

## Legal consequence of binding a guarantee on land rights with a sale and purchase agreement when the debtor defaults

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### Abstract

This study aimed to examine and analyze the legal consequences of binding land rights guarantees with a Sale and Purchase Agreement when the debtor defaults. The method used in this study was normative legal research with secondary data from primary legal materials and secondary legal materials related to research. The result of this study showed that the bonding of debts and receivables in the form of land rights with the Sale and Purchase Agreement had violated the provisions in Article 1 number 1 of Law Number 4 of 1996 concerning Mortgage Rights to Land and Objects related to Land or often called Mortgage Rights Law. It stated that guarantees imposed on land rights are carried out with Mortgage Rights. Based on the terms of the agreement validity, the collateral for the debts and receivables in the form of land rights with the Sale and Purchase Agreement did not meet the objective requirements. This is because of a forbidden cause; the Sale and Purchase Agreement's legal consequences were null and void by law. Therefore, if the debtor was not interpreted in the debt agreement, the name of the certificate from the debtor to the creditor can be made based on the Sale and Purchase Agreement and cannot be pursued through the auction process as stated in Article 6 of the Insurance Rights Law. In the absence of a Mortgage, the security right over Land for certain repayment did not have a position that took precedence over other creditors.

**Keywords:** legal consequences, guarantee, sale and purchase agreement

### Introduction

Human life as social beings interacting with each other can be manifested in a civil relationship. In this case, the civil relationship between one party and another party binds themselves to one another in an engagement. Basically, an agreement in accordance with Article 1233 of the Civil Code arises because of an agreement of one thing. An agreement is the consent of two or more people binds themselves to carry out something in the field of wealth <sup>[1]</sup>. An agreement begins with a legal relationship between two or more legal subjects regarding rights and obligations; on the one hand, it deals with the other's rights and obligations. Common agreements in the community include a debt agreement and a Sale and Purchase Agreement.

The Sale and Purchase Agreement itself is an agreement made based on a deal between the parties in order to regulate the interests of the parties, namely the seller and the buyer, which arise due to conditions or elements that have not been fulfilled in the buying and selling process. The Sale and Purchase Agreement has not been regulated in the law, and in practice, the Sale and Purchase Agreement can be made by notarial deed or underhand. In making the Sale and Purchase Agreement deed, the notary relies on the provisions of Article 15 paragraph (2) letter f of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Position (hereinafter referred to as UUJN), which gives authority to notary to do deeds related to land <sup>[2]</sup>.

The making of the Sale and Purchase Agreement is not based on buying and selling land but on a debt agreement. In society, there is no debt, both small and large amounts. Accounts payable legal relationship can be carried out by anyone who can do so, for example, account payable

between individuals. The debt and credit agreement is included in the borrowing and lending agreement, as stipulated in Article 1754 of the Civil Code (Civil Code) stated that the loan and loan agreement is an "An agreement, where one party gives the other party a certain number of items which have been used upon the condition that the latter party will return the same number of items of the same kind and condition".

The object of the borrowing and lending agreement based on Article 1754 of the Civil Code can be in the form of goods used up due to usage, such as money. Money, which functions as a medium of exchange, can be categorized as the object of a lending-borrowing agreement because it includes goods used up due to usage <sup>[3]</sup>. In accounts payable, there are two parties, namely the party that lends money and the party that receives the money loan. The term used in the debt and credit agreement for the party that provides the loan is creditor, while the party receiving the loan is called a debtor <sup>[4]</sup>.

In general, the legal relationship between creditors and debtors makes a debt agreement by requiring a debt guarantee. Self-guarantee can be divided into 2 types: material guarantee (material) and immaterial guarantee (individual) <sup>[5]</sup>. Debt collateral can be provided in the form of land rights, which are collateral for immovable objects.

