



Repressive legal protection of banks as creditors of mortgage holders seized by the state related to corruption cases

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Abstract

This research aims to analyse the dualism that takes precedence in terms of banks as holders of mortgage rights with assets seized by the state related to corruption. This research is normative legal research with a statutory, conceptual, and case approach. The formulation of the problem in: a) Legal Position of Banks as Creditors of Mortgage Holders Seized by the State Related to Corruption Cases; and b) Ratio Decedendi of Judge Decisions Regarding Banks as Creditors of Mortgage Holders Seized by the State Related to Corruption Cases. The result of this research is that the legal position of the bank as a preferred creditor of the holder of a mortgage right that is seized by the state related to a corruption case, the bank should still get legal protection, because the bank as a preferred creditor has a privilege over the sale of the object of the mortgage right to pay off the debtor's legal obligations must be protected by law, so that the Bank can submit legal remedies in accordance with Perma 2/2022.

Keywords: Bank, separate creditor, mortgage rights, corruption

Introduction

Banks are business entities that collect funds from the public in the form of deposits and channel them to the public in the form of credit and / or other forms in order to improve people's lives. In Indonesia, banks have a very important role in the economy. Cita Yustisia Serfiyani elaborates: "Banking as a financial institution that plays an important role in the economy also faces the threat of disruption and business competition between fellow banking institutions and with non-banking institutions that offer similar products." (Free translation: "Banking as a financial institution that plays an important role in the economy also faces the threat of disruption and business competition between fellow banking institutions and with non-banking institutions that offer similar products."). From this opinion, it can be understood that banks are institutions that have an important role in the economy and banks often face challenges in their banking activities. The importance of banks in a country's economy is parallel to the overview of the Law of the Republic of Indonesia Number 7 of 1992 on Banking as Amended by Law Number by Law Number 10 of 1998.

That, one of the main reasons that banks have an important role in a country's economy is because banks are institutions that collect and distribute funds from the public or commonly known as the intermediary function. This function is manifested in Article 3 of the Banking Law which stipulates: "The main function of Indonesian banking is to collect and distribute public funds." The purpose of the bank's intermediary function is to create economic prosperity that is equitable and proportionality from people who have excessive funds can be channelled to people who need funds.

Given the importance of this lending function, banks cannot disburse credit carelessly and even banks must be careful in providing credit to the public. Related to the prudential principle for banks in providing credit is manifested in Article 20A paragraph (1) of the Banking Law and its explanation. From Article 20A paragraph (1) of the Banking

Law and its elucidation, it can be understood that the bank will do the following Comprehensive and holistic analysis, before granting credit to a legal subject, both from the character, ability and ability of the Debtor Customer. One of the things requested by the bank, to ensure that the debt given to the debtor is paid, is the request for collateral from the debtor, as stated in Article 8 paragraph (1) of the Banking Law and its explanation. The most common collateral requested by banks is a mortgage against certain assets (usually assets owned by the debtor).

In its development, there is a legal problem, namely that even though the bank has a mortgage right against an asset pledged by the debtor, the debtor's asset then has the status of a state booty asset in a corruption crime. There is a dualism related to this, where some consider that the interests of the bank as a good faith creditor should be protected, so that if the seized goods have been executed, it is the mortgage creditor who has the right to receive repayment first, such as J. Satrio and Mohamad Assegaf. If there is a remainder, it is then given to the state. However, there are those who argue that the state's interest in confiscating goods suspected to have come from the proceeds of crime should take precedence over private or civil interests, such as Chaerul Huda's opinion. Thus, it can be understood that there are legal problems, namely obscurity of law related to the legal protection of banks as creditors of mortgage holders who are seized by the state related to corruption cases.

Regarding the issue of the legal position of creditors holding mortgages seized by the state related to corruption cases, this has legal vagueness, resulting in dualism, which can be seen in the Supreme Court Decision 2951 K/Pid/2006 and Supreme Court Decision Number 2701 K/Pdt/2017. Based on the description of this dualism, there is a possibility that the party that must be prioritised or the party that must be protected is the creditor who owns the mortgage rights, which in the context of this research is the bank. However, there are subsequent legal problems, namely legal vagueness regarding legal protection for banks as creditors

of mortgage rights owners whose mortgage assets are seized by the state related to corruption cases.

