHT, among others, regulates the position of the Power of Attorney to impose Mortgage Rights (SKMHT) as stated in Article 15 UUHT, which provides the opportunity for mortgage givers to use SKMHT. To prevent protracted power of attorney and achieve legal certainty, SKMHT is limited in time. Article 15 paragraph (3) of the UUHT stipulates that for land that has been registered, SKMHT must be immediately followed by making APHT within 1 (one) month after it is granted. Meanwhile, Article 15 paragraph (4) of UUHT stipulates that for land that has not been registered, SKMHT must be immediately followed by making APHT within 3 (three) months after it is granted.

Article 15 paragraph (5) UUHT stipulates exceptions to the validity period of SKMHT for certain loans. The existence of this exception is intended to support the implementation of development and facilitate the interests of the economically weak groups for the provision of certain loans determined by the Government, such as program loans, small loans, housing loans, and other similar loans. These provisions invalidate the time limit for the validity of the SKMHT as referred to in Article 15 paragraph (3) and Article 15 paragraph (4) of the UUHT. The determination of the time limit for the validity of the SKMHT for certain types of credit is carried out by the Minister in charge of land affairs after coordinating and consulting with the Minister of Finance, Governor of Bank Indonesia, and other relevant officials.

To carry out the provisions of Article 15 paragraph (5) of the UUHT, its implementation is further regulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 22 of 2017 concerning Stipulation of Deadline for the use of Power of Attorney to impose Mortgage Rights to Guarantee the Repayment of Certain Credits (hereinafter written Permen ATR/Ka. BPN No. 22 Th. 2017).

The difference in the time limit for the validity of the SKMHT, of course, will also bring legal consequences for the recipient of the SKMHT (in this case, the creditor) if the SKMHT is not followed up by making APHT, along with registration of mortgage rights at the Land Agency Office (BPN) to issue a Mortgage Certificate (Certificate of Mortgage Rights). SHT), if there is bad credit, the creditor does not have preference rights. The regulation regarding the difference in the time limit for the validity of the SKMHT gives birth to a vague norm (vague norm), especially in the provisions governing the SKMHT time limit, which is valid until the expiration of the main agreement because given the time period it seems there is no obligation to follow up the SKHMT process to APHT.

The validity of the SKMHT period difference, on the one hand does play a role in the implementation of development and facilitates the interests of the weak economic group, however, with

this difference, the legal protection aspect in binding the object of credit guarantees becomes unclear so that in this case there is legal uncertainty.

Methods

The present study uses a normative legal research method that is conducted in finding solutions for legal matters (Isnaini & Utomo, 2019). The research approach used is the statute approach, conceptual approaches, historical approach and philosophical approach.

Discussion

The Government is the holder of the mandate to carry out collective tasks in realizing justice and welfare and a good life order for the whole community. The state's role is treated in the instrument and functionalization of Islamic economic values in the legal aspects, planning, planning, management, and supervision. Therefore, the Government as the beneficial owner of economic resources is public, including production and distribution, and an institution that oversees economic life.

The existence of a Government is very important for humans so that human relations can be maintained properly. Humans are obliged to maintain harmony in all interactions, and the Government has an essential role in supporting this harmony. The Government has the right to interfere in the economic field by individuals, both to supervise the activities carried out by economic actors and to regulate matters related to the economy that is unable to be carried out by individuals (Manan, 2014).

Every citizen has the same rights and opportunities to be treated fairly by the state and fellow citizens. The state must play the principle of justice towards society, covering all sectors of life, from religion, education, health, law, and politics to the economy. In the economic foundation, justice is one of the important aspects of the economy. Justice can produce balance in the economy by eliminating the gap between owners of capital and those who need capital.

Muchsan stated that the functions/duties of the Indonesian state are:

1. Functions of security, defense, and order. Included in this function is the protection function of life, property rights, and other rights in accordance with those stipulated in the legislation.
2. Welfare function, including social service and social welfare, is all activities aimed at realizing public welfare and social justice for all Indonesian people.
3. Educational Function, including the task of general information, nation and character building, cultural improvement, and so on.
4. The function of realizing world order and welfare (Muchsan, 2000).

The activity of distributing credit to the public plays an important role in the life of commercial banks both in Indonesia and in the international banking world, considering the function of the bank as a party to collect funds and to be channeled them to parties who need funds, including in the form of credit where this is very helpful Government in providing public welfare.

