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An analysis of Indonesia's constitutional court decision number 18/PUU-XVII/2019 on the execution of fiduciary objects

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Abstract
A fiduciary is a transfer of ownership of an object by a trust with the rule that the thing that its right is transferred is kept under the owner of the thing. The position of the holder of the fiduciary owner is protected by the Law of Fiduciary in which the creditor has a right to execute towards the fiduciary object in case the debtor violates the agreement. It is not fully applied by the decision of the Constitutional Court Number 18/Puu-Xvii/2019 on Fiduciary that nullifies Article 15 (2) and (3) of the Fiduciary Law. The Constitutional Court Decision states that the execution can be done as long as the agreement is regulating on this, and there is no challenge from the debtor. This rule is not following the principle of *droit de suite* of the fiduciary trustee. This is doctrinal legal research that is done by reviewing the kinds of literature that are laws relating to the fiduciary, books, journals, and other relevant works of literature.

Keywords: execution, trustee, fiduciary

Introduction

Financial institutions are commercial institutions whose main purpose is to make a profit. Therefore, it is very risky if financial institutions provide loans without being followed by a guarantee agreement.[1] The guarantee agreement is a follow-up agreement or is called a complementary agreement or assessor. As a follow-up agreement, a new guarantee agreement exists if there is a principal agreement first. In this case, the principal agreement is an agreement to obtain a loan or credit facility from a bank financial institution or other financial institution.[2] To guarantee the implementation of the achievements in the main agreement as agreed, a further agreement is needed, namely a guarantee agreement whose arrangements are outlined in the guarantee law.

The term guarantee law comes from the Dutch word "zekerheid" or in English known as *security of law*.[3] Sri Soedewi Masjhoen Sofwan said the law of guarantee is "the law that regulates juridical constructions that allow the granting of credit facilities, by pledging the objects purchased as collateral".[4] With this kind of regulation, it is hoped that it will provide legal certainty for financial institutions in providing loans to borrowing customers. J. Satrio said that the law of guarantee is "a legal regulation that regulates the guarantees of a creditor's receivables against a debtor".[5]

The law recognizes material/material guarantees and immaterial guarantees. Sri Soedewi Masjchoen Sofwan explained that what is meant by material guarantees is "collateral which is an absolute right to an object, which has the characteristics of having a direct relationship to certain objects, can be defended against anyone, and always follows the object in the hands of whoever the object is. In the law, this principle is known as the "droit de suite" or "zaaksgevolg" principle, which is a right that continues to follow the owner of the object, or a right that follows the object in the hands of whoever the object is in.[6] One form of material security is a fiduciary guarantee. Sri Soedewi Masjhoen Sofwan said the fiduciary was born due to the provisions governing the pawn there were many shortcomings, unable to meet the needs of the community which continues to experience development. [7]

Fiduciary arrangements are contained in Law Number 42 of 1999 concerning Fiduciary. Article 1 paragraph (2) of this Law states that fiduciary guarantees are "guaranteed rights to movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage which remains in the control of the fiduciary giver, as collateral for the repayment of certain debts, which gives priority to the fiduciary recipient over other creditors. In a fiduciary guarantee, the debtor only submits the object of collateral to the creditor based on trust or constitutum possessorium which in the legal dictionary is defined as "Submission by continuing to control the object".[8] By law, the object has become the property of the creditor but the control remains in the hands of the debtor.

This construction is very helpful for debtors in running their businesses. This condition becomes reversed when the debtor neglects to carry out his achievements. The debtor objected to the execution or auction of the object of collateral as regulated in Article 29 of the Fiduciary Law under the provisions of Article 15 paragraphs (2) and (3). However, with the issuance of the decision of the Constitutional Court No. 18/PUU-XVII/2019 which

annuls Article 15 paragraph (2) and paragraph (3) of the Fiduciary Law has changed. Thus, it is worth analyzing to see how the concept of execution of fiduciary guarantees is after the Constitutional Court Decision Number 18/PUU-XVII/2019.

Research Method

This is normative legal research. According to Johnny Ibrahim, normative legal research is a scientific research procedure to find the truth based on scientific logic from the normative side. The normative side here is not limited to laws and regulations.[9] In this study, various primary legal materials were used as study materials, namely the Civil Code, Law Number 42 of 1999 concerning Fiduciary Guarantee, Constitutional Court Decision No. 18/PUU-XVII/2019, and Constitutional Court Decision Number 2/PUU-XIX/2021. The secondary legal materials used are in the form of Implementing Regulations which explain primary legal materials, research results, or writings in the form of scientific works, newspapers, and other reading sources, either obtained through print or electronic media. Dictionaries, be it from the Indonesian Language Dictionary or legal dictionaries, encyclopedias are tertiary legal materials. The technique of concluding is done deductively.

