

Parate Execution Secured Assets of Bad Credit In Indonesian Banking System

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ABSTRACT

Parate execution carried out by the bank as a repayment on credit customers are executions carried out solely by the holder of a security interest (the bank) without the assistance or intervention of the District Court, but directly through the Office of State Auction. In the execution of the auction debtors seek legal shortcomings with the proposition less sense of fairness. To analyze the problem is to use a grand theory of the welfare state, middle range theory legal justice and applied theory of development, because who wants to be resolved how the relationship between banks and customers to jointly provide welfare are not detrimental to either side, as well as on the legal certainty guaranteed by the legislation in carrying out the execution parate to the bank and find the concept of law in the resolution of bad loans for the purpose of legal development in the future. The Research method is normative legal research, to obtain the necessary data in connection with the period issues. The data used secondary data. Data analysis be done with juridical analysis of qualitative. From the research results can be obtained dispute bad credit not provide legal justice and certainty for creditors as they occur rejection of the auction by KPKNL result of the confiscation of the object of mortgage.

INTRODUCTION

Parate execution is the execution undertaken solely by the holder of security rights without the assistance or intervention of the District Court, but only by a support of the Office of State Auction, or in other words, Parate Execution implemented without asking the fiat execution or permission from the District Court (Poesoko 2007). From the provisions of contained in the the Act No. 4 of 1996 on Encumbrance of Land and Their Bodies Relating to Land execution of collateral can be done through public auction mechanism. In the Minister of Finance declared the auction is a sale of goods which is open to the public at a price quote in writing and/or oral increased or decreased to achieve the highest price which was preceded by the announcement of the auction. This auction sales can be made by the District Court, the State Receivables and Auction Service Office and Auctioneer, the private banks can do parate execution through the Auctioneer Private (Soewandy, 2005).

The provisions of Article 6 of Law No. 4 of 1996 on Encumbrance Right Over Land and Land-Related Objects, mentioning if the debtor breach of contract, the holder of the first Encumbrance has the power to sell the objects Encumbrance on its own power through public auction as well as taking repayment of its receivables from the sale proceeds. According to Article 1178 (2) of Civil Code, it is known as parate execute which is an immediate execution without executorial title. In other words, parate execute can be agreed and if the debtor defaults (when the principal is not repaid or interest payable is not paid), the creditor irrevocably authorized to sell the mortgaged property to take repayment. Based on Article 1211 Civil Code which is intended in the article are themselves creditor can sell directly through an auction without the assistance of the court to: a) sell in public; b) the local custom; c) the sale by auction, and therefore *beding van eigenmachtige verkoop* are outside the field of *recths voordering*, there should be no confiscations and ostensibly sells his own (Poesoko, 2007).

Parate execution is also possible in the case of a mortgage. However, there are differences between parate execution of encumbrance and parate execution of a mortgage. Mortgage holders only have the right to do parate execution had previously been agreed if such a thing was in deed granting the mortgage or under power of attorney installing a mortgage. While in the Encumbrance, the rights holder of a security interest to be able to do parate execution is a right granted by Article 6 Act Encumbrance. In oth-

er words, agreed or not agreed, that for legal rights possessed by holders of Encumbrance (Sjahdeni, 1999).

In the implementation which acts as the party carrying out the auction is the State Property and Auction Office in lieu of the Office of State Receivables and Auction Service the term changed since the enactment of the Minister of Finance No. 40/PMK.06/2007. In contrast to the District Court and the State Property and Auction Office, that the State Receivables and Auction Service who were born under the Act. In its development then was born the auction are intended to facilitate the creditors exercise their rights through the institution parate execution. However, since its birth auction house is not based on a law that in exercising its authority to conduct auction sales arising different interpretation and execution of the auction on bad credit guarantees, through the auction houses often have constraints (Soewandy, 2005). The presence of auction based on the Decree of the Minister of Finance No. 47/KMK.01/1996 in conjunction with No. 339/KMK.01/2000 in conjunction with No. 509/KMK.01/2000 on auction hall and the Ministry of Finance Regulation No. 118/PMK.07/2005 on Hall auction and last through the Minister of Finance Regulation No. 176/PMK.06/2010 on Auctioneer.

The weaknesses Encumbrance Act is not regulate in detail the execution of encumbrance as recognized under Article 26 Act Encumbrance is not even predict barriers to the auction execution of the collateral. A common phenomenon is legal certainty to collide with a sense of justice, such as the existence of obstacles in the auction due to the implementation of parate execution with rebuttal debtor and or also a third party, and if the auction can be implemented gave rise to a new problem, namely the objects auctioned cannot be controlled by the winner of the auction because it has not been emptied by the owner or a third party who occupied it.

Based on this phenomenon several problems can be formulated as follows: (1) How to dispute bad loans are bears encumbrance through execution parate associated with the rejection of the auction due to the sequestration of the object encumbrance ?; (2) How does the legal protection of the rights of creditors based on fairness in the implementation of the execution parate associated with the resistance of the debtor ?; (3) How does the concept of dispute resolution burdened with bad loans encumbrance through execution parate in the development of Indonesia's banking system as the purpose of the Welfare State ?

