

Parate Execution in Disputes Settlement of Financing Contract with Guaranteed Mortgage on Sharia Banking Practices

by

Dewi Nurul Musjtari, Benny Riyanto (Co-Author) and Ro'fah Setyowati (Co-Author)

Lecturer of Faculty of Law Universitas Muhammadiyah Yogyakarta
Student of Doctoral Program of Law Science, Universitas Diponegoro, Semarang
Jalan Imam Bardjo, S.H., No. 1, Semarang, Central Java, Indonesia.

Email: dewinm@yahoo.com and dewinurulmusjtari@umy.ac.id
dr.bennyriyanto@yahoo.com
rofah_undip@yahoo.com

ABSTRACT

Disputes settlement of financing contract with guaranteed mortgage after the decision of the Constitutional Court No. 93/PUU-X/2012 requires a follow-up of the existing verdict by conducting execution. Execution implies a forced attempt to realize rights and/or sanctions. There are three kinds of executions: the execution of the will of the parties, the parate execution and the fiat execution. In practice, there are still obstacles in the implementation of parate execution. Based on the phenomenon, the purpose of this research is to know the legal basis and parate execution mechanism in the dispute settlement of the financing contract with the guaranteed mortgage on sharia banking practices. The theory used to analyze in this research is Eggen's Simplified Execution Theory and Concept Effectiveness of Law Enforcement according Soerjono Soekanto. This research is socio-legal research, using qualitative analysis and philosophical and sociological approach. Primary data was obtained from the results of research in PA Yogyakarta, PA Sleman, PA Bantul, PA Gunung Kidul, PA Temanggung, PA Bandung, PA Purbalingga and Supreme Court. As for the results of the research, it was found that the parate execution in the disputes settlement of the financing contract with the guaranteed mortgage on sharia banking practice is based on Surah al-Baqarah verses 280, 282 and 283, Law No. 21 year 2008, Article 54 of Law No. 7 year 1989 in junction with Law No. 3 year 2006 in junction with Law No. 50 year 2009, Article 20 paragraph (1 a) in junction with Article 6 of Law No. 4 year 1996, Article 1121, 1178, 1241 Civil Code, PERMA No. 2 year 2008. The mechanism of execution of guaranteed mortgage is executed by the *Shahibul Maal* (creditor/sharia bank) without having to perform the fiat execution to the religious court but can be executed in cooperation with the State Auction Office (SAO).

Keywords: Execution Parate, Dispute Settlement, Financing Contract, Guarantee Mortgage, Sharia Banking

I. Introduction

Non-performing financing is one of the five major problems faced by the national banking system including sharia banking. The definition of non-performing financing is a financing that is in the classification of doubt and troubled (Mahmoeddin, 2010). In the case of

non-performing financing, the bank maintains its liquidity by attempting to solve the problems it faces. The settlement of the problems arising in the financing contract with the guaranteed mortgage is based on the principle of binding of the contract (*Mabda' Wujub Al Wafa' Bi Al 'Aqad/Pacta Sunt Servanda* principle) which means that the legally created parties' contract binds the parties as law.

Dispute Settlement of financing contract with guaranteed mortgage after the decision of the Constitutional Court No. 93/PUU-X/2012 requires a follow-up of the existing verdict by conducting execution. Execution implies a forced attempt to realize rights and/or sanctions. There are three kinds of executions: the execution of the will of the parties, the parate execution and the fiat execution. In practice, there are still obstacles in the implementation of parate execution due to the ignorance and lack of clarity related to its legal basis and the mechanism. Based on the description then the formulation of the problem is what is the legal basis and how the mechanism of parate execution in the dispute settlement of the financing contract with the guaranteed mortgage in the practice of sharia banking.

II. Method and Legal Material

This research used socio-legal approach with qualitative tradition (Noeng Muhajir, 2002). Its operationalization was carried out according to the constructivism paradigm. The research was conducted with two strategies namely library research and case study. The secondary data were obtained through library research and legal documents, which include: a. Primary Legal Material, including: Surah Al-Baqarah verses 280, 282 and 283, Law No. 21 year 2008, Article 54 of Law No. 7 year 1989 in junction with Law No. 3 year 2006 in junction with Law No. 50 year 2009, Article 20 paragraph (1 a) in junction with Article 6 of Law No. 4 year 1996, Article 1121, 1178, 1241 Civil Code, PERMA No. 2 year 2008, Several Decrees of the Judges in Religious Courts and b. Secondary Law Materials, consisting of books on Sharia Banking, Legal Principles, Legal Theory, Procedure Laws in Religious Courts, Legal Research Methodology, and Journals. The primary data were obtained through field research conducted by observations and interviews in PA Yogyakarta, PA Sleman, PA Bantul, PA Gunung Kidul, PA Temanggung, PA Bandung, PA Purbalingga and the Supreme Court.