The formulation of the problems in: a) Legal Position of Banks as Creditors of Mortgage Holders Seized by the State Related to Corruption Cases; and b) Ratio Decedendi of Judges' Decisions Regarding Banks as Creditors of Mortgage Holders Seized by the State Related to Corruption Cases.

Literature review

Confiscation is defined as the process, method, act of confiscation. Confiscation or taking of private property by the government without compensation. The law enforcement process authorises an action in the form of confiscation. Confiscation is a legal action in the form of taking over and temporarily controlling the goods and hands of a person or group for the purposes of investigation, prosecution and justice.

After confiscating an object committed in a criminal offence, the object must be secured by the investigator by placing it in a special place to store state confiscated objects. State confiscated objects are objects confiscated by investigators, public prosecutors or officials who because of their position have the authority to confiscate goods for the purposes of evidence in the judicial process.

Confiscated goods are evidence that has obtained permanent legal force, seized for the state which is then executed by means of:

- a. Destroyed.
- b. Burned to the ground.
- c. Sinking to the bottom of the sea so that it cannot be retrieved.
- d. Planted in the ground.
- e. Damaged until it can no longer be used.
- f. Auctioned for the State.
- g. Handed over to the designated agency for utilisation.
- h. Stored in Rupbasan for evidence in other cases.

Article 1 point 16 of KUHAP Law Number 8 Year 1981 on Criminal Procedure (hereinafter referred to as KUHAP) stipulates that "confiscation is a series of actions by investigators to take over and or keep under their control movable or immovable, tangible or intangible objects for the purpose of evidence in the investigation, appointment and trial." Based on the above provisions, the transfer of goods is carried out by handing over the goods from the seized to the investigator. In addition to providing a receipt of confiscated goods, the investigator must ask the seized to put his signature in the minutes of the seizure. The minutes must be made by the investigator in accordance with the provisions stipulated in Article 8 Paragraph (1) of the Criminal Procedure Code Jo. Article 75 Paragraph (1) letter f of KUHAP.

The types of objects that can be subject to confiscation are as follows:

1. Objects or bills of the suspect or defendant which are wholly or partly suspected to have been obtained as a result of a criminal offence or as a result of a criminal offence (Article 39 paragraph (1) letter a of KUHAP).
2. Packages or letters or objects whose transport or delivery is carried out by the Post Office or Telecommunications, Communication or Transport Services or Companies as long as the package, letter or

object is intended for the suspect or originates from him (Article 41 of the Criminal Procedure Code).

3. Letters or other writings and those who are obliged by law to keep them secret as long as they do not concern state secrets (Article 43 KUHAP).
4. Prohibited items such as unauthorised firearms, material State booty is evidence that has obtained permanent legal force, is confiscated for the state which is then executed by destroying it, auctioning it for the state, handing it over to the designated agency to be utilised and stored in Rupbasan for evidence in other cases. In Article 1 point 4 of Permenkumham 16/2014, it is explained that state booty is confiscated objects based on Court Decisions that have obtained permanent legal force declared seized for the state.

Research methodology

This research is a type of normative research. In this research, law is conceptualised as what is written in legislation (law in book) or law which is conceptualised as rules or norms which are a benchmark for society's behaviour towards what is considered appropriate. However, in fact, law can also be conceptualised as what is in action (law in action). The law in the book is a law that should work as expected, both are different, meaning that the law in the book is often different from the law in people's lives.

The approaches in this research are statute approach, conceptual approach, and case approach. The legal materials used are primary and secondary legal materials.

The technique for collecting legal materials used in this thesis research is Normative Law research or literature with library studies of legal materials, both primary legal materials, secondary legal materials, tertiary legal materials and non-legal entities. Searching for legal materials can be done by reading, listening, Viewing or by searching for legal materials via the internet. In fact, the law is then analysed to find answers to existing legal issues.