In conducting this research, according to the discussion topics, as an analytical tool, researchers will use the theory of welfare state (welfare state) as a grand theory, to answer an indication of the problem which is the subject of this research. Basically the concept of the Welfare State is an integral part of the concept of the State of Law. "As a state based on law, the national development should be carried out based on the law and be accountable according to the law based on Pancasila and the Constitution of 1945.

In addition to the concept of State of Law which is defined as a state of law, also known as the concept of the theory of welfare state (welfare state) is a concept that puts the state's role in every aspect of consciousness of the people for the realization of social welfare for all the people (Matutu in Antawidjaya, 2007), according to the concept this, the country's goal is for the welfare of all the people, which the state is a means to achieve prosperity and welfare for the people.

The concept of the Welfare State not only includes a description of a way of organizing welfare or social services, but also a normative concept or system ideal approach which emphasizes that everyone should acquire social service (welfare) as rights. Welfare state is closely associated with social policies that include strategy and the government's efforts in improving the welfare of its citizens, especially through social protection include social security (either in the form of social and social insurance), as well as social safety nets.

In the context of the Welfare State, according to Friedmann (1971), the country has four (4) main task, namely (i) the state as the provider (the state in its function as a servant), (ii) the state as regulator (the function of the State as a regulator). (iii) The state as entrepreneur (the function of the state as an entrepreneur). (iv) The state as umpire (function of the state as umpire). In doing so credit is given to improving the welfare of society. As mandated by Article 4 of Law No. 10 of 1998 on the Amendment Act Number 7 of 1992 concerning Banking. Indonesian Banking purpose is to support the implementation of national development in order to improve equity, economic growth and national stability towards improving people's welfare.

Accordingly, at the level of middle range theory as analytical knife to solve the problems faced in this research use Theory of Justice, combined with the

Theory of Social Justice, because justice is one of the pillars of law must always be upheld.

In the view of Aristotle, justice must be understood in the sense of similarity. But he distinguishes similarities in the two groups, the similarity of numerical and proportional similarity. Numerical similarity view humans are equal and are one unit, this view which later became a concept of equality and commonality that is shared by the Indonesian nation and forth in Article 27 of the Constitution of 1945 is all citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions. In proportional similarity, looking at each person be given what they are entitled according to his ability or achievement. Further Aristotle distinguishes justice into two kinds of distributive justice and commutative justice. Distributive justice is justice that gives each person rations according to his services, he does not demand that each person gets the same number of parts, not equality but a proportionality. This distributive justice applies in public law because it regulates public relations in particular that countries with public relations. While commutative justice is justice that gives each person as much by not considering the merits of individual (Darmodiharjo and Sidhartha, 2006), this applies justice in civil law and criminal law.

Both kinds of justice are equally susceptible to the problem of similarity or equivalence, in distributive justice, the important thing is that the same reward will be given for similar achievements, the commutative justice will arise a problem of inequality if the parties are not balanced performing feats for example in event of default or violation of the agreement. Rawls said the core of the difference principle is that social and economic disparities must be set in order to provide the greatest benefits for those who are most disadvantaged. Differences lead to inequality in the outlook of people to get welfare, income and authority. Meanwhile, the principle of fair equality of opportunity to show them the most disadvantaged because of lack of prospects have the opportunity to achieve prosperity, opinions or authority. According to Rawls these shall be given special protection. Rawls argued that justice is a social virtue of the first institution to be true of a system of thought. The existence of a community is dependent on formal regulation through laws and institutions supporters.

Furthermore, at the level of applied theory, be used Legal Theory Development of the theory that was

born because of interest Kusumaatmadja (in Mustafa, 2007) against Sociological Jurisprudence which essentially suggests that laws are made to pay attention to the law in the society (living law) written or not written (Salman, 1986), and good law are legal according to the laws of life in society. With a sense that law is reflects the values that live in the community (Rasyidi & Rasyidi, 2001).

Legal Theory actually Development is a concept that is built by combining the culture of Northrop Theory, the Theory of Orientation Policy (policy-oriented) and Pragmatic Theory of Law (Rasyidi and Putra, 1996). Development of Legal Theory as summarized by Rasyidi as follows: Legal Theory Development Mochtar = Mochtar Legal Theory (the Theory of Culture Northrop + theory "policy-oriented" Laswell & Mc. Dougal) + Legal Theory Roescoe Pound (a concept mechanical) + adjustments to the conditions Indonesia (Kusumaatmadja, 1989).

The theory is to look at the needs of the law as a means of development and the condition of social change in Indonesia, because the change is characteristic of people who are building and the role of law in development is to ensure that changes occur properly and regularly, then the law becomes a tool that cannot be ignored in the process development. As a means of development, law plays an important role for the success of the development, the law must be a means of paving the way and channel the will and needs of the community the desired direction (Kusumaatmadja, 1989). Thought "law as a tool of social Engineering" or law as an instrument of renewal of society is at the core of the idea of Pragmatic Legal Realism (Rasyidi & Rasyidi, 2001).

