

Legal Consequences of Third Party Resistance to Assets Encumbered with Mortgage Rights (Study of Decision Number 46/Pdt.Bth/2016/PN. Smr)

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Abstract. *Legal certainty is very important for every Indonesian citizen as a subject holding land rights, therefore the State must guarantee every rights holder to obtain legal protection as a certificate of proof of the rights they have and as strong and perfect evidence if a dispute occurs in the future. The purpose of this thesis research is to study the law on third party resistance as a mortgage holder when viewed from the aspects of justice, legal consequences and legal certainty in Decision Number 46 / Pdt.Bth / 2016 / PN.Smr and How are the legal consequences of third party resistance to assets that are subject to mortgage rights when viewed from Decision Number 46 / Pdt.Bth / 2016 / PN.Smr. This study uses the Normative Juridical method. The data sources obtained are primary data sources and secondary data sources, namely Court Decisions and related Laws. This study was conducted by reviewing the Samarinda District Court Decision. The results of this study, if viewed based on the theory of justice, the legal consequences and legal certainty are fair enough for the winning party, but unfair for the third party as the holder of the Mortgage Right. The legal consequences for the third party are clearly disadvantaged because the third party is not allowed to file a third party objection. Viewed from the side of legal certainty, the Panel of Judges has also not made legal considerations as its rights in a concrete manner because there are two references, so this creates a side of legal uncertainty.*

Keywords: *Guarantee; Mortgage; Party; Resistance.*

1. Introduction

Indonesia is a country that, based on the law, provides legal certainty for every citizen who carries out legal acts or legal events, including providing legal certainty in relation to land registration as in the certificate of proof of land rights holder or land rights certificate.

In this case, if a dispute arises regarding land rights in the future, the parties to the case can file a civil lawsuit with the competent court with the aim of

resolving the problem completely and finding justice, certainty and legal benefits through a court decision. Execution is carried out only against court decisions that have permanent legal force and contain a proper and definite legal relationship between the parties to the case.

The Republic of Indonesia is a country based on law according to Article 1 paragraph (3) of the 1945 Constitution where in determining the fairness of the settlement of a case before the Court, it is not seen from the final result of the decision handed down to the parties to the case, but must be assessed from the beginning of the case examination process carefully. The ideal of an honest trial process from the beginning to the end of the realization of the principle of due process rights which gives everyone the right to be treated fairly in the examination process during the trial which in this case in civil courts requires a broad understanding and comprehension in actual and contextual terms regarding the scope of procedural law both in terms of theory and practice in order to create a trial that provides certainty, justice and legal benefits.¹

The social gap that is currently occurring in society is the issuance of Certificates of Ownership (hereinafter referred to as SHM) owned by the first party covering an area of ±49,332 M2 and Building Use Rights Certificate (Hereinafter referred to as HGB Certificate) Number 3 / K Bukuan covering an area of 83,602 M2 owned by the second party in the same land object and each has a Certificate issued by the Samarinda City Land Agency (Party II), both of which have permanent legal force. Related to this, it resulted in losses experienced by the parties because the Judge's Decision stated that those who have the Ownership Rights Certificate will be given their rights, namely being able to execute according to the area of the Ownership Rights Certificate, this is clearly detrimental to the second party and the other party, namely the bank, is referred to as the third party as a creditor because the Building Use Rights Certificate owned by the second party has been pledged to the bank where the bank holds the Mortgage Right for the land object. If the object is still to be executed, the amount charged to the debtor will be reduced, so this is considered very detrimental to the bank itself.