Land rights guarantee institution is Mortgage Rights as regulated in Law Number 4 of 1996 concerning Mortgage Rights to Land and Objects related to Land (hereinafter referred to as the Mortgage Rights Law). Mortgage Rights are collateral for Land for the settlement of certain debts, which give priority to certain creditors over other creditors. The creditor's purpose takes precedence over other creditors; namely, if the debtor is in default, the creditor holding the

mortgage may sell the collateral through a public auction to pay off the debtor's debt. This priority position certainly does not affect the repayment of debtors' debts against other creditors <sup>[6]</sup>.

However, there are irregularities in the legal process in which creditors and debtors make other legal actions, namely in their debt and receivable agreements, binding guarantees of their land rights with a Sale and Purchase Agreement accompanied by the power to sell. The creditor and debtor are parties to the Agreement. The Sale and Purchase Agreement contains the debtor and creditor, which are made with the background because of the debt and credit agreement, not the sale and purchase of land. The bonding of debt and credit collateral in land rights is carried out using a Sale and Purchase Agreement. Its existence is not regulated in the laws and regulations, considering that the land rights guarantee institution is with a mortgage. Therefore, this will affect the legal consequences of binding collateral for land rights with the Sale and Purchase Agreement when the debtor defaults.

Based on the description above, the researcher is interested in conducting a study entitled "Legal Consequence of Binding a Guarantee on Land Rights with a Sale and Purchase Agreement When the Debtor Defaults." The researcher review and analyze one research question "How is the legal consequence of binding a guarantee on land rights with the Sale and Purchase Agreement when the debtor defaults?"

### Research Methods

In this study, the researcher employed doctrinal law research or also known as normative law research. This study was conducted to obtain conformity between the problem under study and the values or rules used as references. Besides, it was done by examining library materials as primary legal materials. This normative research can be library research or document study because it was mostly conducted on secondary data in the library <sup>[7]</sup>. This study used secondary data in the form of legal materials, namely:

1. Primary Legal Materials are authoritative legal materials, which mean that they have authority. Primary legal materials consist of legislation, official records or minutes in the making of legislation, and judges' decisions <sup>[8]</sup>. In this study, the primary legal materials included:
  - a. Code of Civil law;
  - b. Law No.5 of 1960 concerning Basic Agrarian Regulations;
  - c. Law No. 4/1996 concerning Mortgage Rights to Land and Objects related to Land;
  - d. Government Regulation Number 37 of 1998 concerning Regulations on the Position of Land Deed Making Officials;
  - e. Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Public.
2. Secondary Legal Materials are legal materials that explain primary legal materials <sup>[8]</sup>. Secondary materials are in the form of all publications on law, including textbooks, legal dictionaries, legal journals, and comments on court decisions. The researcher used secondary legal materials in the form of legal books, scientific journals, and papers related to the Sale and Purchase Agreement, accounts payable agreement,

guarantees, and other secondary legal materials related to the research.

This study applied qualitative analysis, which was based on the sound of the provisions of the law. Then it would be linked to the theory obtained from the literature study so that the answers to the problems studied and analyzed were obtained using deductive thinking methods, namely thinking patterns originated from submission of the major premise (general statement) then minor premise (special in nature) was submitted. According to Philipus M. Hadjon (as cited in Peter Mahmud Marzuki), the major premise is the rule of law in logic for legal reasoning. In contrast, the minor premise is legal facts. From these two things, a conclusion can be drawn <sup>[9]</sup>.

### Results and Discussion

The accounts are payable legal relationship can be carried out by anyone who can do so, both between individuals and banks. In the lending and borrowing money activities that occur in the community, it can be noted that, in general, a loan guarantee is often required by the lender to the recipient of the loan. Debt collateral can be in the form of goods (objects) so that it is collateral for materiality and/or in the form of a debt guarantee so that it is an individual guarantee. Material guarantees provide property rights to the guarantee holder <sup>[10]</sup>. Debt guarantee is the giving of confidence to the creditor on debts payment that has been given to the debtor. This happens because of the law or the issuance of an assessor agreement of the principal agreement in the form of an agreement that issues debts <sup>[11]</sup>. The subject in the guarantee law is a debtor. The debtor is the party who is obliged to pay debts to the creditor, while the creditor is the party entitled to receive payments from the debtor. The creditors are divided into 2 (two), namely:

1. Concurrent creditors are creditors who collectively receive debt repayment based on the size of the receivables. Thus, they have the same position in paying off debts without prioritization.
2. Preferred creditors are creditors who have the right to take precedence in paying off debts. Thus, because of the law and the receivables' nature, they are paid in advance from other creditors.