Differences of opinion between the concepts expressed by Pound with Kusumaatmadja concept is that the Pound with Northrop cultural philosophy and approach to "policy-oriented" Laswell-Mc Dougal process it further into a legal conception that sees the law as a means of renewal, as well as a means to ensure order and legal certainty (Dimyati, 2004). According to Pound, the law is not a static situation but a process, a momentum change naturally always in a state of growing (are dynamic not static) (Atmasasmita, 2009). So according to the law duty Pound is as social engineering, by Kusumaatmadja translated as renewal in society (Atmasasmita, 2009).

According Atmasasmita (2003), the law is not only recognized as a tool of social Engineering solely but also to be recognized as a tool of social bureaucratic Engineering. So that the law should be able

to make a difference to society leads to regularity, but the law also required to be able to change the behavior of the bureaucrat's law as a public servant. Therefore the legal connotations adequate should not only look at the law as a set of rules and principles that govern human life in society, but should also include institutions and processes necessary to realize the law is in fact (Kusumaatmadja, 2002). If the theory is applied in the execution parate which looked at the relationship between the creditor and the debtor, the law continues to grow both in terms of personnel and the public should be able to ensure order and tranquility in the credit agreement.

IMPOSITION OF THE ENCUMBRANCE GUARANTEE FOR LEGAL CERTAINTY

Principles of Security Rights for Legal Certainty

The word "Security" in of Statutory Regulations can be found in Article 1131 of the Civil Code and the elucidation of Article 8 Act No. 7 of 1992 on Banking, however in both the regulation is not explain what is meant securities. Nevertheless from the above two provisions can be known, that the securities are closely related to the debt problem. Usually the loan agreement to borrow money, lenders ask the borrowers to provide collateral in the form of a number of wealth for the benefit of debt settlement, when the after a period of time agreed turns debtor does not pay off.

Individual guarantees is an agreement between the indebted or creditor with a third which ensures fulfillment of the obligations of the debt or the debtor. As for the characteristics of individual guarantees, among others:

1. Has a direct relationship with a specific person.
2. Can only be defended against a particular debtor.
3. The entire assets of the debtor to be a guarantee of debt repayment for example *borgtocht*.
4. Give rise to individual rights which contains the principle of similarity or balance (concurrent) means not distinguish which occurs first receivables and receivables which ensues. Thus did not heed the order of occurrence because all lenders have the same status on the assets of the debtor are used as repayment of debt.
5. If the event of bankruptcy, the sale proceeds of objects assurance divided among the creditors by the magnitude of the individual receivable.

In Civil Code contained several provisions that may be classified as a security right. Which means, security right in the legal provisions of the Civil Code

are as contained in the Second Book which regulates the principles of security right institutions guarantee (Pawn and Mortgages) and in Book Three is regulates the debt responsibility. Several principles of law guarantee as stipulated by the provisions of the Civil Code is as follows: (a) Status of Assets Borrower. Article 1131 of the Civil Code regulates the notch hand borrower's property, that property the borrower is entirely a collateral (mortgage) on debt; (b) Status of Parties Lender. How the position of the lender against the borrower's property is can be considered from the provisions of Article 1132 of the Civil Code. Divided into two categories, namely: (1) that has a balanced position in accordance with the individual receivable; and (2) The position has precedence over other lenders under a legislation. (3) Prohibition of object ownership foretell collateral by the lender. The lender is prohibited foretell would have the object collateral if the borrower broken promises (defaults). Such provisions are governed by Article 1154 of the Civil Code on concerning pledges, and Article 1178 of the Civil Code on concerning mortgages.

POSITION ENCUMBRANCE RIGHT IN THE LEGAL LENDING

Juridically the provisions of Article 1 point 1 of The Law On Encumbrance Over Land And Land-Related Objects provides formulation sense Encumbrance as follows: "Encumbrance on land and objects related to land, hereinafter called the Encumbrance, is a security interest that is charged on land rights as defined in the Act No. 5 of 1960 on the Basic Regulation of Agrarian, following or not following other objects that are installed on the land, for the repayment of certain debt, which gives precedence to the position that certain creditors to other creditors. "

Later point 4 General Elucidation on The Law On Encumbrance Over Land And Land-Related Objects states in part: "Encumbrance is a guarantee of land rights for the repayment of certain debt, which gives precedence to a certain creditor position against other creditors. In a sense, that if the debtor injury appointment, creditors Encumbrance holder the right to sell through the auction of public land as collateral under the terms of the legislation in question, with the right to precede rather than other creditors."

Subject encumbrance covering provider and beneficiary or the security right mortgage holders, since it is said to be the subject because it involves the parties to the agreement mortgage; a) Giving Encumbrance, pursuant to Article 8 of The Law On Encumbrance Over Land And Land-Related Objects,

Encumbrance is the person or legal entity that has the authority to take legal actions against the relevant object security rights; b) Encumbrance Holder, pursuant to Article 9 of The Law On Encumbrance Over Land And Land-Related Objects mentioned that security rights holder is an individual or legal entity, which serves as the parties indebted. As the parties are indebted here may include financial institutions such as banks, non-bank financial institutions, other legal entities or individuals.