So in this case in court as a third party filed a lawsuit, in civil case Number 46/Pdt.Bth/2016/Pn.Smr between the third party as the holder of the Mortgage Rights against the first party as the owner of the SHM, the second party and the National Land Agency where in the author's consideration it is considered inappropriate, among others in the consideration of the first level Legal Council stating that based on Article 206 (6) RBg third party resistance to conservatoir seizure, revindicator seizure and execution seizure, can only be filed on the basis of ownership rights; so it can only be filed by the owner or by a person who feels that he is the owner of the goods. It is clear that tenants, mortgage holders/Mortgage Rights or creditverband, holders of land use rights, are not

¹M. Yahya Harahap, 2005, Civil Procedure Law, Sinar Grafika, Jakarta, p. 5.

permitted to file third party resistance or third party resistance to execution can only be filed by the land owner.

That regarding the above considerations, the third party as the Opponent who is the Mortgage Holder according to the principle of "droit de suite" where the second party provides collateral in the form of SHGB Number 3 / K to the bank for its debts according to Credit Agreement Deed Number 7 dated June 19, 2006, where the debt is always attached to the object that is the object of the collateral.

2. Research Methods

The author in compiling this research uses the Normative Law or literature research method. Data collection techniques in normative legal research are carried out by means of a Literature study of legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials and/or non-legal materials. The search for these legal materials can be done by reading, viewing, listening, or now many searches for these legal materials are carried out through the internet media.² This type of research is the Statute Approach. The Statute Approach is carried out by reviewing all laws and regulations that are related to the legal issue being handled.³

The approach method used in this research is a normative legal approach. Mnormative legal approach method or doctrinal legal research, namely legal research that uses secondary data sources. Conducted by emphasizing and adhering to the legal aspects. Normative legal research is a library research, namely research on secondary data. Secondary data has a scope that includes personal letters, books, to official documents issued by the government.⁴

3. Results and Discussion

3.1 Legal Study of Third Party Resistance as Mortgage Holders when viewed from the aspects of Justice, Legal Consequences and Legal Certainty in Decision Number 46/Pdt.Bth/2016/PN.Smr.

- Court Decision Number 46/Pdt.Bth/2016/PN.Smr seen from the Theory of Justice

That based on the Decree of the Head of the Samarinda District Court Number 80/Pdt.G/2010/PN.Smda dated January 22, 2016, the Defendant I has been summoned and given a warning (Aanmaning) on February 3, 2016 in order to comply within 8 (eight) days after being given the warning with the contents of the Decision of the Samarinda District Court Number 80/Pdt.G/2010/PN.Smda dated January 5, 2011 in conjunction with the Decision of the East Kalimantan High Court Number 113/Pdt/2011/PT.KT dated February 9, 2012 in conjunction with the Supreme Court of the Republic of Indonesia Number 1010/K/pt/2013

²Ronny Hanitijo Soemitro, 1982, *Legal Research Methodology*, Ghalia Indonesia, Jakarta, p. 9.

³Peter Mahmud Marzuki, 2015, *Legal Research*, Prenadamedia Group, Jakarta, p. 133.

⁴Soerjono Soekanto and Sri Mamudji, 2004, *Normative Legal Research: A Brief Review*, eighth printing, Sinar Grafika, Jakarta, p. 24.

dated June 26, 2014, namely the order to vacate land covering an area of approximately 49,332 M2 which is part of a plot of land with a HGB Number 3/K Bukuan covering an area of 83,602 M2 to be handed over to the Defendant.

According to the author's analysis, the content of the decision has fulfilled the principle of justice according to John Rawls, namely, the principle of greatest equal liberty which includes the right to maintain private property. Because on the one hand, the panel of judges decided to grant the request for ownership of SHM owned by Johan in the form of a decision issued by the Samarinda District Court containing the implementation of the execution and on the other hand, in this case, the panel of judges decided that the execution decision would not be implemented and in connection with this, the third party, namely PT. CIMB Niaga, Tbk was given the opportunity to fight for what was considered his right in the form of filing a third party lawsuit.