This guarantee/collateral usually has functions, namely <sup>[12]</sup>:

1. As a debt/credit payer, if the debtor cannot pay off his debt/credit by selling/auctioning collateral/guarantees.
2. As a result of the first function, it is one factor determining the amount of credit extended (except in special cases, such as program credits, etc.).
3. As a motivator for debtors.

Regarding the collateral for debt and credit in the form of land rights, it can be done with a guarantee institution for mortgage rights as referred to in Article 1 number 1, namely: "Mortgage is an imposed security right on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, following or not including other objects which are an integral part of the land, for the settlement of certain debts, which gives priority to certain creditors over other creditors".

The emergence of a mortgage is only possible if it has been previously agreed in the debt-receivables agreement and becomes the basis for granting debt guaranteed by the mortgage given a security right to the creditor. This is based

on Article 10 paragraph (1) of the Mortgage Rights Law "granting mortgage rights is preceded by a promise to provide security rights as collateral to pay off certain debts, which are outlined in and are an integral part of the related debt agreement or agreement others who caused the debt".

Meanwhile, the mortgage giver itself will be carried out by making a separate agreement by the Land Deed Making Official (PPAT) in the form of a Deed of Granting Mortgage Rights as explained in Article 10 paragraph (2) of the Mortgage Rights Law, which states "granting of mortgage rights is done by making a deed provision of mortgage rights by PPAT in accordance with the applicable laws and regulations." It is known that there is a need for a debt agreement that precedes the Deed of Granting Mortgage Law, which is to remember the nature of the mortgage as an accessory agreement of the parent agreement in the form of a debt-receivable agreement<sup>[13]</sup>.

However, in practice, there is still a binding of collateral for debts and receivables in the form of land rights carried out with a Sale and Purchase Agreement with a notary deed, not by doing a Deed of Granting Mortgage by Land Deed Making Official (PPAT). This action still occurs in the community because it is more effective and procedurally; it is easier not to complicate things if the collateral object will be sold when the debtor defaults or breaches his/her promise.

The Sale and Purchase Agreement is an agreement between the seller and the buyer before the sale and purchase carried out due to the elements that must be fulfilled for the sale and purchase. In the case of the Sale and Purchase Agreement of land rights, the problem that may arise due to the unfulfilled elements of the sale is the land certificate that does not yet exist. This is because it is still in process at the Land Office, or there has been no payment of tariffs or taxes imposed on the sale and purchase of the land. Besides, it has not been able to be paid either by the seller or by the buyer. In the Sale and Purchase Agreement, the parties who will conduct the sale and purchase are already bound and have the rights and obligations to fulfill the agreement as agreed in the agreement<sup>[14]</sup>.

In the law of the agreement, Sale and Purchase Agreement itself is an agreement born because of the principle of freedom of contract according to the provisions of Article 1338 of the Civil Code. Based on the provisions of Article 1320 of the Civil Code regarding the validity conditions of an agreement, four conditions are required in making an agreement, namely:

1. To agree with those who bind themselves;
2. The ability to make an engagement;
3. A certain thing, and;
4. A lawful cause.