IMPOSITION MORTGAGE FOR LAW CERTAINTY

The process of granting Mortgage executed in two (2) phases, namely (a) Giving Phase Mortgage, pursuant to Article 10 Paragraph (2) of the Act Mortgage, Encumbrance Right shall be established by drawing up Encumbrance Right Deed made by Land Deed Official, pursuant to the prevailing laws and regulation. The general official vested with an authority to draw up a deed of the transfer of a land title, Land Deed Official a deed of granting a land title and a deed of granting authority to establish Encumbrance Right pursuant to the prevailing laws and regulations.

The Encumbrance Right Deed shall mention in Article 11 section 1 among others: a) name and identity of the holder and the grantor of Encumbrance Right; b) Domicile parties holders and providers of Encumbrance; c) clear reference to the debt or debts secured; d) value of the security; e) clear description about the Encumbrance Right object. b) Phase Registration of Encumbrance. Registration of security rights carried by the Land Office to make the land book encumbrance and recorded in the land book rights to the land that became the object of encumbrance and copy such records on land rights certificates in question. Imposition Encumbrance providers shall be carried out by the Encumbrance, only when absolutely necessary, i.e. in the case of Encumbrance providers can not appear before Land Deed Official, then allowed to use the Power of Attorney Imposing Encumbrance. Power of attorney to establish Encumbrance Right shall be made in a notarial deed or Land Deed Official and meet the requirements as specified in the legislation (Harsono, 2002).

This means encumbrance certificate is evidence of the birth of encumbrance or security rights. Therefore the encumbrance certificate can prove anything at the time of manufacture there or in other words as a standard staple is the date of registration or recordation of security rights in the land book of Encumbrance Right (Harsono and Wiriodarsono,

1996). Under the provisions of Article 18 of The Law On Encumbrance Over Land And Land-Related Objects, then the things that cause of Encumbrance rights shall be void due: (a) the debt secured by Encumbrance Right is void, it is as a consequence of the nature *accessoir* Encumbrance Rights; (b) the holder of Encumbrance Right releases the Encumbrance Right, its mean that Encumbrance holder stated in the deed and given to the Provider Encumbrance; (c) the Encumbrance Right is released pursuant to the stipulation of ranking by the Head of District Court;, based on the determination of the Chairman of the District Court at the request of buyers Encumbrance object, if the object of Encumbrance proceeds are not sufficient to pay off all the debt the debtor. If not held cleaning, Encumbrance concerned will continue to weigh on the object purchased. It is stipulated in Article 19 of Law Encumbrance; (d) the land title secured by Encumbrance Right is void.

RESEARCH METHODS

This research is a normative juridical approach that focuses on literature data and secondary data (Soekanto and Mamuji, 2001). The approach method in this research is descriptive analysis was performed by means that is searching, reviewing and researching and analyzing secondary data in the field of law, either in the form of legal materials of primary legislation in the field of banking law, security law and agrarian law as well as substances secondary law.

Library research (library research) conducted to obtain secondary data derived through the primary legal materials (of legal provisions covering the field of civil law, Banking, Law on Mortgage, Law on Basic Agrarian, Ministry of Finance, as well as other provisions relevant), secondary law (the paper books scientific articles and several papers or writing legal experts in the field of civil law), tertiary legal materials (dictionaries and several articles in the print media and the Internet) to get as much detail as possible about the problems faced by the about the problems surrounding the implementation of the loan guarantee *parate executie* encumbered security rights.

As advocates in reviewing secondary data consists of primary legal materials, secondary law and tertiary legal materials, in addition to the literature study also conducted field research through interviews in order to obtain primary data from informants and respondents. Data from field research, presented descriptively and analyzed by juridical qualitative (normative qualitative). The data analysis was also

conducted on the results of this study in the form of information obtained from the study of literature, as well as interviews, to be able to formulate the concept of how the implementation of *parate executie* against credit guarantees encumbered security rights, due to the differences in the perception of the public and also for law enforcement in *parate* implement *executie* question, because there is a distinction between the provisions of Article 6 encumbrance right, and also Article 20 encumbrance right.

Based on this analysis, were made conclusions deductively, which begins on some cases, and then projected to the provisions of the existing legislation. Exposure thus aims to obtain legal concepts are defined and can be implemented and applied in the settlement of the problem of bad loans in the banking sector. This study illustrates the broader and deeper than the various aspects of the law on *parate* execution of credit guarantees encumbered security rights. The results of this study will be used as input to the creditors in implementing *parate* execution of credit guarantees encumbered security rights, as well as a means to enhance and provide suggestions for perfecting solutions, both to stakeholders and to the policy makers.