However, the author believes that the decision of the panel of judges has not been able to fulfill the objectives, one of which is to provide an authoritative solution, which in its own sense aims to provide a way out for resolving the case between the disputing parties using all available evidence, but in the decision, the Panel of Judges did not even conduct a direct review of the location of the mapping of the object of the case, while the evidence in the form of letters and witness statements in the trial was different, leaving the impression that the Panel of Judges did not explore the entire evidence objectively. As regulated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning the Power of Judges, which reads "Judges and Constitutional Judges are required to explore, follow and understand the legal values and sense of justice that live in society."

- Court Decision Number 46/Pdt.Bth/2016/PN.Smr seen from the Theory of Legal Consequences

According to the theory put forward by Jazim Hamidi, there are three types of legal consequences. First, legal consequences in the form of the birth, change or disappearance of a certain legal situation; Second, legal consequences in the form of the birth, change or disappearance of a certain legal relationship; Third, legal consequences in the form of sanctions, which are not desired by the legal subject (acts against the law).

According to the author's analysis, the decision of the panel of judges in this case has not fulfilled the rights and obligations of the parties because the decision is only beneficial for the winning party, namely Johan, so that PT. CIMB Niaga, Tbk feels that the decision has not been able to provide satisfaction and has not been able to resolve the conflict of the disputing parties, the object that is considered the right of PT. CIMB Niaga, Tbk cannot be obtained again and has not been able to create a balance between the parties.

From the above case, it can be concluded that a judge in examining and deciding

a case does not always stick to just one principle.⁵Judges, in each case casuistically, can change from one principle to another.

Judges must consider legal considerations with good reason, why in certain cases they must choose one of the principles.⁶Thus, the quality of the judge's decision can be assessed from the weight of the reasons and legal considerations used in the case.⁷

- Court Decision Number 46/Pdt.Bth/2016/PN.Smr seen from the Theory of Legal Certainty

Judges in resolving civil cases in court have the task of finding the right law. Judges, in finding the law,⁸It is not enough to just look in the law, because it is possible that the law does not regulate clearly and completely, so that the judge must explore the legal values that exist in society.⁹

According to the author's analysis in the decision of the panel of judges of Court Number 46/Pdt.Bth/2016/PN.Smr regarding the resistance of third parties as holders of mortgage rights, the panel of judges has not carried out legal considerations as their rights in a concrete manner because in Article 378 RV which states that "If the rights of a third party are harmed by a decision, then he can file an objection against the party" which is also explained in Article 206 paragraph (6) RBg that only parties who have proof of ownership of the disputed object are allowed to file a third party objection. This becomes confusing if the party who feels that he has been harmed is not allowed to fight for his rights just because he is not the holder of the ownership rights.

According to Article 1 paragraph (1) of Law Number 4 of 1996 concerning Mortgage Rights, the creditor holding the mortgage right has a more prioritized position as long as the object being guaranteed has been registered and meets the publicity requirements. Article 1135 of the Civil Code also states that "Between creditors who have priority rights, the level is regulated according to the nature of their priority rights." Even one of the principles in Mortgage Rights states that if an execution order has been issued by the court against the object, the court still cannot place a seizure. How unfair it is for a creditor holding a material guarantee to be treated the same as a creditor who does not hold a

⁵Hartini, 2009, "Exceptions to the Application of the Ultra Petitem Partum Principle in Proceedings at Religious Courts", *Jurnal Mimbar Hukum*, Vol. 21, FH UGM, Yogyakarta, p. 383.

⁶M. Syamsudin, 2011, "Reconstruction of Judges' Mindset in Deciding Corruption Cases Based on Progressive Law", *Journal of Legal Dynamics*, No. 1, Vol. 11, FH Jenderal Soedirman University, Purwokerto, p. 11.

⁷Luki Indrawati, 2007, "Reconstruction of Judges' Legal Reasoning (Epistemological Perspective on Legal Logic)", *Jurnal Media Hukum*, No. 3, Vol. 14, FH Universitas Muhammadiyah, Yogyakarta, p. 175.

⁸Bambang Sutiyo, 2004, "Implementation of Legal Standing and Class Action Lawsuits in Judicial Practice in Indonesia", *Ius Quia Justum Law Journal*, No. 11, Vol. 26, FH UII, Yogyakarta, p. 77.