The agreement that binds themselves means that the parties who agree have agreed or agree with their will or mutually agree with each other's choice, which is born by the parties with no coercion, error, and fraud. It is an agreement that can be expressed explicitly or tacitly<sup>[15]</sup>. The second requirement is the ability of the parties to make an engagement mutually. In connection with this, Article 1329 of the Civil Code states that every person can make engagements if he/she is not declared incompetent by law. People who are not capable of making an engagement are mentioned in Article 1330 of the Civil Code; they are people who are not yet mature, those who are placed under

interdiction. The third requirement is that the agreement must be about certain things. In this case, it is regarding the object of the agreement or the subject of the agreement. Based on Article 1333 of the Civil Code, an agreement must have the principle of a slightly determined item. Besides, it is not an obstacle that the quantity of goods is not determined/certain, provided that the amount can then be determined or calculated. The fourth requirement is regarding legalized causa. The meaning of causa is the content and purpose of the agreement itself. The meaning of causa, which is not legalized, is contrary to law, decency, or public order<sup>[16]</sup>. The first two requirements are called subjective conditions. They concern the people or subjects who agree, while the last two requirements are called objective conditions. It is because they relate to the agreement itself or the object of the legal act committed<sup>[17]</sup>. If the objective requirements are not met, then the agreement is null and void. It means that an agreement is never born from the beginning, and there is never an engagement. The purpose of the parties who agree to give birth to a legal engagement is to fail. Thus, there is no basis for suing each other in front of the judge. If the subjective requirements are not met, then the agreement is not null and void, but one of the parties has the right to request that the agreement be canceled. The party that can request cancellation is the incompetent party or the party who agreed not freely. Thus, the agreement that has been made is also binding, as long as it is not canceled (by the judge) at the request of the party entitled to request the cancellation. Therefore, such an agreement's fate is uncertain and depends on a party's willingness to comply with it. He/she is always threatened with cancellation<sup>[18]</sup>.

According to the researcher, although the position of the Sale and Purchase Agreement itself in the law of the agreement is an agreement born because of the principle of freedom of contract based on the provisions of Article 1338 of the Civil Code, the agreement made does not violate the law, public order, and morals. The Sale and Purchase Binding Agreement made by the debtor and creditor itself aims to bind the debt and credit collateral in the form of land rights belonging to the debtor, not because there will be a sale and purchase of land. Judging by the agreement's validity in Article 1320 of the Civil Code, it does not meet the objective requirements because of a prohibited cause. Based on the provisions in Article 1335 of the Civil Code states that "an agreement without cause or has been made for false or prohibited causes, has no power (law). In other words, null and void". An agreement is made with a cause prohibited if the cause is contrary to both written and unwritten legal norms. In this regard, the provisions of Article 1337 of the Civil Code states "a cause is prohibited if it is prohibited by law or if it is contrary to good morals or public order."

A legal cause is related to the contents of the contract. The freedom to contract will be limited if the exercise of freedom of contract in a concrete situation is contrary to a higher level's interests. The law respects the principle of freedom of contract, but this freedom is limited because the agreement must have a lawful cause. In general, action will be declared prohibited because the act is contrary to law, decency, or public order<sup>[19]</sup>.

It can be stated that the agreement is made because of some false or forbidden reason. The Sale and Purchase Agreement is made based on a debt agreement as to the principal

agreement, not because a land sale and purchase will be carried out between the debtor and creditor. Therefore, Sale and Purchase Agreement is null and void, which means that from the beginning, an agreement has never been born, and there has never been an engagement. The creditors and debtors in bonding debt collateral in the form of land rights with the Sale and Purchase Agreement have deviated from the provisions of Article 1 number 1 of the Mortgage Law, which states that the collateral imposed on land rights is carried out with the Mortgage Rights.

In general, a creditor and a debtor make a Deed of Acknowledgment of Debt with a guarantee of land rights, a Deed of Granting Mortgage Right is caused, in which if at any time the debtor breaks his/her promise (default), it will be pursued through an auction process. This is in accordance with Article 6 of the Mortgage Rights Law, which states that "if the debtor breaches the promise, the first Mortgage Right holder has the right to sell the object of the Mortgage Right on his own power through a public auction and to collect his receivables from the sale proceeds."

The debtor can be said to be in default based on the provisions in Article 1238 of the Civil Code, namely "the debtor is negligent, if he/she, using a warrant or with a similar deed, has been declared negligent, or for the sake of his own agreement, if this stipulates that the debtor must be considered negligent by time has passed". Default (negligence or absence) of a debtor consist of four types:

1. Not doing what he/she is supposed to do;
2. Carrying out what he promised, but not as promised;
3. Doing what he promised but too late;
4. Doing something that cannot be done according to the agreement.