RESULTS AND DISCUSSION

DISPUTE RESOLUTION THE BAD DEBT BURDENED BY PARATE EXECUTION ENCUMBRANCE ASSOCIATED WITH IMPLEMENTATION REFUSAL EXISTENCE FORECLOSURE AUCTION RESULT SECURITY AGAINST THE OBJECTS ENCUMBRANCE

In the Ministry of Finance Regulation No. 93/PMK.06/2010 regarding Implementation Guidelines the Auction predetermined stages in implementation of the auction collateralize, namely:

- a. The preparation Auctions, provided for in Article 6 to Article 28 of the Regulation the Minister of Finance No. 93/PMK.06/2010 on Guidelines for the Implementation of the Auction. At this preparatory stage, there are six (6) activities to be carried out, namely: application for the auction, an auction, the auction terms, delays cancellation of an auction, the auction bail and the auction announcement.
- b. Implementation of the Auctions, implementation of the auction at the State Property and Auction Office, include: 1) The applicant who wants to do the bidding auction, declared its intention to conduct the auction to the Head Office of the Auctions; and 2) The application filing submitted in writing to the auction accompanied by:
 - (i) The day and the desired date for the imple-

mentation of the auctions; (ii) Determine which offers the desired manner; (iii) determine the manner of payment; (iv) The tender document required (general documents and specific documents).

When considered the auction conducted on object security rights shows that existence of justice will be obtained both parties, whereby the creditor will be guaranteed their rights to payment of receivables from the auction sales of objects security rights, while on the other hand for the debtor to conduct the auction is to ensure that the object of security rights has a higher value when compared to only be sold under the hands of the creditor.

However if the note of the legal theory of development, then implementation of the auction of the security is to guarantee that the creditor will be the payment of the debt, so there is no reason for debtors to postpone or stall the execution parate execution in the form of legal action of any kind, with the understanding else if there is going to auctions with parate execution cannot be delayed by the efforts of others (whether it be a denial and claims of other parties), so that the strength of the provisions of Article 6 of Law No. 4 of 1996 can be implemented on its own by itself is the holder of security rights (bank) so that legal certainty can be realized in the development of national legal systems.

LAYING CONFISCATION SECURITY AGAINST THE OBJECTS ENCUMBRANCE RIGHTS

Efforts to resolve the problem of bad loans generally begins with the efforts of banks as creditors, among others by means of direct collection by the bank to the debtor concerned to immediately pay off loans or debts. If the settlement in a way that was not successfully implemented, in general, the efforts made by the bank is through legal procedures. In connection with this, there are various legal means and institutions of execution that can be used to accelerate the settlement of the problem of bad loans.

In Article 6 Encumbrance Right Over Land and Land-Related Objects, stated: "In the event of Debtor's default, the holder of first Encumbrance Right may sell by virtue of his own authority the Encumbrance Right object in a public auction and collect the settlement of his receivables from the proceeds of such sale." From the above provision, then in the execution of the sale of objects Encumbrance on its own power (parate execution) does not require the fiat or approval of the Chairman of the local District Court and does not require *Grosse* deed, but the

implementation of the Article in question must be made through the Office of State Auction or the State Property and Auction Office. In this case the creditor acted as the seller/applicant auction.

In Article 20 (1) Encumbrance Right Over Land and Land-Related Objects has also mentioned, that in the case of debtor default, in addition to the holders of Encumbrance first granted the right to sell the object of Mortgage as referred to in Article 6, then based executorial title contained in the certificate Encumbrance, Mortgage object can also be sold through public auction in accordance with the procedures laid down in the legislation for the settlement of accounts with rights holders precede Encumbrance of the other creditors. As long as there are no regulations that govern it, according to Article 26 UUHT and explanation, the execution of these (with the basic delivery Encumbrance certificate as the basis for its implementation) is based on Article 224 HIR/258 RBg.

Especially with regard to the disputed issue credit based on Law 49 of 2009 on the Second Amendment to Act 2 of 1986 jurisdiction includes the authority of the judiciary general environment. So that the judicial authority officially in charge resolve bad loans when the disputed is the district court. Dispute settlement of bad debts through the courts may be carried out through two (2) ways: (a) Bank sued for doing the customer defaults on the loan agreement that has been agreed; and (b) the Bank requested the establishment of execution against the debtor collateral goods which have been bound properly.

Thus, on the basis that there are obstacles in practice on the ground that if there and there is a blocking of the debtor or a third party, then the auction of the State Property and Auction officials are not willing to carry out the auction. Dependent rights object being placed sequestration loan collateral by a third party because there are ongoing civil cases where the debtor sued by a third party for breach of contract. Laying the confiscation of the objects that have been encumbered security rights actually not justified and is contrary to the results of a national working meeting Supreme Court in 1989 page 21, point 14 C which reads; "The land which has been burdened Mortgages cannot be put foreclosure by the district court because according to the laws of a receivable/credit/demands other money secured by a mortgage has the right of preference and therefore has the right to a higher priority to take precedence over other receivables, which can be done by the District Court is *vergelijkend beslag* (RV 463).