⁹Busyro Mugaddas, 2002, "Criticizing the Principles of Civil Procedure Law", *Ius Quia Tustum Law Journal*, No. 9, Vol. 20, FH UII, Yogyakarta, p. 21.

material guarantee.

That in the trial as evidence of the Samarinda District Court Decision Number 80/Pdt.G/2010/PN.Smda, the RESPONDENT was only able to show a photocopy of the Land Ownership Certificate Number 1 which was legalized by the Samarinda City Land Office, which was apparently never explicitly confirmed by the Samarinda City Land Office which at that time was made Defendant II, so that a copy of the Land Ownership Certificate Number 1 could not be used as evidence and because none of the parties provided justification for the existence of the Land Ownership Certificate Number 1, it was not proven that the land area of ± 49,332 M2 is land with Certificate of Ownership Number 1 in the name of the DEFENDANT.

The verdict of the judge who examined this case, the author believes that the above argument has not fulfilled the aspect of legal certainty because the judge's consideration did not consider at all the evidence in the form of letters provided by Johan's Party, which were only photocopies of letters that had been legalized by the Samarinda Land Agency, which in fact the BPN never confirmed that they had legalized it. The judge's verdict seemed to only consider that all evidence in the form of letters submitted by PT. SLJ Global, Tbk was not a statement of ownership of the disputed object, even though it had been proven in court that the evidence of letters owned by PT. SLJ Global, Tbk was a statement of ownership.

The existence of the Basic Agrarian Law Number 5 of 1960 and several other laws and regulations under it are the answer that the Law is to guarantee legal certainty in order to obtain access to legal justice that has been given by the state to every legal subject. So, it can be said that the legal incident that occurred which was studied by the author regarding the case of Court Decision Number 46/Pdt.Bth/2016/PN.Smr is the inaccuracy and lack of understanding of stakeholders and legal apparatus in applying the will, intent and purpose of the Basic Agrarian Law Number 5 of 1960 including the Panel of Judges who decided the case did not heed the related laws and regulations.

3.2 Legal Consequences of Third Party Resistance to Assets Encumbered by Mortgage Rights if viewed from Decision Number 46/Pdt.Bth/2016/PN.Smr.

After seeing the explanation above, the issuance of a Mortgage Certificate is proof that the Mortgage Right exists. As stated by Soedjono Dirdjosisworo in his book Introduction to Legal Science, namely that legal consequences arise because of a legal relationship where in the legal relationship there are rights and obligations. In this case, as a third party, it is clear that his rights cannot be fulfilled. In fact, the obligations as a third party have been fulfilled, namely having a valid Mortgage Right issued by a Notary/PPAT with the condition that the following matters are met based on Law Number 4 of 1996 concerning Mortgage Rights. In Article 13 paragraph (1) which reads "The Granting of Mortgage Rights must be registered at the Land Office". Furthermore, Article 11

paragraph (1) means that the Deed of Granting of Mortgage Rights must include: the name and identity of the holder and grantor of the Mortgage Right including the domicile of the parties, explaining the debts guaranteed, explaining the value of the mortgage and describing in detail the object of the Mortgage Right. The last characteristic is seen in Article 2 paragraph (1) which explains that the nature of the Mortgage Rights cannot be divided, unless agreed in the Deed of Granting of Mortgage Rights. In these three articles, the Notary / PPAT is responsible, it is necessary to check again whether the Deed made has fulfilled these things. Here, the accuracy of the Notary / PPAT as the maker of the Deed is needed. If all of this has been done correctly, the Mortgage Rights should also have permanent legal force.