III. Results and Discussion

The position of guarantees in Islamic civil law and the practice of sharia banking is not to cover the capital issued by the bank and the guarantee is not the principal issue of the financing contract. Bank Indonesia allows sharia banks to bind customers' (*musytari*) assets in order to provide trust to the bank. The guarantee should only be executed if the customer (*musytari*) breaks a promise or default occurs. Prior to the execution of guaranteed mortgage, sharia banks in general will perform three stages of settlement, including: rescheduling, reconditioning and restructuring. This is in line with the principle of postponement in sharia based on Surah Al-Baqarah verse 280, which states that "And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew." However, in principle it is impossible for the banks to give the money lent to their customers because if it happens of course the bank will go bankrupt, but at least the sharia bank gives the postponement period so that customers can pay off their debts and the existence of the guaranteed mortgage is for the security of sharia banking.

The legal correlation between sharia banks and customers begins with the contract. The discussion in this article is focused on the financing contract. The existence of the contract is based on Al Qur'an Surah Al-Baqarah verse 282 and the legal basis of binding of guarantee in the practice of sharia banking is based on Al Qur'an Surah Al-Baqarah verse 283 which means: The legal basis for the justification of the implementation of guarantee in the practice of sharia banking other than the above three paragraphs is also based on Article 1 number 26 of Law Number 21 Year 2008 concerning Sharia Banking (Law of Sharia Banking).

According to the rule of positive law, a guarantee is something given to the creditor submitted by the debtor to induce trust and to ensure that the debtor will fulfill the obligation which can be valued by money arising from an engagement (Hartono Hadisoeparto, 1984). The provisions on Guarantee are further regulated in Article 20 paragraph (12) of the Supreme Court Regulation No. 2 year 2008 on Compilation of Sharia Economic Law (KHES). Under Article 303 KHES, a guarantee is known of by the term *kafalah*. Sayyid Sabiq mentions two types of *kafalah*: *kafalah bi an-nafs* (self *kafalah*) and *kafalah bi al-mal* (property *kafalah*) (Sayyid Sabiq, 1987).

Based on Article 10 paragraph (1) of Law No. 4 year 1996 on Mortgage (hereinafter written UUHT), it mentions that the grant of the mortgage is preceded by a pledge to grant the mortgage as a guarantee of certain debt repayment written in and not separated from related financing contract of the parties or any other agreements that incur such debt. Article 10 Paragraph (2) UUHT mentions that the granting of mortgage is done by making the Deed of Grant of Mortgage by the Land Deed Official (hereinafter written PPAT). Therefore, the financing that will apply the mortgage should be done by an authentic deed. This is based on the provisions of Article 15 paragraph (1) of the Act of Mortgage which mentions that the Power of Attorney to Charge a Mortgage shall be made by the notary deed or the PPAT deed. The PPAT deed can be categorized as an authentic deed.

The convenience of using the means of Article 6 UUHT is due to the sale of the object of mortgage which is only through public auction without having to request the fiat execution to the Chairman of the Religious Court. The convenience primarily reflects the efficiency of time compared to the execution of court decisions that have a permanent legal force. This is because if the procedure of execution through the formalities of procedure law, the process takes a long time and complicated procedures. Execution *parate* is cheaper than the implementation of execution using the executorial title because they do not bear the cost of applying for the appointment of execution proposal so that it is a more effective means of dispute settlement on the guaranteed mortgage.

The definition of *Parate Execution* is if the debtor default, creditor can execute the object of the guarantee without having to ask for fiat from the Chairman of the Court, and without having to follow the rules of the game in the Procedure Law. Therefore there are rules of the game itself, no need to have confiscated first, no need to involve bailiffs and hence the procedure is easier and cheaper (Herowati Poesoko, 2013).

Parate Execution is implicitly expressed and implied in UUHT. Particularly it is regulated in point 9 on the section of General Explanation of UUHT, which states: "One of the characteristics of a strong mortgage is easy and certain in the execution, if the debtor breaks the contract. Although in general the provisions on execution have been regulated in applicable Civil

Procedure Law. It is deemed necessary to include in particular the provisions on execution of mortgage in this law, which governs the institution of “Parate Execution” (by the author) as referred to in Article 224 of Updated Indonesia Regulation (*Het Herziene Inlands Reglement*) and Article 258 Regulation of Procedure Law for the Regions of Outer Java and Madura (*Reglement tot Regeling van het Rechtwezen in de Gewesten Buiten Java en Madura*)...” (Ibid, p. 198).

The provisions that exist before the UUHT are provisions for the mortgage institution, which is regulated in Article 1178 paragraph (2) of the Civil Code. There is a correlation between the provisions of Article 1178 paragraph (2) of the Civil Code with Article 1211 of the Civil Code. Article 1178 paragraph (2) of the Civil Code demands the requirement of “public sale”, by referring to the provisions of Article 1211 of the Civil Code which must comply with the provisions: (1) Sales must be made publicly; (2) Based on local custom; (3) The sale shall be conducted in the presence of public employees namely State Auction Official (Djuhaendah Hasan, TT).