Therefore auction officials are not willing to carry out the auction of objects contained security rights caused sequestration of the auction object, the creditor must take legal action in advance to carry out the removal of sequestration, so that the object security rights can continue the auction. Law attempts to do is:

- a. Filed third-party resistance against sequestration (*derden verzet*). Resistance third parties submitted to the District Court who issued the determination of confiscation of objects security rights. Factors that be a weakness in the process of filing resistance is take a long time due to its decision to do an appeal and cassation. It can also give rise to legal uncertainty for creditors if the holder of security rights of creditors as a fighter lost the appeal level, the Supreme Court decision as 256 K/Pdt/2006 September 30, 2009.
- b. Filed bankruptcy. Mortgage creditor rights holders can apply for bankruptcy against debtors in a bid to lift sequestration attached to the object security rights, as defined in Law 37 of 2004 on Bankruptcy and Suspension of Payment. Bankruptcy petition filed by creditors if the holder of security rights granted by the Commercial Court will release the confiscation of objects security rights and status changes to general confiscation. Factors which is a drawback for lenders holder of security rights in bankruptcy, is there must be a minimum of two (2) creditors and the creditors must be willing to give evidence of its receivables at the time verified by the court examining the bankruptcy case filed by creditors.

LEGAL PROTECTION OF THE RIGHTS OF CREDITORS BASED JUSTICE IN THE IMPLEMENTATION OF PARATE EXECUTION ASSOCIATED WITH RESISTANCE EXISTENCE DEBTOR

LEGAL PROTECTION AGAINST THE AUCTION WINNER IN THE IMPLEMENTATION OF PARATE EXECUTION ON RESISTANCE DEBTOR

Legal protection against the winner of the auction must be provided by statute because the auction winner is the key object of security rights in the resolution of bad debts due on the purchase of the object guarantees the security rights of creditors (Bank) can take on debt repayment debtors to creditors. The existence of the settlement is the purpose of the sale of the object of security rights. Legal certainty auction winner in control of the object guarantees mortgages have been purchased to be enforced. If the auction is canceled by a court ruling, the purpose of the imposition of security rights becomes

futile because creditors cannot retrieve on debt repayment debtors. If the auction is canceled then the sale is considered never happened and the principle of *droit de preference* is not met because creditors cannot take on debt repayment of creditors.

Legal protection in the auction, given to the auction buyer with good intention so get legal certainty on the court ruling stating that the auction action is legitimate and legally binding to the auction buyer to control of auction object purchased through auction. The legal protection of the purchaser should receive legal guarantees for the sale of the object of collateral security rights through the auction is still open indications of the lawsuit and the uncertainty over the emptying of the auction object, in other words that the auction does not provide absolute protection to the winner of the auction. The legal protection required by the winning bidder in order to obtain legal certainty. The legal certainty provided to the buyer in good faith in accordance with the jurisprudence of the Supreme Court of the Republic of Indonesia on August 28, 1976 No. 821 K/SIP/1974 (Sianturi, 2008).

Legal Protection against the Creditors in the Implementation of Parate Execution on Resistance Debtor Position as a preferred creditor means the creditor concerned take precedence in the settlement on the results of the execution of certain objects insurer in relation to Encumbrance specifically bound to guarantee the creditors bill. Thereby, a new position as a preferred creditor has a role in an execution. But in practice, , the State Property and Auction office could not be carry out parate executions because the object Encumbrance foreclosure is currently in the District Court, means the position of the holder of Encumbrance not as preferen creditors and unsecured creditors but as this is contrary to Article 1 paragraph 1 Encumbrance Right Over Land and Land-Related Objects.

Obstacles such as these will continue in the absence of the implementing regulation of Act of Encumbrance Rights especially regarding execution. In the absence of the implementing regulations, the absence of legal certainty for creditors. For the execution of the current parate execution based on the Minister of Finance, and causing overlap. National Land Agency issued regulations and the blocking of the District Court put sequestration. In order to that we need the legislation between the Ministry of Finance which oversees the State Property and Auction office, the National Land Agency, the District Court and the Supreme Court, that can be arranged

together, to ensure legal certainty for creditors, as well as to provide legal protection to creditors and the winner of the auction, because if there is objection or claim of the debtor in the execution of the objectives cannot be achieved with good, especially the repayment to the creditor banks that are constrained to make a bank in a difficult position to maintain the CAR (capital adequacy).

In the presence of parate execution is the right of the holder of security rights (the Bank) should not be canceled by the resistance efforts of the debtor, because in this case the auction is done with parate execution due to not executed the obligations by the debtor to make payments to the bank, as stated in credit agreements are made between the bank and the customer (debtor) themselves. In another sense that the actual implementation of parate execution itself is an embodiment of the obligation of the debtor to be carried out properly because the debtor itself has an obligation to do so, meaning that the obligations it has emerged from the very beginning because the lender has provided a loan to be paid at the time determined.