According to Jazim Hamidi, there are three types of legal consequences, one of which is a legal consequence in the form of sanctions, which are not desired by the legal subject (unlawful acts). The panel of judges should reconsider carefully because in this case there are likely several parties who did not carry out their duties properly. Where the first; the owner of the SHM only holds a photocopy of the SHM that has been legalized by the BPN, but this is not permitted by the BPN, the second; whether the making of the Deed of Mortgage Holder has been carried out correctly based on the applicable UUHT. The judge must be more careful in examining this deviation.

Furthermore, if viewed from the creditor's side, it is possible to sell the Collateral object if the Debtor is in default. Why is it said that the debtor has defaulted, because the debtor provides collateral to the creditor, namely PT. CIMB Niaga, Tbk in the form of a Building Use Rights Certificate whose ownership is in doubt because the SHGB has been issued above the Ownership Rights Certificate in the name of the ownership of the Heirs of the late Johan Kairupan.

The debtor is said to be in default if the debtor is unable to pay the debt to the bank. The classification of debtors based on credit collectibility is as follows:¹⁰

1. Fluent
2. In Special Attention
3. Not that smooth
4. Doubtful
5. Congested

If the debtor is in category 2 to 5, then the Bank has the right to collect until the debtor pays the arrears that have been running. If the debtor has entered the Substandard category, the Bank will issue a Warning (Somasi) within a period of one week. Then negotiations are carried out between the Debtor and/or the Mortgage Provider with the Bank to complete the Credit Repayment. However, if

¹⁰Ratih Prihatina, "Understanding the Collectibility (Kol) of Banking Credit in Relation to Law No. 4 of 1996 (UUHT)", <https://www.djkn.kemenkeu.go.id/kpknl-pekalongan/baca-article/14713/Mengenal-Kolektibility-Kol-Kredit-Perbankan-Kaitannya-dengan-dengan-UU-No-4-Tahun-1996-UUHT.html> accessed May 24, 2024 at 13.29.

the Debtor still cannot pay the installments until entering the Doubtful to Default category, the Bank will suggest selling the collateral.¹¹

The sale of collateral can be said as the Execution of Mortgage Rights. If viewed based on the Mortgage Law Number 4 of 1996, the Execution of Mortgage Rights can be divided into 3 stages, namely:

- a. In accordance with the provisions of Article 20 paragraph 2 of the UUHT;
- b. In accordance with the provisions of Article 20 paragraph 1 in conjunction with Article 6 of the UUHT;
- c. In accordance with the provisions of Article 20 paragraph 2 of the UUHT.

However, if we examine it again and look at Law Number 4 of 1996 concerning Mortgage Rights in Article 6, it explains that "If the debtor defaults on his promise, the first Mortgage Right holder has the right to sell the object of the Mortgage Right under his own authority through a public auction and take payment of his receivables from the proceeds of the sale."

This can be interpreted as the term Parate Execution although the term is not stated in the legislation. Parate execution etymologically comes from the word *paat* which means ready in hand, so parate execution is said to be a means that is ready in hand. According to the legal dictionary, parate execution means direct implementation without going through a court process or judge.¹²

According to Subekti, Parate Executie means carrying out or taking what is rightfully yours, meaning without the intermediary of a judge, which refers to a collateral item and then selling the item yourself.¹³ So the term parate execution can be said to be the authority to sell under one's own authority through a public auction institution without the approval of the Chief Justice.

4. Conclusion

The Panel of Judges is quite fair because on the one hand the panel of judges decided to grant the request for ownership of the Certificate of Ownership owned by Johan in the form of an execution order and on the other hand, in this case the panel of judges decided that the execution order would not be implemented and with this the third party, namely PT. CIMB Niaga, Tbk was given the opportunity to fight for its rights in the form of filing a third party counterclaim. In terms of legal consequences, according to the author, the panel of judges has not considered the subsequent effects if one party is not allowed to fight for its rights because as a third party who feels disadvantaged. If in terms of legal certainty, according to the author, the judge has also not considered the law as his rights in a concrete way because there are two references, then this

¹¹Rachmadi Usman, 2001, *Legal Aspects of Banking in Indonesia*, PT. Gramedia Pustaka Utama, Jakarta, p. 247.