Access to finance is a fundamental human right. Providing access to large-scale financing requires the banking sector. Without access to adequate financing, it is a barrier for micro and small business actors to increase their business and improve the quality of people's lives (Yunus, 2008). Banks as financial institutions also work based on public trust. Banks have an important role in people's lives, especially in terms of physical development with the availability of funds that can be used to meet

community needs. Banks play a role in protecting funds entrusted by the public and can channel and administer these public funds to productive business fields to achieve economic development targets.

Of the many business activities of commercial banks, lending is one type of banking activity. This is due to the large influence of credit on the life of the banking industry and the life of the monetary economy in general. Besides that, lending is a business that dominates the allocation of bank funds; the use of funds for lending reaches 70-80% of the bank's business volume (Siamat, 2005). However, it must be admitted that compared to the banking products and services offered, the income and profits of a bank are mostly sourced from continuous lending.

As a business-oriented financial institutions, banks also carry out various business activities. The most basic banking activity is buying money by collecting funds from the wider community. Then sell the money that has been collected by channeling it back to the community through the provision of loans or credit. There are various types of credit loans, one of which is productive credit. Productive credit is credit given to conduct business activities. Today, banks are starting to look at providing credit to MSMEs on the grounds that loans that are not too large will minimize the risk of the debtor being unable to pay because the loans for MSMEs are relatively small.

The bank/creditor has tried to obtain legal protection for the granting of credit. The documents (deeds) are arranged in such a way as to make it easier for creditors to obtain settlements if the debtor defaults. Special arrangements to protect the interests of creditors in lending by private banks are not explicitly regulated in the law. Protection for banks/creditors referring to Article 1131 of the Criminal Code is general protection, where all movable and immovable property belonging to the debtor, both existing and future, becomes a guarantee for the debtor's engagements. Likewise, Article 1132 of the Criminal Code states that "these goods are a mutual guarantee for all creditors against them, the proceeds from the sale of these goods are divided according to the ratio of their respective receivables unless there are valid reasons for taking precedence among the creditors."

General guarantees are less favorable for creditors, so it is necessary to hand over certain assets to be tied up specifically as collateral to repay debtors' debts so that the creditors concerned have a position that takes precedence over other creditors in paying off their debts. This kind of guarantee provides protection to creditors, and the agreement will explain this. Special guarantees provide a pre-emptive position (preferred) for the holder. So banks always ask for this special guarantee for every loan.

The presence of Mortgage Rights in Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) and UUHT can accommodate the needs of banking institutions as an effort to secure credit extended to the public. UUHT defines "Security Rights on land and objects related to land" in Article 1 paragraph (1) UUHT, as follows: as referred to in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, including or not including other objects which are an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors.

Based on the definition of Mortgage as stated in Article 1 paragraph (1) UUHT, it can be seen that Mortgage gives priority to certain creditors over other creditors. The particular creditor in question is the one who obtains or becomes the holder of the Mortgage Rights.

The owner himself must carry out the granting of mortgage rights, and this is in accordance with the general principle that the interested parties themselves must carry out legal action. But that doesn't mean it can't deviate if a situation demands it. A condition that requires it can be done because the rules allow it.

UUHT aims to provide a basis for the enactment of a strong mortgage institution, including regarding the position of the Power of Attorney to impose Mortgage Rights (SKMHT), as stated in

Article 15 of the UUHT, providing opportunities for mortgage givers to use SKMHT. Based on Article 15 paragraph (1) UUHT, SKMHT must be made with a notarial deed or a deed of the Land Deed Making Officer (PPAT) and fulfill the following requirements:

1. Does not contain the power to carry out other legal actions than impose mortgage rights.
2. Does not contain the power of substitution.
3. Clearly state the object of the Mortgage, the amount of debt and, the name and identity of the creditor, the name and identity of the debtor if the debtor is not the giver of the Mortgage (Tunggal, 2005).

SKMHT must be made under a special power of attorney. The special powers in question are:

1. If the mortgagee cannot present himself before the Land Deed Making Officer (PPAT).
2. SKMHT must be in the form of an authentic deed made by a Notary or PPAT.
3. The substance of the SKMHT is limited; that is, it only contains legal actions imposing mortgage rights, does not contain the power to sell, leases the object of Mortgage, does not contain the right to replace the beneficiary through transfer, clearly states the object of Mortgage, the amount owed by the debtor and the name and identity the creditor, the name and identity of the debtor, if the debtor is not a mortgagee, if the above conditions are not fulfilled, a power of attorney concerned is null and void (Hatta, 2020).