Results and Discussions

The discussion about the law of guarantees has existed since the Dutch era, precisely in the Civil Code known as general guarantees and special guarantees. General guarantees are still considered weak considering that creditors only have the position of concurrent creditors, not as independent or preferred creditors who have the right to material guarantees so that they have the position to be prioritized in paying off their receivables. Preferred creditors have special characteristics that are attached to the object of material guarantee or known as the Droit de Preference principle. This is one of the special characteristics of material security guarantees.[10] One form of material security is a fiduciary guarantee. Fiduciary comes from the Dutch language, namely "fiducie" which means trust. In English, it is called "fiduciary transfer of ownership".

Hartono Hadisoeprapto and M. Bahsan quoted in Shinta Andriyani's thesis, state that a guarantee is "something given to a creditor to create a belief that the debtor will fulfill obligations that can be valued in money arising from an engagement."[11] In contrast to a pawn, the agreement is only made in the form of a deed under the hand, it can even be made orally [12], The fiduciary guarantee of the agreement must be made with a notarial deed as regulated in Article 5 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Objects that are objects of Fiduciary guarantees must be registered (Article 11 paragraph (1) of the Fiduciary Law. This is considering the risks faced in the case of debtors defaulting are greater until finally the decision of the Constitutional Court Number 18/PUU-XVII/2019 concerning the Execution of Fiduciary Guarantees are issued. cancel the existence of Article 15 paragraphs (2) and (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees which regulates the execution of Fiduciary guarantees.

The agreement is the law for the parties. The meaning contained in it is that every achievement promised in the agreement must be carried out by the parties. If the debtor defaults, the creditor must make a subpoena as regulated in Article 1238 of the Civil Code which states that the new debtor can be said to be in default or negligent to perform his obligations with a warrant or similar deed, or seen from the strength of the agreement itself which states that the debtor is considered expressly negligent. with the passage of the specified time. The article requires that the default does not occur suddenly. The Civil Code regulates several consequences of default, namely: the creditor can demand the fulfillment of the engagement, demand compensation, demand the fulfillment of the engagement with compensation, demand termination of the engagement, demand termination of the engagement with compensation [13], In a fiduciary guarantee, the object of the guarantee will be withdrawn by the creditor to be sold or auctioned to pay off the debt. In other words, the creditor will execute the fiduciary guarantee object.

Provisions regarding the execution of fiduciary guarantees are contained in Articles 29 to 34 of the Fiduciary Law. There are three ways to execute a fiduciary guarantee, namely:

Execution of the executorial title as referred to in Article 15 paragraph (2) by the fiduciary recipient;

The sale of the object of the guarantee by the fiduciary recipient through a public auction as well as taking the settlement of his receivables from the proceeds of the sale;

Underhand sales must be made based on the agreement of the fiduciary giver and the recipient of the highest price can be obtained.

The sale is carried out under the procedure, namely after 1 (one) month has passed since it has been notified in writing by the giver and or recipient of the fiduciary to interested parties and announced in at least 2 (two) newspapers circulating in the area concerned. [14] The provisions stipulated in Article 29 cannot be implemented again immediately considering the provisions in Article 15 paragraphs (2) and (3) have been canceled by the Constitutional Court Decision Number 18/PUU-XVII/2019 concerning the Execution of Fiduciary Guarantees. The words "For the sake of Justice Based on the One Godhead" which contain the same executorial power as court decisions are no longer there. The decision of the Constitutional Court states that the execution or on hand execution can be carried out if there is an agreement in the agreement for it and the debtor does not object to the execution or on hand execution.[15] If this provision is met, the case must be settled before the court, unless a mutual agreement is reached between the parties. Settlement through the courts causes the weak existence of the droit de suite principle in fiduciary guarantees.

Conclusion

To sum up, the decision of the Constitutional Court gives caution to creditors that the execution of fiduciary guarantees can no longer be carried out based on the executor's power through or on hand execution executions as stipulated in Article 15 paragraphs (2) and (3) of the Fiduciary Law.

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