However, bonding debts and receivables collateral such as land rights with a Sale and Purchase Agreement accompanied by a power to sell as if there has been a sale and purchase agreement of land rights between the seller and the buyer that actually for the settlement of the debt or credit cannot be used as a basis for reversing the name of the certificate from debtors to creditor as debt repayment because it is a legal deviation that has violated the objective terms of the legal terms of the agreement. An agreement without a cause (causal) or has been made because of something false or forbidden is not legally enforceable. Besides, based on the provisions in the Mortgage Rights Law based on the Sale and Purchase Agreement and the power to sell that is in the Sale and Purchase Agreement, the sale of land from the debtor to the creditor cannot be carried out.

Deviation from the bonding of debt collateral, such as land rights, not doing a Deed of Granting Mortgage Rights, but through the Sale and Purchase Agreement, it can affect the creditor's position in a guarantee. Basically, the Mortgage Rights provides a special position and takes precedence for creditors who hold security rights over other creditors. It means that if the debtor is in default, the creditor, as the recipient of the Mortgage Rights, has the right to execute the object of the guarantee and is entitled to get the debt repayment. The creditor's position, which previously has the right to precedence, namely as a preferred creditor, has turned into a concurrent creditor. The concurrent creditors are creditors who collectively receive debt repayment based on the size of the receivables. Thus, without Mortgage

Rights, the land guarantees right for particular repayment does not have a position that takes precedence over other creditors.

General guarantees in the debt and credit agreement do not provide a sense of security and certainty for creditors for the debt given. In general guarantees, all creditors have the same position as other creditors; no creditor takes priority or is more privileged than other creditors. Article 1132 of the Civil Code explains that these items become joint guarantees for all those who account for them. The income from the sale of these objects is divided according to the balance, namely size of the respective receivables unless there is a reason among the debtors' legal precedence.

### Conclusion

The binding of the object for collateral for debts, such as land rights with the Sale and Purchase Agreement by the debtor and creditor, has violated the provisions in Article 1 number 1 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects related to Land (Law Mortgage Rights). It states that guarantees imposed on land rights are carried out with Mortgage Rights. Based on the terms of the agreement's validity, the collateral for the debts and receivables in the form of land rights with the Sale and Purchase Agreement does not meet the objective requirements, namely because of a prohibited cause. This is because the agreement has been made due to a false or prohibited cause, namely the Sale and Purchase Agreement made by the debtor and creditor based on their debt agreement, not because they are going to buy and sell land so that the legal consequences of the Sale and Purchase Agreement are null and void by law. The certificate is declared null and void in settlement of the debt if the debtor is not interpreted, the name of the certificate from the debtor to the creditor can be made based on the Sale and Purchase Agreement and cannot be pursued through the auction process as stated in Article 6 of the Mortgage Rights Law In the absence of a Mortgage Rights, then, the security right over land for certain repayment does not have a position that takes precedence over other creditors.

The suggestions of this study can be seen in the following:

1. For creditors, It is better if in binding collateral objects for debts and receivables such as land rights that can be charged with guarantees of Mortgage Rights as stated in Article 1 number 1 of Law Number 4 of 1996 concerning Mortgage Rights to Land and Objects related to Land to be able to protect creditor if the debtor is in default.
2. For debtors, in the debt and receivable agreement, they must be able to carry out their obligation to return the debt to the creditor and must be able to understand the provisions in the binding of the object of collateral for land rights with the imposition of Mortgage Rights so that they can provide a sense of certainty and the position of the land rights they own.
3. For notaries, there are parties in making a debt and credit agreement that will bind the object of the debt collateral, such as land rights with the Sale and Purchase Agreement, to explain and understand the Sale's position and Purchase Agreement itself. Thus, no action violates the provisions of the laws and regulations in binding the object of collateral for a debt or credit and providing legal certainty in binding the debt guarantee in the form of land rights.



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