THE CONCEPT OF BAD DEBT SETTLEMENT THE BURDENED ENCUMBRANCE THROUGH PARATE EXECUTION IN THE FRAMEWORK OF THE INDONESIAN BANKING SYSTEM DEVELOPMENT AS THE AIM OF THE WELFARE STATE

THE OBSTACLES ADOPTION OF THE LAW ON THE AUCTION OBJECT SECURITY RIGHTS IN THE LEGAL SYSTEM OF BANKING

Speaking about implementation of the auction procedure execution object in particular to guarantee security rights on the land, then sometimes it found any obstacles or problems, which in turn can lead to the process implementation of the auction cannot be run smoothly and cause a lot of losses for debtors and creditors, among others:

- a. Problems/obstacles usually encountered in the process of Pre-Auctions (especially with regard to the auction execution object security rights) are: 1) Object to be auctioned (land) are still in dispute; 2) The interlocutory decision of the court which usually contents ordered that made the suspension auction implementation execution object security rights and prohibit anyone who gets the right of him to take legal action that intends to sell, auctioning, and or transfer and or acts of others which may result the transfer of rights over land security; 3) The claim of the debtor or a third party; 4) The absence of legally binding decisions on civil lawsuits; 5) Incomplete documents both the original and the copy.

- b. At this stage of the auction itself, in fact practically no problem when the pre-tender stage smoothly and no problems or denial of a third party.
- c. For the Post/Full Auctions, problems often arise are: 1) The problem of emptying the object of auction mortgage; 2) Payment of the debtor; 3) The building that stood on the land lease rights.
- d. The emergence claim/remonstrance filed by the debtor and/or third parties.

THE CONCEPT OF BAD DEBT SETTLEMENT THROUGH PARATE EXECUTION IN THE FRAMEWORK OF THE INDONESIAN BANKING SYSTEM DEVELOPMENT

In the loan agreement is often the creditors are in a position that is at a disadvantage when opposed to its promise (the debtor) is negligent in carrying out his performance (default) when the debt has been past due payment, this is because the process to take repayment through sales of security object is not as easy as we imagine, especially if the debtor or the owner of the collateral is not acting in good faith to complete its obligations, then there will always be a way to be able to inhibit the process of settlement of the security object, either with the efforts that are provided according to the legal procedure civil procedure (See Article 207 HIR and Article Rbg 225), or by other means, which in turn intended for the creditors fail or are unable to get redemption with his security object.

Under the provisions of the law, creditors' holders of collateral material, can choose some alternative repayment of its receivables through several ways, among others:

- a. By conducting sale of collateral objects on its own authority or later called parate execution for the holder of the first bail;
- b. By using executorial title through the fiat chairman of the district court to invoke the provisions of Article 224 HIR / 258 Rbg of execution grosse deed;
- c. By method of selling under the hand based on the agreement of both sides to obtain a higher sales price.

In addition to security measures and the rescue loans, in dealing with a case of bank credit amicably resolve problems with the negotiations, and if deemed necessary, and the new bank will dispute against to the local court. In the implementation of parate execution of many factors that impede, due to the absence of laws/regulations on execu-

tion as has the author explained, and therefore to ensure legal certainty creditors, necessary to issue joint regulation involving the Supreme Court, the National Land Agency and the Minister of Finance which oversees the State Property and Auction office where things that need to be regulated jointly among others:

- a. The District Court cannot be put *Conservatoir Beslag* of objects that have been burdened with Encumbrance, and do not need to issue a fiat, because the characteristics of parate execution based on a promise to sell on its own power is carried out executions without trial fiat chairman. If there should be fiat, parate execution is tantamount to execution on *grosse* deed mortgages and bonds that have the executorial title.
- b. The emergence claim/remonstrance filed by the debtor and/or third parties.
- c. The State Property and Auction office continue to implement the auction even though the object of the auction is being sued in a civil case by the debtor or a third party, it must be stressed because in practice the suit only engineered to inhibit the auction.

CONCLUSION

Based on research the authors as noted above, the concluded as follows:

1. Dispute settlement bad debts that encumbered security rights through execution parate was not easy and yet provide legal certainty for creditors' holder of security rights because it is still going on rejection auction implementation by The State Property and Auction office result of the confiscation of the object of security rights.
2. Legal protection in the implementation of the execution parate not give a sense of justice for creditors holder of security rights when associated with the resistance of the debtor.
3. The underlying concept is parate executie as a means to accelerate the repayment of receivable creditor is legal protection for rights holders' first bail but in practice is not in line with expectations security rights holder creditors.

RECOMMENDATIONS

1. Issued the joint regulation integrative made by the Minister of Agriculture and Spatial Planning / Head of National Land Agency in charge of the entire land office in Indonesia and the Minister of Finance which oversees The State Property and Auction office as a tenderer who is able to bridge the two institutions associated with the implementation parate execution and the Minister of Finance immediately revise Article 27, paragraph d Regulation of the Minister of Finance 106 / PMK.06 / 2013 on Amendment to the Regulation the Minister of Finance No. 93 / PMK.06 / 2010 on Guidelines for the Implementation of Auctions, stating that the cancellation of the auction before the auction outside the provisions referred to in Article 24 the Auction conducted by officials in the case of goods to be auctioned in the status of confiscation / seizure execution / seizure of criminal, special Auctions of Non-execution;
2. To provide legal protection and justice for creditors holder of security rights as well as the auction winner is associated with the resistance of the debtor or a third party, so that the Supreme Court issued a Circular Letter the Supreme Court which contains instructions to all district court in Indonesia for not putting seizure a guarantee of land that has been burdened with security rights and providing legal protection for auction implementation which has been carried out by The State Property and Auction office and also against the winner of the auction.
3. In order to improve equity, economic growth and national stability towards improving the welfare of the people at large in order to be revision of Law No. 4 of 1996 on Encumbrance over the Land along with objects related to land, especially regarding parate execution by adding provisions that strengthen the position of creditors holders of Encumbrance in the execution parate execution when a dispute broke out bad loans with collateral encumbered Encumbrance, so as to give a sense of justice and ensure legal certainty for creditors Encumbrance holders.