Discussion

Legal Position of banks as creditors of mortgage holders seized by the state related to corruption cases

One of the collateral that is often used is Mortgage Rights. Article 1 point 1 of Law No. 4 of 1996 on Mortgage Rights on Land and Objects Related to Land stipulates that Mortgage Rights on land and objects related to land, hereinafter referred to as Mortgage Rights, are security rights imposed on land rights as referred to in Law No. 5 of 1960 on the Basic Regulations on Agrarian Principles, including or excluding other objects that form an integral part of the land, for the repayment of certain debts, which give priority to certain creditors against other creditors.

From this definition, it can be understood that Hak Tanggungan is a security for land rights along with other objects that form an integral part of the land. On this basis, the object of Mortgage Rights has been limitatively regulated in Article 4 of the Mortgage Rights Law. Article 4 paragraph (1) of the Mortgage Rights Law basically stipulates that land rights that can become objects of mortgage rights: 1) ownership rights; 2) business use rights; and 3) building use rights. It is as if other than these 3 (three) land rights cannot be pledged, but from Article 4 paragraph (2) of the Mortgage Rights Law which basically regulates that in addition to land rights as referred to in

Article 4 paragraph (1) of the Mortgage Rights Law, the Right of Use on State land which according to applicable provisions must be registered and by its nature can be transferred can also be burdened with Mortgage Rights. Thus, the holder of a mortgage right is qualified as a prioritised and protected separatist creditor.

It is possible to seize the assets of the accused that were used for or obtained from corruption offences. Sometimes, however, the seized assets belong to third parties. On this basis, the Anti-Corruption Law makes arrangements in Article 19 of the Anti-Corruption Law. From Article 19 paragraph (1) of the Anti-Corruption Law, it can be understood that a court decision regarding the confiscation of goods that do not belong to the defendant is not imposed, if the rights of third parties who are in good faith will be harmed. From Article 19 paragraph (2) of the Anti-Corruption Law, third parties who have good faith can submit a letter of objection to the relevant court, no later than 2 (two) months after the court decision is pronounced in open court for the public. From Article 19 paragraph (3) of the Anti-Corruption Law, the submission of a letter of objection as referred to in paragraph (2) does not suspend or stop the implementation of the court's decision and of course the Public Prosecutor will be questioned, as per Article 19 paragraph (4) of the Anti-Corruption Law. As referred to in Article 19 paragraph (5) of the Anti-Corruption Law, the legal remedy against the judge's decision on the objection letter as mentioned above is cassation to the Supreme Court.

First, the Anti-Corruption Law does not further regulate the existence of third party objections, as Article 19 of the Anti-Corruption Law. Over time, the Supreme Court regulated this matter in Supreme Court Regulation Number 2 Year 2022 Procedures for Settling Objections from Third Parties in Good Faith to the Decision on the Forfeiture of Goods Not Owned by the Defendant in Corruption Cases (Perma 2/2022).

Ratio decedendi of judges' decisions related to banks as creditors of mortgage holders seized by the state related to corruption cases

That, various decisions related to banks as creditors of holders of mortgage rights that were seized by the state related to corruption cases were outlined.

A. Supreme Court Decision Number 2951 K/Pid/2006

In this case, the defendant was Agus Dwikora. In this case, Agus Dwikora, who served as a member of the Maros Regency DPRD, was charged with committing acts with the aim of enriching himself or another person or a corporation, abusing the authority, opportunity or means available to him because of his position or position which then caused state losses of Rp. 1,145,994,953. Because of Agus Dwikora's actions, several items of evidence were confiscated which were used to pay for the losses, one of which was in the form of 1 (one) plot of land covering an area of 225 square metres along with 1 (one) shophouse building standing on it located on Jalan Raya Kariango (Griya Maros Complex), Bontoa Village, Mandari District, Maros Regency, which was installed with Mortgage Rights with Deed of Granting Mortgage Rights No. 29/APHT/AMD-1- 2004 dated 30 January 2004 with Mortgage Rights Certificate No. 00045 dated 18 February 2004.

In the Supreme Court Decision Number 2951 K/Pid/2006, the Panel of Judges of the Supreme Court stated and confirmed that as chairman of KUD Sejahtera Agus Dwikora had committed a criminal act of corruption amounting to Rp 1,010,165,703. In the verdict, the evidence in the form of land and buildings that are still encumbered by mortgage rights is confiscated and seized for the state which is then auctioned and the proceeds of the auction are deposited into the State treasury to be fully calculated to pay compensation for state losses.