In the imposition of Mortgage Rights, the making of APHT is preceded by doing an SKMHT deed for the following reasons:

1. The cost of encumbering a Mortgage is quite expensive. The cost of loading the Mortgage is charged to the debtor so that the high cost burdens the debtor's finances.
2. Credit is small, and creditors feel no need to install a Mortgage immediately. Mortgage installation is only carried out if there are lousy debtor credit quality signs. By having SKMHT, creditors can charge Mortgage Rights without having to present a guarantor.
3. The certificate of land rights, which is the object of the Mortgage Rights, has not been issued when the credit is granted; it is still being completed.
4. To carry out a partial roya on land that has been encumbered with Mortgage Rights in practice is not easy, so the Bank avoids installing Mortgage Rights. Partial roya is required in the context of selling houses (with mortgage facilities built on land encumbered with Mortgage Rights).

To carry out development evenly, the government considers the existence of the weak economic group to obtain credit facilities to improve the level of community welfare. The government provides various kinds of facilities in relation to lending to the weak economy. The government, in this case, is trying to improve the welfare of the community through regulations that facilitate credit distribution for the weak economy.

As an embodiment of the government's role in improving people's welfare, provisions regarding SKMHT for certain loans are regulated in a regulation. The existence of this arrangement is intended to facilitate the disbursement of credit funds. The existence of SKMHT of a certain duration, one of which can be valid as long as the main agreement is still running, aims to facilitate credit in relation to the cost of making a guarantee deed. The existence of SKMHT that is valid until the end of the principal

agreement makes the cost of binding credit guarantees more affordable for creditors and debtors because if the debtor has good intentions and pays his credit on time, there will be no need to upgrade from SKMHT to APHT, which is the estuary of making APHT. This is intended to facilitate execution. Based on the explanation above, it can be concluded that the government has an essential role in the economy. The government is a medium to create a prosperous society by differentiating arrangements for the validity period of SKMHT, which is used concerning certain loans.

Conclusion

Based on the results of the discussion, it is concluded that the provisions for differentiating the SKMHT period for certain loans are intended to facilitate the implementation of small-scale loans but, on the other hand, ignore legal certainty. These provisions place creditors in a position that is prone to be harmed in the event of a blockage on the object that is used as collateral. Such a condition has a legal consequence that the creditor cannot become a preferred creditor anymore due to the inability to install Mortgage Rights. The provisions for the difference in the period of SKMHT for certain loans do not provide legal protection for creditors because SKMHT, which is not followed by the making of APHT and registration at the Land Office, does not give birth Mortgage Rights. The creditor only gets legal protection after the Mortgage is registered for this condition.

Suggestion

Furthermore, based on the conclusion, suggestions are also put forward that to avoid the potential for bad loans followed by the failure of creditors to execute the object of the guarantee, the regulation regarding the difference in the SKMHT period should be abolished, and general provisions for the validity period of SKMHT a maximum of 3 (three) months. The provisions for the difference in the period of SKMHT need to be abolished to provide more legal certainty. At this time, the cost of imposition of Mortgage is affordable and transparent, so it would be better for an object of guarantee to directly install the Mortgage.

Reference

- Hatta, H. I. W. U. (2020). Perlindungan Hukum Bagi Kreditur Atas Obyek Jaminan Berupa Bangunan Tanpa Tanah Dalam Perspektif Asas Pemisahan Horizontal. *Jurnal Selat*, 7(1), 50–64. <https://doi.org/10.31629/selat.v7i1.1521>
- Isnaini, H., & Utomo, W. (2019). The existence of the notary and notarial deeds within private procedural law in the industrial revolution era 4.0. *International Journal of Innovation, Creativity and Change*, 10(3), 128–139.
- Manan, A. (2014). *Hukum Ekonomi Syariah*. Kencana.
- Muchsan. (2000). *Sistem Pengawasan Terhadap Perbuatan Aparat Pemerintah dan Peradilan Tata Usaha Negara di Indonesia*. Liberty.
- Siamat, D. (2005). *Manajemen Lembaga Keuangan* (5th ed.). Fakultas Ekonomi Universitas Indonesia.
- Tunggal, H. S. (2005). *Undang-Undang Hak Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah Dan Perturan Pelaksananya*. Harvarindo.
- Yunus, M. (2008). *Grameen Bank at a Glance*. Grameen Communications.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).