To implement the provisions of Article 6 of UUHT, the implementation guideline shall be regulated in the Circular Letter of the State Agency of Receivables and Auctions Number: SE-21/PN/1998 concerning the Implementation Guideline of Article 6 of UUHT and the Circular Letter of the State Agency of Receivables and Auctions Number SE-23/PN/2000. In number 1 of Circular Letter Number: SE-21/PN/1998, it is mentioned that therefore there is no need to hesitate again to serve the auction demand from the banking sector on the Object of Mortgage under Article 6 UUHT”. Based on the number 3 of Circular Letter Number SE-21/PN/1998, it determines that the Auction Object of Mortgage under Article 6 of UUHT is categorized as Voluntary Auctions.

Based on the objectives of the legislators regulating the Parate Execution as regulated in Article 1155 of the Civil Code and Article 1178 paragraph (2) of the Civil Code, it can be seen the legislation ratio – the reason why there is such provision (Peter Mahmud Marzuki, 2005) – a Parate Execution is to accelerate the settlement of the creditor’s receivables when the debtor is defaulted by giving the creditor the right to sell the object of guarantee to his or her own power through a public auction, which is carried out by the State Auction Office known as KP2LN.

If a justification found based on simplified theory proposed by Eggen which states that in the case of the mortgage holder’s lender sells under Article 1178 paragraph (2) of the Civil Code, the holder of mortgage executes the sale of mortgage on the basis of his or her own power. Eggen develops the theory that in such an implementation the creditor actually exercises his own rights and acts as the representative of the owner of the plot (Herowarti Poesoko, 2013).

The right of creditors to conduct Parate Execution in the financing contract with the guaranteed mortgage on the practice of sharia banking can also be based on the lawsuit ratio arising in the law of engagement which is also based on the provisions of Articles 1240 and 1241 of the Civil Code.

In order to have effective execution of Parate Execution of Guaranteed Mortgage in the implementation of financing contracts on the practice of sharia banking, its enforcement can also pay attention to the concept of Effectiveness of Law Enforcement according to Soerjono Soekanto (Soerjono Soekanto, 2005). Soerjono Soekanto argues that there are 5 (five) factors in

law enforcement, among others: a. Legal factor (Law); b. Law enforcer factor; c. Facilities or supporting facilities factor; d. Community factor; and e. Cultural factor.

Based on the above description, the existence of legal factors (law) has been presented. In order to carry out the Parate Execution more effectively, the other four factors namely law enforcer factor, facilities or supporting facilities factor, community factors and cultural factors must also support.

IV. Conclusion

The conclusion of this research is that the parate execution in dispute settlement of financing contract with the guaranteed mortgage on sharia banking practice is based on Surah al-Baqarah verses 280, 282 and 283, Law No. 21 year 2008, Article 54 of Law No. 7 year 1989 in junction with Law No. 3 year 2006 in junction with Law No. 50 year 2009, Article 20 paragraph (1 a) in junction with Article 6 of Law No. 4 year 1996, Article 1121, 1178, 1241 Civil Code, PERMA No. 2 year 2008. The mechanism of execution of guaranteed mortgage is executed by the *Shahibul Maal* (creditor/sharia bank) without having to perform the fiat execution to the religious court but can be executed in cooperation with the State Auction Office (SAO). The implementation of Parate Execution is evidenced by the transfer of certificate of mortgage from the *Musyitari* (beneficiary) to *Shahibul Maal* in this case, the sharia bank.

VI. References

- Djuhaendah Hasam. (TT). Perjanjian Jaminan Kebendaan Bagi Tanah dan Benda lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horisontal, Bandung, Citra Aditya Bakti, p. 320-321.
- Hartono Hadisoeparto. (1984). Pokok-pokok Hukum Perikatan dan Hukum Jaminan, Yogyakarta, Liberty, Cetakan ke-1, p. 50.
- Herowati Poesoko. (2013). Dinamika Hukum Parate Executie Obyek Hak Tanggungan, Yogyakarta, Aswaja Presindo, 2013, p. 195.
- Mahmoeddin. (2010). Melacak Kredit Bermasalah, Cetakan Pertama, Jakarta, Pustaka Sinar Harapan, p.1.
- Peter Mahmudi. (2005). Penelitian Hukum, Jakarta, Kencana, Prenada Media Group, p. 104.
- Salim HS. (2004). Perkembangan Hukum Jaminan di Indonesia, Jakarta, PT. Raja Grafindo Persada, p. 21-22.
- Sayyid Sabiq. (1987). Fikih Sunnah Buku ke-13, Terjemah, Kamaludin A Marzuki, Fiqhsunnah, Buku Ke-13, Cetakan Pertama, Bandung, Al-Maarif, p. 177.
- Soerjono Soekanto. (2005). Faktor-faktor yang Mempengaruhi Penegakan Hukum, Jakarta, PT RajaGrafindo, p. 9.
- Yahya Harahap. (1997). Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesaian Sengketa. Bandung, Citra Aditya Bakti, p. 1-2.