The verdict of the Supreme Court Number 2951K/PID/2006:

M E N G A D I L I

Reject the cassation petition of the Cassation Petitioner/Defendant: AGUS DWIKORA;

Charges the Cassation Petitioner/Defendant to pay court costs in this cassation in the amount of Rp. 2500 (two thousand five hundred rupiahs);

From the description above, it can be understood that in this decision the object of mortgage rights in the form of land and buildings pledged to Bank Bukopin Makassar Branch was confiscated and seized by the state in order to pay state losses. From this decision, it can be understood that even though the bank as the preferred creditor has placed a mortgage on the object and should have the right to execute based on Article 16 of the Mortgage Law, either fiat execution or parate execution, the Panel of Judges confirmed that the object containing the mortgage is still confiscated by the state. From Supreme Court Decision Number 2951 K/Pid/2006, it can be understood that there is no legal protection for the bank as the preferred creditor holding the object of the mortgage.

B. Supreme Court Decision Number 2701 K/Pdt/2017

This case originated from an opposition in the Bitung District Court with case register Number 70/Pdt.BTH/2015/PN.Bit. The parties in this case are between PT Bank Panin Indonesia Tbk. against the Government of the Republic of Indonesia CQ. Attorney General's Office R.I. CQ. North Sulawesi High Prosecutor CQ. Chief State Attorney of Bitung and Mohammad Hasan Rahmat. PT Bank Panin Indonesia Tbk. is the holder of a mortgage on 1 house with a certificate of ownership in the name of Mohammad Hasan Rahmat. However, based on the Stipulation of the Chairman of the Bitung District Court Number 60/Pen.Pid/2014/PN.Btg, the land has been confiscated.

In the Supreme Court Decision Number 2701 K/Pdt/2017, the panel of judges basically stated the validity of the security right and the inapplicability of the Manado District Court's determination, as one of the considerations the judge stated, that the creditor has a privilege over the object of the mortgage right and must be protected by law, and against the object of the mortgage right in the case a quo cannot be confiscated, which is in line with the Jurisprudence of the Supreme Court Decision No. 1731/K/Pdt/2011 dated 14 December 2011, then the plaintiff can be declared a good and right plaintiff. In the Jurisprudence of the Supreme Court Decision No. 1731/K/Pdt/2011 dated 14 December 2011, there is indeed a rule of law which basically states that an object of dispute in the case a quo which has been placed a Certificate of Mortgage, becomes the main right for the holder of the mortgage right to be used as a repayment of the debtor's legal obligations, because the debtor's rights

to the object of the mortgage right are considered legally transferred to the holder of the mortgage right (creditor); therefore the creditor has a privilege over the sale of the object of the mortgage right to repay the debtor's legal obligations must be protected by law.

The verdict of the Supreme Court Number 2701 K/PDT/2017:

M E N D I L I:

1. Reject the cassation petition of the Cassation Petitioner GOVERNMENT OF THE REPUBLIC OF INDONESIA cq the AGENCY OF INDONESIA cq the HIGH COURT OF NORTH SULAWESI cq the HIGH COURT OF BITUNG;
2. Punish the Cassation Petitioner formerly Defendant I/Appellant I to pay court costs in this cassation in the amount of Rp500,000.00 (five hundred thousand rupiah); From this decision, it can be understood that the bank as the preferred creditor of the holder of the mortgage rights confiscated by the state related to corruption cases can file a legal objection in the event of confiscation. This is a preventive legal protection for banks as preferred creditors so that their rights can be protected. This needs to be done so that the bank's rights are not lost.

Conclusion

The legal position of the bank as the preferred creditor of the holder of the mortgage rights seized by the state related to the corruption case, the bank should still get legal protection, because the bank as a preferred creditor has a privilege over the sale of the object of the mortgage rights to pay off the debtor's legal obligations must be protected by law.

Suggestions

The government needs to make a standardised and detailed regulation related to the Bank's prudential principles, one of which is related to the need to trace the history and status of goods that will be used as collateral to the bank including the source of funds used to obtain the goods as intended.

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