REFERENCES

- Antawidjaya, Tubagus Djodi Rawayan. (2007). *Penyanderaan Yang Berkeadilan Dalam Sistem Perpajakan Indonesia Sebagai Upaya Peningkatan Penerimaan Negara Suatu Kajian Atas Pembangunan Hukum Pajak Nasional*, Bandung: UNPAD.
- Atmasasmita, Romli. (2003). *Pengantar Hukum Kejahatan Bisnis (Business Crime)*, Jakarta: Prenada Media.

- (2009). *Teori Hukum Integratif Rekonstruksi Terhadap Teori Hukum Pembangunan dan teori Hukum Progresif*, Yogyakarta: Genta Publishing.
- Darmodiharjo, Darji dan Sidharta. (2006). *Pokok-Pokok Filsafat Hukum, Apa dan Bagaimana Filsafat Hukum Indonesia*. Jakarta: PT Gramedia Pustaka Umum.
- Dimiyati, Khudzaifah. (2004). *Teorisasi Hukum Studi Tentang Perkembangan Pemikiran Hukum Di Indonesia 1945-1990*, Surakarta: Muhammadiyah University Press.
- Friedmann, W. (1971). *The State and The Rule of Law in a Mix Economy*. London: Steven and Son.
- Harsono Boedi. (2002). *Hukum Agraria Indonesia, Himpunan Peraturan-Peraturann Hukum Tanah*. Jakarta: Djambatan.
- Harsono, Boedi dan Sudarianto Wiriodarsono. (1996). "Konsepsi Pemikiran tentang UUHT". Makalah Seminar Nasional. Bandung. 27 Mei.
- Ketentuan Pasal 207 HIR dan Pasal 225 Rbg tentang perlawanan terhadap sita eksekusi (partij verzet) dan Pasal 195 ayat (6) tentang perlawanan pihak ketiga (derden verzet) terhadap eksekusi; lihat juga Buku Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan Buku II Mahkamah Agung RI, hal: 144-145, cacatan: walaupun pada dasarnya perlawanan tidak menanggukhan eksekusi namun ketua pengadilan dengan alasan tertentu tetap dapat menanggukhan pelaksanaan eksekusi
- Kusumaatmadja, Mochtar. (1986). *Pembinaan Hukum dalam Rangka Pembangunan Nasional*, Bandung: Binacipta.
- Kusumaatmadja, Mochtar. (1989). *Hukum, Masyarakat dan Pembinaan Hukum Nasional*. Bandung: Binacipta.
- (2002). *Konsep-Konsep Hukum Dalam Pembangunan*, Bandung: PT. Alumni.
- Mustafa, Marni Emmy. (2007). *Prinsip-Prinsip Beracara Dalam Penegakan Hukum Paten Di Indonesia Dikaitkan Dengan TRIPS-WTO*, Bandung: Alumni.
- Rasyidi, Lili & I.B. Wyasa Putra. (1996). *Dasar-dasar Filsafat Hukum*, Cetakan Ketujuh, Bandung: Citra Aditya Bakti.
- Rasyidi, Lili & Ira Thania Rasyidi. (2001). *Dasar-Dasar Filsafat dan Teori Hukum*, Bandung: Citra Aditya Bakti.
- Salman, R. Otje. (1986). *Ikhtisar Filsafat Hukum*, Bandung: CV. Armico.
- Sianturi, Purnama Toira. (2008). *Perlindungan Hukum Terhadap Pembeli Barang Jaminan Tidak Bergerak Melalui Lelang*, Bandung: Mandar Maju.
- Soekanto, Soerjono & Sri Mamuji. (2001). *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta: Raja Grafindo Persada.
- Undang-Undang Dasar 1945
- Kitab Undang-Undang Hukum Perdata.
- Undang-Undang Republik Indonesia No. 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah.
- Peraturan Menteri Keuangan Nomor 40/PMK.06/2007 Tentang Perubahan Atas Peraturan Menteri Keuangan Nomor 40/Pmk.07/2006 Tentang Petunjuk Pelaksanaan Lelang

Keputusan Menteri Keuangan Nomor 47/KMK.01/1996 juncto Nomor 339/KMK.01/2000 juncto Nomor 509/KMK.01/2000 tentang Balai lelang

Peraturan Menteri Keuangan Nomor 118/PMK.07/2005 tentang Balai Lelang

Peraturan Menteri Keuangan Nomor 176/PMK.06/2010 tentang Balai Lelang.