¹²Complete Edition of the Legal Dictionary, 1977, Dutch-Indonesian-English, Aneka, Semarang, p. 655.

¹³Herowati Poesoko, 2013, *Dynamics of Parate Executie Law of Mortgage Rights Objects*, CV. Aswaja Pressindo, Yogyakarta, p. 196.

creates an aspect of legal uncertainty.

The debtor has committed a breach of contract by using a SHGB whose ownership is in doubt, the creditor can carry out a Parate Execution as regulated in Article 20 paragraph (1) of the UUHT. It is expected that the Judge of the Court Decision will be more careful in resolving a dispute in terms of the laws and regulations relating to the dispute and the evidence provided by the parties and the actual events in a case so that no party feels disadvantaged. Correctly considering the existing facts in order to realize the principles of justice, legal consequences and legal certainty. As a Mortgage Holder with the status of Separatist Creditor in this case is the party who has the right to carry out Parate Execution, this Separatist Creditor should be able to carry out the execution itself. However, because it takes a very long time and process. The Mortgage Law Number 4 of 1996 should regulate the strengthening of creditors who have Mortgage Rights, for example, if there is resistance from a third party, it does not have to be through filing a lawsuit through the court but can be through an Institution that can resolve disputes between the parties such as conducting arbitration as regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Trade Disputes to facilitate the disputing parties.

5. References

- Bambang Sutiyoso, (2004), "Implementation of Legal Standing and Class Action Lawsuits in Judicial Practice in Indonesia", *Ius Quia Justum Law Journal*, No. 11, Vol. 26, FH UII, Yogyakarta.
- Busyro Mugaddas, (2002), "Criticizing the Principles of Civil Procedure Law", *Ius Quia Tustum Law Journal*, No. 9, Vol. 20, FH UII, Yogyakarta.
- Complete Edition of the Legal Dictionary, (1977), Dutch-Indonesian-English, Semarang: Aneka.
- Hartini, (2009), "Exceptions to the Application of the Ultra Petitem Partum Principle in Proceedings at Religious Courts", *Jurnal Mimbar Hukum*, Vol. 21, FH UGM, Yogyakarta.
- Herowati Poesoko, (2013), *Dynamics of Parate Executie Law on Mortgage Rights Objects*, Yogyakarta: CV. Aswaja Pressindo.
- Luki Indrawati, (2007), "Reconstruction of Judges' Legal Reasoning (Epistemological Perspective on Legal Logic)", *Journal of Legal Media*, No. 3, Vol. 14, FH Muhammadiyah University, Yogyakarta.
- M. Syamsudin, (2011), "Reconstruction of Judges' Mindset in Deciding Corruption Cases Based on Progressive Law", *Journal of Legal Dynamics*, No. 1, Vol. 11, FH Jenderal Soedirman University, Purwokerto.
- M. Yahya Harahap, (2005), *Civil Procedure Law*, Jakarta: Sinar Grafika.
- Peter Mahmud Marzuki, (2015), *Legal Research*, Jakarta: Prenadamedia Group.

Rachmadi Usman, (2001), *Legal Aspects of Banking in Indonesia*, Jakarta: PT. Gramedia Pustaka Utama.

Ratih Prihatina, Understanding Bank Credit Collectibility (Kol) in Relation to Law No. 4 of 1996 (UUHT), <https://www.djkn.kemenkeu.go.id/kpknl-pekalongan/baca-article/14713/Mengenal-Kolektibility-Kol-Kredit-Perbankan-Kaitannya-dengan-dengan-UU-No-4-Tahun-1996-UUHT.html> accessed May 24, 2024.

Ronny Hanitijo Soemitro, (1982), *Legal Research Methodology*, Jakarta: Ghalia Indonesia.

Soerjono Soekanto and Sri Mamudji, (2004), *Normative Legal Research: A Brief Review*, Jakarta: Sinar Grafika.